

Response to Comments Document

Final Rulemaking

Financial Responsibility Requirement Under CERCLA 108(b) for Facilities in the Chemical Manufacturing Industry

November 2020

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1. General Support/Opposition

1.1 General Support

Broad statements of support for EPA's decision not to propose financial assurance requirements for the chemical manufacturing industry.

Commenter Name:

Commenter Affiliation: American Chemistry Council (ACC) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1033

Page(s): 1

Comment:

We, the undersigned organizations, submit the following comments to the U.S. Environmental Protection Agency (“EPA” or “Agency”) in support of the proposed rule, “Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry” (“Proposed Rule”).¹

Our members have a substantial and direct interest in the outcome of this rulemaking. Some of our members own and operate chemical manufacturing facilities; others provide the equipment and materials needed to run those facilities; and many are consumers of products manufactured by this industry. As such, it is important that EPA does not impose burdensome and unnecessary financial responsibility requirements on this industrial sector. Our members also have a vested interest in EPA’s process for evaluating financial risks when deciding whether to promulgate regulations for any industry sector under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA” or “Section 108(b)").²

EPA Response:

This comment provides general support for EPA’s finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry.

Commenter Name:

Commenter Affiliation: J. R. Simplot Company

Comment Number: EPA-HQ-OLEM-2019-0086-1034

Page(s): 1

Comment:

The J.R. Simplot Company (Simplot) is a privately held agribusiness company, headquartered in Boise, Idaho. Simplot is a vertically integrated agribusiness company producing products along the entire food supply chain. This includes phosphate ore and other natural resources to make fertilizers, operate numerous farms to produce a variety of crops, raise and feed cattle and then make a number of food products in food processing plants (both vegetable and beef). The

fertilizer operations include the manufacture of both phosphatic fertilizers (NAICS Code 325312) and nitrogenous fertilizers (NAICS Code 325311). Specifically, Simplot manufactures phosphoric acid, ammonia, and nitric acid, which are then used to make a number of phosphate and nitrogen fertilizers. These operations occur in California (Helm and Lathrop), Idaho (Pocatello) and Wyoming (Rock Springs). Thus, this proposed regulation is of direct interest to Simplot.

Simplot supports the decision by the Agency to not issue financial responsibility requirements under CERCLA 108(b) for the chemical manufacturing industry.

EPA Response:

This comment provides general support for EPA's finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry.

Commenter Name:

Commenter Affiliation: Society of Chemical Manufacturers & Affiliates (SOCMA) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1031

Page(s): 1

Comment: As we explain below, EPA has correctly construed the statute by focusing on the risk that federally funded response actions may, in the future, become necessary at facilities within the chemical manufacturing sector operating under the modern regulatory framework. EPA has also reasonably concluded, based on analysis of the historical record, that this risk is extremely low.

EPA Response:

This comment provides general support for EPA's finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry.

Commenter Name: Laurie Droughton Matthews, Morgan, Lewis & Bockius LLP

Commenter Affiliation: Superfund Settlements Project (SSP)

Comment Number: EPA-HQ-OLEM-2019-0086-1035

Page(s): 1

Comment:

SSP is an association of major companies from many different sectors of American industry. It was organized in 1986 to help improve the effectiveness of the Superfund program by encouraging settlements, streamlining the settlement process, and reducing transaction costs for all concerned. Since its formation, the SSP has provided constructive input to EPA and other regulatory agencies on critical policy issues affecting the cleanup of contaminated sites; SSP representatives also have testified before Congress on many of these issues.

These comments are submitted on behalf of the Superfund Settlements Project ("SSP")¹ on the Proposed Rule, Financial Responsibility Requirements Under CERCLA 108(b) for Facilities in

the Chemical Manufacturing Industry, 85 Fed. Reg. 10128 (February 21, 2020). SSP strongly supports the United States Environmental Protection Agency's ("EPA's") thorough and common sense analysis, grounded in an evaluation of risk conditions associated with current operating practices of and comprehensive regulatory network governing the Chemical Manufacturing Industry (the "Industry"). Appropriately, the EPA concludes that financial responsibility requirements are not warranted for the Industry.

.....

In closing, SSP thanks EPA for its adherence to the statutory dictate and thorough review of relevant data and facts to make a sound and defensible decision. This decision will ensure that the funds that would have been diverted to unnecessary financial instruments will remain in productive use, allowing the Industry to continue to operate in an environmentally safe manner and to maintain and create jobs.

EPA Response:

This comment provides general support for EPA's finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 5

Comment:

TFI supports and agrees with EPA's analysis and conclusions in the Proposed Rule regarding the broader chemical manufacturing industry, and writes to offer specific support for the decision regarding the fertilizer manufacturing industry.

EPA Response:

This comment provides general support for EPA's finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry.

1.2. General Opposition

Broad statements of opposition to EPA's decision not to propose financial assurance requirements for the chemical manufacturing industry.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 1

Comment:

EPA's proposal lacks support in the record, is contrary to CERCLA, and will increase the toxic burden on already overburdened communities.

EPA's decision is based on a flawed interpretation of Section 108(b) of CERCLA that narrowly focuses on financial risks to the Superfund trust, while ignoring CERCLA's broader goals of making the polluter pay, and protecting human health and the environment.

EPA Response:

This comment opposes EPA's finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry. EPA's describes additional analyses and thinking based on comments received in the final action, specifically in section VII.C. Decision to Not Impose Requirements.

Commenter Name: S Berman

Commenter Affiliation: Private citizen

Comment Number: EPA-HQ-OLEM-2019-0086-1023

Page(s): 1

Comment: As a citizen of the United States, I support "Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry".

EPA Response:

This comment opposes EPA's finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry. EPA's describes additional analyses and thinking based on comments received in the final action, specifically in section VII.C. Decision to Not Impose Requirements.

Commenter Name:

Commenter Affiliation: Little Traverse Bay Bands of Odawa Indians (LTBB)

Comment Number: EPA-HQ-OLEM-2019-0086-1032

Page(s): 1-2

Comment:

Secondly, based upon our initial review of the proposed rule, LTBB believes it to be against the Tribe's best interests and against the best interests of the American people in general. This proposed rule will effectively strip away crucial financial responsibility requirements for the Chemical Manufacturing Industry and substitute taxpayer money for cleanups.

As a Tribal Government and as stewards of our natural resources and environment, we believe that financial responsibility requirements under CERCLA Section 108(b) at facilities in the Chemical Manufacturing Industry are absolutely necessary. We advocate that companies should be held fully liable for any spills or pollution that they cause and that taxpayers should only be the last resort for paying for cleanups. We strongly support the 2014 Petition for Writ of Mandamus filed by Idaho Conservation League, Earthworks, Sierra Club, Amigos Bravos, Great Basin Resource Watch, and Communities for a Better Environment requiring issuance of CERCLA Section 108(b) financial assurance rules for the Chemical Manufacturing industry among three other large industries. It is our belief that the role of the Environmental Protection Agency is to uphold laws, such as CERCLA, in order to protect public and environmental health to the utmost. By not imposing proper financial responsibility requirements for the Chemical Manufacturing industry the EPA is essentially eliminating important protections and clean up liability from businesses and corporations that produce some of the most hazardous materials in the country.

LTBB is firmly opposed to this rulemaking, as we support companies responsible for toxic releases being held fully financially liable for their mistakes. We appreciate this opportunity to provide feedback for the protection of Tribal and environmental health, and for the shared purpose of water resource protection and public health.

EPA Response:

Thank you for the comment. This proposed rule does not strip away crucial financial responsibility requirements. Existing Superfund enforcement authorities would not be modified, 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. In addition, 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 must use fund resources to conduct a cleanup, EPA can take an enforcement action to recover its CERCLA costs and replenish government resources. It is not accurate to suggest that this proposed rule would strip away CERCLA 108(b) financial responsibility and taxpayer's money would be used for cleanups.

In addition, EPA conducted a systematic evaluation of the Chemical Manufacturing industry which considered not just existing financial responsibility laws, but existing environmental standards, regulations, and practices, the Superfund program's history of cleanups in the industry, and enforcement and compliance history of the industry. 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. 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 Chemical Manufacturing industry, compliance and enforcement history for the relevant regulations. Based on this review, EPA concludes 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.

Commenter Name:

Commenter Affiliation: Private citizen

Comment Number: EPA-HQ-OLEM-2019-0086-1021

Page(s): 1

Comment: I recommend these companies not only be held fully accountable in the cleanup costs but any cost related to an incident. I also recommend a company be held criminally liable for any incident. In no instance should taxpayer money be used to bail out a corporation.

EPA Response:

This comment opposes EPA's finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry. EPA's describes additional analyses and thinking based on comments received in the final action, specifically in section VII.C. Decision to Not Impose Requirements.

Commenter Name:

Commenter Affiliation: Private citizen

Comment Number: EPA-HQ-OLEM-2019-0086-1022

Page(s): 1

Comment: Companies should be fully liable for their pollution. First, they should be required to have insurance equal to multiples of the worst-case scenario cost. If they for some reason go bankrupt regardless, their parent, sibling, and subsidiary corporations should be held liable. When they are bankrupted, executive pay at all of the aforementioned should be clawed back, with interest equal to the firm's cost of capital, going back to it's founding. When that pool is exhausted, the heirs of any deceased executives should have their inheritances clawed back, again with interest. Taxpayers should last in line for paying for polluter's mistakes and malfeasance.

EPA Response:

This comment opposes EPA's finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry. EPA's describes additional analyses and thinking based on comments received in the final action, specifically in section VII.C. Decision to Not Impose Requirements.

Commenter Name:

Commenter Affiliation: Private citizen

Comment Number: EPA-HQ-OLEM-2019-0086-1029

Page(s): 1

Comment:

I am writing to express my concern about the proposed rule #EPA-HQ-OLEM-2019-0086-0001 regarding the requirement for Chemical Manufacturers to abide by the financial responsibility requirements set forth by the Comprehensive Environmental Response, Compensation and Liability Act, CERCLA. I believe that waiving the financial responsibility requirements outlined in Section 108(b) would be an unnecessary step backwards and contrary to the overall purpose of the Act.

By adopting this rule, the agency would not be acting in the best interests of their constituents or the environment. The EPA was established to protect human and environmental health. As the administrator of CERCLA, rolling back this requirement is directly contrary to the Agency's purpose and should not be permitted.

EPA Response:

This comment opposes EPA's finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry. EPA's describes additional analyses and thinking based on comments received in the final action, specifically in section VII.C. Decision to Not Impose Requirements.

Commenter Name:

Commenter Affiliation: Private citizen

Comment Number: EPA-HQ-OLEM-2019-0086-1030

Page(s): 2

Comment:

Drivers in most states must prove financial responsibility in order to register a car. One purpose of the requirement is to ensure that the driver will have the ability to pay for damage caused by accident despite financial condition. Likewise, chemical manufacturing companies should also prove financial responsibility.

Even if the current industry practices and the practices of leading companies within the industry address the financial risk, not every individual company within the industry will always follow those practices. The purposes of the regulation are to ensure that the industry practice will always address and minimize the risk and to deal with individual companies within the industry.

I urge the EPA to propose financial responsibility requirements under CERCLA Section 108(b) for the chemical manufacturing industry.

EPA Response:

This comment opposes EPA's finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry. EPA's describes additional analyses

and thinking based on comments received in the final action, specifically in section VII.C. Decision to Not Impose Requirements.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 1

Comment:

Chemical manufacturing facilities routinely release hazardous substances that harm nearby communities. These communities are disproportionately lower-income and communities of color. Far too often, lax practices at chemical manufacturing facilities lead to preventable pollution and community harm. Far too often, irresponsible owners fail to quickly and completely remediate the harm they cause. Despite their long track record of contamination, EPA proposes to exempt chemical manufacturing facilities from the requirement that they carry insurance or other assurances to cover the cost of cleaning up their own toxic messes. EPA's proposal lacks support in the record, is contrary to CERCLA, and will increase the toxic burden on already overburdened communities.

Chemical manufacturing facilities are a major source of hazardous pollution that poses substantial risks to human health, drinking water sources, and ecosystems. EPA's no-action proposal places the public at risk of exposure to toxic pollutants, and at risk of having to pay for the cost of cleaning up these facilities.

EPA Response:

This comment opposes EPA's finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry. EPA's describes additional analyses and thinking based on comments received in the final action, specifically in section VII.C. Decision to Not Impose Requirements.

2. Industry Practices

Information on industry operational practices within the Chemical Manufacturing Industry, including potential environmental risks

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 24-25

Comment:

In the proposed action, EPA interprets 42 U.S.C. § 9608(b) in a manner that limits the evidence the agency may consider such that only releases of hazardous substances from facilities operating under a “modern” regulatory framework are relevant to the agency’s decision. EPA used this interpretation of the statute as a basis for ignoring releases that occurred at facilities before 1980. EPA stated that RCRA solid waste regulations changed hazardous waste management, such that prior releases are not indicative of current industry practices. However, EPA does not present any data to support this statement by documenting changes in industry practices. Rather, EPA merely assumes that the change in law in fact changed industry practice. However, contamination at chemical manufacturing facilities even after the passage of RCRA demonstrate this assumption is false.

At the Gulf States Steel facility in Gadsden, Alabama, EPA approved a \$3 million cleanup of this manufacturing facility, of which \$2.5 million came from EPA’s regional allowance. The facility made steel products as well as metallurgical coke, coke oven gas, coal tar, ammonium sulfate, light oil, and naphthalene. Doc. No. EPA-HQ-OLEM-2019-0086-0354. The facility began operations in 1986, entered the RCRA program as a treatment, storage, and disposal facility in 1990. The company violated RCRA, and entered into a consent decree with EPA in 1994. A few short years later, the company declared Chapter 11 bankruptcy in 1997, which it then converted to a Chapter 7 liquidation bankruptcy. The United States recouped \$2 million to finance response actions at the site, but this did not cover the full cost of remediation at the site. The facility stored waste oil in four unlined lagoons. In 2003, EPA funded an emergency removal action at the site to recover spilled sulfuric acid, remove two leaking ground storage tanks containing sulfuric acid, and to remove 69,000 gallons of waste oil from the surface lagoons. In the most recent action proposed in 2007, EPA proposed removing 81,000 gallons of toxic waste containing benzene and pyridine, highly carcinogenic contaminants that damages the skin, liver, kidneys, and the digestive tract. This example directly rejects EPA’s contention the passage and enforcement of environmental laws, such as RCRA, prevents the need for a CERCLA response action. It also rejects EPA’s contention that cleanups would not be funded by the Superfund trust.

EPA Response:

Thank you for the comment. As part of its chemical manufacturing proposal, EPA systematically evaluated CERCLA NPL, 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 85 FR 10135-10144 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.

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. 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 chemical manufacturing industry, compliance and enforcement history for the relevant regulations. 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.

The information provided by this comment does not change EPA's position. EPA endeavored to research examples of releases and pollution cited by commenters to identify potential additional cleanup cases that may impact the Agency's decision. In general, however, commenters did not identify a significant number of sites that show risk to the Fund exists at facilities operating under the modern regulatory framework. In the case of Gulf State Steel site in Gasden, AL referenced in this comment the site does not fall within the Chemical Manufacturing industry (NAICS 325). Rather, the site was the location of a steel mill (NAICS 331110) and the EPA removal actions were associated with the plant's integrated coke plant and associated residual mill, waste piles from the mill and an associated on-site power facility.

Commenter Name:

Commenter Affiliation: J. R. Simplot Company

Comment Number: EPA-HQ-OLEM-2019-0086-1034

Page(s): 3

Comment:

Risks Due to Liquid Releases from Nitrogenous Fertilizers Are Limited

Manufactured products associated with nitrogenous fertilizers include solids (such as urea) and liquid nitrogen fertilizers (examples include ammonium nitrate solutions, calcium ammonium nitrate solutions and ammonium polyphosphate). Potential impacts to the environment from these products include releases to the subsurface (soils and groundwater) of nitrogen related chemistry (ammonium, nitrites, and nitrates). There are technologies to address such releases including physical removal (soils), phytoremediation, and in-situ treatment. Potential financial risks to taxpayers are minimized by the ability of these proven technologies to provide near immediate results to address releases.

EPA Response:

This comment supports EPA’s analysis presented in the proposal.

Commenter Name:

Commenter Affiliation: Society of Chemical Manufacturers & Affiliates (SOCMA) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1031

Page(s): 3-4

Comment:

Any risks posed in the future by a facility’s operations will, by definition, be occurring at a time when modern regulation will be in force. Current environmental laws and rules have produced dramatic changes in business operations, particularly those involving waste management, and it would be arbitrary and capricious for EPA to ignore that fact by considering practices that no longer occur. Only by considering existing requirements – which also include the prospect of Superfund liability, the combined operations of generally accepted accounting principles and SEC disclosure requirements, possible tort liability, and insurance underwriting standards – can EPA gather information regarding the future “degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances.”

EPA adopted this prospective interpretation of Section 108(b) in the hardrock mining rule, and the D.C. Circuit endorsed its approach:

EPA found that existing federal and state programs as well as modern mining practices reduced the risk that the EPA would be required to use the Superfund to finance response actions at currently active mines. . . . EPA observed that . . . some of the sites discussed in the Proposed Rule operated before the development of modern mining regulatory schemes, rendering their “legacy contamination” irrelevant in determining modern mining risks, [and that] spills at several of the sites occurred as a result of problems since addressed by updated state regulations.¹²

EPA has adopted the same future orientation in the current proposal: “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 Chemical Manufacturing facilities operating under modern conditions.”¹³ EPA should reiterate that interpretation, in light of the text and structure of the statute, in the final rule.

EPA Response:

This comment supports EPA’s analysis presented in the proposal.

Commenter Name:

Commenter Affiliation: Society of Chemical Manufacturers & Affiliates (SOCMA) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1031

Page(s): 4-5

Comment:

As the Supreme Court explained recently in interpreting another statute administered by EPA:

“[A]ppropriate” is “the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.” . . . Read naturally in the present context, the phrase “appropriate and necessary” requires at least some attention to cost. One would not say that it is even rational, never mind “appropriate,” to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.¹⁵

In the current proposal, the Agency concludes its analysis by saying:

There were 34 sites that indicated the potential for a significant impact to the Fund while operating under the modern regulatory framework. For context, there are approximately 13,480 establishments currently operating in the industry. Thus, this is a relatively small number of cases in comparison to the size of the industry. Moreover, EPA estimates the total fund expenditure amount at the 34 sites (including 30 removal sites and 4 NPL sites) is approximately \$104 million (through 2017). This amount of expenditures is only a fraction of just one year’s Superfund budgetary authority. . . . It is EPA’s assessment 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).¹⁶

While the proposed rule does not discuss what the potential burden on the industry might be from imposing financial assurance requirements under Section 108(b), that burden could easily amount to the “billions of dollars” to which the Supreme Court referred.¹⁷ It would hardly be rational to tie up that amount of productive capital in an innovative industry to guard against such a small potential liability.

EPA Response:

This comment supports EPA’s analysis presented in the proposal.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 11

Comment:

Notably, unlike any of the other subsectors in NAICS Code 325, the Phosphatic Fertilizer Manufacturing subsector includes a “mineral processing” component, phosphoric acid production, that was previously evaluated by EPA in the context of the HRM rulemaking, wherein the Agency concluded that the imposition of CERCLA § 108(b) financial responsibility on hardrock mining *and* “mineral processing” facilities was not warranted. As such, TFI believes that EPA has been overbroad by including references to phosphoric acid “mineral processing” facilities in its Proposed Rule, and that the Agency’s evaluation of the need for CERCLA financial responsibility in NAICS Code 325312 should be limited to phosphate fertilizer production not addressed in the HRM rulemakng.

EPA Response:

Thank you for this comment. EPA's proposal, "Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry," proposed to not impose financial responsibility requirements for the chemical manufacturing industry. EPA considered the industry as a whole in its overall analysis, and in doing so did not identify any subsectors of the industry for which financial responsibility requirements are appropriate.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 18

Comment:

EPA's evaluation of the degree and duration of risk associated with the chemical manufacturing industry was conservative in its approach, considering a broad range of facilities and measuring each risk. For instance, even EPA's identification of the scope of the chemical manufacturing industry was conservative as EPA evaluated every subsector under NAICS Code 325 (Chemical Manufacturing), despite many of these subsectors, including fertilizer manufacturing facilities, using far less "hazardous substances" and generating much lower volumes of "hazardous waste." Despite the low risk these subsectors pose, EPA kept the entirety of NAICS Code 325 within its evaluation to err on the side of over-inclusiveness. Further, instead of merely evaluating NPL sites in the chemical manufacturing industry, EPA broadened its review to consider Superfund Alternative Approach ("SAA") sites and removal actions at non-NPL/SAA sites.

EPA Response:

Thank you for this comment. EPA's proposal, "Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry," proposed to not impose financial responsibility requirements for the chemical manufacturing industry. EPA considered the industry as a whole in its overall analysis, and in doing so did not identify any subsectors of the industry for which financial responsibility requirements are appropriate.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 26

Comment:

EPA does not explain in either the Proposed Rule or accompanying background documents why phosphoric acid "mineral processing" facilities are lumped into the chemical manufacturing industry CERCLA § 108(b) rulemaking when these facilities were previously and comprehensively evaluated in the HRM rulemaking. For example, the Agency does not identify any "new" risks posed by these facilities (there are none), or any shortcomings of existing federal

and state regulations, including financial responsibility, to mitigate any risks associated with these facilities (there are none). In addition, the over decade-long MMPI has achieved its objectives as demonstrated by the Agency returning the MMPI to the “base” enforcement program in fiscal year 2017.

EPA Response:

Thank you for this comment. EPA’s proposal, “Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry,” proposed to not impose financial responsibility requirements for the chemical manufacturing industry. EPA considered the industry as a whole in its overall analysis, and in doing so did not identify any subsectors of the industry for which financial responsibility requirements are appropriate.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 31

Comment:

As discussed in Section III.B of TFI’s comments, there are two primary activities encompassed by NAICS Code 325312 (Phosphatic Fertilizer Manufacturing): (1) phosphoric acid production; and (2) phosphate fertilizer production. EPA’s Proposed Rule appears to include within its scope phosphoric acid production, which is a “mineral processing” activity that was thoroughly evaluated as part of EPA’s HRM rulemaking. As such, TFI recommends that EPA make clear in the Final Rule that only phosphate fertilizer production after the conclusion of “mineral processing” is subject to the Proposed Rule, and that phosphoric acid “mineral processing” was previously evaluated by the Agency in the HRM rulemaking.

EPA Response:

Thank you for this comment. EPA’s proposal, “Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry,” proposed to not impose financial responsibility requirements for the chemical manufacturing industry. EPA considered the industry as a whole in its overall analysis, and in doing so did not identify any subsectors of the industry for which financial responsibility requirements are appropriate.

2.1. Impacts of Industry Practices

Potential environmental, health, and social impacts of industry practices.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 10-11

Comment:

E. EPA failed to analyze cumulative risks posed by chemical manufacturing, and thereby ignored disproportionate environmental harms borne by low-income communities and communities of color.

Communities of color are often disparately burdened by a variety of pollution impacts not only from chemical manufacturing, but also from oil refining, oil drilling, use, storage, or distribution of hazardous chemicals, and many others. These pollution sources cumulatively harm people's health, making these communities especially vulnerable to toxic exposures from derelict and defunct chemical manufacturing facilities.

EPA ignores how this proposed action could contribute to creating an environmental injustice, stating that Executive Order No. 12898 does not apply because EPA proposes no regulatory requirements. 86 Fed. Reg. 10146. This is wrong. President Clinton's executive order on environmental justice requires federal agencies "identify[] and address[], as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions[.]" Exec. Order No. 12898, § 1-101 (emphasis added). EPA's proposal not to impose financial assurances on chemical manufacturing facilities is a proposed federal action. As such, it constitutes an activity within the meaning of the order, and EPA must consider how this proposed action would disproportionately burden environmental justice communities. EPA's decision not to impose financial assurances also constitutes a policy of the agency, albeit a policy not to require such assurances. As such, for that same reason, EPA must disclose the impact this action will have on environmental justice communities.

EPA Response:

Thank you for your comment. EPA disagrees with the assertion that it ignored relevant risks or did not satisfy executive order 12898 regarding environmental justice. EPA developed an analytic framework to assess the appropriateness of CERCLA 108(b) financial responsibility in a manner consistent with CERCLA. See "Statutory Interpretation" section of the final action for more information. EPA's analysis included a systematic review of Superfund cleanup sites in the industry with a variety of contaminants and contaminated media. In effect, the analysis considered the types of risk the Superfund program was designed to address and that would be addressed by any 108(b) financial responsibility. Moreover, many of these sites analyzed were actually the product of pollution from multiple facilities. As such, EPA did consider the impact of cumulative risks from facilities located in close proximity to each other and to the extent the CERCLA program requires.

With respect to the Executive Order concern, the EPA proposal followed standard practice for regulatory actions that do not establish an environmental health or safety standard.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 11-13

Comment:

In its proposed action, EPA defines relevant future risk based on first analyzing each polluting sector separately. Such an approach ignores the cumulative pollution burdens experienced by environmental justice communities, by examining risk facility by facility. While it is important to evaluate the unique characteristics of each facility, the analysis should not ignore the cumulative risks faced by communities with a high concentration of chemical manufacturing facilities and other polluting industries.

U.S. EPA found that Basic Chemical Manufacturing (especially concentrated in the Gulf Coast), has almost half of its total value in five states — Texas (17%), California (11%), North Carolina (7%), Louisiana (7%), and Illinois (6%).

It would be very difficult to lay out the breadth of similar hazards across the country in this comment. Below are examples of this widespread disparity communities across the nation face, highlighting Texas, California, and Louisiana. The regions below face multiple hazards beyond this sector. These examples highlight the need for strong national protections.

1. Texas examples show major impacts of Chemical Manufacturers side by side with heavy petroleum industry.

In the Houston-Woodlands-Sugar Land, TX region, Chemical Manufacturers make up all of the top five TRI facilities, discharging many millions of pounds of pollutants mostly to land, also to off-site disposal, water and air: Because the Houston area is already one of the most heavily industrialized metropolitan areas in the country, having only chemical manufacturers within the top five polluting facilities demonstrates how prolific the impacts of chemical manufacturing are in this region.

Even though chemical manufacturers rank highest among those included in the toxic release inventory, the Houston region also suffers from environmental and health impacts due to the extreme concentration of oil refining in addition to chemical and other major polluting impacts. The pollution from these facilities disproportionately impacts communities of color and low-income communities.

