NO.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE:

IDAHO CONSERVATION LEAGUE, EARTHWORKS, SIERRA CLUB, AMIGOS BRAVOS, GREAT BASIN RESOURCE WATCH, and COMMUNITIES FOR A BETTER ENVIRONMENT,

Petitioners.

PETITION FOR WRIT OF MANDAMUS

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	Environmental Protection Agency
GAO	Government Accountability Office
RCRA	Resource Conservation and Recovery Act

INTRODUCTION

Idaho Conservation League, Earthworks, Sierra Club, Amigos Bravos, Great Basin Resource Watch, and Communities for a Better Environment ("Petitioners") petition this Court for a Writ of Mandamus requiring EPA to issue rules ensuring that industries that handle hazardous substances will have the financial means to clean up any inadvertent releases. More than thirty years ago, Congress directed EPA to issue such rules in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). 42 U.S.C. § 9608(b). After an order from a federal district court, in 2009 and early 2010 EPA issued findings that financial assurance rules were warranted for four industries. 74 Fed. Reg. 37,213 (July 28, 2009); 75 Fed. Reg. 816 (Jan. 6, 2010). Despite the explicit directive from Congress and EPA's own findings, however, EPA has yet to issue such rules.

STATEMENT OF RELIEF SOUGHT

Petitioners seek an order finding EPA has unreasonably delayed issuing financial assurances rules required by law and directing EPA to finalize such rules by January 1, 2016, for the four industries already identified by EPA.

STATEMENT OF JURISDICTION

This Court has jurisdiction under the APA. 5 U.S.C. § 702. *See also id.* § 706(1). This Court has the authority to issue a writ of mandamus pursuant to the All Writs Act. 28 U.S.C. § 1651(a). This Court would have exclusive jurisdiction to review any final rule issued by EPA, *see* 42 U.S.C. § 9613(a), so this Court also

has jurisdiction to determine if EPA's delay is unreasonable. *Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 75 (D.C. Cir. 1984) (hereinafter "*TRAC*").

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether EPA's failure to issue financial assurance rules for more than thirty years constitutes an unreasonable delay?

STATEMENT OF THE CASE

I. THE GOALS OF CERCLA.

Congress in 1980 enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). CERCLA requires that parties responsible for hazardous substance pollution bear the cost of cleanup. *See* 42 U.S.C. § 9607. Often, however, the responsible parties include businesses that have been liquidated through bankruptcy, restructured to limit liability for environmental cleanup, or are otherwise unable to shoulder cleanup costs. *See* App. 605-06 (2005 GAO Report at 58-59).[1] Most of the costs for these "orphan" sites are borne by the public, through a trust fund known as the "Superfund." *See* 42 U.S.C. § 9611. The Superfund was initially funded by designated taxes, but since these taxes expired in 1995, funding has steadily decreased. *See* App. 555 (2005 GAO Report at 8); App. 289-90 (2010 GAO Report at 6-7).

[1] Exhibits have been filed as a separately-bound Appendix. Citations to "App. [number]" refer to the bates-stamped page number in the Appendix.

Public funding for cleanups is decreasing, but the number of sites requiring cleanup is not. EPA has estimated that one in four Americans lives within three miles of a hazardous waste site, and that more than 47,000 sites potentially require cleanup actions. *See* App. 401 (2008 GAO report at 1). EPA places the most contaminated of these sites on a list for priority remediation, known as the National Priorities List. *See* 42 U.S.C. § 9605. Between 2005 and 2009, EPA added an average of sixteen sites per year to the National Priorities List, and in 2010 EPA projected adding twenty to twenty-five sites per year between 2010 and 2015. *See* App. 311 (2010 GAO Report at 28). The cost of cleaning up even a single site can be quite high—according to a 2005 report, it will cost $140 million, on average, to clean up each of the 142 largest Superfund sites, for a total of almost $20 billion. App. 549 (2005 GAO Report at 2). Cleanup at sixty of these so-called mega-sites is already being funded either wholly or partly by the public. *Id.* The National Priority List encompasses more than 1,300 sites, App. 22 (NPL Site Totals), so the cost of cleaning up all the orphan sites may be many times this amount.

II. THE ROLE OF FINANCIAL ASSURANCE.

A. CERCLA's Financial Assurance Requirement.

In 1980, Congress directed EPA to enact rules requiring that facilities involved with hazardous substances demonstrate financial responsibility sufficient to remedy any environmental damage caused by their operations. 42 U.S.C.

