



May 6, 2020

U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
Attn: Docket ID No. EPA-HQ-OLEM-2019-0086

via Regulations.gov and via Email

Re: Comments on EPA's Proposed Rule Regarding Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry

Dear Sir or Madam:

These comments are submitted on behalf of the Society of Chemical Manufacturers & Affiliates (SOCMA), American Chemistry Council (ACC), American Coke and Coal Chemicals Institute (ACCCI), and American Fuel and Petrochemical Manufacturers (AFPM) (collectively, the Associations) in support of the U.S. Environmental Protection Agency (EPA)'s proposal not to impose additional financial responsibility requirements on facilities in the chemical manufacturing industry under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹

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.

The Associations commissioned Optima Analytics, Inc. (Optima) to conduct an independent review and critique of the record underlying EPA's analysis. Optima's conclusions validate EPA's analysis. Indeed, they go further, concluding that taxpayer-funded cleanups at chemical manufacturing facilities are even less likely than EPA estimated:

- No chemical manufacturing facility appears to have been listed on the National Priorities List (NPL) for releases only occurring under the modern regulatory framework (i.e., since 1980).
- Only six other chemical manufacturing facilities where Superfund ("Fund") response costs have been incurred appear to have had releases that occurred under the modern regulatory framework. Those costs amounted to a total of \$2.8 million.

Optima's report also highlights the extent to which financial assurance requirements under the Resource Conservation and Recovery Act (RCRA), and financial disclosure requirements imposed by Securities and Exchange Commission (SEC) regulations and Generally Accepted Accounting Principles

¹ 85 Fed. Reg. 10128 (February 21, 2020).

(GAAP), already effectively require companies within the chemical industry to provide financial assurance for potential cleanup obligations.

Finally, these comments describe how deleterious financial responsibility requirements would be for the chemical manufacturing industry, particularly small businesses.

I. EPA Properly Interpreted the Superfund Statute In Concluding that Financial Responsibility Requirements Are Unnecessary for the Chemical Manufacturing Industry.

This proposal reflects EPA's fourth rulemaking under its CERCLA Section 108(b) authority. EPA's repeated and consistent decisions not to impose additional financial assurance requirements in the three prior rulemakings—for the hardrock mining, electric utility, and petroleum and coal products manufacturing industries—establish important precedents for this rulemaking, as does the decision of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") upholding EPA's interpretation of Section 108(b) in the hardrock mining determination.²

EPA has followed those precedents here, and has correctly construed Section 108(b), in three respects that are particularly important for the current rulemaking. On each issue, EPA's interpretation of the statute has been upheld by the D.C. Circuit.

A. The Relevant "Risk" is Financial Risk.

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."³ 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."⁴ 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."⁵

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."⁶ 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.⁷ 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.

² *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

³ 42 U.S.C. § 9608(b)(2).

⁴ *Id.* § 9608(b)(1).

⁵ *Id.* § 9608(b)(2).

⁶ 85 Fed. Reg. 10132.

⁷ 930 F.3d at 502-504.

B. Section 108(b) is Future-Focused.

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.").⁸ The statute also speaks of the level of financial assurance being "initially established, and, when necessary, adjusted . . . based on experience."⁹

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.¹⁰ 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.¹¹

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:

⁸ 42 U.S.C. § 9608(b)(1).

⁹ *Id.* § 9608(b)(2).

¹⁰ *Id.* § 9607(a).

¹¹ *See, e.g.*, 40 C.F.R. § 264.142 (rules for estimating the cost of closure of a hazardous waste treatment, storage or disposal facility under RCRA).

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 has further concluded that there is little likelihood that Fund-financed cleanups will be required at chemical manufacturing sites operating under the current regulatory system. As explained in Part II below, that conclusion is well-supported.

C. EPA Has Discretion to Balance the Risk to the Fund Against the Overall Burden on the Industry.

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”¹⁴ 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.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

¹² 930 F.3d at 501.

¹³ 85 Fed. Reg. 10132.

¹⁴ 42 U.S.C. § 9608(b)(2).

¹⁵ *Michigan v. EPA*, 135 S.Ct. 2699, 2707 (2015) (citations omitted).

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 came to a similar conclusion in the hardrock mining rule, and the D.C. Circuit upheld that exercise of Agency discretion and judgment:

Ultimately, the EPA recognized that existing federal and state programs have minimized the need for the EPA's expenditures to respond to "CERCLA-like" releases and have "reduce[d] the risk of federally financed response actions to a low level." The remaining "handful of examples of sites where EPA has incurred response costs, notwithstanding regulation under . . . state and federal law," the EPA concluded, are not "an appropriate basis for regulation" under § 9608(b).¹⁸

. . .

