ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 118 and 300

[EPA–HQ–OLEM–2021–0585; FRL–7881–01–OLEM]

RIN 2050–AH17

Clean Water Act Hazardous Substance Facility Response Plans

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA or Agency) is finalizing facility response plan requirements for worst case discharges of Clean Water Act (CWA) hazardous substances for onshore non-transportation-related facilities that could reasonably be expected to cause substantial harm to the environment by discharging a CWA hazardous substance into or on the navigable waters, adjoining shorelines, or exclusive economic zone.

DATES: This final rule is effective on May 28, 2024.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OLEM–2021–0585. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *http://www.regulations.gov.*

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SUPPLEMENTARY INFORMATION:

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I. General Information

A. Does this action apply to me?

A list of entities with facilities that could be affected by requirements established under CWA section 311(j)(5) is provided in Table 1:

TABLE 1—ENTITIES POTENTIALLY AFFECTED BY THE FINAL RULE

NAICS 3	NAICS description
111	Crop Production.
112	Animal Production and Aquaculture.
115	Support Activities for Agriculture and Forestry.
211	Oil and Gas Extraction.
212	Mining (except Oil and Gas).
213	Support Activities for Mining.
221	Utilities.
236	Construction of Buildings.
237	Heavy and Civil Engineering Construction.
238	Specialty Trade Contractors.
311	Food Manufacturing.
312	Beverage and Tobacco Product Manufacturing.
313	Textile Mills.
314	Textile Product Mills.
321	Wood Product Manufacturing.
322	Paper Manufacturing.
323	Printing and Related Support Activities.
324	Petroleum and Coal Products Manufacturing.
325	Chemical Manufacturing.
326	Plastics and Rubber Products Manufacturing.
327	Nonmetallic Mineral Product Manufacturing.

TABLE 1—ENTITIES POTENTIALLY AFFECTED BY THE FINAL RULE—Continued

NAICS 3	NAICS description
331	Primary Metal Manufacturing.
332	Fabricated Metal Product Manufacturing.
333	Machinery Manufacturing.
334	Computer and Electronic Product Manufacturing.
335	Electrical Equipment, Appliance, and Component Manufacturing.
336	Transportation Equipment Manufacturing.
339	Miscellaneous Manufacturing.
423	Merchant Wholesalers, Durable Goods.
424	Merchant Wholesalers, Nondurable Goods.
441	Motor Vehicle and Parts Dealers.
444	Building Material and Garden Equipment and Supplies Dealers.
447	Gasoline Stations.
453	Miscellaneous Store Retailers.
481	Air Transportation.
486	Rail Transportation.
488	Support Activities for Transportation.
493	Warehousing and Storage.
511	Publishing Industries (except Internet).
518	Data Processing, Hosting, and Related Services.
522	Credit Intermediation and Related Activities.
531	Real Estate.
541	Professional, Scientific, and Technical Services.
561	Administrative and Support Services.
562	Waste Management and Remediation Services.
611	Educational Services.
622	Hospitals.
624	Social Assistance.
712	Museums, Historical Sites, and Similar Institutions.
713	Amusement, Gambling, and Recreation Industries.
811	Repair and Maintenance.
812	Personal and Laundry Services.
921	Executive, Legislative, and Other General Government Support.
924	Administration of Environmental Quality Programs.
926	Administration of Economic Programs.
928	National Security and International Affairs.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding affected entities likely to be regulated by this action. This table includes the types of entities that EPA is aware could potentially be regulated by this action. Other types of entities not included in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in § 118.3. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

B. What action is the Agency taking?

EPA is finalizing new requirements for Facility Response Plans (FRPs) for worst case discharges of CWA hazardous substances from onshore non-transportation related facilities (hereafter, covered facilities or facility) that, because of their location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or exclusive economic zone.

C. What is the Agency's authority for taking this action?

This final rule is authorized by section 311(j)(5) and 501(a) of the CWA, (33 U.S.C. 1321(j)(5), 1361(a)).

D. What are the incremental costs and benefits of this action?

EPA estimated the total incremental costs of the final action by combining the per-covered facility estimates of compliance costs with the estimate of the affected covered facility universe. EPA estimated the annualized cost of the final rule over a 20-year analysis period, using three percent and seven percent discount rates, as presented in Table 2.

TABLE 2—TOTAL INCREMENTAL COMPLIANCE COST OF THE FINAL ACTION, ANNUALIZED

[2022$]

	Present value, 7%	Annualized cost, 7%	Present value, 3%	Annualized cost, 3%
Facility Cost	$1,120,290,646	$105,747,512	$1,641,867,861	$110,359,310
Agency Cost	70,880,205	6,690,590	101,561,496	6,826,528
Total Cost	1,191,170,851	112,438,102	1,743,429,357	117,185,838

The final action is expected to have a mitigating effect on CWA hazardous substance worst case discharges because the rule provisions address the categories of damages and adverse impacts expected from this type of discharge. The planning activities associated with developing FRPs are likely to mitigate several damage categories through pre-discharge planning and identification of potential receptors and applicable endpoints; the emergency response information provision; descriptions of discharge detection systems, hazard evaluation, and training programs; and drills and exercises. Quantifying the costs and benefits of this action is challenging due to a lack of data around the likelihood of a worst case discharge in the baseline, the universe of potentially regulated facilities, costs of program elements, historical discharges, baseline compliance behavior, and the degree to which the final action will mitigate the probability and severity of worst case discharges. Despite the numerous uncertainties associated with estimating the benefits of the final action quantitatively, information on previous worst case discharges of a similar nature suggests that the benefits of mitigating these discharges could be large relative to the final rule's estimated cost. Chapters 5 and 6 of the final rule Regulatory Impact Analysis (RIA) developed for this action provide additional details on costs and benefits, respectively. This analysis, ''Regulatory Impact Analysis: Clean Water Act Hazardous Substance Facility Response Plans,'' is available in the docket.

E. List of Abbreviations and Acronyms

ACP Area Contingency Plan
ANFO ammonium nitrate-fuel oil
APA Administrative Procedures Act
BLS United States Bureau of Labor Statistics
CAA Clean Air Act
CAS Chemical Abstracts Service
CBI Confidential Business Information
CFR Code of Federal Regulations
CERCLA Comprehensive Environmental Response, Compensation, and Liability Act of 1980
CFATS Chemical Facility Anti-Terrorism Standards
CRA Congressional Review Act
CWA Clean Water Act
DHS United States Department of Homeland Security
DOI United States Department of the Interior
E.O. Executive Order
EPA United States Environmental Protection Agency
EPCRA Emergency Planning and Community Right-to-Know Act
ERAP Emergency Response Action Plan
FBI Federal Bureau of Investigation
FR Federal Register
FRP Facility Response Plan
FRS Facility Registry Service
FWSE Fish, Wildlife, and Sensitive Environments
GIUE Government-Initiated Unannounced Exercises
HAZWOPER Hazardous Waste Operations and Emergency Response
ICP Integrated Contingency Plan
ICR Information Collection Request
IPAWS Integrated Public Alert & Warning System
LC50 Lethal Concentration 50%
LEPC Local Emergency Planning Committee
MCL Maximum Contaminant Level
MOU Memorandum of Understanding
MTR Marine Transportation-Related
NAICS North American Industry Classification System
NCEI National Centers for Environmental Information
NCP National Contingency Plan
NOAA National Oceanic and Atmospheric Administration
NPDES National Pollutant Discharge Elimination System
NPDWR National Primary Drinking Water Regulations
NPRM Notice of Proposed Rulemaking
NRC National Response Center
NSFCC National Strike Force Coordination Center
O&M Operations and Maintenance
OMB Office of Management and Budget
OPA 90 Oil Pollution Act of 1990
OSC On-Scene Coordinator
OSHA Occupational Safety and Health Administration
POTW Publicly Owned Treatment Works
PRA Paperwork Reduction Act
PREP Preparedness for Response Exercise Program
PSM Process Safety Management
PWS Public Water System
QI Qualified Individual
RA Regional Administrator
RCP Regional Contingency Plan
RCRA Resource Conservation and Recovery Act
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
RMP Risk Management Plan
RQ Reportable Quantity
SDWA Safe Drinking Water Act
SDWR State Drinking Water Regulations
SERC State Emergency Response Commission
SPCC Spill Prevention Control and Countermeasure
SRO Spill Response Organization
SWPA Source Water Protection Area
TBD Technical Background Document
TEPC Tribal Emergency Planning Committee
TRI Toxics Release Inventory
TSDF Treatment, Storage, and Disposal Facility
U.S.C. United States Code
UMRA Unfunded Mandates Reform Act
USCG United States Coast Guard
USDOT United States Department of Transportation
UST Underground Storage Tank
WOTUS Waters of the United States
ZOC Zone of Concern

II. Background

A. Statutory Authority and Delegation of Authority

1. Statutory Requirements

The CWA, as amended by the Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq; hereafter, ''OPA 90''), states, ''The President shall 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)). The statute defines a covered facility as ''. . . [an] onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone'' (33 U.S.C. 1321(j)(5)(C)(iv)). As described below, the Administrator has been delegated this authority under Executive Order (E.O.) 12777 (56 FR 54757, October 18, 1991). The Administrator also has authority under CWA section 501 to prescribe such regulations as are necessary to carry out provisions of the Act.

In 33 U.S.C. 1321(j)(5)(D), the CWA states that these response plans must:

(1) Be consistent with the National Contingency Plan (NCP) and Area Contingency Plans (ACP);

(2) Identify the qualified individual (QI) having full authority to implement removal actions, and require immediate communications between that individual and the appropriate Federal official and the persons providing personnel and equipment;

(3) Identify, and ensure by contract or other means approved by the President the availability of private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge;

(4) Describe the training, equipment testing, periodic unannounced drills, and response actions of persons on the vessel or at the facility, to be carried out under the plan to ensure the safety of the facility and to mitigate or prevent the discharge, or the substantial threat of a discharge;

(5) Be updated periodically; and

(6) Be resubmitted for approval of each significant change.

EPA's responsibilities pursuant to the CWA (33 U.S.C. 1321(j)(5)(E)) for this action for facilities that could

reasonably be expected to cause significant and substantial harm to the environment by discharging into or on the navigable waters are to:

(1) Promptly review plans;

(2) Require amendments when plans do not meet the statutory requirements;

(3) Approve plans; and

(4) Review each plan periodically.

Additionally, EPA may require inspection of containment booms, skimmers, vessels, and other major equipment used to remove discharges (33 U.S.C. 1321(j)(6)(A)). EPA also has the authority to conduct unannounced drills of removal capability in areas for which ACPs are required and under relevant FRPs (33 U.S.C. 1321(j)(7)).

EPA intends that the provisions of the rule be severable. In the event that any individual provision or part of the rule is invalidated, EPA intends that this would not render the entire rule invalid, and that any individual provisions that can continue to operate will be left in place. The rule contains many discrete provisions that operate independent of each other. For example, the screening criteria are designed to provide an initial, relatively bright line for identifying covered facilities that do not need to engage in any further applicability determination. That is independent of the criteria that actually determine whether a covered facility could cause substantial harm to the environment from a worst case discharge into or on the navigable waters or a conveyance to navigable waters. Thus, the rule would still satisfy the statutory requirements if the one-half mile distance screening criterion were struck down. Similarly, the four substantial harm criteria are independent of one another, and covered facility owners and operators could still conduct a substantial harm analysis to determine whether an FRP is required absent any one substantial harm criterion. Likewise, if the provisions regarding Regional Administrator (RA) determinations were struck down, the rule would still meet statutory requirements and fulfill its purpose. Furthermore, while there are many different components of an FRP, they serve different functions and are independent requirements.

2. Delegation of Authority

Under E.O. 12777 (56 FR 54757, October 18, 1991), EPA was delegated the authority to regulate non-transportation-related onshore facilities and non-transportation-related offshore facilities landward of the coastline. The U.S. Department of Transportation (USDOT) was the delegated authority for transportation-related facilities and the U.S. Coast Guard (USCG) was delegated the authority for tank vessels and marine transportation-related (MTR) facilities. Section 2(i) of E.O. 12777 allows for further delegation between the agencies as later occurred in a February 3, 1994 memorandum of understanding (MOU) between EPA, the U.S. Department of the Interior (DOI), and USDOT (59 FR 9494, February 28, 1994). DOI redelegated 33 U.S.C. 1321(j)(5) authority to regulate non-transportation-related offshore facilities landward of the coastline to EPA. This MOU applies to both oil and CWA hazardous substance facilities.

EPA has delegated authority over offshore facilities landward of the coastline as per 40 CFR part 112 Appendix B. However, this final action is limited to non-transportation-related onshore facilities as defined in the consent decree described below.

B. Litigation

On March 21, 2019, the Natural Resources Defense Council, on behalf of Clean Water Action, and the Environmental Justice Health Alliance for Chemical Policy Reform filed suit in the United States District Court for the Southern District of New York alleging violations of the CWA section 311(j)(5)(A)(i) and the Administrative Procedures Act (APA).[1] The first claim alleged that EPA failed to issue ''regulations mandated by the [CWA] requiring non-transportation-related substantial-harm facilities to plan, prevent, mitigate and respond to worst case spills of hazardous substances . . . [which] constitutes a failure to perform a non-discretionary duty or act in violation of the [CWA].'' The second claim alleged, ''EPA's failure to issue these regulations constitute[d] Agency action unlawfully withheld contrary to and in violation of the [APA] and the [CWA].'' The plaintiffs requested an order from the Court to compel EPA to promulgate CWA Hazardous Substance Worst Case Discharge Planning Regulations. Following EPA's Answer, filed on June 4, 2019, Plaintiffs and EPA entered discussions regarding a potential resolution of the lawsuit.

The plaintiffs and EPA entered into a consent decree on March 12, 2020, which resolved the claims of the suit.[2] The consent decree requires that within two years (24 months) of entry into the consent decree, *i.e.,* by March 12, 2022, EPA sign a notice of proposed rulemaking pertaining to the issuance of the CWA Hazardous Substance Worst Case Discharge Planning Regulations for non-transportation-related onshore facilities. The consent decree further requires EPA to sign a notice taking final action within an additional two and half years, or 30 months after publication of the proposal. On March 28, 2022 (87 FR 17890), EPA proposed to require planning for worst case discharges of CWA hazardous substances for onshore non-transportation-related facilities. This final action satisfies EPA's second obligation under the consent decree.

C. Proposed Rule

On March 28, 2022, EPA proposed to require planning for worst case discharges of CWA hazardous substances for 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, with a 60-day comment period, which was later extended to 120 days. EPA proposed that FRPs must (1) be consistent with the NCP and ACPs; (2) identify the QI having full authority to implement response actions and require immediate communications between that individual and the appropriate Federal official and the persons providing personnel and equipment, with a description of duties; (3) identify, and ensure by contract or other approved means, the availability of private personnel and equipment necessary to respond to the maximum extent practicable to a worst case discharge of CWA hazardous substances (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge; (4) describe the training, equipment testing, periodic unannounced drills, and response actions of persons at the covered facility; (5) be reviewed and updated periodically and resubmitted to the RA for approval of each significant change.

In developing CWA hazardous substance worst case discharge plan components, EPA considered existing requirements for the Oil Pollution Prevention FRP regulation under 40 CFR 112.20 given that these requirements have been in place since 1994 and were promulgated under the same statutory authority as the proposal. Notwithstanding the differences between CWA hazardous substances and oil, EPA understands that, where possible, there is value to having a high

[1] 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., filed March 21, 2019).

[2] Envtl. Justice Health All. for Chem. Reform v. U.S. EPA, Case1:19–cv–02516–VM, Document 32 (S.D.N.Y., filed March 12, 2020).

level of consistency between similar regulatory programs. Even if this rule applies to a different set of regulated entities, there will be synergy among local responders, States, and others, such as spill response organizations (SROs) and consultants, that have experience with worst case discharge planning. Invariably, the experience of implementing and complying with the Oil Pollution Prevention FRP regulation will make this rule easier to comply with, understand, and implement. Additionally, EPA examined elements under the Risk Management Plan (RMP) regulation under 40 CFR part 68, which implements section 112(r)(7) of the Clean Air Act (CAA) and requires facilities that use regulated substances to develop an RMP. Specific CWA hazardous substance FRP components in the proposed rule included: facility information, owner or operator information, hazard evaluation, reportable discharge history, response personnel and equipment, evidence of contracts or other approved means to ensure the availability of personnel and equipment, notification lists, discharge information, personnel roles and responsibilities, response equipment information, evacuation plans, discharge detection systems, response actions, disposal plans, containment measures, training and exercise procedures, self-inspection, and coordination activities.

Eight commenters requested a 60-day extension to submit comments. In response, EPA extended the original comment period an additional 60 days, to July 26, 2022. EPA received a total of 220 unique comments: 59 organization comments from 53 unique organizations, 158 private citizens, and 3 mass mailer campaigns representing a total of 29,860 signatories.

III. This Action

After issuing its proposal, EPA received comments on numerous issues relating to:

1. General comments;
2. Costs and benefits of various regulatory provisions;
3. Background analyses; and
4. Proposed provisions.

EPA has structured this document to address these issues and discuss each proposal element, related significant comments, and how any changes EPA considered are reflected in the final rule.

A. General Comments

As discussed above in Section II.A.1 of this preamble, Congress directed EPA to issue regulations to address worst case discharges for both oil and CWA hazardous substances, providing clear and unambiguous authority for this action. While some commenters asserted that the Agency has the authority to decide not to proceed with the rulemaking and questioned the data analysis supporting this action, including the breadth of the potentially regulated community, EPA has judged the underlying data as sufficient to warrant a regulatory program as detailed in the RIA, available in the docket. While worst case discharges historically may be rare, that in and of itself is not a rationale for not planning for a worst case discharge. This is especially true given trends in natural disasters in the US, with more than $1 trillion in damage from 2016–2022,[3] illustrating that planning for severe weather events is critical as they become more common and intense and reflecting the long term challenges posed by climate change.[4] Additionally, the requirements follow the statutory directives set forth in 33 U.S.C. 1321(j)(5)(D). Indeed, OPA 90 is clear in directing the President to promulgate regulations for worst case discharges of CWA hazardous substances, regardless of the number of facilities that may be ultimately regulated. EPA is following the same approach as the Oil Pollution Prevention FRP regulation, which was promulgated under the same statutory authority, and as such disagrees with commenters who argued that the proposal represents administrative overreach. Worst case discharge planning provisions will appropriately place response planning responsibilities on covered facility owners and operators, as is clearly the Congressional intent, as per the OPA 90 Conference Report, while enumerating EPA's role in oversight and enforcement.

EPA notes that in March 2000, USCG published a notice of proposed rulemaking (NPRM) in the **Federal Register** entitled ''Marine Transportation-Related Facility Response Plans for Hazardous Substances'' (65 FR 17416, March 31, 2000) under the same CWA authority as this final rule. USCG then withdrew that rulemaking in February 2019 (84 FR 2799). Given that nearly 20 years elapsed between the proposal and withdrawal, it is unsurprising that USCG found the proposed rule was no longer appropriate to the current state of spill response in the chemical industry. USCG also noted that their NPRM may overlap with existing local and State regulatory schemes as well as current industry practice. EPA has reviewed USCG's actions, reports, and findings. EPA did not find sufficient overlap for onshore non-transportation-related facilities to justify not promulgating this regulation as per Chapter 2 of the Technical Background Document (TBD), available in the docket. Finally, to commenters who pointed to the no action final rule under CWA 311(j)(1)(C) (84 FR 46100, October 3, 2019), that rulemaking is outside the scope of this final rule and the Agency conclusion there has no bearing here.

EPA disagrees with commenters who asserted they were not adequately notified as per the APA. The proposal was clear and the comment period was ample. Indeed, the Agency extended the comment period to 120 days from 60 days to accommodate commenters who requested additional time (87 FR 29728, May 16, 2022).

Several commenters noted that the rule does not fully define ''waters of the United States'' (WOTUS) and that this causes the term ''navigable waters'' to be ''very ambiguous.'' The commenters highlighted a related and, at the time, pending Supreme Court decision and EPA rulemaking that would ultimately clarify these concerns. These commenters stressed the importance of holding off from any final rulemaking until the court decision is issued or navigable waters is more clearly defined while additional commenters recommended EPA release a supplementary proposed rule once 'WOTUS' and 'navigable waters' are clearly defined.

EPA disagrees with the comment. Following the Supreme Court's May 25, 2023, decision in *Sackett* v. *Environmental Protection Agency,* 143 S. Ct. 1322 (2023), the EPA and Department of the Army developed a rule to amend the final ''Revised Definition of 'Waters of the United States''' rule consistent with *Sackett* (88 FR 61964, Sept. 8, 2023).

EPA has determined that the rule should cite to the definition in 40 CFR 120.2 to determine whether a particular water is a water of the United States, as opposed to establishing a separate definition. The revised definition provides clarity and citing to this definition will ensure consistency with the Supreme Court's decision in *Sackett,* as well as ensuring greater understanding and consistency

[3] National Oceanic and Atmospheric Administration (NOAA) National Centers for Environmental Information (NCEI). (2023). U.S. Billion-Dollar Weather and Climate Disasters. *https://www.ncei.noaa.gov/access/billions/,* DOI: 10.25921/stkw–7w73.

[4] U.S. Global Change Research Program (USGCRP). (2017). Climate Science Special Report: Fourth National Climate Assessment, Volume I, Chapter 7: Precipitation Change in the United States. *https://science2017.globalchange.gov/chapter/7/.*

nationwide. Because this definition is also used by other regulatory programs, it provides the greatest amount of information and experience regarding its applicability. The Agency disagrees with commenters who asserted that this definition is prohibitively technical or costly; and notes that the September 2023 definition, issued following *Sackett,* covers fewer waters than the rule that was in place at the time comments were received. In sum, it is the Agency's position that the regulated community has sufficient information to determine whether they are more than one-half mile from navigable waters or a conveyance to navigable waters such that they are not subject to the rule. Doing so, as some commenters suggest, could inadvertently inject unintended ambiguities or questions about applicability, causing more uncertainty, not less.

Finally, EPA acknowledges concerns raised about the impact of litigation and court rulings on post-2015 definitions of ''waters of the United States,'' and a resulting patchwork of definitions across the country. Needless to say, this is a different rule and while EPA recognizes that due to ongoing litigation there is variation among jurisdictions as to which definition of ''waters of the United States'' governs, *e.g.,* using the pre-2015 definition in the SPCC context, presumably at some point the litigation will be resolved resulting in national consistency and, in any event, introducing another variation would do nothing to advance national consistency. To the contrary, codifying yet another definition would introduce more complexity within every jurisdiction by requiring regulated entities that need to comply with different CWA regulations to navigate two different definitions within that jurisdiction. Thus, even if currently there is variation with respect to which definition (pre- or post-2015) applies in different jurisdictions, there is merit to having the definition be consistent for regulated parties within their jurisdiction for purposes of the CWA (see Operative Definition of Waters of the United States chart at: *https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update*).

B. Costs and Benefits of Various Regulatory Provisions

EPA estimated the total costs of the final action by combining the per-covered facility estimates with the estimate of the affected facility universe. To provide information about the scale of costs that covered facilities will incur, EPA compiled estimates of unit compliance costs for each of the program elements in the final action. EPA developed unit burden estimates for individual elements of the response plan on a first- and subsequent-year basis. EPA also estimated the extent of baseline compliance for facilities subject to the rule due to the overlap in facilities and program elements in the existing Oil Pollution Prevention FRP, RMP, and Resource Conservation and Recovery Act (RCRA) regulatory requirements, as these three regulations have the most significant crossover. EPA estimated an average compliance cost per covered facility after accounting for baseline compliance with existing regulations by multiplying labor rates and unit burdens.

EPA has prepared and posted in the docket an RIA of the potential costs and benefits associated with this action. As presented in Chapter 5 of that analysis, EPA estimated the final rule will result in total annualized costs of 112.4 to 117.2 million per year, at 7 percent and 3 percent discount rates, respectively. This cost includes 92.0–93.5 million for existing covered facilities to comply, 13.7–16.9 million for projected new covered facilities to comply in the future, and 6.7–6.8 million for the Agency to administer the regulations. Table 3 and Table 4 present the estimated costs of the final rule by FRP program component for covered facilities and the Agency, respectively. See Chapter 6 of the final rule RIA for additional details regarding benefits of the final action.

TABLE 3—TOTAL COST OF THE FINAL ACTION, FACILITIES, ANNUALIZED (2022)

Response plan requirements	Present value, 7%	Annualized cost, 7%	Present value, 3%	Annualized cost, 3%
Facilities completing the substantial harm certification only				
Rule Familiarization	$2,840,473	$268,121	$2,950,783	$198,339
Substantial Harm Certification Form	51,660,843	4,876,418	57,916,345	3,892,888
Subtotal, Substantial Harm Certification Form only facilities	54,501,316	5,144,539	60,867,128	4,091,227
Facilities developing FRPs				
Rule Familiarization	2,120,519	200,162	2,202,869	148,067
Substantial Harm Determination	38,419,664	3,626,544	43,071,820	2,895,103
Facility and Owner Information	1,234,121	116,492	1,383,558	92,997
Emergency Response	501,508,344	47,338,840	730,536,570	49,103,533
Hazard Evaluation	16,929,190	1,597,996	18,979,110	1,275,694
Discharge Detection	1,456,263	137,461	1,632,598	109,736
Response Actions, Disposal, and Containment	7,407,466	699,212	8,304,421	558,188
Drills & Exercises	253,557,291	23,934,015	376,924,100	25,335,220
LEPC/TEPC Coordination	46,538,057	4,392,863	69,523,895	4,673,098
Training	3,597,780	339,605	4,670,568	313,936
FRP Amendments	38,554,948	3,639,314	59,705,771	4,013,166
ERAP	9,234,533	871,675	13,347,586	897,167
Subtotal, FRP facilities	920,558,174	86,894,179	1,330,282,867	89,415,904
Subtotal, Existing Facilities	975,059,491	92,038,718	1,391,149,995	93,507,131
Subtotal, Projected New Facilities	145,231,155	13,708,794	250,717,866	16,852,179

TABLE 3—TOTAL COST OF THE FINAL ACTION, FACILITIES, ANNUALIZED (2022)—Continued

Response plan requirements	Present value, 7%	Annualized cost, 7%	Present value, 3%	Annualized cost, 3%
Grand Total, Facilities	1,120,290,646	105,747,512	1,641,867,861	110,359,310

TABLE 4—TOTAL COST OF THE FINAL ACTION, THE AGENCY, ANNUALIZED (2022)

Agency cost	Annualized cost, 7%	Annualized cost, 3%
Review Existing Facility Plans	$1,359,732	$1,126,250
Review New Facility Plans	345,366	389,990
Government-Initiated Unannounced Exercises (GIUEs) and Inspections	3,846,625	4,141,097
FRP Amendments	289,529	311,693
IT/Data Management and Integration	849,339	857,498
Total	6,690,590	6,826,528

The benefits of the final action are assessed qualitatively and include a wide diversity of potential benefit mechanisms, such as reductions in impacts to public water systems (PWS) and waterways used for recreational and commercial purposes; impacts to the ecosystem and environment; impacts to human health; and other socioeconomic impacts driven by business disruption, evacuations, and other elements of emergency response. These benefits include prevention of economic loss in value of homes near discharges [5] and the economic losses to communities affected by a discharge. See Chapter 6 of the final rule RIA for additional details regarding benefits of the final action.

