

Federal Water Quality Coalition

July 26, 2022

VIA ELECTRONIC SUBMISSION

EPA Headquarters
Office of Emergency Management
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

**Re: Comments of the Federal Water Quality Coalition on the U.S.
Environmental Protection Agency’s Proposed Clean Water Act Hazardous
Substance Worst Case Discharge Planning Regulations
Docket ID No. EPA-HQ-OLEM-2021-0585**

Dear Sir or Madam:

The Federal Water Quality Coalition (FWQC or Coalition) appreciates the opportunity to file the following comments regarding U.S. Environmental Protection Agency’s (EPA or Agency) Proposed Clean Water Act Hazardous Substance Worst Case Discharge Planning Regulations (Proposed Rule or Proposal), 87 Fed. Reg. 17890 (March 28, 2022). The comment period initially ran through May 27, 2022 and subsequently was extended to July 26, 2022.

I. The Commenters’ Interest

The FWQC is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or that have members that are directly affected, by regulatory decisions made by EPA and States under the federal Clean Water Act (CWA or Act). FWQC membership includes entities in the aluminum, agricultural, automobile, chemicals, coke and coal chemicals, electric utility, home building, iron and steel, mining, municipal, paper, petroleum, pharmaceutical, rubber, and other sectors. FWQC members, for purposes of these comments, include: The Aluminum Association; American Chemistry Council; American Coke and Coal Chemicals Institute; American Forest & Paper Association; American Iron and Steel Institute; American Petroleum Institute; Association of Idaho Cities; Auto Industry Water Quality Coalition; Cargill, Incorporated; China Clay Producers Association; City of Pueblo (CO); City of Superior (WI); City of Tempe (AZ); Corn Refiners Association; Eli Lilly and Company; Freeport McMoRan Inc.; Hecla Mining Company; Mid America CropLife Association; National Association of Home Builders; National Oilseed Processors Association; Portland Cement Association; Shell; Treated Wood Council; U.S. Tire



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Manufacturers Association; Utility Water Act Group; and Western States Petroleum Association.

Many FWQC members own and operate facilities that have CWA hazardous substances onsite or may otherwise meet one or more of the substantial harm criteria announced in the Proposed Rule. Because this Proposal would impose requirements on FWQC members, the FWQC and their members have a direct interest in the Proposed Rule. Beyond the issues raised in these comments, individual members of the FWQC may have additional concerns with various aspects of the Proposal and may file additional comments separately.

II. FWQC Analysis and Recommendations

As an initial matter, the Coalition believes that EPA should not proceed to finalize this Proposal. Given the existing requirements that already apply to CWA hazardous substance discharges, and the Agency's previous finding that further requirements are not needed, there is no justification for imposing this new set of regulations and the substantial regulatory burden that the new requirements would create.

EPA's Proposed Rule is in response to a lawsuit that was brought to implement the statutory requirement in the Oil Pollution Act for EPA to "issue regulations which require an owner or operator of a tank vessel or facility . . . to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance." 33 U.S.C. 1321(j)(5)(A)(i). In a related lawsuit filed a few years prior, it was argued that EPA should expand its Spill Prevention, Control, and Countermeasure (SPCC) regulations to apply to releases of hazardous substances. Under the last administration, EPA issued a final action that concluded that extension of SPCC requirements to hazardous substances was not warranted in light of existing federal regulatory programs that already are adequately serving to prevent, contain, and mitigate CWA hazardous substance discharges. In support of its conclusion, EPA also referenced existing state programs addressing such potential discharges. 84 Fed. Reg. 46100-46136 (Sept. 3, 2019). The findings and conclusions from this prior regulatory action are directly relevant to the present action. It is arbitrary for EPA to find under one Administration, after significant input and analysis, that SPCC requirements should not be extended to hazardous substances, only to reverse that finding 2-3 years later as applied to potential worst case discharges, just because of a change in Administration. The justification that EPA offers for the change in position is not persuasive,¹ and this failure is further exacerbated by the vague nature of the Proposed Rule and its scope and application.

¹ In the Proposal, EPA presents an extensive analysis of CWA release data. From its analysis of over 250,000 discharges reported to the National Response Center, it only identifies 52 non-transportation CWA discharges of the type potentially addressed by this rulemaking. None of the events were identified as worst-case



If EPA nevertheless proceeds to finalize this rule, it needs to consider and address the many serious problems with the proposed requirements. The Proposal is overbroad and includes requirements that far exceed the scope of what is necessary to protect against the risk of substantial harm in the event of a worst-case discharge. Due to the overly broad scope of these requirements, compliance with the Proposal is likely to result in unnecessary costs to regulated parties, without advancing the objective of focusing emergency planning requirements on those facilities that have the greatest potential to cause substantial harm to human health and the environment. Moreover, the Proposed Rule has substantial legal deficiencies. It goes well beyond the Agency's authority under the relevant provisions of the CWA, and it opens the door to arbitrary, unsupported decisions by Agency officials. The FWQC has set forth comments below regarding a number of the new requirements in the Proposed Rule and has requested clarification or additional information on several aspects of the Proposed Rule. The Coalition continues to believe that EPA should not proceed with adoption of the Proposed Rule. If the Agency nevertheless decides to proceed with this rulemaking, the Coalition encourages EPA to make appropriate revisions to the Proposal, as set forth in these comments.