§ 9608(b). *See also* 52 Fed. Reg. 2923 (Jan. 23, 1987) (delegating to EPA). CERCLA sets out a three-step process for EPA to enact and implement financial responsibility regulations. First, EPA must publish a notice identifying classes of facilities for which financial responsibility requirements will first be developed by no later than 1983. 42 U.S.C. § 9608(b)(1). Second, EPA must promulgate requirements that classes of facilities establish and maintain evidence of financial responsibility "consistent with the degree and duration of risk associated with the production, treatment, transportation, storage, or disposal of hazardous substances" beginning not earlier than 1985. *Id.* In developing these rules, "[p]riority . . . shall be accorded to those classes of facilities . . . which [EPA] determines present the highest level of risk of injury." *Id.* Third, EPA must incrementally impose these requirements "as quickly as can reasonably be achieved but in no event more than 4 years after the date of promulgation." *Id.* § 9608(b)(3). To date, EPA has not promulgated any financial assurance requirements under CERCLA.

CERCLA is not the only statute containing financial assurance requirements. While the Resource Conservation and Recovery Act ("RCRA") also requires financial assurances, 42 U.S.C. §§ 6924(a)(6), 6924(t), the universe of facilities not covered by RCRA's financial assurance requirements is immense. *See* App. 757-58 (1987 GAO Report at 2-3) (more than 100,000 companies generate, handle, or dispose of hazardous substances, but only 4,000 are subject to RCRA financial

assurance requirements). Similarly, several federal agencies require financial assurances for certain mining activities on federal land, but mines located on non-federal land are not covered. *See, e.g.*, App. 112 (2012 GAO Report – Uranium Mining at 39); App. 160 (2012 GAO Report – Phosphate Mining at 15). These substantial gaps mean that most facilities are not required to carry insurance or provide any evidence of their ability to clean up hazardous contamination.

B. Financial Assurances Prevent Releases.

CERCLA's financial responsibility requirements not only ensure that responsible parties are able to pay for cleanup of hazardous substances, these requirements also play a significant role in preventing hazardous substance releases. 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.

App. 794 (Senate Report 99-11 at 47). EPA has similarly concluded that financial assurances play a critical preventative role by creating incentives for the proper handling of hazardous substances. *See* App. 436 (EPA National Priority Announcement at 1) (financial assurance requirements "protect public health and the environment by promoting the proper and safe handling of hazardous materials"); App. 388 (EPA Region 10 Strategy at 2) ("Financial assurance…plays

a significant role in reducing risks to human health and the environment because it provides a financial incentive for operators to improve environmental practices").

C. The Lack of Financial Assurance Requirements Contributes to Funding Shortfalls, Delayed and Incomplete Cleanups, and Injury to Human Health and the Environment.

EPA's failure to issue financial assurance rules is directly tied to funding shortfalls for cleanup. A 2005 GAO Report explained:

> The need for EPA to fully use its existing authorities to execute the 'polluter pays' principle underlying the Superfund and RCRA laws is even more compelling today than it was during the 1980s and 1990s when corporate taxes … provided about $1 billion a year for Superfund cleanups. Now, without revenue from Superfund taxes, the cleanup burden has increasingly shifted to the general public—and at a time when large federal deficits are likely to constrain EPA's ability to obtain such funding for these cleanups. In addition, over time, businesses have become more sophisticated in using the limited liability principle to protect their assets by separating them from their liabilities. The result is that businesses of all sizes can easily limit the amounts they may be required to pay for environmental cleanups under Superfund and RCRA. . . .
>
> These challenges can seriously hamper EPA's ability to achieve its primary mission of protecting human health and the environment because they present formidable obstacles to obtaining the funding needed for cleanups. … Thus, we believe it is imperative for EPA to increase its focus on financial management and to fully use its existing authorities to better ensure that those businesses that cause pollution also pay to have their contaminated sites cleaned up.

App. 605-06 (2005 GAO Report at 58-59). *See also* App. 431 (2006 GAO Testimony at 4) ("By its inaction on the Superfund mandate …, EPA has continued to expose the Superfund program, and ultimately the U.S. taxpayers, to potentially billions of dollars in cleanup costs . . . ."); App. 235-36 (2011 GAO Testimony at

4-5); App. 509 (2005 GAO Report – Hardrock Mining at 65); App. 751 (EPA Enforcement Alert) ("Casmalia is an example of how hazardous waste facilities' failure to adequately fulfill their financial assurance obligations can result in Superfund sites.").

Funding shortfalls reduce the effectiveness of Superfund cleanups, leaving the public exposed to higher levels of hazardous substances. EPA's Office of Inspector General found that in fiscal year 2003, a $174.9 million funding shortfall "prevented EPA from beginning construction at all sites or providing additional funds needed to address sites in a manner believed necessary by regional officials." App. 649 (2004 OIG Report at 1). The report identified 29 specific sites where cleanup work was delayed or scaled back in ways harmful to human health and the environment because of funding shortfalls. For example, "[t]he impact of reduced funds for the Bunker Hill site [in Northern Idaho and Eastern Washington] is associated with risk to human health, particularly for young children and pregnant women, from lead contamination in a residential area." App. 656 (2004 OIG Report at 8). *See also* App. 301 (2010 GAO Report at 18).