Texas A&M University and others published a 2020 study highlighting these cumulative impacts in Environmental Justice communities, and the need to look at data using an integrated approach. The researchers found:

The Houston area provides an exemplary illustration of the challenges of [Environmental Justice]. In addition to being among the most populous metropolitan areas in the United States, Houston is home to the largest

petrochemical complex in North America and two of the largest refineries in the country. There are more than 400 chemical plants located along the Houston Ship Channel, which reaches within 5 miles of Downtown Houston [3]. It is also a large urban port city, with the Houston Ship Channel being a transportation hub for freight, further adding to regional air pollution. East Houston, where most of these facilities are concentrated, is predominantly populated by communities which are African-American and Hispanic and which suffer from poor environmental conditions resulting from not only routine industrial business practices but also natural and manmade disasters such as hurricanes and chemical tank fires. Moreover, due to historical segregation and redlining, many neighborhoods in East Houston lack deed restrictions, and the region as a whole has resisted land use zoning laws [4,5]. (emphasis added)

The Houston Ship Channel is one of the largest petrochemical complexes in the world, and unremediated legacy pollution is commonplace in the Houston area. A 2015 cancer cluster analysis by the Texas Department of State Health Services found evidence of elevated cancer risks of several types of cancer in several census tracts in East Harris County. A follow up analysis attributed the cause of this widespread cancer to legacy pollution. Having so many facilities in close proximity to each other and to communities reinforces the need for proper remediation and financial assurances.

Without proper remediation, spills and waste from chemical manufacturing will pollute land, air, and waterways within communities near the Houston Ship Channel. In fact, in a recent environmental impact statement analyzing the potential impacts of the widening and deepening of the Houston Ship Channel, the Army Corps of Engineers states this, referring to the effect of Hurricane Harvey on the Houston Ship Channel:

The potential for drastic changes to the [Hazardous, Toxic, and Radioactive Waste] HTRW existing condition as a result of dramatic weather events, such as Hurricane Harvey, cannot be discounted. Catastrophic weather events have the...potential to affect previously controlled HTRW sites and release contaminants into receiving waters such as the HSC. While the specific effect of the most recent event cannot be fully quantified yet, catastrophic weather events can dramatically destabilize the HTRW context of the proposed project. New HTRW sites may be identified once the impact of Hurricane Harvey is fully realized.

The threat of hurricanes along the Gulf Coast creates an even larger recipe for disaster as communities contend with the pollution from chemical manufacturing facilities as well as oil refiners within close proximity.

In addition to the Houston region, other regions along the Gulf Coast suffer from the shared burden of chemical manufacturing in proximity to oil refining and goods movement, like Corpus Christi and Beaumont/Port Arthur.

The Beaumont/Port Arthur region is home to over 50 chemical manufacturing facilities and refineries, including the largest oil refinery in the United States. In November 2019, a series of explosions and fire at the TPC plant in Port Neches, in the Beaumont region, released pollution and damaged homes and businesses. Officials called for the evacuation of ~50,000 people within a 4 mile radius of the plant.

The TPC facility produces and emits multiple hazardous chemicals like 1-3 butadiene, Nmethyl-2-pyrrolidone, ethylbenzene, methyl tert-butyl ether, methanol, benzene, propylene, Nhexane, toulene, and chlorine. Furthermore, asbestos, a known carcinogen, was discovered several miles away in Bridge City as a result of the blast.

It would be wrong to piecemeal and minimize the impacts of Chemical Manufacturing, which are considerable in themselves, and also part of a cumulative picture of chemical and petroleum impacts.

EPA Response:

Thank you for the comment. This comment suggests that geographic areas with many chemical manufacturers present some unique risk that presents a greater need for CERCLA 108(b) financial responsibility. EPA considered and researched the geographic areas in question and, while they identified one additional problem site, the Agency determined that they do not indicate a need for CERCLA 108(b) financial responsibility. First, EPA examined the five chemical manufacturers in the Houston-Woodlands-Sugar Land, TX region, that comprise the top five TRI facilities as identified by the commenter. These five facilities were the Ascend Performance Materials Chocolate Bayou Plant, TM Deer Park Services facility, BASF Corp Freeport facility, Lyondell Chemical Company site, and the Chevron Phillips Chemical Co LP facility. Based on the research, these five facilities, cumulatively or individually, have not required CERCLA actions.

Next, EPA examined the broader Houston Ship Channel area. Based on public information including EPA's ECHO database and EPA's On Scene Coordinator's database, EPA was able to identify 11 potential incidents/releases in the area for additional research. Of these eleven incidents, four were already considered as part of the cleanup case analyses done in support of the proposal. Of the seven new incidents, most were addressed by the owner/operator with some combination of state or EPA oversight. However, there were two sites that appeared to require an EPA response action. At one of these sites, EPA was able to recover its costs associated with responding to pollution at the site that operated from 1961 to 1991. At the other site which was abandoned in 2005, there was no indication that EPA was able to recover its costs. EPA considers this site a problematic example of issues arising under a modern regulatory framework that seemed to require a taxpayer response. However, it is only one additional site that alone does not change EPA's conclusion from the proposal that CERCLA 108(b) financial responsibility is not necessary for the industry.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

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Comment:

2. *Louisiana's "Cancer Alley" includes one of the most dense concentrations of chemical industries in the country.*

Louisiana's "Cancer Alley" is an 85 mile-long stretch of the Mississippi river lined with an extremely large complex of petrochemical plants and refineries, between New Orleans and Baton Rouge. EPA has found profoundly higher cancer risks to communities along the corridor, where most communities are predominantly black.

Four out of five of the top TRI polluters in the state are Chemical Manufacturers, with Monsanto number one, operating along this dense corridor. This high concentration of chemical manufacturing and other hazardous industries together leaves a legacy of concentrated contamination and higher impacts of risks from future contamination. This cumulative risk must be acknowledged by EPA in light of the already extreme burden of this region, and financial assurances should be required to prevent these facilities from causing further harm

EPA Response:

Thank you for the comment. This comment suggests that geographic areas with many chemical manufacturers present some unique risk that presents a greater need for CERCLA 108(b) financial responsibility. EPA considered and researched the geographic areas in question and determined that they do not indicate a need for CERCLA 108(b) financial responsibility. EPA examined the so called "Cancer Alley" area. Based on public information including EPA's ECHO database and EPA's On Scene Coordinator's database, EPA was able to identify 7 potential incidents/releases in the area for additional research. Of these 7 incidents, 3 were already considered as part of the cleanup case analyses done in support of the proposal. The remaining four incidents either required no CERCLA involvement or were addressed by the PRP. As such, EPA does not believe the "Cancer Alley" geographical area is indicative of a need for CERCLA 108(b) financial responsibility.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

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Comment:

3. *California examples also show multiple impacts from chemical manufacturers, side by side with petroleum refineries and other hazards.*

Like Texas, many of California's chemical manufacturing facilities exist near petroleum refineries, in addition to other industrial facilities that use, distribute, and store chemicals. Again, in the absence of financial assurances, the concentration of these facilities in low-income communities of color places a disproportionate risk on these communities of a future chemical accident or spill. This can include impacts to the communities where these facilities are located, or to the smaller number of available hazardous waste processing locations where these facilities can send their waste.

Examples of chemical manufacturers closely related to oil refining in California includes catalyst producers, and industrial gas manufacturers, which produce gases such as hydrogen (generally located right next door to refineries, or even on refinery property). The location of these facilities in heavily industrialized communities increases the financial and environmental risks.

This is especially true since both the San Francisco Bay Area and Los Angeles are overdue for major earthquakes. Seismic events can cause multiple releases by chemical manufacturers at the same time as oil refineries and other releases. This is not theoretical—major earthquake events will happen in these regions, and the cumulative impacts on environmental justice communities has not been evaluated by EPA in this proceeding, including chemical spills, fires, and multiple simultaneous hazards, further increasing future costs that can overwhelm community response capacity.

EPA Response:

Thank you for your comment describing closely located facilities and seismic risks. EPA developed an analytic framework to assess the appropriateness of CERCLA 108(b) financial responsibility in a manner consistent with CERCLA. See “Statutory Interpretation” section of the final action for more information. EPA’s analysis included a systematic review of Superfund cleanup sites in the industry with a variety of contaminants and contaminated media. In effect, the analysis considered the types of risk the Superfund program was designed to address and that would be addressed by any 108(b) financial responsibility. Moreover, many of these sites analyzed were the product of pollution from multiple facilities. As such, EPA did consider the impact of cumulative risks from facilities located in close proximity to each other and to the extent the CERCLA program does.

In response to releases related to seismic events, there are several 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 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.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

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Comment:

- a. **Dow Chemical, Pittsburg, CA**, manufacturers one of the world's deadliest chemicals (HF)—releases can also cause long-term environmental contamination.

Dow Chemical in the San Francisco Bay Region manufactures hydrogen fluoride (HF). Hydrogen fluoride is one of the deadliest gases in existence—which, if released through a small hole in a vessel, can form a ground-hugging cloud which travels for miles and remains lethal miles away.

Dow reported in its 2018 TRI report that the maximum amount of HF it stores in Pittsburg California is one to ten million pounds.

Not only does this chemical pose an immediate lethal hazard to people during a release, but afterward, a release can cause long-term contamination of soil and water whether released through air, water or soil. In addition to the immediate lethal hazards of releases to humans, the seminal 1993 report to Congress regarding HF by EPA described water and other hazards that can persist:

If HF was released to the environment in sufficient concentrations, the fluoride ions in the water could be toxic to surrounding plants and animals, while airborne HF in a vapor cloud could burn both plant and animal tissue. **Whether released to water, air, or land, HF does not biodegrade. Calcium present in large enough quantities in soil or water will form an insoluble solid with the fluoride ion, removing it as an immediate environmental hazard.** Dilution or natural buffering capacities of soils or water will reduce the increased acidity created by the release of HF.

HF is highly soluble in water. Fluoride ions, readily available in aqueous HF, were found to be lethal to fresh water fish at 60 milligrams per liter (mg/L). Fluoride ions are harmful to many other species of fish at concentrations of 40 mg/L and below. Other more sensitive aquatic life are affected at levels as low as 10 mg/L. An aquatic toxicity rating for HF has not been assigned. According to a Canadian study, concentrations of fluoride equal to or exceeding 1.5 mg/L constitute a hazard in the marine environment, while levels less than 0.5 mg/L present minimal risk of deleterious effects.

The study also found impacts from release to land by killing or contaminating plants, and harming animals who eat the plants:

Gaseous HF can directly attack plant foliage, especially if present in high concentrations. In low concentrations, HF is absorbed by the leaves. The most apparent effect of fluoride on vegetation is necrosis or tip burn, but exposure to fluoride in sufficient quantities also may result in growth abnormalities or a decrease in reproductivity in both plants and animals. Livestock that drink fluoride contaminated water or eat contaminated foliage may have dental lesions, bone overgrowth, lameness, loss of appetite, a decrease in milk production, and reduced reproductivity.

Such a release would be a prime example of an impact that could bankrupt a company, causing major liability for impacts to humans harmed or killed, and at the same time causing longer term contamination of the surrounding soil and water. This is another perfect example of the need for upfront financial assurances.

In addition, the Dow Chemical zip code (94565) shows on CalEnviroScreen as one of the very worst areas in California for toxic Cleanups (96th percentile worst), Groundwater Threats (96th percentile worst), Hazardous Waste (98th percentile worst), and Impaired water (91st percentile worst). CalEnviroScreen is provided by the California Office of Environmental Health Hazard Assessment (OEHHA). This site describes Cleanups as follows:

Cleanup sites are places that are contaminated with harmful chemicals and need to be cleaned up by the property owners or government. People living near these sites are more likely to be exposed to chemicals from the sites than people living further away. Some studies have shown that neighborhoods with cleanup sites are generally poorer and have more people of color than other neighborhoods.

The Dow zipcode on CalEnviroScreen also shows very high asthma rates for the nearby community (99th percentile worst), and other health and economic hazards.

This site has major existing hazards. The future risks to communities nearby and to the environment must be evaluated to account for cumulative existing and future hazards, including financial and environmental risks. Clearly such multiple hazards warrant financial assurances.

In addition to HF risks, this major Chemical Manufacturer (Dow Pittsburg, CA) reported multiple hazardous chemicals produced and emitted, including 1,2,4-Trimethylbenzene, 2-Methylpyridine, Ammonia, Carbon Tetrachloride, Chlorine, Chloroform, Cumene, Diisocyanates, Ethylbenzene, Hexachlorbenzene, Hydrochloric Acid, Methanol, N-Methyl-2-Pyrrolidone, Naphthalene, Nitrapyrin, Sulfuric Acid, Tetrachlorethylene, Xylene (mixed isomers). Such a variety in hazardous chemical manufacturing in itself compounds financial and environmental risks, especially in a region facing severe seismic hazards.

EPA Response:

Thank you for the comment. This comment provides information about releases and hazardous materials at the Dow Pittsburgh, CA facility. EPA conducted additional research on the site to determine whether the releases or hazardous materials at the site have impacted the Superfund program. Based on this research, there is no indication a CERCLA action is or was necessary.

More information on the research and information sources considered is available in the spreadsheet titled, “325_Incident Research” available in the rulemaking docket.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

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Comment:

b. Products & Chemicals, Inc., Wilmington, CA, sends substantial toxics offsite.

Air Products, an Industrial Gas Manufacturer in Wilmington, California³³ (part of the City of Los Angeles) produces hydrogen and other gases for oil refineries next door. This facility sent almost 8,600 lbs. of methanol to offsite disposal or other release in 2018 (as well as over 65,000 lbs. of ammonia to the air, 10,876 lbs. of ammonia to offsite disposal or other release, and 109 lbs. of n-hexane to the air). The facility reported similar, but increasing amounts of methanol between previous years’ reports and 2018.

Releases to land or soil are a main concern with respect to potential impacts after facility closure. (Air impacts will generally be gone after closure, unless emissions include chemicals such as lead, or other chemicals which can be deposited onto surfaces.) This facility’s offsite disposal represents a future risk of spills of methanol to land or soil.

Since methanol is a toxic liquid, it has the potential to be spilled or released to water or soil. Because many such spills have occurred, the Wyoming Dept. of Environmental Quality website provided the following guidance on methanol spill hazards:

Spills of methanol (the commercial chemical product, not products that contain methanol) on or into environmental media create a listed hazardous waste. Staff should ensure that the remediation requirements for spill media (contaminated soils and/or groundwater) meet the requirements of the Hazardous Waste Rules, as described in this memo.

Methanol degrades in the environment relatively quickly, unless the spill intersects with other hazardous chemicals. In that case, it has been found that methanol can slow the degradation of BTEX (Benzene, Toluene, Ethylbenzene, and Xylgene) compounds in groundwater plumes, as found in more than one study. Especially because this type of manufacturer is basically a “captive industry” of the oil refineries next door, cumulative impact risks of such complex spills and releases involving multiple chemicals must be considered.

EPA also provides a risk score (RSEI or Risk Screening Environmental Indicators) for TRI facilities, based on TRI releases. Because this is a Risk Screening tool (not a detailed risk assessment), the exact numbers are less relevant, but the trends and comparisons to the rest of the county and industry are important. The RSEI for Air Products shows the following in blue a much higher risk to the surrounding community compared to the industry sector, others in the county, etc.: This number has moved up and down, but stayed well above the county average (note the scale to left is logarithmic).

While this score includes the facility's air releases, it is an indicator of higher risk compared to the industry average, and may indicate poorer performance or regulatory oversight in general. Note that Air Products also has a facility in Carson nearby, also servicing the large complex of Oil Refineries in Carson and Wilmington, and also reporting thousands of pounds of methanol in TRI data.

In addition, other industrial gas manufacturers near oil refineries in Southern and Northern California are part of the chemical manufacturing sector, and should be evaluated by EPA related not only to their own potential risks, but also as contributing to cumulative hazards alongside the oil refiners for which they provide gaseous feedstocks. (Companies in this subsector include other Air Products locations, Air Liquide, and Praxair, perhaps others.)

EPA Response:

Thank you for the comment. This comment provides information about releases and hazardous materials at the Air Products and Chemicals, Inc. Wilmington, CA facility. EPA conducted additional research on the site to determine whether the releases or hazardous materials at the site have impacted the Superfund program. Based on this research, there is no indication a CERCLA action is or was necessary. More information on the research and information sources considered is available in the spreadsheet titled, "*325_Incident Research*" available in the rulemaking docket.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

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Comment:

The Chemical Manufacturing subsector transforms organic and inorganic raw materials by a chemical process to formulate products.¹ EPA has made a preliminary finding that:

Based on that examination, EPA is proposing that, in the context of CERCLA section 108(b), the degree and duration of risk associated with the modern production, transportation, treatment, storage or disposal of hazardous substances by the Chemical Manufacturing Industry does not present a level of risk of taxpayer funded response actions that warrant imposition of financial responsibility requirements for this sector.

This conclusion runs contrary to the evidence. There is a clear risk that this major industrial sector will almost certainly result in high costs to the public or failure to clean up sites in the future, unless financial assurances are required.

U.S. EPA support documents acknowledge that not only does the Chemical Manufacturing sector generate most of the hazardous waste in the nation, but the amounts are rising:

In 2017, **chemical manufacturers reported** to EPA's National RCRA Hazardous Waste Biennial Report (BR) the **generation of 21.7 million tons of hazardous waste, accounting for 62% of the hazardous waste generated nationally.** This represents a

5% growth since 2015. . . . **Over 50% of the total releases from the Chemical Manufacturing industry are to land.**

This high and growing volume increases the risk of adding new hazards to soil and water from this industry in the future, requiring financial assurances to protect human health and the environment. While it is impossible to predict where inadvertent or deliberate environmental contamination will occur, it is a certainty that for some percentage of these facilities, it will occur.

EPA Response:

Thank you for this comment. EPA disagrees with risk of the chemical manufacturing industry implied in the comment. First, EPA repeats its position on use of biennial report data. EPA has stated that it chose not to rely on TRI and BR data and does not find the data sources valuable for assessing current risk of a Fund financed response action in the industry. Rather, the analysis presented in the proposal looked at risks by examining records of releases of hazardous substances from facilities in the industry in combination with the payment history of the Fund and enforcement settlements and judgments. To enable EPA to base its decision on risk posed by facilities operating under modern conditions, i.e., the types of facilities to which financial responsibility requirements would apply, EPA developed an approach to identify and consider relevant state and Federal regulatory requirements and financial responsibility requirements that currently apply to operating facilities, as well as voluntary protective practices. The comment did not offer evidence which persuasively contradicts this approach.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 6-7

Comment:

C. A long history demonstrates that chemical industries cause major and long-term contamination of Soil & Water.

EPA's preliminary determination is that modern regulations and requirements make the long-term risks of costs to the public low. But this does not account for non-compliance with regulations, gaps in regulation, deliberate dumping, sloppy operations, or lax enforcement (which can vary geographically). Further, unforeseen circumstances such as catastrophic accident, or a global pandemic, could halt enforcement activities.

It is well-established that inadvertent or deliberate contamination by hazardous chemicals of our soil and water has occurred throughout the nation due to activities of many different chemical industries, including chemical manufacturers.

Data compiled by EPA pursuant to the Resource Conservation and Recovery Act ("RCRA") documents widespread hazardous contamination to lands in every state.

For a specific review of overall status and prospects for cleanup, the National Academy for Sciences, Engineering, and Medicine published a study, *Alternatives for Managing the Nation's*

Complex Contaminated Groundwater Sites–2013. The study found that widespread and persistent chemical contamination of groundwater was a problem throughout the U.S., requiring hundreds of billions of dollars for cleanup:

At hundreds of thousands of hazardous waste sites across the country, groundwater contamination remains in place at levels above cleanup goals. The most problematic sites are those with potentially persistent contaminants including chlorinated solvents recalcitrant to biodegradation, and with hydrogeologic conditions characterized by large spatial heterogeneity or the presence of fractures. While there have been success stories over the past 30 years, the majority of hazardous waste sites that have been closed were relatively simple compared to the remaining caseload. In 2004, **the U.S. Environmental Protection Agency (EPA) estimated that more than \$209 billion would be needed to mitigate these hazards over the next 30 years**—likely an underestimate because this number did not include sites where remediation was already underway or where remediation had transitioned to long-term management. (p. 1, emphasis added)

This problem is not going away—the study found that at many sites, contamination could be expected to persist for up to a century:

Significant limitations with currently available remedial technologies persist that make achievement of MCLs⁶ throughout the aquifer unlikely at most complex groundwater sites in a time frame of 50-100 years. Furthermore, future improvements in these technologies are likely to be incremental, such that long-term monitoring and stewardship at sites with groundwater contamination should be expected. (p. 7, emphasis added)

The future monitoring and stewardship of contaminated groundwater at Superfund sites is one of the costliest components of cleanup actions.

EPA Response:

Thank you for the comment noting that compliance with and enforcement of existing regulations is not uniform and sometimes imperfect. EPA does not disagree with that suggestion. However, the Agency believes its analysis adequately accounts for the existence of non-compliance. Please recall that, as part of its proposal, EPA conducted a systematic evaluation of the Chemical Manufacturing industry which considered existing environmental standards, regulations, and practices, the Superfund program's history of cleanups in the industry, and enforcement and compliance history of the industry. As part of this suite of analyses, EPA systematically evaluated CERCLA NPL, 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 actions. EPA's review of the Superfund NPL, SAA, and removal sites associated with the industry found that only 34 sites indicated a potential for a significant impact to the Fund while operating under the modern regulatory framework. These 34 sites included sites with issues stemming from a potential gap in the regulatory framework, or, issues stemming from noncompliance with a regulations that does exist. As such, the 34 resulting sites from EPA's analysis captures the instances where non-compliance with modern regulations led to a Fund financed Superfund response.

With respect to the comment that there are many cleanups in the industry some of which are long term in nature and expensive, EPA does not disagree. However, EPA believes its analysis adequately accounts for the extent of cleanups. EPA's systematic analysis of NPL, SAA and removal sites in the industry found that the vast majority were either legacy issues or being addressed by the PRP. Furthermore, the Agency believes it is important to consider the number of cleanups in the chemical manufacturing industry in the context of the size of the industry itself. The chemical manufacturing industry is very large with an estimated 13,480 facilities in operation. As such, the cleanup figures are not too large. Consider, for instance, that in the review of the NPL, SAA and removal sites in the industry, EPA found only 34 sites that indicated a potential for a significant impact to the Fund while operating under the modern regulatory framework. Finally, where there are cleanups, it is important to keep in mind that there is often financial assurance associated with the cleanups. For example, Superfund orders and settlements typically include an FA requirement and RCRA Subtitle C corrective action cleanups are required to have financial assurance.

Commenter Name: Michael Karnosh

Commenter Affiliation: Confederated Tribes of Grand Ronde Community of Oregon

Comment Number: EPA-HQ-OLEM-2019-0086-1027

Page(s): 2

Comment:

Grand Ronde is made up of more than 30 antecedent tribes and bands having homelands in western Oregon, southwest Washington, and northern California, areas that are rich in natural resources and to which the Tribe has had a strong connection since time immemorial. Our ceded lands include areas in the Columbia, Willamette, upper Umpqua and upper Rogue River systems. All of these systems are habitat for listed Threatened and Endangered species, including but not limited to spring Chinook salmon and winter steelhead, and many areas within these systems have been designated as critical habitat. For these listed Threatened and Endangered species as well as other culturally-important species of the Tribe, environmental contaminants including pesticides and other manufactured chemicals are a well-known and scientifically proven limiting factor, in addition to being a proven human health risk for traditional Tribal practices such as fishing, hunting, gathering, and consumption of traditional food sources. The Tribe has a great interest in protecting, recovering, and restoring Tribal resources adversely affected by the use of chemicals such as pesticides, and in protecting our Tribal members who in the course of traditional practices are subjected to heightened exposures to chemicals such as pesticides and their residual compounds in the environment for long periods of time throughout their lives.

Grand Ronde's ceded lands include numerous CERCLA and other cleanup sites, some of which are former facilities owned and operated by chemical manufacturing companies. At the time these companies were operating, the chemicals being used and manufactured at their facilities were legal, and the discharge of these materials into waterways and onto lands was generally not seen by businesses as a liability. These materials included the pesticide known as DDT, now banned from manufacture or use in the U.S. Decades later, these materials have been proven to be highly toxic and damaging to humans and ecosystems, highly persistent in the soils, sediments, porewater and foodweb of the areas of their manufacture and/or discharge, and extremely difficult and/or expensive to remediate. Fish consumption advisories have been put in

effect in these places, and in some areas cleanup has yet to occur although planned for decades, largely because the responsible parties i.e. the chemical manufacturing companies have become insolvent. Fishing, gathering, and other traditional practices can no longer occur in these areas; the water, sediments and fish are still too toxic.

If EPA makes the proposed rule under Section 108(b) of CERCLA, there is an increased risk of history repeating itself. Chemicals manufactured today, even though clearing current regulations for approval, may have harmful impacts that could take years or decades to become apparent. Many chemicals' synergistic effects and long-term residual products are still being discovered after years of post-approval use. Additionally, even the best-intentioned chemical manufacturers experience mishaps and accidents in the processes of production, storage and transfer, resulting in violations of the guidelines under which the chemical was originally approved. An approval for manufacture of a chemical normally assumes that certain standards will be met in the production, storage and transfer processes; however, violations of these standards are difficult if not impossible to completely safeguard against. Finally, to give little or no regard to the financial responsibility requirements for an inherently high-risk industry would contradict logic and would place a disproportionate burden for the potential cleanup on the shoulders of the public. Even if the increase in risk were slight it is not worth the potential incremental damage; the health of Tribal members, the threatened salmon and steelhead of the Tribe's ceded lands, and the myriad other resources that depend on clean water, sediments, and soils are far too valuable to put at greater risk.

EPA Response:

Thank you for your comment. EPA has not and is not contending that the existing state and federal regulations eliminate all releases. Rather, the analyses conducted as part of the proposal, led EPA to conclude that the network of federal and state regulations applicable to the chemical manufacturing industry creates a comprehensive framework that applies to prevent or minimize releases that could result in a need for a Fund-financed response action.

EPA provides a comprehensive overview of the modern federal and state regulatory framework that applies to the chemical manufacturing industry, including those laws and regulations that regulate the production, transportation, treatment, storage, and disposal of hazardous substances and minimize or prevent releases, as well as programs that already require financial assurance. For example, all of the major federal statutes, including the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act are applicable across the chemical manufacturing industry and lay the foundation for regulating air pollution, water pollution, emergency planning and response, hazardous substances management, and hazardous and non-hazardous waste management. In addition, state regulations provide another layer of environmental protection through state specific air, water (surface and groundwater), emergency response and planning, and hazardous waste regulatory programs. Additionally, a number of these regulations have their own financial responsibility requirements. Specifically, with regard to releases that could potentially lead to a CERCLA response, these existing laws address the range of risk by requiring owners and operators to: (1) adopt safe operating practices to avoid releases; (2) implement programs and designs to minimize the scope of releases when they do occur; and (3) address any resulting environmental conditions promptly if they occur and also often at closure and during post-closure. Overall, substantial advances have 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 prevent and address such releases at chemical manufacturing facilities.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

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Comment:

Despite the limited usefulness of TRI and RCRA BR data, EPA cites to these data in its Industry Practices Document. TFI recommends that EPA again make clear in the Final Rule that the Agency did not use either TRI or RCRA BR data in its financial responsibility analysis for the chemical manufacturing sector. Nonetheless, with respect to the fertilizer industry, the data are *de minimis* when compared to the entire NAICS 325 sector.