A. Applicability Criteria

1. The Rule Should Require Facility Response Plans Only for Those Hazardous Substances that Meet the Threshold Quantity

The FWQC is extremely concerned with the Proposed Rule's requirement that a facility must submit a facility response plan (FRP) for *all* CWA hazardous substances stored in containers, even if only one substance onsite meets the substantial harm criteria. This requirement is unjustifiably broad and would be overly inclusive, covering CWA hazardous substances that do not pose a substantial threat of harm. This aspect of the Proposal would be unnecessarily burdensome and would not serve the purpose of this rule: to focus emergency planning resources on facilities that pose the greatest potential to cause substantial harm.

Development of an FRP to address each substance would be difficult and unnecessarily burdensome, because the manner of response to a hazardous substance spill is a function of the properties of the hazardous substance. For example, the form and properties of the hazardous substance (a powder, liquid, or granular; insoluble or soluble in water; etc.) could require many different types of equipment and materials to respond to spills of the various hazardous substances. As an example, at one manufacturing site, there are 20 hazardous substances being stored, with two hazardous substances above the

discharges. The Agency's own analysis thus reinforces a finding that the other release prevention measures provided under existing State and Federal rules are already preventing CWA worst-case discharges.



threshold and 18 hazardous substances below the threshold. The characteristics of the 18 below-threshold substances are as follows:

- Three hazardous substances present due to trace quantities in lab standards.
- Eight hazardous substances present in amounts less than 10 pounds.
- Three hazardous substances present at less than 3% of the threshold quantity.
- Three hazardous substances present at less than 6% of the threshold quantity.
- One hazardous substance present at 67% of the threshold quantity.

The inclusion of CWA hazardous substances that do not pose a substantial threat of harm is contrary to the intent of the law. To require the facility to prepare a response plan for every one of those hazardous substances, as the Proposed Rule would do, is simply unjustified, unnecessary, and inappropriate. The applicability criteria need to be substantially narrowed and more clearly articulated.

2. The Threshold Quantity Provisions Should Be Clarified

EPA's proposal to use a threshold for applicability that is 10,000 times the reportable quantity for CWA hazardous substances is preferable over the other multipliers that EPA considered. The other multipliers that EPA considered would over-include facilities, such that emergency planning requirements would not be focused on the facilities with the greatest potential threat of harm. Similarly, the other multipliers That would create additional, undue burdens on regulators and facilities without a commensurate environmental benefit, by placing planning requirements on numerous facilities that do not have large enough onsite capacities of CWA hazardous substances for a worst case discharge to pose a risk of substantial harm to public health or the environment. Local and facility emergency planning efforts could be overwhelmed, without a commensurate environmental benefit. The Coalition recommends that only those individual containers that exceed the "10,000 times the reportable quantity" criterion should be subject to the rule's requirements. Preparation of plans should only be required when a single container exceeds the threshold that EPA is presuming would cause significant harm.²

The Coalition also seeks clarification as to whether only CWA hazardous substances in liquid form are subject to this rule, and, if so, what constitutes a "liquid." Some CWA hazardous substances can be present in both liquid and gaseous forms, and some substances can fluctuate between the two states depending on certain conditions. Importantly, those substances that fluctuate between gaseous and liquid form but tend to volatilize at ambient temperatures and pressures are unlikely to discharge into a navigable

² EPA should also consider that the Clean Air Act Risk Management Plan (RMP) rule focuses on the risks posed by single containers, rather than considering all containers on site together. See <https://www.epa.gov/rmp/do-quantities-interconnected-vessels-need-be-aggregated-worst-case-release-scenario-analysis> .



water or any other surface water feature. Accordingly, the Coalition requests that EPA clarify that the form of substances covered expressly excludes hazardous substances that volatilize at ambient temperatures and pressures.

One example of a substance that can be present in multiple states is chlorine. Chlorine may be stored in gaseous form (or become gas as soon as it is depressurized), and it would not be expected to discharge as a liquid during a worst case scenario. Hence, a facility with a storage capacity of 100,000 pounds or more of chlorine gas would be subject to the rule even though there is no chance for a discharge. (Releases to air, of course, would be subject to other programs). Another example is anhydrous ammonia. Such substances should not be subject to the rule.

Another example of a substance that can be stored in multiple states is adipic acid. Adipic acid is a solid at ambient temperature and has a melting point of 152 C. It is normally stored in silos as a powder. Although it may melt during processing, any release would quickly solidify, mitigating the risk of a CWA discharge. It has no potential to flow into a navigable water. Such substances should be excluded from the rule.

EPA should also consider whether, for threshold purposes, in-use substances should be considered. By way of example, the reportable quantity (RQ) for polychlorinated biphenyls (PCBs) is 1 pound, so the applicability threshold would be 10,000 pounds. It is not unusual for in-use transformers to contain this amount, which would trigger applicability of the rule - especially in light of the “mixture rule” for unknown concentrations of constituents in a mixture.³ This would result in applying the new requirements to many facilities with transformers, even though the risk of substantial discharge of PCBs from a transformer are small.

