



# **CERCLA 108(b) Financial Responsibility Rulemaking**

**For Facilities in the Electric Power Generation, Transmission, and Distribution Industry**

**Public Webinar**

**July 18, 2019**



## Purpose of Webinar

To provide:

- An overview of section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) regarding Financial Responsibility
- A review of the history of EPA's actions with respect to CERCLA 108(b)
- An introduction to the CERCLA 108(b) proposed rulemaking for the Electric Power Generation, Transmission and Distribution industry signed by the EPA Administrator on July 2, 2019




# Outline

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# CERCLA Background

- The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) establishes a comprehensive environmental response and cleanup program.
- Generally, CERCLA:
  - Authorizes EPA to undertake removal or remedial actions in response to any release or threatened release into the environment of “hazardous substances” or, in some circumstances, any other “pollutant or contaminant.”
  - Imposes liability for response costs on a variety of parties, including certain past and current owners and operators, generators, arrangers, and transporters of hazardous substances.



## CERCLA 108(b) Background

Statutory language provides general instructions on how to determine what financial responsibility requirements to impose for a particular class of facility.

- A key purpose of section 108(b) is to assure that owners and operators make financial arrangements to address risks from the hazardous substances at their sites.
- 108(b)(1) directs EPA to develop regulations that require classes of facilities to establish evidence of financial responsibility “consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances.”
- 108(b)(2) directs that the “level of financial responsibility shall be initially established and, when necessary, adjusted to protect against the level of risk” that EPA “believes is appropriate based on the payment experience of the Fund, commercial insurers, courts settlements and judgments, and voluntary claims satisfaction.”



## Additional Classes Rulemaking and Litigation History

- February 25, 2009 - Court Order requiring EPA to publish a Priority Notice to identify the classes of facilities for which EPA would first develop financial responsibility requirements under CERCLA 108(b).
- July 28, 2009 - EPA published the 2009 Priority Notice, identifying hardrock mining facilities as the first industry EPA would address.

## Additional Classes Rulemaking and Litigation History (cont.)

- On January 6, 2010 EPA published an Advanced Notice of Proposed Rulemaking (ANPRM) identifying three additional industries for which EPA would develop proposed regulations identifying appropriate financial responsibility requirements under CERCLA 108(b), the:
  - Chemical Manufacturing industry (NAICS 325)
  - Petroleum and Coal Products Manufacturing industry (NAICS 324)
  - Electric Power Generation, Transmission, and Distribution industry (NAICS 2211)



## Additional Classes Rulemaking and Litigation History (cont.)

- August 2014 – EPA was sued in the U.S. Court of Appeals for the District of Columbia Circuit to require EPA to issue CERCLA 108(b) financial responsibility rules for the hardrock mining industry, and the three other identified industries.
- January 29, 2016 – the Court granted a joint motion from the parties and issued an Order establishing a publication schedule for rulemaking for hardrock mining and the three additional classes industries.

## Additional Classes Rulemaking and Litigation History (cont.)

- January 2017 EPA published a Notice of Intent to Proceed with Rulemakings that stated that EPA had not identified sufficient evidence to determine that initiating rulemaking was NOT warranted, nor had EPA identified sufficient evidence to establish 108(b) requirements.
  - Stated that EPA would decide whether proposal of requirements was necessary and, if they were, propose appropriate requirements.
  - If EPA were to determine that requirements under CERCLA § 108(b) are not necessary, EPA would propose to not impose requirements.



## Current Proposal - Overview

Notice of Proposed Rulemaking signed by the EPA Administrator on July 2, 2019.

- Concludes that financial responsibility requirements under CERCLA § 108(b) for the Electric Power Generation, Transmission, and Distribution industry are not necessary.
- Presents the supporting information and analysis EPA used to reach this conclusion.
- Proposes to not impose financial responsibility requirements for the industry, thus does not include regulatory text.
- Solicits public comment on the proposal and the supporting information and analysis.



