July 26, 2022

Dr. Carlton Waterhouse
Deputy Assistant Administrator, Office of Land and Emergency Management
U.S. Environmental Protection Agency
Attention: Docket ID No. EPA-HQ-OLEM-2021-0585
1200 Pennsylvania Avenue NW
Washington, DC 20460

The undersigned organizations submit the following comments in response to the Environmental Protection Agency's (EPA) Proposed Rule regarding **Docket ID No. EPA-HQ-OLEM-2021-0585, Clean Water Act Hazardous Substance Worst Case Discharge Planning Regulations**, published in the *Federal Register* March 28, 2022.

Introduction

Owners and operators of member companies represented by the undersigned organizations have a personal stake in the safety and security of their employees, companies, and communities. They take their responsibility seriously and demonstrate this through their commitment to voluntary safety programs; their relationships with employees; their involvement in local communities, including participation in Local Emergency Planning Committees (LEPCs); and careful compliance with numerous environmental, health, safety, and security regulations at the federal, state, and local levels.

We share EPA's goals of preventing chemical accidents, improving preparedness, practicing environmental stewardship and sustainability, and enhancing community partnerships. It is with these goals in mind that we urge the EPA to reconsider several aspects of the Clean Water Act Hazardous Substance Worst Case Discharge Planning Regulations proposed rule to make the final rule workable for those companies, including small businesses, that will be required to comply. If this rule is too expansive, vague, and impractical, it will not achieve its goal of reducing the number of worst-case chemical discharges that reach navigable waterways and will instead divert important resources from facilities and their safety efforts.

Cost-Benefit Concerns

First, EPA's data demonstrates insufficient need for this costly and expansive rule. In EPA's assessment, from 2010 to 2019 only 52 discharges of CWA hazardous substances reached water (or it was unknown whether they reached water) from non-transportation facilities and also had reported impacts. Using this data, it is reasonable to conclude that this proposed rule would only address 5.2 discharges per year. In addition, EPA's estimate concluded that there has been a 24% decline in the average discharges per year over this period. This is strong evidence that industry is already devoting the necessary resources and capability to prevent and respond to discharges that may reach navigable waters, especially when considering that entire industries and substances have no reported releases. Forcing facilities to divert additional resources to comply with an overly complex and burdensome rule may

inadvertently interfere with the success industry has had in preventing and reducing these kinds of worst-case discharges while yielding minimal benefit.

Furthermore, a significant concern with the proposed rule is the high cost of compliance. The Regulatory Impact Analysis associated with this proposed rule estimates that the cost of maintaining operations required under facility response plans and submitting substantial harm certification forms to be a first-time burden of roughly $26,000 per facility with an annual recurring cost of $15,000. The undersigned organizations are concerned that these numbers are severely underestimated. The costs of comprehensive endpoint modelling and the necessary Hazardous Waste Operations & Emergency Response (HAZWOPER) training alone would reasonably be well above the $26,000 first-time cost and $15,000 per year mark.

Also, companies who are ultimately not covered by the rule but meet the first two criteria are still required to submit substantial harm certification forms, forcing them to invest significant capital into those assessments and undergo expensive endpoint modelling. We urge the EPA to work closely with those who will be impacted by this rule to revise its economic impact analysis to more accurately assess the economic burden this rule will put on affected companies.

Applicability

This proposed rule requires all facilities that are within 0.5 miles of a navigable waterway (or a conveyance to a navigable waterway) and have the capacity to house 10,000 times a reportable quantity of a CWA hazardous substance to submit a substantial harm criteria assessment. If a criterion is met, the facility is required to submit a facility response form. To avoid unnecessarily adding facilities, the EPA should narrow its definition of capacity to house CWA hazardous substances, as further explained below.

In addition, due to regulatory overlap and the nature of several of the chemicals included in this rule, facilities should be exempt from the rule in certain circumstances. These exemptions, and the narrowed definition of capacity to house that we note above, are summarized as follows:

- **This proposed rule has several programmatic overlaps with EPA's Risk Management Program (RMP) regulation.** The technical background document associated with this proposed rule found that RMP at least partially covers every major aspect of this proposed rule. Due to this, the undersigned organizations urge the EPA to exempt facilities already covered by the RMP regulation from this rule. Not doing so would require a significant number of facilities to complete burdensome duplicative work. If facilities are covered by RMP, they already have plans in place to respond to a worst-case discharge at their facility, and therefore it is reasonable to conclude that submitting and preparing a facility response plan in accordance with this additional rule would not reduce the likelihood of a discharge reaching navigable waters.