For example, in the Nitrogenous Fertilizer Manufacturing subsector (NAICS Code 325311), EPA reports approximately 16 million pounds of TRI-listed chemicals released to the land based on 2017

TRI data. To put this in context, this amount constitutes approximately 3.2% of the total pounds of TRI-listed chemicals released to land by the chemical manufacturing sector in 2017.¹⁶⁶ In addition, the Nitrogenous Fertilizer Manufacturing subsector generated 2,637 tons of “hazardous waste” in 2017, representing approximately 0.012% of all “hazardous waste” generated by the chemical manufacturing industry as a whole that year.

According to EPA, the Phosphatic Fertilizer Manufacturing subsector (NAICS Code 325312) released approximately 9 million pounds of TRI-listed chemicals to the land based on 2017 TRI data. This constitutes approximately 1.8% of the total pounds of TRI-listed chemicals released to land by the chemical manufacturing sector in 2017. In addition, the Phosphatic Fertilizer Manufacturing subsector only generated 1,194 tons of “hazardous waste” in 2017, representing approximately 0.0055% of all “hazardous waste” generated by the chemical manufacturing industry as a whole.

Finally, according to EPA, the Fertilizer (Mixing Only) Manufacturing subsector (NAICS Code 325314) released approximately 16 thousand pounds of TRI-listed chemicals to the land based on 2017 TRI data, constituting only 0.0032% of the amount released to the land in the chemical manufacturing industry in 2017. This subsector only generated 3,352 tons of “hazardous waste” in 2017, representing only 0.015% of the total amount of “hazardous waste” generated by chemical manufacturing industry in 2017.

While TFI questions the Industry Practices Document references to TRI and RCRA BR data, when EPA indicates in the Proposed Rule preamble that it is not relying on these data to assess risk, the data demonstrate that the fertilizer industry should not even be among those subsectors under consideration due to its relatively small footprint compared to the rest of the chemical manufacturing industry.

EPA Response:

Thank you for this comment. EPA’s proposal, “Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry,” proposed to not impose financial responsibility requirements for the chemical manufacturing industry. EPA considered the industry as a whole in its overall analysis, and in doing so did not identify any subsectors of the industry for which financial responsibility requirements are appropriate.

EPA explained in the proposed rule that while the Agency found the BR and TRI data sources appropriate for identifying classes of facilities to examine further, the Agency does not find the data sources valuable for assessing current risk of a Fund financed response action in the industry. EPA also analyzed the limitations of the data sources in the final action for the Hardrock Mining rule and do not deem it relevant to include in the final rulemaking for the chemical manufacturing industry.

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Comment:

F. EPA ignored the substantial increased risk posed by climate change, seismic hazards, and other natural disasters.

EPA failed to analyze or even consider reasonably knowable and calculable ways in which future conditions will increase the risk of releases from this class of facilities. One particularly glaring omission is the lack of any reference in the proposed rule or supporting documents to the threat posed by climate change. EPA conducted its analysis explicitly to assume “modern management practices and modern environmental regulations”— but neglected to analyze “modern” (and future) environmental conditions. As the EPA acknowledged in the supporting materials for this rule, much of the chemicals industry— especially basic chemicals, including petrochemicals—is concentrated in the gulf states of Texas and Louisiana. These states are vulnerable to tropical storms and sea level rise, and a well- known present and future impact of climate change is increased severity and frequency of these storms, plus sea-level rise higher even than the global average rise in those states. Hurricanes and storm surges can cause releases of hazardous substances at both active chemical manufacturing sites and superfund sites still under construction or even where construction has finished. For example, Hurricane Harvey caused an explosion at one active chemical manufacturing facility and partially displaced a cap at a completed superfund site in Houston. The Environmental Integrity Project estimated that Harvey also caused the release of 8.3 million pounds of air pollutants. As the storms become more frequent and more violent, related releases can be expected to increase. Notably, EPA has identified the risk to superfund sites in Louisiana and Texas in its latest Climate Change Adaptation strategy, from 2014. Excluding consideration of the impacts of changing environmental conditions on the risk of releases and therefore of taxpayer funded responses from this analysis was unreasonable.

EPA Response:

Thank you for the comment noting the performance of the modern regulatory framework under the potential increased risk of release posed by climate change, seismic hazards and other natural disasters. EPA acknowledges that it cannot predict future natural disasters. However, the Agency analysis has shown that existing regulations in the modern regulatory framework address these concerns and most accidents and releases do not lead to Superfund responses, Fund expenditures, or CERCLA liability claims.

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 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 collected state environmental regulatory information for the chemical manufacturing industry from the nine states with the most establishments that constitute over 50 percent of the total establishments in the United States: California, Texas, Illinois, Ohio, Florida, New Jersey, Pennsylvania, New York, and Georgia. Louisiana was ranked number 20 out of 51. EPA's analysis of Texas's regulations find that these state regulations supplement the federal regulatory regime and are effective. For example, Texas air regulations require reporting of emissions events, set standards for maintenance, start-up, and shutdown, and establish a voluntary

supplemental leak detection program for facilities that handle volatile organic compounds. Texas also has surface water quality standards that include general and site-specific criteria, as well as control procedures for toxic substances and total toxicity. Texas regulations establish annual fees to be assessed against wastewater permit holders authorized to discharge wastewater into or adjacent to waters of the state. Texas requires employers to provide information regarding hazardous chemicals in the workplace to employees who are at risk of exposure to those chemicals. Lastly, Texas establishes requirements for underground storage tanks located over certain aquifers in the state to protect and maintain the quality of groundwater resources.

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Comment:

Similarly, EPA's failure to consider the risk of multiple releases due to earthquakes was arbitrary. The U.S. Geological Survey (USGS) performed an analysis of what would happen during a major earthquake expected in California, and chose Southern California as the example (in *The Shakeout Scenario*). It found the likelihood that thousands of fires would break out, and that resource constraints and water distribution disruption could allow them to spread quickly. It also found hazardous chemicals could be released:

It is generally acknowledged that a major earthquake in an industrialized, densely populated area of the United States could lead to the release of hazardous chemicals.

Furthermore, communities are accustomed to responding to hazardous materials releases one at a time, while in an earthquake situation multiple accidents may occur simultaneously, greatly compounding resource problems...

Conducting detailed seismic risk assessments and modeling potential failures in chemical facilities is very time consuming and expensive; few communities can afford to conduct such studies. Adding to the complexity of the problem, highly hazardous materials number in the thousands and new products are constantly being developed.

Note that Southern California, in addition to chemical hazards, has the highest concentration of oil refineries on the West Coast, processing over a million barrels a day within Los Angeles County, in addition to having the largest port complex in the nation including the Port of Los Angeles and Port of Long Beach, and the largest urban oil fields. Other areas also face compound risks from multiple facilities in regions with major seismic hazards. For example, Dow Chemical in the San Francisco Bay region would also be vulnerable to extreme seismic hazards in a region that also has high levels of oil refining and other industrial sources.

The USGS report discusses the need to assess risks for prevention of hazards, but also identifies the difficulty communities would have in handling the costs of multiple failures (and even modeling assessments). This, again, speaks to the need for chemical manufacturers to be held financially accountable for these known risks.

Northern California and other parts of California pose similar, severe seismic risks, as do many other parts of the country. EPA's Earthquake Resilience Guide for Water and Wastewater Utilities show that earthquake hazards are widespread:

Chemical manufacturers will need to prepare for these risks to prevent disasters and be responsible in the event of spills and releases. The Federal Emergency Management Agency (FEMA) found that while other natural disasters such as hurricanes occur more frequently, the public has less experience preparing for and responding to earthquake disasters. Financial assurances are thus necessary for chemical manufacturers, oil refineries, and all sectors processing hazardous materials which are frequently sited in communities together, and vulnerable to multiple spills due to natural disasters.

EPA Response:

Thank you for the comment noting the performance of the modern regulatory framework under the potential increased risk of release posed by earthquakes. EPA acknowledges that it cannot predict future natural disasters. However, the Agency analysis has shown that existing regulations in the modern regulatory framework address these concerns and most accidents and releases do not lead to Superfund responses, Fund expenditures, or CERCLA liability claims.

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.

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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.

3. Cleanups and/or Response Actions at Industry Facilities

Impetus for, status, and success of cleanups and remediation efforts at chemical manufacturing facilities.

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Comment:

D. Examples of contamination from the chemical manufacturing industry.

There are many examples of Chemical Manufacturers causing accidents or deliberate contamination associated with long-term environmental contamination. Years and decades of negotiation for cleanup funds have caused long delays, and don't necessarily end with success in assuring that companies responsible for contamination pay for cleanup, or that cleanup ever occurs. Below are a few examples.

1. Dupont in Belle, West Virginia — Multiple preventable accidents in 2010 and continuing soil and water contamination

The U.S. Chemical Safety Board (CSB) found that three DuPont accidents in Belle, West Virginia, resulted from numerous safety deficiencies including lack of safe equipment design, ineffective mechanical integrity programs, and incomplete investigations of previous near misses. CSB officials registered alarm about these accidents, since Dupont had been considered one of the better operators in the industry. CSB stated:

Charleston, West Virginia, July 7, 2011— A series of preventable safety shortcomings -- including failure to maintain the mechanical integrity of a critical phosgene hose -- led to a string of three serious accidents that occurred over a 33-hour period on January 22 and 23, 2010, at the DuPont Corporation's Belle, West Virginia, chemical manufacturing plant, according to the draft report of the U.S. Chemical Safety Board (CSB) which was issued today. In one of the accidents, a worker died following exposure to phosgene, a gas used as a chemical weapon in World War I.

U.S. EPA found that this plant (later called Chemours Belle Plant) caused major hazardous waste contamination requiring years of cleanup, apparently still underway. This included contamination of soil and groundwater by volatile and semi-volatile organic compounds (mainly acetone, benzene, 2-butanone, phenol, toluene, and xylene).

EPA Response:

Thank you for the comment. This comment offers the Chemours Belle, WV plant as an example of a facility with safety violations and pollution presumably to suggest that financial responsibility under CERCLA 108(b) should be required for the industry. EPA conducted additional research into the facility to assess these claims. While the facility does have safety violations and pollution, the information collected by EPA suggests that the modern regulatory framework is functioning effectively at this facility. The violations in question resulted in

enforcement actions under which a former owner/operator has paid penalties and has undertaken a variety of corrective measures. Moreover, the owner/operator is undertaking a cleanup at the facility overseen by the State and EPA under RCRA authorities. As the pollution and violations are being addressed under existing authorities, it does not appear that this site indicated a necessity for CERCLA 108(b) financial responsibility requirements for the industry.

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Comment:

2. *Diamond Alkali (Occidental Chemical), Newark, New Jersey, caused miles of contamination impacting drinking water for many decades, with payment for cleanup design only starting in 2016 (not actual cleanup).*

That contamination started earlier than “modern” regulations does not negate relevance as an example in this proceeding. In fact, such examples further emphasize what has happened when financial assurances were not available in the past. Financial assurances required up front, rather than waiting until accidents or spills occur and facilities close, prevent fiascos such as the Diamond Alkali/Occidental Chemical example from happening again in the future, where EPA was forced to negotiate with multiple parties for cleanup funds.

The Center for Public Integrity summarized this case in 2017:

The now-defunct Diamond Alkali Co. in Newark, New Jersey, manufactured chemicals including those used to make Agent Orange. EPA investigations found that the chemicals produced at the company polluted the Passaic River, a drinking water source for millions of New Jersey residents.

The EPA regulates 94 chemicals in drinking water sources but doesn’t set standards for many others that could potentially be dangerous. A News21 analysis of EPA data shows that the drinking water of more than 244 million people contains contaminants that can be linked back to industrial practices and are not currently regulated.

Diamond Alkali eventually became part of Occidental Chemical Corporation. Occidental Chemical is the same corporation responsible for the Love Canal disaster. Three decades later, they continue to endanger the public, this time by poisoning groundwater.

On September 30, 2016, EPA settled with Occidental Chemical Corporation to perform engineering and design work to *begin* cleanup of 8.3 miles of the lower Passaic River. The estimated cost of \$165 million included sampling, evaluating technologies, and engineering *before* physical cleanup. EPA stated it will need to pursue additional agreements with more than 100 parties to ensure the actual cleanup work will be carried out and paid for by those responsible.

This settlement agreement will start the cleanup of the largest environmental dredging project in the history of the federal Superfund program. This is the first step in the restoration of the Passaic River, which borders the neighboring New Jersey communities of Newark, Harrison,

Kearny, Belleville, and Nutley. The cleanup work will remove 3.5 million cubic yards of toxic sediment from the lower 8.3 miles of the Passaic, from Newark Bay to the Newark/Belleville border.

The harms of this contamination are ongoing and severe:

The site was listed on the Superfund National Priorities List (NPL) in 1984. Dioxin, pesticides and other hazardous substances were found in the soil and groundwater at 80-120 Lister Avenue; and dioxin, polychlorinated biphenyls (PCBs), metals and pesticides were found in sediment in the Lower Passaic River. New Jersey prohibits consumption of fish or shellfish from the Lower Passaic River and Newark Bay. Cleanup activities to date include immediate actions at 80-120 Lister Avenue and surrounding properties, removal actions in the Lower Passaic River, and the interim remedy for 80-120 Lister Avenue. In March 2016, EPA selected the remedy for the lower 8.3 miles of the Lower Passaic River. Additional investigations and planning for long-term cleanup are ongoing.

EPA Response:

Thank you for the comment. This comment offers the Diamond Alkali (Occidental Chemical) site where legacy contamination and associated long term cleanup are examples of the need for CERCLA 108(b) financial responsibility. This site was already considered by EPA as part of its analysis of NPL sites in the industry. That analysis found that the pollution at the site was a legacy issue (1970s and earlier). Additionally, a PRP is leading the work and has agreed to reimburse EPA for its oversight costs. As the releases and pollution at the site resulted from practices and operations not reflective of those that occur today and the PRP is conducting the work, EPA does not believe this site indicates a need for CERCLA 108(b) financial responsibility across the whole industry.

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Comment:

3. *JACAM Manufacturing in Sterling, Kansas willfully injected hazardous wastes into a salt water well.*

Not only do chemical accidents occur, but willful dumping, including after modern regulation was present. In 2016, U.S. EPA had to secure a guilty plea for RCRA violations to achieve fines for JACAM Manufacturing; it is unknown if these are enough for cleanup:

JACAM Manufacturing, LLC, a chemical manufacturing company in Sterling, Kansas, pleaded guilty to felony violations of the Safe Water Drinking Act and the Resource Conservation Recovery Act and paid a \$1 million fine. In its plea, the company admitted to knowingly and willfully disposing of hazardous wastes in an injection well that was permitted only for the disposal of salt water. JACAM also admitted it was knowingly disposing of acetone, benzene and other hazardous chemicals into the well. The Safe

Water Drinking Act identifies salt water disposal wells as a potential source of pollution to the nation's underground aquifers.

EPA Response:

Thank you for the comment. This comment offers the noncompliance at the JACAM Manufacturing facility in Sterling, KS as an indication that noncompliance with modern regulations occurs. EPA agrees that noncompliance still exists. However, as documented in its proposal, EPA found that active enforcement serves as an important component of the regulatory framework and where non-compliance is identified many industry responsible parties are conducting or paying for cleanups, returning to compliance, and improving public health and the environment. The JACAM facility is an example of noncompliance being met with enforcement actions and a penalty. Based on additional research conducted by EPA to investigate the comment further, the compliance issues at the JACAM facility have not required any Superfund actions. While regrettable, EPA does not see how noncompliance at this facility suggests CERCLA 108(b) is necessary across the industry.

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Comment:

c. **Phibro-Tech, Inc., Santa Fe Springs, CA** - Insufficient enforcement, repeat violations, and *increasing* hazardous risk despite modern regulation erodes expectation of better financial responsibility if the facility closes

One chemical manufacturer, Phibro-Tech, Inc., treats and recycles industrial hazardous waste, making specialty products for the electronics and aerospace industries. Phibro-Tech was identified as a prime example of poor enforcement of regulations in California by the Department of Toxic Substances Control (DTSC) in a scathing 2013 investigative report, which found that DTSC fines levied were not sufficient to stop repeat violations. DTSC came under even more scrutiny years later when a lead-acid battery recycler (Exide) was allowed to contaminate thousands of homes in the Los Angeles region (as described below).

In the case of Phibro Tech, the company had not cleaned up its groundwater contamination (among other hazards), and had caused repeated chemical equipment leaks and overflows, with fines insufficient to stop this behavior, at the time of the 2013 Consumer Watchdog report. The report found the facility's groundwater contamination was only 500 feet from a water well and 600 feet from homes. This site is a Superfund site.

Despite the pattern of repeat violations, the company was granted a permit for additional storage of hazardous materials in 2018. At the same time, California had to go through the courts to win a 2019 judgement ordering more fines for multiple violations including improper storage, transfer, record-keeping, many other hazardous materials violations, and a fine.

Given such recalcitrant operators, it is predictable that such facilities will not volunteer to pay costly cleanup if they are to close operations. Moreover, such facilities routinely wage legal

fight to avoid such costs. In this and many states, whether regulators fail in their duty or aggressively work to win cleanup costs, it is not easy to get companies to concede, and it is not always easy to win lengthy court battles. Complex technical issues are difficult to translate in legal arenas. Meanwhile, contamination can go on for decades. Facilities with a history of poor operation with respect to the public trust and compliance are not likely to improve environmental responsibility after closure, when they have no income. In addition to the history of violations, this facility continues to report TRI chemical transport offsite, including thousands of pounds of heavy metals (lead and nickel).

EPA Response:

Thank you for the comment. This comment offers non-compliance at the Phibro-Tech Inc. facility in conjunction with what the commenter claims is insufficient enforcement as an example of CERCLA 108(b) financial responsibility being necessary for the industry. EPA conducted additional research into this site in response to the comment, and EPA was able to validate the commenter's claim that the facility had compliance issues and may have contributed pollution to a nearby Superfund site. However, EPA has sent Phibro-Tech a CERCLA notice letter related to the nearby Superfund site and has already reached agreement with 66 PRPs to contribute \$78 million towards the cleanup. Moreover, the nearby site, Omega Chemical, was already identified and analyzed as part of the analyses supporting the proposal and was identified as a PRP-lead site where taxpayer burden was thus unlikely. As such, EPA does not believe the compliance issues at this site, which have not resulted in or required any CERCLA fund-financed actions, indicate a need for CERCLA 108(b) financial responsibility.

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Comment:

d. **Astrazeneca / Zeneca, Richmond, CA**

Zeneca is listed as a chemical manufacturer (Pesticide and Other Agricultural Chemicals), an indirect subsidiary of Astrazeneca.

Contamination of this beautiful part of Richmond on the San Francisco Bay began in the late 19th century, with Stauffer Chemical leaving contamination from manufacturing sulfuric acid, and later manufacturing pesticides and herbicides in the 1950s, when it allowed runoff to "chemical ponds". By 1997 after multiple mergers, pharmaceutical company AstraZeneca owned and closed the site, and began cleanup from 1999 to 2002. The cleanup and thin concrete cap was meant to be temporary. Later Zeneca was the final party involved, with DTSC fining Zeneca and the University of California nearby for related violations in 2009.

East Bay Express reported this background and illnesses in neighbors who spent time on the site, where extensive toxins remained. The neighbors formed a community advisory group, trying to get the San Francisco Bay Regional Water Quality Control Board and later the California Department of Toxic Substances Control (DTSC) to address remaining cleanup needs for over

15 years. The chair of the neighborhood committee (a chemist and former environmental compliance supervisor for the West County Wastewater District) stated there are toxic hot spots remaining all over the site, containing more than 100 chemicals, including arsenic, barium, copper, lead, mercury, and volatile organic compounds. There are toxic metals in the ground and the groundwater. During a storm or an earthquake, these can migrate off-site. The group also has concerns about radioactive materials.

Another article reported disagreements between Zeneca and the City, which sent a letter stating the company had “misused, polluted, and discarded” the property. The City wanted long term plans to fully clean up the whole tract, but Zeneca stated “there is no basis for the agency to require the company to remediate the entire site to accommodate a ground-floor residential use.” Community members were concerned that DTSC did not require rigorous cleanup for fear that the company would abandon the site. One community member stated it is “incomprehensible to the community” that AstraZeneca, with over \$50 billion in assets, would not pay for a thorough cleanup.

This is yet another example in the long list of contaminated sites in the country, where the complexity of securing cleanup financing from responsible parties becomes almost impossible after the fact. Multiple parties were responsible for the contamination onsite, and multiple government agencies and the public have to squabble with the polluters over who is responsible, and how much should get cleaned up.

EPA Response:

Thank you for the comment. This comment offers the Astra Zeneca site in Richmond, CA as an example of what the commenter claims was a slow cleanup process that left pollution remaining indicating a need for CERCLA 108(b) financial responsibility. EPA conducted additional research into the site to determine whether or not it may represent an example of failure in the modern regulatory framework requiring or resulted in a taxpayer funded response. As noted by the commenter, the pollution at the site dates back to the late 19th century. As such, the pollution itself is not an indictment of the modern regulations in place today. In fact, based on the additional research EPA conducted, the regulations and authorities in place today are addressing the pollution. California DTSC has overseen the development of a feasibility study and remedial action plan for which AstraZeneca will be responsible. According to a 2019 response to public comment document on the draft feasibility study and remedial action plan, DTSC issued a Site Investigation and Remediation Order (Order) naming Zeneca Inc., Bayer Crop Science Inc., Cherokee Simeon Venture I, LLC, and the Regents of the University of California as responsible parties. DTSC’s Order requires responsible parties to take or pay for appropriate removal or remedial actions necessary to protect the public health and safety of the environment. DTSC worked extensively with the City of Richmond’s planning department and City Manager when drafting the FS/RAP to ensure that it supports the residential and other land uses identified in the City of Richmond’s Richmond Bay Specific Plan. EPA’s research did not indicate that Superfund involvement had occurred or was likely. It is not clear how CERCLA 108(b) financial responsibility would have led to the faster development of a remedy which is often a lengthy and complex endeavor.

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Financial assurances also promote rapid cleanup when releases occur, limiting the time that the public and the environment are exposed. See S. Rep. No. 96-848, at 11-13. When assurances are absent or inadequate, funding shortfalls lead to delayed, and incomplete cleanups and prolonged injury to human health and the environment. Ex. I, U.S. Env'tl. Prot. Agency, Significant Data Quality Deficiencies Impede EPA's Ability to Ensure Companies Can Pay for Cleanups, at 2 (Mar. 2016) ("Site cleanup delays from a lack of sufficient financial assurance create a risk of longer exposures to unsafe chemicals or longer periods where natural resources are restricted and unavailable for use."). EPA's narrow interpretation of Section 108(b) frustrates these purposes.

Rapid cleanups are essential given long delays in securing funding for cleanups at chemical manufacturing facilities:

- EPA only recently selected a remedy for cleanup of the Lower Passaic River, even though pollution from the Diamond Alkali manufacturing facility occurred at least three decades prior.
- In a memorandum prepared by EPA regarding a Superfund cleanup at a chemical research facility formerly owned by British Petroleum, the agency stated that "[d]elayed or non-action may result in increased likelihood of inhalation of airborne asbestos fibers from the site." Doc. No. EPA-HQ-OLEM-2019-0086- 0128, at 7. The memo, prepared in 2002, recommended remediation of the site, which was heavily contaminated with asbestos. A day-care facility and elementary school were directly across the street from the site "posing a potential direct contact threat to children[.]" *Id.* at 4. Asbestos causes lung disease and can cause lung cancer. *Id.*
- At the Gulf States Steel facility, discussed further below, EPA found that any delay in cleanup "pose[s] an immediate threat to the nearby residences and trespassers due to the ignitability and toxicity of these wastes." Doc. No. EPA- HQ-OLEM-2019-0086-0354.

Where significant releases have occurred, and funding is obtained through after-the-fact enforcement orders or consent decrees, it is too late to prevent the releases by providing a strong incentive for best practices. Similarly, funding that must be obtained through consent decrees or enforcement orders does not promote immediate and thorough cleanup, because consent decrees and enforcement orders take time and resources to obtain.

EPA Response:

Thank you for the comment. This comment suggests that CERCLA 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 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 108(b) financial responsibility would result in delays of cleanup and therefore an increased risk to human health and the environment.

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Comment:

2. *Louisiana case studies demonstrate the sustained presence of serious risk, even with state-level regulations in place.*

By their own admission, the Louisiana Department of Environmental Quality (LDEQ) works with companies to avoid fines and instead update their permits so they're no longer in non-compliance. Louisiana also has a track record of not enforcing compliance with the Clean Air Act, even allowing companies to pollute at levels multiple times those set by the EPA as "safe" levels of exposure to certain toxic chemicals.

Three examples from the past 5 years make clear that LDEQ prioritizes company interests over public health or the enforcement of state and federal laws.

i. *Noranda Alumina*

In 2014, Noranda Aluminum notified LDEQ that it had been emitting mercury at toxic levels that violated its operating permits into the air over residential communities in St. James and St. John. Noranda initially downplayed the extent of the releases, only to admit later that they reached over one thousand pounds per year between 2013 and 2015, making this plant one of the top five mercury emitters in the United States. Rather than enforcing penalties against Noranda for these emissions, the LDEQ instead issued the company a 5-year permit to continue emitting mercury near these neighborhoods. In their issuance of that 2017 permit, LDEQ outlined their justification:

"The social and economic benefits of Noranda Alumina outweigh its adverse environmental impacts...Notably, the Louisiana constitution requires balancing, not protection of the environment as an exclusive goal."

The previously unreported emissions from Noranda potentially dated back to the 1950s. Faced with the prospect of litigation and unfavorable market forces, the owner sold the plant after filing for Chapter 11 bankruptcy in 2016. LDEQ had apparently not taken any enforcement action at the time of sale, as no enforcement actions, claims, or even likely fines were acknowledged in the sale documents. This non-enforcement may have been to facilitate the bankruptcy sale, as in 2017, LDEQ issued the new owner a fine of \$95,750 for the old violations—and an updated permit to allow the company to continue poisoning the surrounding community by releasing up to fifteen hundred pounds of mercury per year. The company would “evaluate and determine the feasibility” of reducing these levels below twelve hundred pounds per year; local communities were told to eat less fish.

EPA Response:

Thank you for your comment. This comment describes an example of a facility with mercury air emissions under a state permit. This comment implies that facilities subject to state regulations don’t necessarily eliminate risk. As a primary matter, EPA has not and is not contending that the existing state and federal regulations eliminate all releases. Rather, the analyses conducted as part of the proposal, led EPA to conclude that the network of federal and state regulations applicable to the chemical manufacturing industry creates a comprehensive framework that applies to prevent or minimize releases that could result in a need for a Fund-financed response action. EPA conducted additional research into this site and determined that the emissions haven’t seemingly led to any CERCLA actions. Additionally, state authorities also have conducted air monitoring at several locations around the Noranda plant and have measured small amounts of mercury vapor and found the amounts are within state standards. Based on the information in the comment and the additional research conducted by EPA, the Agency doesn’t believe this facility illustrates a need for CERCLA 108(b) financial responsibility across the industry.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 29

Comment:

ii. *Dupont / Denka*

EPA’s own air quality measurements around the Denka (formerly Dupont) plant in LaPlace, La. revealed emissions of chloroprene gas, which it deems a “likely carcinogen,” at 2.5 to 17 times the limit deemed safe by the agency. In 2015, the EPA identified the community surrounding this plant as having a significantly higher risk of developing cancer from an airborne source than any other census tract in the country, largely because of these emissions. Yet the LDEQ has not required Denka to meet the emissions limits recommended by the EPA, even in the face of strong community pressure. They have worked with the plant to reduce emissions, but not to below the EPA’s recommended maximum for exposure to the highly toxic chloroprene.