## Current Proposal – Analytical Approach

- Evaluates 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.
- Considers historical cleanup cases to identify potential risk at currently operating facilities and where taxpayer funds were expended for response action.
- Assesses the risk posed by facilities operating under modern conditions, *i.e.*, the types of facilities to which financial responsibility requirements would apply, by identifying and considering relevant current federal and state regulatory requirements, financial responsibility requirements, and voluntary protective practices.



# Current Proposal – Analytical Approach

## Areas of Analysis

- Industry characterization
  - Current industry practices
  - Industry economic profile
- Cleanup sites analysis
  - Cleanup sites evaluations
- Role of federal and state regulatory programs and voluntary protective practices
- Existing state and federal financial responsibility programs
- Compliance and enforcement history



## Analysis: Industry Characterization – Current Industry Practices

- Facilities classified in North American Industry Classification System (NAICS) code 2211
- NAICS 2211 is defined as: facilities primarily engaged in generating, transmitting, and distributing electric power. Establishments in this industry may perform the following activities:
  - generate electric energy
  - operate transmission systems that convey electricity from the generation facility to the distribution system
  - operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer
- Most recently available census data identifies the size of the industry at 10,330 establishments nationally



## Analysis: Industry Characterization - Economic Profile

- EPA prepared a high-level economic profile of the industry, which includes a summary of relevant financial metrics, market consolidation and diversification trends, industry default risks, and accounting standards for environmental liabilities.
- EPA found that market structures and typical bankruptcy restructuring in the industry suggest that, as a whole, the industry should retain the capacity and fiduciary responsibility to pay the costs of addressing their environmental obligations.
  - Publicly-owned utilities subject to rate-setting regulations, as well as federally-owned utilities, are less likely to default on liabilities than in other industries.
  - For investor-owned utilities and those that operate in deregulated markets, bankruptcy code provisions and legal precedents can provide other protections against the discharge of environmental liabilities in bankruptcy.



## Analysis: Cleanup Sites Analysis

- In evaluating the need for financial responsibility requirements, EPA focused first on assessing response actions at Superfund National Priority List (NPL) sites and sites using the Superfund Alternative Approach (SAA), and also assessed Superfund removals at non-NPL sites.
- Additionally, given the small number of NPL and SAA cleanup cases and the consideration of Coal Combustion Residuals (CCR) damage cases for the 2010 ANPRM, EPA chose to evaluate the potential risk from CCR damage cases.
- EPA collected information on the timing and nature of releases or threatened releases at the sites, focusing on facility operation end dates, release dates, sources of contamination, NPL proposal dates, contaminated media, type of contaminant, cleanup lead and information on Superfund expenditures.



## Analysis: Cleanup Sites Analysis (cont.)

EPA identified cases where releases had occurred under a modern regulatory structure and releases that resulted in taxpayer funded response actions:

- NPL or SAA sites where the pollution incident occurred before 1980 (the year CERCLA was enacted and initial regulations under RCRA subtitle C governing the generation, treatment, storage, and disposal of hazardous waste were promulgated) were screened out.
- Using Superfund program data, EPA screened out the potentially responsible party (PRP) lead sites.
- EPA reviewed the remaining sites, considering the site history, and pollution sources at the site in the context of the regulations that would be applicable to that facility today.



## Analysis: Cleanup Sites Analysis - Results (cont.)

- The 10 CCR damage cases that remain after the pre-1980 and Responsible Party lead screening steps were assessed against today's modern regulatory framework.
- The releases were all found to have occurred prior to promulgation of the 2015 CCR Rule and therefore they were screened from further consideration as preceding the modern regulatory framework for CCRs.
- The 2015 CCR Rule was specifically designed to include requirements that address the risks from coal combustion residue disposal – such as leaking of contaminants into groundwater, blowing of contaminants into the air as dust, and catastrophic failure of coal ash surface impoundments. (These are the sources of contamination identified in the CCR damage cases.)