- **There are several chemicals included in the CWA hazardous substance list that cannot realistically reach navigable waters as they are either solid or gaseous upon release.** Accordingly, we are requesting that the EPA exempt gaseous chemicals and

solid chemicals — when not mixed into substances — from the list of hazardous substances covered by this rule. Including these chemicals would require numerous facilities to undergo time-consuming and costly substantial harm criteria assessments when there is no possibility of them ultimately being covered by the rule. A list of these substances is attached to these comments in a separate document.

- **The definition of capacity to store CWA hazardous materials is problematic.** Under the proposed rule, a facility would be subject to the requirements based on its ***capacity*** to store 10,000 times the reportable quantity (RQ) of a CWA hazardous substance as opposed to the actual amount that is stored onsite. This proposed requirement would create confusion among owners and operators trying to determine if they are subject to the rule. Moreover, it would also include numerous facilities that will never house enough of a hazardous substance to meet the threshold, as facilities often use additional storage capacity to stow chemicals. For example, anhydrous ammonia containers are prohibited to be filled beyond 85% liquid volume to allow expansion and contraction, ensuring only vapor pressure on containers. Despite this, these containers would be assumed to be 100% full of liquid anhydrous ammonia in this proposed rule. Instead of using a maximum capacity criterion, EPA should instead screen facilities based on what they physically store onsite.

Definitions

Throughout this proposed rule there are several terms that are not clear or do not seem reasonable. We request that the EPA fully define or reconsider the following definitions so that those who are impacted by this rule can fully understand the requirements and take every step needed to comply:

- **The term "navigable waters" is ambiguous as "waters of the United States" (WOTUS) is not fully defined.** There is a Supreme Court case regarding the scope of WOTUS that has yet to be decided, and a separate EPA rulemaking in progress that is intended to give further definition to the term. With these efforts ongoing, the actual definition of WOTUS, and therefore navigable waters, remains in question. This makes the proposed rule especially difficult to comply with as the first screening criteria is based on a facility's proximity to navigable waters. It is not reasonable to expect facilities to identify whether they meet this criterion until the definition of this term is fully decided. Moreover, it is not possible to develop comprehensive comments on a proposed rule when such an integral part of its scope is not completely defined. The undersigned organizations request that the EPA release a supplementary proposed rule after the definition of navigable waters has been clarified by the Supreme Court and any further follow-on regulatory action required by the Court's decision has been completed.

- **The term "conveyance to a navigable waterway" is not defined in the proposed rule.** This raises additional questions in regard to which facilities are actually included in the 0.5 mile screening criterion. This also creates additional risks of this proposed

rule being applied unevenly as two identical facilities may interpret a conveyance to a navigable waterway differently, resulting in one being covered by this rule and the other not. It is necessary for the EPA to define this term to better inform facilities of whether they meet the screening criteria.

- **In addition, the term "adverse weather" is ambiguous.** The definition of this term is "weather conditions that make it difficult for response equipment and personnel to clean up or respond to discharged CWA hazardous substances." This is difficult to quantify and forces facilities to make subjective interpretations of what constitutes adverse weather, adding another burden on facilities as they must decide how they will apply this term. Moreover, this creates further opportunity for uneven implementation of this proposed rule. Two identical facilities may have different interpretations of what constitutes adverse weather and therefore have different substantial harm criteria assessments. We urge the EPA to redefine adverse weather in a clear and objective manner.

- **Lastly, the definition of container in this proposed rule is not consistent with previous EPA regulations, specifically the Spill Prevention, Control, and Countermeasure (SPCC) regulations for oil**. In the SPCC regulations there are specific instances where a receptable is to be considered a "container" in the rule, giving facilities needed clarity. Furthermore, SPCC regulations exempt containers below 55 gallons, a necessary exemption when accounting for containers that are soon to be distributed. The undersigned organizations believe the definition in the proposed rule is too broad and request that the term be fully defined and more closely follow the SPCC interpretation.