EPA Response:

Thank you for your comment. This comment describes an example of a facility with chloroprene gas air emissions. This comment implies that facilities subject to existing regulations still result in releases and risk. As a primary matter, EPA has not and is not contending that the existing state and federal regulations eliminate all releases. Rather, the analyses conducted as part of the proposal, led EPA to conclude that the network of federal and state regulations applicable to the chemical manufacturing industry creates a comprehensive framework that applies to prevent or minimize releases that could result in a need for a Fund-financed response action. EPA conducted additional research into this site and determined that the emissions haven't seemingly led to any CERCLA actions which is not surprising as air emissions are less likely to do so. Additionally, the owner/operator has voluntarily worked with EPA and the state to reduce the emissions. For example, Denka signed a voluntary agreement to reduce emissions in January 2017 and finished installing emissions reduction technology by the end of that year. Unfortunately, the emissions reductions haven't been as significant as hoped. Based on the information in the comment and the additional research conducted by EPA, notably the fact that the issues haven't required any CERCLA involvement, the Agency doesn't believe this facility illustrates a need for CERCLA 108(b) financial responsibility across the industry.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 29-30

Comment:

iii. Mosaic Uncle Sam Plant

Mosaic operates the Uncle Sam phosphatic fertilizer manufacturing facility in St. James Parish, which contains massive piles of phosphogypsum waste. EPA investigated Mosaic over conditions at this site and sites in Florida, and Mosaic admitted to mixing highly corrosive waste water with the piles of phosphogypsum. After a 10 year regulatory and court fight, EPA, DOJ and state regulators settled for \$8 million in penalties and required Mosaic to set up a multibillion dollar trust fund for site closure, remediation and monitoring. However, Mosaic's strategy for "correcting" the previous conditions was to build highly acidic ponds within the phosphogypsum piles in which to store the waste water. In early 2019, Mosaic revealed that the pile walls were moving half an inch per day, threatening a breach that would send this acid cascading into local waterways. It is unclear whether the existing trust funds will cover remedying this new threat—or why EPA and LDEQ allowed Mosaic to continue operating in such a risky manner without sufficient oversight.

EPA Response:

Thank you for the comment. This comment offers the Mosaic Uncle Sam Plant as an example of where risk persists despite existing regulations in place. The Mosaic Uncle Sam Plant was one site in a large 2015 RCRA settlement with the company. The settlement established requirements for the hazardous wastewater treatment and closure and post-closure care of units at the site. The settlement, as alluded to by the commenter, resulted the establishment of a \$680 million dollar trust fund designed to grow to \$1.8 billion in order to backstop the performance of the closure

and post-closure care work. EPA believes this site represents an example of a success of the enforcement and compliance aspect of the modern regulatory framework. Violations of a Federal law were identified and addressed, and significant injunctive relief obtained. The settlement has required the company to internalize and bear the costs of addressing the pollution and regulatory violations. The company continues to be viable and presumably could address any significant risk that has resulted as part of the approach to treating the hazardous wastes at the site noted by the commenter. With financial assurance in place for the facility and a viable owner/operator, EPA does not view this example as demonstrating a need for CERCLA 108(b) financial responsibility across the industry.

Commenter Name:

Commenter Affiliation: Private citizen

Comment Number: EPA-HQ-OLEM-2019-0086-1030

Page(s): 1-2

Comment:

According to the EPA, the current industry practices already address the financial risk; therefore, these risks do not warrant the financial responsibility requirements under the superfund act (CERCLA).

Even with the advances in safety procedures in recent years, accidents still happen in even the best-run chemical manufacturing plants. E. I. DuPont De Nemours Co. (DuPont) has long been recognized as a leader in chemical industry safety, according to John Bresland, a Chemical Safety Board (CSB) member. Yet, in the last two decades, DuPont has had at least four accidents, with six fatalities and the evacuation of several communities.

In addition to the DuPont cases, the EPA has identified 84 cases for discussion in its document “Enforcement, Court Settlements and Judgments in the Chemical Manufacturing Industry”⁶ that is a part of this docket.

Bankruptcy following an accident is one situation for which it is necessary to assure that there is financial responsibility, preferably in the form of a third-party such as an insurance company, for every chemical manufacturing plant.

Among the bankruptcy cases are those involving the Eastman Kodak Company (Kodak) and its affiliates,⁷ Mississippi Phosphates Corp. (MPC), F and C International, and others.

EPA Response:

EPA recognizes that accidents do occur at facilities in the chemical manufacturing industry; however, EPA’s analysis showed that current risk under the modern regulatory framework within the chemical manufacturing industry does not rise to the level that warrants imposition of financial responsibility requirements under CERCLA Section 108(b). The analytic approach was based on EPA’s statutory interpretation, upheld by the D.C. Circuit in *Idaho Conservat’n League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019). EPA has properly applied that statutory interpretation and analytical framework in this industry sector.

EPA also recognizes that bankruptcies have occurred in the chemical manufacturing industry, as is suggested by the commenter. EPA's final rulemaking makes note of the existence of legal case law and bankruptcy protections as one of the factors for why financial assurance was not warranted for this industrial sector. EPA acknowledges that such protections while helpful, may not be fully protective on their own. In its decision, EPA first conducted a systematic review of relevant incidents and cases of burden to Superfund, as well as the impacts born from a more modern regulatory framework. Only after such considerations did the agency point to additional positive influencing factors, such as increased transparency from the application of generally accepted accounting practices and bankruptcy law requirements that a company comply with environmental obligations. While not a guarantee, such factors help reduce potential risks to the Fund even further.

EPA discussed the Mississippi Phosphates Corporation site and factors leading to its listing on the NPL in the proposed rulemaking. As part of that discussion, EPA highlighted the long history of issues at the site, including instances of enforcement actions that took place prior to bankruptcy. Additionally, EPA received comment from The Fertilizer Institute which described how the Mississippi Phosphates Corporation NPL site was not representative of current operations in the fertilizer manufacturing subsector. EPA determined that this, and the small number of other sites that resulted in Fund expenditure, in the context of the modern regulatory framework that applies to the industry, did not present a level of risk that warrants financial responsibility requirements under CERCLA 108(b).

Commenter Name:

Commenter Affiliation: Society of Chemical Manufacturers & Affiliates (SOCMA) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1031

Page(s): 6-7

Comment:

As noted at the outset, the Associations retained Optima to conduct an independent review and critique of the historical record underlying EPA's analysis. That report, which is attached, supplements the record for this rulemaking in two important respects.

First, based upon a thorough review of EPA's case narratives, Optima has substantially narrowed the universe of sites where releases appear to have occurred under the modern regulatory system.

Second, as discussed in Part III below, the Optima report describes the extent to which the RCRA regulations, and financial disclosure requirements imposed by SEC regulations and GAAP, already require financial assurance, as a practical matter, within the chemical manufacturing industry.

The screening portion of EPA's "cleanup sites" analysis produced lists of four NPL sites and 30 non-NPL sites that appeared to have experienced releases since the "modern" era of environmental regulation, which EPA deemed to have begun in 1980. Optima's analysis focused on the detailed case narratives that EPA created for those sites. Optima tabulated the data from the narratives, focusing on when each site began and concluded operations, and when the events

that purportedly led to a need for response occurred. Of greatest importance, Optima found in many cases that the problematic releases may have occurred years earlier than when they were discovered:

Discoveries of releases are often the result of regulatory inspections following events such as bankruptcy, property purchase, fires or community complaints. In other words, the year that hazardous releases are discovered often does not coincide with the likely time frame of the environmental impact. However, EPA's analysis of the case narratives often appears to take the position that the "release" and "site discovery" dates are one and the same.

Optima found that all four of the NPL sites where EPA posited releases post-1980 either had or likely had hazardous releases prior the modern regulatory framework. All four also had long histories of non-compliance, which further supports the conclusion that releases occurred prior to the modern framework. *Therefore, it appears that no chemical manufacturing facility has been placed on the NPL based solely on environmental releases occurring under the modern regulatory framework.* As Optima notes, hazardous releases at facilities such as the four NPL sites examined by EPA would likely have been detected much earlier under the current regulatory framework.

EPA's narratives for the 30 non-NPL sites were not as complete. Upon a close review, however, Optima found only six sites for which the narratives identified events occurring post-1980. *The response costs at these six sites amounted to a total of only \$2.8 million.*

Based on Optima's review and analysis, taxpayers appear to have paid less than \$3 million over the past 40 years to respond to hazardous substances releases at chemical manufacturing facilities. In light of this experience, how much would Section 108(b) cost the chemical industry now to provide financial assurance? Some illumination can be gained from the initial, 2017 hardrock mining proposed rule, where EPA proposed to require financial assurance. In that proposal, EPA estimated that the total required amount of financial assurance, for a universe of 221 mining facilities owned by 121 companies, was \$7.1 billion, or \$32 million per facility. ²² If one assumes that the average chemical facility cleanup costs 1/5th the amount of the average mining site (i.e., \$6.4 million), the 13,480 sites in the chemical manufacturing industry would require \$86.3 billion in total financial assurance.²³ EPA estimated that the 121 mining companies covered by the proposed rule would incur aggregate annualized costs of between \$111 million and \$171 million, depending on whether EPA allowed a financial test option, or between \$1 million and \$1.5 million per company, per year.²⁴ Assuming 1/5th the cost for the chemical industry, chemical manufacturing companies would be facing costs of \$200,000 to \$300,000 per company, per year. These are huge amounts to assure such a relatively trivial amount of potential liability. And to the extent the 1/5th estimate is low, the per-company figures would only be greater. EPA was certainly justified in concluding that this outcome was inappropriate.

EPA Response:

Thank you for your comment. EPA agrees that the RCRA Subtitle C financial assurance program is an important aspect of the modern regulatory framework and appreciates the effort to quantify the extent of coverage for the chemical industry. EPA also agrees that the hardrock mining proposal is illuminating; however, EPA did not have the opportunity to validate this research and analysis. In general, this comment supports the Agency's proposal and suggests that CERCLA

108(b) financial responsibility requirements are not appropriate in the chemical manufacturing industry.

Commenter Name: Laurie Droughton Matthews, Morgan, Lewis & Bockius LLP

Commenter Affiliation: Superfund Settlements Project (SSP)

Comment Number: EPA-HQ-OLEM-2019-0086-1035

Page(s): 2

Comment:

Moreover, the analysis summarized in the preamble to the proposed rule accurately concludes that, in the event a facility operating today is found not in compliance, Federal and state enforcement results in “many industry responsible parties [] conducting or paying for cleanups, returning to compliance, and improving public health and the environment.” 85 Fed. Reg. 10144.

The Industry has adopted “substantial advances . . . in the development of manufacturing, pollution control, and waste management practices.” 85 Fed. Reg. 10138. Should there be an accidental release at an Industry facility, beyond the authorities identified above, the United States Chemical Safety Board (“CSB”) would investigate such accident and develop recommendations to prevent future releases. As stated on its website, “[m]any CSB recommendations have been implemented in industry, leading to safer plants, workers, and communities.” See <https://www.csb.gov/about-the-csb/mission/>.

Thus, it was appropriate, indeed necessary per the statutory directive, that EPA recognize these other laws, evaluate present v. past practices in the Industry, and conclude that hazardous substance management at currently operating facilities does not present a financial risk warranting §108(b) financial responsibility requirements.

The evaluation of cleanup cases is enlightening. EPA correctly discounted releases prior to 1980. As stated above and as acknowledged by EPA, those releases would have occurred in an entirely different regulatory environment before the pervasive regulation of the handling and disposal of hazardous substances. EPA discounting actions not financed by taxpayer money also is appropriate because, as EPA noted, response actions paid by private parties do not support the need for financial responsibility regulations. To the contrary, they demonstrate financial responsibility. The Industry has a strong track record of private parties covering response costs, even response costs from legacy contamination. The evidence confirms an extremely low incidence of modern era releases for which taxpayer funding was required which minor incidence cannot support imposing the enormous cost of financial responsibility requirements on the entire Industry. In addition, as belt and suspenders, the Industry has a solid record of financial stability, and there is no reason to foresee any change.

EPA Response:

This comment supports EPA’s analysis presented in the proposal.

Commenter Name: Laurie Droughton Matthews, Morgan, Lewis & Bockius LLP

Commenter Affiliation: Superfund Settlements Project (SSP)

Comment Number: EPA-HQ-OLEM-2019-0086-1035

Page(s): 2-3

Comment:

SSP further endorses EPA's decision to recognize that Toxic Release Inventory ("TRI") data and RCRA Biennial Reports ("BR") are irrelevant to an evaluation of the degree and duration of risk. As industry has consistently maintained in this regard, presence of hazardous substances or waste at a facility does not equal risk. TRI data include estimates of the volume of hazardous substances that an industry released, recycled, transferred, treated or used for energy recovery. Importantly, these volumes reported include permitted releases and disposal at, or discharges to, permitted facilities, as well as recycling activities. BR data simply show quantities of hazardous waste handled in accordance with law. Since neither of these reports correlate with risk of releases for which would translate to financial risk, it was appropriate to disregard such data.

Finally, SSP applauds EPA's acknowledgement of voluntary protective practices, such as the American Chemistry Council's Responsible Care program. Corporations in the Industry today are motivated to not only comply with the law and regulations, but very often go beyond these requirements. It is refreshing that EPA has acknowledged this reality.

EPA Response:

This comment supports EPA's analysis presented in the proposal.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 26-27

Comment:

The judicially-entered consent decrees resulting from the MMPI to date are comprehensive, imposing extensive design, operational and closure requirements, best management practices, corrective action standards, and post-closure standards for each facility's phosphoric acid "mineral processing" phosphogypsum stack system. The consent decrees include RCRA-like financial assurance requirements to backstop the owner's commitments to close and provide long-term care for each stack system, and require the settling party to review, and as necessary revise, cost estimates and financial assurance amounts to perform such work.

To date, EPA has reached such settlements with three phosphoric acid manufacturers. First, in August 2010, CF Industries, Inc. ("CF") settled alleged RCRA violations with EPA and the Florida Department of Environmental Protection ("FDEP"), and agreed to provide \$163.5 million in financial assurance to support the closure and long-term care of its phosphogypsum stack system at a facility in Florida.¹⁵⁶ In addition, CF agreed to provide financial assurance for corrective actions, if needed, and also to provide financial assurance for third-party claims.

Second, in September 2010, ExxonMobil (as the former owner of the Agrifos facility) settled alleged RCRA violations with EPA at the former Agrifos facility in Pasadena, Texas.¹⁵⁷ Under the terms of the settlement, ExxonMobil agreed to spend more than \$150 million to close phosphogypsum stacks at the facility, install and operate injection wells to inject process wastewater stored in the phosphogypsum stacks, and engage in post-closure care at the facility (including groundwater monitoring). In addition, ExxonMobil agreed to provide financial assurance for (1) third-party claims, (2) closure of, and long-term care for, the phosphogypsum stacks, and (3) corrective actions, if needed.

Third, in 2015, Mosaic Fertilizer, LLC settled alleged RCRA violations with EPA and FDEP at five facilities in Florida, and with EPA and the Louisiana Department of Environmental Quality at two facilities in Louisiana.¹⁵⁸ Under the financial assurance component of those settlements, Mosaic Fertilizer agreed to place \$630 million into trust, and issue a \$50 million letter of credit to support the closure and long-term care of phosphogypsum stack systems for these facilities in Florida. Beyond those commitments, Mosaic's parent company (The Mosaic Company) is providing a parent guarantee to cover the difference, if any, between the amounts held in trust and the estimated closure and long-term care costs. Like the CF and ExxonMobil settlements, the Mosaic Consent Decrees require additional financial assurance amounts to address any needed corrective action and financial assurance for third-party claims.

Further, TFI understands that EPA is in settlement negotiations with the remaining phosphoric acid "mineral processing" manufacturers to resolve the government's RCRA allegations related to their sites.

EPA Response:

Thank you for the comment outlining some of the notable settlements reached under EPA's mineral processing initiative. EPA agrees that these enforceable settlements, along with the work required and conducted as part of the settlements, significantly reduce the risk at facilities where they are applicable. EPA believes these court settlements are indications of healthy implementation of the modern regulatory framework. This comment is supportive of the Agency's proposal.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 34-35

Comment:

In the Enforcement Document supporting the Proposed Rule, EPA has evaluated fertilizer facilities in the chemical manufacturing industry relevant to its CERCLA § 108(b) methodology. Consistent with EPA's financially-based interpretation of "risk" under the statute, EPA focuses on financial settlements previously reached during enforcement actions at fertilizer manufacturing facilities within the Enforcement Document. TFI agrees that this approach is consistent and appropriate, based principally upon the D.C. Circuit's affirmance of EPA's analysis supporting the HRM Final Action. However, it is important to clarify that financial settlements at fertilizer facilities have been buttressed by additional injunctive and regulatory

forms of relief (e.g., in the form of new permit conditions, environmental management practices, and similar obligations) that further support EPA’s determination that imposing financial responsibility through CERCLA § 108(b) is unwarranted.

The preamble to the Proposed Rule briefly recognizes injunctive and regulatory relief achieved in past settlements by stating, “. . . enforcement cases can result in . . . supplemental environmental projects (SEPs), and activities required to return to compliance.”²⁰⁵ Similarly, EPA explains: “The compliance and enforcement action documented here and in the [Enforcement Document] show that where noncompliance is identified, many industry responsible parties are conducting or paying for [1] private cleanups, [2] returning to compliance, and [3] improving public health and the environment.”²⁰⁶ TFI agrees that this observation is accurate within the fertilizer manufacturing industry, and that it further supports the current trajectory of EPA’s rulemaking. However, it is important to elaborate on the scope of relief that EPA already has obtained under existing environmental laws.

In particular, under EPA’s MMPI, EPA performed comprehensive inspections at currently-operating phosphate fertilizer facilities for “hazardous waste” management compliance issues under RCRA. At some facilities, allegations of unauthorized commingling of “mineral processing” “Bevill-exempt” “solid waste” with chemical processing “hazardous waste” in phosphogypsum stack systems resulted in negotiated settlements that imposed operational requirements, corrective action standards, design and closure requirements, and post-closure standards for relevant facilities, as well as RCRA-like financial assurance requirements to support commitments to close and provide long-term care. For example, a subsidiary of one of TFI’s members settled such claims in 2015; in doing so, it posted \$630 million in cash and a \$50 million letter of credit to address some of the settlements’ financial assurance requirements. These substantial funds are available to draw upon should these facilities fail to perform these requirements properly, providing assurance that costs will not fall to the public. Similar settlements were reached to resolve CAA, CWA, and other compliance issues — underscoring that existing environmental programs are working as intended.

EPA’s Enforcement Document identifies fertilizer facilities where enforcement settlements were reached under various environmental statutes. On balance, the examples in the Enforcement Document illustrate that in those instances where EPA has alleged noncompliance, the owners and operators of the facilities have acted responsibly – under existing regulatory programs – to address those issues, and do not require yet another federal regulatory scheme to incentivize good practices. These examples show that EPA and fertilizer facilities (1) reached meaningful and substantial injunctive and regulatory remedies to resolve alleged violations (e.g., separate management of potential “hazardous wastes” from excluded “solid wastes”), and (2) imposed further conditions to return facilities to compliance with existing permit limitations or obligations. Accordingly, for the fertilizer manufacturing industry, these examples support EPA’s overarching determination in the Proposed Rule that a CERCLA § 108(b) financial responsibility rule would be unnecessary and unwarranted.

EPA Response: Thank you for your comment describing EPA’s enforcement analysis approach as it applies to the fertilizer manufacturing industry. This comment provides evidence supporting the proposed rule.

Commenter Name:**Commenter Affiliation:** The Fertilizer Institute**Comment Number:** EPA-HQ-OLEM-2019-0086-1028**Page(s):** 6-7**Comment:**

Second, EPA's enforcement summaries for NAICS Code 32531 (*i.e.*, Fertilizer Manufacturing¹⁴) demonstrate that the fertilizer industry is subject to frequent inspections, and where noncompliance is identified, the "responsible parties are conducting or paying for cleanups, returning to compliance, and improving public health and the environment."

In particular, the prior settlements between regulators and fertilizer companies identified by EPA in a background document have resulted not only in monetary relief to EPA and other agencies to address past releases, but also site-specific implementation of environmental projects, state-of-the-art process improvements, and innovative management requirements to prevent recurrences of releases in the future (often far exceeding the cash value of penalties or fines obtained in the same settlements).

EPA Response:

Thank you for your comment describing EPA's enforcement summaries for the fertilizer manufacturing industry and examples of site specific conditions implemented at fertilizer manufacturing facilities because of such enforcement actions. This comment provides evidence supporting the proposed rule.

Commenter Name:**Commenter Affiliation:** The Fertilizer Institute**Comment Number:** EPA-HQ-OLEM-2019-0086-1028**Page(s):** 30-33**Comment:**

The result of EPA's analysis is that 16 of the 34 NPL sites identified by EPA (representing 47%) are identified in the broader NAICS four-digit category of Pesticide, Fertilizer, and Other Agricultural Chemical Manufacturing (NAICS Code 3253). However, as discussed in Attachment A to TFI's comments, a closer inspection by TFI into the nature of operations at, and associated releases from, 15 of these 16 sites (the Mississippi Phosphates Corporation NPL Site is discussed below), reveals that none of these sites should be attributed to the more-specific five-digit NAICS Code 32531 (Fertilizer Manufacturing).

EPA next performed a more detailed review of the 34 sites to determine whether the releases associated with each site did, in fact, occur prior to 1980. Based on this more detailed review, EPA concluded that only 4 of the 34 NPL sites had "significant releases or threatened releases of hazardous substances under the modern regulatory framework [(i.e., 1980 or later releases)] and required significant taxpayer-funded cleanups." These 4 sites are: (1) Diaz Chemical Corporation NPL Site in Holley, New York; (2) Eldorado Chemical Company NPL Site in Live Oak, Texas; (3) Mississippi Phosphates Corporation NPL Site in Pascagoula, Mississippi; and (4) White Chemical Corporation Site in Newark, New Jersey. As noted above, and discussed in Attachment

A, of these four sites, only the Mississippi Phosphates Corporation NPL Site had fertilizer production at the site.

For non-NPL sites, EPA employed a similar methodology to that utilized to ascertain relevant NPL sites for its risk evaluation of the chemical sector. But, unlike with NPL sites, EPA attempted to collect more-specific six-digit NAICS Codes. However, to do so, EPA limited its review to the SEMS and On-Scene Coordinator Response databases.¹⁸⁶¹⁸⁴ ⁸⁵

Preliminarily, EPA concluded that 79 sites in NAICS Code 325 involved either exclusively government-funded removal actions, or mixed-funded actions. These 79 sites included 2 sites in NAICS Code 32531 (Fertilizer Manufacturing), 3 sites in the more specific NAICS Code 325311 (Nitrogenous Fertilizer Manufacturing), and 1 site in the six-digit NAICS Code 325312 (Phosphatic Fertilizer Manufacturing), representing, in total, 8 percent of the 79 sites.

Next, EPA removed 27 sites from the list of 79 sites due to insufficient information to determine whether the contaminants released or cleanups occurred prior to 1980, leaving 52 sites. As the final step, EPA performed a more-detailed review of the remaining 52 sites, and concluded that 18 of the sites had contamination resulting from legacy practices.

Of the remaining 34 sites, only 2 sites were identified by EPA in a fertilizer NAICS code, Queen Avenue Property Absorbent Technologies (NAICS Code 325311) and Thunder Products (NAICS Code 325311), representing 6 percent of the 34 sites.

However, as discussed in Attachment B to TFI's comments, a closer inspection of the nature of operations at, and associated releases from, these two sites reveals that despite being identified in the SEMS database as in NAICS Code 325311, neither site had contamination resulting from fertilizer operations.

As a result of TFI's analysis, only a single site, the Mississippi Phosphates NPL Site in NAICS Code 325312, remains in the fertilizer industry out of all the NPL and non-NPL sites identified and evaluated by EPA as representing releases under a modern regulatory framework and requiring taxpayer-funded cleanups. As explained in the next section of TFI's comments, the Mississippi Phosphates facility is not indicative of current fertilizer manufacturing operations, or the risk they pose of taxpayer-funded cleanups.

The Risks From The Mississippi Phosphates Corporation NPL Site Are Not Indicative of The Fertilizer Manufacturing Subsector

When operational, Mississippi Phosphates Corporation produced phosphoric acid through "mineral processing" operations, generating process wastewater and phosphogypsum, which were routed to the facility's phosphogypsum stacks. The phosphoric acid was used to produce DAP fertilizer.¹⁹⁵ The bulk of EPA's current and anticipated costs at the facility relate to neutralizing the process wastewater and the closure and post-closure care of the phosphogypsum stacks. As such, the phosphate fertilizer component of this facility was not the source of the releases. Nonetheless, the Mississippi Phosphates facility is atypical in the phosphoric acid and phosphate fertilizer manufacturing industry.

Unlike currently operating phosphoric acid and phosphate fertilizer manufacturers, Mississippi Phosphates was unique in that it did not have a captive source of phosphate ore. Rather, Mississippi Phosphates imported the vast majority of its phosphate ore from Morocco.¹⁹⁶ This resulted in substantially higher operating costs than other phosphoric acid and phosphate fertilizer

manufacturers.¹⁹⁷ As evidence of this, the largest creditor as a result of its 2014 Chapter 11 bankruptcy proceeding was OCP, a Moroccan state-owned phosphate company (with a \$4.7 million claim).¹⁹⁸ Demonstrating the financially challenging circumstances of Mississippi Phosphates, over time, the company also filed for bankruptcy protection.¹⁹⁹

Importantly, the Mississippi Phosphates facility went out of business before EPA negotiated and finalized a consent decree with it under the MMPI. As discussed in Section IV.D.3 of TFI's comments, at other facilities, the consent decrees resulting from the MMPI specifically address the operation of phosphoric acid "mineral processing" facilities, including management and disposal of wastes, and closure, post-closure, and corrective action associated with phosphogypsum stacks, all backed by extensive RCRA-like financial assurance. Notably, RCRA consent decrees with such financial assurance were in place in 2010 with two other phosphoric acid manufacturers (CF and ExxonMobil), roughly *four years before* Mississippi Phosphates entered bankruptcy proceedings.²⁰⁰ Had Mississippi Phosphates remained in operation, or had EPA achieved a consent decree under the MMPI, there would have been RCRA-like financial assurance in place to avoid the use of the Superfund to fund cleanup activities at the facility and treat the process wastewater.

Finally, as part of the HRM rulemaking, EPA evaluated releases from the Mississippi Phosphates "mineral processing" operations.²⁰¹ Thus, those operations are not relevant to EPA's Proposed Rule. Nonetheless, EPA's conclusion that this site does not demonstrate a need for CERCLA financial responsibility in the chemical manufacturing sector is consistent with the Agency's conclusion in the HRM rulemaking. However, for the reasons stated above, TFI does not believe that the Mississippi Phosphates Corporation NPL Site is relevant to evaluating the degree and duration of risk in the chemical manufacturing sector, in general, or the fertilizer manufacturing subsector, in particular.