EPA should specify that mineral-oil containing electrical equipment can be evaluated in accordance with the procedures specified in the PCB regulations, which state that spills of oil known to contain <50 ppm PCB by generator knowledge or testing do not require reporting. If the PCB regulations do not require reporting, an FRP plan similarly should not be required.

For PCB-containing used oil from transformers and other equipment that is stored in tanks at service facilities, prior to disposal, using the proposed “mixture rule,” a small tank (e.g., 1,300 gallon capacity) used to store the PCB-containing oil would trigger a reporting threshold for PCBs, and an FRP would be required. The used oil is already regulated under EPA’s Oil Pollution Prevention Program (OPP), 40 CFR 112 Subpart D. An SPCC Plan is required, and if the quantity of oil meets the reporting threshold under

³ EPA should clearly specify, with regard to the “mixture rule,” that it only applies to substances that appear on the MSDS or SDS, and that it should only apply to substances that are present in concentrations of 1% or more (as provided in Department of Homeland Security (DHS) rules.



OPP, an FRP is required. Requiring additional FRPs for hazardous substances in the oil would be duplicative.

3. Flexibility Should Be Provided to Use Maximum Quantity Instead of Maximum Capacity

The Coalition also urges EPA to provide flexibility for facilities to rely on a facility's actual storage quantity of CWA hazardous substances, as opposed to its capacity, including for the extrapolation of quantities in a mixture, which may greatly expand the rule's scope. This would be consistent with EPA's own regulations concerning Tier II Chemical Inventory Reporting under the Emergency Planning and Community Right-to-Know Act (EPCRA). A facility may have a very large capacity to store CWA hazardous substances, but in practice may only be using a fraction of its capacity to store CWA hazardous substances. Relying on capacity, rather than actual storage quantity, over-emphasizes the potential threat of facilities with a large capacity but relatively lower actual storage. Incorporating flexibility to consider actual storage quantity, as opposed to maximum capacity, in threshold applicability determinations would ensure that the final rule appropriately focuses on those facilities that have the greatest potential to cause substantial harm to human health or the environment. Also, using actual storage capacity instead of maximum storage capacity should create a useful incentive for facilities that may choose to further reduce their onsite storage of hazardous substances or remove excess storage capacity.

4. The Rule Should More Clearly Define "Container"

The aggregation of capacity should not necessarily include every container onsite. A release from a small container, for example, would not have the same impact as a release from a large container and may not pose any substantial risk at all. Inclusion of all containers regardless of size creates an inordinate and unnecessary regulatory burden for facilities in making threshold applicability calculations, without commensurate environmental benefit. Accordingly, there should be limits as to what types and sizes of containers must be included.

Additionally, the Coalition requests clarification as to what constitutes a "container" for purposes of this rule. The Proposed Rule defines "container" as "any device or portable device in which a CWA hazardous substance is processed, stored, used, transported, treated, disposed of, or otherwise handled." 87 Fed. Reg. at 17926. This proposed definition is ambiguous, subject to various interpretations, and should be appropriately narrowed.

For instance, there is no discussion in the preamble of what is meant by the term "device" in the definition of "container." The preamble acknowledges the uncertainty, noting that the term "containers" is not precise, and explaining "that for the chemical industry, chemical inventory quantities routinely fluctuate, and facilities use a wide variety of containers to store CWA hazardous substances;



common containers include storage tanks, process vessels, railcars, and other onsite shipping containers not in transportation.” 87 Fed. Reg. at 17902 (emphasis added). These examples are helpful, but expanding on these examples would add clarity. We urge EPA to revise the definition by including language identifying additional examples such as “vessel, canister, drum, tank, dumpster, bulk cargo container,” and by noting that containers are “typically sealed or closed with a closure device such as a cover, cap, hatch, lid, plug, seal, valve, or other type of fitting,” and “are constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic), which provide structural support.”

Further, the proposed definition of “container” could be read to cover Resource Conservation and Recovery Act (RCRA) solid waste, solid waste management units, and landfills. There are some solid waste management units that are of a sufficient size that might otherwise trigger the threshold quantity test, even though the CWA hazardous substances that they contain are so diluted that the waste mixture is non-hazardous. While these non-hazardous wastes may contain some amount of CWA hazardous substances, they are by definition *not* hazardous and therefore should not be subject to worst case discharge regulations that are designed to address hazardous substances. As a result, the rule should carve out those materials that meet the RCRA definition of non-hazardous solid waste.

These changes would make clear that the rule does not apply to units, such as landfills and various kinds of surface impoundments, that should not be considered containers within the scope of the rule and which, in any event, are already regulated under other programs.