Substantial Harm Criteria Determinations

As the proposed rule is currently written, all facilities that are determined to be within 0.5 miles of a navigable waterway and have the capacity to store 10,000 times an RQ of a CWA hazardous substance must undergo substantial harm criteria assessments. However, only facilities that meet a substantial harm criterion are covered by the rule. Therefore, many facilities will ultimately not be covered by this rule but will still be required to conduct extensive effort to assess whether they meet substantial harm criteria. Due to this, it is important for the EPA to make substantial harm assessments simple to conduct and avoid burdensome requirements.

Perhaps the most difficult aspect of assessing substantial harm criteria is the need to perform planning distance and endpoint modeling to determine when the concentration of a substance no longer poses the ability to cause injury to fish, wildlife, and sensitive environments or public receptors. The proposed rule does not provide a tool or even identify how to conduct the modeling and instead leaves discretion to the facilities. This creates more opportunity for inconsistency, as two identical facilities may use different models and achieve different results in their assessments. Furthermore, not providing a standard model puts additional costs on facilities to assess their substantial harm criteria, as they must dedicate more time and resources to either work in-house to develop a model or find a third-party to model

endpoints for them. The undersigned organizations urge the EPA to take an approach similar to RMP and provide modelling tools and access to technical assistance for facilities. This will significantly reduce the cost burden put on facilities, avoid any issues created by a lack of private firms equipped to provide modelling, and ensure consistency among facilities.

In addition, we urge that reportable discharges and public receptors be removed as substantial harm criteria as neither highlights a risk of a discharge reaching navigable waters (however the Supreme Court may ultimately delineate the scope of that term), therefore falling out of the stated scope of this rule and the Clean Water Act.

As there are existing requirements to model a worst-case discharge, the reportable discharge criterion is unnecessary. Facilities are already determining a worst possible discharge so any past discharge would certainly fall within that model. Adding this requirement would not reasonably reduce any risk of discharges reaching navigable waters; instead, it may serve to dissuade facilities from proactively reporting future discharges.

Moreover, the substantial harm criterion related to public receptors only identifies risks of discharges reaching a public receptor, not navigable waters. If a facility has no risk of a discharge reaching a navigable water, but can reach a public receptor while meeting the screening criteria then it would be covered by this rule. Such a scenario does not fall under the scope of the Clean Water Act, and therefore the substantial harm criterion related to public receptors should be removed.

We are also concerned with the disregard of passive mitigation in the proposed rule. Passive mitigation has proven to be highly effective in preventing discharges from impacting surrounding communities. Facilities have invested heavily in adding these systems to their facilities to ensure that the most comprehensive safety and risk prevention measures are taken. Not allowing these to be included when assessing substantial harm criteria would significantly inflate the number of facilities covered by this rule, putting unnecessary burdens on owners and operators of facilities who pose no risk of substantial harm while also distorting EPA data. This is especially pertinent as secondary containment is extremely prevalent in the management of the substances included in this proposed rule, playing a critical role in why there are such few discharges of these substances. Moreover, the value of these systems have already been acknowledged by EPA as passive mitigation is required in various regulations.

Passive mitigation ought to be included in calculating planning distances as having such measures in place will significantly impact how far a hazardous substance could travel in a discharge. This approach would allow for more accurate data and encourage more facilities to invest in passive mitigation, a proven method to reduce spills and spill impacts. We do not support adding the lack of passive mitigation as a substantial harm criterion as the impact of not having these measures should instead be incorporated in any modelling activities. Under this approach, if a lack of containment measures does create a risk of discharges reaching navigable waterways, this will already be a factor in the harm criteria.

Worst-Case Discharge Considerations

When evaluating various aspects of this rule, the operators or owners of the facilities in question are asked to use a worst-case discharge scenario. It is important that this definition be clearly stated and as straightforward as possible to implement. This will ensure accurate data while also avoiding any unintended burdens on facility owners or operators.