The Agency disagrees with commenters who assert that EPA has underestimated costs. EPA recognizes commenters' concern that covered facility owners or operators will need to spend some resources to determine whether they meet the initial screening criteria, and for those that do, potentially significantly more resources and time determining whether they meet any of the substantial harm criteria, preparing an FRP including in-depth hazard evaluations, and potentially revising the FRP. The Agency has accounted for these costs, as well as all other aspects of the regulatory program in Chapter 5 of the final RIA.

The Agency proposed that if the maximum capacity onsite exceeds 10,000x the reportable quantity (RQ), a covered facility meets the threshold quantity screening criterion. While EPA proposed a 10,000x RQ multiplier, the Agency has determined that a 1,000x RQ multiplier will more appropriately screen for covered facilities that could cause substantial harm to the environment from a worst case discharge of a CWA hazardous substance, to fully address the range of potential releases that merit worst case discharge planning and response. This results in substantially more covered facilities having to determine whether they are subject to the planning requirements of the rule, *i.e.,* meet the initial screening criteria in the first instance, and analyzing the substantial harm criteria. The Agency also revised the economic analysis for the final rule, estimating annualized costs for regulated facilities of approximately 117 million per year, as documented in section 5.5 the final RIA.

EPA estimated the total costs of the final action by combining per-facility estimates with the estimate of the affected facility universe. To provide information about the scale of costs that covered facilities would incur, EPA compiled estimates of unit compliance costs for each of the program elements in the final action. EPA developed unit burden estimates for individual elements of the response plan on a first- and subsequent-year basis. EPA calculated the annualized total cost to regulated facilities of the final action over a 20-year analysis period, using the three percent and seven percent discount rates.

The Agency also notes that the majority of labor burden for regulated facility staff are estimated using labor rates of $93.50 and $70.84, based on U.S. Bureau of Labor Statistics (BLS) wage data. The Agency also recognizes the role of consultants in facility planning efforts. This cost is accounted for as an annually recurring cost of $18,471 per facility for contractor support.

C. Background Analyses

1. CWA Hazardous Substance Discharge History And Impacts Analysis

EPA maintains that it has sufficient data to support the need for this final rule. As detailed in the final rule RIA, EPA analyzed National Response Center (NRC) data on CWA hazardous substances discharges to water. 40 CFR 117.21 requires immediate notification to the NRC once the person in charge of a vessel or an offshore or onshore facility has knowledge of a discharge of a CWA hazardous substance from the facility in quantities equal to or exceeding its assigned RQ in any 24-hour period. NRC data are generated by notifications received immediately following a discharge and often lack complete information on chemicals and quantities discharged, incident and response details, impacts, and locations. While EPA's analysis of NRC data shows a decline in the average number of CWA hazardous substance discharges from 2010 to 2019, past discharge history is not a guarantee of future outcomes, nor does the number of discharges definitively indicate the level of impact of those discharges. Thus, it's possible that a smaller number of higher consequence discharges could cause more adverse impacts due to the circumstances of the incident. Moreover, NRC data are a starting point for further analysis to inform CWA hazardous substance worst case discharge occurrences. Based on past experiences of oil and chemical spills, EPA has observed data gaps with NRC reports, but continues to improve oil and CWA hazardous substance spill data as incidents progress through regional and EPA Emergency Operation Center reporting. Furthermore, NRC

[5] Burton, K., Maas, A., and Lee, K. (2022). A Case Study in Contamination: Persistent Home Value Losses Associated with the Elk River Spill. *https://jareonline.org/articles/a-case-study-in-contamination-persistent-home-value-losses-associated-with-the-elk-river-spill/*).

data is the most complete dataset available, and it does show that CWA hazardous substance discharges to water continue to occur. Accordingly, EPA has determined that worst case discharge planning regulations for CWA hazardous substances are critical to protect the environment, keep our waterways safe and clean, and protect human health.

While 10 CWA hazardous substances account for most of the CWA hazardous substance discharges reported to the NRC, as detailed in section 3.1 of the RIA, these data often lack the names and quantities of chemicals discharged, and do not reflect future probabilities of release. Also, the frequency of reported releases does not reflect the impacts that could occur with a worst case discharge. While some commenters suggested narrowing the number of CWA hazardous substances covered by the rule, changing the list of CWA hazardous substances in 40 CFR part 116 is outside the scope of this action.

Moreover, EPA has no reliable information to support the commenter claim that the industry is already devoting the necessary resources and capabilities to prevent and respond to discharges that may reach navigable waters or a conveyance to navigable waters. And even if there is any merit to the commenter's assertion, that would generally serve to change the baseline, mitigating the impact of this rule, and not a reason to have no rule or even the playing field between those that are responsibly planning for such events and those that are not. In any case, EPA intends to work collaboratively with industry to ensure robust response plans for CWA hazardous substance worst case discharges into or on navigable waters or a conveyance to navigable waters that could cause substantial harm to the environment. Additionally, while this final regulation does not address the causes of worst case discharges, it does require comprehensive response planning regardless of how a CWA hazardous substance discharge occurs. By focusing on covered facilities within one half mile to navigable waters or a conveyance to navigable waters and above the threshold quantity that also meet one or more proposed substantial harm criteria, the final regulation will appropriately ensure robust planning for covered facilities that pose the highest risk of causing substantial harm to the environment.

2. Analysis of Existing Programs/Technical Background Document

In sum, EPA's analysis found few Federal programs that comprehensively cover all the CWA section 311(j)(5)(D) requirements for all CWA hazardous substances. While CWA hazardous substance covered facilities subject to the Oil Pollution Prevention Program FRP requirements or RMP regulations, among others, have some overlap for the required program elements, those programs do not cover all requirements in CWA section 311(j)(5)(D) for CWA hazardous substances. EPA also recognizes commenter feedback that industry guidance and voluntary programs are valuable resources for ensuring safe, protective practices. However, those practices are not enforceable nor required and do not fulfill the statutory requirements of this action. In addition, EPA acknowledges State programs may be comprehensive for CWA hazardous substance worst case discharge planning. The Agency agrees with commenters who stated that duplicative requirements should be avoided and refers the commenters to Chapter 2 of the TBD for more information and analysis. As such, a regulated facility owner or operator may augment an existing plan with the requirements of this rule or use an Integrated Contingency Plan (ICP) approach, such as One Plan, which will reduce the administrative burden. However, an owner or operator may not assume they are compliant with this regulation due to their compliance under other programs (*e.g.,* the Oil Pollution Prevention FRP regulation, RMP regulation). See the Response to Comments document for specific responses to each program, in the docket for this action. Please see section III.D.7 of this Preamble for a discussion of exemptions.

D. Rule Provisions

1. Definitions

Some commenters requested that EPA revise its definitions of key terms. EPA has considered these comments carefully as is committed to providing clarity throughout this action.

i. Adverse Weather

EPA considered comments advocating that the definition of ''adverse weather'' should be revised. To the extent that commenters are concerned with ''ambiguity,'' it seems largely because they are interested in narrowing the definition to a limited number of clearly delineated events. However, the definition is intentionally broad and meant to capture the wide range of potential weather changes and conditions due to the nation's varying regional weather patterns. Prescribing specific types of events or adverse weather conditions is unrealistic and does not represent the myriad challenges facing our nation due to climate change. EPA also disagrees with commenters who asserted that the breadth of this definition will cause uneven implementation of the final rule; rather, it will allow covered facility owners or operators and local emergency planners to consider the full range of potential adverse weather events, taking into consideration varying local and regional weather patterns (current and future), that could impact the covered facility and affect worst case discharge response planning as well as changing conditions and emerging threats such as the widening impact of extreme heat. For example, while specific events, such as ''20-year storm conditions'' may be useful as one type of climatological condition to consider in one region, EPA agrees that it is equally important to consider effects of, for example, increased drought or lack of rain activity in other regions and the effects on a potential worst case discharges of CWA hazardous substances. As such, EPA has added language describing some types of climate change impacts that may need to be considered when accounting for adverse weather conditions during a worst case discharge of CWA hazardous substances into or on the navigable waters or a conveyance to navigable water, such as the increased frequency and intensity of adverse weather, temperature fluctuations, rising seas, storm surges, inland and coastal flooding, drought, wildfires, and permafrost melt in northern areas.

EPA chose to define ''adverse weather'' in this final rule differently from the Oil Pollution Prevention regulation definition of adverse weather found in 40 CFR 112.2 due to the variance in physicochemical properties among oil and the 296 CWA hazardous substances as well as how different types of adverse weather may impact the analysis of appropriate response actions for those myriad CWA hazardous substances. This is another reason why a broad definition of ''adverse weather'' is appropriate for this rule.

EPA recognizes that, given the increased probability of extreme weather events, historic incidents are becoming less of a predictor of future effects. Compliance assistance will be available to aid owners or operators in determining the appropriate types and severity of weather events, sea level rise, drought, flooding, heat, wildfire, and subsidence risk, etc., to consider for their worst case discharge in adverse

weather, as well as references and data sources.

ii. Container

While several commenters noted that the definition of ''container'' is not consistent with the Oil Pollution Prevention regulation in 40 CFR 112.2 and that there is no corresponding definition in this action for ''bulk storage container.'' The primary reason for this is because the two regulations do not cover the same substances. Additionally, while the Oil Pollution Prevention regulation has determined that a 55-gallon *de minimis* container size is appropriate, as noted by commenters, this is not the case for CWA hazardous substances. To the contrary, certain CWA hazardous substances have been determined that they ''may be harmful'' at quantities as low as one pound. Accordingly, a 55-gallon container size would be an inappropriate *de minimis* amount for all substances because smaller containers may contain hazardous levels of substances that could cause substantial harm in the event of a worst case discharge, especially when aggregated. Additionally, CWA hazardous substances are stored in a wide variety of containers, and CWA hazardous substances are typically measured and regulated [6] by mass (*e.g.,* pounds), not volume (gallons), underscoring why a 55-gallon *de minimis* container standard would be unsuitable. Because of the variation of the chemical properties, including toxicity, of CWA hazardous substances, EPA has no basis for setting a *de minimis* container size at 55-gallons or any other level, including the RQ level, as suggested by some commenters. Furthermore, the OPA Conference Report states that ''. . . the selection criteria should not necessarily omit those smaller facilities that are near major water supplies or that are near environmentally sensitive areas.'' (H.R. Rep. No. 101–653, 10lst Cong., 2d Sess., p.151.). Threshold determinations must consider all CWA hazardous substance present at the covered facility in the aggregate, but without consideration to container size or capacity because the maximum quantity onsite may contribute to the potential harm posed by a covered facility. Finally, two commenters asked for additional examples of containers. Accordingly, EPA notes that containers may consist of a rail car or other mobile storage not under active shipping papers, process vessel, canister, drum, bulk storage tank, dumpster, tote, or bulk cargo container positioned on land, among other things. For the reasons enumerated above, EPA is finalizing the definition of container as proposed.

iii. Conveyance to Navigable Waters

EPA considered whether to include a rule-specific definition for ''conveyance to a navigable waterway.'' EPA is aware that the CWA definition of ''point source'' at 33 U.S. Code § 1362(14) uses the term conveyance and includes some examples. However, EPA determined that cross-referencing that description of conveyance, with its specific exclusions, would not be appropriate for this rule. In this rule, conveyances are a critical consideration in a facility's worst case discharge scenarios because a straight-line analysis may overlook an opportunity to travel via pipe or open channel that could more easily enter navigable waters. Indeed, the concern is not particular types of structures or pathways (and categorizing them) but that a conveyance to navigable waters can result in a more immediate discharge to navigable waters. Moreover, while there are some broad categorical generalizations that can be made about what constitutes a conveyance to navigable waters, there are factual elements that necessarily make the determination a case-by-case determination (even if most of the time it will be straightforward, if not obvious), *i.e.,* where identifying particular types of conveyances will not suffice or capture the variations that exist in the real world.

In any case, in terms of a definition, conveyance is meant to have its normal English language definition and usage. That said, consistent with having the elements of the initial screen be relatively straightforward, EPA is clarifying that it considers a conveyance to navigable waters in the context of this rule to be a means of transport that provides a direct pathway to navigable waters. In the majority of cases, a means of transport will be discernible, confined, and discrete, and thus will present a straightforward factual scenario. Some examples are a storm drain, pipe, or channel that discharge directly into navigable waters.

A few commenters had categorical questions about types of structures or features such as a dry gulch, a wellhead, subsurface water or even groundwater. While EPA could make some generalization that it does or does not expect that any of these examples would serve as a means of transport, the reality is there will inevitably be situations where it will depend on the specific facts to determine whether a given structure or feature (no matter what it is called) serves as a means of transport to navigable waters. Finally, given the purpose of the rule, EPA disagrees that the inclusion of a means of transport that could result in a more immediate discharge to navigable waters in the initial screen (and in some cases may require some analysis), makes the reach or scope of the rule ''unbounded.''

iv. Distance to Endpoint

EPA is adjusting the definition of distance to endpoint for clarity and to reflect that the distance represents the greatest distance a CWA hazardous substance can travel in a worst case discharge to navigable waters or a conveyance into or on the navigable waters while still being able to cause injury to fish, wildlife, or sensitive environments (FWSE) or public receptors, or adversely impact a PWS.

v. Endpoint

Accordingly with the definition of distance to endpoint above, EPA is adjusting the definition of endpoint to clarify that it represents the concentration at which a worst case discharge of a CWA hazardous substance into or on the navigable waters has the ability to cause injury to FWSE or public receptors, or adversely impact a PWS.

vi. Facility

Some commenters asserted that the definition of ''facility'' is unclear while others were concerned about the possibility of gamesmanship in drawing facility boundaries. EPA is adjusting the definition to reflect the Preamble to the proposed rule, that stated that an owner or operator may not make determinations as to what constitutes a covered facility indiscriminately and in such a manner as to simply avoid applicability of the final rule (for example, the division of one facility into separate facilities with one CWA hazardous substance container located at each facility where all containers are located side-by-side or in close proximity to each other and are used for the same purpose). EPA maintains that the flexibility afforded to owners or operators in determining what constitutes a covered facility allows those most knowledgeable about its operations to decide whether it should be aggregated or divided, which may vary widely due to the range of CWA hazardous substance operations and types of facilities. Furthermore, EPA notes that it is adopted from the Oil Pollution Prevention regulation at 40 CFR 112.2, is appropriately broad, and captures the types of facilities intended

[6] EPCRA Reporting Rule (40 CFR part 370), RMP regulation (40 CFR part 68), DHS CFATS (6 CFR part 27), OSHA's PSM (29 CFR 1910.119).

to be regulated by EPA under CWA hazardous substance worst case discharge regulations. Please see the Response to Comments document in the docket for further discussion.

EPA has adjusted the definition to separate out non-transportation-related onshore facilities for clarity and ease of navigation in the document.

vii. Injury

Because of the need to maintain consistency with the NCP, the Agency has determined it is appropriate to use the definition of ''injury'' established by the Natural Resource Trustees for this rule. Federal officials authorized by the President and the authorized representatives of Indian Tribes and State and foreign governments act as public trustees to recover damages to natural resources under their trusteeship. Under the NCP, each trustee has responsibilities for protection of resources; mitigation and assessment of damage; and restoration, rehabilitation, replacement, or acquisition of resources equivalent to those affected (40 CFR 300.615). EPA maintains that the definition of ''injury'' is appropriate to assess substantial harm based on the extensive experience of the Natural Resource Trustees in conducting evaluations of CWA hazardous substance impacts on natural resources. The definition of ''injury'' in 40 CFR 112.2 of the Oil Pollution Prevention regulation was adapted from the definition of ''injury'' in the DOI Natural Resources Damage Assessments (NRDA) final rule at 43 CFR part 11 and includes only the part of the definition that addresses oil discharges, which EPA is now adapting for this regulation to provide regulatory consistency.

In response to the commenters who stated that the definition of ''injury'' could apply to ''insubstantial effects'' rather than ''substantial harm,'' EPA notes that the definition of ''injury'' is intended to assist in the identification of covered facilities that could cause substantial harm. The potential for a spill to cause an injury to FWSE or public receptors is coupled with the screening criteria to determine if a covered facility could cause substantial harm to the environment. In that context, causing injury indicates the potential for a worst case discharge to cause substantial harm to the environment. EPA concludes that the injury relies on changes that have been demonstrated to adversely impact the resources in question, or services provided by those resources.

While ''injury'' to a public receptor as a concept may be new to the regulatory community, EPA holds that it is an important consideration due to the variability of CWA hazardous substances, how they act in water, their effects on human health and the environment, and their impact on the potentially exposed public. EPA agrees with the commenter who asserted that just being a measurable effect does not mean that the effect is ''substantial;'' however, the endpoints in Appendix B are not limited to just measurable effects. Indeed, the endpoints are both measurable and indicate a covered facility could cause substantial harm to the environment due a worst case discharge into or on the navigable waters or a conveyance to navigable waters.

viii. Maximum Quantity Onsite

EPA has revised the definition of ''maximum capacity onsite'' to ''maximum quantity onsite.'' This is based on the decision to use a threshold quantity based on quantity, not capacity, discussed below in section III.D.2.ii. Please note, a covered facility owner or operator must plan proactively for future anticipated product onsite and FRP threshold quantities are based on the maximum quantity onsite at any time for each CWA hazardous substance. For example, a covered facility with both chlorine and benzene onsite must consider when those CWA hazardous substances will be at their maximum quantity onsite both as to whether they meet the threshold quantity and for planning purposes. If the owner or operator is developing a plan in January and does not want to amend their plan in the coming months, the maximum quantity onsite for chlorine may occur in March and the maximum quantity onsite of benzene may occur in September. For the FRP to be valid without amendments, it must plan for the maximum quantities onsite for each CWA hazardous substance at any time, so both maximum quantities onsite, regardless as to whether the times overlap.

ix. Permanently Closed

EPA is removing the definition of ''permanently closed'' because a CWA hazardous substance maximum quantity onsite, threshold quantity, and worst case discharge scenario quantities in the final rule are based on using quantity, not capacity, discussed below in section III.D.2.ii.

x. Publicly Owned Treatment Works

EPA is adding a definition for publicly owned treatment works (POTW), referring to the existing definition in 40 CFR 403.3, but including federally owned treatment works for the purposes of this final rule.

xi. Public Receptor

Some commenters suggested that the definition of ''public receptor'' is too broad. However, EPA's definition of ''public receptor'' is intentionally so in order to cover a wide variety of areas through which the public has access to navigable waters and could be affected by a worst case discharge. EPA did not include first responders in the definition of public receptor, as one commenter suggested, because first responders are covered in a facility and community's health and safety plan and emergency planning.

While this definition is not part of the Oil Pollution Prevention regulation in 40 CFR part 112, CWA hazardous substances differ from oil in important and varied ways and require different considerations. For instance, certain CWA hazardous substances may have no realistic means of recovery once the substance enters a waterbody, meaning that receptors must be prepared for and swiftly notified of the diluted substance as it travels downstream. As with other aspects of this rule, EPA intends to provide compliance assistance to covered facility owners or operators on types of areas they should consider when determining their ability to cause injury to public receptors.

xii. Public Vessel

EPA did not receive any comments on the definition of public vessel and has adjusted the definition to refer to the definition in section 311(a)(4) of the CWA. This will provide regulatory consistency with other CWA programs and reflect the statutory authority of this action rather than creating a new definition just for use in this regulation.

xiii. Vessel

EPA did not receive any comments on the definition of vessel has adjusted the definition to refer to the sections 311(a)(4) of the CWA and 101(28) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). This will provide regulatory consistency with other CWA and CERCLA programs and reflect the statutory authority of this action, rather than creating a new definition just for use in this regulation.

xiv. Water Distribution System

EPA has revised the definition for accuracy and to align with its use in other EPA programs in order to more

accurately reflect drinking water system characteristics.[7]

xv. Wellhead Protection Area

EPA is adding a definition for wellhead protection area for consistency with the Oil Pollution Prevention FRP regulation and to aid responders in identifying risks in the event of a worst case discharge to protect drinking water sources.

xvi. Worst Case Discharge

Some commenters suggested EPA change its definition of worst case discharge; however, EPA concludes that the current definition is designed to capture the worst case discharge and consistent with the statutory authority of this action. It is worth noting, however, that discharges in compliance with NPDES (40 CFR part 122) are not covered by this regulation. To commenters concerned with impacts due to climate change, a largest foreseeable discharge must already be evaluated in adverse weather conditions, including those due to climate change, which may include challenging climatic conditions such the increased frequency and intensity of extreme weather events, temperature fluctuations, rising seas, storm surges, inland and coastal flooding, drought, wildfires, and permafrost melt in northern areas. In addition, EPA refers commenters to 40 CFR 118.10 and section III.D.9 of this preamble for more specific language and discussion on worst case discharge calculations.

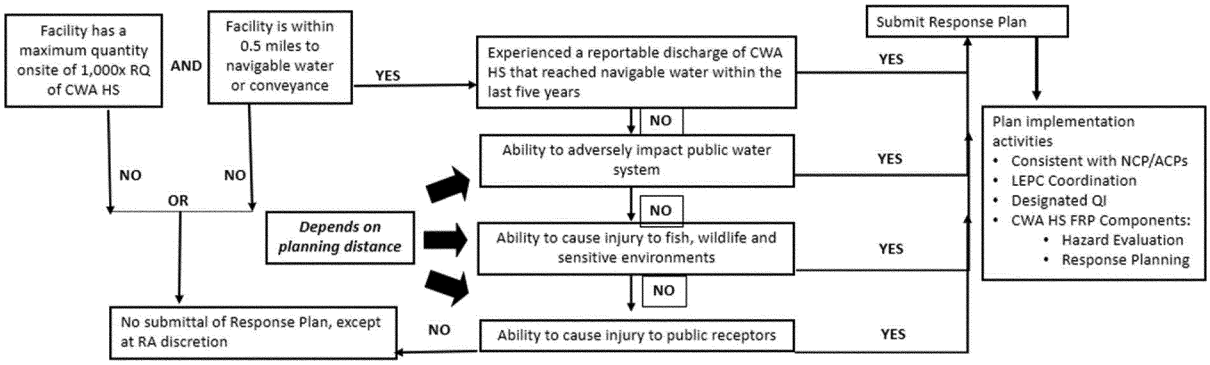
xvii. Other Definitions

EPA did not receive major substantive comments on the remaining definitions in § 118.2 and is finalizing them as proposed, with some separated out for clarity.

2. Applicability

In 40 CFR 118.3, EPA set forth a two-step applicability process, whereby a covered facility owner or operator assesses two screening criteria, and, if both criteria are met, the owner or operator then, and only then, assesses the ability to cause substantial harm to the environment through four substantial harm criteria (all described in detail below). To ensure that EPA tied the proposed applicability provisions to the statutory requirements, the Agency proposed four substantial harm criteria to target covered facilities that could cause substantial harm to the environment by discharging into or on navigable waters or a conveyance to navigable waters. Additionally, EPA proposed location-based criteria (using both distance from navigable waters or conveyance and planning distance calculations) to ensure covered facilities are regulated based on their location, as required by statute. In combination with the screening criteria, EPA determined that the substantial harm criteria reflect real world scenarios whereby a worst case discharge could cause substantial harm to the environment. Some commenters raised concerns about the level of responsibility on owners or operators to determine if they are subject to the rule. While EPA staff will be available to work with facilities and provide compliance assistance, consistent with Congressional intent, the responsibility for safeguarding their materials and for planning for a worst case discharge of CWA hazardous substances into or on the navigable waters or a conveyance to navigable waters rests first and foremost with the covered facility owner or operator (H.R. Rep. No. 101–653, 101st Cong., 2d Sess. 1990).

Figure 1—Final Applicability Criteria for CWA Hazardous Substance FRP-Subject Facilities



i. Example of the Applicability Determination Process

Below is a detailed discussion of the applicability determination process in 40 CFR 118.3. The first step is to complete the screening criteria, which are to be assessed concurrently; there is no implied order of which screening criterion to assess initially, and a covered facility owner or operator may choose to examine either their distance to navigable waters or a conveyance to navigable waters or threshold quantity first, whichever is preferable to their circumstances. In this example, the owner or operator chooses to determine if their maximum quantity/quantities onsite of CWA hazardous substance(s) meets or exceeds the threshold quantity first. The aggregate maximum quantity onsite at any time of benzene (a listed hazardous substance as found in 40 CFR 116.4) is 15,000 pounds. Since benzene has an RQ of 10 and the RQ multiplier is 1,000, the threshold quantity for benzene is 10,000 pounds. Because the covered facility's maximum quantity onsite exceeds the threshold quantity for benzene, it meets this screening criterion. If there are mixtures containing CWA hazardous substances onsite, the owner or operator must follow the requirements regarding mixtures, as detailed in section III.D.8 of this preamble. The covered facility owner or operator then determines whether it has a maximum quantity onsite at any time that meets or exceeds the threshold quantity for each other CWA hazardous substance onsite and in mixtures following the same procedure. Alternatively, if a covered facility does not have any CWA hazardous substances that meet the CWA hazardous substance screening threshold (1,000x RQ), it need not

[7] *https://www.epa.gov/dwreginfo/drinking-water-distribution-system-tools-and-resources.*

proceed further with the applicability determination.

Again, if the covered facility meets the CWA hazardous substance threshold quantity screening criterion, the owner or operator next determines its distance to navigable waters or a conveyance to navigable waters. In this instance, the covered facility boundary or nearest opportunity for discharge nearest to a navigable water or a conveyance to navigable water as assessed using an online mapping tool is 0.3 miles. Thus, the covered facility is within one-half mile of navigable waters or a conveyance to navigable waters. Since the covered facility meets both prongs of the screening criteria, the owner or operator then determines whether it meets any of the substantial harm criteria. If a covered facility is not within one-half mile of a navigable waters or a conveyance to navigable waters, the owner or operator need not proceed further.

Similar to the screening criteria, there is no implied order of operations in determining whether a covered facility meets any of the substantial harm criteria, and an owner or operator may proceed through the criteria as preferred. However, unlike the screening criteria (where both prongs need to be met), if an owner operator determines that the covered facility meets one of the substantial harm criteria, the owner or operator must submit an FRP to EPA. In addition, the owner or operator must still assess the other substantial harm criteria, as it is important to have a guide to all the potential areas of impact in the case of a worst case discharge as well as past vulnerabilities as shown through previous reportable discharges. Therefore, the assessments for all four criteria must be included in the FRP or Appendix A: Substantial Harm Certification Form.

Proceeding through each of the substantial harm criteria, for the substantial harm criteria based on calculating distances to endpoints (FWSEs and public receptors and the ability to adversely impact a PWS), EPA expects that covered facility owners or operators will need to gather information related to the CWA hazardous substances onsite above the threshold quantity and information relevant to their fate and transport following a worst case discharge. This may include modeling a worst case discharge scenario under various flow conditions to obtain the arrival time, duration, and concentration of the discharge as it reaches a FWSE, public receptor, or water intake. Typically, low flow conditions will result in larger peak concentrations of the discharged substance, and thus could be more likely to cause substantial harm.

Next, a covered facility owner or operator determines whether a worst case discharge of each CWA hazardous substance with a maximum quantity onsite above the threshold quantity could cause injury to FWSE. To calculate the quantity of a worst case discharge for each CWA hazardous substance onsite above the threshold quantity, the owner or operator identifies the maximum CWA hazardous substance container, interconnected containers, pipe, or piping system quantity onsite. Then, a covered facility owner or operator consults the relevant ACP (available by contacting their EPA regional office) to identify FWSE that could potentially be reached by a worst case discharge. To calculate planning distance, the owner or operator must consider the factors for overland and in water transport detailed in § 118.10(b)(3)(i) and (ii), as well as adverse weather conditions in § 118.10(b)(3)(iii) and properties of the CWA hazardous substance in 40 CFR 118.10(b)(3)(iv) or associated aqueous products. Once an owner or operator completes the planning distance calculations, they compare the concentration-based (*i.e.,* mg/L) results to the chart in Appendix B to determine whether a worse case discharge could cause injury to FWSE.