Here, the Coalition has outlined several other specific concerns as to the scope of the requirements for “containers,” and our suggested revisions to the Proposed Rule to address those concerns:

- The regulation does not exclude small containers of hazardous substances from threshold determination, which is allowed under the SPCC regulations at 40 CFR 112.1(5). Containers less than 55 gallons are excluded from the threshold calculation under SPCC. Adopting this exclusion here would reduce a site’s burden in accounting for hazardous substances in liter jars or 5 gallon containers for RQ threshold determination, since spillage from these small containers would be readily cleaned up by on-site personnel and would have minimal, if any, impact to the environment.
- Process tanks used specifically for research and development that are “idle” but not “permanently closed” should not be included in the full capacity calculation toward the RQ threshold. Research and development (R&D) process tanks are infrequently used and may process batches with different hazardous substances in different concentration from one campaign to the next. Frequently, these tanks are either idle or processing non-hazardous substances. It would be unreasonable to have to include, in the threshold determination, the whole tank capacity of frequently idle tanks that may occasionally run batches containing



hazardous substances. These tanks are situated inside buildings, which would prevent spillage from entering into the environment.

- Hazardous waste storage tanks, and containers containing hazardous substances with varying concentrations depending on the upstream process generating the waste, should not be included. These tanks and containers will not have a definitive concentration on a regular basis. The EPCRA Section 312 rules, at 40 CFR 370.13, exclude reporting substances for which facilities are not required to have a Material Safety Data Sheet (MSDS) or Safety Data Sheet (SDS) under the Occupational Safety and Health Administration (OSHA) regulations. Hazardous waste is excluded from the MSDS requirements under OSHA regulations, at 29 CFR 1910.1200(b)(6)(i). Furthermore, hazardous waste storage tanks and containers are subject to RCRA regulations. Any large quantity generators (LQGs) are required to have a RCRA contingency plan under 40 CFR 264.50 to address emergency response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water. These storage devices are already well-covered by the RCRA contingency plan provisions.
- Tanks and basins or lagoons used for wastewater treatment, whether these wastewater holding devices are used for equalization, neutralization, sedimentation or biological treatment, should be excluded. Wastewater may contain varying trace amounts of hazardous substances. The Proposal does not exclude wastewater operations, which the SPCC regulation under 40 CFR 112.1(6) does exclude; nor does the exemption for process water under 40 CFR 118.9(b)(iv) clearly define wastewater as part of process water. Appropriate exclusions for wastewater operations should be incorporated.
- Process vessels of any kind should be excluded from consideration. Any vessel in which a physical, chemical, or biological change is intended to occur should not be considered to be the same as bulk storage, and should be excluded. This would include water/wastewater treatment system components, as well as manufacturing processes.
- Basins, impoundments, ponds or lagoons used for storing process intermediates, such as pulping liquor, should be excluded. These open-top, excavated impoundments present a very low risk of catastrophic spilling or rupture, since they maintain liquid levels below maximum capacity and are most commonly integrated with a gravity-fed process flow system.
- On site tanks used to treat or to store drinking water, reverse osmosis (RO) water, boiler feedwater, or deionized (DI) water through the use of hazardous substances, such as sodium hypochlorite, chlorine, or sodium hydroxide may contribute to the threshold determination, since these tanks would have varying concentrations of the treatment chemical. The current proposed



exemption of process water under 40 CFR 118.9(b)(iv) does not clearly include on-site treated drinking water, RO water, boiler feedwater, or DI water. Inclusion of these tanks in the threshold determination, as containing unknown mixtures, is not appropriate.

- On-site tanks used for storage of fire-fighting/deluge water, which will contain an unknown amount of chlorine from treated municipal sources or on-site treatment systems, should not be included. The current proposed exemption of process water under 40 CFR 118.9(b)(iv) does not clearly include on-site fire-fighting/deluge water storage tanks, and should be revised to clearly cover those tanks.

5. The Quantity Threshold for Mixtures Should Reflect Actual Risk

Regarding mixtures, the Proposal would require that, when one or more of the hazardous substances in the mixture is unknown, the lowest reportable quantity must be used. Requiring use of the lowest reportable quantity of the constituents of the mixture is overly conservative and does not reflect the actual risk of harm, if the mixture is released. Importantly, regulated facilities should have the opportunity to provide information about the substances in the mixture, which, in turn, should inform the threshold quantity for the mixture. Accordingly, the Coalition requests that EPA modify this provision to better reflect the actual risk of harm from the release of mixtures.

EPA also needs to clarify how the “mixture rule” would be used in determining the threshold quantity. For example, does the threshold quantity calculation include the entire mixture that includes a hazardous substance or does the quantity only include that amount of the hazardous substance in the mixture? Or does the threshold quantity calculation only include quantities of “pure” substances? If it is the latter, then a facility should be able to document what amount of the total mixture is comprised of the hazardous substance and use that figure for the threshold quantity calculation.

6. “Navigable Waters” Should Be Clearly Defined

The Proposal would require any facility meeting the threshold quantity that is located within one-half mile of a navigable water or a conveyance to a navigable water to complete the substantial harm determination. The Coalition has concerns over the concept and definition of navigable waters in the Proposal, set forth below.