The delayed cleanup and prolonged health risks at the Bunker Hill site are not unique: indeed, it is now more common than not for cleanup to be delayed due to lack of funding, even at the sites that pose the highest risks to human health. *See* App. 294 (2010 GAO Report at 11) ("At over 60 percent of the 75 nonfederal

[National Priority List] sites with unacceptable human exposure, all or more than half of the work remains to complete the remedial construction."); App. 309 (*Id.* at 26) ("Since fiscal year 2000, most [EPA] regions have experienced delays because of insufficient funding . . . ."). These delays "increase the length of time it takes to clean up a site; the total cost of cleanup; and, in some cases, the length of time populations are exposed to contaminants." App. 310 (*Id.* at 27).

Huge funding shortfalls are not unusual. For example, in March 2008, W.R. Grace entered into the then-largest Superfund settlement in history, agreeing to pay $250 million to clean up asbestos contamination from its mine in Libby, Montana. App. 15 (EPA Libby Milestones). Asbestos contamination caused hundreds of deaths and thousands of illnesses in Libby. App. 66 (AP Libby Article); *see also* App. 370-72 (EPA Libby Action Memo). W.R. Grace declared bankruptcy in 2001, shortly after the deadly situation came to light. App. 575 (2005 GAO Report at 28). But even the record-setting settlement does not come close to covering the cost of cleanup: as of July 2012, the cleanup had already cost $447 million, and was not nearly complete. App. 66 (AP Libby Article); *see also* App. 383 (EPA Libby Determination). Similarly, despite recent record-setting settlements with Asarco, the primary responsible party for the Bunker Hill site, substantial public funds will be needed to cover the full cost of cleanup. *See* App. 17 (EPA Bunker Hill FAQ) ("While the Asarco bankruptcy settlement is very significant [$494

million], the funds received represent only about 20% of the overall site cleanup needs. EPA estimates that the cost of a final Bunker Hill remedy, including the Coeur d'Alene Basin and Bunker Hill Box, would be more than $2 billion.").

EPA and other government oversight agencies have consistently arrived at the same conclusion, in study after study: the high cost of cleanup and the dwindling resources of the Superfund program render it impossible to address all sites in a timely and adequate manner. *See* App. 316 (2010 GAO Report at 33) ("The limited funding, coupled with increasing costs of cleanup, has forced EPA to choose between cleaning up a greater number of sites in a less time and cost efficient manner or cleaning up fewer sites more efficiently."); App. 556 (2005 GAO Report at 9) ("The decrease in Superfund funding in recent years and this backlog of sites ready for additional funding may make the already lengthy NPL cleanup process even lengthier."); App. 642 (NACEPT Report at 64) ("Some of the sites in the backlog have been in the Superfund Program for many years…if not addressed, this backlog of sites will continue to pose threats to communities, and cleanup costs at these sites will increase, sometimes dramatically."); App. 652 (2004 OIG Report at 4) ("When funding is not sufficient, construction at National Priority List (NPL) sites cannot begin; cleanups are performed in less than an optimal manner; and/or activities are stretched over longer periods of time. As a result, total project costs may increase and actions needed to fully address the

human health and environmental risk posed by the contaminants are delayed."). With hundreds of National Priority List sites awaiting cleanup and tens of thousands of contaminated sites not even on the list for public remediation, the risk to health and the environment is substantial.

III. THE 2008 LAWSUIT AND EPA'S FEDERAL REGISTER NOTICES.

To remedy EPA's decades-long failure to issue financial assurances rules, in 2008 many of the Petitioners here filed a CERCLA citizen suit in federal district court. On cross-motions for summary judgment, the court held that EPA had a non-discretionary duty to take the first step in developing financial assurance rules – identification of the classes of facilities for which EPA would first develop rules – and ordered EPA to take this initial step by May 4, 2009. *Sierra Club v. Johnson*, No. C 08-01409, 2009 WL 482248 (Feb. 25, 2009). The court subsequently held that jurisdiction over a challenge to EPA's failure to issue the rules themselves lies in the D.C. Circuit. *Id.*, 2009 WL 2413094 (Aug. 5, 2009).

Pursuant to the district court's order, EPA issued notice in 2009 that it would first develop financial assurance requirements for the hardrock mining industry. *See* Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements, 74 Fed. Reg. 37,213 (July 28, 2009). Several months later, EPA issued notice that it would develop financial assurance requirements for three additional industries: chemical manufacturing,

petroleum and coal products manufacturing, and electric power generation, transmission, and distribution. *See* Identification of Additional Classes of Facilities for Development of Financial Responsibility Requirements Under CERCLA Section 108(b), 75 Fed. Reg. 816 (Jan. 6, 2010). In these notices, EPA described in detail the risks posed by these four industries and concluded that financial assurance rules for each of these industries is warranted.

A. EPA's Notice of Intent to Regulate Hardrock Mining Facilities.

In EPA's hardrock mining notice, its analysis was extensive and its conclusion unequivocal: it is "readily apparent that hardrock mining facilities present the type of risk that, in light of EPA's current assessment, justifies designating such facilities as those for which EPA will first develop financial responsibility requirements." 74 Fed. Reg. at 37,214.

