

What You Need to Know

EPA Releases New Proposed Rule For Clean Water Act Hazardous Substance Worst Case Discharge Planning

EPA has just released a **proposed rule** that would require facilities near “navigable water” that store listed hazardous substances above a threshold amount to prepare facility response plans for spills. Here’s what you need to know about the proposal.

What would this proposal require?

- The proposal would require certain facilities to prepare a Facility Response Plan (“FRP”) which will include a hazard evaluation for a “worst case discharge” of hazardous substances that could harm the environment by ending up in certain waters, as well as the process that the facility will use to determine responses to potential discharges.
- Facilities will also need to develop a response training program and a drills and exercise program and to engage in annual coordination activities with local emergency planning and response organizations.
- Facilities that currently meet the criteria described below must submit FRPs within 12 months of the final rule’s effective date. In the future, “newly regulated” facilities will have 6 months to submit an FRP, and newly constructed facilities must submit a plan before starting operations.
- Updates to the FRP would be required every 5 years or within 60 days of change “at or outside” the facility that impacts the facility’s potential to cause substantial harm to the environment.

What facilities would need to create a Facility Response Plan?

Facilities must create an FRP if they meet three criteria based on a facility’s location, capacity to store certain substances,

and potential to impact certain resources – but EPA Regional Administrators can require other facilities to submit an FRP after consideration of site-specific factors, regardless of whether it meets the screening and substantial harm criteria described below.

- First screening criteria: Facilities with a capacity to store certain threshold amounts (10,000x the CWA “Reportable Quantity”) of Clean Water Act hazardous substances including:
 - PBCs
 - Benzene
 - Sulfuric acid
 - Sodium hydroxide
 - Ammonia
 - Hydrochloric acid
 - Chlorine
 - Sodium hypochlorite

A full list of the covered substances is available at 40 C.F.R. Part 116.

- Second screening criteria: Facilities within half a mile of a navigable water or a conveyance to navigable water. Given the breadth of the term “navigable water” most facilities that meet the first criteria will likely meet this criteria as well. However, there is an exception for facilities that “could not reasonably be expected to have a discharge, or substantial threat of discharge” based on “geographic and location aspects” (but not man-made features) that restrain, hinder, or otherwise prevent discharge.

Once a facility meets the two screening criteria described above, the facility must undertake an evaluation to determine if they also meet the “substantial harm” criteria and will therefore need to submit a FRP.



- This “substantial harm” evaluation includes determining if a discharge could:
 - Cause injury to:
 - Fish wildlife, and sensitive environments, **or**
 - A “public receptor” which includes 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 to navigable waters; **or**
 - Adversely impact a Public Water System.

If the facility meets the first two “screening criteria” **and** could cause substantial harm to any of these three categories then it must prepare an FRP. Alternatively, if the facility meets the first two “screening criteria” **and** the facility has had a reportable discharge of a CWA hazardous substance within the last five years, then it must prepare an FRP.

Even if a facility does not meet the criteria described above, an EPA Regional Administrator can still require the facility to complete an FRP based on site-specific factors including considerations related to climate change and environmental justice such as:

- A lack of passive mitigation measures or systems, including those that enhance resilience to climate change;
- Potential vulnerability to adverse weather conditions resulting from climate change; and
- Potential for a worst case discharge to adversely impact communities with environmental justice concerns.

Members of the public as well as government agencies can also petition a Regional Administrator to request that a facility be required to submit an FRP.

Are there any exemptions or exceptions?

- The proposal only applies to “non-transportation facilities” (i.e., facilities not subject to Department of Transportation jurisdiction). This generally includes industrial, commercial, agricultural, and public facilities that use and store certain substances, but not pipelines or other modes of transportation that are in movement “under active shipping papers.” It likewise does not apply to vessels or certain onshore and offshore facilities subject to U.S. Coast Guard or Department of Interior control and certain underground storage tanks.
- There are also several exemptions that apply when determining if a facility meets the first screening criteria (maximum onsite capacity).



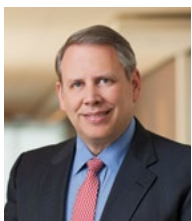
Where to find more information:

- EPA has provided more information, including the text of the proposed rule [here](#).

What to do next:

- Assess whether any of your facilities or operations could be subject to the proposed rule. If so, consider how you will meet the new requirements.
- Assess whether any of your facilities or operations are vulnerable to physical climate risk and consider their proximity to environmental justice communities.
- Consider filing comments with EPA to raise any concerns with the proposal or recommend ways they can improve any final rule. Comments on the rule are due on May 27, 2022.
- Track the progress of this proposal so you know if and when a final rule is issued and when it will become effective.

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