One specific point on which clarity is needed is how the timing of the discharge ought to be considered. The proposed rule does not clarify whether a worst-case discharge should be considered an instantaneous discharge of the entire contents of the largest container or a timed discharge. It is necessary that the EPA clearly define this aspect of the discharge to ensure accurate data and standardization among those submitting facility response plans and substantial harm certification forms.

Also, in the proposed rule EPA outlines several considerations concerning additional scenarios that facilities may be required to model. These considerations include planning for additional scenarios when there would be different procedures used to mitigate a discharge, when a different receptor would be reached, and when there are different hazard classes of CWA substances; and planning for more likely discharges. Including these additional considerations would put significant burdens on those complying with the rule. Each scenario would require additional endpoint modelling, which will be expensive and time-consuming, while providing limited benefit. With facilities already planning for their worst-case scenarios, they will have adequate planning in place to respond to different situations.

Facility Response Plan Requirements

If a facility meets the requisite harm criteria, they would be required to submit a facility response plan to the EPA. These plans have several requirements that covered facilities must consider.

The most comprehensive aspect of facility response plans are the hazard evaluation requirements under which facilities must assess the endpoints of all CWA hazardous substances, examine impacts to environmental justice communities, consider impacts of climate change, and more. The undersigned organizations are concerned that imposing such extensive hazard evaluation requirements via the proposed rule would put unnecessary costs on facilities, while being extremely difficult to carry out:

- **Requiring additional endpoint calculations poses significant cost concerns as this would likely require additional modelling.** As the EPA acknowledges earlier in the proposed rule, planning for a worst-case discharge ensures that facilities are equipped for any foreseeable discharge that may occur, and thus adding these requirements to assess additional endpoints are not necessary.

- **Also, examining impacts to environmental justice communities is vague in this proposed rule and goes beyond the scope of the Clean Water Act.** It is unclear what can be considered as an "impact" and how facilities are expected to utilize this information. The organizations we represent care deeply about their surrounding communities and how they may impact each other, but as written this proposed requirement appears to be an exercise with no clear purpose.

- **The proposed requirement to consider potential impacts of climate change is ambiguous as there is no standard for what meets the threshold of "consider."** Are facilities required to model how climate change may affect endpoint distances in the future, or are they expected to simply acknowledge that the environment may look different in the future? It is unclear if it is even possible for facilities to accurately predict how climate change will impact their surroundings as there are a myriad of everchanging variables that must be considered. Attempting to accomplish this would be a monumental — if not impossible — task, especially for small businesses. The undersigned organizations request that the EPA remove the proposed requirements to model endpoints for all CWA hazardous substances, examine environmental justice communities, and consider climate change impacts from hazard evaluations.

- **An additional piece of concern within proposed hazard evaluation requirements is the consideration to include cascading failures.** While cascading failures may pose a risk to generate significant discharges, it is not practical to require two separate facilities under different ownership to coordinate at a level that would create meaningful safeguards. Moreover, if both facilities already have facility response plans in place, the facilities would already be prepared as cascading failures would likely not equate to more than two worst-case discharge scenarios. The undersigned organizations urge the EPA to not add this requirement to facility response plans and instead take the responsibility of assessing any risks of cascading failures itself as the agency has access to sensitive information that two facilities would likely not be willing to disclose to one another.

In addition to hazard evaluation requirements, the undersigned organizations also share concern with several more provisions included in facility response plan requirements:

- **One extremely difficult aspect of a facility response plan to meet is the Qualified Individual (QI) requirements.** Under the proposed rule, the QI must have the authority to immediately access company funds to initiate cleanup activities while also maintaining incident commander training requirements and having the ability to immediately assess the spill and coordinate its cleanup. Placing these requirements on one individual is not practical and is inconsistent with how the operations of most facilities are structured. Instead of requiring one individual to meet each of the requirements, the undersigned organizations recommend that a management system be acceptable. A system under which identified individuals can collectively meet the reporting and response requirements of the QI would fulfill the intended effects of the QI requirement of the proposed rule while also lending more flexibility to facilities. Under the current proposed rule, there is no clear guideline on how a facility should proceed if there is a discharge and the QI is not present, unreachable, or incapacitated. Allowing for a management system would enable facilities to be better prepared to meet QI requirements in more diverse scenarios.