\* 2015 Disposal of Coal Combustion Residuals from Electric Utilities Rule

# Analysis: Cleanup Sites Analysis - Results

Table 1: Evaluation Results for NPL and SAA Sites in the Electric Power Generation, Transmission and Distribution Industry

Total NAICS 2211 NPL & SAA Sites Evaluated	Number of NAICS 2211 NPL & SAA Sites Screened Out Based on Pre-1980, or PRP Lead Status	Detailed Review Concluded Release Occurred Prior to Modern Regulation	Detailed Review Identified a Possible Modern Regulation Release but no Taxpayer Expenditures	Cases with Release(s) Under Modern Regulation that Required Taxpayer Funded Response
5	5	0	0	0

Table 2: Evaluation Results for CCR Damage Cases in the Electric Power Generation, Transmission and Distribution Industry


Total Proven CCR Damage Cases Evaluated	Number of CCR Damage Cases Screened Out Based on Pre-1980, or Responsible Party Lead Status	Detailed Review Concluded Release Occurred Prior to Modern Regulation	Detailed Review Identified a Possible Modern Regulation Release but no Taxpayer Expenditures	Cases with Release(s) Under Modern Regulation that Required Taxpayer Funded Response
27	17	10	0	0

# Analysis: Cleanup Sites Analysis - Results (cont.)

Table 3: Evaluation Results for non-NPL Superfund Removal Sites in the Electric Power Generation, Transmission and Distribution Industry

Total NAICS 2211 Superfund Removal Cases Evaluated	Number of NAICS 2211 Superfund Removal Cases Screened Out Based on Pre-1980, or PRP Lead Status	Detailed Review Concluded Release Occurred Prior to Modern Regulation	Detailed Review Identified a Possible Modern Regulation Release, but no Taxpayer Expenditures	Cases with Release(s) Under Modern Regulation that Required Taxpayer Funded Response
24	19	0	3	2

- EPA did not identify any cases where contamination arising under a modern regulatory framework resulted in significant Fund expenditures.
- Sources of contamination observed at these sites include groundwater contamination from unlined or leaking CCR surface impoundments and landfills, catastrophic failures/breaches of dikes, and collapse of dry ash stacks.
- Issues observed at most removal sites were legacy PCB and asbestos contamination resulting from the handling and disposal of PCB-containing oil and asbestos-containing insulation materials at fossil fuel powered electric generation plants.



## Analysis: Role of Federal and State Regulatory Programs and Voluntary Protective Practices


- EPA gathered information about federal and state environmental programs and industry voluntary programs applicable to currently operating facilities within the industry today.
- EPA found that a comprehensive regulatory framework has developed since the enactment of CERCLA, including federal statutes that are applicable across the entire industry such as the Clean Air Act (CAA), the Clean Water Act (CWA), CERCLA, Toxic Substances Control Act (TSCA), and RCRA.
- Additional state regulations address issues related to air pollution, water pollution, emergency planning and response, hazardous substances management, and hazardous and non-hazardous waste disposal and management.
- EPA reviewed facility Risk Management Plans, industry materials, government literature and academic literature to locate voluntary programs and found that the industry voluntary programs can be effective at reducing both pollution and the frequency of government enforcement actions.



## Analysis: Role of Federal and State Regulatory Programs and Voluntary Protective Practices (cont.)

EPA evaluated the extent to which activities that contributed to the risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances are now regulated.

- In particular, the 2015 CCR Rule was identified as addressing the types of risks observed in the CCR proven damage cases.
- PCB contamination and asbestos contamination are addressed by restrictions on manufacturing, use, storage, and disposal under TSCA. Additionally, regulations under TSCA provide for the cleanup of PCBs.
- Under the Clean Air Act, the Asbestos NESHAP established requirements that apply to asbestos removal, transportation, and disposal practices from a variety of sources, and is intended to minimize the release of asbestos fibers during activities involving the handling of asbestos.



# Analysis: Existing Federal and State Financial Responsibility Programs

EPA reviewed existing programs that cover a wide range of liabilities, including closure, post-closure care, corrective action, third-party personal injury/property damage, and natural resource damages.