To determine whether a covered facility could cause injury to a public receptor, the owner or operator follows the same steps as for FWSE, but uses the appropriate concentration-based (*i.e.,* mg/kg) endpoint values found in Appendix B. To identify public receptors, an owner or operator may consult local maps, local authorities, their Local Emergency Planning Committee (LEPC) or Tribal Emergency Planning Committee (TEPC), or any other available information about parks, recreational areas, docks, or other public spaces inhabited, occupied, or used by the public at any time where members of the public could be injured as a result of a worst case discharge into or on the navigable waters or a conveyance to navigable waters.

To evaluate whether a worst case discharge from a covered facility could adversely impact a PWS, the owner or operator determines whether a worst case discharge would result in certain outcomes as detailed below by working with potentially affected PWSs. Using information including properties of CWA hazardous substances onsite and information relevant to their fate and transport arrival time, duration, and concentration of the discharge as it reaches a water intake, the owner or operator coordinates with downstream PWSs to determine impacts to the system and documents that coordination. If the owner or operator has made and documented good faith efforts but is nonetheless unable to work with the PWS, the covered facility will use the estimated concentration of the CWA hazardous substance from a worst case discharge at the water intake to assess the potential to adversely impact a PWS. Specifically, an owner or operator must assess each of the following impacts:

—Violation of a National Primary Drinking Water Standard or State Drinking Water Regulation: To assess whether a worst case discharge violates any National Primary Drinking Water Regulations (NPDWR) or State Drinking Water Regulations (SDWR), a covered facility owner or operator determines whether the released CWA hazardous substance, aqueous products, or a chemical product that forms when the CWA hazardous substance reacts with drinking water treatment chemicals, is subject to a NPDWR or SDWR, and is predicted to exceed the maximum contaminant level (MCL) at the point of compliance with the NPDWR or SDWR. For example, benzene is a CWA hazardous substance and is subject to a NPDWR with an MCL of 0.005 mg/L measured at the entry point to the water distribution system. An example of a chemical product that could form through a reaction is the CWA hazardous substance ammonium thiocyanate, which reacts with free chlorine to form cyanogen chloride and/or free cyanide, both of which are acutely toxic above a threshold and are regulated under SDWA.

—Interference with the ability of PWSs to comply with any NPDWR or SDWR: To assess whether a worst case discharge compromises the ability of the PWS to produce water that complies with any NPDWR or SDWR, a covered facility owner or operator determines whether the released CWA hazardous substance alters water quality or interferes with treatment processes in a manner that impacts a PWS's ability to produce water that complies with an NPDWR or SDWR. For example, a release of a strong acid, such as sulfuric acid in sufficient quantity may reduce water alkalinity to a degree where the PWS can no longer maintain adequate corrosion control, putting it at risk of a violation under the Lead and

Copper Rule (40 CFR part 141 subpart I).

—Threat to public health: To assess whether a worst case discharge results in adverse health impacts in people exposed to the maximum concentration that could enter a drinking water distribution system, a covered facility owner or operator determines whether the released CWA hazardous substance, aqueous products, or a chemical product that forms when the CWA hazardous substance reacts with drinking water treatment chemicals, is predicted to exceed scientifically accepted reference concentrations below which adverse human health impacts are not expected. An example of such reference concentrations are EPA's established Drinking Water Health Advisories, which are intended to protect public health during an emergency, such as a chemical release. As an example, benzene has a one-day Drinking Water health advisory of 0.2 mg/L.

—Contamination of PWS infrastructure: To assess whether a worst case discharge will contaminate PWS infrastructure, including but not limited to intake structures, treatment facilities, and drinking water distribution systems, or premise plumbing systems [8] to a degree that requires remediation to restore system components to acceptable performance, a covered facility owner or operator determines whether the released CWA hazardous substance, aqueous products, or a chemical product that forms when the CWA hazardous substance reacts with drinking water treatment chemicals, is likely to corrode, foul, adhere to, adsorb into, permeate into, or otherwise damage components and materials used at any point in the PWS, from the intake through premise plumbing systems. For example, CWA hazardous substances that are oil-like can foul water treatment filtration media, making it ineffective.

—Impact to aesthetic characteristics of drinking water: To assess whether a worst case discharge impairs the taste, odor, or other aesthetic characteristic of the water entering a drinking water distribution system to a degree that could make the water unacceptable to consumers and that could prompt the PWS to issue use restrictions, a covered facility owner or operator determines whether the released CWA hazardous substance, aqueous products, or a chemical product that forms when the CWA hazardous substance reacts with drinking water treatment chemicals, is predicted to exceed scientifically accepted reference concentrations, below which aesthetic impacts from the CWA hazardous substance are not expected. For example, a CWA hazardous substance at a concentration above established taste and odor thresholds could prompt a water system to issue use restrictions, such as a ''do not drink'' order. When available, secondary MCLs established under SDWA should be used as a reference concentration for aesthetic impacts. For example, chloride has a secondary MCL of 250 mg/L—above this concentration, the taste of the water may be unacceptable to customers. Several CWA hazardous substances, such as hydrochloric acid, would increase the chloride concentration in water.

When assessing each criterion for substantial harm to PWSs, the covered facility owner or operator should attempt to work collaboratively with the downstream PWS(s) to determine precisely how the worst case discharge would impact the system. Given the complexity of fate and transport of a CWA hazardous substance in aqueous environments as well as the impact of drinking water treatment processes on the CWA hazardous substance, system specific information from the PWS will facilitate the most accurate assessment for the potential of the CWA hazardous substance to cause substantial harm to the PWS. However, if the covered facility owner or operator has made and documented good faith efforts but is nonetheless unable to work with the PWS in this assessment, the owner or operator must use the predicted concentration of the CWA hazardous substance at the drinking water intake resulting from a worst case discharge, along with scientifically accepted information about the impact of common water treatment processes (*e.g.,* chlorination) on the CWA hazardous substance to make the substantial harm determination.

The covered facility owner or operator must consider each of the five potentially adverse outcomes to PWSs described above and determine the concentration at which the adverse outcome could occur. The lowest concentration at which any of the five adverse outcomes could occur must be used in the substantial harm determination, and if the concentration at the reference point (*e.g.,* at the intake, at the entry point to the distribution system) is equal to or greater than the concentration at which the adverse outcome could occur, then the covered facility meets this substantial harm criterion.

Finally, a covered facility owner or operator assesses whether they have had a reportable discharge of a CWA hazardous substance (a discharge over the RQ) to navigable waters in the last five years. This could be accomplished by reviewing discharge records and those submitted to the NRC in the event of a reportable discharge.

If the covered facility CWA hazardous substance maximum quantity onsite meets or exceeds the threshold quantity and it is located within one-half mile of navigable waters or a conveyance to navigable waters, but does not meet any of substantial harm criteria, the owner or operator must still submit a Substantial Harm Certification Form (Appendix A) to EPA, including supporting calculations and modeling. If the covered facility meets at least one of the substantial harm criteria, the owner or operator must complete and submit an FRP to EPA that includes information on each CWA hazardous substance onsite above the threshold quantity, along with their Substantial Harm Certification Form.

Below is a detailed discussion of the significant comments and EPA's responses, as well as adjustments made to the regulatory text.

ii. Threshold Quantity

In 40 CFR 118.3, EPA proposed that if the maximum capacity onsite exceeds 10,000x the RQ, a covered facility meets the threshold quantity screening criterion. While EPA proposed using 10,000x RQ multiplier for threshold quantities, the Agency has determined that a 1,000x RQ multiplier will more appropriately screen for covered facilities that could cause substantial harm to the environment from a worst case discharge. For example, some commenters criticized the 10,000x multiplier citing a lack of evidence that those facilities under that threshold quantity would not be reasonably be expected to cause substantial harm to the environment from a worst case discharge. Therefore, the commenters urged EPA to take a more precautionary approach and not exclude these facilities from determining their ability to cause substantial harm to the environment. Since threshold quantity is a screening tool, *i.e.,* a covered facility with less than that amount is not covered by the rule and need not consider whether it may reasonably cause a worst case discharge in the first instance, setting a lower initial screening level at this stage has merit,

[8] *https://www.epa.gov/emergency-response-research/premise-plumbing-decontamination.*

since even with less than a 10,000x RQ amount, it is reasonably foreseeable that a covered facility could cause substantial harm from a worst case discharge. Said another way, setting the threshold quantity too high may mean that higher risk covered facilities are not required to determine their ability to cause substantial harm at all, which could leave the environment more vulnerable to worst case discharges.

Several commenters supported the initial proposed 10,000x RQ multiplier, but EPA agrees with other commenters who suggested lowering the RQ multiplier to 1,000x. See Chapter 2 of the RIA for this final rule for a detailed analysis of covered facilities with CWA hazardous substances onsite at the 1,000x and 10,000x RQ multiplier levels. This analysis shows that at the 1,000x RQ multiplier, a number of additional covered facilities with CWA hazardous substances onsite that present a significant threat to downstream PWSs, FWSEs, and public receptors will need to determine if they meet the substantial harm criteria. For example, for covered facilities with 1,000x RQ onsite of arsenic trioxide (arsenic, a known toxin regulated under the Safe Drinking Water Act (SDWA)), 66% would now meet the quantity threshold, versus 50% at 10,000x RQ. Similarly, for covered facilities with benzene onsite, a known carcinogen also regulated under the SDWA, 75% would now meet the threshold quantity versus 32% at 10,000x RQ. A few other examples include lead sulfate (lead, regulated under SDWA), 66% of covered facilities at 1,000x RQ versus 17% at 10,000x RQ; sodium arsenate (arsenic, a known toxin regulated under SDWA), 100% of covered facilities at 1,000x RQ versus 11% at 10,000x RQ; and hydrogen cyanide (cyanide, regulated under SDWA), 57% at 1,000x RQ versus 29% at 10,000x RQ. These additional covered facilities evaluating their substantial harm criteria will significantly add to protection of the environment.

EPA disagrees with commenters who argued that this lower multiplier value will bring in too many covered facilities under the rule without a concomitant increase in environmental protection. First, meeting the threshold quantity does not automatically make a covered facility subject to the rule. Second, a lower threshold quantity is appropriate for an initial screening criterion, ensuring that only covered facilities that are unlikely to meet the substantial harm criteria are excluded from the scope of the rule. Accordingly, EPA has judged that the screening criteria in conjunction with the substantial harm criteria appropriately targets those covered facilities that could cause substantial harm to the environment from a worst case discharge of CWA hazardous substances into or on the navigable waters.

To the commenters who asked for more information on the basis of the threshold quantity, the RQ multiplier reflects relative toxicity parameters used to establish the original RQs. See section IV.A.1.a.i of the proposed rule preamble, Docket ID EPA–HQ–OLEM–2021–0585–0001, for a discussion on RQs and how they were derived. The RQs provide a means to use an existing regulatory structure that already considers risk on a scale and that has been successfully used for release notification for decades. EPA also balanced the variability among the 296 CWA hazardous substances and tailoring threshold amount against a uniform, easily applied, mass-based RQ multiplier, as advocated for by many commenters, deciding on balance in favor of using a single RQ multiplier. In addition, while the proposal focused on capturing larger capacity covered facilities that could pose a greater risk, with additional consideration, in EPA's judgment, a 1,000x multiplier for determining the threshold quantity as a screening criterion more effectively represents the potential risks associated with a worst case discharge.

In this final rule, EPA has adjusted its approach to use maximum quantity onsite (inventory) rather than maximum container capacity onsite as the basis for assessing risk to the environment. EPA based this decision largely on the fact that risk determinations using maximum quantity onsite will more accurately reflect the hazard posed and has been used successfully in other EPA chemical regulations, such that this is standard business practice. Additionally, since containers are typically measured by volume and CWA hazardous substances may vary dramatically in weight due to their physical properties, there is not a clear association between container size and quantity of CWA hazardous substances onsite, which many commenters raised as an unnecessary complication. Thus, a covered facility owner, operator, or inspector would have to convert the volume of each CWA hazardous substance container onsite to a chemical-specific weight in order to compare reported values and determine if the covered facility meets the threshold quantity, exacerbating conversion difficulties discussed in the proposed rule including at 87 FR 17900 and raised by several commenters.

While the Oil Pollution Prevention FRP regulations use container capacity for applicability threshold determination, this is consistent with how oil is measured and regulated, using volume (gallons). On the chemical side, CWA hazardous substances (and all chemicals that EPA and other Federal agencies regulate) are measured and regulated by weight, typically in pounds. CWA RQs are also weight-based (1, 10, 100, 1,000, and 5,000 pounds). The OPA Conference Report (H.R. Rep. No. 101–653, 101st Cong., 2d Sess. 1990) specifically directed EPA to account for oil storage capacity, but it has no corresponding language for CWA hazardous substances. As oil and the 296 CWA hazardous substances differ in important and myriad ways, it is reasonable to pursue a different approach in terms of determining the appropriate amount that should be used for determining threshold quantities and as a planning factor.

In so doing, EPA is responding to commenter concerns about covered facilities that may have capacity for but will never actually have CWA hazardous substances onsite in quantities sufficient to meet the threshold quantity but (if capacity were the metric) could be subject to the rule, especially considering some CWA hazardous substances will never be stored at the full capacity of a container due to their physical properties. For example, several commenters noted that for one of the highest volume and occurrence CWA hazardous substances, anhydrous ammonia, containers are prohibited to be filled beyond 85% liquid volume to allow expansion and contraction.

For mixtures, using capacity gets even more complicated, an issue raised by many commenters, since a covered facility owner or operator, or EPA inspector would have to convert varying volumes of CWA hazardous substances into weights, then extrapolate based on their proportions to the full capacity of the container. This seems needlessly complex and potentially introduces calculation errors into threshold applicability determinations and worst case discharge scenario quantities. To add to the complexity, CWA hazardous substance and mixtures can be present onsite in myriad types of containers and configurations.

EPA understands the concern regarding fluctuating quantities and numbers of containers, particularly at certain batch processors and in some industries and also the use of mobile storage containers and notes that the maximum quantity onsite must reflect the aggregated quantity at the covered

facility across all containers, including but not limited to rail cars or other mobile storage not under active shipping papers, process vessels, canisters, drums, bulk storage tanks, dumpsters, totes, or bulk cargo containers positioned on land. However, EPA disagrees with commenters who asserted that the only way to adequately plan for response to worst case discharges is to account for the full storage capacity for CWA hazardous substances. Indeed, EPA and other Federal regulators routinely use actual chemical inventory quantities for a variety of regulatory and planning purposes. EPA intends that an FRP for CWA hazardous substances be forward-looking and account for the maximum quantity onsite at any time. On balance, EPA believes that choosing quantity over capacity is appropriate in terms of implementability and the risks presented. Moreover, covered facilities have many incentives to accurately track their inventories over time.

iii. Proximity to Navigable Waters or a Conveyance to Navigable Waters

EPA is retaining the proposed location-based screening criterion that covered facilities must determine whether they are located within one-half mile of navigable waters or a conveyance to navigable waters, while clarifying that this should be measured from the facility boundary or nearest opportunity for discharge. This distance is based on research related to the Oil Pollution Prevention FRP regulation. On balance, while the Agency agrees that there are significant differences between oil and CWA hazardous substances, one-half mile is an appropriate distance to infer that a covered facility has a reasonable expectation to discharge to navigable waters or a conveyance to navigable waters in the event of a worst case discharge.

Some commenters argued that the distance should be extended farther for more complete protection of the nation's waters and in the context of CWA hazardous substances. However, in EPA's analysis, 80% of covered facilities with CWA hazardous substances onsite were within one-half mile to navigable waters (see Chapter 2 of the RIA in the rulemaking docket). To extend the distance would make the criterion effectively meaningless because nearly every covered facility that meets or exceeds the threshold quantity would meet this screening criterion. While commenters were concerned about differences in topography complicating determinations of whether a covered facility is within one-half mile of navigable waters or a conveyance to navigable waters, this distance should be measured from the nearest opportunity for discharge and industry will be able to comply using widely available electronic mapping tools. EPA has determined that the one-half mile distance is protective and simple to calculate, and covered facility owners or operators will have the opportunity to model a worst case discharge in evaluating the substantial harm criteria that depend on planning distance. Additionally, an owner or operator may appeal to the RA if they believe there is no reasonable expectation to discharge into or on navigable waters or a conveyance to navigable waters from their covered facility.

EPA agrees with commenters who stated that one-half mile to navigable waters or conveyance to navigable waters applicability requirement is important to minimize harms to the environment. The Agency again notes that this is an initial screening criterion; it does not mean that a facility is subject by the rule. Rather, it means that if a covered facility does not meet either of these initial screening thresholds, it is not subject to the rule and need not do any further analysis. Only covered facilities within one-half mile to navigable water or a conveyance that also meets or exceeds a threshold quantity must then determine whether they satisfy any of the substantial harm criteria.

EPA recognizes commenter concerns regarding CWA hazardous substances that have physical properties (*e.g.,* viscosity, vapor pressure, etc.) that preclude the substance from reaching navigable waters or a conveyance to navigable waters. However, a covered facility owner or operator will consider these properties, and their implications for the ability of the substance to impact water, when they evaluate the substantial harm criteria, not in the initial screening criteria. A covered facility will need to determine its distance to navigable waters or a conveyance to navigable waters regardless of the route or method of travel of a CWA hazardous substance in a worst case discharge.

iv. Substantial Harm Criteria

In § 118.3(c), EPA proposed four substantial harm criteria. EPA is retaining these criteria in the final rule, with minor modifications. Below is a summary of changes and responses to major comments.

Several commenters asserted that the extensive efforts to assess whether they meet the substantial harm criteria were essentially requiring compliance with the rule. EPA disagrees with this premise; indeed, the reason for the initial screening criteria is to mitigate the impact on covered facilities that would not meet the substantial harm criteria. However, given the variability of the CWA hazardous substances at issue (including variations in transport, fate, and other chemical characteristics), it is inevitable that some covered facilities that meet the screening criteria will nonetheless not meet any of the substantial harm criteria. Because of the myriad of variables involved, the analysis is necessarily case-by-case. And while simplicity can reduce costs, it also often faces the dilemma of being either over or under inclusive. So, while EPA determined that simple to apply, bright line screening criteria were appropriate to satisfy the requirements of the statute in terms of adequately protecting human health and the environment, a more nuanced analysis of the substantial harm criteria to determine which covered facilities must incur the added cost of preparing an FRP is warranted. Nevertheless, in principle, EPA agrees that making it as easy as possible to conduct these assessments is an important goal and will facilitate the successful implementation of this rule. EPA intends to continue to identity and provide tools to the regulated community and the public to support these determinations.

To commenters who suggested a standalone substantial harm criterion based on the potential impacts of worst case discharges to navigable waters or a conveyance to navigable waters on communities with environmental justice concerns, EPA recognizes the unique risks faced by these communities. In § 118.5(b), an RA may determine that a covered facility could cause substantial harm to the environment due to its potential impacts on communities with environmental justice concerns. Another issue for communities with environmental justice concerns is the potential cumulative impact of multiple covered facilities in one area where any one covered facility may not have a maximum quantity onsite that meets or exceeds the threshold quantity of CWA hazardous substances, but it seems likely that if one covered facility experienced a worst case discharge due to extreme weather conditions, others could be similarly impacted and the collective effects could cause substantial harm to the environment. Upon consideration and in response to commenter concerns, an RA may now consider concerns regarding co-located covered facilities when determining whether a covered facility has the

potential to cause substantial harm to the environment.

a. Ability To Cause Injury to FWSE

In § 118.3(c)(1), EPA proposed and is retaining in the final rule a substantial harm criterion to consider the covered facility's ability to cause injury to FWSE. Relatedly, the Agency proposed in Appendix B, and is retaining in the final rule, 10 percent of Lethal Concentrations 50% (LC50) as the toxic endpoints a covered facility owner or operator must use to perform planning distance calculations. FWSEs are identified in ACPs. This regulation does not alter how FWSEs are identified or what constitutes FWSE. EPA has added language that facility owners and operators must also consider aqueous products that form when the CWA hazardous substance enters water to ensure the full range of risk is represented in this assessment.

EPA disagrees with the commenter who requested that the regulated community should identify endpoints for individual CWA hazardous substances (as opposed to categories of CWA hazardous substances) and incorporate these facility-defined endpoint concentrations given EPA approval. Determining these on a site-by-site and CWA hazardous substance-by-substance basis would be prohibitively difficult to assess. On a case-by-case basis, a covered facility owner or operator may appeal a substantial harm determination to the RA if they disagree with the planning distance calculations. EPA maintains that the LC50-based endpoints appropriately model for effects on wildlife, regardless of the type of hazardous substance discharge or type of waterbody.

One commenter requested that EPA acknowledge that ''not all navigable waters identify fish, wildlife, and sensitive environments and public receptors in their Area Contingency Plans,'' and asked for flexibility in these determinations because of these situations, specifically referencing the Oil Pollution Prevention FRP regulation's vulnerability analysis, § 112.20(h)(4) and section 1.4.1 of Appendix F. EPA is aware that ACPs currently may not reflect impacts of worst discharge of CWA hazardous substances to navigable waters. Working with Federal response partners, the Agency intends to provide compliance assistance to covered facilities to ensure these areas are properly identified and impacts are assessed. In addition, the owner or operator is responsible for identifying public receptors, not just ACPs.

b. Ability to Adversely Impact a Public Water System

EPA proposed in § 118.3(c)(2) and is retaining in the final rule the substantial harm criterion for covered facilities located at a distance such that a worst case discharge has the ability to adversely impact a PWS. Covered facilities are required to coordinate with the PWS to determine whether predicted concentrations from a worst case CWA hazardous substance discharge would result in substantial harm to the PWS. EPA has added language that facility owners and operators must also consider aqueous products that form when the CWA hazardous substance enters water to ensure the full range of risk is represented in this assessment.

However, several commenters expressed concern with EPA's approach. Some commenters requested that EPA provide detailed, transparent, and clear guidance about the applicable drinking water standards to prevent inconsistencies in implementation and confusion for covered facilities. An owner or operator must assess the possibility of a worst case discharge to cause any of the impacts enumerated in § 118.3(c)(2)(ii) through (v). Information that supports this assessment includes NPDWR, SDWR, human health impact thresholds, taste and odor thresholds, and physicochemical properties of the CWA hazardous substance. Furthermore, EPA intends to provide compliance assistance to covered facility owners or operators in making these assessments, including resources that crosswalk CWA hazardous substances against existing NPDWR.

Additionally, several commenters suggested that EPA allow covered facility owners or operators to show a good-faith effort of coordination with PWSs through documented attempts, especially in certain circumstances where coordination is difficult or not possible. EPA agrees and is revising the requirement to more clearly state that owner or operators may show a good-faith effort of coordination with PWSs through documented attempts where coordination is difficult or not possible.

(i) Alternative Approaches

—*Source Water Protection Areas (SWPAs):* As part of the proposal, EPA considered requiring covered facilities within SWPAs to prepare an FRP. Although several commenters supported this approach, largely for the reasons enumerated in the proposal preamble at IV.A.2.b.ii EPA has decided not to finalize this requirement. On the one hand, SWPAs would be a useful tool that could eliminate the need for distance planning if they were universally available and uniformly applied. However, they are not. Moreover, EPA is concerned with the burden that would be placed on State drinking water programs to respond to requests for SWPAs from covered facilities if this were a requirement of the rule. Commenters provided no data or information to support the assertion that responding to requests for SWPAs from covered facilities would likely not place a significant burden on State drinking water programs. One purpose of this final regulation is to implement congressional intent by shifting the responsibility for planning from public resources to private covered facilities that pose a substantial risk to the environment in the event of a worst case discharge into or on the navigable waters or a conveyance to navigable waters, not create new burdens for State drinking water programs or PWSs. Furthermore, requiring additional updating of SWPAs or uniformity in their application so that they could be used as a substantial harm criterion is outside the scope of this rulemaking.

—*Groundwater:* Including potential discharges to groundwater is outside of the scope of this final rule, which is specific to onshore non-transportation-related facilities that, because of their location, could reasonably be expected to cause substantial harm to the environment by a worst case discharge into or on navigable waters or a conveyance to navigable waters. Nonetheless, several commenters requested that EPA include a provision to protect groundwater under the final rule. One commenter recognized that groundwater is not jurisdictional water of the United States under the CWA but argued that the rule affects the quality of groundwater drawn by groundwater-supplied PWSs regulated under the SDWA as well as nearby groundwater users and other downstream surface water users if the groundwater discharges to surface water. Again, navigable waters does not, by definition, include groundwater.

—*Zones Of Concern (ZOCs):* EPA disagrees with commenters who posited that the source water zones of concern (ZOCs) described in the report ''Occurrence of Releases with the Potential to Impact Sources of Drinking Water'' (EPA 817–R–21–001) are appropriate for this regulation. The ZOCs used in the study described in the referenced report were

intended to provide a uniform definition for identifying whether releases captured by the NRC would be included in the analysis or not. The methodology was not designed to identify worst case discharges. As noted in Section 2.6 of the referenced report: Limitations of the Methodology, ''It is possible that releases significantly impacting a source of drinking water occurred outside a zone of concern. Conversely, it is also possible that releases within a zone of concern did not significantly impact the source water.'' The criteria in the final rule, which are based on whether a worst case discharge from a covered facility could cause substantial harm to a PWS are outcome based and therefore will more appropriately target covered facilities for regulation compared to the ZOCs in the referenced report.

c. Ability To Cause Injury to Public Receptors

In § 118.3(c)(3), EPA proposed a substantial harm criterion for covered facilities that could cause injury to public receptors through a worst case discharge into or on navigable waters or a conveyance to navigable waters, using the same parameter and toxic endpoint approach proposed for FWSE. EPA is retaining this provision in this final action. Several commenters expressed concern with EPA's proposal to have a separate substantial harm criterion for covered facilities that could cause injury to public receptors through a worst case discharge into or on the navigable waters or a conveyance to navigable waters and asserted that this is out of scope of the CWA. EPA disagrees that this substantial harm criterion does not fall under the scope of the CWA or the stated purpose of this final rule. The scope of the rule is onshore non-transportation-related facilities that, because of their location, could reasonably be expected to cause substantial harm to the environment by a worst case discharge into or on navigable waters or a conveyance to navigable waters. Public receptors are defined as areas through which the public has access to navigable waters, thus tying this criterion to the statutory authority.

Covered facility owner or operators should include impacts to public receptors in their hazard evaluations in § 118.11(b)(3), based on the physicochemical properties of the CWA hazardous substances onsite and their potential effects as well as the potential economic effects to businesses.

d. Reportable Discharge History

In § 118.3(c)(4), EPA proposed, and is retaining in the final action, that a reportable discharge history is a substantial harm criterion, meaning the covered facility has had a discharge of a CWA hazardous substance at or exceeding the RQ, as listed in 40 CFR 117.3, that violates CWA section 311(b)(3), *i.e.,* that reaches navigable waters or adjoining shorelines. If a covered facility that meets the screening criteria has had a reportable discharge within the last five years that reached navigable waters, it will be considered to have the potential to cause substantial harm in the event of a worst case discharge. Reportable discharge history will be limited to the preceding five years, so if a covered facility has had a reportable discharge outside of that date range, it does not meet that substantial harm criterion. EPA clarifies here that discharges permitted under National Pollutant Discharge Elimination System (NPDES) are not subject to this regulation (40 CFR part 122).

