



July 25, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan, Administrator  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

**Re: Comments on EPA's proposed Clean Water Act Hazardous Substance Worst Case Discharge Planning Rule (EPA Docket EPA-HQ-OLEM-2021-0585-0001).**

Dear Administrator Regan:

On March 28, 2022, the Environmental Protection Agency (EPA) published a notice of proposed rulemaking on planning for worst case discharges of hazardous substances.<sup>1</sup> As described below, the Office of Advocacy (Advocacy) believes that only facilities that have a certain minimum quantity of any of the substances defined as hazardous under the Clean Water Act (hazardous substances) should be subject to the proposed regulation. Subjecting facilities to the proposed rule that do not have hazardous substances onsite in a quantity that is likely to cause substantial harm to the environment is an unnecessary burden on small entities.

### **The Office of Advocacy**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA)<sup>2</sup>, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA)<sup>3</sup>, gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

---

<sup>1</sup> 87 Fed. Reg. 17890 (March 28, 2022).

<sup>2</sup> 5 U.S.C. § 601 et seq.

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>4</sup> The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.<sup>5</sup>

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."<sup>6</sup>

### **Proposed Rule**

Under the Clean Water Act, as amended by the Oil Pollution Control Act of 1990, EPA is required to promulgate regulations requiring certain facilities to create a plan for responding to worst case discharges of either oil or hazardous substances into navigable waters.<sup>7</sup> In response, EPA is proposing this rule, which requires certain onshore facilities to create a Facility Response Plan (FRP) to prepare for a possible worst-case discharge of a hazardous substance into a navigable water that could cause substantial harm to the environment.<sup>8</sup>

The proposed rule creates a threshold analysis to determine which facilities are subject to regulation. In order to satisfy the first threshold, the facility must have "the container capacity for a CWA hazardous substance onsite at or above a threshold quantity."<sup>9</sup> This letter will refer to this criterion as Capacity Threshold. As proposed, EPA estimates that over forty percent of the facilities subject to the proposed regulation are owned by small entities.<sup>10</sup>

### **The Proposed Rule Inappropriately Chooses Capacity as a Threshold over Quantity**

As described above, a facility can only be subject to the proposed rule if it has satisfied the Capacity Threshold. The Capacity Threshold is satisfied only when the maximum capacity of a hazardous substance onsite is at or above the threshold level. The proposed rule defines "maximum capacity onsite" as "the total aggregate container capacity for each CWA hazardous substance present at all locations within the entire facility at any one time."<sup>11</sup> EPA proposes that if the "maximum capacity onsite" meets or exceeds 10,000 times its Reportable Quantity (RQ) as defined in 40 C.F.R. §117.3, the facility has satisfied this first threshold and may be subject to the proposed rule.<sup>12</sup>

---

<sup>4</sup> Small Business Jobs Act of 2010 (Pub. L. No. 111-240) § 1601.

<sup>5</sup> Id.

<sup>6</sup> 5 U.S.C. § 601 note.

<sup>7</sup> 33 U.S.C. § 2701 (2018).

<sup>8</sup> See generally 87 Fed. Reg. 17890 (March 28, 2022).

<sup>9</sup> 87 Fed. Reg. 17890 (March 28, 2022). Two addition criteria are that a facility to be "within one-half mile to navigable water or a conveyance to navigable water," and that a facility meets any one of four separate substantial harm criteria.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> See fn.9.

EPA believes that the maximum possible capacity should be used as a threshold for four main reasons. First, EPA notes that, in the chemical industry, “chemical inventory quantities routinely fluctuate.”<sup>13</sup> Second, according to EPA, the Capacity Threshold “will allow regulated stakeholders an opportunity to plan for the worst case quantities of CWA hazardous substances at the facility” even if the facility doesn’t have 10,000 times the RQ of the hazardous substance.<sup>14</sup> Third, EPA states that the Capacity Threshold also “allows emergency response planners to reflect the risk posed by CWA hazardous substances onsite in those maximum possible quantities,” even if those maximum possible quantities never exist at the facility. Lastly, EPA argues the Capacity Threshold should be used because it simplifies EPA inspectors’ work “to determine facility applicability based on container sizes instead of reviewing and aligning quantities in fluctuating inventories.”<sup>15</sup>