First, the Coalition requests that EPA remove the reference to “conveyances” to navigable waters in the proximity criterion. The term “conveyance” is not defined and, therefore, could be read in an overly broad and open-ended manner. The CWA broadly describes “conveyance” within the definition of “point source” as “any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container. . .” 33 U.S.C. 1362(14). Therefore, “conveyance” may include ditches, fissures, or other features that eventually connect to a navigable water. The CWA reference to a



“conveyance” has no limitation on distance or directness, and none is specified in this Proposal. For example, a facility could be 50 miles from the nearest navigable water, but covered by the Proposed Rule because it is within one-half mile of an upland ditch or erosional feature that eventually leads to a navigable water. This result is inconsistent with the objective of focusing the proposed emergency planning requirements on those facilities with the greatest potential to cause substantial harm to human health or the environment. Accordingly, the Coalition recommends that the Agency remove “conveyances” from the proximity criteria. If EPA does include conveyances in the proximity criterion, they should be defined and geographically limited to ensure that the rule focuses on facilities with the greatest potential to cause substantial harm in the event of a release. For example, ephemeral features, such as dry washes found in the arid and semi-arid Southwestern U.S., should be excluded from any definition of conveyance. There is a low probability that a hazardous substance discharge into a dry wash, which flows infrequently and only during and in immediate response to substantial rainfall, will reach a navigable water.

Second, the Coalition requests clarification as to the meaning of “navigable waters” in the context of this specific program. There is relevant regulatory and litigation history on this issue as it applies to hazardous substance discharges, which is as follows:

- Prior to 2015, the SPCC regulations, which are based on the same statutory framework as EPA’s Proposed Rule, defined “navigable waters of the United States” to mean “‘navigable waters’ as defined in section 502(7) of the FWPCA, and includes: (1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92–500), and tributaries of such waters; (2) Interstate waters; (3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and (4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.” 40 C.F.R. 112.2 (2014).
- On July 17, 2002, EPA issued a final rule amending the SPCC regulations to broaden the definition of “navigable waters” to mirror the broad definition of “waters of the United States” found in 40 C.F.R. 122.2. 67 Fed. Reg. 47042, 47142 (Jul. 17, 2002).
- The American Petroleum Institute, the Petroleum Marketers Association of America, and Marathon Oil Company challenged certain aspects of the July 2002 SPCC regulations. On March 31, 2008, the U.S. District Court for the District of Columbia ruled that EPA’s promulgation of the revised definition of “navigable waters” in the July 2002 SPCC rule violated the Administrative Procedure Act. *American Petroleum Institute v. Johnson*, 571 F.Supp.2d 165 (D.D.C. 2008). The court concluded that EPA failed to provide a reasoned explanation for its decision to promulgate the broader definition of “navigable waters.” *Id.* at 181-185. The court vacated the July 2002 SPCC regulatory definition of “navigable waters” and specifically restored the 1973 SPCC regulatory definition pending further appropriate action by EPA. *Id.* at 185-187.



- On November 26, 2008, EPA issued a final rule to amend the SPCC regulations in response to that court decision, and that rule stayed in effect through 2015. 73 Fed. Reg. 71941 (Nov. 26, 2008).
- While EPA has recently attempted to redefine “navigable waters” or “waters of the United States” in 2015 and 2020, including for purposes of the SPCC regulations, those revised definitions are not legally applicable at this time, and EPA has clarified that determinations of jurisdictional scope are currently based on the pre-2015 regulatory regime. Furthermore, neither the 2015 rulemaking nor the 2020 rulemakings provided the “reasoned explanation” required under *American Petroleum Institute* in order to apply a broader definition of “navigable waters” to the SPCC program and other CWA Section 311 programs.
- In 2021, EPA proposed another revised definition of “navigable waters,” including for purposes of CWA Section 311. See 86 Fed. Reg. 69,376 (Dec. 7, 2021). However, that proposal also fails to address why it is appropriate to impose a broader definition of “navigable waters” to CWA Section 311 programs.

Based on the above, EPA’s definition of “navigable waters” for purposes of its Proposed Rule should track the 1973 SPCC regulatory definition that was in the pre-2015 SPCC regulations.

7. The Agency Should Revise its Substantial Harm Criteria and Provide Further Justification for the Toxic Endpoints Selected.

Once a facility has determined that it meets threshold quantity and geographic proximity requirements, the facility must then determine whether it meets any of the “substantial harm” criteria. One of the substantial harm criteria is that the facility is located at a distance where a discharge of CWA hazardous substances has the potential to cause injury to fish, wildlife and sensitive environments (FWSE). The Proposal includes parameters and toxic endpoints to be used by facilities when determining whether a worst case CWA hazardous substance discharge could cause injury to FWSE. We have a number of concerns regarding the proposed “substantial harm” criteria, which are provided below with our recommendations:

- With respect to mixtures, EPA states that a facility must assume that the entire container discharges the hazardous substance with the lowest RQ. 87 Fed. Reg. 17905. If a facility can document that is not the case, this assumption should be rebuttable, so a different level can be used in the toxic endpoint calculation.
- The “substantial harm” criterion related to the ability of a worst case discharge of a hazardous substance to adversely impact a public water system should be limited to public water systems that have surface water or groundwater under the direct influence of surface water as a source, and not to public water



systems that have groundwater as their only source (since the CWA does not cover discharges to groundwater).

