CERCLA 108(b) Financial Responsibility Rulemaking

for Facilities in the Petroleum and Coal Products Manufacturing Industry

Public Webinar

January 29, 2020

Outline

- Purpose of webinar
- CERCLA 108(b) background
- Litigation history
- Rulemaking schedule
- Rulemaking history
- Overview of current proposal
- Decision to not propose requirements
- Potential Tribal Interest
- How to provide comment

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 Petroleum and Coal Products Manufacturing Industry.

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

CERCLA 108(b) 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."
- Establish the level of financial responsibility, and, when necessary, adjust it, to protect against the level of risk that EPA in its discretion believes is appropriate based on the payment experience of the Fund.

The statutory language on determining the degree and duration of risk and on setting the level of financial responsibility confers a significant amount of discretion on EPA.

CERCLA 108(b) Background (cont.)

CERCLA 108(b) also instructs EPA to:

- Publish, within three years from the date of enactment of CERCLA (1980), a "priority notice" identifying the classes of facilities for which EPA would first develop financial responsibility requirements. Priority for development of requirements was to be accorded to those classes of facilities that present the highest level of risk of injury.

Mandatory Duty/Mandamus Litigation

- March 11, 2008 - Sierra Club, Great Basin Resource Watch, Amigos Bravos, and Idaho Conservation League filed suit alleging that EPA had not complied with CERCLA 108(b).
- February 25, 2009 - the US District Court ordered EPA to identify classes and publish a Priority Notice.
- July 28, 2009 - EPA published a Priority Notice which identified the hardrock mining industry as the first industry to evaluate for financial responsibility regulations, and indicated it was evaluating data to consider other industries for possible regulation

Litigation History (cont.)

- January 6, 2010 – EPA published an Advanced Notice of Proposed Rulemaking (ANPRM) identifying three additional industries:
  - Electric Power Generation, Transmission, and Distribution Industry
  - Petroleum and Coal Products Manufacturing Industry
  - Chemical Manufacturing Industry

Litigation History (cont.)

- August 2014 – Litigants filed a new suit seeking a writ of mandamus requiring issuance of CERCLA Section 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.

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 so, would propose appropriate requirements.
  - If EPA were to determine that requirements under CERCLA Section 108(b) are not necessary, EPA would propose to not impose requirements.

Court-Ordered Rulemaking Schedules

Court Order ***(EPA selected)***	**Proposal Signature Date**	**Final Signature Date**
Industry 1 *(Electric Utilities)*	July 2, 2019	December 2, 2020
Industry 2 *(Petroleum & Coal Products)*	December 4, 2019	December 1, 2021
Industry 3 *(Chemical Manufacturing)*	December 1, 2022	December 4, 2024

Rulemaking History

- December 1, 2016 - EPA signed a proposed rule on financial responsibility requirements for certain classes of facilities in the Hardrock Mining industry.
- December 1, 2017 - EPA signed a final action to not issue regulations for financial responsibility for the Hardrock Mining industry. The decision was based on EPA's:
  - Interpretation of the statute, and
  - Analysis of the record developed for the rulemaking addressing the risk of taxpayer funded cleanups at hardrock mining facilities operating under modern management practices and modern environmental regulations.

Rulemaking History(cont.)

- After the Agency issued its final action for hardrock mining, the litigants involved in the mandamus lawsuit challenged that Final Action.
- July 19, 2019 – DC Circuit Court of Appeals upheld EPA's interpretation of the statute and its decision not to impose financial responsibility requirements for hardrock mining.
- July 2, 2019 – EPA signed a notice proposing to not impose CERCLA108(b) financial responsibility requirements for the Electric Power Generation, Transmission, and Distribution industry.
  - Based on EPA's interpretation of CERCLA 108(b);
  - Consistent with the analytical principles for hardrock mining final action; and
  - Solicited public comment on the proposal that financial responsibility requirements for the electric power industry are not necessary, and the supporting information and analysis.

Current Proposal: Overview

- Propose to not impose financial responsibility requirements under CERCLA 108(b) for the Petroleum and Coal Products Manufacturing industry based on the conclusion that the degree and duration of risk posed by this industry does not warrant financial responsibility requirements under CERCLA 108(b).
- Present the supporting information and analysis EPA used to reach the proposed conclusion, which are consistent with the Hardrock Mining final action and the Electric Power Generation, Transmission, and Distribution proposal.
- Solicit 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 (cont.)

Areas of Analysis

- Industry Characterization
  - Current industry practices/operation
  - Industry economic profile
- Cleanup Sites Analysis
- Role of Federal and state regulatory programs and voluntary protective practices
- Existing state and Federal Financial Responsibility Programs
- Compliance and Enforcement History

Current Proposal: Industry Characterization

- Facilities classified in North American Industry Classification System (NAICS) code 324.
- NAICS 324 is defined as facilities involved in the transformation of crude petroleum and coal into usable products.
- Most recently available census data identify the size of the industry at 2,167 establishments nationally.
- Sector is relatively stable financially with low default risk.

Current Proposal: 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.
- EPA collected information on the timing and nature of releases or threatened releases at the sites. Specifically, EPA sought to identify, as applicable, facility operation end dates, release dates, sources of contamination, NPL proposal dates, contaminated media, type of contaminant, cleanup lead, and information on Superfund expenditures.

Current Proposal: Cleanup Sites Analysis (cont.)

