



July 26, 2022

U.S. Environmental Protection Agency  
EPA Docket Center  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

**RE: EPA Clean Water Act Hazardous Substance Worst Case Discharge Planning Rule;  
Docket ID # EPA-HQ-OLEM-2021-0585-0001**

On behalf of the Agricultural Retailers Association (ARA), I am submitting comments regarding the U.S. Environmental Protection Agency's (EPA) proposed rule on "Clean Water Act Hazardous Substance Discharge Planning Rule." While ARA supports efforts to improve the environment, any final proposed rule needs to prevent duplicative regulatory burdens and unnecessarily increasing operating costs at agricultural retail facilities.

**Statement of Interest**

ARA is a 501(c)(6) non-profit trade association that represents the interests of agricultural retailers and distributors across the United States on legislative and regulatory issues. As the political voice for agricultural retailers and distributors, ARA advocates on critical issues, educates legislators and collaborates with regulatory officials on critical issues affecting the industry. Ag retailers supply farmers and ranchers with products and services. These products include seed, nutrients, crop protection products, feed, equipment, and technology.

Retailers also provide consultative services such as crop scouting, soil testing, field mapping, custom planting and application and development of nutrient management and conservation plans. Certified Crop Advisers (CCAs) and Pest Control Advisers (PCAs) are often retained on the retailer's staff to provide professional guidance and crop input recommendations to farmers and consumers. Agricultural retailers range in size from small, family-held businesses to large companies and farmer-owned cooperatives with many outlet stores. Large and small retail facilities are scattered throughout all fifty states and provide critical goods and services, as well as jobs and economic opportunities in rural and suburban communities.

**Comments**

ARA appreciates the opportunity to provide input on this EPA proposal as it could directly impact the regulatory requirements for agricultural retail facilities. Our industry support efforts to ensure the nation's drinking water supplies are protected from hazardous substance discharges under the Clean Water Act (CWA). ARA in cooperation with The Fertilizer Institute (TFI) established the ResponsibleAg (RA) program nearly a decade ago as an industry-led initiative committed to helping

agribusinesses properly store and handle farm input supplies. RA helps members ensure they are compliant with environmental, health, safety and security regulations to keep employees, customers and their communities safe. The program is built upon a comprehensive assessment checklist of more than 400 questions, covering a comprehensive list of federal regulations that are commonly found at an agricultural retail facility.

ARA does not believe EPA has provided the required data to show the need for this proposal other than an attempt to comply with a consent decree that should never have been agreed upon by the agency in the first place. As stated in the proposal, “While there are notable instances of high-volume discharges of non-CWA hazardous substances to water, EPA found limited data on historical worst cases discharges to water of CWA-regulated hazardous substances and the NRC has no information related to the origination of the data cited in this section”. In addition, EPA admits that “Given the generally cursory nature of data provided to the NRC as part of an emergency notification, the Agency was unable to determine whether any of the 52 discharges could have been considered worst case discharges (*i.e.*, the largest foreseeable discharge in adverse weather conditions, including a discharge resulting from fire or explosion”.

Under this proposal, the CWA jurisdiction remains very unclear and it would be difficult for a facility to ascertain if they are required to comply with these new proposed federal regulatory requirements. The proposal as currently written would require all facilities within .5 miles of a navigable waterway (or a conveyance to a navigable waterway) and have the capacity to house 10,000 times reportable quantity of a CWA hazardous substance to submit a substantial harm criteria assessment. A key challenge in defining what is considered covered under the CWA, including “waters of the U.S.” (WOTUS), is to properly define jurisdiction lines that are applicable and appropriate to all parts of the country. As you know, the U.S. Supreme Court will hear oral arguments in October 2022 regarding the case of *Sackett v. EPA* with a decision likely in 2023. This case is likely going to have the U.S. Supreme Court more clearly clarify what test (Justice Scalia or Justice Kennedy) should govern the definition of WOTUS. EPA should hold off any final rulemaking related to this proposal until the court decision is issued. In addition, EPA will need to clearly provide maps of the United States showing which areas are governed by this proposal to ensure facilities are aware of their potential regulatory compliance obligations.