- The “substantial harm” criterion related to the ability to cause injury to public receptors is overbroad and not well defined. This criterion should be removed, or at least refined to focus more carefully on actual harm to water quality.
- The “substantial harm” criterion related to previous hazardous substance discharges would presume “substantial harm” if the facility has had just one small discharge of a CWA hazardous substance in the last five years, even if the facility meets none of the other indicators of “substantial harm.” This criterion should be removed, or if retained, focused on facilities with a history of significant discharges.

8. The Agency Should Incorporate Additional Flexibility and Develop Guidance as to Modeling

The Coalition appreciates that the Proposal incorporates flexibility that allows facilities to use their own models and methodologies to evaluate substantial harm. However, facilities should have the ability to use other methods if they can develop plans without using modeling, which is likely to be costly and time-consuming. Accordingly, the Coalition requests that EPA remove the requirement that facilities must model a worst case discharge scenario and allow for facilities to use other methods, where appropriate.⁴ Additionally, the Coalition requests that EPA provide guidance as to models and methodologies that would be appropriate for facilities to use to calculate the distance to endpoints.

9. The Rule Should Include Exemptions for Beneficial Use Chemicals that Do Not Pose a Risk of Substantial Harm

The Proposal exempts CWA hazardous substances present in process water or non-contact cooling water from the threshold quantity calculations. The Coalition requests clarification as to whether wastewater treatment chemicals present in a facility are exempt from maximum capacity determinations where those chemicals are used for treating process water and cooling water. Additionally, the rule should clarify that exempt chemicals are exempt both for purposes of determining maximum capacity and for purposes of preparing RFPs, even when another chemical at the facility exceeds the threshold quantity. Wastewater treatment chemicals and chemicals used to treat cooling water serve an important water treatment function, and are typically stored in quantities less than the proposed threshold quantities. Therefore, it is logical to exempt these high-

⁴ Such non-modeling methods are available for use in other programs, including the RMP program under the CAA.



utility, low-risk chemicals.⁵ The rule should also do the following: (1) clarify that this exemption applies to chemicals used to treat process or cooling wastewater including ferric chloride, sulfuric acid, hydrochloric acid, and sodium hydroxide, chlorine, sodium hypochlorite, and sodium bisulfite, and (2) clarify the meaning of the phrase “as drawn from the environment or municipal sources.”

10. The Agency Must Clearly Explain How it Will Address Environmental Justice Concerns

The Coalition supports the Agency’s intention to address environmental justice (EJ) concerns, but the Agency must clearly identify how it will address EJ concerns through this rulemaking. The Proposal affords Regional Administrators significant discretion to require FRPs for facilities located in communities with EJ concerns, but does not explain why this discretion is necessary or how the Regional Administrators will invoke this discretion to address EJ concerns. If a facility is found not to meet the substantial harm criteria, it is unclear how an EJ community would be adversely or disproportionately impacted. The substantial harm criteria should be comprehensive enough to protect communities with and without EJ concerns. The authority conferred on Regional Administrators to require FRPs for facilities that do not meet the substantial harm criteria on the basis of vague EJ concerns is improper and should be limited. If the Agency is going to afford significant discretion to the Regional Administrator to require FRPs on the basis of EJ concerns, the Agency must clarify the factors that a Regional Administrator must consider in determining whether the facility poses a unique, substantial harm to the EJ community.

11. The Agency Must Clearly Explain How “Adverse Weather” Encompasses Climate Change Impacts

The Proposal would require facilities to develop FRPs for a worst case discharge, which is defined as the largest foreseeable discharge in adverse weather conditions. The FRP program for oil contains a definition of adverse weather that includes factors to consider such as wave height, ice conditions, temperatures, weather-related visibility, and currents. *See* 40 C.F.R. 112.2. The legislative history for the Oil Pollution Act of 1990 states that the “largest foreseeable discharge” from a facility was intended to describe a scenario that is worse than either the largest spill to date or the maximum probable spill for that facility. *See* 101 H. Rpt. 653. However, the Proposed Rule’s definition of adverse weather is much broader and does not contain the same specificity regarding the factors that should be considered when evaluating adverse weather conditions.

⁵ Similarly, EPA should exempt chemicals used in air emissions control systems, such as scrubbers and selective catalytic reduction (SCR) systems.



Notably, the Proposal lists climate change as a factor that must be considered. Climate change, however, is an unpredictable, complex, and extremely broad concept that itself involves many factors. The Coalition seeks clarification as to how facilities can consider climate change in evaluating adverse weather conditions. Specifically, the Coalition seeks guidance as to what types of weather events should be considered, and how those weather events, which are often unpredictable, should be modeled. For example, hurricanes could be considered as “adverse weather conditions,” but their intensity and frequency are highly unpredictable, and it would be unsafe and unreasonable, in many circumstances, to try to respond to a release during a hurricane. EPA should follow the definition for “adverse weather” in 40 C.F.R. 112.2, and should provide guidance to regulated facilities regarding the evaluation of climate change impacts and how these impacts should influence FRPs. Further, the Coalition seeks clarification and guidance regarding how facilities should evaluate potential vulnerabilities from climate change-related impacts that are not necessarily extreme weather events, such as sea-level rise.