EPA notes that the fact that a reportable discharge in this context means that the discharge entered into or on navigable waters in quantities that may be harmful. Furthermore, these discharges are required to be reported to the NRC, so evaluating whether a covered facility has had one in the last five years should add no burden. Additionally, discharge history may indicate deficiencies at a covered facility and so warrant further care and additional planning, as shown in the related study of oil spills discussed in the preamble to the Oil Pollution Prevention FRP regulation (58 FR 8832, February 17, 1993).

EPA maintains that five years is a reasonable look back window and ample time for a covered facility to improve spill resilience as demonstrated through the lack of reportable discharges into or on navigable waters. EPA agrees with commenters that limiting the reportable discharge releases into or on navigable waters is reasonable and has added clarifying text to the final rule. The Agency is not expanding the discharge history criterion to cover other reportable discharges (*e.g.,* to land) given that the authority for this action is specific to impacts into or on navigable waters, adjoining shorelines, or exclusive economic zone.

e. Passive Mitigation, Administrative Controls, and Secondary Containment

EPA did not propose and is not including provisions regarding passive mitigation, administrative controls, or secondary containment in this rule. This is a planning regulation, as per its statutory authority under the CWA 311(j)(5). As such, the Agency is not incorporating mitigation techniques into the screening criteria, determinations of substantial harm, nor in the FRP hazard evaluation.

As per the CWA, as amended by the OPA, a worst case discharge is defined as ''the largest foreseeable discharge in adverse weather conditions.'' The OPA Conference Report goes on to state that the largest foreseeable spill from a given type of facility is intended to describe a case that is worse than either the largest spill to date or the maximum most probable spill for that type of facility. Further, Congress' intent was that the worst case discharge reflects the partial failure of various preventive systems, and that the private sector be encouraged to increase its spill response capability (H.R. Rep. No. 101–653, 101st Cong., 2d Sess. 1990). Relatedly, in extreme weather events, mitigation systems may fail. In addition, written administrative controls may be overridden or overlooked, making it foreseeable that a worst case discharge could occur notwithstanding such controls.

Furthermore, although EPA encourages covered facilities to implement additional release prevention, detection, and mitigation measures such as those cited by commenters, the Agency believes that the effects of these measures on the size and impact of a potential spill are not readily quantifiable, nor easily supported with historical spill evidence. CWA hazardous substances vary widely in physicochemical properties and prevention and response strategies correspondingly differ based on the substance. EPA maintains that incorporating factors into the worst case discharge calculation that consider the risks associated with a variety of site-specific conditions regarding passive mitigation or administrative controls will, in general, be too complex for this rulemaking, and will require a very detailed verification and inspection processes. Requirements to prevent CWA hazardous substance discharges are based on many different regulatory regimes and industry standards and thus may be difficult for an inspector to assess and requiring installation or operation of such systems is outside the scope of this final action. As a result, EPA does not believe that it is feasible or warranted to include a calculation of mitigation measures tied to a reduction in the worst case discharge volume. Nonetheless, if an owner or operator

believes that the circumstances of the covered facility are such that it could not cause substantial harm to the environment from a worst case discharge to navigable waters or a conveyance to navigable waters, they may appeal the substantial harm determination to their RA.

For these reasons, EPA maintains that it is inappropriate to include secondary containment, administrative controls, and passive mitigation in this final rule.

f. Transfers Over Water

EPA did not propose an additional or different substantial harm criteria for covered facilities that transfer CWA hazardous substances over water. The Agency received comments both supporting and opposing such a provision. EPA has decided against including one in this final action. First and foremost, the USCG has primary responsibility for MTR facilities and would be the implementing Agency for any CWA hazardous substance FRP regulations for that type of facility. Should the USCG initiate a rulemaking for facilities over which it and the Agency share jurisdiction, the two agencies will collaborate to ensure consistency. Moreover, EPA did not receive data or information to support adding this as a substantial harm criterion. EPA notes that should a covered facility within EPA's jurisdiction have a reportable discharge during transfers over water, this would meet the § 118.3(c)(4) substantial harm criterion (*i.e.,* reportable discharge of a CWA hazardous substances under § 117.21 within last five years).

3. General Requirements

In § 118.4, EPA proposed and is finalizing, with some adjustments, general requirements and compliance dates for CWA hazardous substance FRPs. In § 118.4(a), to aid in informing the regulated community of their responsibilities under this regulation, the Agency has added ''implement'' to the list of items a covered facility must do regarding their FRP. This will reduce uncertainty and make clear that plans must be in place and followed.

In § 118.4(a), EPA has changed the language for plan submission to emphasize that there is an initial 36-month implementation period. This will allow covered facilities ample time to familiarize themselves with the rule requirements, gauge seasonal and commodity flow-related inventory fluctuations to determine the maximum quantity onsite at any time, perform planning distance calculations, and prepare their plans. Plan preparation, submission, and implementation timelines are as follows:

—*Initially regulated covered facilities (covered facilities in operation on November 30, 2026, and that meet the criteria in § 118.3 or are notified by an RA as in § 118.5): by June 1, 2027.*

—*Newly regulated covered facilities (covered facilities that meet the criteria in § 118.3 or are notified by an RA as in § 118.5 after November 30, 2026:* Within 6 months.

—*Newly constructed covered facilities (covered facilities starting operations after June 1, 2027:* Prior to the start of operations and including a 60-day start up period adjustment phase.

—*Covered facilities regulated as a result of a planned event or change:* Prior to the start of operations and including a 60-day start up period adjustment phase, but no sooner than June 1, 2027. An example of a facility characteristic change could be processing expansion whereby nearest opportunity to discharge moves within one-half mile to navigable waters or a conveyance to navigable waters, such as adding a rail spur.

—*Covered facilities regulated as a result of an unplanned event or change:* Prior to the start of operations and including a 60-day start up period adjustment phase, but no sooner than November 30, 2026.

Newly constructed covered facility owners or operators should use projected CWA hazardous substance maximum quantities onsite to develop the FRP, which can then be adjusted during the 60-day operational start up period.

For covered facilities meeting the criteria in § 118.3(a) and (b), Appendix A: Substantial Harm Certification Forms must be submitted to EPA by June 1, 2027, while covered facilities meeting that criteria at a later date have 60 days to submit their forms to EPA, but no sooner than June 1, 2027. The Agency has adjusted this timeline from one month to recognize that the required calculations may require additional time and resources.

EPA recognizes that some commenters believe that the timelines provided are too short or insufficient for FRP development and submission. In response, all covered facilities now have 36 months following the effective date to comply with the requirements in 40 CFR part 118. On the other hand, some commenters would prefer a swifter implementation period. However, due to resource constraints and the complexity of implementing a new regulatory program, EPA had judged a 36-month implementation period to be warranted. Moreover, as this is a new program, albeit modeled on an existing program, EPA is prepared to provide necessary compliance assistance as facilities develop plans for the first time.

Although EPA understands that current practices at some covered facilities may present challenges with meeting the 60-day window for changes to FRPs, documenting and adjusting material changes must be done swiftly to ensure that plans adequately prepare for worst case discharges of CWA hazardous substances. Longer timelines could render the FRP unusable as a response plan. Larger and more complex batch processors, laboratories, and facilities require proactive planning for the anticipated maximum quantities onsite. In addition, as detailed in the proposal, these timelines are roughly based on OPA 90 transition provisions, which directed EPA to issue regulations for oil worst case discharge response plans (oil FRPs) under section 311(j)(5) of the CWA within 24 months. Facilities could submit the oil FRPs beginning 30 months from enactment and were required to be submitted by 36 months of enactment. For existing and new facilities, oil FRPs were to be submitted within six months from the time of discovery or notification that a facility could cause ''substantial harm.'' This timeline is similar to that of the oil FRP program, where an oil FRP must be resubmitted within 60 days of each material change in facility or plan that could affect the adequacy of a facility's response capabilities, such as the ability to respond to a worst case discharge.

EPA has added § 118.4(a)(6), whereby a covered facility owner or operator must review and recertify their plan Agency every five years. This will ensure that FRPs stay updated and that owners or operators remain cognizant of their responsibilities under this regulation. A five-year review period is common in EPA programs and the Agency judges this to be a necessary component of an effective program.

EPA has added § 118.4(a)(7), whereby a covered facility owner or operator must evaluate their operations if EPA adds or removes a CWA hazardous substance from the list at 40 CFR 116.4 or adjusts relevant RQs as found in 40 CFR 117.3. Such additions, deletions, or adjustments are done through a formal notice and comment rulemaking procedure, so the regulated community will be on notice and have ample opportunity to review such proceedings before they become final. If a covered facility becomes newly subject to this regulation at that time, the owner or operator has six months to submit a new or updated FRP to EPA.

4. Regional Administrator Determination of Substantial Harm and Significant and Substantial Harm

In proposed § 118.5, EPA detailed a process by which an RA may require a covered facility to prepare a CWA hazardous substance FRP after consideration of site-specific factors. EPA has added a provision in § 118.5(a) whereby the RA may require amendments to FRPs submitted under their authority in § 118.5. Additionally, the Agency proposed factors for the RA to consider in § 118.5(b), as well as the factors in § 118.3. Some commenters urged EPA to remove the provision regarding the process for RAs to determine that a covered facility could cause substantial harm to the environment and must prepare, implement, and submit an FRP.

For the following reasons, EPA has decided to retain the language largely as proposed in the final action. On the one hand, EPA understands that § 118.5 creates some uncertainty for owners and operators. With respect to determining whether covered facilities could cause substantial harm to the environment in the first instance, EPA decided to implement a rule with two components (*i.e.,* regulatory criteria, including an initial screen followed by an analysis of substantial harm criteria). The regulatory criteria are designed to capture the bulk of those covered facilities that could reasonably be expected to cause substantial harm to the environment. However, because of the size and diversity of the types of covered facilities within the regulated community, EPA believes that there are covered facilities that will not meet the criteria in § 118.3, but may, due to facility-specific or location-specific circumstances, pose sufficient risk to the environment to be designated as being able to cause substantial harm to the environment. Accordingly, EPA has included the ability of the RA to make a case-by-case determination. Although EPA has made every effort to avoid being overly broad in terms of covered facilities that must submit an FRP, EPA understands that there may be circumstances where the regulatory criteria are overinclusive. In such cases, an owner or operator may seek a determination by the RA that the covered facility does not have the potential to cause substantial harm to the environment despite meeting the regulatory criteria. The Agency recognizes that RAs possess unique knowledge of Region-specific considerations and EPA has authority under E.O. 12777 to designate covered facilities on a case-by-case basis that could reasonably be expected to cause substantial harm to the environment. That said, EPA expects to exercise this authority judiciously and in manner that is reserved to ensure adequate protection of the environment. This type of process is not without precedent; indeed, the Oil Pollution Prevention FRP regulation has a similar provision in 40 CFR 112.20.

Moreover, EPA agrees with commenters who stressed that communities with environmental justice concerns may have unique circumstances that are not captured in the published applicability criteria. To be sensitive to these specific issues, of which RAs are uniquely positioned to have knowledge, EPA maintains that considering these concerns and circumstances is necessary to protect these communities. Similarly, the impacts of climate change may be difficult to anticipate and vary widely; thus, the Regional ability to assess facilities on a case-by-case basis and, if appropriate, to require a facility to develop a response plan is warranted in order to protect the environment.

EPA has decided to augment § 118.5(b)(2) to specifically reference CWA hazardous substance characteristics, such as ignitability and reactivity. Thus, RAs may take such considerations into account when determining if a covered facility could cause substantial harm to the environment in the event of a worst case discharge to navigable waters. This addition is important in certain instances to account for the wide variety of CWA hazardous substances and their physicochemical properties, including CWA hazardous substances present in waste, especially in combination with the other substantial harm factors in § 118.5(b), of which the RA is uniquely situated to be knowledgeable. In addition, and with further consideration of public comments, EPA has decided to add § 118.5(b)(10), whereby an RA may consider facility density and potential cumulative impacts of co-located facilities in requiring a covered facility to prepare and submit an FRP. EPA agrees with commenters concerned about cascading effects of a worst case discharge and submits that the RA is best positioned to evaluate this potential in the regulated community.

Some commenters also urged EPA to remove the provision regarding the process by which RAs determine that a covered facility could cause significant and substantial harm through a worst case discharge into or on navigable waters or a conveyance to navigable waters. However, the CWA directs the President to develop criteria to identify a subset of substantial harm facilities that could reasonably be expected to cause both significant and substantial harm to the environment. As such, EPA proposed factors for the RA to consider when determining that a covered facility could cause significant and substantial harm to the environment in § 118.5(d), along with the substantial harm criteria found in §§ 118.3(c) and 118.5(b). Also, in § 118.5(d)(3), EPA has expanded the factors an RA may consider when designating a covered facility as a significant and substantial harm facility to include the condition of containers or equipment onsite, as deteriorating or poor quality containers or equipment could more readily fail. In addition, EPA removed a duplicative provision referring to plan reviews. Finally, an owner or operator may appeal an RA's determination that their covered facility could cause significant and substantial harm to the environment through a worst case discharge using the process in § 118.6.

To assist RAs in achieving nationwide consistency, EPA intends to outline specific screening procedures for use by RAs and to foster consistency in how the substantial harm and significant and substantial harm factors are applied. RAs should consider the relationship of the substantial harm and significant and substantial harm factors and not consider one factor in isolation except under unique circumstances. Although the RA may consider that one factor is sufficient to require that a response plan be submitted, this would be done only under limited circumstances where site-specific conditions warrant. EPA believes that this will help to ensure a greater degree of uniformity in Regional determinations of substantial harm and significant and substantial harm.

RAs will provide a written basis for the determination of substantial harm or significant and substantial harm, which will be made available to the covered facility owner or operator. An owner or operator may use the appeals provision in § 118.6 to request reconsideration and ultimately appeal to the Administrator that their covered facility could cause substantial harm or significant and substantial harm to the environment from a worst case discharge into or on navigable waters or a conveyance to navigable waters.

5. Appeals

EPA proposed and is retaining in § 118.6 a two-step appeals process to allow covered facility owners or operators seek reconsideration of the RA's determination of substantial harm or significant and substantial harm or the disapproval of a CWA hazardous

substance FRP, and then, if warranted, to appeal that decision to the EPA Administrator. The two-step appeals process is similar to one that has been available in the Oil Pollution Prevention FRP regulation for close to 30 years and is intended to provide owners or operators with an avenue to present their data and information to EPA through a formal process.

In the first stage, the owner or operator submits a request for reconsideration, including supporting data and information, to the RA. Then, the RA will evaluate the submitted information and data and decide whether to approve the covered facility's appeal or adjust its evaluation of the ability to cause substantial harm to the environment. The RA will issue a written decision, including the basis for the determination, as soon as practicable. Depending on the outcome, the owner or operator either must submit a plan or amendments to a plan following the timelines in § 118.4 or is not required to submit a plan or amendments. After the RA issues a determination, the owner or operator may appeal the decision to the EPA Administrator within 60 days. If the EPA Administrator requires a plan or amendments to be submitted to EPA, the owner or operator shall follow the timelines in § 118.4.

As per the OPA 90 amendments to the CWA, the intent of this regulation is to shift the burden of planning and response to covered facilities rather than public resources; thus, putting the onus on the owner or operator to disprove the need for a plan is appropriate.

6. Petitions

EPA proposed and is retaining in this final rule a petition provision in § 118.7 whereby the public and other government agencies may petition EPA to determine whether a CWA hazardous substance covered facility should be required to submit an FRP to EPA. Petitions are submitted to the RA, who in turn reviews the submissions as soon as practicable. Petitions must include a reasonable basis for asserting that the covered facility may pose a risk of substantial harm to the environment. Specifically, a petition must include a discussion of how the factors in § 118.3 apply to the covered facility. Although including quantitative or other data as to the substantial harm criteria would be ideal, petitioners are not required to submit such data. EPA will make the petition available to the owner or operator that is the subject of the petition and provide an opportunity to respond. RAs may render a decision based solely on the information in the petition and in the response provided by the owner or operator that is the subject of the petition, but may also gather additional information before rendering a decision.

In terms of public availability, EPA does not believe that making all petitions public would serve to protect human health and the environment. Some materials may contain sensitive information or be inaccurate; once a covered facility is subject to FRP requirements, EPA will make public those parts of the FRP that can be shared as determined in conjunction with Federal partners like the U.S. Department of Homeland Security (DHS) and the Federal Bureau of Investigation (FBI). EPA is also not adding a deadline for acting on petitions, since they and covered facilities may be complex, and it is important to allow ample time for review and to work with both petitioners and owners or operators to address any concerns.

EPA disagrees with commenters who assert that petitions will lead to the regulation being unevenly applied. It is not unusual for Executive Agencies to have a process that develops and establishes applicability norms over time. A few commenters suggested that the rule should require petitioners to provide supporting evidence and allow covered facility owners or operators an opportunity to respond before an RA decides how the Agency will proceed in response to such a petition. Other commenters expressed concern that the rule does not provide procedures for covered facilities that are the subject of a petition to test the claims made in the petition, to submit data or information, or rebut the petition in other ways. In response to these concerns, EPA has revised § 118.7 to specify EPA will make the petition available to the owner or operator of the covered facility in question and provide an opportunity to respond. In addition, the RA will work with the owner or operator to substantiate the petition, as appropriate. The appeals and petitions provisions are complementary: one the one hand, the petition provision allows for stakeholder participation in whether EPA determines if a covered facility poses a risk of substantial harm to the environment through a worst case discharge into or on navigable waters or a conveyance to navigable waters and must prepare an FRP. On the other hand, the appeals provision allows covered facilities that may meet the criteria but could not reasonably be expected to cause substantial harm to the environment from a worst case discharge into or on navigable waters or a conveyance to navigable waters to appeal to the RA that the owner or operator is not required to submit an FRP, or otherwise engage with EPA on determinations.

While commenters expressed concern that the petition process is based on subjective opinion and lacks evidence-based standards for determining covered facility applicability, EPA will still determine covered facility status based on the regulatory criteria in §§ 118.3 and 118.5. EPA clarifies here that it is not necessary for petitioners to provide detailed analyses and calculation as to whether the covered facility meets one of the specific criteria in § 118.3 but rather must provide a reasonable basis for asserting that the covered facility may pose a risk of substantial harm to the environment. For example, if a covered facility is located near a wildlife sanctuary and appears to store significant quantities of a CWA hazardous substance, then the petition need only include such observations. That said, a petition that fails to provide a basis for why a covered facility should be determined to reasonably be expected to cause substantial harm to the environment from a worst case discharge into or on navigable waters or a conveyance to navigable waters (*e.g.,* the covered facility is near a drinking water supply or a priority sensitive environment listed in an ACP, or has a history of frequent discharges to water or poor maintenance, etc.) may not receive immediate action by the RA or may be summarily denied. The purpose of the requirement to provide some basic information based on knowledge of EPA's criteria is to help screen out frivolous, unfounded petitions. The RA will use his or her discretion in following up on petitions that do not include a reasonable basis to believe a covered facility could cause substantial harm to the environment from a worst case discharge into or on navigable waters or a conveyance to navigable waters.

To commenters concerned that communities at risk of a CWA hazardous substance discharge would be dependent on petitions in order to protect themselves, EPA maintains that the applicability criteria in § 118.3 appropriately target the bulk of covered facilities that could cause substantial harm to the environment from a worst case discharge into or on navigable waters or a conveyance to navigable waters. Rather, for the subset of covered facilities that may not be captured using that mechanism, the public may submit a petition asking EPA to pursue the matter. The RA then follows the processes in §§ 118.3 and 118.5 to

determine whether a covered facility could cause substantial harm to the environment.

One commenter requested that EPA authorize State Emergency Response Commissions (SERCs) to make covered facility designations—due to their greater local capacity to address environmental justice, responder and public safety—unless the RA disagrees. EPA disagrees that SERCs should be authorized to make covered facility designations, as this is EPA's authority. The SERC may use the petition process to work with the RA in determining whether a covered facility could cause substantial harm to the environment through a worst case discharge into or on navigable waters or a conveyance to navigable waters.

Finally, EPA disagrees that the petitions process is unprecedented and expansive; the petitions process is similar to one that has been available in the Oil Pollution Prevention FRP regulation for close to 30 years and is intended to provide stakeholders and the public with an avenue to participate in the FRP determination process with EPA through a formal process.

7. Exceptions and Exemptions

EPA proposed and is retaining in § 118.8 certain exceptions and exemptions to this regulation, but with some adjustments and clarifications. Several commenters expressed concern about areas where they thought the rule overlapped with other regulations or programs. Below is a brief summary of the regulations commenters most commonly cited as overlapping:

—The RMP regulation under the CAA's authority is for air releases; for that reason alone, it is insufficient to rely upon to determine whether a covered facility could cause substantial harm to the environment by discharging into or on navigable waters (40 CFR part 68).

—The Oil Pollution Prevention Program FRP regulation is comprehensive for oils but does not regulate CWA hazardous substances (40 CFR 112.20 and 112.21, Appendices C–F). Similarly, the Oil Pollution Prevention Spill Prevention, Control, and Countermeasure (SPCC) program regulates oils, specifically the prevention of oil spills (40 CFR part 112).

—Occupational Safety and Health Administration's (OSHA) Process Safety Management (PSM) standard sets requirements for preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals in order to protect workers. The provisions of the PSM standard were written to assure safe and healthful working conditions for employees, not to protect the environment from discharges of CWA hazardous substances. (29 CFR 1910.119).

—The CWA NPDES Permit Program, authorized by the CWA, controls water pollution by regulating point sources that discharge pollutants into waters of the United States. An NPDES permit establishes limits on what can be discharged, monitoring and reporting requirements, and other provisions to protect water quality. In essence, the permit translates general requirements of the CWA into specific provisions tailored to the operations of the facility discharging pollutants. A NPDES general permit may be written to establish requirements that apply to eligible facilities with similar operations and types of discharges that obtain authorization to discharge under the general permit. It does not require response planning and permitted discharges are not regulated under this final rule (40 CFR part 122).

—Bureau of Alcohol, Tobacco, Firearms and Explosives ammonium nitrate-fuel oil (ANFO) requirements apply to ANFO, which is not a CWA hazardous substance (27 CFR part 555).

—USDOT regulations for product and waste shipping apply to items in transportation, while this proposal applies explicitly to onshore non-transportation-related facilities (49 CFR parts 171–185).

—DHS regulations do not require planning for worst case discharges of CWA hazardous substance into or on the navigable waters or a conveyance to navigable waters; rather, they identify and regulate high-risk facilities to ensure security measures are in place to reduce the risk that certain dangerous chemicals are weaponized by terrorists (6 CFR part 27).

—The Emergency Planning and Community Right-to-Know Act (EPCRA) Reporting Rule is a reporting rule and does not require worst case discharge planning (40 CFR part 370).

EPA refers commenters to the TBD, available in the docket, for more information on how the program elements in existing Federal programs do or do not align with the requirements in CWA Sec. 311(j)(5).

After examining the RCRA regulations and commenter concerns, EPA is adding an exemption at § 118.8(b)(2)(viii) for the storage and accumulation of hazardous waste subject to the Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities (TSDF), 40 CFR part 264 and 40 CFR part 265 and Standards Applicable to Generators of Hazardous Waste, 40 CFR part 262, subpart M. For covered facilities subject to the TSDF requirements under 40 CFR parts 264 and 265, these regulations comprehensively address the program elements required under CWA section 311(j)(5)(D). For hazardous waste generators covered under 40 CFR part 262, EPA is exempting those generators subject to subpart M (*i.e.,* large quantity generators) for the same reason; the contingency plan and emergency procedures requirements therein comprehensively address the program elements required under CWA section 311(j)(5)(D). While small quantity generators have preparedness and prevention requirements, these do not cover all required program elements under CWA section 311(j)(5)(D), and very small quantity generators are not subject to prevention and preparedness requirements nor required to develop a contingency plan and emergency procedures. Since hazardous waste at these generators may contain CWA hazardous substances and are not subject to all RCRA hazardous waste requirements, EPA has decided that hazardous waste generators not subject to RCRA part 262, subpart M requirements must follow the applicability criteria at § 118.3 to determine if they could cause substantial harm to the environment through a worst case discharge into or on navigable waters or a conveyance to navigable waters. Solid, non-hazardous waste is also subject to this final rule.

Additionally, EPA excepts tanks already regulated under the underground storage tank (UST) program at 40 CFR part 280 at 40 CFR 118.8(a)(4). EPA is not regulating substances present as oil and that may be part of an oil mixture, such as gasoline, at covered facilities in this action since those are regulated under 40 CFR 112.20.

In terms of adjustments and clarifications, the Agency clarifies that permitted discharges are not included in the § 118.3 applicability determinations, nor the § 118.11 FRP requirements. Also, EPA is adding an exemption under § 118.8(b)(2)(v) for wastewater whereby a POTW does not need include CWA hazardous substances present in wastewater entering their collection system prior to treatment under a NPDES permit in their threshold quantity determinations. The Agency, however, notes the pretreatment program oversight requirements in 40

CFR 403.8(f) for any industrial users that may be subject to this rule, and recommends control authorities evaluate whether program elements such as slug control plans or local limits expressed as best management practices should be issued or revised in coordination with the requirements of this rule.

Additionally, EPA clarifies here that the exemption under § 118.8(b)(2)(iv) for use of process water or cooling water is specific to amounts of a CWA hazardous substance present in water drawn into a covered facility from the environment or municipal sources. For example, chlorine present in water taken from municipal sources does not have to be considered for threshold determination. This is consistent with the approach taken by other chemical regulations, including Toxics Release Inventory (TRI) and RMP, and DHS's Chemical Facility Anti-Terrorism Standards (CFATS) program and reflects the low level of risk of such waters.

Finally, this regulation applies to only the non-transportation-related portion of MTR facilities that are subject to both EPA and USCG jurisdiction, as per § 118.8. As such, the non-transportation-related portion of the facility is generally defined as the valve manifold adjacent to the tank nearest the connection to the transportation-related portion of the facility (*i.e.,* the structure used or intended to be used to transfer CWA hazardous substances to or from a vessel or pipeline). The interface may be defined differently at a specific facility if agreed to by the RA and the appropriate Federal official.

8. Mixtures

In § 118.9, EPA proposed and is retaining in this final action a mixture provision for determining the CWA hazardous substance maximum quantity onsite at the covered facility of CWA hazardous substance(s), under § 118.3(a) and mixture worst case discharge quantities under § 118.10. This provision is based on CERCLA Notification Requirements, found in CERCLA section 103(a) (40 CFR 302.6). EPA agrees with a commenter that noted the chosen approach mirrors existing regulations on how to treat mixtures of CWA hazardous substances under the CWA and CERCLA. Regulated facilities are familiar with the mixture rule and how to apply it.

EPA disagrees with commenters who argued that requiring the use of the lowest RQ when the exact mixture composition is unknown is overly conservative, unrealistic, and does not reflect the actual risk of harm. If there are known and unknown substance constituent quantities, the covered facility owner or operator must only apply the lowest RQ to the unknown portion of the mixture, not the entire quantity. This approach is properly conservative and reflective of risk. If a covered facility owner or operator can provide evidence that the mixture composition does not meet the lowest RQ, they may use the appeals provision in § 118.6 to adjust their maximum quantity onsite or worst case discharge scenario quantity, or for reconsideration of their status.