EPA noted that the hardrock mining industry is responsible for polluting approximately 440,000 acres of land and contaminating as much as 10,000 miles of rivers and streams. *Id.* at 37,215. EPA described the volume of toxic chemicals released by hardrock mining facilities as "enormous": 1.15 billion pounds annually. *Id.* The risk posed by this substantial volume of waste has been borne out on many occasions: many hardrock mining sites have been listed on the National Priorities List – 90 listed and another 20 proposed as of 2009 – and the cleanup required for these sites is often substantial and complex. *Id.* at 37,216-17.

EPA next noted that "[t]he severity of consequences posed by hardrock mining facilities is evident in the enormous costs associated with past and projected future actions necessary to protect public health and the environment, after releases from hardrock mining facilities occur." *Id.* at 37,217. Specifically:

> EPA has estimated that the cost of remediating all hardrock mining facilities is between $20 and $54 billion. EPA's analysis showed that if the total Federal, State, and potentially responsible party outlays for remediation were to continue at existing levels . . ., no more than eight to 20 percent of all cleanup work could be completed within 30 years. In another analysis based on a survey of 154 large sites, EPA's OIG projected that the potential total hardrock mining remediation costs totaled $7 to $24 billion. OIG calculated that this amount is over 12 times EPA's total annual Superfund budget of about $1.2 billion.

Id. EPA also described numerous examples of hardrock mining facilities declaring bankruptcy and leaving enormous cleanup costs to be borne by EPA, concluding that "the hardrock mining industry has experienced a pattern of failed operations, which often require significant environmental responses that cannot be financed by industry." *Id.* at 37,218.

B. EPA's Notice of Intent to Regulate Three Additional Industries.

1. Chemical Manufacturing

Like hardrock mines, chemical manufacturing facilities pose significant risks. There were 13,000 facilities operating in the U.S. as of 2007, and the industry releases approximately 220 million pounds of hazardous substances and nearly 20 million tons of hazardous waste annually. 75 Fed. Reg. 816, 824.

Beyond the sheer volume of substances released, there are over 180 National

Priority List sites associated with chemical manufacturing, including multiple examples of sites that pose "high risk to the environment and human health," such as sites across the street from residential areas and sites in close proximity to the drinking water supply for hundreds of thousands of people. *Id.* Remediation of these sites has been historically costly and complex – for the chemical manufacturing sites on the National Priority List, EPA has spent approximately $2.7 billion through 2009. *Id.* at 825. Simply put, "EPA's past experience with some [National Priority List] sites leads it to conclude that chemical manufacturing facilities are likely to and continue to present a substantial financial burden that could be met by financial responsibility requirements." *Id*.

Additionally, "common corporate structures and interrelated corporate failures within the Chemical Manufacturing industry also increase the likelihood of uncontrolled releases of hazardous substances being left unmanaged, increasing risks." *Id.* Parent-subsidiary relationships that allow parent corporations to shield assets from liability for cleanups, frequent changes in site ownership, and bankruptcies in the industry all make it difficult to assign liability for cleanup costs in the chemical manufacturing industry. *Id*.

2. Petroleum and Coal Products Manufacturing

The petroleum and coal products manufacturing industry primarily consists of petroleum refining facilities. These "tend to be very large, high-volume

facilities," and releases from these large sites have resulted in exposure to hazardous substances "on a regional scale." *Id.* at 826. Moreover, refineries tend to be operated for decades, so "there is a long timeframe for potential releases and exposure of hazardous substances to occur." *Id.* "In addition, because of their need for large amounts of cooling water for operations, refineries tend to be located near navigable waterways or on the seashore, which likely increases the potential to impact groundwater, surface water, and aquatic vegetation." *Id.*

The petroleum and coal products manufacturing industry generated 4.2 million tons of hazardous waste in 2007 – second only to the chemical manufacturing industry – and releases 46 million pounds of hazardous substances annually. *Id.* These releases have in some cases led to surface and ground water contamination, and 22 of the sites on the National Priority List as of 2009 are attributed to petroleum refinery operations. *Id.* at 827. The contamination at some of these sites is extensive and has led to substantial risk to human health and the environment – for example, EPA noted that uncontrolled dumping at the Tennessee Products site contaminated the groundwater and surface water downstream of the facility, which residents from nearby housing projects used for swimming, playing, and fishing. *Id.* In addition to sites listed on the National Priority List, EPA described many additional examples of releases of hazardous substances from refineries, including to groundwater – in fact, in some instances

the level of groundwater contamination from refineries is so high that refineries "are actually pumping out the hydrocarbons from the groundwater table, and recovering them back in the refinery, which demonstrates the significant extent to which these materials have been released into the environment." *Id.*

EPA noted the large costs associated with "what are often extensive and long-term remediation efforts" at refinery sites—for example, as of 2009, EPA had spent $250 million on remediation of refinery sites on the National Priorities List. *Id.* EPA concluded that its "past experience with these sites leads it to conclude that petroleum and coal products manufacturing facilities may be likely to continue to present a substantial financial burden that could be met by financial responsibility requirements." *Id.* at 827-28.