12. The Rule Should Include Exemptions for Facilities with Spill Mitigation Measures and Secondary Containment

The Agency has solicited comment “on whether and how to include passive mitigation measures, such as secondary containment, and administrative controls in determining substantial harm, as well as whether to consider passive mitigation and administrative controls in planning distance calculations.” The Coalition urges EPA to exclude facilities with spill mitigation measures or secondary containment, such as retention ponds, that would minimize the risk of a discharge to navigable waters.

Including secondary containment as a criterion for determining applicability is especially appropriate for hazardous substances, where containment would actually prevent the risk of a discharge into navigable waters. For example, systems that are capable of withstanding adverse events such as fires, explosions, floods, hurricanes, and earthquakes and have no connection to the environment, such as a rainwater drain valve, do not pose a risk of substantial harm. Therefore, the final rule should exclude and not require a FRP where facilities have secondary containment systems or spill mitigation that is sufficient to minimize the risk of a hazardous substance discharge to a navigable water.



13. The Agency Should Justify the Need for the Substantial Harm Certification Form

The FWQC questions the purpose and value of the Substantial Harm Certification Form. It is unclear from the Proposal how the Substantial Harm Certification Form would advance the objectives of the rulemaking. Covered facilities will be required to develop and submit other documentation, including the FRP, which includes or overlaps with much of the information required in the Substantial Harm Certification Form. The Coalition requests that the Agency clarify the regulatory purpose and value of the Substantial Harm Certification Form, especially in light of the increased burden to facilities that would have to complete the form.

Relatedly, the Coalition seeks confirmation that facilities that do not meet the reportable quantity threshold or substantial harm criteria need not demonstrate that they do not meet the threshold or criteria. Such a demonstration would be unnecessary, because it would not advance the objectives of the rule and would place an unnecessary regulatory burden on facilities that are not intended to be covered by the rule.

There may, however, be circumstances under which a facility would prefer to voluntarily submit an FRP, where the initial screening criteria of threshold quantity and geographic proximity are met, even if substantial harm criteria are not met or are uncertain. In such circumstances, the final rule should allow for voluntary submission of FRPs.

B. Response Planning

1. The Rule Must Avoid Duplication, Overlap, and Inconsistency with Other Regulatory Programs

Many Coalition members already are subject to requirements that apply to prevent and control discharges of hazardous substances, including the Oil Pollution Prevention FRP rules under the CWA, effluent limitations guidelines issued under the CWA for specific industries⁶, the RMP rule under the Clean Air Act (which addresses, for example, ammonia), OSHA regulations, and State programs (such as aboveground storage tank programs that require installation of secondary containment systems).⁷ The Agency should ensure that this rule addresses only those issues not covered under other Federal or State programs. Due to the potential overlapping requirements of the Proposed Rule with

⁶ See, e.g., 40 CFR 430.03, which specifies best management practices for spent pulping liquor, soap, and turpentine management, spill prevention and control, for certain pulp, paper and paperboard mills.

⁷ This is not an exhaustive list of all of the spill prevention and control requirements that apply to regulated operations of FWQC members. Other, additional requirements are provided for in rules that apply to specific types of facilities and industries. For instance, storage of gas and hazardous liquids in salt domes is considered incident to transportation and is therefore subject to Pipeline and Hazardous Materials Safety Administration (PHMSA) rules and State rules on pipeline safety and on oil and gas operations.



existing rules, it is critical that the Agency carefully consider areas in which duplication, overlap, and inconsistencies may unnecessarily burden regulated facilities. Accordingly, the Coalition requests that EPA analyze these programs to assess how they interact, and then streamline the rule to avoid duplicative, overlapping, and inconsistent requirements.

Hazardous waste storage tanks and containers are subject to RCRA regulations. Any large quantity generators (LQGs) are required to have a RCRA contingency plan under 40 CFR 264.50 to address emergency response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water. These storage devices are already well covered by the RCRA contingency plan provision. Also, it is worth noting that 40 CFR 264.52 in the RCRA regulations allows facilities with SPCC plans or any other emergency contingency plans to amend those plans to meet the RCRA contingency plan requirements without creating a new plan. The current Proposal does not provide that flexibility.

EPA's Regulatory Impact Analysis for the Proposal utilizes EPCRA 312 Tier II reports to estimate the number of regulated facilities subject to the rulemaking. It stands to reason that regulatory threshold determinations should follow the same regulatory interpretations used under EPCRA 312 Tier II regulation for reporting. Therefore, the regulation should consider the exemptions and exclusions listed under 40 CFR 370.13 for threshold determinations in this program, including those exemptions and exclusions from the Tier II program that are specifically discussed elsewhere in these comments.⁸

2. Reportable Discharge History Should Not Include Permitted Releases

The Proposal requires that facilities report any discharge to a water that is above the reportable quantity of CWA hazardous substances with a maximum capacity onsite. Some permittees, however, may be authorized to discharge a hazardous substance in an amount that would otherwise constitute a reportable quantity. In these instances where the discharge is federally permitted and does not constitute a violation of the facility's NPDES permit, the discharge is not "reportable" and should not need to be included in the FRP. Accordingly, EPA should modify this language to clearly and specifically exclude permitted discharges from the FRP.