A few examples illustrate how the mixture rule is applied when evaluating whether the quantity of CWA hazardous substances onsite is greater than or equal to their respective RQs. The first example provides a case where a covered facility has a mixture where all components are known. The covered facility has 5,000 pounds of a cleaning solution containing 45–55% water, 1–10% chromic acid, 1–10% sodium sulfate, and 25–35% sulfuric acid onsite. Chromic acid (CAS 7738–94–5) and sulfuric acid (CAS 7664–93–9) are CWA hazardous substances with RQs of 10 and 1,000 pounds, respectively. The owner or operator assumes the highest percentage of each CWA hazardous substance in the range, performing mixture calculations based on 10% chromic acid and 35% sulfuric acid. Based on the total quantity of the cleaning solution at the covered facility, there are 500 pounds of chromic acid and 1,750 pounds of sulfuric acid onsite. The threshold quantity for chromic acid is 10,000 pounds, while the threshold quantity for sulfuric acid is 100,000 pounds. The quantities of chromic acid and sulfuric acid onsite are below the threshold quantity.

A second example demonstrates threshold calculations when the composition of a mixture is not known. A large manufacturing covered facility produces chromated copper arsenate as a wood preservative for specialized timber applications. The covered facility regularly generates production waste, which is stored in a container. The container has 1,000 pounds of a waste of unknown composition, but which has been determined to be non-hazardous under RCRA and contains water, copper oxide, arsenic pentoxide, and chromic acid. Arsenic pentoxide (CAS 1303–28–2) and chromic acid (CAS 7738–94–5) are CWA hazardous substances with RQs of 1 and 10 pounds, respectively. The covered facility has 50 pounds of arsenic pentoxide and 75 pounds of chromic acid onsite as reactants. Because the composition of the waste is unknown, the owner or operator must assume that the entire mixture is composed of the lowest RQ substance, in this case arsenic pentoxide. Based on the total mass of the waste, the owner or operator calculates that they have 1,000 pounds of arsenic pentoxide from the waste mixture, and 50 pounds of arsenic pentoxide as a reactant (but which is not a commercial chemical product), with a total mass of 1,050 pounds of arsenic pentoxide. The threshold quantity for arsenic pentoxide is 1,000 pounds. The quantity of arsenic pentoxide onsite is above the threshold quantity.

A final example demonstrates a case when part of a waste mixture containing CWA hazardous substances is known and part is unknown. A small, covered facility uses hydrochloric acid and nitric acid as part of its manufacturing process. The spent acid is collected in a large vessel containing 100,000 pounds of a mixture with a pH of 3 composed of 25% water by weight and an unknown percentage of hydrochloric acid, nitric acid, and several other unknown chemical substances. Hydrochloric acid (CAS 7647–01–0) and nitric acid (CAS 7697–37–2) are CWA hazardous substances with RQs of 5,000 and 1,000, respectively. The covered facility has 1,000 pounds of hydrochloric acid and 5,000 pounds of nitric acid onsite. Because 25% of the waste mixture is of known composition, the owner or operator only needs to assume the remaining 75% of the mixture is the CWA hazardous substance with the lowest RQ. Because nitric acid has the lowest RQ, the owner operator calculates that they have 75,000 pounds of nitric acid in the waste mixture, with 80,000 total pounds of nitric acid onsite. The threshold quantity for nitric acid is 1,000,000 pounds. The quantity of nitric acid onsite is below the threshold quantity.

Note that CWA hazardous substance maximum quantities onsite are calculated by CWA hazardous substance. They should not be aggregated, even if they have the same RQ.

9. Worst Case Discharge Calculations

As discussed earlier, EPA is adjusting the worst case discharge calculations in § 118.10. The CWA, as amended by the OPA, defines the worst case discharge for a facility as ''the largest foreseeable discharge in adverse weather conditions.'' As detailed above, adverse weather conditions include those due to climate change, which may consist of challenging climatic conditions such as those that would maximize the peak concentration of the discharged substance in the receiving waterbody. The OPA Conference Report goes on to

state that the largest foreseeable spill from a given type of facility is intended to describe a case that is worse than either the largest spill to date or the maximum most probable spill for that type of facility (see H.R. Rep. No. 101–653, l0lst Cong., 2d Sess. 1990 at pp. 149–150.), which is unlikely to be the entire capacity or quantity stored at a facility in a single event.

Again, EPA has adjusted its approach to worst case discharge scenario quantity to use the maximum quantity of a single container for substances stored in separate containers or the maximum quantity of a group of interconnected containers, rather than capacity. Facility circumstances and methods of storage vary widely, and owners or operators should know their inventories and largest containers. Additionally, this simplifies procedures for facilities accounting for mixtures. EPA has further adjusted its approach to require worst case discharge scenarios for all CWA hazardous substances onsite above the threshold quantity once a covered facility is subject to this regulation. This will satisfy the statutory requirement to plan for CWA hazardous substance worst case discharges and address the concerns of commenters around which substance to use in worst case discharge scenarios. The Agency has also revised language to clarify that covered facility owners or operators must compare the distance to the endpoints provided in Appendix B against their calculated CWA hazardous substance planning distance to determine if the covered facility could cause substantial harm to FWSE or public receptors from a worst case discharge into or on navigable waters or a conveyance to navigable waters and also in their hazard evaluation once a covered facility is subject to the regulation. EPA has further adjusted the properties of the CWA hazardous substance to be evaluated to reflect those properties as they relate to a discharge to navigable waters. Additionally, an owner or operator must provide evidence in their Appendix A: Substantial Harm Certification Form that containers with common piping or piping systems are not operated as one unit. Finally, EPA has added pH and alkalinity under the conditions of the receiving water to better characterize a worst case discharge in § 118.10(b)(ii)(E).

While a few commenters were concerned about piping and measuring the contents of piping systems, EPA maintains that, in general, if a covered facility owner or operator has two or more containers that contain a CWA hazardous substance and are connected through piping or hoses to transfer the CWA hazardous substance, the owner or operator must consider the total quantity of the CWA hazardous substance in all the connected containers and piping when determining the maximum worst case discharge scenario quantity. If the containers are connected for transfer of the CWA hazardous substance using hoses that are sometimes disconnected, the owner or operator still must consider the contents of the containers as one process, because if one container were to rupture while a hose was attached or a hose were to break during the transfer, both containers could be affected. Again, the statute directs EPA to address the worst case discharge scenarios—even in situations where the conditions are not static, *i.e.,* sometimes containers are connected but not always. Therefore, the owner or operator must count the quantities in both containers and in any connecting piping or hoses. Similarly, the presence of automatic shutoff valves or other devices that can limit flow do not change the analysis because these are assumed to fail for the purpose of determining the worst case discharge scenario quantity. This is consistent with and required under other regulations, such as onshore oil pipelines regulated by the USDOT Pipeline and Hazardous Materials Safety Administration.

EPA agrees with commenters who noted that there are chemicals in the CWA hazardous substance list at 40 CFR 116.4 that may be in either a solid or gaseous form upon release and may be physically unable to reach navigable waters or a conveyance to navigable waters. Specifically, facility circumstances and methods of storage vary widely, so the covered facility owner or operator must use their best professional judgment based on the physicochemical properties and characteristics of the substance at issue and best available information and practice in determining if a worst case discharge or a CWA hazardous substance that releases as a gas or solid could, in adverse weather conditions, reach navigable waters or a conveyance to navigable waters, cause injury to a public receptor or FWSE, or adversely impact a PWS. This may mean that for a substance released as a gas in adverse weather conditions and without consideration of passive mitigation, secondary containment, or administrative controls, the distance to endpoints cannot be calculated. Solid CWA hazardous substances may be miscible in water and, as such, a planning distance may be calculated. Thus, if a solid stored as a powder or in pellets has the ability to release in a flood scenario and reach navigable waters or a conveyance to navigable waters, the covered facility owner or operator must make a substantial harm determination, and if determined to be able to cause substantial harm to the environment from a worst case discharge of a CWA hazardous substance into or on navigable waters or a conveyance to navigable waters, submit an FRP to EPA. However, EPA stresses that adverse weather conditions, including extreme events due to climate change, must be considered. As such, if a solid stored as a powder or in pellets could release in a high-intensity rainfall event or flood scenario and navigable waters or a conveyance to navigable waters, the covered facility must make a substantial harm determination. Similarly, should a worst case discharge consist of a CWA hazardous substance releasing as a gas that could mix with rainwater and then reach navigable waters or a conveyance to navigable waters, the covered facility owner or operator would need to examine that outcome in their worst case discharge scenario(s). Relatedly, EPA is not choosing to set a temperature range or define the form of the substance as it releases; instead, the covered facility owner or operator should make a similar determination as described above. The Agency recognizes commenter concern over covered facilities with a variable inventory of CWA hazardous substances. Owners or operators of these covered facilities will need to plan for the maximum quantity in a single container or interconnected containers of a CWA hazardous substance onsite at any one time and forecast when such occasions may occur. Due to the potentially catastrophic effects of a worst case discharge, the Agency does not see these requirements as overly burdensome. EPA notes that plans can and should be updated if, for example, there is an unexpected increase in demand such that the worst case discharge scenario quantity is outside of anticipated fluctuations and necessitates different or more response resources, requiring an amendment to the FRP as in § 118.4(b).

While some commenters asked for clarification on the timing of a discharge, EPA maintains that a worst case discharge may occur instantaneously or over time, and a covered facility owner or operator is best situated to determine the appropriate timing scenario based onsite-specific considerations and the

physicochemical properties of the CWA hazardous substances in question. The timing used for the worst case discharge scenario should reflect reasonable conditions that have the greatest potential to cause substantial harm. One commenter suggested that calculations should be based on the dollar amount of potential damage. EPA is not following this approach as such calculations would be very difficult to assess and could fluctuate over time dependent on inflation and the costs of equipment, materials, labor, etc.

The Agency is aware that CWA hazardous substance planning distance modeling is a critical component of successful implementation of this regulation and is engaged with its research arm to identify additional data and resources to aid the regulated community in compliance. That said, EPA disagrees with commenter concerns that having covered facilities exercise their professional judgment and applying best modeling practices creates opportunities for inconsistency, as it provides flexibility and allows for those most familiar with the substance, facility, and site conditions to examine the event of a worst case discharge and its potential effects.

For commenters concerned with public availability of the models used, § 118.10 as proposed and finalized in this action requires covered facility owners or operators to provide EPA access to models, submit documentation substantiating the methodology, and describe the features to local emergency planners. EPA will work with other Federal partners to determine the feasibility and safety of providing such information to the public.

For the commenter who suggested requiring use of the Chezy Manning equation as in the Oil Pollution Prevention FRP regulation (40 CFR part 112, Appendix C), this approach may be applicable to some oil-like CWA hazardous substances. However, it is not generally applicable to the myriad characteristics and effects of the 296 hazardous substances listed in 40 CFR 116.4. So, while they may be useful tools, dictating or limiting the analysis to those methods alone would not be adequate for calculating planning distances for all CWA hazardous substances, though they may be used for oil-like CWA hazardous substances as appropriate.

10. Facility Response Plan Requirements

EPA proposed and is finalizing with adjustments the FRP requirements in § 118.11. One major objective of the OPA 90 amendments to section 311(j)(5) of the CWA was to shift the burden of response from public to private resources. While a worst case discharge of hazardous substances will likely require the use of both public and private resources, section 311(j)(5)(D)(iii) of the CWA states specifically that facility owners or operators must identify and ensure by contract or other means the availability of private personnel and equipment necessary to respond to the maximum extent practicable to a worst case discharge. The Agency clarifies here that covered facility owner or operators who meet the screening and one or more of the substantial harm criteria must prepare and submit an FRP to EPA that plans for all CWA hazardous substances onsite above the threshold quantity but not CWA hazardous substances onsite below the threshold quantity.

The requirements in § 118.11 are designed to address concerns specific to CWA hazardous substances; as such they do not mirror exactly the requirements under the Oil Pollution Prevention FRP regulation. A written plan that complies with other Federal contingency plan regulations or is consistent with the approach in the National Response Team's ICP Guidance (''One Plan'') and that includes the elements required will satisfy the requirements of this final rule. Facilities may augment an existing response plan with requirements that are specific to this action.

The Agency is aware that planning for any number of the 296 possible CWA hazardous substances with disparate characteristics and impacts may be involved. That is one reason EPA has implemented an initial screen with relatively bright line criteria to that will identify covered facilities that do not need to engage in further analysis.

In this final action, once a covered facility determines it meets one of the substantial harm criteria, the owner or operator must plan for all CWA hazardous substance onsite above the threshold quantity. EPA has adjusted its approach from the proposed rule, where one CWA hazardous substance worst case discharge scenario provided the basis for the FRP. This change is consistent with EPA's statutory authority under this action to require plans for covered facilities that, because of their location, could cause substantial harm to the environment from a worst case discharge into or on the navigable waters. It also recognizes that response and/or recovery actions may vary widely depending on the physicochemical properties of the substance, so one CWA hazardous substance at facilities with multiple CWA hazardous substances that meet or exceed the threshold quantity cannot adequately inform that facility's FRP.

i. Consistency With National Contingency Plan and Area Contingency Plans

Despite supporting the overall proposed rule, one commenter requested EPA add a provision to § 118.11(a)(1) to provide a way to evaluate facility owner or operator compliance with the requirement to ensure consistency with the NCP and ACPs. This seems like a commonsense suggestion that should not impose any additional burden on facilities and will allow the Agency and other reviewers to confirm compliance and cross check relevant plans. Accordingly, EPA has added § 118.11(a)(1)(ii), requiring a signed affirmation of review of relevant plans and § 118.11(a)(1)(iii), requiring a list of area and sub-area plans reviewed.

Additionally, EPA has augmented this provision to require consistency with Regional Contingency Plans (RCPs) as per 40 CFR 300.210. This is appropriate and consistent with the requirements of the CWA since RCPs form a fundamental component of the NCP.

ii. Qualified Individual

Several commenters stated that the requirements for a QI are extremely difficult to meet and impractical, while placing all these responsibilities on one individual is inconsistent with most facilities' operational structures. On the one hand, EPA understands that this is a new program and these requirements may be foreign compared to how owners or operators currently do business. On the other hand, such requirements have been in operation for close to 30 years in the Oil Pollution Prevention FRP regulation, so there is precedent and a successful model for this approach. Accordingly, EPA is keeping in place the requirements for a QI. However, in response to the concerns raised in the comments, EPA is clarifying that a documented management system that can perform the stated functions may take the place of a single individual. For example, as in the Oil Pollution Prevention FRP regulation, duties may be spread across corporate departments and consist of a regional QI structure, corporate call center, and corporate media relations department.

As stated in the OPA conference report (H.R. Rep. No. 101–653, 101st Cong., 2d Sess. 1990), a main objective of this statutory mandate is to shift the burden of response from public to private resources. A sufficiently trained QI can be a valuable member of the incident response team who has

intimate knowledge of the facility and its operations, allowing the QI to make better and informed decisions for the facility if the plan needs to be put into action as well as how the facility response fits into the larger community response. Assuming public responders will take on this role is inappropriate to this action.

In § 118.11(a)(2)(xii), EPA is requiring QIs to acquire and maintain incident commander training requirements consistent with 29 CFR 1910.120(q)(6)(v). Commenters asserted that this is inappropriate because OSHA's Hazardous Waste Operations and Emergency Response (HAZWOPER) standard at 29 CFR 1910.120 is for uncontrolled releases, which could be mitigated by passive mitigation and thus be controlled. EPA maintains that a worst case discharge into or on navigable waters or a conveyance to navigable waters that causes substantial harm to the environment is, by definition, an uncontrolled release and is not allowing for consideration of passive mitigation in this final action. EPA maintains that proper facility personnel training is critical to an effective response program.

iii. Emergency Response Information

EPA has endeavored to provide a framework in § 118.11(b) that is consistent with the Oil Pollution Prevention FRP regulation in 40 CFR 112.20 while maintaining the flexibility needed to address the specific planning needs for 296 disparate CWA hazardous substances.

Facility Information

EPA agrees with a commenter suggestion to add EPA identification numbers to make it easier for EPA, response officials, and stakeholders to cross-reference other relevant information about the facility related to discharge response and preparedness. As such, the Agency has added ''EPA identification numbers'' as a data element to report so facility owner or operators can report various EPA ID numbers they may use, such as TRI IDs, Facility Registry Service (FRS) numbers, etc. This will aid in cross referencing submissions across programs.

Additionally, to provide consistency with the Oil Pollution Prevention FRP regulation, EPA is adding that a facility owner or operator must indicate whether their facility is located in or drains into a wellhead protection area as defined by the SDWA. This information will aid responders in determining whether further assessment of impacts to those areas is warranted.

Owner or Operator Information

The Agency maintains that information on the facility owner or operator is sufficient; both are not needed. EPA is not requiring notification of related facilities nearby and disagrees with a commenter who suggested that listing all facilities within a three-mile radius that are under common ownership would enhance response planning efforts. Related information should be included in the hazard evaluation, where a facility owner or operator would identify nearby businesses that could be affected by a worst case discharge.

Hazard Evaluation

The Agency is aware of the complexity and cost of modelling endpoints for all CWA hazardous substances above the threshold, examining communities with environmental justice concerns, and considering climate change impacts in hazard evaluations. EPA intends to provide tools and compliance assistance to help the regulated community comply with these requirements and maintains that their inclusion is critical to protect the environment in the event of a worst case discharge. The hazard evaluation will additionally serve to inform equipment selection (*i.e.,* based on physicochemical characteristics of the CWA hazardous substance as floater, sinker, or soluble in water) and response actions to be taken, since those will all depend on what risks are identified and characterized, the necessary control methods, and communications required. Additionally, EPA has added a requirement that, when identifying risks, facility owners or operators must assess the age of CWA hazardous substance containers, since older containers may be more susceptible to failure. Facility owners or operators must also identify taste or odor thresholds in water in their assessment of the ability to adversely impact a PWS in order to more fully inform the relevant PWS of the risks.

For the commenters concerned about assessing cascading failures, EPA does not have access to facility-specific risk information and is not taking on that responsibility for this evaluation, nor is it requiring facilities to assess these impacts across facilities. However, the risks associated with facility density is a factor the RA may consider in § 118.5(b)(10) when determining if a facility could cause substantial harm to the environment through a worst case discharge into or on navigable waters or a conveyance to navigable waters. That said, it is incumbent upon the facility owner or operator to identify nearby schools, businesses, places of worship, or other areas that could be impacted by a worst case discharge.

In addition, the hazard evaluation must examine the effects of CWA hazardous substance worst case discharges on communities with environmental justice concerns as well as the effects of climate change, including those that result in low flow conditions in receiving water bodies, on the likelihood, duration, and impacts of a CWA hazardous substance worst case discharge into or on navigable waters or a conveyance to navigable waters. EPA is not specifying specific climatological data or scenarios in regulation in order to be flexible and in recognition that climate change impacts are occurring in unexpected ways. Indeed, climate change considerations may include the increased frequency and intensity of extreme weather events, temperature fluctuations, rising seas, storm surges, inland and coastal flooding, drought, wildfires, and permafrost melt in northern areas. Instead, the Agency will continue to provide compliance assistance for assessing both climate change impacts and effects on communities with environmental concerns.

Reportable Discharge History

EPA maintains that reportable discharge history is not only relevant but also an appropriate substantial harm criterion; this information is critical to scenario development, including lessons learned from past CWA hazardous substance discharges and response efforts. In terms of a timeline for reporting, EPA is following the lead of the Oil Pollution Prevention FRP regulation and requiring this information to be retained for the life of the facility. EPA notes that permitted discharges under NPDES and reportable discharges under 40 CFR part 112 are covered under those regulations. EPA is not requiring information on non-CWA hazardous substance discharges, since it is unclear at best how relevant they are or would be to worst case discharges of CWA hazardous substances. Similarly, EPA is only including reportable discharges that reach navigable waters, since other discharges are outside the scope of this action.

Another commenter suggested that that any discharge above a RQ is already required to be reported under the CWA or the ancillary State program, so it should be sufficient for the CWA hazardous substance FRP to simply reference the notification submitted to EPA or the State. EPA disagrees that this

is an adequate substitute for purposes of using the information as a planning tool.

Response Personnel and Equipment

Pursuant to § 118.11(b)(5), facility owners or operators must provide the identity and a description of response personnel and equipment and response action implementation necessary to respond to a discharge of a CWA hazardous substance. The Agency clarifies that a management system that clearly outlines the spill response roles will be sufficient for this requirement, as long as it is properly documented.

Contracts

EPA has revised the contracts requirement to explicitly require response resources with firefighting capability. Adding this clarification will aid facility owners or operators in their preparations for a worst case discharge due to fire or explosion, as per the statutory requirement. This is also consistent with the Oil Pollution Prevention FRP regulation at 40 CFR part 112, Appendix E, section 7.4. If a facility does not have adequate resources onsite and it is unable to rely on locally available resources with firefighting capabilities, the facility owner or operator must identify such resources and ensure they are available by contract or other approved means as per § 118.2. The plan must also identify an individual, who could be the QI, at the facility to work with the local fire department during a response and verify that sufficient well-trained resources are available within a reasonable response time to respond to a worst case discharge.

EPA recognizes that, in many cases, contracting resources will need to be identified to fill the role of SROs. Most large Oil Spill Removal Organizations already have the capability to respond to hazardous material incidents, particularly if they have been contracted by truck and rail carriers. EPA expects that the potential increase in demand for SROs caused by the rule will result in greater competition and increased market entry by new contractors. Additionally, in § 118.4, EPA is providing a 36-month implementation period before facility owner or operators must submit plans. Finally, EPA will work with USCG to identify SROs that can fulfill this role.

Notification Lists

EPA received a variety of suggestions of possible interested parties who could potentially be contacted in the event of a discharge. EPA is not expanding the scope of the notification list, since Federal, Tribal, State, and local responders, as well as the non-specific listing of potential receptors or interested parties is inclusive of all of these suggestions. The Agency did, however, remove the requirement to notify the Federal On-Scene Coordinator (OSC) and/or Regional Response Center, since this notification will be handled by the NRC. Federal, State, and local responders will be best positioned to determine whether additional types of notifications are necessary and will be most knowledgeable about the language needs of their local community. Additionally, local responders will be aware of special populations, *e.g.,* hospitals, long-term care homes, assisted living facilities, etc., that may have specific concerned and needs in an emergency situation.

EPA can expect facilities to ensure that a community notification system is available because FEMA has established the Integrated Public Alert & Warning System (IPAWS) for community notification. This system provides authenticated emergency and life-saving information to the public through mobile phones using wireless emergency alerts. It also provides alerts to radio and television via the Emergency Alert System and on NOAA's Weather Radio. The Emergency Alert System devices found at radio, TV and cable stations can support multiple languages and wireless Emergency Alerts can support both English and Spanish. EPA has judged that the presence of State and/or local IPAWS alerting authorities—with the designated authority to alert and warn the public when there is an impending natural or human-made disaster, threat, or dangerous or missing person—in all 50 States provides the necessary infrastructure for facilities to ensure that a community notification system is operational in the event of a worst case discharge of a CWA hazardous substance with the potential to impact the public. The most applicable alerts through this system would be the imminent threat and public safety alerts. Imminent threat alerts include natural or human-made disasters, extreme weather, active shooters, and other threatening emergencies that are current or emerging. Public safety alerts contain information about a threat that may not be imminent, or about an imminent threat that has occurred.

EPA disagrees with commenters who argued that ''preferred communication'' should be removed, since telephone call is not the only method of notification. The reason telephone communication has been historically preferred is because the ''sender'' knows that they have gotten through, or just as importantly, that they have *not* gotten through and need to continue trying. That said, as long as receipt of the communication is confirmed, notification can take any number of electronic forms, including text or email.

Discharge Information

EPA clarifies that there is an expectation that a facility will provide response officials with material updates to discharge information as the facility learns more about the scope and nature of the discharge as it becomes available to aid response efforts.

Personnel Roles and Responsibilities

In response to the concerns raised in the comments, the Agency is clarifying that a documented management system that can perform the stated functions may take the place of a specific individual.

Response Equipment Information

In order to avoid unnecessary confusion or redundancy, EPA notes that CWA hazardous substance FRPs may reference lists in other plans as long as they meet the requirements of § 118.11. For example, oil FRP plan holders could reference their existing response equipment and update the narrative to meet the CWA hazardous substance FRP requirements in an ICP.

EPA disagrees with a commenter who asserted that monitoring and sampling equipment should be specified as ''can be made available.'' Since time will always be of the essence in responding to a worst case discharge, these items are an important component of CWA hazardous substance response and should be actually available rather than possibly available. Additionally, plan holders should refer to their ACP, which contains equipment and response resource requirements in some areas. Finally, determining the type, quantity, etc. of response resources may vary widely given the range of facilities and chemicals at issue, which is one reason EPA has decided that facility owners and operators should have the latitude to make these types of determinations.

Evacuation Plans

One commenter suggested that the final rule explicitly require FRPs to identify the community evacuation plan(s) with which they coordinated and how that coordination with the surrounding community was conducted. EPA agrees with the commenter that this is an important aspect of response planning for a worst case discharge and has adjusted its approach to require FRPs to identify and list the community

evacuation plans consulted in § 118.11(b)(11).

The Agency recognizes that evacuation routes may vary, which is why § 118.11(b)(11) includes ''limitations on evacuation routes'' as a plan element. A facility may include more than one diagram to reflect different scenarios as necessary. Facility owner or operators may include evacuation plans prepared in accordance with 29 CFR 1910.38, but they must reflect the requirements of this section.

To the commenter who suggested cross referencing to evacuation plans prepared under other statutes, while EPA understands there is some redundancy in submitting a plan and in some cases cross referencing is appropriate, the Agency maintains submitting the evacuation plan here allows OSCs to have the plans readily available in the event of a worst case discharge and to inform coordinated response. However, a facility owner or operator may combine their plans in a single ICP to reduce the administrative burden.

Discharge Detection Systems

The Agency maintains that in the event of a worst case discharge, discharge detection systems are critical to inform response timelines. If a facility demonstrably has the ability to cause substantial harm to the environment, it must also have the ability to detect when such a discharge is occurring. EPA notes, however, that the facility owner or operator may include personnel procedures (visual examination, etc.) designed to detect discharges. EPA recognizes that this may increase costs but maintains that the effects of worst case discharges can be catastrophic and costly (see chapter 3 of RIA in the docket).

EPA disagrees with a commenter who argued that discharge detection systems for the 296 CWA hazardous substances should follow the same requirements as for oils. The context of this regulation is for worst case discharges of CWA hazardous substances, as such, discharge detection systems should be sufficient for those events. Additionally, the Agency notes that these systems should not be limited to response actions, as they may alert a facility owner operator of a discharge in the first place.

Response Actions

EPA has adjusted the language in this section to clarify that air monitoring and water sample collection, including analytical methods and laboratory support, must be described in this section. Monitoring and sampling are critical components of CWA hazardous substance release responses, since many CWA hazardous substances cannot be recovered, in contrast to oil discharges, where recovery is more likely feasible. Therefore, it is imperative that they be planned for accordingly. Additionally, and in the same vein, EPA has added a requirement to identify types of environmental monitoring to be collected, including method collection techniques, parameter of interest measurement, a description of how the data will be used in a response, and personal protection and safety considerations.

A facility owner or operator; PWS; or responding Federal, State, or local agency can determine whether it is necessary to obtain a third-party to assess and monitor the community health effects following a hazardous discharge to a PWS and make this information publicly available. This will be part of the response actions to a discharge.

