



EPA Proposes Rulemaking to Require Facility Response Plans for Clean Water Act Hazardous Substances

On March 28, 2022, the United States Environmental Protection Agency (EPA) published a proposed rule to expand the types of non-transportation-related facilities that may need to develop Facility Response Plans (FRPs) under the Clean Water Act (CWA). [87 Fed. Reg. 17890](#). At present, FRPs are required for certain facilities¹ that are reasonably expected to cause “substantial harm” to the environment by discharging *oil* into navigable waters. The proposed rulemaking would require FRPs for facilities that could reasonably be expected to cause substantial harm to the environment by discharging CWA *hazardous substances* to navigable waters.

Background

The proposed rulemaking is in response to judicial challenges related to EPA’s failure to meet the requirements of § 311(j)(5) of the CWA, which requires the president to “issue regulations which require an owner or operator of a tank vessel or facility . . . to prepare and submit . . . 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\(j\)\(5\)](#).

In 2019, the Natural Resources Defense Council filed suit in federal court, claiming that the EPA’s failure to issue the regulations required by § 311(j)(5), was a “failure to perform a non-discretionary duty or act in violation of the [CWA].” Complaint for Declaratory and Injunctive Relief, *Environmental Justice Health Alliance for Chemical Policy Reform v. EPA*, No. 1-19-cv-02516 (S.D.N.Y. Mar. 21, 2019). The plaintiffs and EPA resolved the litigation through the entry of a consent decree requiring EPA, by March 12, 2022, to sign a notice of proposed rulemaking relating to FRPs for CWA hazardous substances. EPA’s proposed rule reportedly satisfies EPA’s first obligation under the consent decree, with EPA’s second obligation being to sign a notice taking final action within 30 months after publication of the proposal.

¹A facility meets the “substantial harm” threshold regarding oil discharges if it: (1) has a total oil storage capacity greater than or equal to 42,000 gallons and it transfers oil over water to/from vessels; or (2) has a total oil storage capacity greater than or equal to 1 million gallons and meets one of the four criteria identified in 40 C.F.R. § 112.20(f).

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Applicability of the Proposed Rulemaking

The proposed rule would apply to onshore non-transportation-related facilities “that could reasonably be expected to cause substantial harm to the environment by discharging CWA hazardous substances into or on the navigable waters, adjoining shorelines, or exclusive economic zone.” EPA proposes two screening criteria and four substantial harm criteria.

First, the facility must determine whether the maximum capacity onsite for any CWA hazardous substance meets or exceeds 10,000 times the reportable quantity (RQ) in pounds. EPA has designated a RQ for each of the approximately 300 CWA hazardous substances (i.e., the quantity above which a discharge to a navigable water of a CWA hazardous substance must be federally reported). The RQ is not the same for every CWA hazardous substance. In many instances, the RQ is 5,000 pounds, but for other substances, the RQ may be as low as 10 pounds (e.g., benzene) or even one pound (e.g., PCBs). Facility owners should determine the RQ of CWA hazardous substances on their sites to determine whether their facilities meet the first screening criteria of the proposed rulemaking.

Second, the facility owner or operator must determine whether the facility is within one-half (0.5) mile of a navigable water or a conveyance to a navigable water. This is an interesting criterion in that the definition of a “water of the United States” (i.e., a navigable water) has been heavily debated for more than a decade, with the Biden administration recently proposing a new definition and the U.S. Supreme Court expected to opine on the appropriate test to evaluate the existing definition during this term. More information on the definition of “waters of the United States” can be found [here](#).

If these two screening criteria are met, the owner or operator of the facility would be required to determine whether the facility meets any of four substantial harm criteria: (1) the ability to adversely impact a public water system; (2) the ability to cause injury to fish, wildlife, and sensitive environments; (3) the ability to cause injury to public receptors; and/or (4) having a reportable discharge of a CWA hazardous substance within the last five years.

If any of these substantial harm criteria are met, the facility would be required to submit a CWA hazardous substance FRP to the EPA. Existing facilities that meet the criteria on the effective date of the rulemaking would be required to submit a FRP to EPA within 12 months of the effective date.

Environmental Justice and Climate Change Considerations

Consistent with the priorities of the Biden administration, EPA is seeking comments on ways to prioritize the needs of communities with environmental justice concerns and considerations related to climate change as part of this rulemaking. EPA stated that the proposed rulemaking was “inherently a climate change adaptation regulation” because it requires planning for worst case discharges in adverse weather conditions. EPA is also seeking comments on “methodologies to take climate change into account in both applicability criteria as well as response plan requirements.” With regard to communities with environmental justice concerns, EPA is proposing to allow “wide authority” to require CWA hazardous substance FRPs for facilities located in these communities.

The EPA is accepting public comment on the proposed rule until May 27, 2022. More information about EPA’s proposed rule can be found on EPA’s website [here](#).

For more information on how the proposed rule may affect your business operations, please contact Lisa M. Bruderly at (412) 394-6495 or lbruderly@babstcalland.com or Mackenzie Moyer at (412) 394-6578 or mmoyer@babstcalland.com.

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