There are several chemicals included in the CWA hazardous substance list that are not able to reach navigable waters as they are in either a solid or gaseous form upon release. ARA is requesting EPA exempt all solid and gaseous hazardous chemicals from the list of hazardous substances included in any final rule. Including these types of chemicals in any final proposal will impose unnecessary compliance costs and time consuming for facility employees. In addition, the requirements for a facility based on its capacity to store 10,000 times the reportable quantity (RQ) of a CWA hazardous substance rather than the actual amount being stored will include a large number of facilities that would never store enough of a hazardous substance to meet the threshold requirements. EPA needs to adjust this proposal to only include a screening threshold quantity based on the actual amount of product being stored, similar to other federal regulations such as RMP and DHS Chemical Facility Anti-Terrorism Standards (CFATS). For example, an anhydrous ammonia storage tank is usually considered to have an 85% usable capacity. (A 15% vapor space must always be

maintained when filling, to allow for expansion). Further filling the tank increases the danger of pressure buildup from sunlight. (Gauges are only an approximate indicator for nurse tanks. The fixed liquid level gauge (bleed valve) must be used to determine actual amount.)

ARA requests that facilities already heavily regulated by EPA regarding the storage and handling of a hazardous chemical should be exempt from these new regulations as it would require burdensome, expensive and unnecessary additional compliance work. ARA's agricultural retailer members that store anhydrous ammonia (NH<sub>3</sub>), a commonly used nitrogen fertilizer product, are regulated under the EPA's Risk Management Plan (RMP) regulations<sup>1</sup>. The EPA RMP regulations already required facilities that use extremely hazardous substances to develop a Risk Management Plan that must be revised and resubmitted to EPA every five years. The facility's RMP is required to include the following:

- Hazard assessment that details the potential effects of an accidental release, an accident history of the last five years, and an evaluation of worst-case and alternative accidental releases scenarios;
- Prevention program that includes safety precautions and maintenance, monitoring, and employee training measures; and
- Emergency response program that spells out emergency health care, employee training measures and procedures for informing the public and response agencies (e.g. the fire department) should an accident occur.

The underlying principles of the EPA RMP regulations is that "one size does not fit all." As a result, different facilities covered by the regulations may have different requirements depending on the processes. EPA needs to take a similar approach with this proposed regulation.

In addition, agricultural retailers store, handle, and distribute several different pesticide products for their farmer customers that is used in production of a wide variety of crops. These facilities are already covered under EPA's Pesticide Container and Containment (PCC) regulations<sup>2</sup>. EPA published the final PCC rules in August 2006 with a compliance phase in period. PPC regulations seek to:

- Minimize human exposure to pesticides while handling containers;
- Facilitate disposal and recycling of pesticide containers; and
- Protect the environment from pesticide releases at bulk storage sites and from spills and leaks when refilling / dispensing pesticides.

Agricultural retailers that store and handle pesticide products subject to these PCC requirements should be exempt from these proposed regulations as it will only increase compliance costs and not improve environmental safety for surrounding waterways that may fall under CWA jurisdiction.

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<sup>1</sup> <https://www.epa.gov/rmp>

<sup>2</sup> <https://www.epa.gov/pesticide-worker-safety/pesticide-container-and-containment-regulations-glance>

ARA has many other serious concerns with this proposal related to environmental justice requirements, the potential release of confidential and sensitive business information to the public, allowing members of the public to lobby EPA Regional Administrators to determine that a facility meets an applicability requirement or substantial harm criteria, and required training for non-employees and periodic “unannounced” drills. More detailed comments on these and other problematic provisions are included in a coalition letter supported by ARA.

### **Conclusion**

ARA appreciates the opportunity to provide input to the EPA as it considers next steps related to this important issue. ARA agrees protecting employees and communities from CWA hazardous substances is important. However, we believe existing EPA regulations fully cover agricultural retail facilities which makes it unnecessary to move forward with this current proposal as currently drafted. EPA needs to focus on compliance assistance and training opportunities for facilities and local emergency responders.

Thank you for your review and consideration of our comments.

Sincerely,

A handwritten signature in black ink, reading "Richard D. Gupton". The signature is written in a cursive, flowing style.

Richard D. Gupton  
Senior Vice President, Public Policy & Counsel