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Ms. Charlotte Mooney
U.S. Environmental Protection Agency
Office of Resource Conservation and Recovery
Mail Code 5303P
1200 Pennsylvania Ave. NW
Washington, DC 20460

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Re: Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Electric Power Generation, Transmission, and Distribution Industry

The American Coal Council (“ACC”) submits these comments in response to the Environmental Protection Agency’s (“EPA”) July 29, 2019 Federal Register Notice of its proposed rule (“Proposed Rule”) not to impose financial responsibility requirements for Facilities in the Electric Power Generation, Transmission, and Distribution Industry under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). The ACC is a nonprofit trade association in its 37th year representing the collective business interests of the American coal industry. Our members include coal suppliers, transportation companies, terminals, utilities and independent power providers, industrial consumers, and support services suppliers. Since our member companies touch every aspect of turning one of America’s most abundant energy resources into reliable and affordable electricity for the United States economy, our Association has first-hand knowledge of the direct and indirect impacts of coal-related regulations and a unique, “boots on the ground” perspective. Coal is also integral to the steel-making process and the industrial production of cement, chemicals, and paper. Our diverse membership base encompasses the entire coal supply chain, and it is from this broad perspective that we assess the impacts of regulations impacting coal supply and use. While ACC provides these comments from that broad perspective,
individual member companies of ACC may submit separate comments on their own behalf that offer additional or other views.

**Background**

Section 108(b) of CERCLA, also known as Superfund, provides EPA with certain regulatory authorities with regard to financial responsibility requirements. It addresses the promulgation of regulations that require classes of facilities to establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. In 2014, a lawsuit was filed in the U.S. Court of Appeals for the District of Columbia seeking to require that CERCLA Section 108(b) financial responsibility rules be issued for the hardrock mining industry and three additional industries that had been identified by EPA in the 2010 Advanced Notice of Proposed Rulemaking (“ANPRM”). Those additional industries were Chemical Manufacturing; Petroleum and Coal Products Manufacturing; and Electric Power Generation, Transmission, and Distribution. In a January 2016 court order, EPA was required to publish a proposed rule on hardrock mining financial requirements by December 2016. EPA was also required to determine whether it would issue a notice of proposed rulemaking for the other three industries by December 2016. EPA announced in January 2017 that it would proceed with rulemakings for all three industries. The court order did not specify which industry would be first, second, or third. The court order also did not mandate any specific outcome of the rulemakings. EPA subsequently issued a Notice of Intent to Proceed with Rulemakings. This formal announcement of its notice of intent to proceed with rulemakings 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 requirements. EPA selected the Electric Power Generation, Transmission, and Distribution (“Electric Power Industry” or “Industry”) as the first additional industry to be evaluated beyond hardrock mining.

**EPA’s Methodology and Analytical Approach**

ACC supports the approach taken by EPA in evaluating whether to impose CERCLA Section 108(b) financial responsibility requirements on the Electric Power Industry. EPA’s approach focused on the risk of taxpayer-funded cleanups at facilities operating under modern industry conditions and regulations. This included assessing the types of Industry facilities that would apply, records of releases from Industry facilities, and the payment history of the Superfund for remediation at Industry sites. It included consideration of the state and federal regulatory and financial responsibility requirements currently in effect for operating Industry facilities. EPA also analyzed the types of activities undertaken and wastes handled and produced, as well as the
financial wherewithal of the Electric Power Industry and its ability to pay for environmental obligations.

EPA’s analysis included assessments for coal combustion residuals, polychlorinated biphenyls (“PCB”) and asbestos. The limited number of noncompliance excursions or releases and the strong track record of remediation by the Electric Power Industry shows not only that the that the modern regulatory framework is effective but it also demonstrates the financial viability of the Industry. Therefore, any risk of taxpayer-funded remediation and impacts to the Hazardous Substance Superfund (“Superfund”) can be deemed to be very low.

Moreover, the regulatory and legislative construct continues to evolve. In 2015, EPA developed and finalized its Resource Conservation and Recovery Act (“RCRA”) final rule for coal combustion residuals. This included addressing structural integrity requirements and providing for groundwater monitoring programs. In 2016, Congress enacted the Water Infrastructure and Improvements for the Nation Act (“WIIN Act”) which added federal enforceability for coal combustion residuals permit programs.

**Recent Court Decision on Hardrock Mining**

Reinforcing the legitimacy of EPA’s analytical approach and methodology for the Electric Power Industry is a recent decision by the U.S. Court of Appeals for the District of Columbia upholding EPA’s earlier determination not to impose financial responsibility requirements on the hardrock mining sector. The Court found EPA’s interpretation of risk to be reasonable, including EPA’s financial risk assessment. EPA’s determination with regard to the Electric Power Industry was made using the same type of approach and methodology as it used for hardrock mining.

EPA had been continuing to pursue its regulatory path for CERCLA 108(b) for the hardrock mining industry and determined in December 2017 there was no need to impose financial responsibility requirements on that sector. Litigation ensued, and the U.S. Court of Appeals decision referred to above was subsequently issued on July 19, 2019. It is noteworthy that the Court decision on the hardrock mining industry was issued after EPA Administrator Andrew Wheeler signed the proposed rule on July 2, 2019 not to impose CERCLA Section 108(b) financial responsibility requirements on the Electric Power Industry.

**Summary and Conclusions**

Importantly, the decision of the U.S Court of Appeals for the District of Columbia on hardrock mining held that EPA had no obligation to promulgate financial responsibility requirements for that industry. ACC commends EPA for consistency in the application of
its analysis and methodology across the hardrock mining and power industries. EPA has appropriately evaluated the risk of the Electric Power Industry and concluded that the degree and duration of risk posed does not warrant CERCLA Section 108(b) financial requirements. Modern Industry practices and existing federal and state regulations form an effective framework for risk minimization. This, combined with the Electric Power Industry’s financial wherewithal and strong track record of paying for remediation supports the reasonable conclusion that additional financial responsibility requirements are unwarranted.