3. Electric Power Generation, Transmission, and Distribution

In deciding that financial assurance rules for this industry were warranted, EPA focused on the risks posed by coal combustion residuals, which are the toxic ash and other residue remaining after coal is burned at electric generation units. *Id.* at 828-29. Like the other industries identified for financial assurance rules, the electric power industry operates on a "large scale"—there are 1,270 fossil fuel electric power generating facilities operating in the U.S.—and so the potential for release and exposure to hazardous substances is high. *Id.* at 829. The industry reports "high levels" of on-site releases of hazardous substances – 161 million

pounds annually – and these substances are "highly toxic." *Id.* EPA noted that coal combustion residuals "are a very large industrial waste stream" that "dwarf[s] the volume of hazardous waste generated in the U.S." *Id.* In 2007 alone, for example, 131 million tons of coal combustion residuals were generated in the U.S., *id.*, in contrast to the 32 million tons of hazardous waste generated by all other industry sectors combined, *id.* at 820-21 & Table 2.

EPA next noted that there are numerous documented instances of substantial and costly groundwater and surface water contamination from coal combustion residuals, including contamination of public drinking water supplies. *Id.* at 822, 829-30. Remediation costs for this industry can be enormous: for example, EPA stated that the costs to clean up the "catastrophic release" of coal combustion residuals from a single site – the Tennessee Valley Authority's Kingston Plant -- "has been estimated to range from $933 million to $1.2 billion," *id.* at 830, an amount that is as large as EPA's entire annual Superfund budget, *supra* at 12. Taking all this information into consideration, EPA determined that financial assurance rules for the electric power industry are warranted. *Id.*

IV. EPA'S CONTINUING FAILURE TO ISSUE RULES.

Since 2009, EPA has made scant progress toward issuing the actual rules it concluded were vitally needed. Year after year, EPA has continually postponed the completion date for these long-overdue rules. Shortly after it issued its notice

of intent for the hardrock mining industry in 2009, EPA stated in its Fall 2010 Regulatory Agenda that it would issue a proposed financial assurance rule for hardrock mining in the spring of 2011. App. 269-70 (Fall 2010 Agenda at 71-72). But when the spring of 2011 arrived, EPA advised that it would instead issue the proposed rule in early 2012. App. 254 (Spring 2011 Agenda at 73). A few months later, EPA demoted the rulemaking to a "long term action" and delayed the proposed rule by another year, until 2013. App. 228 (Fall 2011 Agenda at 80). A year later, EPA pushed the date of the proposed rule back another year. App. 65 (Fall 2012 Agenda at 66); *see also* App. 50-51 (Spring 2013 Agenda at 47-48). And after yet another year had passed, in fall of 2013, EPA pushed the date of the proposed rule back over two years, to summer of 2016. App. 35 (Fall 2013 Agenda at 59); *see also* App. 13 (Spring 2014 Agenda at 60).

EPA's progress on financial assurance rules for the other three industries has been even less promising. Shortly after EPA issued its notice of intent in early 2010, EPA advised that it would issue a proposed rule in 2011. App. 278 (Spring 2010 Agenda at 138). A year later, EPA listed the rulemaking as a "long term action" and gave no date for its estimated completion. App. 255 (Spring 2011 Agenda at 88); App. 226-27 (Fall 2011 Agenda at 78-79). And since 2011, EPA has not even mentioned the rulemaking in its regulatory agenda.

SUMMARY OF ARGUMENT

EPA has a clear statutory duty under CERCLA to issue financial assurance rules. Although issuance of these rules is not subject to a date-certain deadline, under the APA, EPA must act within a reasonable time. Over thirty years have passed since Congress first directed EPA to issue such rules, and nearly five years have passed since EPA itself concluded such rules were necessary for at least four industries. While EPA continues to delay, scarce resources delay cleanups and prolong public exposure to known toxins. EPA's delay is unreasonable and this Court should order EPA to finalize financial assurance rules by January 1, 2016.

STANDING

The "irreducible constitutional minimum" of standing contains three elements: (i) injury in fact that is (ii) fairly traceable to the defendant's conduct and (iii) likely to be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). "However, a litigant to whom Congress has accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007) (internal citations and quotation marks omitted). A federal district court has already held that Petitioners have representational standing to challenge EPA's failure to issue financial assurance rules. *Sierra Club*, 2009 WL 482248 at *3-*7.