One commenter recommended that EPA require facilities to develop a safety plan prior to conducting sampling that considers variable factors like weather conditions, chemical hazards, and situational awareness. EPA notes provisions for worker health and safety are found at § 300.150 of the NCP. The Agency emphasizes that the NCP requires compliance with applicable worker health and safety regulations, including OSHA, under § 300.150(b) during a response action taken by the responsible party, the responsible party must assure that an occupational safety and health program consistent with 29 CFR 1910.120 is made available for protection of workers at the response site.

Finally, EPA has added requirements for response actions to be taken within one- and two-hours of discharge detection. Within one hour of discharge detection, actions include making notifications, mobilizing facility personnel, identifying the extent of the incident, coordinating with the SRO, consulting the hazard evaluation to determine potential effects of the discharge, ensuring containment and neutralization systems are working, evacuation assessment, and coordination with PWSs and local responders. Within two hours, resources and monitoring must be deployed. Explicitly stating EPA's expectations within these critical response time frames will ensure resources are ready and available, and guide exercise and training programs as well as GIUEs, further enabling readiness.

Disposal Plans

EPA has adjusted its approach to include disposal plans for firefighting foam and runoff. As seen in responses such as the Menominee Michigan Warehouse Fire, where several million gallons of fire suppression water have been collected to minimize runoff of fire-related contaminants into to the Menominee and Marinette water treatment plant and adjacent Menominee River,[9] these types of plans are important to ensure chemicals are properly disposed of and to minimize runoff of fire-related contaminants.

Containment Measures

One commenter recommended that EPA define the term ''adequate containment'' to prevent industry confusion and differences in interpretations by the regions. Adequate containment will vary based on the worst case discharge scenario and associated response actions and consist of sufficient resources to contain the items described in § 118.11(b)(15). As per the statutory authority of this action under CWA sec. 311(j)(5), this is a response planning regulation. Inherently safer technologies and designs related to CWA hazardous substance storage are outside the scope of this rule. Nonetheless, EPA notes that § 118.11(b)(15) includes requirements for measures to provide adequate containment and drainage of discharged CWA hazardous substances in a response scenario, as this is a response function.

Training Procedures

See section III.D.vi of this preamble for a discussion of training procedures.

Exercise Procedures

See section III.D.vi of this preamble for a discussion of training procedures.

Self-Inspection

EPA is finalizing § 118.11(b)(18) as proposed.

iv. Emergency Response Action Plan

In § 118.11(c), EPA has added a provision requiring an Emergency Response Action Plan (ERAP), similar to the provision under the Oil Pollution Prevention FRP regulation at 40 CFR 112.20(h)(1). As detailed in the proposed rule, the ERAP's purpose is to provide a summary of steps for discharge source stabilization, including immediate actions by the facility incident management team, such as internal and external notifications and

[9] *https://response.epa.gov/site/site_profile.aspx?site_id=15823.*

initiation of CWA hazardous substance discharge preparedness and evacuation procedures, to be kept in the front of the CWA hazardous substance FRP or in a separate binder to accompany the full CWA hazardous substance FRP. This requirement will provide important site-specific information for facility personnel and responders. EPA has found ERAPs to be important to plan holders responding to oil spills and expects that a CWA FRP ERAP will be similarly critical for responders to a CWA hazardous substance worst case discharge into or on navigable waters or a conveyance to navigable waters.

v. Coordination Activities

As State and local emergency response officials are vital participants in community and facility response planning, EPA disagrees with the commenters who requested that EPA remove § 118.12(c) as well as the requirement to coordinate drills and exercises with local public emergency response officials and invite them to participate in § 118.13(c)(1). The Agency maintains that such coordination is critical for planning for worst case discharges since public entities are often involved in response efforts and, as such, EPA has added language to include local emergency planning and response organizations outside of SERCs, TERCs, LEPCs, and TEPCs in coordination activities. Additionally, the rule does not contain language that State and local emergency response officials should set drill and exercise schedules; rather, it states that facility owner or operators shall include consulting with the appropriate officials to establish schedules and plans.

EPA recognizes that, in some cases, it may be difficult to coordinate with LEPCs, TEPCs, or other local emergency planning and response organizations due to competing priorities or limited resources. In response, the Agency has added § 118.12(d)(3), which allows a facility owner or operator to demonstrate through documentation that he or she has made a good faith effort to coordinate on the schedule required under § 118.12(a). The Agency is retaining the requirement to maintain signed agreements as a compliance tool and to encourage in-depth, practicable coordination. Correspondence such as email may be used for purposes of documenting good faith efforts, as long as it is preserved. In terms of retention, facility owners or operators are expected to maintain coordination documentation for the life of the facility. Due to the ease of storing electronic records, the Agency does not expect this to be burdensome, and past agreements and discussions may be valuable tools in response planning, revision, and augmentation.

EPA recognizes that historically, planning and response has been a public function. However, as stated in the OPA Conference Report (H.R. Rep. No. 101–653, 101st Cong., 2d Sess.), a major purpose of this action is to shift the burden of worst case discharge planning from public resources to private resources and ensure that facility owners and operators are properly planning for worst case discharges of CWA hazardous substances into or on navigable waters or a conveyance to navigable waters. EPA agrees that facility and community plans should work in concert to plan for these events. However, this regulation does not put requirements on local emergency responders because that is beyond the scope and authority for this action. Nonetheless, EPA notes that ASTM E3241–20 Standard Guide for Coordination and Cooperation between Facilities, Local Emergency Planning Committees, and Emergency Responders is a valuable guide and resource and encourages LEPCs or TEPCs and emergency responders to familiarize themselves with the standard. The Agency is aware that many communities prepare all hazards plans and reiterates that this regulation does not require additional planning by emergency planners. Instead, facilities must reach out to these planners and coordinate FRPs. Community planners then have access to this information and any other types of information they may need to strengthen their community plans.

vi. Facility Response Training, Drills, and Exercises

EPA proposed and is finalizing with minor adjustments training requirements in § 118.13(b). EPA is retaining a reference to OSHA's 29 CFR 1910.120 training specific to hazardous substances, while also ensuring that training is conducted for facility personnel, private personnel, casual laborers, and volunteer responders. However, in response to commenter concerns and consistent with the Oil Pollution Prevention FRP program, training may be specific to job tasks and personnel roles. This additional training will ensure the full population of those who could respond to a worst case discharge are prepared. The Agency notes that OSHA's 29 CFR 1910.120 already applies to emergency response operations for releases of, or substantial threats of release of, hazardous substances without regard to the location of the hazard (29 CFR 1910.120(a)(1)(v)) and facility owners or operators should already be complying with these requirements. EPA has added language to § 118.13(b) to clarify that facility personnel are also subject to these requirements.

While some commenters suggested that the provision that requires facilities to work with and train volunteers and casual laborers who may respond to a discharge should be removed from the FRP requirements and instead a public entity such as the LEPC or TEPC should coordinate volunteer and casual laborer response activities, EPA disagrees, as this shifts the burden of properly training response personnel to the public, which is counter to the intent of OPA 90. Additionally, there may be LEPCs or TEPCs that are inactive or do not have time, personnel, resources, or capabilities to provide this type of training.

To account for modern business practices and the easy of electronic record storage, EPA has adjusted the documentation provision in § 118.13(b)(4) to allow records to be maintained under usual and customary business practices and either as an annex or included in the FRP.

Under § 118.13(c), EPA is finalizing the drills and exercises requirements with minor adjustments. In § 118.13(b)(1), a facility owner or operator must coordinate with local public emergency response officials when appropriate and invite them to participate. EPA has added language in § 118.13(c)(1) which allows a facility owner or operator to demonstrate through documentation that he or she has made a good faith effort to coordinate. Finally. EPA notes that the Preparedness for Response Exercise Program (PREP) guidelines will be updated to reflect the requirements under 40 CFR part 118, CWA Hazardous Substance FRPs.

11. Substantial Harm Certification Form

EPA has made several adjustments to Appendix A: Substantial Harm Certification Form to reduce confusion and duplicative entries as well as to aid in compliance. EPA has adjusted the initial submission date from one month to within 60 days of meeting the criteria in § 118.3(a) and § 118.3(b), for covered facilities that do not satisfy the substantial harm criteria in § 118.3(c). Because substantial harm calculations and modeling may be involved, the Agency recognizes that additional time may be necessary. Those submitting an FRP will still need to submit a Substantial Harm Certification Form, which should add minimal burden, since this information will be included in their FRP. However, facilities submitting their FRPs may submit their

Appendix A Substantial Harm Certification Form at the same time. EPA has added a requirement to list the ACP(s) consulted in question 3, as well as list the FWSEs and list and describe the public receptors potentially affected by a worst case discharge. This will allow reviewers to cross check entries against the ACP. EPA is not requiring submission of forms to local emergency response organizations, though covered facility owners or operators must make the forms available to local emergency response organizations upon request. Covered facility owner or operators must also recertify their Forms every five years.

EPA understands why covered facilities are interested in keeping the form as simple as possible and has taken efforts to that effect. However, there are countervailing reasons for including more robust information. Completing and submitting Appendix A ensures that the covered facility reviews their potential to cause substantial harm to the environment and that EPA has access to updated information in a timely manner. This approach is based on the Oil Pollution Prevention FRP regulation, in which facility personnel must complete, and maintain at the facility, a certification form which identifies substantial harm information for the facility (see 40 CFR part 112 Appendix C, Attachment C–II). The form is required of all SPCC-regulated facilities and requires signature by the certifier for the facility. The inclusion of information that demonstrates the reliability and analytical soundness of the substantial harm evaluation as well as a review of potential receptors that could be impacted as a result of a CWA hazardous substance discharge will assist EPA in making compliance determinations as well as provide sufficient information to identify those covered facilities that could reasonably be expected to cause significant and substantial harm to the environment. Again, while EPA recognizes that the form will require time and resources to complete, the agency maintains that this information is critical for protecting the environment and can help covered facility owner or operators identify risks at their facilities.

EPA disagrees that these forms will cause confusion for the public. Appendix A will be used as a public information, enforcement, and compliance tool for this regulation; thus, the relevant information on CWA hazardous substance present onsite must be readily available. EPA has revised Appendix A in the final rule to aid in clarity. For example, EPA has adjusted the language in Question 5 to clarify that the reportable discharge must have been to navigable waters. For discharges after the effective date of this rule, EPA expects that covered facility owners or operators will collect this information routinely in order to improve their business practices and minimize accidental discharges. The adverse impact reported are limited to what is listed in Appendix A. In addition, conforming changes regarding the requirement to analyze all CWA hazardous substances above the threshold level onsite have been made. Finally, EPA has adjusted the certification statement for clarity as to its expectations of the certifier.

12. Confidential Business Information (CBI)

EPA agrees with commenters concerned about security and the sensitivity of certain types of information and will work with its Federal partners such as DHS and DOJ and other appropriate agency security and cybersecurity experts to determine which parts of the FRP may not be made publicly available. Additionally, the Agency takes personal privacy seriously and will ensure the safety of individual information and data.

E. Additional Considerations

1. Climate Change

EPA appreciates the concerns raised by the commenters and understands that the unpredictability of breadth of the impacts of climate change make it challenging to assess. Because the impacts of climate change continue to expand, EPA expects to provide ongoing compliance assistance and guidance to assist covered facilities in compliance with the climate change considerations in the final rule. That said, EPA disagrees that climate change impacts are occurring on a longer-term scale than can be considered within the FRP's five-year cycle. For example, the increase in severity and frequency of severe weather, including conditions resulting in flooding or drought, is a clear impact of climate change that should be considered by a covered facility owner or operator when evaluating their worst case discharge scenarios. The agency agrees that owners or operators should use the best available climate data when evaluating climate risks because the climate is changing rapidly compared to historical conditions. As part of ongoing compliance assistance, EPA expects to make existing and evolving data sources and tools available. The Agency recognizes that these evaluations are not without costs, however, due to the known risks of increasing and more frequent severe weather and other climate change impacts, their inclusion in this action is vital to ensure protection of human health and the environment.

One commenter stated that, because climate change could impact factors like the distance to navigable waters or a conveyance to navigable waters, EPA could plan to reassess CWA worst case scenario discharge risks at a regular interval to see if the actions' requirements remain effective. The Agency notes that FRPs must be recertified every five years as per § 118.4(a)(6), which will give owners or operators the opportunity to reassess their worst case discharge scenarios. Finally, EPA appreciates the suggested data and information sources suggested by commenters and will evaluate them for purposes of ongoing compliance assistance.

2. Communities With Environmental Justice Concerns

As discussed in the Preamble to the proposed rule, there is clear evidence of co-location of hazardous substance facilities in or near communities with environmental justice concerns. Specifically, the co-location assessment confirms that industrial facilities and aboveground storage tanks are disproportionately located in these communities and worst case discharges or threats of worst case discharges of CWA hazardous substances are examples of environmental justice concerns that can affect local communities. Currently, once a facility meets the applicability criteria in § 118.3, their hazard evaluation (§ 118.11(b)(3)) must examine impacts on nearby communities that could be affected by a discharge. Although, the final rule does not require consultation with communities with environmental justice concerns, there are other avenues of participation for the public in the response planning process, including involvement in the ACP development process or participation in the LEPC or TEPC. EPCRA section 303 tasks LEPCs and TEPCs to develop community emergency response plans and to share chemical information to citizens in the community and is the current avenue for public participation in these types of plans, in consideration of communities with environmental justice concerns. Existing stewardship programs through partnerships or company initiatives may fulfill the requirements in § 118.11(b)(3) or be augmented to do so. In addition, one factor RAs may consider in determining whether to require CWA hazardous substance FRPs for covered

facilities is the potential for a worst case discharge to adversely impact communities with environmental justice concerns.

3. Facility Density

EPA recognizes the increased risk of worst case discharges in areas with a high density of CWA hazardous substance facilities that could be involved in an incident impacting multiple sites. In § 118.5(b)(10), EPA has included density of facilities in the immediate area with CWA hazardous substances onsite as a factor that an RA may consider in determining whether to require that a covered facility owner or operator to submit an FRP. EPA notes, however, that the hazard evaluation (§ 118.11(b)(3)) must already consider local businesses that could be affected by a worst case discharge. EPA also recognizes that there are many factors, including greenbelts, facility design, spacing requirements, facility size, and manufacturing processes, that complicate considerations for facility density. Accordingly, the RA must take all these site-specific circumstances into account when making a determination.

F. Consistency With the NCP

Section 311(j)(5)(D) of the CWA states that facility response plans must be consistent with the NCP and ACPs. As such, in §§ 300.185, 300.211, and 300.411, EPA is finalizing as proposed minor changes to 40 CFR part 300 to ensure uniformity. EPA did not receive any comments on these changes which include adding references to 40 CFR part 118 in §§ 300.185 and 300.211, adding § 300.411 to detail requirements for responses to CWA hazardous substance worst case discharges, and mirroring the requirements for oil worst case discharges in § 300.324, including OSC responsibilities to notify the NSFCC, requiring the FRP be initiated, implementing ACP worst case discharge plans, taking response actions, and coordinating private and public equipment for response.

IV. Statutory and Executive Orders Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a ''significant regulatory action'' as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket. The EPA prepared an economic analysis of the potential impacts associated with this action. This *Regulatory Impact Analysis, Clean Water Act Hazardous Substance Facility Response Plans,* is available in the docket for this action.

B. Paperwork Reduction Act (PRA)

The information collection activities in this final action have been submitted for approval to OMB under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR No. 2710.02. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

The CWA hazardous substance provisions of the final rule include requirements for onshore non-transportation-related facilities that could reasonably be expected to cause substantial harm to the environment, based on their location, to prepare FRPs for worst case discharges and submit them to EPA. Specific CWA hazardous substance FRP components include: facility information, owner or operator information, hazard evaluation, reportable discharge history, response personnel and equipment, evidence of contracts or other approved means to ensure the availability of personnel and equipment, notification lists, discharge information, personnel roles and responsibilities, response equipment information, evacuation plans, discharge detection systems, response actions, disposal plans, containment measures, training and exercise procedures, self-inspection, a coordination activities.

EPA has estimated an average annual total burden for respondents of 984,891 hours per year in the first three years, average annual labor cost of $69.7 million and operations and maintenance (O&M) costs of $18.0 million ($87.7 million total cost per year). EPA has carefully considered the burden imposed upon the regulated community by the regulations. EPA believes that the activities required are necessary and, to the extent possible, has attempted to minimize the burden imposed. The requirements specified in the final rule are intended to have a mitigating effect on CWA hazardous substance worst case discharges because the rule provisions address the categories of damages and adverse impacts expected from this type of discharge.

Respondents/affected entities: 12,618, including 7,264 estimated for rule familiarization and the Substantial Harm Certification Form; and 5,354 facilities further developing and maintaining FRPs under the final rule.

Respondent's obligation to respond: Mandatory.

Estimated number of respondents: 12,618 responses by 12,618 respondents during the three-year ICR period. The overall average number of responses during the ICR period is 4,206.

Frequency of response: One-time, then if required to amend an FRP.

Total estimated burden: Average hours per year: 984,891. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: Average cost per year: $87,705,322 per year.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. The small entities subject to the requirements of this action are 1,509 potentially small businesses classified under a broad range of 148 different North American Industry Classification System (NAICS) industries, at the five-digit level. For facilities owned by regulated small entities, the cost per facility ranges from $11,753 to $20,064, depending on the industry. The Agency has determined that 47 small entities may experience a cost-to-revenue impact of 1% to 3% of revenues (or, about three percent of all small entities). These entities are in four industries:

- Animal Food Manufacturing (33 small entities).
- Sawmills and Wood Preservation (4 small entities).
- Resin and Synthetic Rubber Manufacturing (9 small entities).
- Marine Cargo Handling (1 small entity).

The Agency also estimated 21 entities (around 1.4 percent of all regulated small entities), may experience an

impact greater than 3% of revenue. These entities include:

- Electric Power Generation (19 small entities).
- Support Activities for Mining (2 small entities).

As documented in section 8.3 of the RIA for the final rule, and in accordance with RFA requirements and SBA guidance, EPA has prepared a screening analysis to assess small entity impacts. This conclusion was reached by identifying the subset of small entities regulated by the final action based on SBA criteria for each NAICS industry. Then, EPA assessed the potential impact of the rule on those small entities using the cost-to-revenue threshold test. The Agency compared the annualized cost per small entity to annual revenues and identified entities where costs exceed one or three percent of annual revenues.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This final rule imposes no new enforceable duty on any State, local, or Tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action has Tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized Tribal governments, nor preempt Tribal law. EPA has concluded that this action may have Tribal implications because it requires covered facility owner or operators to notify their local TEPC if a worst case discharge should occur and coordinate with their TEPC on developing the Facility Response Plan and any associated community emergency response planning.

EPA mapped the location of the available sample of 661 in-scope facilities present in EPA's Tier II data against EPA's geographic boundaries for Tribal lands and did not identify any covered facilities located on Tribal lands. EPA notes that these data capture only a portion of potentially regulated facilities, and do not include some States with relatively higher proportions of Tribal lands, such as Oklahoma. In addition, EPA lacks information on the location of water intakes associated with facilities, which is a further uncertain potential source of Tribal impacts. EPA consulted with Tribal officials under EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this regulation to enable them to have meaningful and timely input into its development. EPA held a national Tribal consultation on the Clean Water Act Hazardous Substance Worst Case Discharge Planning Regulation Proposal in FY2022. On March 21, 2022, EPA sent a notification letter via email to Tribal leaders of all 574 federally recognized Tribes in lieu of a hardcopy because of the COVID–19 pandemic. In addition, EPA hosted one national Tribal informational webinar on April 6, 2022, to explain the action, answer questions, and record Tribal input. Five Tribal participants attended the webinar. No Tribes requested government to government consultation with EPA on the Clean Water Act Hazardous Substance Worst Case Discharge Planning Regulation Proposal. A few Tribes provided comments during the webinar. No federally recognized Tribes submitted comments to the docket during the public comment process.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 directs Federal agencies to include an evaluation of the health and safety effects of the planned regulation on children in Federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. This action is not subject to Executive Order 13045 because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The Agency has concluded that the effect of the requirements codified in this final rule will mitigate the adverse effects of environmental and socio-economic damage that could otherwise result from worst case discharges. This final action will therefore not have a disproportionate adverse effect on children. However, EPA's *Policy on Children's Health* applies to this action. Information on how the Policy was applied is available under ''Children's Environmental Health'' in the Supplementary Information section of this preamble.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The requirements specified in the final rule are intended to result in greater overall environmental protection. The final rule will not cause reductions in the supply or production of oil, fuel, coal, or electricity; nor will it result in increased energy prices, increased cost of energy distribution, or an increased dependence on foreign supplies of energy.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

The EPA believes that the human health or environmental conditions that exist prior to this action result in or have the potential to result in disproportionate and adverse human health or environmental effects on communities with environmental justice concerns. Under Executive Order 14096, ''Revitalizing Our Nation's Commitment to Environmental Justice for All'' (which builds upon Executive Order 12898 [10]) agencies must, as appropriate and consistent with applicable law, identify, analyze, and address the disproportionate and adverse human health and environmental effects (including risks) and hazards of rulemaking actions and other Federal activities on communities with environmental justice concerns.[11] Worst case discharges of hazardous substances from facilities regulated by this action would likely pose disproportionate risks to such communities located near these sites *e.g.,* including communities that have been historically marginalized by underinvestment and overburdened by pollution. EPA has concluded that the regulatory requirements will advance fair treatment of those communities by

[10] Exec. Order No. 12898 of Feb. 11, 1994 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations), 59 FR 7629 (Feb. 16, 1994).

[11] For further information, including the definition of environmental justice, see Exec. Order No. 14096 of Apr. 21, 2023 (Revitalizing Our Nation's Commitment to Environmental Justice for All), 88 FR. 25,251 (Apr. 26, 2023).

reducing the disproportionate damages that worst case discharges might otherwise inflict on those areas.

The EPA believes that this action is likely to reduce existing disproportionate and adverse effects on communities with environmental justice concerns. EPA has concluded that the regulatory requirements will advance fair treatment of those communities by reducing the disproportionate damages that worst case discharges might otherwise inflict on those areas. EPA has concluded that the requirements codified in this final rule will mitigate the adverse effects of environmental and health damage that could otherwise result from worst case discharges and are likely to reduce existing disproportionate and adverse effects on communities with environmental justice concerns. EPA has concluded that the regulatory requirements will advance fair treatment of those communities by reducing the disproportionate damages that worst case discharges might otherwise inflict on those areas.

The focus of this action is to finalize new requirements for FRPs for worst case discharges of CWA hazardous substances for onshore non-transportation related facilities that, because of their location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters or a conveyance to navigable waters. The EPA additionally identified and addressed environmental justice concerns associated with the final rule and qualitatively assessed whether the requirements codified in this final rule will mitigate the adverse effects of environmental and health damage that could otherwise result from worst case discharges. EPA has concluded that, while the changes in this rule were independent of environmental justice considerations, the regulatory requirements will advance fair treatment of communities with environmental justice concerns by reducing the disproportionate damages that discharges might otherwise inflict on them. Specifically, EPA has concluded that:

- Communities with environmental justice concerns (including communities historically marginalized by underinvestment and overburdened by pollution) are more likely to be in proximity to those covered facilities (and thus at greater risk) than other communities. To the extent that communities living closer to covered facilities are more likely to be exposed if a discharge occurs, potential CWA FRP facilities pose a greater risk to these groups. Therefore, the final action will reduce risk for these communities.
- The final requirements for FRPs will improve preparedness planning and public awareness of planning and response activities. EPA expects the final rule requirements will also enhance EPA's ability to address area- and regional-specific concerns.

The information supporting this review is contained in the RIA, section 8.7, which includes an environmental justice analysis and is available in the docket for this action.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action does not meet the criteria set forth in 5 U.S.C. 804(2).

List of Subjects in 40 CFR Parts 118 and 300

Environmental protection, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Michael S. Regan,
Administrator.

For the reasons stated in the preamble, Title 40, chapter I, of the Code of Federal Regulations is amended as follows:

■ 1. Add part 118 to subchapter D to read as follows:

Subchapter D Water Programs

PART 118—CLEAN WATER ACT HAZARDOUS SUBSTANCES FACILITY RESPONSE PLANS

Sec.

Authority: 33 U.S.C. 1251 *et seq.,* and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

§ 118.1 Purpose.

This part establishes Clean Water Act (CWA) hazardous substance facility response plan requirements for the owner or operator of any non-transportation-related onshore facility that, because of its location, 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 the exclusive economic zone.

§ 118.2 Definitions.

For the purposes of this part:

Adverse weather means weather conditions that make it difficult for response equipment and personnel to clean up or respond to discharged CWA hazardous substances, accounting for impacts due to climate change, such as the increased frequency and intensity of extreme weather events, temperature fluctuations, rising seas, storm surges, inland and coastal flooding, drought, wildfires, and permafrost melt in northern areas and that must be considered when identifying response systems and equipment in a response plan for the applicable operating environment.

Article means a manufactured item that is formed to a specific shape or design during manufacture, has end use functions dependent in whole or in part upon the shape or design during end use, and does not release or otherwise result in exposure to a CWA hazardous substance under normal conditions of processing and use.

Container means any device or portable device in which a CWA hazardous substance is processed, stored, used, transported, treated, disposed of, or otherwise handled.

Contract or other approved means is defined as:

(1) A written contractual agreement with a spill response organization that identifies and ensures the availability of the necessary personnel and equipment within appropriate response times;

(2) A written certification by the owner or operator that the necessary personnel and equipment resources, owned or operated by the facility owner or operator, are available to respond to a discharge within appropriate response times;

(3) Active membership in a local or regional spill response organization that has identified and ensures adequate access through such membership to necessary personnel and equipment to respond to a discharge within appropriate response times in the specified geographic area; or

(4) Any other specific arrangement approved by the Regional Administrator upon request of the owner or operator.

CWA Hazardous Substance means any hazardous substance designated in 40 CFR part 116.

Discharge includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a CWA hazardous substance, but excludes: discharges in compliance with a permit under section 402 of the CWA; discharges resulting from circumstances identified, reviewed, and made a part of the public record with respect to a permit issued or modified under section 402 of the CWA, and subject to a condition in such permit; and continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of the CWA, that are caused by events occurring within the scope of relevant operating or treatment systems.

Distance to the endpoint means the greatest distance a CWA hazardous substance in a worst case discharge into or on the navigable waters or a conveyance to navigable waters can travel while still having the ability to cause injury to public receptors or fish, wildlife, and sensitive environments, as determined under § 118.3(c)(1) and (c)(3) using endpoint concentrations enumerated in Appendix B or adversely impact a public water system as in § 118.3(c)(2).

Endpoint means the concentration at which a worst case discharge of a CWA hazardous substance has the ability to cause injury to public receptors or fish, wildlife, and sensitive environments as in Appendix B or adversely impact a public water system as in § 118.3(c)(2).

Exclusive economic zone means the zone contiguous to the territorial sea of the United States extending to a distance up to 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.

Facility means any mobile or fixed building, property, parcel, lease, structure, installation, equipment, pipe, or in-plant pipeline (other than a vessel or a public vessel), used in CWA hazardous substance handling, production, manufacturing, storage, processing, refining, transfer, distribution, treatment, or in which any CWA hazardous substance is used. The boundaries of a facility depend on several site-specific factors, including but not limited to, the ownership or operation of buildings, structures, and equipment on the same site and types of activity at the site. Therefore, contiguous or non-contiguous buildings, properties, parcels, leases, structures, installations, pipes, or pipelines under the ownership or operation of the same person may, for legitimate operational and response planning reasons, be considered separate facilities.