EPA identified cases where releases had occurred under a modern regulatory structure and releases that resulted in Fund-financed response actions:

- NPL or SAA sites where the pollution incident occurred before 1980 (the year CERCLA was enacted and initial regulations under Resource Conservation and Recovery Act (RCRA) Subtitle C governing the generation, treatment, storage, and disposal of hazardous waste were promulgated) were screened out.
- EPA removed sites where significant Fund expenditures had not occurred by screening 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 today.

Cleanup Sites Analysis Results – NPL/SAA Sites

Petroleum and Coal Products Manufacturing Industry

NAICS 324 NPL and SAA sites evaluated	Number of NAICS 324 NPL & SAA sites screened out based on pre-1980, or PRP lead status	Detailed review concluded release occurred prior to the modern regulatory framework	Detailed review identified a possible modern regulation release but no significant taxpayer expenditures	Cases with release(s) under modern regulation that required taxpayer funded response
34	26	6	2	0

Cleanup Sites Analysis Results - Removals

Petroleum and Coal Products Manufacturing Industry

Total NAICS 324 Superfund removal cases evaluated	Number of NAICS 324 Superfund removal cases screened out based on pre-1980, or PRP lead status	Detailed review concluded release occurred prior to the modern regulatory framework	Detailed review identified a possible modern regulation release, but no significant taxpayer expenditures	Cases with release(s) under modern regulation that required taxpayer funded response
51	30(16)*	2	2	1

*an additional 16 sites were removed because EPA determined that the industrial activities did not involve petroleum refining or coal products manufacturing

Cleanup Sites Analysis Results: Prevalent Sources

- EPA identified only a limited number of cases in the industry where contamination arising under a modern regulatory framework resulted in significant Fund expenditures.
- Sources of contamination observed at the NPL, SAA and Non-NPL removal sites include the following:
  - In the Petroleum and Coal products Manufacturing industry the most prevalent sources of contamination included unlined or leaking storage tanks, drums, surface impoundments, and surface water lagoons, abandoned units, and uncontrolled polluted stormwater runoff.

Role of Federal and State Regulatory Programs and Voluntary Protective Practices

- EPA identified a range of existing Federal and state Financial Responsibility programs that may be applicable to facilities in this industry.
- EPA is basing its regulatory decision on risk posed by facilities operating under modern conditions, *i.e.,* the types of facilities to which financial responsibility requirements would apply.
- Thus, EPA gathered information about Federal and state environmental programs and voluntary programs that apply to currently operating facilities in the Petroleum and Coal Products Manufacturing industry.
- 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, with a focus on the prevalent sources of contamination identified in the cleanup sites analysis.
- EPA found that a comprehensive regulatory framework has developed since the enactment of CERCLA, including regulations under Federal statutes such as the CAA, the CWA, CERCLA, TSCA, and RCRA.

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

- In particular, the comprehensive regulations for the management and disposal of hazardous waste, promulgated under the authority of RCRA, were designed to prevent these types of releases and assure that past spills are cleaned up by facility owners and operators.
  - The Hazardous and Solid Waste Amendments (HSWA) substantially expanded corrective action authorities and created the land disposal restrictions (LDR) program.
- Section 112(r) of the CAA Amendments require certain facilities to generate Risk Management Plans (RMP) to mitigate the effects of a chemical accident and coordinate with local response personnel. Significant chemical accidents have declined more than 50% since the original RMP requirements became effective in 1999.

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

- Specific Federal and state regulations address issues related to air and water pollution, emergency planning and response, hazardous substances management, and hazardous and non-hazardous waste disposal and management.
- EPA found that the network of Federal and state regulations applicable to this industry creates a comprehensive framework that applies to prevent releases that could result in a need for future cleanup.
- To locate voluntary programs, EPA reviewed a variety of industry materials, government literature and academic literature, and found that the industry voluntary programs can be effective at reducing both pollution and the frequency of government enforcement actions.

Current Proposal: Existing 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 a CERCLA 108(b) rulemaking, and thus they help inform the need for CERCLA 108(b) financial responsibility requirements.
- In addition, existing financial responsibility programs help create incentives for sound practices, reducing the risk of releases requiring CERCLA response action.

Current Proposal: Compliance and Enforcement

- Compliance monitoring can identify noncompliance at regulated facilities.
- Enforcement provides legal instruments to ensure correction of deficiencies and cleanup.
- Enforcement activities reviewed utilizing EPA's Enforcement and Compliance History Online (ECHO) data system include major CERCLA and RCRA enforcement cases.
- The compliance and enforcement actions that ensure responsible parties conduct or pay for cleanups, drive return to compliance, and incentivize compliance documented in this industry demonstrates proper functioning of the modern regulatory framework.
- Active enforcement serves as an important component of the regulatory framework.

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 identified only one case in the Petroleum and Coal Products Manufacturing Sector where contamination arising under a modern regulatory framework resulted in significant Fund expenditures

Decision to Not Propose Requirements (cont.)

- Note that the analysis and proposed findings 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. 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 Interest

- CERCLA authorities apply in Indian country.
  - A final decision to regulate or not regulate 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 February 28, 2020.

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 February 28, 2020.

How to Provide Comment

- Petroleum and Coal Products Notice of Proposed Rulemaking (NPRM) published in the FR on December 23, 2020 (84 FR 70467) at: https://www.regulations.gov/docket?D=EPA-HQ-OLEM-2019-0087
- Instructions on how to submit public comment are provided in the text of the proposal.
- 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 for the proposal.