EPA Response:

Thank you for the comment, which included detailed information regarding the historic operations at the Mississippi Phosphates Corporation, and their subsequent bankruptcy. The commenter suggests that this manufacturer should not have been considered in EPA's underlying analyses by claiming that a primary source of pollution at the site arguably was not associated with the chemical and fertilizer manufacturing operations. This comment suggests that fertilizer manufacturing may represent a lower level of risk than was indicated by EPA's analysis, were the Agency not to have included Mississippi Phosphates Corp. as part of the industry sector being considered for regulation. EPA recognizes that operations at Mississippi Phosphates site span hardrock mining and chemical manufacturing industries and the releases at the site cannot be attributed all to one industry, but did not conduct more detailed evaluation of this issue as it would not impact the Agency's analysis and conclusion to not require CERCLA 108(b) financial responsibility for the Chemical Manufacturing Industry. EPA acknowledges that the Mississippi Phosphate Corporation NPL site is an example of one of the few sites where EPA has incurred response costs, notwithstanding other federal or state laws. 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).

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 25-26

Comment:

EPA also ignored all evidence of sites involving privately funded cleanups. However, private cleanups ordered pursuant to a CERCLA consent decree can provide important information as to the risk of a release occurring when producing, transporting, storing, or disposing of hazardous substances at chemical manufacturing facilities. Further, private cleanups can provide insight into whether existing environmental laws are sufficient to prevent and deter releases of hazardous materials. Simply because these sites happened to have sufficient financial resources to pay for remediation, that does not make them wholly irrelevant to the issue of evaluating risk.

As an example, EPA ordered a \$57 million cleanup at the Eastern Michaud Flats site in 2013. The facilities at this complex mined, processed elemental phosphorus, and manufactured fertilizers. Doc. No. EPA-HQ-OLEM-2019-0086-0179. The cleanup work will control exposure to 45.7 million yards of contaminated soil. The facility contains two processing plants. The FMC Corporation operated its facility from the 1940s until 2001, and the JR Simplot Company processes phosphate fertilizers in an adjacent facility and is still operating. *Id.* In 1999, EPA entered into a consent decree pursuant to RCRA, but despite this cleanup order, continued contamination at the site still necessitated action pursuant to CERCLA in 2015. Soils and groundwater contain “ignitable-reactive elemental phosphorus,” which emits “elevated levels of gamma radiation[.]” *Id.* Pollutants including arsenic, cadmium, and lead leached into the groundwater, and contaminated the aquifer and surface water. The facility is located within the Fort Hall Indian Reservation in Idaho, home to the Shoshone Bannock Tribes. In testimony to Congress, a representative of the Shoshone-Bannock tribes described the impact of continuing contamination at this site:

The EMF Site is a continuing source of chemical and radioactive contamination, introducing dangerous airborne, surface, and groundwater contamination into our ecosystem and into the regional ecosystem. Contaminants from the Site move off the private property boundary via groundwater and air and enter the Reservation, impacting our health, our land, and water resources. The groundwater moves generally north- northeast under the EMF Site, and discharges into springs and into the Portneuf River, which flows past the Simplot Don Plant and onto the Reservation. Thousands of mammals, reptiles and birds that have come into contact with the Site have died. The Site has also affected the Bottoms area, our sacred hunting grounds. The Tribes have fought for decades to require Simplot and FMC to clean up their Superfund site on and next to the Reservation, which **has contaminated our lands and watersheds to the point that we cannot eat the fish we catch or swim in our streams and lakes.** Simplot and FMC still have not cleaned up the EMF site.

This example shows that despite a RCRA enforcement action, facilities operating under modern regulations still pose a risk of requiring a CERCLA response action. While FMC Corporation may have the money to pay for the cleanup, the next company may not. Further, if the facility had obtained financial assurances, its cleanup would have occurred faster or perhaps been prevented, mitigating the decades long harm endured by the tribes.

EPA Response:

Thank you for your comment. This comment appears to suggest that EPA ignored all evidence of sites involving private party cleanups and that the Eastern Michaud Flats Superfund site is an example of the need for CERCLA 108(b) financial responsibility. EPA disagrees with the assertion that it ignored the evidence of sites involving private party cleanups. As a primary matter, the analyses conducted and the information considered by EPA were consistent with CERCLA. Those analyses included identification and documentation of private party cleanups. For example, in the analysis of NPL and SAA sites associated with the chemical manufacturing industry, EPA documented and identified the existence of PRP lead cleanups. Moreover, for the NPL and SAA sites with PRP leads, EPA collected information regarding the nature and timing of the releases, the contaminants and contaminated media, and the facility operation dates among other fields. This information, in turn, informed the review of existing environmental regulations to ascertain to what extent existing regulations address the types of risks identified at the cleanup cases. As such, it is not accurate to claim that EPA ignored evidence of private party cleanups.

Regarding the Eastern Michaud Flats site cited here, EPA included and reviewed the site as part of its analysis of NPL sites in the industry. In that case, the contamination appeared to have all occurred in 1981 or earlier. In addition to largely reflecting legacy issues, the PRP is conducting the cleanup. As such, EPA does not believe the site indicates a need for CERCLA 108(b) financial responsibility.

This comment also intends to suggest that CERCLA 108(b) financial responsibility could promote rapid cleanup in instances of pollution such as the Eastern Michaud Flats site. As a primary matter, this is not necessarily the case. EPA believes any CERCLA 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 CERCLA 108(b) financial responsibility would eliminate delays in cleanup or the risk to human health and the environment.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 26

Comment:

Similarly, because EPA ignored all privately funded cleanups, EPA ignored evidence of releases at sites owned and operated by Kerr-McGee. In 2011, EPA settled its bankruptcy and fraud action against Kerr-McGee for \$2 billion. This was the largest settlement secured for cleanup of environmental contamination in U.S. history. Doc. No. EPA-HQ-OLEM-2019-0086, at 20-21. EPA prosecuted a fraud action against Kerr-McGee for trying to transfer its legacy operations into a separate company with insufficient assets to pay for environmental cleanup liabilities. While EPA succeeded here, if the company had financial assurances to pay for environmental cleanups, it would not be able to avoid its liabilities through fraud. Further, enforcement discretion could affect whether the agency even pursues such litigation. Under this presidential administration, EPA conducted approximately 40% fewer inspections, and referred far fewer cases to the Department of Justice for litigation.⁴⁹ This is especially concerning because absent diligent fraud prosecution by skilled EPA litigators, this \$2 billion in environmental liabilities would have to be cleaned up using money from the Superfund trust. EPA should analyze what releases occurred at these facilities, what practices caused such releases, the prevalence of those practices within the industry and the danger those releases posed to the environment and public health. EPA ignores all this evidence, simply because a private party paid for the cleanup.

EPA Response:

Thank you for your comment. This comment appears to suggest that EPA ignored evidence of sites involving private party cleanups and that the Kerr-McGee case is an example of the need for CERCLA 108(b) financial responsibility. EPA disagrees with the assertion that it ignored the evidence of sites involving private party cleanups. As a primary matter, the analyses conducted and the information considered by EPA were consistent with CERCLA. Those analyses included identification and documentation of private party cleanups. For example, in the analysis of NPL and SAA sites associated with the chemical manufacturing industry, EPA documented and identified the existence of PRP lead cleanups. Moreover, for the NPL and SAA sites with PRP leads, EPA collected information regarding the nature and timing of the releases, the contaminants and contaminated media, and the facility operation dates among other fields. This information, in turn, informed the review of existing environmental regulations to ascertain to what extent existing regulations address the types of risks identified at the cleanup cases. As such, it is not accurate to claim that EPA ignored evidence of private party cleanups.

Regarding the Kerr-McGee case cited here, EPA included two NPL sites associated with the company in its analysis of NPL sites in the industry. In both those cases, the contamination appeared to have all occurred in the 1970s or earlier. Moreover, while the commenter notes the existence of a relatively large bankruptcy/fraud settlement associated with Kerr-McGee, the commenter understates the value of the funds obtained from the polluter in the bankruptcy and fraud cases. In 2011, EPA (and other parties to the lawsuit) obtained \$270 Million as part of the Tronox bankruptcy settlement. In a related fraud case, EPA and other parties reached a \$5.15 Billion settlement against Anadarko petroleum which was approved by the court in 2015. As such, EPA does not believe the sites indicate a need for CERCLA 108(b) financial responsibility.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 26

Comment:

Finally, under CERCLA EPA can and should impose financial assurances on owners and operators for the *ongoing* costs and risks associated with past contamination. At many sites, spills and releases that occurred in the past still require significant cleanup costs today, ranging from long term groundwater treatment to continuing removal and remediation actions. EPA can and should impose financial assurances on owners and operators regardless of when the releases occurred, to ensure that current and future costs are borne by the responsible parties. Imposing assurances will also give owners and operators a strong incentive to expedite the cleanup and minimize ongoing risks.

EPA Response:

Thank you for this comment presenting concern for ongoing costs from past contamination. EPA expressed in its proposal that it believes the comprehensive set of regulations under the modern regulatory framework provide the safeguards necessary to cover the types of risks intended to be covered by financial responsibility under Section 108(b) of CERCLA. EPA believes that its analysis of cleanup cases, which concluded that there is not a level of risk to the fund that warrants imposition of financial responsibility, supports this position. EPA offers the corrective action program under RCRA as an example of existing requirement that could be employed to address past contamination. 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. EPA can also require financial assurance through CERCLA enforcement settlements and orders that require CERCLA response actions.

4. Economic Profile

Financial stability of chemical manufacturing sector and risk that entities within that sector will default on environmental obligations.

Commenter Name:

Commenter Affiliation: American Chemistry Council (ACC) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1033

Page(s): 1

Comment:

Due to the industry's longstanding financial stability and a low default risk, this industry does not have a history of failing to pay for cleanups.

EPA Response:

This comment supports EPA's analysis presented in the proposal.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 33-35

Comment:

E. Chemical manufacturing facilities pose a high bankruptcy risk.

EPA concluded that the risks of default for this sector were acceptable, and that in the event of bankruptcy, there were protections that minimized the risk of a taxpayer funded response. In both cases, EPA ignored key evidence, making its conclusions arbitrary and capricious.

1. The risks of default are higher than captured by the metrics EPA chose.

EPA's analysis underestimates the level of financial risk associated with this sector because the metrics it chose to measure financial health—current ratios, interest coverage ratios, and credit-strength estimates—by and large do not factor in environmental obligations. Current ratios would not factor in environmental obligations other than those set to come due in the next year (and perhaps not even those); interest coverage ratios also would not cover future environmental obligations as no interest is owed on them. While in an ideal world, credit-strength estimates such as z-Altman scores or Beta estimates would consider these sorts of long-term, and sometimes probabilistic environmental obligations, in fact it is almost certain they do not.

Under generally accepted accounting principles (GAAP), environmental remediation liabilities, such as those under CERCLA, only appear on a company's balance sheet when management considers it reasonably probable that an obligating event has occurred and the liability can be reasonably estimated.⁸⁴ This in turn is only true when litigation has commenced or a claim or assessment has been issued—or one of these is deemed likely to occur *and* to result in an unfavorable outcome for the company.⁸⁵ This standard obviously leaves management with a

great deal of discretion. Under GAAP, companies may also defer recording environmental loss contingencies, such as tort liability, and to a lesser extent asset retirement obligations,⁸⁷ until there is sufficient certainty of their accrual and/or estimation. Without this information, it is unlikely the credit estimates EPA considered adequately factored in environmental obligations either. Yet these obligations obviously represent significant financial risks for firms in this sector.

Furthermore, certain subsectors of chemicals manufacturing in the United States are gravely imperiled by climate transition risk—or risk stemming from policies necessary to prevent the worst effects of climate change—which these metrics also do not consider. Petrochemicals, the building blocks of plastic, are the most prominent example. Plastics generate unsustainable levels of greenhouse gases throughout their life-cycles, and plastic production must be curtailed as part of strategies to limit global temperature increase to 1.5-2 degrees Celsius. A conservative estimate for the total so-called “cradle to resin” emissions—e.g. emissions associated with extraction, transport, and refining of fossil fuels, and manufacturing of petrochemicals—for plastic produced in the United States is 1.89 megatons of carbon dioxide equivalents (Mt CO₂e) per megaton of plastic produced. Current disposal methods for plastic—especially incineration and mismanaged plastic winding up in the ocean—also generate significant quantities of greenhouse gases. For example, incineration of plastic packaging alone emitted 15.9 million metric tons of CO₂ equivalent in 2015 globally. And plastic on the surface of the ocean has been estimated to release 2,129 MTCO₂e annually—a preliminary and incomplete estimate that does not account for any emissions from plastic anywhere lower than the surface nor for its potential interference with the ocean’s ability to act as a carbon sink. Crucially, these disposal problems cannot be solved via increased recycling capacity, but only through reductions in the use of plastics. Historically, recycling has been extremely low—only 9% of plastic discarded since 1950 has been recycled even once. Many plastic products are difficult to recycle, purely on a physical basis, and all but the highest value plastic resins are currently not cost competitive to recycle.

Experts, including at the Intergovernmental Panel on Climate Change (IPCC) and Carbon Tracker, have calculated the remaining “carbon budget” for the planet—i.e. the total quantity of greenhouse gases that can be emitted consistent with a good chance of not exceeding the 1.5 degrees Celsius of warming the IPCC has said represents the upper limit before likely irreversible and tragic consequences. Under current industry plans for expansion, plastics manufacturing and incineration between the years 2015-2050 alone would emit 10-13% of the *total* remaining carbon budget. Given that energy, buildings, transportation, and food systems all need time to adapt to achieve economy-wide net-zero emissions, this level of emissions from plastic is simply incompatible with scenarios that avoid tragic consequences for humanity. Plastics production must be reduced; therefore petrochemicals production must be reduced.

The external pressure of a finite carbon budget is compounded by the fact that the sector has been overbuilt in the United States as an outlet for the glut of cheap natural gas created by the fracking boom. From 2010 to 2017, \$85 billion in new petrochemical manufacturing capacity was built or started construction in the United States. It is projected that this oversupply will drive prices for petrochemicals downward, leading many projects currently under construction to become unprofitable. Furthermore, as Brent Crude oil and U.S. shale gas prices converge, the competitive advantage for U.S. petrochemicals over naphtha-based alternatives produced in Asia dwindles, also harming profitability.

EPA Response:

EPA's analyses of financial stability within this sector specifically sought to rely on standard measures widely relied upon for all sectors across the U.S. While no such measure can capture all potential factors (whether those might involve uncertain long-term environmental liabilities and/or climate impacts such as those posed by the commenter), the measures that were evaluated by EPA in its original Economic Sector Profile for this sector included a long list of widely accepted metrics for purposed of such analyses.

As an added level of consideration regarding these concerns, EPA conducted an update of its Economic Sector Profile originally conducted in support of the proposed rulemaking. For purposes of consistency, these analyses again examined the same sector-wide ratio measures of economic stability that are widely used as standard market metrics for such sector-by-sector comparisons. This update was also conducted with the most recent prior year's worth of data available at the close of the comment period for the proposed rule. This updated analysis finds the financial stability of the sector relatively unchanged from the original report, further suggesting that the economic conditions of the sector as a whole are not at undue risk.^[1]

^[1] USEPA, Addendum Update to CERCLA 108(b) Economic Sector Profile: NAICS 325 – Chemicals Manufacturing; May 2020.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 35-37

Comment:

2. *Bankruptcy law is much less protective of the public health and fisc than EPA suggests.*

EPA's analysis of the relevant bankruptcy provisions and caselaw is selective and presents a distorted picture. First, EPA focuses only on reorganization—however, liquidation is much more likely to result in taxpayers paying for environmental obligations. While environmental obligations may in theory survive liquidation, they survive only in a corporate shell. Instead, regulators and PRPs must compete with creditors for a slice of the liquidating estate's assets. While the presence of other PRPs for some sites under CERCLA mitigates this risk slightly, it would not do away with it altogether—and obviously is unavailing at sites without other remaining viable PRPs.

Moreover, companies have found ways to use even Chapter 11 bankruptcy to offload environmental obligations. One study of two of the largest coal company reorganizations from the 2015-16 period (Peabody and Alpha) found the companies shed \$1.4 billion in SMCRA obligations, along with billions more in pension and health retirement obligations, through the bankruptcy process. The companies accomplished this largely by placing legacy mines or other

contaminated sites into underfunded subsidiaries and either spinning them off into independent companies as part of the reorganization plan (in the case of Alpha) or liquidating them, with the funds going to a liquidating trust meant to cover the liabilities (in the case of Peabody). The spin-off and liquidating trust respectively ended up being wholly unable to meet the costs of the environmental obligations, much of which will now likely be borne by the public. In the case of Peabody, this strategy also helped shield it from liability as a PRP for the Asarco Taylor Springs NPL site. Some have argued that the transfer of these impaired assets and liabilities to unfunded subsidiaries should be considered fraudulent conveyances—and state fraudulent transfer laws, the Federal Debt Collection Practices Act and bankruptcy law all provide avenues to challenge and avoid them. However in most cases those challenges depend on the will of the regulator or trustee, given the short statutes of limitations available to ordinary creditors and the longer time frame in which insolvency can become apparent. Additionally, pursuing such challenges requires significant resources and time.

Similarly, while EPA is correct that under some circumstances regulators can obtain administrative expense priority in the priority scheme for the costs of meeting environmental obligations, EPA ignores unfavorable caselaw. Many circuits and courts draw distinctions based on the type of liability, when it accrued or came due, whether the government has already spent funds, whether the company still owns or leases the contaminated property, and more. For example, the Third Circuit has found that post-petition criminal fines for ignoring enforcement orders from environmental regulators are not to be granted administrative expense priority and are subject to discharge. The District of Delaware has denied AEP to post-petition cleanup expenses incurred by the state because the debtor had sold the property before entering bankruptcy—even though the debtor had ongoing obligations on that property under a consent order. Multiple courts, including the Bankruptcy Courts of the Southern District of New York and District of Massachusetts have denied priority to state regulators' claims for *any* future costs of remediating contaminated sites if the court deemed the costs too speculative, even in the scenario of a liquidation when these claims represented the last chance to hold the companies accountable.

Similarly, when it comes to abandonment, while EPA is correct that *Midlantic* limits the trustee's power to abandon contaminated property in contravention of state environmental laws, EPA again ignored significant deficiencies in the law as it stands at present in protecting both the public health and fisc. A number of courts, including the 10th and 4th Circuits, District of New Jersey and Eastern District of Texas Bankruptcy Court have interpreted *Midlantic* narrowly. These courts have allowed abandonment of property that was out of compliance with state environmental laws, as long as the property did not pose an imminent and identifiable threat to the public health. Many firms may declare bankruptcy well before releases threaten to migrate off of contaminated property—but remediation is no less necessary in such cases, and these holdings demonstrate the weakness of bankruptcy law in protecting the public health or preventing taxpayer funded cleanups.

EPA Response:

In EPA's final rulemaking, EPA makes note of the existence of legal case law and bankruptcy protections as only one of the factors for why financial assurance was not warranted for this industrial sector. EPA acknowledges that such protections while helpful, may not be fully protective on their own. In its decision, EPA first conducted a systematic review of relevant

incidents and cases of burden to Superfund, as well as the impacts born from a more modern regulatory framework. Only after such considerations did the agency point to additional positive influencing factors, such as increased transparency from the application of generally accepted accounting practices and bankruptcy law requirements that a company comply with environmental obligations. While not a guarantee, such factors help reduce potential risks to the Fund even further.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 37

Comment:

In sum, manufacturers in NAICS Code 3253 (*i.e.*, Pesticide, Fertilizer, and Other Agricultural Chemical Manufacturing) are healthy and capable of addressing potential risks impacting their firms, including the need to address a potential release of “hazardous substances.”

EPA Response:

This comment supports EPA’s analysis as presented in the proposal.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 7

Comment:

Similarly, even though the steps necessary to conduct fertilizer manufacturing are straightforward, as detailed below, it is a sophisticated, large-scale enterprise requiring extensive manufacturing process control and capitalization to process feedstocks and produce end-products. Therefore, TFI agrees with EPA’s economic analysis of the industry, and the Agency’s conclusion that this industry presents a low bankruptcy risk compared to other sectors.

EPA Response:

This comment supports EPA’s analysis as presented in the proposal.

5. Existing Regulatory Framework

Existing federal and state environmental and financial assurance regulations applicable to facilities in the chemical manufacturing industry.

Commenter Name:

Commenter Affiliation: Mosaic Fertilizer, LLC.

Comment Number: EPA-HQ-OLEM-2019-0086-1024

Page(s): 3-5

Comment:

For purposes of the chemical manufacturing rulemaking, most Mosaic phosphate fertilizer manufacturing processes were already evaluated under 108(b). PG stacks, although not included in EPA's HRM final action, are subject to other federal laws or standards, including settlements under a national enforcement initiative under RCRA and substantial FA requirements already exist. The D.C. Circuit rejected arguments that the statute requires EPA to promulgate financial responsibility requirements "for facilities in addition to those" covered by other federal statutes. For these reasons, EPA should include in the proposal to address the chemical manufacturing sector a statement that EPA's responsibility under CERCLA 108(b)(1) was completed with respect to phosphate fertilizer manufacturing when the agency issued the final rule for classes of facilities in the HRM industry. Any additional FA requirements would be redundant, unwarranted and inconsistent with the plain meaning of § 108(b).

EPA analyzed the need for FA based on the risk of taxpayer-funded cleanups at HRM facilities operating under modern environmental regulations and management practices. Key to EPA's analysis was evaluating how hazardous substances are managed at these facilities by examining federal and state regulatory programs, including financial responsibility requirements. After close evaluation, EPA determined that the requirements of existing federal and state laws reduce the risk of release and that existing FA obligations reduce potential costs to the taxpayer, mitigating the need for federally financed response actions.

These regulatory programs impose substantial FA obligations, including on those facilities that manage phosphogypsum and phosphoric acid process water. For example, since 1993, the Florida Department of Environmental Protection (FDEP) requires owners or operators to provide financial responsibility to cover phosphogypsum stack systems. Under this program, companies must submit a closure plan to FDEP designed to protect human health and the environment, and demonstrate financial responsibility sufficient to close a phosphogypsum stack system and thereafter monitor and maintain the stack system for 50 years. Similar programs and FA requirements exist in Louisiana.

The plain language of Section 108(b) evidences Congressional intent only to require financial responsibility requirements under CERCLA for facilities that do not already have such requirements. Congress clearly did not intend for CERCLA to impose an unnecessary, duplicative burden on facilities that already have requirements to provide FA to respond to environmental releases. For example, CERCLA's financial responsibility requirements do not apply to facilities that are subject to financial responsibility requirements under Subtitle C of RCRA, which governs the management of hazardous waste, and other federal laws. EPA

properly interpreted this language in promulgating the final rule for HRM to require EPA to consider other potentially duplicative federal financial responsibility requirements when determining whether financial responsibility requirements are appropriate. The Agency also rightly decided that Congress intended EPA to consider state laws before imposing financial requirements, just as Congress did not mean for EPA to disrupt state programs or impose duplicative FA requirements. The Court agreed with EPA's interpretation in all respects.

Existing laws already provide sufficient oversight and assurances rendering 108(b) FA requirements unnecessary. For example, federal laws that impose requirements on phosphate fertilizer manufacturing facilities beyond RCRA include: the Clean Air Act, the Clean Water Act, Toxic Substances Control Act, and the Emergency Planning and the Community Right-to-Know Act. The states have also enacted multiple statutes and regulations governing the phosphate industry. These regulations include requirements for sophisticated control technologies, monitoring, best management practices and other requirements to prevent and address risk of release.

Mosaic's phosphate fertilizer manufacturing facilities are already subject to tremendous FA obligations resulting from an EPA National Enforcement Initiative for Mining and Mineral Processing. Under this Initiative, EPA performed comprehensive inspections at all operating facilities for compliance with RCRA. Allegations of unauthorized co-mingling of waste streams resulted in negotiated settlements that impose operational requirements, corrective action standards, design and closure requirements, and post-closure standards for each facility's phosphogypsum stack system, as well as RCRA-like FA requirements to support commitments to close and provide long-term care. For example, Mosaic settled such claims in 2016; in doing so, posted \$630 million in cash, a \$50 million letter of credit and a corporate guarantee to address financial assurance requirements. These FA sources are available to draw upon should these facilities fail to perform these requirements properly, providing assurance that costs will not fall to the public.

EPA has already evaluated most of the phosphate fertilizer sector within the scope of the HRM rule, finding that existing state and federal laws sufficiently address risk of releases, including imposition of FA where warranted. PG stacks are not subject to CERCLA 108(b)(1) as they are already subject to a substantial FA. Consequently, no additional FA obligation is justified under the requirements of 108(b).

EPA Response:

This comment supports EPA's analysis as presented in the proposal.

Commenter Name:

Commenter Affiliation: Private citizen

Comment Number: EPA-HQ-OLEM-2019-0086-1029

Page(s): 1

Comment: Additionally, CERCLA's establishment of sites is not all inclusive and there are many instances where there are incidents handled at the state level, which were not included in this analysis. Companies that don't make it on the NPL, another qualitative measurement device within the act, are not provided the same resources even though they could benefit. One such

example is the FMC Middleport site in Middleport, NY. This site is a pesticide formulation and packaging plant that in the past utilized arsenic based compounds. The site and the surrounding neighborhoods are significantly contaminated from these past practices and are under a Consent Order with NYSDEC to perform remedial actions on the site itself and in the community. These remedial actions are totaling in the billions of dollars, and while the financial securities may not be quite that significant, the presence of dedicated funds is a safety net for the communities in which they operate.

Lastly, passing this rule would set a dangerous precedent where other industries would indicate that they, too, have a "safe" history and wish to have the same benefit. Though the practices in industry across the board have improved dramatically over the last 40 years, there is inherent risk in developing, manufacturing and transporting hazardous substances. Society's demand for newer, lighter, more efficient products drives innovation which is often achieved through new chemical development. The prevention of spills and incidents are driven by standards within OSHA, DOT, PSM/RMP, TSCA, and other agencies, but even then, spills and exposures still occur. The Arkema disaster during Hurricane Harvey highlights this. Even though they were following standard procedures for handling and storage of the materials, the disaster still occurred. There were certainly lessons learned as a result of the incident, but nonetheless this was a resource intensive cleanup event.

EPA Response:

Thank you for the comment. EPA appreciates and acknowledges that some cleanups are conducted outside the Superfund program as noted by the commenter. As a practical matter, information on non-EPA cleanups are not readily available to EPA for analysis. In the example of the New York state cleanup in Middleport, NY cited by the commenter, EPA believes this represents an example of the modern regulatory framework effectively working. The cleanup, conducted by the responsible party, under state RCRA and Superfund authorities is addressing the contamination resulting from operations as far back as the 1920s. Moreover, as required under the consent decree, the responsible party is providing financial assurance for the cleanup. As such, EPA does not believe the site indicates a need for CERCLA 108(b) financial responsibility.

