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EPA Finalizes New Facility Response Plan Requirements for Hazardous Substances

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On March 14, the EPA finalized a rule requiring an estimated 5,400+ industrial facilities to submit comprehensive response plans for certain worst-case chemical discharges into waterways during adverse conditions.¹

Background. The Clean Water Act (“CWA”) empowers the President to require that an owner or operator of a tank vessel or facility prepare and submit to the EPA “a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of [1] oil or [2] a hazardous substance.”² In 1994, EPA promulgated regulations for Facility Response Plans, training, and drills for worst-case discharges of oil.³ This new rule amends those regulations and adds to the body of CWA regulations by including worst-case discharges of “a hazardous substance” from onshore, non-transportation-related facilities.

Applicability. EPA’s final rule requires response plans to include hazard evaluation, personnel roles and responsibilities, response actions, drills, and exercises. It applies to facilities that meet screening criteria of (1) a maximum onsite quantity of “a hazardous substance” that is at least 1,000 times the Reportable Quantity,⁴ (2) location within a 0.5-mile radius of navigable water or conveyance to navigable water, and also meets one or more “substantial harm” criteria:

- Ability to cause injury to fish, wildlife, and sensitive environments.
- Ability to adversely impact a public water system.
- Ability to cause injury to public receptors.
- Has had a reportable discharge of a CWA hazardous substance above the Reportable Quantity within the last five years that reached navigable water.

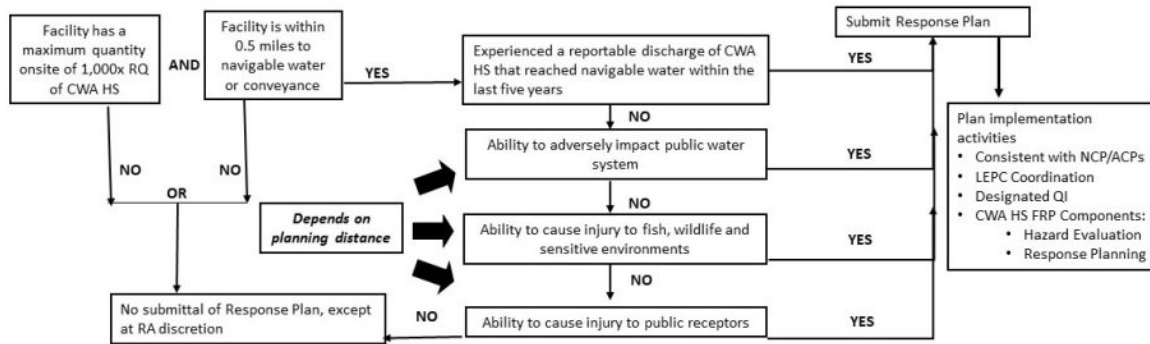
¹ 40 C.F.R. Part 118; 40 C.F.R. Part 300.

² 33 U.S.C. § 1321(j)(5).

³ 40 C.F.R. Part 112 Subpart D §§ 112.20-112.21.

⁴ See 40 C.F.R. Part 117.3 (including table of hazardous substance materials and their “RQ” in pounds and kilograms).

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If a facility does not contain a maximum quantity onsite that exceeds the threshold for its hazardous substance or is not within one-half mile of a navigable waters or a conveyance of the same, the owner or operator need not proceed further.⁶ But when a facility meets both prongs of the screening criteria, the owner or operator then must submit a Substantial Harm Certification Form to the EPA, including calculations and modeling supporting the determinations.⁷ If the facility meets at least one of the substantial harm criteria, the owner or operator must complete and submit a Facility Response Plan and a Substantial Harm Certification Form to the EPA that includes information on each CWA hazardous substance onsite above the threshold quantity.⁸

The final rule also provides a process for EPA Regional Administrators to assess facilities on a case-by-case basis and, if appropriate, to require a facility to develop a response plan based on considerations like potential impacts of a worst-case discharge on communities with environmental justice concerns.⁹

⁵ See *Clean Water Act Hazardous Substance Facility Response Plan Applicability*, U.S. Env't Prot. Agency, <https://www.epa.gov/hazardous-substance-spills-planning-regulations/clean-water-act-hazardous-substance-facility>.

⁶ *Clean Water Act Hazardous Substance Facility Response Plans*, 89 FR 21924, <https://www.federalregister.gov/documents/2024/03/28/2024-05870/clean-water-act-hazardous-substance-facility-response-plans>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* (“Under Executive Order 14096 [of April 26, 2023], “Revitalizing Our Nation’s Commitment to Environmental Justice for All” (which builds upon Executive Order 12898) 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.”).

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In support of the new rule, the EPA cited enhanced risks posed by climate change, including increased frequency and severity of extreme weather events. Facilities to which this rule applies must submit Facility Response Plans within 36 months of May 28. —the effective date of the final rule.¹⁰

¹⁰ *Id.* (“This final rule is effective on May 28, 2024.”) (“[A]ll covered facilities now have 36 months following the effective date to comply with the requirements in 40 CFR part 118.”).