Petitioners' members are and likely will be injured by releases of hazardous substances from facilities in the four industry classes at issue. For example, Sierra Club member Mark Romines lives a quarter mile from the Louisville Gas and Electric coal plant in Kentucky and is regularly exposed to the toxic coal ash dust from the plant. *See* Romines Decl. ¶¶ 4-6.[2] Other members' health, economic, recreational, aesthetic, and other interests are similarly affected. *See, e.g.*, Hervey Decl. ¶¶ 6-9; Weber Decl. ¶¶ 12-13; Robison Decl. ¶¶ 16, 21, 24-25; Hayes Decl. ¶¶15-16; Cabrales Decl. ¶¶ 10-11, 13-14; Dixon Decl. ¶¶ 6-7; Rojo Decl. ¶¶ 7, 10-14; Land Decl. ¶¶ 4, 7; Kark Decl. ¶¶ 8-9.

These injuries are fairly traceable to EPA's failure to issue financial assurance regulations. As Congress recognized in enacting 42 U.S.C. § 9608(b), requiring financial assurances provides facility owners and operators—and their insurers—with a powerful incentive to minimize releases. App. 794 (Senate Report 99-11 at 47). "And while Congress cannot create standing on its own, it can provide legislative assessments which courts can credit in making standing determinations." *NWF v. Hodel*, 839 F.2d 694, 708 (D.C. Cir. 1988). EPA has similarly recognized the preventative role of financial assurances, *supra* at 5-6, as has at least one court, *see Safety-Kleen, Inc., (Pinewood) v. Wyche*, 274 F.3d 846, 866 (4th Cir. 2001) ("The incentive for safety is obvious: the availability and cost

[2] Standing declarations are provided in a separate addendum. D.C. Cir. R. 28(a)(7).

of a bond will be tied directly to the structural integrity of a facility and the soundness of its day-to-day operations…To put it more bluntly, sloppy 'design and operating procedures ... are more likely to be avoided' with the financial assurance requirements and the resulting incentive to reduce bond costs.").

Additionally, Petitioners' members are and likely will be injured by delayed and/or incomplete cleanup at sites where responsible parties have declared bankruptcy. *See, e.g.*, Hayes Decl. ¶¶ 9-15, 25-30; Robison Decl. ¶¶12-20. It is well-established that EPA's failure to issue financial assurance rules contributes to funding shortfalls and that funding shortfalls lead to delayed or incomplete cleanup. *Supra* at 6-10. *See Autolog Corp. v. Regan,* 731 F.2d 25, 31 (D.C. Cir. 1985) ("We are concerned ... not with the length of the chain of causation, but… [with] the plausibility of the links that comprise the chain.")(internal citations and quotation marks omitted). *See also Hodel*, 839 F.2d at 710 & n.13 (finding standing for plaintiffs' claims that EPA regulations provide "insufficient bond coverage for damage to water supplies caused by subsidence").

Finally, Petitioners' members' injuries would be redressed by an order requiring EPA to finalize financial assurance rules. Congress directed EPA to issue financial assurance rules to prevent injury to health and the environment from exposure to hazardous substance pollution, and there is "a 'substantial likelihood that the judicial relief requested' will prompt EPA to take steps to reduce that risk."

Massachusetts v. EPA, 549 U.S. at 521 (internal citation omitted).

ARGUMENT

A writ of mandamus "is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act." *In re Bluewater Network,* 234 F.3d 1305, 1315 (D.C. Cir. 2000). "In the case of agency inaction, we not only must satisfy ourselves that there indeed exists such a duty, but that the agency has 'unreasonably delayed' the contemplated action." *Id.* (quoting 5 U.S.C. § 706(1)). This Court analyzes unreasonable delay claims under the six factors established in *TRAC*, 750 F.2d at 79. Here, EPA's duty to issue financial assurance rules is clear, and consideration of the *TRAC* factors demonstrates that EPA's thirty-year delay is so egregious as to warrant mandamus relief.

I. EPA HAS A CLEAR DUTY TO ACT.

When Congress enacted CERCLA in 1980, it spoke in clear terms: EPA "shall promulgate requirements . . . that classes of facilities establish and maintain evidence of financial responsibility." 42 U.S.C. § 9608(b) (emphasis added). The statute "indisputably commands" EPA to establish financial responsibility requirements, and it is undisputed that EPA has not done so. *See In re Bluewater Network,* 234 F.3d at 1315; *Cutler v. Hayes*, 818 F.2d 879, 895 (D.C. Cir. 1987) ("the agency lacks authority to simply do nothing to effectuate the purpose of the Act"). CERCLA's plain language allows for only one interpretation: EPA has a

clear statutory duty to issue financial assurance regulations.

II. RELIEF IS JUSTIFIED UNDER THE *TRAC* FACTORS.

This Court adopted a six-factor test for judging whether to compel agency action on the basis of unreasonable delay in the *TRAC* decision. 750 F.2d at 80 (listing factors). Under these six factors, EPA's thirty-year delay is unreasonable.