Commenter Name:

Commenter Affiliation: Society of Chemical Manufacturers & Affiliates (SOCMA) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1031

Page(s): 9-10

Comment:

As noted earlier, in the initial hardrock mining proposed rule, EPA estimated that the 121 mining companies covered by the proposal rule would incur aggregate annualized costs of between \$111 million and \$171 million, depending on whether EPA allowed a financial test option. In the chemical manufacturing industry, larger companies might similarly be able to meet a financial test option, assuming it were offered, but smaller companies would be faced with extremely high annual out-of-pocket costs. Existing state-level financial assurance requirements provide an illuminating insight into the impacts that could be caused by a Section 108(b) rule. The level of

assurance required under state programs to perform an investigation and conduct remediation is often as much as \$5 million to \$6 million per site. If that amount is required for multiple company sites, the necessary amount of financial assurance for a company can become quite large.

Under such state requirements, companies – particularly small ones that cannot meet a balance sheet-based financial test – often rely upon letters of credit to demonstrate current financial assurance for active remediation projects. The cost of maintaining such assurances can be as large as 10% of a company's total debt, and as much as the available balance on revolving lines of credit. This would obviously have a chilling effect on the ability to execute capital investments.

A relevant case study involves a SOCMA member company that is required by the New Jersey Industrial Site Recovery Act (ISRA) to provide financial assurance for a remediation project in the state. The ISRA rules establish a complicated financial assurance structure, under which different mechanisms are permissible based on the financial condition of the company. In this case, the company has had to obtain a letter of credit from a bank demonstrating financial assurance obligations in the amount of \$4 million. The company's annual fee to maintain the letter of credit for its \$4 million financial assurance is \$48,000. This company has 30 operating sites in the United States. If EPA required a similar level of financial assurance for all of these sites, this company could face expenses exceeding \$1.4 million annually. If facilities not in operation were also included, the total annual cost could reach \$1.8 million for this same company. The net benefit of spending \$1.8 million annually in most cases would be zero, as these costs are all fees paid to financial institutions.

Not only must this company maintain the letter of credit, but the New Jersey Department of Environmental Protection also requires the company to pay an annual fee of 1% of the face amount of the letter of credit, or \$40,000. Thus, the company pays \$88,000 annually for this one facility to maintain financial assurance. If other states mimic New Jersey and add a fee to any financial assurance that may be required by EPA for a chemical manufacturing plant, the costs would expand significantly.

This cost has the potential to drive some companies into bankruptcy and increase pressures to offshore operations. Such scenarios would also have a disproportionate financial impact on companies with numerous small sites. And, as demonstrated in Part II above, the financial responsibility imposed would be wildly disproportionate to the degree and duration of risk to the Fund that such sites actually present under the current regulatory system.

EPA Response:

Thank you for the comment. EPA appreciates the examples of financial assurance mechanism financing costs. As a result of the suite of analyses conducted by EPA as part of its proposal, and after consideration of the comments received, EPA is not requiring financial responsibility under CERCLA 108(b) for the chemical manufacturing industry.

Commenter Name: Laurie Droughton Matthews, Morgan, Lewis & Bockius LLP
Commenter Affiliation: Superfund Settlements Project (SSP)

Comment:

Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §9608(b), permits EPA to adopt or decline to adopt rules requiring that certain “classes of facilities establish and maintain evidence of financial responsibility,” provided also that any such rules must not be more than what is required to be “consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances.” 42 U.S.C. § 9608(b)(1). EPA’s decision strictly complies with the statutory mandate by evaluating risk in the industry today, not when §108(b) was enacted.

When §108(b) was enacted in 1980, the modern environmental regulatory regime was in its infancy. In contrast, the Industry is now subject to pervasive Federal and state regulatory programs including environmental review under NEPA, 42 U.S.C. §§ 4321 et seq., and similar state environmental review laws; media-specific programs addressing hazardous substances and wastes, such as through programs established under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., Clean Air Act, 42 U.S.C. §§ 7401 et seq., and the Solid Waste Disposal Act, 42 U.S.C. §§ 6901 et seq.; operating-specific programs, such as Risk Management Plan and Process Safety Management regulations and pipeline and storage tank regulations; and general emergency response programs, such as under CERCLA and the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001 et seq. Specifically, with regard to releases that could potentially lead to a CERCLA response, these existing laws address the range of risk by requiring owners and operators to: (1) adopt safe operating practices to avoid releases; (2) implement programs and designs to minimize the scope of releases when they do occur; and (3) address any resulting environmental conditions promptly if they occur and also often at closure and during post-closure. In addition, a number of these regulations have their own financial responsibility requirements. In short, the risks that §108(b) was targeting are now fully regulated.

EPA Response:

This comment supports EPA’s analysis as presented in the proposal. It is true that, 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. 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 Chemical Manufacturing industry, compliance and enforcement history for the relevant regulations. Based on this review, EPA concludes 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.

5.1. Environmental Regulations

Existing federal and state regulations that address sources or reasons for releases at chemical manufacturing facilities.

Commenter Name:

Commenter Affiliation: American Chemistry Council (ACC) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1033

Page(s): 1

Comment:

Potential releases from manufacturing facilities in this sector are directly regulated through an almost uniquely comprehensive and stringent matrix of federal and state statutes and regulations.

EPA Response:

This comment supports EPA's analysis as presented in the proposal.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 23-24

Comment:

B. The existence of other environmental laws does not eliminate the need for financial assurances.

In the proposed rule, EPA relies on an analysis of RCRA and TSCA requirements to determine that these environmental laws mitigate the need for a CERCLA response. However, data compiled by EPA fails to support this conclusion. As documented in the Enforcement Report, many chemical manufacturers entered into consent decrees with EPA for violation of federal environmental laws including RCRA and the Clean Water Act. Nevertheless, many of these same facilities required CERCLA response actions, some of which were financed from the Superfund trust. *See* Doc. No. EPA-HQ-OLEM-2019-0086. Indeed, this report concludes that while active enforcement serves as an important component of the regulatory framework, “[e]nforcement actions alone do not completely supplant the need for Fund-financed response actions either at these highlighted sites or generally in the Chemical Manufacturing industry.” *Id.* at 1. Indeed, repeat violators likely indicate the future need for a CERCLA response action. For example, at one site EPA discusses in its supporting materials, the Eastern Michaud Flats site, enforcement orders totaled \$220 million over the course of several decades, and included seven CERCLA and RCRA enforcement orders, with EPA noting that the facility had “egregious” violations of RCRA and a history of non-compliance. *Id.* at 21.

In another example, EPA added the Mississippi Phosphates Corporation as a Superfund site in 2018. EPA discussed this example in its proposed action. This company started operations in the 1950s and declared bankruptcy in 2017. In 2013, the facility discharged pollutants in

violation of its Clean Water Act permit “resulting in the death of more than 47,000 fish and the closing of Bayou Casotte[,]” which is part of the Grand Bay National Estuarine Research Reserve. Doc. No. EPA-HQ-OLEM-2019-1014, at 27. Since 2000, this facility had repeatedly violated federal environmental laws. Ultimately, the Superfund trust will pay \$133 million to cover the cost of this cleanup—a fact conveniently ignored in EPA’s findings in the proposed action. *See* 85 Fed. Reg. 10145, n.85.

In the proposed action, EPA itself admits: “Enforcement actions alone do not completely supplant the need for Fund-financed response actions either at these highlighted sites or generally in the Chemical Manufacturing industry . . . Active enforcement serves as an important component of the regulatory framework.” 85 Fed. Reg. 10144. Nevertheless, in the following section, the agency concludes contrary to the evidence and its own statements, that existing environmental laws “create[] a comprehensive framework that applies to prevent releases that could result in a need for future cleanup.” *Id.* at 10145.

EPA Response:

EPA disagrees with the premise of this comment. As a preliminary matter, EPA discussed in the proposal how it considers enforcement to be an essential tool of the modern regulatory framework, which demonstrates intended function of the regulations. Through compliance and enforcement authorities, EPA and other regulating bodies can compel compliance and require responsible parties to carry out cleanups. The prospect of and financial penalties can further encourage compliance.

Regarding the Eastern Michaud Flats site and Mississippi Phosphate site cited here, EPA included and reviewed both of the sites as part of the Agency’s analysis of NPL sites in the industry. As such, EPA does not believe the comment offers any additional information that should be factored into the Agency’s analysis of the industry. In the case of Eastern Michaud Flats, the contamination was noted to have all occurred in 1981 or earlier. In addition to largely reflecting legacy issues, EPA noted that the PRP is conducting the cleanup. As such, EPA does not believe the Eastern Michaud Flats site indicates a need for CERCLA 108(b) financial responsibility. At the Mississippi Phosphate site, EPA acknowledged the site in its proposal as an (relatively rare) example of a site operating under a modern regulatory framework requiring a fund-financed superfund action to address pollution. Additionally, EPA received comment from The Fertilizer Institute which described how the Mississippi Phosphates Corporation NPL site was not representative of current operations in the fertilizer manufacturing subsector.

Commenter Name:

Commenter Affiliation: J. R. Simplot Company

Comment Number: EPA-HQ-OLEM-2019-0086-1034

Page(s): 2-3

Comment:

Financial Assurance Requirements for Phosphoric Acid Manufacturing, a Segment of Phosphatic Fertilizers, have already Been Determined.

The production of phosphoric acid is a mineral processing activity. Phosphoric acid is the building block for phosphatic fertilizers; phosphate fertilizers are commonly produced at facilities that manufacture phosphoric acid. Phosphate mineral processing operations were a part of EPA's examination of financial responsibility requirements under CERCLA 108(b) for classes of facilities in the hardrock mining industry. EPA, after extensive review of the industry and substantial public comment, decided that establishing new financial assurance requirements for this sector was not warranted:¹ "the degree and duration of risk associated with the modern production, transportation, treatment, storage or disposal of hazardous substances by the hardrock mining industry does not present a level of risk of taxpayer funded response actions that warrant imposition of financial responsibility requirements for this sector." This 2018 decision by EPA was litigated by six environmental organizations. The United States Court of Appeals for the District of Columbia, in 2019, affirmed EPA's decision.² The D.C. Circuit concluded EPA had reasonably interpreted CERCLA § 108(b) by focusing on quantifiable financial risks to taxpayers and deferred to its methodology.

Additional Financial Assurance Requirements for Phosphoric Acid Manufacturing, a Segment of Phosphatic Fertilizers, are Being Implemented.

As discussed in the documents associated with this rulemaking for chemical manufacturing facilities, phosphoric acid manufacturing is a part of EPA's National Enforcement Initiative for Mineral Processing under RCRA. This initiative has resulted in changes in operations at mineral processing facilities including phosphoric acid facilities. This initiative has also resulted in additional financial assurance requirements, including those phosphoric acid manufacturing/mineral processing facilities that have reached an agreement with the federal government.

Existing Regulations Provide a Framework for Financial Assurance and Actions by Phosphatic Fertilizer Manufacturers

EPA's proposed decision to not require new financial assurance requirements for chemical manufacturing is consistent with Simplot's experience that the existing regulatory framework sufficiently minimizes the risk of taxpayer funded response actions. As noted above, EPA's National Enforcement Initiative for Mineral Processing has resulted and will continue to result in additional financial requirements for major parts of the phosphatic fertilizer manufacturing segment. In addition, existing CERCLA requirements require responsible parties to address releases of hazardous substances. Simplot's phosphatic fertilizer facility near Pocatello, Idaho is part of the Eastern Michaud Flats (EMF) Superfund site. Since the listing of this site in 1990, Simplot has fulfilled its responsibilities, including funding of investigations, risk assessments, implementation of corrective actions and agency costs (including costs for a neighboring Native American tribe), and maintained adequate financial assurance. These costs (through 2017) have exceeded \$40 million, which includes approximately \$4 million in agency costs.

Thus, the existing environmental financial assurance requirements provide a framework that minimize potential risk to taxpayers to address releases to the environment from chemical manufacturing facilities.

EPA Response:

This comment supports EPA's analysis as presented in the proposal.

Commenter Name:**Commenter Affiliation:** The Fertilizer Institute**Comment Number:** EPA-HQ-OLEM-2019-0086-1028**Page(s):** 33-34**Comment:**

As EPA summarizes in the Proposed Rule, the broader chemical manufacturing industry already is thoroughly regulated on a multi-media basis by federal environmental laws, and similar state environmental laws.²⁰² Those regulatory programs provide numerous protections or remedies against historical, ongoing, or threatened “releases” to the environment, and demonstrate that additional financial responsibility for such “releases” through CERCLA § 108(b) would be unwarranted. Similarly, imposing such obligations could potentially undercut or interfere with existing financial assurance obligations or negotiations arising under other environmental laws.

TFI agrees with EPA’s current summary and analysis of these existing federal and state programs, including those that impose long-term financial responsibility requirements (*e.g.*, RCRA),²⁰³ not to mention the voluntary programs that EPA briefly describes in its preamble.²⁰⁴ As EPA correctly acknowledges, CERCLA § 108(b) does not support the concept of imposing redundant requirements under CERCLA for facilities that already are regulated under other federal laws. Existing laws already provide sufficient oversight and assurances that potential “releases” will be addressed and remedied in a timely manner.

Most prominently, for potential “solid waste” and “hazardous waste” generation and management issues, RCRA and HSWA impose stringent prohibitions, legal remedies, and penalties against any unauthorized “disposal” or “discard” of “solid waste” or “hazardous waste” resulting from fertilizer manufacturing activities. Fertilizer manufacturing facilities are subject to RCRA for their waste generation activities. EPA has consistently placed great weight on the risk-mitigating effect provided by RCRA under its national enforcement initiatives. As an example, for over a decade, EPA’s MMPI has resulted in sweeping consent decrees that set detailed waste management requirements within the phosphate fertilizer manufacturing subsector. Thus, potential risks of “releases” from fertilizer manufacturing facilities are adequately addressed by RCRA (or already *have been* resolved by prior RCRA enforcement). In turn, they are not risks that warrant further regulation or responsibility under CERCLA § 108(b).

Beyond RCRA, federal laws that impose requirements on fertilizer manufacturing facilities include (1) the CAA, (2) the CWA, (3) TSCA, and (4) EPCRA, as well as the detailed permitting obligations for “stationary sources” or “point sources” that apply on a facility-specific basis under the CAA and CWA. EPA has accurately summarized the requirements of these programs in the Proposed Rule. Added to RCRA, these federal environmental programs provide further bulwarks against the potential risk of releases or threatened releases from fertilizer manufacturing facilities, and subject them to detailed permitting and regulatory requirements. As such, EPA’s summary of existing federal environmental law in the Proposed Rule is accurate and relevant for all fertilizer manufacturing facilities.

States have also enacted statutes and regulations governing the fertilizer manufacturing industry (some of which are state analogues to existing federal requirements, such as RCRA’s implementing regulations, as noted above). These regulations include requirements for control

technologies, monitoring, best management practices and other requirements to prevent and address the risk of a release, accounting for the unique circumstances of each state.

In closing, fertilizer manufacturers already are subject to extensive regulation under existing environmental laws. On balance, the combined weight of these existing legal obligations supports EPA's determination that further financial responsibility under CERCLA § 108(b) would be unwarranted.

EPA Response:

This comment supports EPA's analysis as presented in the proposal.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 5-8

Comment:

The risk of taxpayer-funding cleanups raised by potential releases from currently-operating fertilizer manufacturing facilities is low, and extensive regulatory and other legal obligations already apply across the modern fertilizer manufacturing industry in the United States. These obligations apply from the outset of fertilizer manufacturing, and extend on a multi-media basis to address virtually any releases that may occur to the environment from those operations. These laws are protective of human health and the environment, and provide the legal recourse to EPA, state agencies, and the public to minimize or entirely avoid possible Superfund expenditures. In turn, the imposition of additional requirements upon the industry under the auspices of CERCLA § 108(b) is unwarranted.

Also, the record demonstrates that the modern fertilizer manufacturing industry (including the remaining component of NAICS Code 325312, the granulation activities that occur in the phosphate fertilizer industry after "mineral processing") does not raise serious risks of taxpayer-funded cleanups (or, significant risks to human health or the environment from potential releases) that are not already prevented or remedied by other laws. Despite the inclusion of some agricultural chemical sites noted in EPA's background documents that are associated with NAICS Code 3253 (*i.e.*, Pesticide, Fertilizer, and Other Agricultural Chemical Manufacturing,¹² which includes both fertilizer manufacturing *and* pesticide manufacturing), once the analysis is confined to fertilizer manufacturing operations (rather than pesticide or other operations), it becomes abundantly clear that fertilizer company owners and operators already are subject to comprehensive environmental responsibilities at their facilities.¹³ First, fertilizer manufacturers are subject to myriad federal environmental laws and regulatory programs from the outset of the construction of their facilities.

As recognized by EPA, fertilizer manufacturers are subject to numerous regulations, including regulations by EPA, the U.S. Occupational Safety and Health Administration ("OSHA"), and associated state and local agencies.²³ These regulations address: air quality; water quality; waste management, generation, and disposal; "hazardous substances;" "toxic substances;" emergency planning; chemical accident prevention; release reporting; worker safety; and process safety. As

correctly noted by EPA, the existence of these comprehensive regulations are relevant to evaluating the need for CERCLA § 108(b) financial responsibility in the fertilizer manufacturing subsector because these “modern environmental requirements” address the risks posed by this subsector

Similarly, enforcement actions and their resulting settlements are relevant to the risk calculus because (1) “if noncompliance causes a release of a hazardous substance, then EPA can ensure through negotiated settlements that the responsible party carries out or pays for the cleanup,” (2) “enforcement actions can result in orders and settlements that compel a responsible party to return to compliance,” and (3) “the prospect of financial penalties that can accompany these enforcement instruments can encourage compliance.”²⁵ Fertilizer manufacturers are frequently inspected by federal and state agencies, with more CERCLA and Resource Conservation and Recovery Act (“RCRA”) inspections (at 19%) compared to the total establishments in NAICS Code 325 (at 9%).²⁶ According to EPA, on average, fertilizer manufacturers are inspected every 12 months. These inspections ensure that “hazardous substances” and “hazardous wastes” are properly managed to avoid releases to the environment.

EPA Response:

This comment supports EPA’s analysis presented in the proposal.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 27

Comment:

D. State laws and enforcement actions do not eliminate risk.

EPA relies on state laws that govern operations and releases at oil refineries, as well as state financial assurance requirements, to conclude that these regulations reduce risk. EPA’s report that purportedly supports this conclusion simply summarizes some laws from some states, without explaining how they minimize risk. In fact, state laws vary widely and many do not prevent contamination that requires costly cleanups. To compound the problem, many states routinely fail to enforce laws meant to limit harm from chemical manufacturing facilities. As the below examples demonstrate, EPA’s blanket reliance on state laws to eliminate risk is unfounded and arbitrary.

1. States have been cutting environmental oversight funding for years, including key states with chemicals manufacturing industries.

Independent analysis and EPA’s own Inspector General both point to a lack of capacity or willingness to enforce environmental laws in key states for the chemicals industry, specifically Louisiana and Texas. In a December 2019 analysis, the Environmental Integrity Project analyzed states’ ability to enforce federal standards under the Clean Air Act and Clean Water Act, by reviewing the capacity of their state environmental oversight agencies. Their analysis was clear: as emissions and spills have increased since 2008, budgets and staffing for state environmental

agencies has decreased. Nearly half of states have cut their staffing by more than 10%. Indeed, Texas and Louisiana rank 1st and 2nd for environmental oversight budget cuts, respectively, even as both states have seen an unprecedented explosion in the number of new chemical manufacturers within their borders.

An earlier analysis by the EPA Office of the Inspector General, looking at the period 2003-2009 reached similar conclusions. The report found that “state enforcement programs frequently do not meet national goals, and states do not always take necessary enforcement actions... EPA does not allocate enforcement resources according to the enforcement workload or high-priority state enforcement problems. As a result, EPA’s enforcement program cannot assure equal and sufficient protection of human health and the environment to all U.S. citizens or consistent enforcement of regulated entities.” Louisiana was singled out as one of the worst offenders, one of the few states to be in the third or bottom quartile on enforcement of both RCRA, CWA and CAA. Texas was in the third or bottom quartile on both CWA and RCRA enforcement

EPA Response:

As a preliminary matter, EPA discussed in the proposal how it considers enforcement to be an essential tool of the modern regulatory framework, which demonstrates intended function of the regulations. Through compliance and enforcement authorities, EPA and other regulating bodies can compel compliance and require responsible parties to carry out cleanups. The prospect of and financial penalties can further encourage compliance.

EPA’s *Summary Report: Federal and State Environmental Regulations and Voluntary Programs in Place to Address CERCLA Hazardous Substances at Facilities in the Petroleum and Coal Products Manufacturing Industry* provides a comprehensive overview of the modern federal and state regulatory framework that applies to the chemical manufacturing industry. The Report includes the laws and regulations that regulate the production, transportation, treatment, storage, and disposal of hazardous substances and minimize or prevent releases. The Report also describes all the major federal statutes, including the Clean Air Act, Clean Water Act, and RCRA, that are applicable across the chemical manufacturing industry and lay the foundation for this regulatory framework. Standards for the industry, including standards for process equipment maintenance, equipment leakage, and breakage have all contributed to reducing financial assurance risk.

In addition, state regulations provide another layer of environmental protection through state specific air, water, emergency response and planning, and hazardous waste regulatory programs. Some states impose additional requirements on the chemical manufacturing industry. These potentially stricter or additional state standards for emissions, spill prevention, emergency preparedness, and hazardous substance management on facilities that handle toxic or hazardous chemicals can further reduce risk of environmental contamination at these facilities. EPA believes that substantial advances have 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 prevent and address such releases at petroleum and coal products manufacturing facilities.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 30-31

Comment:

3. *Texas state laws on air emissions are only enforced 3% of the time, and the fines collected are a fraction of those allowed under state law—depriving communities of needed response costs.*

The Texas Council on Environmental Quality (TCEQ) is also unable or unwilling to enforce environmental laws. This can be seen very clearly in TCEQ's enforcement of the Clean Air Act's National Ambient Air Quality Standards (NAAQS) under Texas's State Implementation Plan ("SIP"). According to a 2019 report from Environment Texas, "emissions events"—unauthorized emissions above CAA permits from equipment breakdowns, process malfunctions, operator errors or maintenance work—have become common-place at industrial facilities in Texas. Some of the worst offenders are chemicals manufacturers, against whom TCEQ has been reluctant to enforce the law. The report finds, "TCEQ levied financial penalties against just 58 facilities in 2017. Looking back over the last seven years, the total number of enforcement orders filed by TCEQ is less than 3 percent of the total number of emissions events recorded by the agency in that time. The trend since 2011 is that enforcement actions are declining. In the few cases when fines are issued at all, the fines are on average a fraction of what TCEQ is authorized to levy." Environmental groups and local governments have frequently had to step in with litigation to halt and obtain a remedy for these emissions events. An earlier report from the Environmental Integrity project found that these emissions events released more than 500 million pounds of pollutants, including sulfur dioxide, volatile organic compounds, and benzene.

TCEQ has frequently declined to issue penalties based on a finding that emitters have met one of a number of affirmative defenses, relying on the companies' self-reporting for whether those defenses have been met. EPA directed Texas and other states to revise their SIPs to curtail the use of affirmative defenses; however Texas and TCEQ refused. Environment Texas concluded that "EPA should maintain, and vigorously defend in court, its requirement that states strengthen rules dealing with emissions from equipment startups, shutdowns, and malfunctions." This proposed rule does the opposite, instead leaving regulatory enforcement and obtaining financial assurances to the states under the clearly erroneous assumption that those state laws are adequate. In Texas and Louisiana, state-level enforcement is clearly not sufficient to protect life and health in nearby communities or to protect the public from bearing the brunt of clean-up and repair costs.

EPA Response:

Thank you for your comment noting that enforcement programs have flaws. EPA doesn't disagree and recommends readers interested in this matter review the Agency's analysis of enforcement and compliance data in the industry titled *Enforcement, Court Settlements and Judgments in the Chemical Manufacturing Industry*. Of note, 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 uses fund resources to conduct a cleanup, EPA can take an enforcement action to recover its CERCLA costs and replenish government resources.

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. 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 Chemical Manufacturing industry, compliance and enforcement history for the relevant regulations. Based on this review, EPA concludes 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.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 31-32

Comment:

4. *Severe enforcement deficiencies in cases of toxic contamination in California.*

Even in California—the state generally considered to have the strongest environmental regulations in the nation—numerous state enforcement deficiencies have caused major environmental harms. The state itself has acknowledged these deficiencies.

For example, the Legislative Analyst’s Office (LAO) published a report for the state legislature regarding another state branch—the Department of Toxic Substances Control (DTSC). It found deficiencies deep enough to warrant continued oversight by the legislature for the coming years.

This report was issued after public uproar over the contamination of thousands of homes by air emissions of a lead-acid battery recycling facility called Exide. DTSC (and also the local South Coast Air Quality Management District – SCAQMD) allowed Exide to emit lead out of its stack for decades until it closed in 2015. The state had to contribute over \$176 million for cleanup of nearby residential areas, but even the large sums allocated will run out at the end of this year according to statements of DTSC officials to CBE staff. DTSC’s webpage states that as of April 10, 2020, 1,754 homes had been cleaned up. But a DTSC video on this same webpage acknowledges that nearly 10,000 parcels may be impacted within the 1.7 mile- perimeter DTSC identified. Furthermore, community members have asked for cleanup of sites within a far-larger 4.5 mile radius, but no funding is available to complete even those within the DTSC-identified perimeter.

Exide has claimed it is not responsible for lead levels in the community and is therefore not obligated to clean up the affected areas. A somewhat reformed DTSC has rejected these claims and asked the U.S. Attorney's Office to end its non-prosecution agreement with Exide. This underscores the difficulty of resolving these issues after the fact -- heavy industry responsible for chemical contamination is not likely to voluntarily accept the government’s arguments for full

payment. Although Exide is not a chemical manufacturer, one of the primary agencies overseeing it — DTSC — also oversees similar chemical impacts of chemical manufacturers. This same agency was found to have major deficiencies.

State government agencies responsible for oversight do not always have the capacity or the will to ensure public protections. The Legislative Analyst's Office report found broad problems with DTSC, including problems completing permits and inspection, toxics oversight issues, and problems in cost-recovery from polluters. It found: "*In light of concerns about the Department of Toxic Substances Control's execution of its responsibilities in recent years, the Legislature has held numerous hearings to monitor the performance of the department's programs.*" The State concluded:

Over the past few years, the Legislature has approved funding and personnel resources to address specific deficiencies in DTSC's programs. Even with these new resources, DTSC's own projections show that for some programs it will be years before the deficiencies are fully remedied. Therefore, it will be important for the Legislature to continue to oversee DTSC's progress and hold DTSC accountable for producing results over the next several years. . . . In our view, such continued oversight is necessary to ensure that the department continues to improve its performance in several key programs.

Problems of this nature — even in California — underscore the need to ensure protections across all states through federal financial assurances.