As EPA noted in the proposed rule, the Capacity Threshold is a 10,000 multiplier of the RQ and not the RQ itself. This is because EPA believes a discharge of a hazardous substance in the amount of only the RQ would not cause substantial harm to the environment.<sup>16</sup> EPA also further acknowledges that an “excessively low threshold quantit[y] would likely be overly cautious and regulate facilities that are not likely to cause substantial harm to the environment.”<sup>17</sup> Per the EPA: “Establishing a lower threshold planning quantity for all CWA hazardous substances could potentially overwhelm local and facility emergency planning efforts and would not be commensurate with the danger posed by individual substances.”<sup>18</sup>

Advocacy agrees with EPA’s above-stated concerns. However, despite these concerns, EPA concludes that the proposed rule should be triggered when “maximum *capacities*” (emphasis added) of the hazardous substances “are large enough to pose a risk of substantial harm to public health or the environment” instead of “maximum *quantities*.”<sup>19</sup>

As EPA implies in the proposed rule, there is an important distinction between “capacity” and “quantity.”<sup>20</sup> Both methods have been used for various regulatory purposes. The Capacity Threshold method was chosen by EPA to be used in the 1973 Oil Pollution Prevention regulation. On the other hand, the quantity method has been used in certain EPA chemical accident preparedness and reporting programs under the Emergency Planning and Community Right to Know Act.<sup>21</sup> As EPA correctly points out, however, oils are fundamentally different from hazardous substances.<sup>22</sup> When oil is mixed with another substance, the combined product is considered oil subject to regulations promulgated under Section 311 of the CWA. When a

---

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> See 87 Fed. Reg. 17890 (March 28, 2022).

<sup>22</sup> 87 Fed. Reg. 17890 (March 28, 2022).

hazardous substance is mixed with another substance, only the hazardous substance itself is subject to regulation and not the other substance mixed in. Thus, it is easier for an oil container to reach full capacity than it is for a hazardous substance to reach full capacity. The former's regulated quantity includes oil as well as any other substances to make a mixture. The latter's regulated quantity only includes the hazardous substance, regardless of the existence or quantity of any other substances mixed with the hazardous substance.

EPA must recognize that because a facility has the capacity to hold a hazardous substance onsite in an amount that is 10,000 more than the RQ does not necessarily mean that the facility actually holds the hazardous substance in such amount. Containers may be completely full and "at capacity," or containers may be partially full ranging from one percent full to 99 percent full and "below capacity." Advocacy understands that small entities are more likely to have containers below capacity. Utilizing the Capacity Threshold will inappropriately subject small entities to the proposed rule and unwarranted economic burdens that do not have a hazardous substance in an amount that poses a substantial harm to the environment.

### **Conclusion**

As proposed, over forty percent of facilities subject to the proposed regulation will be owned by small entities. The goal of the proposed rule is to prepare for worst case discharges of hazardous substances into navigable waters that could cause substantial harm to the environment. However, the proposed rule as structured will regulate facilities that do not utilize any of the hazardous substances in any quantity that could cause such substantial harm to the environment. To avoid this unnecessary burden on small entities, Advocacy recommends that EPA utilize the quantity method as the first threshold to determine whether a facility may be subject to the proposed regulation and acknowledge the key differences between hazardous substances and oil. If we can be of any further assistance, please contact Astrika Adams, Assistant Chief Counsel, at [astrika.adams@sba.gov](mailto:astrika.adams@sba.gov). Thank you for your attention to this matter.

Sincerely,

/s/

Major L. Clark, III  
Deputy Chief Counsel  
Office of Advocacy  
Small Business Administration

/s/

Astrika W. Adams  
Assistant Chief Counsel  
Office of Advocacy  
Small Business Administration