- These categories of damages, actions, and costs are like those that could be covered by CERCLA 108(b), and thus they help inform the need for CERCLA 108(b) Financial Responsibility (FR) for this industry.
- In addition, the existence of FR requirements can help create incentives for sound practices, reducing the risk of releases requiring CERCLA response action.
- EPA identified a range of existing federal and state FR programs that may be applicable to facilities in the industry, and these state and federal FR programs help reduce risk at facilities where they are applicable.



## Analysis: Compliance and Enforcement History

- Compliance assistance, monitoring, and enforcement are important components of the regulatory framework.
  - Compliance monitoring can identify noncompliance at regulated facilities
  - Enforcement provides legal instruments to ensure correction of deficiencies to achieve compliance with environmental requirements.
- The compliance and enforcement actions documented show that where noncompliance is identified, the preponderance of industry responsible parties are conducting or paying for cleanups, returning to compliance, and improving public health and the environment.



## Decision to Not Propose Requirements

- Based on the analysis, EPA concludes that the degree and duration of risk posed by this industry does not warrant financial responsibility requirements under CERCLA 108(b) and thus is proposing to not issue such requirements.
- EPA did not identify any cases where contamination arising under a modern regulatory framework resulted in significant Fund expenditures.
- Note that the analysis and proposed finding in the proposal are not applicable to and do not affect, limit, or restrict EPA's authority to take a response action or enforcement action under CERCLA at any particular facility in the industry. The rulemaking record supports the Agency's proposal for this class, but a different set of facts could demonstrate a need for a CERCLA response action at an individual site.
- This proposed rulemaking also does not affect the Agency's authority under other authorities that may apply to individual facilities, such as the CAA, the CWA, RCRA, and TSCA.



## Potential Tribal Interests

- CERCLA authorities apply in Indian country.
  - A final decision to regulate or not regulate electric power generation, transmission, and distribution facilities under CERCLA 108(b) would apply to such facilities in or near Indian country.
  - EPA encourages tribes to submit comments to the docket to identify information on existing tribal financial responsibility requirements and any other information that you believe may be relevant to the development of the rule.
- If a tribe believes they could be affected by this proposed action, EPA invites the tribe to consult with EPA prior to the Agency issuing the final rule. The deadline to contact EPA is August 16, 2019.



## Potential Alaska Native Claims Settlement Act (ANCSA) Corporations Interest

- EPA encourages the ANCSA Corporations to submit comments to the docket to identify any information that the ANCSA Corporation believes may be relevant to the development of the rule.
- If a ANCSA Corporation could be affected by this proposed action, EPA invites the ANCSA Corporation to meet with EPA by phone prior to the Agency issuing the final rule. The deadline to contact EPA is August 16, 2019.


# Additional Classes Court Ordered Rulemaking Schedule

Court Ordered Deadlines	Proposal	Final
Industry 1 (EPA first proposed Electric Power Generation, Transmission, and Distribution Industry)	July 2, 2019	December 2, 2020
Industry 2	December 4, 2019	December 1, 2021
Industry 3	December 1, 2022	December 4, 2024



## Other Additional Classes Rulemakings

- Petroleum and Coal Products Manufacturing Industry (NAICS 324)
  - Anticipated to be the second industry EPA will propose 12/4/2019
- Chemical Manufacturing Industry (NAICS 325)
  - Anticipated to be the third industry EPA will propose 12/4/2019



## How to provide public comment on the Electric Power Industry Rulemaking

- Prepublication copy available now at <https://www.epa.gov/superfund/superfund-financial-responsibility#ElectricPower>
- Anticipate Federal Register publication soon.
- Proposal and supporting documentation:
  - Docket ID No. EPA-HQ-OLEM-2019-0085
- Instructions on how to submit public comment are provided in the proposal text.
- Public comment period: 60 days from *Federal Register* publication.
- EPA solicits comments on all aspects of this proposal, including the completeness of our data.
- Comments should be submitted at Regulations.gov, referencing the above Docket ID number.