EPA Response:

Thank you for your comment noting that enforcement programs have flaws. EPA doesn't disagree and recommends readers interested in this matter review the Agency's analysis of enforcement and compliance data in the industry titled *Enforcement, Court Settlements and Judgments in the Chemical Manufacturing Industry*. After review, EPA determined that active enforcement serves as an important component of the regulatory framework. However, EPA does note that the Exide case referenced by the commenter is not an example of an issue in the chemical manufacturing industry as Exide, as a battery manufacturer, is more appropriately classified as NAICS 335 -Electrical equipment, appliance and component manufacturing.

5.2 Financial Responsibility Regulations

Existing federal and state regulations that require chemical manufacturing facilities to post financial assurance available to cover environmental liabilities.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 32-33

Comment:

5. *State Financial Responsibility laws also do not prevent risk and EPA's conclusions based on the mere existence of such laws in some states are arbitrary.*

The state financial responsibility rules EPA examines either apply only to a small subset of chemical manufacturing facilities (e.g. petrochemical plants in Alaska or phosphatic fertilizer plants in Florida) or only require a company to post financial assurance *after* a release has occurred or as part of submitting a remediation plan, rather than as a condition of constructing or permitting the facility. This post-release approach to financial assurances cedes all leverage to the company, which can delay providing the required assurances, sometimes using the threat of bankruptcy to negotiate the amount or timing of assurances. Phibro Tech in California, discussed earlier in these comments, is a case in point. Because California DTSC did not already have financial assurances on hand, when it requested them as part of an order to Phibro Tech to clean up contamination, the company was able to stonewall and delay. The same study found that DTSC was widely exempting hazardous waste and other facilities from providing financial assurances covering corrective action as a condition of reissuing permits. Given that poor financial health can in many cases contribute to releases through deteriorating equipment, lower staffing, etc. or result therefrom, as a consequence of litigation and tightened credit, this latter approach to financial assurances is wholly inadequate. It greatly increases the risk that companies will resist providing assurances for the full amount of a release, using the threat of bankruptcy.

EPA offers no reason why the mere existence of these inadequate financial responsibility rules in about half of the states chosen for its sample supports a blanket decision not to require financial responsibility under CERCLA at a federal level. It gave no reason why, for example, it would not establish federal financial responsibility rules and then perform a state by state or site by site examination to exempt those facilities that already have financial assurances to cover all possible liabilities stemming from hazardous releases, including site closure and remediation.

EPA Response:

Thank you for your comment. EPA acknowledged in its proposal that the applicability of the existing financial responsibility laws depend on a variety of facility-specific factors, for example, use of a specific piece of equipment (e.g., an underground storage tank that contains regulated substances) or engaging in a specified activity (e.g., a release of a hazardous substance). Furthermore, state financial responsibility programs vary by state and some types of financial responsibility programs exist only in limited subsets of the states reviewed. That being said,

where the state and federal financial responsibility laws apply, EPA believes that they help reduce risk of a Fund-financed response actions. While financial responsibility programs vary in structure and function, they may reduce such risk in a myriad of ways. For example, they may help ensure undercapitalized firms do not engage in environmentally risky enterprises, reduce the incentive to abandon properties with extensive contamination, ensure compliance with protective requirements, and incentivize better environmental practices. For more information on the review conducted by EPA, as part of the proposal, please see: *Review of Existing Financial Responsibility Laws Potentially Applicable to Classes of Facilities in the Chemical Manufacturing Industry* (available in the docket).

It is also important to stress that, as part of its proposal, EPA conducted a systematic evaluation of the Chemical Manufacturing industry which considered not just existing financial responsibility laws, but existing environmental standards, regulations, and practices, the Superfund program's history of cleanups in the industry, and enforcement and compliance history of the industry. As part of this suite of analyses, EPA systematically evaluated CERCLA NPL, 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 85 FR 10135-10144 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 only 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. 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. 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 Chemical Manufacturing industry, compliance and enforcement history for the relevant regulations. Based on this review, EPA concludes 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.

With respect to the Phibro Tech site, cited by the commenter, California has utilized its enforcement authorities and fined Phibro-tech for multiple violations of State laws. In supplementary research conducted by EPA, no evidence was found that the site discussed by the commenter is a Superfund site. See the Chemicals Incidents spreadsheet available in the docket for more information.

Commenter Name:

Commenter Affiliation: Society of Chemical Manufacturers & Affiliates (SOCMA) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1031

Page(s): 8-9

Comment:

EPA properly notes that the RCRA regulations “were designed to prevent the[] types of releases” that are “most prevalent” among the cleanup cases that EPA analyzed, and to “assure that past spills are cleaned up by facility owners and operators.”²⁵ This is undoubtedly part of the reason that, so far as Optima can determine, only two of the 34 facilities on which EPA focused were RCRA-permitted hazardous waste treatment, storage and disposal (TSD) facilities.²⁶ EPA also notes that the RCRA rules require that TSDs maintain financial assurance. The preamble does not, however, explain the details of this requirement, which includes both liability insurance and financial assurance for closure and post-closure care,²⁷ as well as financial assurance for any corrective action obligations contained in a TSD permit.²⁸

The preamble also does not quantify the extent of RCRA financial assurance that is currently outstanding. That figure can be determined, however, and Optima has done so. Optima began by determining the cost estimates for which all RCRA TSD facilities are currently providing financial assurance. Optima then used the EPA’s Enforcement and Compliance History Online (ECHO) database to determine which of those TSDs are classified under NAICS code 325. Finally, Optima aggregated the amounts. As shown in tabular and graphic forms, the NAICS code 325 facilities that are TSDs currently maintain an aggregate of \$3.94 billion in financial assurance.

As the Optima report explains, the proposed rule does not acknowledge that all public corporations are required by SEC Regulation S-K and GAAP to estimate and report environmental and asset retirement obligations.

Two provisions of Regulation S-K are particularly relevant to environmental liabilities:

- S-K Item 101, “Descriptions of Business,” requires “[a]ppropriate disclosure . . . as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment . . . may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries. The registrant shall disclose any material estimated capital expenditures for environmental control facilities for the remainder of its current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem material.”³⁰
- S-K Item 303, “Management’s Discussion and Analysis,” requires disclosure of material commitments for capital expenditures, material trends in capital resources, and known uncertainties that will have a material impact on income.³¹

The SEC relies upon various federal, state, and self-regulatory organizations (SROs) to establish financial reporting standards for the private sector; these are known as Generally Accepted Accounting Principles (GAAP). Currently, the SEC recognizes the Financial Accounting Standards Board (FASB) as the designated authority for establishing GAAP. Guidance on reporting environmental (e.g., remediation) obligations is provided by Accounting Standards Codification (ASC) 410-30. Guidance on reporting asset retirement obligations is provided by

ASC 410-20. Disclosure of these obligations is used by investors and shareholders to evaluate the overall financial health of a company. Private companies may perform similar analyses for purposes of borrowing, and mergers and acquisitions.

Corporations commonly use ASC 410-30 and 410-20, along with applicable ASTM standards and in consultation with external auditors, to make high-quality representative estimates of their environmental and asset retirement obligations. These estimates can be larger than the RCRA financial assurance estimates, because they include the impact not only of RCRA but also of other federal and state environmental regulations (e.g. underground storage tank regulations). They also include estimates associated with voluntary cleanup programs. Lastly, the asset retirement obligations include the full cost of demolishing and decommissioning items such as building structures and processing equipment – not just the cost of environmental obligations.

As a result of these SEC and FASB requirements, therefore, public companies are already required, as a practical matter, to demonstrate to the investing public that they are maintaining financial responsibility for material environmental response liabilities. This fact further lessens the need for EPA to impose such requirements.

EPA Response:

Thank you for the comment. EPA appreciates the supplemental information describing the RCRA Subtitle C financial assurance program and accounting standards. EPA agrees that the RCRA Subtitle C financial assurance program is an important aspect of the modern regulatory framework. Of course, as EPA noted in the proposal, the applicability of the existing financial responsibility laws, including Subtitle C of RCRA, depend on a variety of facility-specific factors, for example, use of a specific piece of equipment (e.g., an underground storage tank that contains regulated substances) or engaging in a specified activity (e.g., a release of a hazardous substance). In the case of the RCRA Subtitle C financial assurance program, the requirements apply only to RCRA hazardous waste treatment, storage and disposal facilities; and most chemical manufacturing facilities are not TSDs. That being said, where the state and federal financial responsibility laws apply, EPA believes that they help reduce risk of a Fund-financed response actions. While financial responsibility programs vary in structure and function, they may reduce such risk in a myriad of ways. For example, they may help ensure undercapitalized firms do not engage in environmentally risky enterprises, reduce the incentive to abandon properties with extensive contamination, ensure compliance with protective requirements, and incentivize better environmental practices. For more information on the review conducted by EPA, as part of the proposal, please see: *Review of Existing Financial Responsibility Laws Potentially Applicable to Classes of Facilities in the Chemical Manufacturing Industry* (available in the docket).

EPA agrees that for public companies, accounting standards established by FASB assist in creating greater transparency and may increase the internalization of environmental costs.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 33

Comment:

As EPA summarizes in the Proposed Rule, the broader chemical manufacturing industry already is thoroughly regulated on a multi-media basis by federal environmental laws, and similar state environmental laws.²⁰² Those regulatory programs provide numerous protections or remedies against historical, ongoing, or threatened “releases” to the environment, and demonstrate that additional financial responsibility for such “releases” through CERCLA § 108(b) would be unwarranted. Similarly, imposing such obligations could potentially undercut or interfere with existing financial assurance obligations or negotiations arising under other environmental laws.

EPA Response:

Thank you for your comment. It is true that, 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. 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 Chemical Manufacturing industry, compliance and enforcement history for the relevant regulations. Based on this review, EPA concludes 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. This comment supports EPA’s analysis presented in the proposal.

5.3. Industry Voluntary Programs

Industry voluntary programs in which chemical manufacturing facilities participate that suggest or impose requirements that reduce environmental liability risk.

Commenter Name:

Commenter Affiliation: American Chemistry Council (ACC) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1033

Page(s): 1

Comment:

Voluntary efforts from this sector have further reduced the risks that the Fund may need to pay for response costs at facilities within the sector.

EPA Response:

This comment supports EPA's analysis presented in the proposal.

6. Legal and Procedural Issues

Legal issues related to EPA's rulemaking, including EPA's legal authority to promulgate financial assurance rule for the chemical manufacturing sector. Procedural issues with respect to EPA's rulemaking methodology.

Commenter Name:

Commenter Affiliation: American Chemistry Council (ACC) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1033

Page(s): 1

Comment:

EPA's prior decisions not to impose additional financial assurance requirements on the hardrock mining, electric utility, petroleum and coal products manufacturing industries all establish important precedents for this matter – as does the decision upholding the hardrock mining determination issued by the U.S. Court of Appeals for the District of Columbia (“D.C. Circuit”). Our members have a common interest in ensuring that EPA appropriately applies the same legally and technically defensible analytical approach in this rulemaking.

EPA Response:

Thank you for your comment of support of EPA's proposal. This comment supports EPA's analysis presented in the proposal.

Commenter Name:

Commenter Affiliation: American Chemistry Council (ACC) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1033

Page(s): 3

Comment:

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

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

Petitioners challenged EPA's decision in the D.C. Circuit on the grounds that it was contrary to the Congressional intent behind CERCLA, arbitrary and capricious, and procedurally defective. Specifically, they claimed that the term “risk” in Section 108(b) was not limited to the risk of

taxpayer-funded response actions and that, regardless of the meaning of risk, the statute required EPA to develop financial assurance requirements for the hardrock mining industry.

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

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

EPA Response:

Thank you for your comment supporting EPA's analytic approach. This comment supports EPA's analysis presented in the proposal.

Commenter Name:

Commenter Affiliation: American Chemistry Council (ACC) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1033

Page(s): 5

Comment:

EPA's analytical approach correctly interprets the term "risk" under CERCLA Section 108(b) and applies it to the facts associated with chemical manufacturing facilities. The Agency's robust evaluation demonstrates why additional financial assurance requirements are unwarranted for this sector. We urge EPA to finalize this decision as proposed.

EPA Response:

Thank you for your comment supporting EPA's analytic approach. This comment supports EPA's analysis presented in the proposal.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 10-11

Comment:

Communities of color are often disparately burdened by a variety of pollution impacts not only from chemical manufacturing, but also from oil refining, oil drilling, use, storage, or distribution of hazardous chemicals, and many others. These pollution sources cumulatively harm people's health, making these communities especially vulnerable to toxic exposures from derelict and defunct chemical manufacturing facilities.

EPA ignores how this proposed action could contribute to creating an environmental injustice, stating that Executive Order No. 12898 does not apply because EPA proposes no regulatory requirements. 86 Fed. Reg. 10146. This is wrong. President Clinton's executive order on environmental justice requires federal agencies "identify[] and address[], as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions[.]" Exec. Order No. 12898, § 1-101 (emphasis added). EPA's proposal not to impose financial assurances on chemical manufacturing facilities is a proposed federal action. As such, it constitutes an activity within the meaning of the order, and EPA must consider how this proposed action would disproportionately burden environmental justice communities. EPA's decision not to impose financial assurances also constitutes a policy of the agency, albeit a policy not to require such assurances. As such, for that same reason, EPA must disclose the impact this action will have on environmental justice communities.

In its proposed action, EPA defines relevant future risk based on first analyzing each polluting sector separately. Such an approach ignores the cumulative pollution burdens experienced by environmental justice communities, by examining risk facility by facility. While it is important to evaluate the unique characteristics of each facility, the analysis should not ignore the cumulative risks faced by communities with a high concentration of chemical manufacturing facilities and other polluting industries.

U.S. EPA found that Basic Chemical Manufacturing (especially concentrated in the Gulf Coast), has almost half of its total value in five states — Texas (17%), California (11%), North Carolina (7%), Louisiana (7%), and Illinois (6%).¹⁵

EPA Response:

Thank you for your comment. EPA disagrees with the assertion that it ignored relevant risks or did not satisfy executive order 12898 regarding environmental justice. EPA developed an analytic framework to assess the appropriateness of CERCLA 108(b) financial responsibility in a manner entirely consistent with CERCLA. See "Statutory Interpretation" section of the final action for more information. EPA's analysis included a systematic review of Superfund cleanup sites in the industry with a variety of contaminants and contaminated media. In effect, the analysis considered the types of risk the Superfund program was designed to address and that would be addressed by any 108(b) financial responsibility. Moreover, many of these sites analyzed were actually the product of pollution from multiple facilities. As such, EPA did consider the impact of cumulative risks from facilities located in close proximity to the extent the CERCLA program does.

With respect to the Executive Order concern, the EPA proposal followed standard practice for regulatory actions that do not establish an environmental health or safety standard.

Commenter Name:**Commenter Affiliation:** Communities for a Better Environment et al. (EarthJustice)**Comment Number:** EPA-HQ-OLEM-2019-0086-1036**Page(s):** 2**Comment:**

Finally, EPA’s no-action proposal is especially troubling because email records from February of 2017 obtained through the Freedom of Information Act suggest newly installed Trump Administration appointees decided not to take action well in advance of the current rulemaking. An email exchange between David Schnare, a former member of Trump’s EPA beachhead team; Charles Dankert of the White House Office of Management; and Donald Benton, then-senior White House Advisor to the EPA, shows Dankert urging Schnare to suggest “recommended actions” on proposed EPA rules long before the agency even started the rulemaking process. **Ex. A**, Email from C. Dankert, OMB Beachhead Team, to D. Schnare, (Feb. 16, 2017). Internal EPA correspondence shows EPA staff taking this advice and recommending a “no action-proposal” on “proposed financial assurance rulemakings” for the chemical manufacturing industry pursuant to CERCLA § 108(b). **Ex. B**, Email from S. Rees, US EPA Director of Office of Policy, to David Schnare (Feb. 24, 2017); **Ex. C**, Attachment, Email from S. Rees, US EPA Director of Office of Policy, to David Schnare (Feb. 24, 2017). This suggests EPA appointees arbitrarily determined at the outset not to regulate—without any data or analysis.

EPA Response:

The emails referred to in the comment do not recommend no-action proposals in advance of the rulemaking, nor do statements in those emails influence the outcome of analyses described in the February 10, 2020, proposal. The February 16, 2017 email from OMB to EPA followed the January 20, 2017 Memorandum for the Heads of Executive Departments and Agencies which directed all Agency heads to review new or pending regulations and notify OMB of actions requiring further review due to law or policy questions. The recommendation of “no action – proposal”, therefore, referred to the January 11, 2017 Regulatory Determination Notice (82 FR 3512), which announced EPA’s intention to move forward with the regulatory process and publish proposed rulemakings for the three additional classes. 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. The “no action - proposal” recommendation meant there was no action required by incoming senior policy staff, and that the notice was a proposal rather than a final action. The recommendation of “no action – proposal” indicates the incoming officials did not plan to reverse the Regulatory Determination Notice.

As described in the proposal, EPA conducted analyses consistent with those described in the January 11, 2017 Notice of Intent to Proceed with Rulemakings, and the findings of those analyses formed the basis for the three rulemakings proposing that requirements under CERCLA Section 108(b) are not warranted.

Commenter Name:

Commenter Affiliation: Communities for a Better Environment et al. (EarthJustice)

Comment Number: EPA-HQ-OLEM-2019-0086-1036

Page(s): 21-22

Comment:

II. EPA IGNORED EVIDENCE RELEVANT TO ACHIEVING THE PURPOSES OF CERCLA.

EPA's proposed action exempting chemical manufacturing facilities from regulation under 108(b) is flawed because EPA solely focuses on risks of a payout from the Superfund trust rather than the broader purposes of CERCLA to protect human health and the environment and make the polluter pay. Additionally, EPA arbitrarily relies on the "modern regulatory framework" as a reason to ignore evidence even though current laws do not eliminate risk, nor do they eliminate existing toxic contamination at oil refineries.

A. EPA ignores examples of CERCLA cleanups that did not result in costs to the Superfund trust.

EPA ignored evidence of risk that did not result in costs to the Superfund trust. By defining the purpose of CERCLA in this manner, EPA's analysis narrowed the relevant evidence to myopically focus on evidence of hazardous releases that required taxpayer expenditures. Fed. Reg. 10129. 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. *See Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 416 (D.C. Cir. 1994) (holding the court need not defer to an agency's policy judgments that are unsupported by or conflict with the statutory scheme).

EPA's sole focus on federal costs runs counter to the purpose of the financial responsibility requirement, because it ignores important goals of protecting the public from harm and making the polluter pay. Financial assurances are not intended to solely account for risks to the federal fisc, but rather to advance all the purposes of CERCLA. 42 U.S.C. § 9608(b)(2) ("In promulgating requirements under this section, the President is authorized to . . . establish[] such evidence of financial responsibility in order to effectuate the purposes of this chapter."). These purposes include helping to prevent harmful releases of hazardous substances by providing incentives for maximum care. As described by Congress:

[A] major goal of the financial responsibility requirements is to enlist insurers to provide additional policing and incentives to monitor the behavior of their insureds. . . It is often policy terms and conditions, as well as inspection and rate-making, that form the basis of the insurer's ability to influence the insured to act carefully and responsibly.

S. Rep. No. 99-11, at 47 (1985).

EPA Response:

EPA disagrees with the commenter that EPA's statutory interpretation is flawed. EPA statutory interpretation was reviewed by the D.C. Circuit in *Idaho Conservat'n League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019) as reasonable, and EPA has properly applied that statutory interpretation and analytical framework in this industry sector.

Commenter Name:**Commenter Affiliation:** Communities for a Better Environment et al. (EarthJustice)**Comment Number:** EPA-HQ-OLEM-2019-0086-1036**Page(s):** 2-5**Comment:**

To reduce the risk of future contamination, CERCLA directs EPA to adopt “financial responsibility” rules to ensure that companies are incentivized to avoid hazardous releases and that they remain financially viable to address them promptly if they occur. 42 U.S.C. § 9608(b)(1). “To ensure that responsible parties have the wherewithal either to reimburse the Superfund or to finance their own response actions, CERCLA mandates that the EPA require certain classes of facilities identified by the EPA to ‘establish and maintain evidence of financial responsibility’ by obtaining, inter alia, insurance, surety bonds or letters of credit.” *Idaho Conservation League v. Wheeler*, 930 F.3d 494, 500 (D.C. Cir. 2019) (quoting 42 U.S.C. § 9608(b)).

To this end, Section 108(b) requires EPA to promulgate financial assurance requirements for classes of facilities that “present the highest level of risk of injury.” 42 U.S.C. § 9608(b)(1). These facilities must 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.” *Id.* Financial assurance requirements should “effectuate the purposes of [CERCLA].” 42 U.S.C. § 9608(b)(1).

Congress’ core purpose in enacting CERCLA was to “respon[d] to the serious environmental and health risks posed by industrial pollution.” *United States v. Bestfoods*, 524 U.S. 51, 55–56 (1998). This purpose is evident, for example, in CERCLA’s direction that EPA designate substances as hazardous “which, when released into the environment may present substantial danger to public health or welfare or the environment.” 42 U.S.C. § 9602(a). Following a release of hazardous substances, CERCLA authorizes EPA to take response measures “necessary to protect the public health or welfare or the environment.” *Id.* § 9604(a). EPA may conduct abatement actions based on “endangerment to the public health or welfare or the environment,” *id.* § 9606(a), sites must be cleaned up to a degree that ensures “protection of human health and the environment,” *id.* § 9621(d), and EPA must prioritize protection of drinking water, *id.* § 9618.

EPA’s no action proposal is particularly surprising, because the death, disease, and poisoning of the public caused by an improper handling and disposal of hazardous contaminants at chemical manufacturing facilities inspired Congress to enact CERCLA in the first instance. The infamous Love Canal disaster caused “birth defects, miscarriages, epilepsy, liver abnormalities, sores, rectal bleeding, headaches—not to mention undiscovered but possibly latent illnesses.” S. Rep. 96-848, at 8. Hooker Chemical Company for years had dumped chemical wastes into a canal near Niagara Falls. *Id.* Later, the city purchased this land for \$1, unaware of the buried contamination, and constructed homes and an elementary school atop. Upon discovering the contamination, President Carter declared a federal emergency, and evacuated all the residents. *Id.* The Hooker Chemical Company also dumped hazardous waste in Montague, Michigan that caused widespread contamination of groundwater. H. Rep. No. 96-1016, pt. 1. Similarly, storage

of pesticide formulation waste products in unlined lagoons in Lathrop, California percolated into the area's drinking and irrigation water—rendering it unusable. *Id.*

In enacting CERCLA, Congress sought to guard against exactly the type of public health and ecological disasters that continue to occur at chemical manufacturing facilities. In legislative history reports, Congress described the disasters facing the nation that propelled passage of CERCLA. Although Congress enacted strong environmental laws, such as the Clean Water Act and Clean Air Act, to protect human health and the environment, these laws failed to deal with “the tragic consequences of improper[], negligen[t], and reckless[] hazardous waste disposal practices[.] . . . existing law is clearly inadequate to deal with this massive problem.” H. Rep. No. 96-1016(I). The House Oversight Committee found that these sites presented a “serious risk to public health” and identified four common characteristics of hazardous waste dump sites: (1) the sites contain large quantities of hazardous waste, (2) unsafe design and disposal methods are widespread, (3) danger to the environment is substantial, and (4) these sites pose major health hazards. H. Rep. No. 96-1016, pt. 1, at 2-3 (1980). By enacting CERCLA, Congress sought to guard against these risks. See also S. Rep. 96-848, at 3 (1980) (expressing concern that “the potential impact of toxic chemicals on the general public and environment through unsound hazardous disposal sites and other releases of chemicals is tremendous.”).

One of the major problems identified by Congress was that hazardous waste sites caused contamination of groundwater and polluted local sources of drinking water. S. Rep. 96-848 at 4 (“The effects of poor disposal methods and abandoned waste disposal sites can be the contamination of surface water and groundwater, causing contamination of drinking water supplies[.]”). Congress was concerned with unsafe disposal methods where hazardous waste was “discharged directly into pits . . . [and] [s]amples of sediment from a water treatment plant only few hundred feet from the site suggest that chemicals from the dumpsite have entered the water.” H. Rep. No. 96-1016, pt. 1, at 3; *see id.* (describing Hooker’s Montague, Michigan site where hazardous waste was dumped in an area that “affords no geological protection against wastes reaching local groundwater.”); *id.* (describing site in Lathrop, California where waste products were “placed in lagoons” and allowed to percolate into permeable soil that threatened the area’s drinking and irrigation water); S. Rep. 96-848 at 4 (“In 1978, the Cedar River, near Charles City, Iowa, was found to contain poisons leached from a nearby dumpsite. . . . This river and the aquifer underlying the dump supply drinking water to 10% of the State’s population.”); *id.* (“At Toone, Tennessee, a chemical company dumped pesticide wastes for years in an area close to groundwater supplies. In 1978, after continued assurances to the community from government officials that their water was safe to drink, the water supply of Toone was found to be contaminated[.]”); S. Rep. 96-848 at 4 (“32 [hazardous waste] sites which have resulted in the closure of public and private drinking water wells, [and] 130 sites with contaminated groundwaters[.]”).

Congress found that where “contaminated groundwater has rendered unusable the local water supplies[.]” the danger to the environment is “substantial” and requires regulation. H. Rep. No. 96-1016, pt. 1, at 3. The Senate Committee on Environment and Public Works found that these “national environmental problems caused by dangerous chemicals” could not be addressed under TSCA or RCRA, and recommended Congress enact CERCLA to address “the pollution of our people and our land by improper disposal, by accidents or misuse of [toxic chemicals].” S. Rep. 96-848 at 2.

CERCLA’s legislative history confirms that Congress enacted the statute not only to make polluters pay, but also to prevent harm to human health and the environment such as “contamination of surface water and groundwater, causing contamination of drinking water supplies, destruction of fish, wildlife and vegetation, and threats to public safety due to health hazards and threats of fires and explosions.” S. Rep. No. 96-848 at 4; see also *id.* at 2 (“[T]he potential impact of toxic chemicals on the general public and environment through unsound hazardous disposal sites and other releases of chemicals is tremendous”).

CERCLA achieves this goal by ensuring that sufficient funds are available to rapidly clean up hazardous waste sites, and to ensure that the polluter pays for response costs, not the federal government, states, or other public parties. However, since the Superfund tax lapsed in the late 1990s, resources of the fund continue to dwindle, and the trust is now funded exclusively by general revenue taxes. Financial assurances are one of the few tools remaining to ensure that polluting companies pay to clean up hazardous wastes they create and mitigate the risk of releasing hazardous pollution that poisons the earth and the American people.

EPA Response:

Thank you for your comment describing features of CERCLA.

Commenter Name: Michael Karnosh

Commenter Affiliation: Confederated Tribes of Grand Ronde Community of Oregon

Comment Number: EPA-HQ-OLEM-2019-0086-1027

Page(s): 1-2

Comment:

Thank you for the opportunity for the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde" or "Tribe") to comment on the proposed rulemaking under Section 108(b) of CERCLA. The current Tribal state of emergency relating to the COVID-19 pandemic precludes a more formal response from Tribal Council at this time (please see the Notice below and the attached Tribal Council Resolution), but as Tribal staff responsible for coordinating intergovernmental participation, I am submitting interim Tribal comments.