Fish, wildlife, and sensitive environments mean areas that may be identified by their legal designation or by evaluations of Area Committees (for planning) or members of the Federal On-Scene Coordinator's spill response structure (during responses). These areas may include wetlands, national and State parks, critical habitats for endangered or threatened species, wilderness and natural resource areas, marine sanctuaries and estuarine reserves, conservation areas, preserves, wildlife areas, wildlife refuges, wild and scenic rivers, recreational areas, national forests, Federal and State lands that are research national areas, heritage program areas, land trust areas, and historical and archaeological sites and parks. These areas may also include unique habitats such as aquaculture sites and agricultural surface water intakes, bird nesting areas, critical biological resource areas, designated migratory routes, and designated seasonal habitats.

Injury means a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource or public receptor (including to human health) resulting either directly or indirectly from exposure to a discharge, or exposure to a product of reactions (*e.g.,* more hazardous degradation products, ignition, or reaction) resulting from a discharge.

Interconnected containers mean containers that are connected via pipes, hoses, or other conveyance (either permanent or temporary) to allow movement of a CWA hazardous substance between containers.

Maximum extent practicable means within the limitations used to determine CWA hazardous substance release planning resources for recovery, shoreline protection, and cleanup for worst case discharges from onshore non-transportation-related facilities in adverse weather. It includes the planned capability to respond to a worst case discharge, including a discharge resulting from fire or explosion, as contained in a facility response plan that meets the requirements in § 118.11 or in a specific plan approved by the Regional Administrator.

Maximum quantity onsite means the maximum total aggregate quantity for each CWA hazardous substance present at all locations within the entire non-transportation-related onshore facility at any time.

Mitigation or mitigation system(s) means specific activities, technologies, or equipment designed or deployed to capture or control substances upon loss of containment to minimize exposure of the public or the environment. Passive mitigation means equipment, devices, or technologies that function without human, mechanical, or other energy input.

Navigable waters mean waters of the United States as defined in 40 CFR 120.2, adjoining shorelines, and the exclusive economic zone.

Non-transportation-related onshore facility means any facility of any kind located in, on, or under any land within the United States and excludes movement of CWA hazardous substances in interstate or intrastate commerce under active shipping papers by rail, pipeline, highway vehicle, or vessel pursuant to 49 CFR parts 171–180.

Offshore facility means any facility of any kind (other than a vessel or public vessel) located in, on, or under any of the navigable waters of the United States, and any facility of any kind that is subject to the jurisdiction of the United States and is located in, on, or under any other waters.

Offsite means areas beyond the property boundary of a facility, and areas within the property boundary to which the public has routine and unrestricted access during or outside business hours.

Onshore facility means any facility of any kind located in, on, or under any land within the United States other than submerged land. Furthermore, this extends to in, on, or under any submerged land as delegated to the Environmental Protection Agency (EPA) pursuant to 40 CFR part 112 Appendix B.

Owner or operator means any person owning or operating an onshore facility or an offshore facility, and in the case of any abandoned offshore facility, the person who owned or operated or maintained the facility immediately prior to such abandonment.

Person means an individual, firm, corporation, association, or partnership.

Planning distance means the distance to an endpoint such that a worst case discharge of CWA hazardous substances into or on the navigable waters or a conveyance to navigable waters from a non-transportation-related onshore facility could adversely impact a public water system or cause injury to fish, wildlife, and sensitive environments or public receptors, as described in § 118.10.

Publicly Owned Treatment Works is defined in 40 CFR 403.3 and includes Federally Owned Treatment Works.

Public receptors mean parks, recreational areas, docks, or other public spaces inhabited, occupied, or used by the public at any time where members of the public could be injured as a result of a worst case discharge into or on the navigable waters or a conveyance to navigable waters.

Public vessel as defined by section 311(a)(4) of the CWA means a vessel owned or bareboat-chartered and operated by the United States, or a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce.

Public water system is a system as defined in 40 CFR 141.2. A public water system is either a ''community water system'' or a ''non-community water system.''

Qualified individual (QI) means the individual having full authority to implement response actions and required to initiate immediate communications with the appropriate Federal official and the persons providing personnel and equipment to respond, to the maximum extent practicable, to a worst case discharge and to mitigate or prevent a substantial threat of such a discharge.

Regional Administrator means the Regional Administrator of the EPA, in and for the Region in which the non-transportation-related onshore facility is located.

Reportable quantities mean quantities that may be harmful as set forth in § 117.3, the discharge into the environment during a 24-hour period, which is a violation of Clean Water Act section 311(b)(3) and requires notice as set forth in § 117.21.

Respond or response means containment, removal, remediation, neutralization, source control, mechanical recovery, bioremediation, or other release countermeasures, in accordance with the applicable Regional Contingency Plan and Area Contingency Plan, of the CWA hazardous substances from the water and adjoining shorelines or the taking of such other actions that may be necessary to prevent, minimize, or mitigate damage to the environment, public health, or welfare, including, but not limited to, persons, fish, shellfish, wildlife, public water systems, and public and private property, shorelines, and beaches.

Response equipment means equipment (including firefighting equipment), or other mitigating substances and devices, available to an owner or operator and Federal, State, and local or Tribal agencies, designed or used to ensure an effective and immediate response to a discharge, and to ensure mitigation or prevention of a substantial threat of a discharge.

Response resources means the personnel, equipment, supplies, and other capability necessary to perform the response activities identified in the facility response plan required under this part.

Source water protection area means the area delineated by the State for a public water system or including numerous public water systems, whether the source is ground water or surface water or both, as part of the State Source Water Assessment Program approved by EPA under section 1453 of the Safe Drinking Water Act (42 U.S.C. 300j–13).

Spill response organization (SRO) means an entity that provides spill response resources to mitigate or remove CWA hazardous substances from the environment and mitigate associated impacts.

Transportation or transport means the movement of property and loading, unloading, or storage incidental to movement pursuant to 49 CFR part 171–199.

Transportation-related onshore facility means any facility of any kind, in, on, or under any land within the United States which provides movement or conveyances of CWA hazardous substances in interstate or intrastate commerce by rail, pipeline, highway vehicle, or vessel pursuant to 49 CFR parts 171–199.

United States means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, and the Pacific Island Governments.

Vessel as defined by section 101(28) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water; and, as defined by section 311(a)(3) of the CWA, means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel.

Water distribution system means a system to connect water treatment plants or water sources (in the absence of treatment) to customers via a network of pipes, storage facilities, valves, and pumps.

Wellhead protection area means the surface and subsurface area surrounding a water well or wellfield, supplying a public water system, through which contaminants are reasonably likely to move toward and reach such water well or wellfield.

Worst case discharge means the largest foreseeable discharge in adverse weather conditions including a discharge resulting from fire or explosion.

§ 118.3 Applicability.

This part applies to the owner or operator of any non-transportation-related onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging CWA hazardous substances into or on the navigable waters or a conveyance to navigable waters by meeting the following criteria:

(a) *Threshold quantity.* The maximum quantity onsite for any CWA hazardous substance listed at 40 CFR 116.4 at any time, meets or exceeds 1,000 times the Reportable Quantity in pounds (kilograms) found at 40 CFR 117.3. Do not include any exceptions or exemptions identified in § 118.8. To calculate the threshold quantities of CWA hazardous substances in mixtures, follow the procedures in § 118.9; and

(b) *Proximity to navigable waters.* The non-transportation-related onshore facility boundary or nearest opportunity for discharge is located within one-half mile of navigable waters or a conveyance to navigable waters; and

(c) *Substantial harm criteria.* The non-transportation-related onshore facility meets one or more of the following substantial harm criteria:

(1) *Ability to cause injury to fish, wildlife, and sensitive environments.* The non-transportation-related onshore facility is located at a distance to an endpoint as calculated using a planning distance in § 118.10(b) such that a worst case discharge of a CWA hazardous substance or the aqueous products that form when the CWA hazardous substance enters water from the non-transportation-related onshore facility could cause injury to fish, wildlife, and sensitive environments. For identification of fish, wildlife, and sensitive environments, owners or operators shall use the applicable Area Contingency Plan prepared pursuant to section 311(j)(4) of the CWA, in addition to identifying other areas pursuant to the definition in § 118.2;

(2) *Ability to adversely impact a public water system.* The non-transportation-related onshore facility is located at a distance to an endpoint such that a worst case discharge could adversely impact a public water system, as described by the five criteria listed

under paragraphs (c)(2)(i) through (v) of this section. This assessment should be conducted in collaboration with the downstream public water system(s). If the owner or operator is unable to work with the public water system after good faith efforts to do so, the owner or operator should use the estimated peak concentration of the CWA hazardous substance from a worst case discharge at the water intake to assess the potential to adversely impact a public water system. Ability to adversely impact a public water system includes a concentration of a CWA hazardous substance, or the aqueous products that form when the CWA hazardous substance enters water, reaching a public water system which:

(i) Violates any National Primary Drinking Water Standard or State Drinking Water Regulation, such as an exceedance of a Maximum Contaminant Level;

(ii) Compromises the ability of the public water system to produce water that complies with any National Primary Drinking Water Standard or State Drinking Water Regulation;

(iii) Results in adverse health impacts in people exposed to the maximum concentration that could enter a drinking water distribution system;

(iv) Contaminates public water system infrastructure, including but not limited to intake structures, treatment facilities, and drinking water distribution systems, or premise plumbing systems to a degree that requires remediation to restore system components to acceptable performance; or

(v) Impairs the taste, odor, or other aesthetic characteristic of the water entering a drinking water distribution system to a degree that could make the water unacceptable to consumers and that could prompt the public water system to issue use restrictions;

(3) *Ability to cause injury to public receptors.* The non-transportation-related onshore facility is located at a distance to an endpoint as calculated using a planning distance in § 118.10(b) such that a worst case discharge into or on the navigable waters or a conveyance to navigable waters could cause injury to a public receptor as defined in § 118.2; or

(4) *Reportable discharge history.* The non-transportation-related onshore facility has had a reportable CWA hazardous substance discharge under § 117.21 within the last five years that reached navigable waters.

§ 118.4 General requirements.

(a) *Preparation, submission, and implementation of facility response plans.* The owner or operator of any non-transportation-related onshore facility meeting the applicability requirements of § 118.3 shall prepare, submit, and implement a facility response plan according to the following provisions:

(1) *Initially regulated facilities.* The owner or operator of a non-transportation-related onshore facility in operation on November 30, 2026 that satisfies the criteria in § 118.3 shall prepare and submit a facility response plan that satisfies the requirements of this section and Appendix A: Substantial Harm Certification Form to the Regional Administrator by June 1, 2027.

(2) *Newly regulated facilities.* The owner or operator of a non-transportation-related onshore facility that did not satisfy the criteria in § 118.3 on November 30, 2026, but satisfies the criteria in § 118.3 after November 30, 2026 or that is notified by the Regional Administrator pursuant to § 118.5 shall prepare and submit a facility response plan that satisfies the requirements of this section and Appendix A: Substantial Harm Certification Form to the Regional Administrator within six months of meeting the criteria or notification.

(3) *Newly constructed facilities.* For a newly constructed non-transportation-related onshore facility that commences operation after June 1, 2027, and is required to prepare and submit a facility response plan based on the criteria in § 118.3, the owner or operator shall submit the facility response plan and Appendix A: Substantial Harm Certification Form to the Regional Administrator prior to the start of operations. Adjustments to the facility response plan to reflect changes that occur during the start-up phase of operations must be submitted to the Regional Administrator after an operational trial period of 60 days.

(4) *Facilities regulated as a result of a planned event or change.* For a non-transportation-related onshore facility required to prepare and submit a facility response plan after June 1, 2027, as a result of a planned change in design, construction, operation, or maintenance so that the non-transportation-related onshore facility now meets the criteria in § 118.3 of this part, the owner or operator shall submit the facility response plan and Appendix A: Substantial Harm Certification Form to the Regional Administrator before the portion of the non-transportation-related onshore facility undergoing the planned change commences operations. Adjustments to the facility response plan to reflect changes that occur during the start-up phase of operations must be submitted to the Regional Administrator after an operational trial period of 60 days.

(5) *Facilities regulated as a result of an unplanned event or change.* For a non-transportation-related onshore facility required to prepare and submit a facility response plan after June 1, 2027, as a result of an unplanned event or change in facility characteristics that renders the non-transportation-related onshore facility subject to the criteria in § 118.3, the owner or operator shall submit the facility response plan and Appendix A: Substantial Harm Certification Form to the Regional Administrator within six months of the unplanned event or change.

(6) *Recertification.* Owners or operators must review and recertify their facility response plans and Appendix A: Substantial Harm Certification Forms every five years.

(7) *Updated CWA hazardous substance information in 40 CFR 116.4 or 40 CFR 117.3.* If a CWA hazardous substance is added or removed from the list maintained at 40 CFR 116.4 or a reportable quantity adjusted as listed at 40 CFR 117.3, an owner operator shall update their facility response plan accordingly within six months.

(b) *Facility response plan amendments.* (1) The owner or operator of a non-transportation-related onshore facility for which a facility response plan is required under this part shall revise and resubmit revised portions of the facility response plan within 60 days of each change that materially may affect the response to or potential for a worst case discharge, including:

(i) A change in the non-transportation-related onshore facility's configuration that materially alters the information included in the facility response plan;

(ii) A change in the CWA hazardous substance maximum quantity onsite (*i.e.,* increase or decrease in the maximum quantity stored onsite) that materially alters the required response resources;

(iii) A material change in capabilities of the spill response organization(s) that provide equipment and personnel to respond to discharges of CWA hazardous substances described in § 118.11(a)(3);

(iv) A material change in the non-transportation-related onshore facility's discharge mitigation and response equipment or emergency response procedures; and

(v) Any other changes that materially affect the implementation of the facility response plan.

(2) Except as provided in paragraph (b) of this section, amendments to

information in the facility response plan (such as personnel, contact information, or changes in the spill response organization(s)) that do not result in a material change in response capabilities do not require review and approval by the Regional Administrator. Owners or operators shall provide a copy of such changes to the Regional Administrator as the revisions occur.

(3) The owner or operator of a non-transportation-related onshore facility that submits changes to a facility response plan as provided in the preceding paragraphs of this section shall provide an EPA-issued facility identification number (where one has been assigned, such as Facility Registry Service number) with the changes.

(4) The Regional Administrator shall review and approve or disapprove changes to a facility response plan submitted pursuant to the requirements in paragraph (b)(1) of this section for a non-transportation-related onshore facility that he or she has determined pursuant to § 118.5(c) to have the potential to cause significant and substantial harm to human health or the environment.

(c) *Substantial harm certification form submission.* If the non-transportation-related onshore facility meets the criteria in § 118.3(a) and (b) but not (c):

(1) If the non-transportation-related onshore facility is in operation on March 30, 2027, complete and submit to the EPA Regional Administrator the Substantial Harm Certification Form in Appendix A to this part by June 1, 2027, or, for facilities meeting the criteria in § 118.3(a) and (b) after March 30, 2027, within 60 days. Owner or operators must retain their completed Appendix A and supporting documentation for the duration that the CWA hazardous substance maximum quantity onsite meets or exceeds the threshold quantity and for an additional 10 years.

(2) Attach to the form documentation, calculations, and any other information necessary to demonstrate the reliability and analytical soundness of the substantial harm determination as well as a review of potential receptors that could be impacted as a result of a CWA hazardous substance discharge.

(3) Submit to the EPA Regional Administrator a recertification of the Substantial Harm Certification Form every five years, or within 60 days of a change at or outside the non-transportation-related onshore facility that impacts the potential to cause substantial harm to the environment in accordance with the criteria in § 118.3.

(4) Provide the Substantial Harm Certification Form in Appendix A to this part to local emergency response organizations upon request.

(d) *Assertion of claims of confidential business information.* (1) Except as provided in paragraph (2) of this section, an owner or operator of a non-transportation-related onshore facility required to submit a facility response plan or otherwise provide information under this part may make a claim of confidential business information for any such information that meets the criteria set forth in § 2.302 of this chapter.

(2) Notwithstanding the provisions of 40 CFR part 2, an owner or operator of a facility subject to this part may not claim as confidential business information the following information:

(i) Data required by § 118.11 (b); and

(ii) Data required in Appendix A of this part, excluding the supporting documentation.

(iii) Notwithstanding the procedures specified in 40 CFR part 2, an owner or operator asserting a claim of confidential business information with respect to information contained in its facility response plan as per § 118.11, shall submit to EPA at the time it submits the facility response plan the following:

(A) The information claimed confidential, provided in a format to be specified by EPA;

(B) A sanitized (redacted) copy of the facility response plan, with the notation ''CBI'' substituted for the information claimed confidential, except that a generic category or class name shall be substituted for any chemical name or identity claimed confidential; and

(C) The document or documents substantiating each claim of confidential business information, as described in paragraph (e) of this section.

(e) *Substantiating claims of confidential business information.* (1) An owner or operator claiming that information is confidential business information must substantiate that claim by providing documentation that demonstrates that the claim meets the substantive criteria set forth in § 2.302 of this chapter.

(2) Information that is submitted as part of the substantiation may be claimed confidential by marking it as confidential business information. Information not so marked will be treated as public and may be disclosed without notice to the submitter. If information that is submitted as part of the substantiation is claimed confidential, the owner or operator must provide sanitized and unsanitized versions of the substantiation.

(3) The owner, operator, or senior official with management responsibility at the non-transportation-related onshore facility shall sign a certification that the signer has personally examined the information submitted and that based on inquiry of the persons who compiled the information, the information is true, accurate, and complete, and that those portions of the substantiation claimed as confidential business information would, if disclosed, reveal trade secrets or other confidential business information.

§ 118.5 Regional Administrator determination of substantial harm and significant and substantial harm.

(a) *Regional Administrator authority to require facility response plans and amendments.* After considering the factors in paragraph (b) of this section, the Regional Administrator may at any time require the owner or operator of any non-transportation-related onshore facility to prepare and submit a facility response plan under this section. If such a determination is made, the Regional Administrator shall notify the owner or operator in writing and shall provide a basis for the determination and the owner or operator shall submit the facility response plan to the Regional Administrator as per the preparation, submission, and implementation guidelines in § 118.4. The Regional Administrator may require amendments to any facility response plan that does not meet the requirements § 118.11.

(b) *Regional Administrator substantial harm determination.* To determine whether a non-transportation-related onshore facility could, because of its location, reasonably be expected to cause substantial harm to the environment by a discharge, or substantial threat of a discharge, of CWA hazardous substances into or on the navigable waters or a conveyance to navigable waters, the Regional Administrator may consider the following:

(1) Type of transfer operation(s);

(2) CWA hazardous substance quantity and category as determined in 40 CFR 117.3 and characteristics (*e.g.,* ignitability or reactivity) stored onsite;

(3) Proximity to fish, wildlife, and sensitive environments and other areas determined by the Regional Administrator to possess ecological value;

(4) Ability to adversely impact public water systems as described in § 118.3(c)(ii);

(5) Location in a source water protection area;

(6) Ability to cause injury to public receptors;

(7) Lack of passive mitigation measures or systems, including those

that enhance resilience to climate change;

(8) Potential to adversely impact communities with environmental justice concerns;

(9) Potential vulnerability to adverse weather conditions resulting from climate change;

(10) Density of facilities with CWA hazardous substances onsite in the immediate area;

(11) Reportable discharge history; or

(12) Other site-specific characteristics and environmental factors that the Regional Administrator determines to be relevant to recovery, shoreline protection, and cleanup.

(c) *Regional Administrator responsibilities for significant and substantial harm facilities.* The Regional Administrator shall review facility response plans submitted by facilities meeting the applicability requirements of § 118.3 to determine whether the non-transportation-related onshore facility could, because of its location, reasonably be expected to cause significant and substantial harm to the environment by a discharge, or a substantial threat of discharge, of CWA hazardous substances into or on the navigable waters or a conveyance to navigable waters based on the factors identified in paragraph (d) of this section. If such a determination is made, the Regional Administrator shall notify the owner or operator in writing and:

(1) Approve any facility response plan that meets the requirements of § 118.11; and

(2) Review each facility response plan periodically thereafter on a schedule established by the Regional Administrator.

(d) *Regional Administrator significant and substantial harm determination.* To determine whether a non-transportation-related onshore facility could, because of its location, reasonably be expected to cause significant and substantial harm to the environment by discharging a CWA hazardous substance into or on the navigable waters or a conveyance to navigable waters, the Regional Administrator shall consider the factors in paragraph (b) of this section and § 118.3(c), as well as the following:

(1) Frequency of past reportable discharges;

(2) Proximity to navigable waters or a conveyance to navigable waters;

(3) Age or condition of containers and equipment;

(4) Potential for hazards such as flooding, hurricanes, earthquakes, or other disasters that could result in a worst case discharge; and

(5) Other facility- and Region-specific information, including local impacts on public health.

§ 118.6 Appeals process.

(a) *Owner or operator request to reconsider requirement to prepare a facility response plan.* In the event the owner or operator of a non-transportation-related onshore facility does not agree that the facility meets the applicability criteria under § 118.3 or with the Regional Administrator's determination under § 118.5 that the facility could, because of its location, reasonably be expected to cause substantial harm or significant and substantial harm to the environment by discharging CWA hazardous substances into or on the navigable waters or a conveyance to navigable waters, or that amendments to the facility response plan are necessary, such as changes to the worst case discharge planning quantity, the owner or operator may submit a request for reconsideration to the Regional Administrator and provide additional information and data in writing to support the request. The request and accompanying information must be submitted to the Regional Administrator within 60 days of receipt of notice of the Regional Administrator's original decision. The Regional Administrator shall consider the request and render a written decision with the basis for the determination as soon as practicable. The owner or operator shall then follow the preparation, submission, and implementation guidelines in § 118.4.

(b) *Owner or operator request to reconsider classification status.* In the event the owner or operator of a non-transportation-related onshore facility believes a change in classification status is warranted because of an unplanned event or change in the facility's characteristics (*i.e.,* substantial harm or significant and substantial harm), the owner or operator may submit a request for reconsideration to the Regional Administrator and provide additional information and data in writing to support the request. The Regional Administrator shall consider the request and render a written decision with the basis for the determination and notify the owner or operator as soon as practicable.

(c) *Appeals process following Regional Administrator decision.* After a request for reconsideration under paragraph (a) or (b) of this section has been denied by the Regional Administrator, an owner or operator may appeal a determination made by the Regional Administrator. The appeal shall be made to the EPA Administrator and shall be made in writing within 60 days of receipt of the decision from the Regional Administrator that the request for reconsideration was denied. A complete copy of the appeal must be sent to the Regional Administrator at the time the appeal is made. The appeal shall contain a clear and concise statement of the issues and points of fact in the case. It also may contain additional information from the owner or operator, or from any other person. The EPA Administrator may request additional information from the owner or operator, or from any other person. The EPA Administrator shall render a written decision with the basis for the determination and notify the owner or operator as soon as practicable. If the EPA Administrator determines a non-transportation-related onshore facility is subject to this regulation, the owner or operator must submit a facility response plan to the Regional Administrator following the preparation, implementation, and submission guidelines in § 118.4.

§ 118.7 Petitions.

Any person, including a member of the public or any representative from a Federal, State, or local agency who has a reasonable basis to believe that a non-transportation-related onshore facility subject to this section could, because of its location, reasonably be expected to cause substantial harm to the environment by a discharge, or substantial threat of a discharge, of CWA hazardous substance into or on the navigable waters or a conveyance to navigable waters may petition the Regional Administrator to determine whether the facility meets the criteria in § 118.3. Such a petition shall include a discussion of how the factors in § 118.3 apply to the non-transportation-related onshore facility and EPA shall make the petition available to the owner or operator in question and provide an opportunity to respond. The Regional Administrator shall consider such petitions and respond as soon as practicable in writing including the basis for the determination. The Regional Administrator may render a decision based solely on the information in the petition but may also gather additional information before rendering a decision.

§ 118.8 Exceptions and exemptions.

(a) *Exceptions.* This part does not apply to the owner or operator of any facility, equipment, or operation that is not subject to the jurisdiction of the EPA under section 33 U.S.C. 1321(j)(5)(C), as follows:

(1) Any non-transportation-related onshore facility, that due to its location, could not reasonably be expected to have a discharge, or substantial threat of a discharge, as described in § 118.3. This determination must be based solely upon consideration of the geographical and location aspects of the non-transportation-related onshore facility (such as proximity to navigable waters, land contour, drainage, etc.) and must exclude consideration of manmade features such as dikes, equipment, depressions, or other structures, which may serve to restrain, hinder, contain, or otherwise prevent a discharge.

(2) Any equipment, or operation of a vessel or transportation-related onshore facility which is subject to the authority and control of the U.S. Department of Transportation, and which provides movement or conveyances of CWA hazardous substances in interstate or intrastate commerce by rail, pipeline, highway vehicle, or vessel. For modes other than pipeline, this exception is limited to movement under active shipping papers prior to arrival at a final destination pursuant to 49 CFR parts 171–180.

(3) Any equipment, or operation of a vessel or onshore or offshore facility which is subject to the authority and control of the U.S. Coast Guard or the U.S. Department of the Interior, as defined in the Memorandum of Understanding between the Secretary of Transportation, the Secretary of the Interior, and the Administrator of EPA (40 CFR part 112, Appendix B).

(4) Any underground storage tank and connected underground piping, underground ancillary equipment, and containment systems, at any facility, that is subject to all the technical requirements of part 280 of this chapter or a State program approved under part 281 of this chapter.

(b) *Exemptions.* For the purposes of determining whether the maximum quantity onsite meets or exceeds the threshold quantity of a CWA hazardous substance or substances, under § 118.3(a), at the non-transportation-related onshore facility, the following exemptions apply:

(1) *Articles.* CWA hazardous substances contained in articles need not be considered when determining whether the maximum quantity onsite meets or exceeds the threshold quantity.

(2) *Uses.* CWA hazardous substances, when in use for the following purposes, need not be included in determining whether the maximum quantity onsite meets or exceeds the threshold quantity:

(i) *Structural components.* Use as a structural component of the non-transportation-related onshore facility;

(ii) *Janitorial.* Use of products for routine janitorial maintenance;

(iii) *Foods, drugs, cosmetics.* Use by employees of foods, drugs, cosmetics, or other personal items containing the CWA hazardous substance;

(iv) *Process water or cooling water.* Use of CWA hazardous substances present in process water or non-contact cooling water as drawn from the environment or municipal sources;

(v) *Wastewater treated by Publicly Owned Treatment Works.* Use of municipal wastewater entering a publicly owned treatment works prior to treatment under a National Pollution Discharge Elimination System permit;

(vi) *Compressed air.* Use of CWA hazardous substances present in air used either as compressed air or as part of combustion;

(vii) *Retail and personal uses.* Use for personal, family, or household purposes, or present in the same form and concentration as a product packaged for distribution and use by the general public. Present in the same form and concentration as a product packaged for distribution and use by the general public means a CWA hazardous substance packaged in a similar manner and present in the same concentration as the substance when packaged for use by the general public, whether or not it is intended for distribution to the general public or used for the same purpose as when it is packaged for use by the general public; and

(viii) *RCRA hazardous waste.* Storage or accumulation of hazardous waste regulated under the Resource Conservation and Recovery Act Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 40 CFR parts 264 and 265, and Resource Conservation Recovery Act Standards Applicable to Generators of Hazardous Waste, 40 CFR part 262 subpart M.

§ 118.9 Mixtures.