A. EPA's Thirty-Year Delay is Excessive.

"The first and most important factor is that 'the time agencies take to make decisions must be governed by a rule of reason.'" *In re Core Commc'ns, Inc.,* 531 F.3d 849, 855 (D.C. Cir. 2008) (quoting *TRAC*, 750 F.2d at 80). Although there is no per se rule as to the amount of time that constitutes an undue delay, "a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (finding FERC's delay of six years in responding to a petition unreasonable). *See also In re Core Commc'ns*, 531 F.3d at 861 (finding FCC's six-year delay in issuing legal authority for interim rules unreasonable); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (finding OSHA's six-year delay in issuing cadmium rules unreasonable); *Nader v. F.C.C.*, 520 F.2d 182, 206 (D.C. Cir. 1975) ("Although the issues are complicated, we can find no justification for a delay of ten years."); *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 37 (D.D.C. 2000) (finding the BIA's four-year delay unreasonable).

Congress directed EPA to issue financial assurance rules beginning in 1985. *See* 42 U.S.C. § 9608(b). There is no dispute that EPA has not yet promulgated any financial assurances rules, and that nearly thirty years have passed since the 1985 date specified by Congress. Moreover, nearly five years have passed since EPA itself concluded that financial assurance rules were needed for at least four industries. EPA's delay goes far beyond the rule of reason.

B. EPA's Delay is Unreasonable in Light of CERCLA's Mandate.

TRAC provides that "where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason." 750 F.2d at 80; *see also Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) (the Court should consider "whether the statutory scheme implicitly contemplates timely final action…"). The court must also consider whether an agency's delay is undermining the goals of the statute. *See Cutler*, 818 F.2d at 897-98.

Here, although the statute does not provide a fixed deadline for EPA to finalize financial assurance regulations, the statute does implicitly contemplate timely final action. Congress directed EPA to take the first step in establishing financial assurance rules – publication of notice of the industries it would regulate first – no later than 1983. 42 U.S.C. § 9608(b). Twenty-six years and one citizen suit later, EPA has finally taken that initial step. Congress directed that EPA take

the second step – issuance of the rules themselves – beginning in 1985, and directed EPA to give "[p]riority in the development of such requirements" to the classes of facilities that "present the highest level of risk of injury." *Id.* And finally, Congress directed EPA to phase in financial responsibility requirements—but also to impose the final requirements "as quickly as can reasonably be achieved and in no event more than 4 years after the date of promulgation." *Id.*

This three-step timeline strikes a balance between the need to provide industry with notice and a phase-in of final requirements, on the one hand, and the need to quickly finalize and implement financial assurance rules, on the other hand. Instead, three decades later, EPA has yet to issue rules for any industry. EPA has impermissibly replaced Congress' timeline with thirty years of inaction.

Moreover, EPA's delay in promulgating financial assurance regulations is frustrating the statutory goals of CERCLA. *See Cutler*, 818 F.2d at 897-98. EPA's thirty-year delay thwarts the goal of ensuring that the cost of cleanup is borne by responsible parties, *Burlington N.*, 556 U.S. at 602—in the absence of financial assurance requirements, responsible parties are frequently unable to shoulder cleanup costs. EPA's failure to issue financial assurance rules also thwarts the goal of ensuring timely and thorough cleanup, *Burlington N.*, 556 U.S. at 602—EPA has repeatedly noted that it lacks funds to clean up all sites in a timely and thorough manner, and that these delays in cleanup lead to additional

public exposure to hazardous substances. *See supra* at 6-10. EPA's delay also thwarts the preventative purpose of financial assurance rules, *supra* at 5-6—many facilities are not required to carry insurance or other assurances, reducing the financial incentive for best practices. *See supra* at 4-5.

Ultimately, "[a]dministrative agencies cannot decide which duties to perform and which duties to ignore, rather they must perform the duties which Congress intends them to perform." *Orion Reserves Ltd. P'ship v. Kempthorne*, 516 F. Supp. 2d 8, 12 (D.D.C. 2007). EPA's protracted inaction upends the balanced timeline created by Congress and thwarts the goals of the statute.

C. EPA's Delay Harms Human Health and Welfare.

EPA's delay is even less tolerable because the Agency's failure to promulgate financial assurance regulations is negatively impacting human health and welfare. *See TRAC*, 750 F.2d at 80; *Cutler*, 818 F.2d at 898 ("The deference traditionally accorded an agency to develop its own schedule is sharply reduced when injury likely will result from avoidable delay.").

EPA's delay in promulgating financial assurance requirements jeopardizes human health and welfare by contributing to a shortfall in resources for remediation of hazardous waste sites. *See supra* at 6-10. Moreover, releases of hazardous substances from the four industries identified by EPA pose enormous threats to human health: EPA itself gave many examples of the magnitude of these

releases and their impacts on human health in its 2009 and 2010 Federal Register notices of its intent to issue financial assurance rules. *See supra* at 11-16.