NOTICE: The Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde" or "Tribe") has declared an ongoing Tribal state of emergency as of March 18, 2020, due to the effects of the COVID19 pandemic. The Tribe has taken numerous measures to protect Tribal members, employees, and the general public from the novel coronavirus. These measures include but are not limited to a partial shutdown of Tribal government operations. As a result, normal Tribal government procedures are largely disrupted; many reviews, approvals, communications and other processes involving non-life-threatening topics have been suspended at this time, severely reducing Tribal capacity in responding to the Tribe's partner governments on such topics. This is expected to continue for as long as the pandemic continues to pose a risk to the community.

For this reason, the Tribe respectfully requests from its partner governments an immediate extension of time for all applicable deadlines on proposed actions potentially impacting resources of Tribal importance. In order to be fair and effective, avoiding any prejudice to or bias

against the Tribe, the extension currently must be indefinite; upon the return to normal Tribal government operations, the Tribe should be able to determine the time needed to respond meaningfully to each proposed action. Whether or not this extension request is granted fully and immediately, Grand Ronde acknowledges and reserves the right to take steps it deems necessary for protection of Tribal resources. These steps may include but are not limited to: submitting interim Tribal comments within the comment period that may be later modified by official comments from Tribal Council; submitting technical comments while reserving the Tribe's right to later submit policy comments; requesting Tribal consultation on the proposed action upon a return to normal Tribal operations; or choosing not to comment within the comment period while reserving the Tribe's right to comment later. The Tribe respectfully notifies its partner governments that such is the case until further notice. Please see attached Tribal Council Resolution 106-20, passed on April 1, 2020. In this case the Tribe will submit interim Tribal comments within the comment period that may be later modified by official comments from Tribal Council.

WHEREAS, the Grand Ronde Tribal Council, pursuant to Article III, Section I of the Tribal Constitution approved November 30, 1984, by the Acting Deputy Assistant Secretary of the Interior, Indian Affairs, is empowered to exercise all legislative and executive authority not specifically vested in the General Council of the Confederated Tribes of the Grand Ronde Community of Oregon; and

WHEREAS, the Tribe's antecedent tribes and bands ceded their ancestral homelands to the United States through seven ratified treaties in exchange for certain rights and benefits, and subsequently were forcibly relocated to the Grand Ronde Indian Reservation; and

WHEREAS, the Tribe maintains ongoing connections with its ceded lands and other homelands, seeking to protect, restore and enhance Tribal cultural and natural resources; and

WHEREAS, the Tribe advocates for its Tribal resources and interests through government-to-government consultation, participation in review and comment periods, and other governmental processes, particularly on actions potentially affecting important Tribal resources; and

WHEREAS, the Tribal Council through Resolution No. 101- 20 has declared a Tribal state of emergency due to the threats to human health, safety and well-being posed by the novel coronavirus COVID- 19 pandemic, in order to protect and serve its Tribal Members, employees, and the general public; and

WHEREAS, due to the Tribal state of emergency, restrictions on employee work and travel, and the threats posed by COVID- 19, Tribal capacity to participate in governmental processes has been severely reduced, including but not limited to a partial Tribal government shutdown; and

WHEREAS, the Tribe acknowledges and exercises its sovereign right to government-to-government consultation, its right to be consulted on matters involving Tribal cultural and natural resources over its homelands, and its right to a reasonable opportunity to participate in review and comment periods and other governmental processes, undue hardships notwithstanding; and

WHEREAS, the Legislative Action Committee has recommended: 1) requesting from the Tribe's partner governments an immediate extension of time for Tribal participation in all projects and actions potentially affecting resources of Tribal importance for the duration of the COVID- 19 public health emergency's impacts on the Tribe, and (2) acknowledging the Tribe's right to take

immediate steps to advocate for its Tribal resources and interests, including but not limited to the submission of interim Tribal comments by Tribal departments, regardless of whether an extension of time is granted.

NOW THEREFORE BE IT RESOLVED, that the Tribal Council hereby requests from the Tribe's partner governments an immediate extension of time for Tribal participation in all projects and actions potentially affecting resources of Tribal importance for the duration of the COVID- 19 public health emergency's impacts on the Tribe; and

BE IF FURTHER RESOLVED, that the Tribal Council hereby acknowledges the Tribe's right to take immediate steps to advocate for its Tribal resources and interests, including but not limited to the submission of interim Tribal comments by Tribal departments, regardless of whether an extension of time is granted.

CERTIFICATION: the Tribal Council of the Confederated Tribes of the Grand Ronde Community of Oregon adopted this resolution at a regularly scheduled meeting, with a quorum present as required by the Grand Ronde Constitution, held on April 01, 2020 by a vote of 8 yes, 0 no, and 0 abstentions.

EPA Response:

Thank you for your comment describing the Tribe's state of emergency relating to the COVID-19 pandemic. EPA responded to the commenter's request for an extension to the comment period in a letter which can be found in the docket for this rule. The comment period for the proposed rule was scheduled to end on April 21, 2020. After considering this request for additional time, EPA extended the comment period until May 6, 2020 (see 85 FR 21366, April 17, 2020). EPA discusses its tribal consultation and coordination effort further in the Tribal Consultation Summary Memo included in the docket to this final action.

Commenter Name:

Commenter Affiliation: Little Traverse Bay Bands of Odawa Indians (LTBB)

Comment Number: EPA-HQ-OLEM-2019-0086-1032

Page(s): 1

Comment:

On behalf of the Little Traverse Bay Bands of Odawa Indians (LTBB), please accept this comment letter pertaining to the financial responsibility requirements under CERCLA Section 108(b) for facilities in the Chemical Manufacturing Industry (Docket ID No. EPA-HQ-SFUND2019-0086). LTBB appreciates this opportunity to provide feedback on this critical environmental law.

LTBB's traditional way of life, and rights to hunt, fish and gather in the Ceded Territory were reserved in the 1836 Treaty of Washington and reaffirmed by the Federal Court in the case of *United States v. Michigan* (WD MI Case 2: 73 CV 26). LTBB is party to the 2000 Great Lakes and 2007 Inland Consent Decrees entered in that case.

Firstly, LTBB would like to join the public interest organizations "Communities for a Better Environment, Center for Biological Diversity, and Public Citizen" in their request of an extension of the comment period deadline by 60 days in light of disruptions caused by the

COVID-19 pandemic. LTBB would also request that EPA conduct a virtual public hearing to receive public comment on the proposed no action.

This rulemaking is technically complex as it covers 27 different categories of industries that produce thousands of different products, that differently handle and process large quantities of hazardous materials, and which are responsible for over 50% of all reported releases in the Toxic Releases Inventory. Further in-depth analyses is required to evaluate many aspects of the proposed no action, a task made especially difficult by the diversity of the industries within its range.

EPA Response:

Thank you for your comment. EPA responded to the Communities for a Better Environment, Center for Biological Diversity, and Public Citizen request for an extension to the comment period in a letter which can be found in the docket for this rule. The comment period for the proposed rule was scheduled to end on April 21, 2020. After considering this request for additional time, EPA extended the comment period until May 6, 2020 (see 85 FR 21366, April 17, 2020). EPA discusses its tribal consultation and coordination effort further in the Tribal Consultation Summary Memo included in the docket to this final action.

Commenter Name:

Commenter Affiliation: Mosaic Fertilizer, LLC.

Comment Number: EPA-HQ-OLEM-2019-0086-1024

Page(s): 1-3; 5-6

Comment:

The Environmental Protection Agency (EPA) is under a court-ordered deadline to propose a rule by December 4, 2019, on whether to impose financial responsibility requirements under Section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) for chemical manufacturing facilities, which includes phosphate fertilizer manufacturing facilities. Mosaic Fertilizer, LLC (Mosaic) respectfully submits these comments to clarify that, as it pertains to Mosaic's phosphate fertilizer manufacturing facilities, EPA should not include these facilities within the chemical manufacturing sector rulemaking based on Agency and judicial precedent and because those facilities clearly are beyond the reach of 108(b)'s financial assurance requirements.

First, phosphate fertilizer manufacturing facilities were within the scope of EPA's February 21, 2018, final action determining not to issue final regulations for financial responsibility requirements for HRM facilities, a final rule the D.C. Circuit recently upheld. Second, to the extent there are areas or features of phosphate fertilizer facilities which are outside the scope of EPA's final action (e.g., phosphogypsum stack systems---engineered impoundments used to store waste from phosphate fertilizer production, and hereafter "PG stacks", these PG stacks are not subject to CERCLA 108(b)(1) as they are covered by other federal laws, and have substantial financial assurance (FA) in place under enforceable consent decrees under Section 3013(a) of Resource Conservation and Recovery Act (RCRA).

The enclosed information establishes that: (1) EPA has already evaluated most of the phosphate fertilizer sector within the scope of the HRM rule, finding that existing state and federal laws sufficiently address risk of releases, including imposition of FA where warranted; and (2) PG stacks are not within the scope of the HRM rule are not subject to CERCLA because these PG stacks already have substantial FA pursuant to RCRA settlements, which also contain prescriptive standards for stack operation, closure and long-term care. Therefore, it is fully warranted for EPA to propose, for purposes of these fertilizer manufacturing facilities, that no further action is warranted under CERCLA 108(b).

Background

CERCLA 108(b) (1) directs EPA to require certain 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. In August 2014, various environmental groups filed a lawsuit in the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) seeking a writ of mandamus to require issuance of CERCLA 108(b) financial responsibility rules for four industry sectors EPA had determined to represent the highest risk: hardrock mining, electric utilities, chemical manufacturing and oil and gas refining. The D.C. Circuit made it clear that while EPA had to act, the Agency's final action could be to decide no rule is needed: "the proposed joint order does not require EPA to promulgate a new, stricter rule." It "merely requires that EPA conduct a rulemaking and then decide whether to promulgate a new rule."

EPA began rulemaking under §108(b) with the HRM sector, determining in 2018 that no rule was needed. This decision was challenged and on July 19, 2019 the D.C. Circuit issued a unanimous decision in favor of EPA's "no action" rule. The EPA is now reviewing the need for 108(b) FA rules in the remaining sectors.

In determining the scope of the HRM sector, EPA swept broadly to include phosphate fertilizer manufacturing facilities that are not mining but instead engaged in chemical manufacturing. TFI objected to EPA's over-inclusive and illogical definition in comments filed with the agency on July 11, 2017. EPA recognized that "some mineral processing is categorized as chemical manufacturing and, thus, would be outside the scope of the proposed 108(b) regulations for mining and mineral processing." Yet, EPA did not revise the scope of the rulemaking and in issuing its final determination, EPA defined "hardrock mining" to include facilities that extract beneficiate, or process metals, including non-metallic non-fuel minerals, asbestos, gypsum, phosphate rock and sulfur.

As noted above, EPA's authority to impose FA requirements under CERCLA §108(b) is limited to and focused on minimizing the risk that the cost of future corrective actions will require expenditures of public funds. That authority extends only to those facilities that represent the highest risk that the cost of remediation will fall on the public. The statute is also clear that authority to impose FA requirements does not extend to facilities already subject to RCRA or other federal laws. As such, EPA would exceed these statutory limitations if it were to impose FA obligations on facilities such as Mosaic's phosphate fertilizer manufacturing operations, which are already addressed under RCRA; including settlements addressing operational practices, closure and post-closure care and the provision of substantial FA. Finally, EPA has considerable discretion under CERCLA §108(b) to determine acceptable risks in establishing requisite FA, but a "zero-risk" approach is both unnecessary and inappropriate.

Based on the foregoing extensive set of requirements that are already in place, a determination that no additional FA obligations under CERCLA 108(b) are warranted is fully consistent with and compelled by EPA's determination on HRM, endorsed by the D.C. Circuit.

EPA Response:

Thank you for this comment. EPA's proposal, "Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry," proposed to not impose financial responsibility requirements for the chemical manufacturing industry. EPA considered the industry as a whole in its overall analysis, and in doing so did not identify any subsectors of the industry for which financial responsibility requirements are appropriate.

Commenter Name:

Commenter Affiliation: Private citizen

Comment Number: EPA-HQ-OLEM-2019-0086-1012

Page(s): 1

Comment: I would like to request a public hearing on this rule.

EPA Response:

The Agency decided not to hold a public hearing for the proposed rule. The Agency held a public webinar on March 18, 2020.

Commenter Name:

Commenter Affiliation: Private citizen

Comment Number: EPA-HQ-OLEM-2019-0086-1029

Page(s): 1

Comment: The language of Section 108(b) provides general instruction on how to determine what financial responsibility requirements are for each class of facility, but does not impose a quantitative method in determining this. The justification for removing this requirement for Chemical Manufacturers is inherently flawed, and leaves the environment and the public at unnecessary risk. The proposed rule cites "examining records of releases of hazardous substances from facilities in the industry in combination with the payment history of the Fund and enforcement settlements and judgments" as a method of analyzing the possibility for removing the requirement. I believe this is flawed in that putting historical cases in modern terms isn't an exact science, and it removes the nuances both political and cultural that are important to consider.

EPA Response:

EPA disagrees with the commenter that EPA's statutory interpretation is flawed. EPA statutory interpretation was reviewed by the D.C. Circuit in *Idaho Conservat'n League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019) as reasonable, and EPA has properly applied that statutory interpretation and analytical framework in this industry sector.

Commenter Name: Jaimini Parekh, Earthjustice

Commenter Affiliation: Public Citizen & Communities for a Better Environment

Comment Number: EPA-HQ-OLEM-2019-0086-1025

Page(s): 1-3

Comment:

The undersigned public interest organizations request an extension of the comment period deadline by 60 days in light of disruptions caused by the Covid-19 pandemic. The undersigned also request that EPA conduct a virtual public hearing to receive public comment on the proposed no action.

These comments are submitted on behalf of Communities for a Better Environment, Center for Biological Diversity, and Public Citizen. Communities for a Better Environment (CBE) builds people's power in California's communities of color and low-income communities to achieve environmental health and justice by preventing and reducing pollution and building green, healthy and sustainable communities and environments. CBE advocates for California's low-income communities of color that are disproportionately affected by the pollution, hazards, and climate impacts of petroleum refineries. Public Citizen advocates for stronger health, safety, and consumer protections, including robust safety protections to ensure the health of workers and community members who live and work in close proximity to pollution from refineries, coal plants, and other petrochemical facilities.

On February 21, 2020, the U.S. Environmental Protection Agency ("EPA") announced the availability of its proposed action not to impose financial responsibility requirements on chemical manufacturing facilities pursuant to CERCLA § 108(b). This rulemaking is technical complex as evidenced by the record, which contains over 1,000 supporting documents. It covers 27 different categories of industries that produce hundreds if not thousands of different products, and that differently handle and process large quantities of hazardous materials, and which are responsible for over 50% of all reported releases in the Toxic Releases Inventory. Expert analyses is required to evaluate many aspects of the proposed no action, a task made especially difficult by the breadth of the industries within its scope.

Even under ordinary circumstances, far more than 60 days would be required to comment on a proposal that (1) affects 27 different types of industries that as a whole are responsible for 62% of hazardous waste generated nationally, (2) relies on over a thousand documents in support, and (3) would exempt from regulation hundreds if not thousands of facilities in the United States some of which pose explosive hazards and risks—a matter especially concerning given that in the past hundreds of these facilities have required CERCLA response actions. The comment period closes in few short weeks, on April 21, 2020.

An extension of the comment period deadline is not without precedent in this matter. In response to numerous requests by industry, in 2017, EPA delayed the comment deadline on the proposed rule requiring financial assurances for hard rock mining facilities by 90 days due to the technical complexity of that rulemaking. See Dkt. No. EPA-HQ-SFUND-2015-0781.

However, these are not ordinary times. The COVID-19 pandemic has led to office and school closures throughout the country.¹ As a result, members of the public, as well as attorneys and support staff at organizations engaged in this project are forced to make necessary adjustments,

including alternative childcare arrangements and coordination of offsite preparation for timely filing of comments. In many cases, this has led to insufficient time for review and comment preparation on the proposed no action under the current deadline. Additionally, community groups have not been able to meet to coordinate comment submission in light of local public health department and Center for Disease Control recommendations prohibiting gatherings of any substantial size. These groups are working to find alternative ways to provide their members instruction to submit comments.

To accommodate these extenuating circumstances, the undersigned respectfully request that the EPA provide a 60-day extension (until May 20, 2020) on the deadline to submit comments on EPA's proposed action not to impose financial assurances for chemical manufacturing facilities. Such an extension should not pose significant delay or burdens given that EPA is not proposing to undertake any regulatory action. Given the upcoming deadline in this matter, we would appreciate a reply to this request within 48 hours.

Further, given the importance of this issue to members of our organization and affiliates that live near to chemical manufacturing facilities, that face the risk of exposure to hazardous materials in the event of an explosion, or release at these facilities, we request that EPA provide the opportunity for a virtual public hearing to hear from affected communities on how this decision not to take action affects them.

EPA Response:

EPA responded to the commenter's request for an extension to the comment period in a letter which can be found in the docket for this rule. The comment period for the proposed rule was scheduled to end on April 21, 2020. After considering this request for additional time, EPA extended the comment period until May 6, 2020 (see 85 FR 21366, April 17, 2020).

Commenter Name:

Commenter Affiliation: Society of Chemical Manufacturers & Affiliates (SOCMA) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1031

Page(s): 2

Comment:

EPA's first key interpretation is that the level of risk against which the need for financial assurance should be evaluated is *financial* risk; i.e., the risk that the taxpayers will be required to fund future cleanups. CERCLA Section 108(b) authorizes EPA to either adopt or decline to adopt rules that require certain "classes of facilities [to] establish and maintain evidence of financial responsibility." These regulations must not be more than what is required to be "consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances." In particular, the statute instructs EPA to set the *amount* of financial assurance, if any, at that requisite "to protect against the level of risk which the President in his discretion believes is appropriate based on the payment experience of the Fund, commercial insurers, courts settlements and judgments, and voluntary claims satisfaction."

In this rulemaking, as in previous rulemakings under Section 108(b), EPA has interpreted this “amount clause” to “mean the risk of future Fund-financed cleanup actions in that industry.” The D.C. Circuit has specifically upheld this interpretation as reasonable given the structure of the statute and the use of financial terms in that clause. Thus, the operative question in this rulemaking is the likelihood that chemical manufacturing facilities will, in the future, require such expenditures of Fund resources that every facility in the industry should be required to set aside capital to avert such expenditures. As EPA has demonstrated, and as further substantiated in Part II below, that risk is extremely low.

EPA Response:

Thank you for your comment in support of EPA’s 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). This comment supports EPA’s analysis presented in the proposal.

Commenter Name:

Commenter Affiliation: Society of Chemical Manufacturers & Affiliates (SOCMA) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1031

Page(s): 3

Comment:

EPA’s second key interpretation is that its decisions under Section 108(b) should be based on a prediction of what will occur in the future, not what has happened in the past. In particular, this means EPA must evaluate the risk that Fund-financed cleanups will be triggered at chemical facilities operating under the current, modern environmental regulatory system. The proposed rule does not fully discuss the logic behind this interpretation, however, and so we do so here.

This prospective orientation derives directly from the present tense language of the statute. In fact, all references to risk in Section 108(b) are in the present tense (e.g., “Priority . . . shall be accorded to those classes...which the President determines *present* the highest level of risk of injury.”). The statute also speaks of the level of financial assurance being “initially established, and, when necessary, adjusted...based on experience.”

Section 108(b)’s future orientation also derives from the structure of the statute. Section 107 addresses past releases, establishing liability for current and past owners and operators, as well as persons who “arranged for disposal or treatment,” or who “accepts or accepted,” hazardous substances. While Section 107 looks backward, to recover past costs of the Fund, Section 108 looks forward, to minimize such costs in the future by ensuring that an ongoing business has made sufficient provision for potential cleanup costs that, even if the business fails, those funds will be available for any required cleanup of that business’s facilities. In so doing, Section 108 operates like other financial responsibility requirements in the environmental context, in which requirements are calculated by assessing future costs of cleanup, using conservative assumptions. Financial responsibility requirements are not a means to remedy legacy contamination from past practices of defunct operations.

EPA Response:

This comment provides general support for EPA’s approach and finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry.

Commenter Name:

Commenter Affiliation: Society of Chemical Manufacturers & Affiliates (SOCMA) et al.

Comment Number: EPA-HQ-OLEM-2019-0086-1031

Page(s): 4

Comment:

As noted earlier, Section 108(b) authorizes EPA to establish financial responsibility requirements “to protect against the level of risk which [EPA] in [its] discretion believes is appropriate...” The upshot of this language is that EPA is not obligated to require some minimum amount of financial responsibility anytime the Fund has incurred any amount of costs. Rather, EPA is authorized to balance the degree of risk to the Fund with any other factors that are “appropriate.”

The most obvious of these factors is the degree of financial burden on facilities that would have to demonstrate financial responsibility. As the Supreme Court explained recently in interpreting another statute administered by EPA:

“[A]ppropriate” is “the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.” . . . Read naturally in the present context, the phrase “appropriate and necessary” requires at least some attention to cost. One would not say that it is even rational, never mind “appropriate,” to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.

EPA Response:

This comment provides general support for EPA’s approach and finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 13-15

Comment:

In *Idaho Conservation League v. Wheeler*, the D.C. Circuit upheld the same methodology that EPA has applied for purposes of the current Proposed Rule, albeit in the context of facilities covered by the HRM Final Action (*i.e.*, hardrock mining and “mineral processing” facilities). TFI commented on that prior rulemaking in support of EPA’s ultimate decision in the HRM Final Action (after a court-imposed deadline for EPA), and intervened in support of EPA when the HRM Final Action was challenged in the D.C. Circuit. In essence, the petitioners alleged that EPA (1) misinterpreted the term “risk” in CERCLA § 108(b), (2) *was obligated* to promulgate an

affirmative new financial responsibility obligation, and (3) acted arbitrarily in its factual analysis of the industry. They were wrong on all counts.

Specifically, the D.C. Circuit affirmed that EPA had reasonably interpreted CERCLA § 108(b) by focusing on quantifiable financial risks to taxpayers, and deferred to its methodology: “Because § 9608(b)’s use of ‘risk’ in the general mandate and amount clauses is ambiguous and the EPA’s interpretation is reasonable, 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.”

Next, the court agreed that CERCLA § 108(b) did not dictate that EPA issue an affirmative financial responsibility requirement after EPA started the rulemaking process culminating in the HRM Final Action: “[N]othing in § 9608(b) mandates the EPA to promulgate financial responsibility requirements for the hardrock mining industry, authorizing the EPA to decline to do so.” Thus, the court concluded that EPA had discretion to issue or *not* issue a financial responsibility rule under CERCLA § 108(b) — provided EPA had developed a sound administrative record.

Finally, the D.C. Circuit upheld the extensive administrative record that EPA had developed to support the HRM Final Action, and EPA’s methodology for (1) excluding certain historical/closed facilities from the CERCLA § 108(b) evaluation, (2) acknowledging advances in sector-specific environmental regulatory requirements (at both the federal and state levels) since the enactment of CERCLA, itself, (3) weighing the likelihood and consequences of possible bankruptcies, and (4) surveying existing financial responsibility requirements at individual facilities, among other factors. In other words, EPA correctly focused its evaluation on *demonstrable* risks raised by *currently-operating* facilities in the HRM industry (rather than speculative risks, or historical risks). The D.C. Circuit agreed that this methodology was a patently “reasonable” approach under CERCLA § 108(b). Further, EPA was entitled to deference for its interpretation of the statute that culminated in the selection of this methodology.

Today, the Proposed Rule for the chemical manufacturing sector applies the same methodology that was upheld by the D.C. Circuit in the HRM Final Action litigation. EPA has provided a detailed explanation of its approach and methodology for both interpreting and applying a CERCLA § 108(b) risk analysis within the modern chemical manufacturing industry. Further, that approach is consistent with the statutory interpretation and methodology that EPA previously utilized to evaluate the HRM industry, the electric power industry, and the petroleum and coal products industry (as discussed in more detail below). That approach already was upheld as a matter of law after the HRM rulemaking. Moreover, TFI believes that EPA’s conclusion and explanation of how its methodology applies to the broader chemical manufacturing sector is sound, comprehensible, and supported by the current administrative record.

Furthermore, procedurally, EPA has posted all of its background documentation supporting the Proposed Rule to the electronic docket from the outset to provide clear, comprehensive notice of its methodology to the public. Like the former process that ultimately culminated in the HRM Final Action, EPA has clearly explained that CERCLA, itself, “does not specify a methodology for the evaluation,” but then explains EPA’s focus on “the risk of future fund-financed cleanup actions” (citing and relying, in part, on the D.C. Circuit’s analysis). For instance, EPA explains in the Proposed Rule how the sub-sections within CERCLA § 108(b) are “sufficiently

interrelated” to focus on financial risks, and then proceeds to discuss its investigation of the recent “payment history of the Fund, and enforcement settlements and judgments” relevant to the chemical manufacturing industry. The Proposed Rule also notes that “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,” or federal programs. Finally, EPA explains how it incorporated public comments to refine its overall approach for analyzing data sources that should be included for developing the Proposed Rule, starting with prior notices regarding EPA’s CERCLA § 108(b) rulemakings.

Therefore, procedurally and substantively, EPA already has created a strong foundation for its evaluation of the chemical manufacturing industry under CERCLA § 108(b). That evaluation is consistent with the statute and D.C. Circuit precedent.

EPA Response:

This comment provides general support for EPA’s approach and finding that CERCLA 108(b) financial responsibility requirements are not warranted for the chemical manufacturing industry.

Commenter Name:

Commenter Affiliation: The Fertilizer Institute

Comment Number: EPA-HQ-OLEM-2019-0086-1028

Page(s): 6

Comment:

Importantly, from the outset of the rulemaking process, EPA has followed a sound and consistent methodology to develop the Proposed Rule, and evaluate the historical and current-day information regarding environmental issues at chemical manufacturing facilities. That methodology is supported by EPA’s prior interpretations of CERCLA § 108(b) and U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) precedent. EPA’s approach also is consistent with all of the Agency’s prior final actions under the statute. Moreover, EPA’s analysis has been both conservative and overly-inclusive: To date, its administrative record shows that the Agency has considered virtually all facilities that could be relevant to its analysis of risk under CERCLA § 108(b) within the fertilizer industry. Below, TFI explains that phosphoric acid manufacturing operations (an essential manufacturing step preceding the production of phosphate-based fertilizers, and also in NAICS Code 325312 (*i.e.*, Phosphatic Fertilizer Manufacturing¹¹)) previously were evaluated through the HRM rulemaking, and therefore, should not be included within the scope of this rulemaking (*i.e.*, because EPA already evaluated them as “mineral processing” facilities and made a final decision during the HRM rulemaking). Nevertheless, the conclusion is the same: The record developed for this subsequent rulemaking simply *reinforces* EPA’s prior decision that phosphoric acid manufacturing operations do not warrant new financial responsibility requirements under CERCLA § 108(b).

EPA Response:

Thank you for this comment. EPA’s proposal, “Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry,” proposed to not

impose financial responsibility requirements for the chemical manufacturing industry. EPA considered the industry as a whole in its overall analysis, and in doing so did not identify any subsectors of the industry for which financial responsibility requirements are appropriate.