For the purposes of determining the CWA hazardous substance maximum quantity onsite at the non-transportation-related onshore facility of CWA hazardous substance(s), under § 118.3(a), the following provisions apply to CWA hazardous substances mixtures:

(a) If the quantity of all of the CWA hazardous substance constituent(s) of the mixture or solution is known, the mixture meets the threshold quantity when the maximum quantity onsite, as defined in § 118.2, meets or exceeds the threshold quantity of any CWA hazardous substance in the mixture.

(b) If the quantity of one or more of the CWA hazardous substance constituent(s) of the mixture or solution is unknown, the mixture meets the threshold when the maximum quantity onsite of the mixture or solution meets or exceeds the quantity for the CWA hazardous substance established in § 118.3(a) with the lowest threshold quantity.

§ 118.10 Worst case discharge.

Non-transportation-related onshore facility owners or operators are required to model a worst case discharge scenario, determine appropriate endpoints using Appendix B as per § 118.3(c)(1) and (3) from a discharge into or on the navigable waters or a conveyance to navigable waters, calculate the distances to endpoints and CWA hazardous substance planning distances, and compare the distances to endpoints against the CWA hazardous substance planning distances from the non-transportation-related onshore facility. If the CWA hazardous substance planning distances determined are shorter than the distances to endpoints as per Appendix B, the worst case discharge can cause substantial harm. Owners or operators shall also use their worst case discharge scenario(s) to determine if the non-transportation-related onshore facility has the ability to adversely impact public water systems per § 118.3(c)(2) from a discharge into or on the navigable waters or a conveyance to navigable waters. The worst case discharge scenarios must represent each CWA hazardous substance onsite that meets or exceeds the threshold quantity set in § 118.3(a). Each scenario must use the largest quantity following the below parameters:

(a) *Determination of worst case discharge quantity.* The worst case discharge quantity shall be the greater of the following:

(1) For CWA hazardous substances in separate containers, the maximum quantity of a single container, such as a bulk storage tank, process vessel, rail car, or mobile or portable container;

(2) For CWA hazardous substances in interconnected containers, the maximum quantity of a group of interconnected containers; or

(3) For substances in pipes, the maximum quantity of a pipe or interconnected pipes, and the owner or operator must provide evidence in Appendix A that containers with common piping or piping systems are not operated as one unit.

(4) For mixtures of CWA hazardous substances, follow the procedures in § 118.9.

(b) *Planning distance determinations.* To determine the distance to endpoints for fish, wildlife, and sensitive

environments, public water systems, and public receptors as referenced in § 118.3(c), an owner or operator shall use a methodology, model, or other technique that accounts for facility-specific conditions and accounts for the stated requirements in this paragraph. An owner or operator may use proprietary models, provided that the owner or operator allows EPA access to the model, submits documentation that demonstrates the reliability and analytical soundness of the methodology used, and describes the model's features to local emergency planners, upon request. Any models used for planning distance determinations shall be used in exercises conducted per § 118.13.

(1) Endpoints for fish, wildlife, and sensitive environments are provided in Appendix B of this part.

(2) Endpoints for public receptors are provided in Appendix B of this part.

(3) In determining CWA hazardous substance planning distance endpoints, owners or operators shall consider the following parameters:

(i) Factors affecting overland transport including:

(A) Nearest opportunity for discharge into or on the navigable waters;

(B) Ground conditions which may include topography of the surrounding area, drainage patterns, land use coverage, impervious cover, soil distribution or porosity, and soil absorption rate or soil saturation during adverse weather conditions; and

(C) Properties of the CWA hazardous substance, which may include evaporation rate based on wind speed; atmospheric stability, ambient temperature, pressure, and humidity; reactivity with rainwater and/or other substances along the overland flow path into or on the navigable water; and ignitability and explosive potential;

(ii) Factors affecting in-water transport including:

(A) Point of entry to navigable waters;

(B) Flow rate and duration of the discharge;

(C) Direction of the discharge at the point of entry;

(D) Surface versus underwater entry; and

(E) Conditions of the receiving water including the velocity of the navigable waters which may be affected by: Slope of the river; hydraulic radius; turbulence and potential for cross-channel mixing; Manning's Roughness coefficient; differentiation of still, tidal or moving waters; currents; wave height; tidal influence; and water temperature, pH, alkalinity, and salinity.

(iii) Adverse weather conditions, which shall be calculated based on adverse winds, currents, and/or river stages, over a range of seasons, weather conditions, and river stages.

(iv) Properties of the CWA hazardous substance such as solubility in water, speciation in water, density (relative to water), polarity, vapor pressure, reactivity with water and common solutes in natural waterbodies, human toxicity, mammalian toxicity, aquatic toxicity, and flammability.

§ 118.11 Facility response plan requirements.

(a) *General requirements.* A written plan that complies with other Federal contingency plan regulations or is consistent with the approach in the National Response Team's Integrated Contingency Plan Guidance (''One Plan'') and that includes the elements provided in this section shall satisfy the requirements. The owner or operator may augment an existing plan with these required elements. All facility response plans must include the following:

(1) *Consistency With National Contingency Plan, Area Contingency Plans, and Regional Contingency Plans.* Plans must be consistent with the requirements of the National Oil and Hazardous Substance Pollution Contingency Plan (40 CFR part 300) and applicable Area Contingency Plans prepared pursuant to section 311(j)(4) of the Clean Water Act and Regional Contingency Plans as per 40 CFR 300.210.

(i) The owner or operator shall review relevant portions of the National Oil and Hazardous Substances Pollution Contingency Plan and applicable Area Contingency Plan annually and, if necessary, revise the facility response plan to ensure consistency with these plans;

(ii) Include a signed affirmation that the owner or operator has reviewed relevant plans during facility response plan development and resubmission and;

(iii) Include a list of area plans and sub-area plans reviewed.

(2) *Qualified individual.* Identify the qualified individual or documented management system having full authority to implement response actions and require immediate communications between that individual and the appropriate Federal official and the persons providing personnel and equipment, with a description of duties including:

(i) Activate internal alarms and hazard communication systems to notify all facility personnel;

(ii) Notify all response personnel, as needed;

(iii) Identify the character, exact source, amount, and extent of the discharge, as well as the other items needed for notification;

(iv) Notify and provide necessary information to the appropriate Federal, State, and local authorities with designated response roles, including the National Response Center, State Emergency Response Commission or Tribal Emergency Response Commission, and Local Emergency Planning Committee or Tribal Emergency Planning Committee;

(v) Notify and provide necessary information to public water systems that may be impacted by a discharge;

(vi) Assess the interaction of the discharged CWA hazardous substance with water, solutes in water, water treatment chemicals, and/or other substances stored at the facility and notify response personnel at the scene of that assessment;

(vii) Assess the possible hazards to human health and the environment due to the worst case discharge. This assessment must consider both the direct and indirect effects of the discharge (*i.e.,* the effects of any toxic, irritating, or asphyxiating gases that may be generated, or the effects of any hazardous surface water runoffs from water or chemical agents used to control fire and heat-induced explosion) and initiate appropriate monitoring;

(viii) Implement prompt response actions to contain and respond, to the maximum extent practicable, the CWA hazardous substance discharged;

(ix) Coordinate rescue and response actions as previously arranged with response personnel;

(x) Use authority to immediately access company funding to initiate cleanup activities;

(xi) Direct cleanup activities until properly relieved of this responsibility; and

(xii) Acquire and maintain incident commander training requirements consistent with 29 CFR 1910.120(q)(6)(v).

(3) *Response resources.* Identify, and ensure by contract or other approved means, the availability of private personnel and equipment necessary to respond to the maximum extent practicable to a worst case discharge of CWA hazardous substances (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge;

(4) *Training, testing, and drills.* Describe the training, equipment testing, periodic unannounced drills, and response actions of persons at the facility to be carried out under the plan to ensure facility safety and to mitigate

or prevent the discharge, or the substantial threat of a discharge; and,

(5) *Plan updates.* Review and update facility response plan periodically and resubmit to the Regional Administrator for approval of each significant change as required by 118.4(a)(6) and (b)(1).

(b) *Emergency response information.* The facility response plan shall include:

(1) *Facility information.* Facility details including the facility name; latitude and longitude; street address, with city, State, and zip code; telephone number; facility location information described in a manner that would aid a reviewer and a responder in locating the facility, EPA identification numbers, and indication if the facility is located in or drains into a wellhead protection area as defined by the Safe Drinking Water Act of 1986;

(2) *Owner or operator information.* Contact information to include name and preferred contact method;

(3) *Hazard evaluation.* Hazard evaluation for worst case discharge into or on the navigable waters or a conveyance to navigable waters and risk-based decision support system shall include:

(i) Chemical-specific information, including the response considerations, health hazards, fire hazards, chemical reactivity, hazard classifications, and physical and chemical properties; potential effects of a CWA hazardous substance worst case discharge as per 118.10; impacts to communities with environmental justice concerns; and impacts of climate change, including but not limited to the increased frequency and intensity of extreme weather events, temperature fluctuations, rising seas, storm surges, inland and coastal flooding, drought, wildfires, and permafrost melt in northern areas. Illustrative diagrams of the hazard evaluation should be included.

(ii) This section of the plan must outline processes that will help responders make decisions relating to the identification, evaluation, and control of risks to human health and the environment following a CWA hazardous substance discharge. The processes outlined below do not need to be scenario-specific but can be generic in nature. At a minimum, the processes must include all the following:

(A) *Risk identification*—describe the process that will be used to determine the extent and route of CWA hazardous substance exposure to humans and the environment including location and age of containers and their contents;

(B) *Risk characterization*—describe the process that will be used to establish relative degrees of risk and prioritizing risks;

(C) *Risk control*—describe the process that will be used to determine feasible response methods to mitigate CWA hazardous substance discharge impacts on human health and the environment; and

(D) *Risk communication*—describe the process that will be used to communicate information resulting from paragraphs (A), (B), and (C) of this section to parties internal and external to response activities.

(4) *Reportable discharge history.* Discharges reported under 40 CFR part 117.21 that reached navigable waters with additional data including date, time, and discharge duration; CWA hazardous substance(s) discharged; estimated quantity discharged in pounds; quantity discharged that reached navigable waters in pounds; the type of discharge event and its source; weather conditions; on-site impacts; offsite impacts; initiating event; description of how the discharge was detected; clean-up actions taken, steps taken to reduce the possibility of recurrence; and contributing factors with all data to be retained for the life of the facility;

(5) *Response personnel and equipment.* The identity and a description of response personnel, equipment, and response action implementation necessary to respond to the maximum extent practicable to a worst case discharge of a CWA hazardous substance described in § 118.10, and to mitigate or prevent a substantial threat of a worst case discharge;

(6) *Contracts.* Evidence of contracts or other approved means as per the definition in § 118.2 to ensure the availability of proper response personnel and equipment, including response resources with firefighting capability and the availability of resources if facility or mutual aid resources are not capable of handling a worst case discharge incident resulting from a fire or explosion. The owner or operator of a facility that does not have adequate firefighting resources located at the facility or that cannot rely on sufficient local firefighting resources through mutual aid agreements must identify adequate firefighting resources, including contracted resources. The response plan must also identify an individual located at the facility to work with the fire department in a response. This individual shall also verify that sufficient well-trained firefighting resources are available within a reasonable response time to a worst case scenario. The individual may be the qualified individual identified in the response plan or another appropriate individual located at the facility;

(7) *Notifications.* A list of the identities, contact information, and preferred communication method(s) of individuals or organizations to be notified in the event of a discharge so that immediate communications and liaising between the qualified individual identified in paragraph (a)(2) of this section and the appropriate Federal officials; State, local, or Tribal response organizations; and persons providing response personnel and equipment can be ensured, and a description of communication methods. Notification shall include but not be limited to the: National Response Center, qualified individual, facility response team, local response team (fire department or cooperatives), fire marshal, State Emergency Response Commission or Tribal Emergency Response Commission, State police, Local Emergency Planning Committee or Tribal Emergency Planning Committee, downstream public water systems, local media for evacuation notification, local hospitals, and any other potential receptor or interested party who could be impacted by a discharge;

(8) *Discharge information.* A description of information to pass to response personnel in the event of a reportable discharge, including specifics about the event, CWA hazardous substance name and quantity discharged, possible areas and receptors affected, potential routes of transport, distance(s) to nearby waterways and conveyances, any data on the characteristics of the CWA hazardous substance and other hazardous substances in proximity, ignition sources, explosion potential, and any other information that may be helpful to responders and the public, including updates on the scope and nature of the discharge as available;

(9) *Personnel roles and responsibilities.* A description of response personnel capabilities, including the duties of persons at the facility during a response action and their response times, training, and qualifications or a description of documented management system that can perform the stated functions, as appropriate;

(10) *Response equipment information.* A description of the facility's response equipment, including roles in response actions, location of the equipment, last inspection or response equipment test date, inspection frequency, last deployment drill date, deployment

frequency, response times, and equipment testing;

(11) *Evacuation plans.* Facility-wide plans for evacuation including a diagram. Include identification and documentation of coordination with community evaluation plans, as appropriate, and consider locations of CWA hazardous substances and their risks when discharged; anticipated flow direction; water conditions; emergency response personnel and equipment arrival routes; limitations on evacuation routes; transportation of injured personnel to nearest emergency medical facility; location of alarm/notification systems; check-in areas for evacuation validation; command center location; and location of shelter at the facility as an alternative to evacuation;

(12) *Discharge detection systems.* Procedures and equipment used to detect discharges, as well as detect and monitor any hazardous air releases resulting from discharges into or on the navigable water or a conveyance to navigable waters as appropriate, including personnel (*i.e.,* routine walk-around visual inspection) or automatic discharge detection for regular and afterhours operations by CWA hazardous substance, reliability checks, and inspection frequency;

(13) *Response actions.* This section should describe the response actions to be carried out by facility personnel or contracted personnel under the facility response plan to ensure the safety of the facility and to mitigate or prevent worst case discharges described in § 118.10 or the substantial threat of such discharges, including immediate response actions for personnel safety, personal protective equipment use, facility personnel responsibilities by job title, facility personnel actions, facility personnel information gathering assignments for response personnel, and facility responsibilities to mitigate a CWA hazardous substance worst case discharge. Identify the types of environmental monitoring data to be collected, collection methods, techniques for measuring the environmental parameters of interest (including established analytical methods when applicable), a description of the data's utility during a response (including procedures for sharing data with response personnel and the public), and required personal protection requirements and safety procedures during data collection and analysis. Include a description of actions to be taken within:

(i) One hour of discharge detection: Complete notifications; mobilize facility response personnel for immediate response actions; identify the scale of the incident and coordinate with SRO on appropriate response actions; complete cross-check of worst case discharge scenarios and resulting potential effects to begin tactical planning based on the scale of the incident; ensure containment and neutralization systems are operational; coordinate evacuation of facility, if necessary; coordinate with drinking water authorities; mobilize response equipment, as appropriate; and coordinate with local police and fire officials. Initiate community evacuation plan, if necessary, and evaluate if downstream (or upstream, if tidally influenced waterbody) public receptors that could be impacted and may require evacuation.

(ii) Two hours of discharge detection: As appropriate, deploy response resources identified in the response plan, including containment and recovery devices (such as containment dams, culvert plugs, underflow dams, containment booms, skimmer equipment or acid/base neutralization resources); and initiate any water, soil, and air monitoring as outlined in the response plan.

(14) *Disposal plans.* Plans to dispose of contaminated cleanup materials, if appropriate to the material, including how and where the facility intends to recover, reuse, decontaminate, treat, and dispose of materials after a discharge has taken place and plans for temporary storage of recovered materials as well as the appropriate permits required to manage recovered materials according to local, State, and Federal requirements. The disposal plan must account for recovered product; contaminated soil and water; contaminated equipment and materials including drums, tank parts, valves, and shovels; personal protective equipment; decontamination solutions; adsorbents; and spent chemicals including firefighting runoff management;

(15) *Containment measures.* Measures to provide adequate containment and drainage of discharged CWA hazardous substances including containment volumes, draining routes from storage and transfer areas, materials used to construct drainage troughs, number and types of valves and separators used in the drainage system, sump pump capacities, containment capacity of weirs and booms and their locations, and other cleanup materials;

(16) *Training procedures.* Training procedures as per § 118.13;

(17) *Exercise procedure.* Exercise procedures as per § 118.13 and the schedule set under § 118.12(c); and

(18) *Self-inspection.* Written procedures and records of inspections including an inspection checklist and method to record the inspection date and findings, to be retained for five years.

(c) *Emergency response action plan.* The response plan shall include an emergency response action plan that is maintained in the front of the response plan, or as a separate document accompanying the response plan, addresses the first two hours of the incident response followed by an outline of continued operations appropriate for Incident Command, and that includes the following information:

(i) The identity and telephone number of a qualified individual having full authority, including contracting authority, to implement removal actions;

(ii) The identity of individuals or organizations to be contacted in the event of a discharge so that immediate communications between the qualified individual identified in paragraph (a)(2) of this section and the appropriate Federal officials and the persons providing response personnel and equipment can be ensured;

(iii) A description of information to provide to response personnel in the event of a worst case discharge;

(iv) A description of the facility's response equipment and its location;

(v) A description of response personnel capabilities, including the duties of persons at the facility during a response action and their response times and qualifications;

(vi) Plans for evacuation of the facility and a reference to community evacuation plans, as appropriate;

(vii) A description of immediate measures to secure the source of the discharge, including the response actions to be taken in the first two hours of an incident as per paragraph (b)(13) of this section, and to provide adequate containment and drainage of discharged CWA hazardous substances;

(viii) A description of the potential discharge pathways of the CWA hazardous substances to public water systems, public receptors, and fish, wildlife, and sensitive environments, and estimated time of travel; and

(ix) A diagram of the facility including evacuation routes.

§ 118.12 Coordination Activities.

The facility response plan shall be coordinated with the local emergency response plan developed by the Local Emergency Planning Committee or Tribal Emergency Planning Committee under section 303 of title III of the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 11001 *et seq.*). Upon request, the owner

or operator shall provide a copy of the facility response plan to the Local Emergency Planning Committee, Tribal Emergency Planning Committee, State Emergency Response Commission, Tribal Emergency Response Commission or other local emergency planning and response organizations. The owner or operator shall coordinate response needs with local emergency planning and response organizations to determine how the facility is addressed in the community emergency response plan and to ensure that local response organizations are aware of the CWA hazardous substances at the facility, their quantities, the risks presented, and the resources and capabilities provided by the facility to respond to a worst case discharge of a CWA hazardous substance into or on the navigable waters or a conveyance to navigable waters.

(a) Coordination shall occur at least annually, and more frequently, if necessary, to address changes at the facility, in the facility response plan, and/or in the community emergency response plan.

(b) Coordination shall include providing to the appropriate State, local, or Tribal emergency planning and response organizations the facility response plan, updated emergency contact information, and other information necessary for developing and implementing the local emergency response plan.

(c) Coordination shall include consulting with appropriate State, local, or Tribal emergency response officials to establish appropriate schedules and plans for drills and exercises required under § 118.13. The owner or operator shall request an opportunity to meet with the Local Emergency Planning Committee or Tribal Emergency Planning Committee (or equivalent) and/or local fire department as appropriate to review and discuss those materials.

(d) The owner or operator shall document coordination with appropriate State, local, or Tribal authorities and retain that documentation for the life of the facility, including:

(1) The names of individuals involved and their contact information (phone number, email address, and organizational affiliations), dates of coordination activities, and nature of coordination activities; and

(2) Signed agreements on activities and resources, identified by the facility, in the facility response plan to be performed by the appropriate State, local, or Tribal emergency response organizations.

(3) If a facility owner or operator is unable to coordinate with their State Emergency Response Commission or Tribal Emergency Response Commission, Local Emergency Planning Committee or Tribal Emergency Planning Committee, and/or local fire department, documentation must show a good faith effort to contact, coordinate, and consult with those bodies in the frequency described in this section.

§ 118.13 Facility response training, drills, and exercises.

(a) The owner or operator of any facility required to prepare a facility response plan under § 118.3 shall develop and implement a facility response training program and a drills and exercise program that satisfy the requirements of this section. The owner or operator shall describe the programs in the facility response plan as provided in § 118.11.

(b) The facility owner or operator shall develop a facility response training program to train facility and non-facility personnel involved in CWA hazardous substance response activities. Training shall be functional in nature according to job tasks for both supervisory and non-supervisory operational personnel.

(1) A facility owner or operator must identify the method to be used for training any volunteers or casual laborers used during a response to comply with the requirements of 29 CFR 1910.120.

(2) The facility owner or operator is responsible for ensuring that all private response personnel are trained to meet the Occupational Safety and Health Administration standards for emergency response operations in 29 CFR 1910.120.

(3) The facility response plan shall include a description of the training program as required in § 118.11.

(4) The facility response plan shall include records, including logs, of CWA hazardous substance facility response plan meetings and describe the type of response training and dates, review of personnel responsibilities during a response action, and drills and exercises. These records may be included in the facility response plan or kept as an annex to the facility response plan. Completed records will be kept for five years following each activity. Records required under this part kept under usual and customary business practices will suffice for purposes of this paragraph.

(c) The facility owner or operator shall develop a program of facility response drills and exercises, including evaluation procedures. A program that follows the National Preparedness for Response Exercise Program (PREP) will be deemed as compliant with the drill and exercise requirements of this section. An alternative program or deviations from the PREP exercise requirements may also be developed by the owner or operator and are subject to approval by the Regional Administrator.

(1) Drills and exercises shall, when appropriate, be coordinated with local public emergency response officials and these officials shall be invited to participate. If a facility owner or operator is unable to coordinate with local public emergency response officials, documentation must show a good faith effort to contact and coordinate with those bodies.

Appendix A to Part 118: Substantial Harm Certification Form

Facility Name:
Facility Address:
EPA Facility ID:
Facility Latitude/Longitude:
Facility Qualified Individual (Last name, First name):
Facility Contact (phone):
Facility Contact (email):
Parent Company:
Facility industry NAICS code: 1. Does the facility have a maximum quantity onsite of a CWA hazardous substance greater than or equal to the CWA Reportable Quantity (RQ)x 1,000?

Yes____ No____

If Yes, list names, CAS no., and maximum quantities (lbs) onsite for each CWA hazardous substance:

If No, you do not need to proceed. 2. Is the facility within one-half mile of navigable waters or a conveyance to navigable waters?

Yes____ No____

If Yes, list navigable waters and a description of conveyance(s).

If No, you do not need to proceed.

If the answers to both 1 and 2 are Yes, answer questions 3–6.3. Is the facility located at a distance such that a worst case discharge from the facility could cause injury to fish, wildlife, and sensitive environments? For further description of fish, wildlife, and sensitive environments (FWSE), see the applicable Area Contingency Plan (ACP). Attach documentation of the formulas, assumptions, ACP(s) consulted, and distances calculated.

Yes ____ No ____

4. Is the facility located at a distance such that a worst case discharge from the facility could cause injury to public receptors? Attach documentation of the formulas and distances calculated.

Yes ____ No ____

5. Would a worst case discharge from the facility cause substantial harm to a public water system by causing any one, or any combination of more than one, of the adverse impacts listed below?

(i) Violates any National Primary Drinking Water Standard or State Drinking Water Regulation, such as exceedance of a Maximum Contaminant Level;

(ii) Compromises the ability of the public water system to produce water that complies with any National Primary Drinking Water Standard or State Drinking Water Regulation;

(iii) Results in adverse health impacts in people exposed to the maximum concentration that could enter a drinking water distribution system;

(iv) Contaminates public water system infrastructure, including but not limited to intake structures, treatment facilities, and distribution systems, or premise plumbing systems to a degree that requires remediation to restore system components to acceptable performance; or

(v) Impairs the taste, odor, or other aesthetic characteristic of the water entering a drinking water distribution system to a degree that could make the water unacceptable to consumers and that could prompt the public water system to issue use restrictions.

Yes ____ No ____

Attach documentation of the methodology and assumptions used to evaluate the potential of a worst case discharge to cause each of the adverse impacts (i–v).

For each worst case discharge scenario list:

—CWA hazardous substance name, CAS no. and worst case discharge quantity (lbs)
—Worst case discharge scenario type (single container or interconnected containers)
—Name(s) of each FWSE receptor(s) and planning distance(s) to FWSE (feet or miles)
—Type(s) and description(s) of public receptor(s) and planning distance(s) to public receptor(s) (feet or miles)
—Adverse impacts (i–v) to a public water system

Attach documentation attesting to the required consultation with the applicable downstream public water system, including name of public water system, point of contact, and date of consultation for each potentially impacted public water system. If efforts to coordinate with the applicable downstream public water systems were unsuccessful, provide documentation to demonstrate the efforts to coordinate and provide the distance to the first downstream public water system intake.

6. Has the facility experienced a reportable CWA hazardous substance discharge to navigable waters within the last five years?

Yes ____ No ____

Attach relevant documentation of past reportable discharges.

For each reportable discharge identify:

Name of CWA hazardous substance, CAS no.
Date of discharge:
Duration of discharge (minutes):
Quantity discharged (lbs):
Navigable water(s) reached:
Injury caused to FWSE:
Injury caused to public receptors:
Adverse impacts to public water systems:
NRC report number:

Certification

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature
Name (please type or print)
Title
Date
Phone/Email

Appendix B to Part 118—Toxicity Endpoints for Calculating Planning Distance for Fish, Wildlife and Sensitive Environments and Public Receptors

Category	RQ (lbs.)	Endpoints for public receptors LD50			Endpoints for fish, wildlife and sensitive environments using 96-hour LC50		
		Mammalian toxicity (oral) (mg/kg)		10% (mg/kg)	Aquatic toxicity (mg/liter)		10% (mg/L)
		Lower	Upper		Lower	Upper	
X	1	0	0.1	0.01	0	0.1	0.01
A	10	0.1	1	0.1	0.1	1	0.1
B	100	1	10	1	1	10	1
C	1,000	10	100	10	10	100	10
D	5,000	100	500	50	100	500	50

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 2. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.;* 42 U.S.C. 9601–9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p. 306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

■ 3. Amend § 300.185 by revising paragraph (a) to read as follows:

§ 300.185 Nongovernmental participation.

(a) Industry groups, academic organizations, and others are encouraged to commit resources for response operations. Specific commitments should be listed in the RCP and ACP. Those entities required to develop tank vessel and facility response plans under CWA section 311(j) must be able to respond to a worst case discharge to the maximum extent practicable, and shall commit sufficient resources to implement other aspects of those plans in accordance with the requirements of 30 CFR part 254, 33 CFR parts 150, 154, and 155; 40 CFR parts 112 and 118; and 49 CFR parts 171 and 194.

* * * * *

■ 4. Amend § 300.211 by revising paragraph (c) to read as follows:

§ 300.211 OPA facility and vessel response plans.

* * * * *

(c) For non-transportation-related onshore facilities, these regulations are codified in 40 CFR 112.20 and 40 CFR part 118;

* * * * *

■ 5. Add § 300.411 to read as follows:

§ 300.411 Response to CWA hazardous substance worst case discharges.

(a) If the investigation by the OSC shows that a discharge is a worst case discharge as defined in the ACP, or there is a substantial threat of such a discharge, the OSC shall:

(1) Notify the NSFCC;

(2) Require, where applicable, implementation of the worst case portion of an approved facility response plan required by CWA section 311(j)(5);

(3) Implement the worst case portion of the ACP required by CWA section 311(j)(4); and

(4) Take whatever additional response actions are deemed appropriate.

(b) Under the direction of the OSC, the NSFCC shall coordinate use of private and public personnel and equipment, including strike teams, to respond to a worst case discharge and mitigate or prevent a substantial threat of such a discharge.

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