- **Beyond employee requirements, this proposed rule also expects facilities to work with and train volunteers and casual laborers who may respond to a discharge.** This provision is concerning, as it would put a heavy burden on facilities, requiring them to ensure that volunteers and casual laborers are given costly HAZWOPER trainings. While assistance with spill cleanup is appreciated greatly, this provision can put a significant burden on facilities to account for something they have no control over. The undersigned organizations urge the EPA to strike this provision from the proposed facility response plan requirements and instead to have a public entity such as the LEPC coordinate volunteer and casual laborer response activities.

- **Lastly, proposed facility response plan requirements have several instances of unclear and ambiguous language.** This ambiguous language appears when, under the proposed rule, unannounced drills are required to be "periodic," plan updates are required to be made "periodically," discharge detection systems are required to have "reliability checks" and inspections with an unspecified timeframe, containment measures are required to be "adequate," and self-inspections are given no specified frequency of when they are to be completed. Each of these proposed requirements is subjective, making it more difficult for owners and operators to have confidence that they are submitting an acceptable facility response plan. This creates yet another instance where the acceptableness of facility response plans from two identical facilities with identical plans may be different depending on the Regional Administrator reviewing them. The undersigned organizations request that the EPA use more concise language in these proposed facility response plan requirements, outlining specific metrics and timelines that owners and operators can use to ensure their plan is adequate. Moreover, we request that the EPA outline the process an owner or operator would have to go through if the Regional Administrator determines their plan is not acceptable; no such process is set forth in the proposed rule.

Administrative Issues

We are concerned with the allotted time that the proposed rule would give to facilities to prepare and submit substantial harm certification forms and facility response plans. A timeline as short as one month for substantial harm certification forms and 6 months for facility response plans is unrealistic. For facilities to undertake the different modelling, training, needed facility changes, and administrative recordkeeping that would be required, a much more generous timeline is necessary. Instead, a timeline of four years to submit facility response plans would be much more realistic. This would be more closely aligned with OSHA's Process Safety Management (PSM) and EPA's RMP regulations as facilities were given four years to comply with PSM and three years to follow RMP guidelines. The undersigned organizations also recommend a much more realistic time period of 18 months for substantial harm certifications in order to meet the proposed requirements of assessing worst-case discharge scenarios, creating endpoint modelling, coordinating with public water systems, and fully assessing the possibility of meeting a criterion. For this proposed rule to have the designed effect, substantial harm certification forms and facility response forms must be filled out carefully and accurately – the undersigned organizations urge the EPA to allow facilities enough time to ensure that happens.

Another issue of concern is the potential release of sensitive information that is contained in facility response plans and substantial harm criteria assessments. This information holds sensitive business information as well as the locations of several potentially dangerous chemicals that are regulated under the Chemical Facility Anti-Terrorism Standards. Making any of this information publicly available could hold serious consequences from a business and security perspective. The undersigned organizations strongly urge the EPA to keep all information included in this regulation limited to those who truly have a need to know.

Furthermore, the unprecedented discretion given to Regional Administrators to determine whether a facility must comply with this regulation is alarming. In this proposed rule, Regional Administrators have the authority to require a facility to submit a facility response plan regardless of whether it actually meets any of the screening criteria. This sets a dangerous precedent as there is nothing to require consistency when applying this aspect of the rule. Two identical facilities could be evaluated differently based on their Regional Administrator and have different facility response plan requirements. Furthermore, if a new Administrator took office with a different perspective than his or her predecessor, a facility that was initially determined not to be covered by this rule could suddenly be covered, despite there being no difference in their facility. The undersigned organizations urge the EPA to remove this provision from the proposed rule.

Lastly, the EPA's inclusion of stakeholder petitions in this proposed rule is concerning. Similar to the issues raised above, this proposed rule needs clear measures to best guide facilities on whether they are covered by the regulation. Allowing for petitions to the Regional Administrators to include a facility would open even more possibility of the rule being unevenly applied. Under this approach, two identical facilities may or may not be covered by the rule simply because an individual or group petitioned the Regional Administrator. Facilities should not be treated differently based on such factors. Similarly, communities at risk of a hazardous discharge should not depend on public petitions to ensure that facilities follow federal regulations. Instead, the rule should be codified in a clear and concise way, that makes facility owners and operators abundantly aware of their obligations without the fear of a petition changing those obligations.