⁸ EPA should also consider the exemptions and exclusions in the Clean Air Act RMP rule (at 40 CFR 68.115), several of which are discussed elsewhere in these comments.



C. Implementation and Enforcement

1. The Regional Administrator's Authority Must Be Limited

The Proposed Rule authorizes Regional Administrators to require FRPs based on site-specific factors *regardless* of whether a facility meets the substantial harm criteria. This grant of authority is seemingly unlimited, as the site-specific factors are not clearly identified. This provision seems to authorize Regional Administrators to make arbitrary and capricious decisions, which is clearly illegal under the Administrative Procedure Act. Moreover, the broad grant of unilateral authority to Regional Administrators renders the substantial harm criteria meaningless and exceeds the Agency's statutory authority under the CWA.

The rule itself should lay out the criteria that will be used to make a substantial harm determination. This clear identification of the substantial harm criteria would promote predictability and regulatory certainty for regulated facilities. If EPA believes that the substantial harm criteria are not comprehensive enough as proposed, then the Agency has a duty to revise the criteria so that a sound substantial harm determination can be made. This overly broad assertion of authority should never be necessary if a facility or Regional Administrator accurately assesses the impacts of a worse case discharge based on the criteria established in the rule. Therefore, the discretion conferred on the Regional Administrator is inappropriate and should be limited.

The Proposed Rule states that any person who "believes" that a facility subject to this section could, because of its location, be expected to cause a substantial harm to the environment by a discharge or substantial threat of a discharge of a CWA hazardous substance, may petition the Regional Administrator to determine whether the criteria for a FRP are met. 87 Fed. Reg. at 17,930. The Proposed Rule does not require a petitioner to provide any evidence in support of such a petition. A petition based on mere belief should not be an adequate basis for initiating an EPA investigation, and this provision raises the possibility that false claims could be used to harass facilities that are fully compliant with the applicable requirements. The rule should require petitioners to provide supporting evidence of substantial harm, and it should allow facilities an opportunity to respond before a Regional Administrator makes a determination as to how it will proceed in response to such a petition.



2. The Appeal Process Should Be Clarified and Streamlined

The Coalition appreciates that EPA has provided an appeal process to challenge decisions made by the Regional Administrator. The appeal process, however, should not be the first opportunity for a facility's mitigation measures or secondary containment systems to be considered. As discussed above, these aspects of a facility should be considered first in the initial substantial harm determination. On appeal of that determination, the facility should be entitled to present additional evidence and information relating to its prevention measures and secondary containment systems, but facilities should not have to appeal a substantial harm determination simply to present this preliminary information, which should be considered at the outset.

Relatedly, the process for petitioning EPA to require that a specific facility prepare and submit a FRP should provide for involvement from the facility in question as well. Petitioners should be required to provide evidence in support of their petitions, and facilities should have an opportunity to respond to the petition before the Regional Administrator makes a determination.

The rule also should clarify that the EPA Administrator's secondary decision reviewing the Regional Administrator's initial decision constitutes final agency action, which is appealable to the federal courts.

3. EPA Should Extend the Compliance Dates to Account for the Complexity and Costs of Developing FRPs for the First Time Under this New Rule

The Proposal requires that regulated facilities meeting the substantial harm criteria prepare and submit a FRP within 12 months of the effective date of this rule. As discussed above, the Coalition has requested guidance from EPA on various aspects of the Proposal. Facilities should not be required to submit FRPs at least until after EPA has issued guidance on any final rule. Additionally, facilities may need to develop and run complex models to assess substantial harm, which may be a time-consuming and resource-intensive effort. Accordingly, the Coalition requests that the Agency extend the compliance dates by at least twelve (12) months, in order to minimize the burden on regulated facilities, promote compliance with the rule, and ensure that FRPs are well developed.

Also, if EPA determines that secondary containment will reduce the occurrence of discharges that can cause substantial harm to the environment, and a facility decides to install secondary containment for a hazardous substance that exceeds the threshold, EPA should allow up to two years for the process of designing the system, procuring needed equipment, and installing the containment systems.



III. Conclusion

The requirements in the Proposed Rule are unnecessary and duplicative, and in some respects they conflict with existing requirements in other Federal and State regulatory programs. Therefore, the FWQC recommends that EPA not finalize the Proposal. If, nevertheless, the Agency decides to proceed with the new regulations, then it should address the substantial policy, legal, and scientific concerns raised as to the Proposed Rule in these comments, and should consider the specific revisions to the Proposal that the FWQC is recommending.

The FWQC appreciates the opportunity to submit these comments concerning the Proposed Clean Water Act Hazardous Substance Worst Case Discharge Planning Regulations. Please feel free to call or e-mail if you have any questions, or if you would like any additional information concerning the issues raised in these comments.



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