As a last note, the Environmental Groups highlight several mining sites for which they believe existing financial responsibility requirements are inadequate. Whatever the merits of the Environmental Groups' concern regarding the sites, it does not undermine the reasonableness of the EPA's decision not to promulgate additional financial responsibility requirements for the entire hardrock mining industry. As noted, 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. We decline to substitute our 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.¹⁹

As explained below, EPA's judgment was even more reasonable and appropriate than would appear from the proposed rule.

II. The Record Demonstrates that Future Fund-Financed Responses at Chemical Manufacturing Facilities Are Even More Unlikely Than EPA Estimated.

¹⁶ 85 Fed. Reg. 10145.

¹⁷ In Part II below, we estimate that the total amount of financial assurance that Section 108(b) would require for the chemical manufacturing industry could conservatively exceed \$80 billion.

¹⁸ 930 F.3d at 506 (citations omitted).

¹⁹ *Id.* at 507 (citations omitted).

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.²⁰ 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.²¹

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,

²⁰ Optima attempted to replicate EPA's approach to screening the universe of NPL and non-NPL sites. This proved to be infeasible, unfortunately, as much of the data on which EPA relied are only available to the public in the form of ".pdf" files. Converting them to searchable form would have required substantial effort beyond the time and scope of Optima's critique and, in any event, might not have produced the desired information in every case.

²¹ Optima report at 8.

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.

III. The RCRA Program and Financial Disclosure Requirements Already Provide Financial Assurance.

A. RCRA-Permitted Chemical Manufacturing Facilities Already Provide Almost \$4 Billion in Financial Assurance.

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

²² See 82 Fed. Reg. 3388, 3390-93 (Jan. 11, 2017).

²³ The Associations have not been able to identify data on the relative cost of Superfund cleanups of mining and chemical manufacturing sites. The average amount of financial assurance maintained by RCRA TSDs is between \$7.6 and 13.7 million, depending on adjustments for outliers. \$7.6 million is 24% of \$32 million (EPA’s estimated average per-site amount for mining sites). So 1/5th is probably conservative.

²⁴ 82 Fed. Reg. 3393.

²⁵ 85 Fed. Reg. 10139.

²⁶ Optima identified two sites, Westwood Chemical Corporation and Reilly Coal Tar, both of which are non-NPL sites, by integrating data extracted from the ECHO database for both active and inactive sites with Appendix I, Tables 1 and 2.

²⁷ See Subpart H of 40 C.F.R. Parts 264 and 265.

²⁸ *Id.* §§ 264.101(b), (c).

assurance. Optima then used the EPA's Enforcement and Compliance History Online (ECHO) database²⁹ 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.

B. SEC Regulations and GAAP Effectively Require Public Companies in the Industry to Provide 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

²⁹ <https://echo.epa.gov>.

³⁰ 17 C.F.R. § 299.101(c)(xii).

³¹ *Id.* § 229.303(a)(2), (3).

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.

IV. CERCLA Financial Assurance Requirements Would Have a Disproportionate Impact on Small Businesses.

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.

V. Conclusion

EPA has reasonably concluded, based on its analysis of the historical record since the advent of the modern regulatory framework, that it is not appropriate to require companies within the chemical manufacturing industry to provide additional financial assurance for potential cleanup obligations. The foregoing comments, and the accompanying Optima report, bolster that conclusion by showing that the likelihood of taxpayer-funded cleanups at chemical manufacturing facilities is even less likely than EPA estimated. As explained above, (i) no chemical manufacturing facility appears to have been listed on the National Priorities List (NPL) for releases only occurring under the modern regulatory framework; (ii) only six other chemical manufacturing facilities where Fund response costs have been incurred appear to have had releases that occurred under the modern regulatory framework, and those costs amounted to only \$2.8 million; (iii) financial assurance requirements under RCRA currently require TSDs to maintain almost \$4 billion in financial assurance; and (iv) financial disclosure requirements imposed by SEC regulations and GAAP already effectively require public companies within the chemical industry to provide financial assurance for potential cleanup obligations.

If you have any questions about these comments, please contact Jared Rothstein of SOCMA at jrothstein@socma.org or 571-348-5122.

Sincerely,

The Society of Chemical Manufacturers and Affiliates
American Chemistry Council
American Coke and Coal Chemicals Institute
American Fuel and Petrochemical Manufacturers