With human health and welfare at stake, EPA's delay of thirty years is unacceptable. *See Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 628 (D.C. Cir. 1987), ("With lives hanging in the balance, six years is a very long time."); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) ("Three years from announced intent to regulate to final rule is simply too long given the significant risk of grave danger EtO poses to the lives of current workers and the lives and well-being of their offspring."). This factor may not alone be dispositive where much of the agency's docket involves issues of human health and welfare. *See Sierra Club v. Thomas*, 828 F.2d at 798. But where, as in this case, each of the *TRAC* factors demonstrate that the agency's delay is unreasonable, mandamus relief is warranted.

D. Competing Priorities Do Not Justify Thirty Years of Inaction.

Federal agencies inevitably face the challenge of limited resources with which to address competing priorities, many of which are technically and administratively complex. Courts must bear this in mind while weighing the reasonableness of agency delay. *See TRAC*, 750 F.2d at 80. But "[h]owever many priorities the agency may have, and however modest its personnel and budgetary resources may be, there is a limit to how long it may use these justifications to

excuse inaction in the face of the congressional command to act…" *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 554 (D.C. Cir. 1999); *see also Cobell v. Norton*, 240 F.3d 1081, 1097 (D.C. Cir. 2001).

For the last three decades, EPA has claimed that competing priorities and scarce resources have prevented it from making any progress on the Congressional mandate to enact financial assurance requirements. *See, e.g.*, App. 552 (2005 GAO Report at 5) ("EPA has cited, among other things, competing priorities and lack of funds as reasons for having made no progress in this area for nearly 25 years"). EPA's complaint of scarce resources falls particularly flat here, as during EPA's decades-long failure to require financial assurances, hundreds upon hundreds of new sites have been added to the National Priorities List. Remediation at many of these sites must be funded partly or entirely by the Superfund, often at enormous cost. *See supra* at 3. While conducting a complex rulemaking undeniably requires a significant commitment of resources from the agency, this pales in comparison to the cost of remediating the many "orphan" sites that have been added to the National Priorities List during EPA's three decades of inaction.

EPA is entitled to some deference in its efforts to prioritize in the face of limited resources, but this justification for delay is far less persuasive in light of the thirty years that have passed since Congress directed EPA to promulgate these rules. *See Cutler*, 818 F.2d at 898 ("The court should weigh any plea of . . .

practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources. Of course, these justifications become less persuasive as delay progresses, and must always be balanced against the potential for harm.").

In response to a court order, EPA has already identified the four industries that pose the greatest risks; in the absence of further judicial mandate, EPA has let nearly five years elapse with little further progress. Petitioners are simply asking that EPA finalize the rules for those industries within a reasonable amount of time.

E. The Harm Caused by EPA's Delay is Serious and Wide-Ranging.

The fifth *TRAC* factor—the nature and extent of the harm caused by delay—weighs strongly in favor of issuing a writ of mandamus in this case. *TRAC*, 750 F.2d at 80. EPA itself has chronicled in detail the harm resulting from sites contaminated by hazardous substances and the additional harm when cleanup is delayed due to lack of funding. *See supra* at 6-10. The nature and extent of the harm to human health and the environment from the four industries EPA identified is serious – EPA's federal register notices describe in detail the harm resulting from releases, and EPA has already concluded that these four industries pose large risks. *Supra* at 11-16. Indeed, it is due to the nature and extent of the risks posed by these four industries that EPA identified them for priority development of financial assurance rules under CERCLA. *See id.* EPA's own conclusions demonstrate that the nature and extent of the harm caused by EPA's delay weigh

strongly in favor of mandamus relief.

F. The Court Need Not Find Any Impropriety to Grant Relief.

It is well-established that EPA need not be acting in bad faith for the Court to grant this petition. *TRAC*, 750 F.2d at 80. While a good faith effort by the agency to address the delay could weigh against mandamus relief, *see Brock*, 823 F.2d at 629, here the promulgation of these financial assurance regulations has been delayed time and time again. *See supra* at 16-17. The agency's pattern of missed deadlines undermines any new promise made in this litigation that the rules will be forthcoming. *See In re Int'l Chem. Workers Union*, 958 F.2d at 1150 (the Court should "have grave cause for concern that if [it] do[es] not insist on a deadline now, some new impediment will be pleaded five months hence"); *id.* ("[w]hether the delays at every stage are the result of the agency's persistent excess of optimism, or attributable to bureaucratic inefficiencies, there must be an end to the process sometime soon.") (internal citations and quotation marks omitted); *Brock*, 823 F.2d at 627; *In re United Mine Workers*, 190 F.3d at 554-55. For thirty years, EPA has offered the same reasons for its failure to complete financial assurance rules as it has more recently given for repeatedly delaying rules for the four industries it has identified as posing the greatest risks. If history is any indication, absent an order from this Court, EPA will never complete the rules that Congress directed EPA to issue beginning in 1985. Mandamus relief is warranted.

CONCLUSION

For the foregoing reasons, Petitioners request that this court order EPA to finalize financial assurance rules for the hardrock mining, chemical manufacturing, petroleum and coal products manufacturing, and electric power generation, transmission, and distribution industries by January 1, 2016.

Respectfully submitted this ____ day of August, 2014.

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