EPA Has the Authority to Decide Not to Move Forward with a Rulemaking

Many of the statutory and regulatory programs that have been adopted in the 45 years since Congress enacted CWA § 311(j)(1)(C) already achieve the same ends as any potential new regulation meeting CWA § 311(j)(1)(C). In light of the existence and administration of these requirements, there is no reason to assume that Congress intended to require EPA to promulgate additional, standalone regulations citing the authority granted under section 311(j)(1)(C), when subsequent statutory and regulatory programs have accomplished Congress' original intent to plan ahead of a worst-case spill. It also is consistent with the directives of Executive Orders 12866, 13563, 13610, and 13777 for federal agencies to streamline regulations, consider alternatives to imposing new regulations, and identify for elimination "unnecessary" regulations. The undersigned organizations hope the EPA considers whether this rule is necessary based on risks and discharges that have occurred under existing programs and recognizes its authority to not move forward with a rulemaking. While the EPA

is required under a consent decree to take final action with this rule[1], the agency's final action can be a decision to not move forward with the rulemaking.

Lack of Clarity

As these comments have outlined, the undersigned organizations are alarmed by the large number of provisions in this proposed rule that are not fully formed and is concerned that proceeding directly to a final rule would violate the Administrative Procedure Act. Because there are so many questions and vaguely outlined proposed requirements, it will be impossible for the final rule to be consistent with and a logical outgrowth from the proposed rule, as so many terms and requirements will need to be defined and clarified. In addition, the definition of WOTUS is disputed making it impossible to know which facilities would actually meet the 0.5 mile proximity to navigable waterways until the definition is finalized. We urge the EPA to release a supplementary proposed rule with more clear guidance and definition if the agency decides to move towards promulgating a final rule.

Conclusion

The undersigned organizations appreciate the opportunity to provide input as the EPA develops new rules to ensure that each substantial threat of discharges of CWA hazardous substances to navigable waters are adequately planned for. It is in the best interest of industry members that such discharges do not occur, and if they do that they are appropriately planned for. We agree that CWA hazardous substances can be dangerous, personnel must be ready to act, and surrounding communities must be notified if a significant discharge does occur. We hope that as the EPA drafts its final rule it considers whether the rule requirements are actually needed for some or all of the industry sectors and hazardous substances that would be covered by the proposed rule and prioritizes creating requirements that can be easily understood, evenly enforced across facilities, and reasonably followed. Moreover, it is important that all requirements established in any final rule can reasonably prevent observed discharges, this has been absent in the proposed rule.

Member companies of the undersigned organizations pride themselves on the safety of their facilities and care deeply about their surrounding communities. Each year member companies invest in their facilities, employees, and business practices to ensure that unintended discharges don't happen, and if they do that there are mitigation measures and a plan in place. As referenced earlier, according to data provided in the proposed rule, only 52 discharges would have been covered by these new regulations over the past 10 years. This is because industry is already taking proper steps to ensure that discharges are rare and properly planned for. Creating a final rule that adds severe requirements with ambiguous language may result in facilities taking important resources away from proven mitigation and planning measures to ensure they follow these new requirements. Recognizing the local, state, and federal measures already in place to prevent discharges, the undersigned organizations encourage the EPA to reconsider the extensive new requirements in this proposal that will be extremely burdensome while providing minimal benefit. Still, if the EPA

[1] *Envtl. Justice Health All. for Chem. Reform* v. *EPA*, No. 1:19-cv-02516-VM, Document 32 (S.D.N.Y., filed March 12, 2020).

moves forward with new requirements, we urge the agency to release a supplementary proposed rule with clear definitions and metrics, that is easy to follow, and can be met with little economic burden.

Sincerely,

Agricultural Retailers Association

American Chemistry Council

American Exploration & Mining Association

Global Cold Chain Alliance

National Association of Chemical Distributors

National Mining Association

Industrial Minerals Association

International Liquid Terminals Association

The Chlorine Institute

The Fertilizer Institute

U.S. Chamber of Commerce