

The EPA Administrator, Andrew R. Wheeler, signed the following final rule on 8/22/19, and EPA is submitting it for publication in the *Federal Register* (FR). EPA is providing this document solely for the convenience of interested parties and to seek informal public input. This document is not disseminated for purposes of EPA's Information Quality Guidelines and does not represent an Agency determination or policy. While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance or effectiveness. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's govinfo website (<https://www.govinfo.gov/app/collection/fr>) and on Regulations.gov (<https://www.regulations.gov>) in Docket No. EPA-HQ-OLEM-2018-0024. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

**6560-50-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 151**

**[EPA-HQ-OLEM-2018-0024; FRL-XXXX-XX-OLEM]**

**RIN 2050-AG87**

### **Clean Water Act Hazardous Substances Spill Prevention**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final action.

**SUMMARY:** The Environmental Protection Agency (EPA or the Agency) is not establishing at this time new requirements for hazardous substances under Clean Water Act (CWA) section 311. This section directs the President to establish procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges. The EPA has been delegated and/or redelegated authority for certain facilities as identified below. On July 21, 2015, a lawsuit was filed against the EPA for failing to comply with the alleged duty to issue regulations to prevent and contain CWA hazardous substance discharges under CWA section 311. On February 16, 2016, the United States District Court for the Southern District of New York entered a Consent Decree between the EPA and the litigants that required a notice of

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proposed rulemaking pertaining to the issuance of hazardous substance regulations, and a final action after notice and comment. After seeking public comment and based on an analysis of the frequency and impacts of reported CWA Hazardous Substances discharges, as well as the existing framework of EPA regulatory requirements, the Agency is not establishing at this time new discharge prevention and containment regulatory requirements under CWA section 311.

**DATES:** This final action is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-HQ-OLEM-2018-0024, “Clean Water Act Hazardous Substances Discharge Prevention Action.” All documents in the docket are listed on the <http://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Gregory Wilson, Office of Emergency Management, Mail Code 5104A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460, (202) 564-7989, [wilson.gregory@epa.gov](mailto:wilson.gregory@epa.gov).

**SUPPLEMENTARY INFORMATION:**

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## I. General Information

### A. Does this action apply to me?

A list of entities potentially subject to CWA section 311(j)(1)(C) requirements is provided in Table 1:

Table 1 - Potentially Affected Entities

Industry	NAICS
Wired and Wireless Telecommunications	51711, 51721
Oil and Gas Extraction	21111
Water Supply and Irrigation Systems	22131
Farm Supplies Merchant Wholesalers	42491
Electric Power Generation, Transmission and Distribution	2211
Support Activities for Crop Production	11511
Warehousing and Storage	4931
Food Manufacturing	311
Chemical Manufacturing	325
Other Merchant Wholesalers, Nondurable Goods	424
Mining and Quarrying	21
Utilities	22
Construction	23
Manufacturing	31-33
Wholesale and Retail Trade	42, 44-45
Transportation and Warehousing	48-49
Other	11, 51-56, 61-62, 71-72, 81, 92
NAICS = North American Industry Classification System.	

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This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities potentially subject to CWA section 311(j)(1)(C) requirements. This table lists the types of entities that EPA is now aware could potentially be regulated under CWA section 311(j)(1)(C). Other types of entities not listed in the table could also be regulated. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the FOR FURTHER INFORMATION CONTACT section.

*B. What action is the agency taking?*

The Agency is taking final action to not establish at this time new regulatory requirements under the CWA section 311(j)(1)(C) authority for CWA hazardous substance (HS) discharge prevention. Based on a review of the existing EPA programs in conjunction with the frequency and impacts of reported CWA HS discharges, the Agency believes the existing regulatory framework meets the requirements of CWA section 311(j)(1)(C) and is serving to prevent, contain and mitigate CWA HS discharges. This action is (1) in compliance with a consent decree addressing CWA section 311(j)(1)(C) and (2) based on public comment on the proposed EPA approach.

*C. What is the agency's authority for taking this action?*

This action is authorized by section 311(j)(1)(C) of the CWA.

*D. What are the incremental costs and benefits of this action?*

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Under the final action, which imposes no new requirements at this time, facilities will not incur any incremental costs. The Agency expects zero incremental change in CWA HS discharges and therefore, no benefits are realized under the final action. The full economic analysis can be found in the *Regulatory Impact Analysis - Clean Water Act Hazardous, Substances Spill Prevention Final Action* document, which is included in the public docket for this action.

## **II. Background**

### *A. Statutory authority and delegation of authority*

CWA section 311(j)(1)(C) directs the President to issue regulations establishing procedures, methods, and equipment, and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges.<sup>1</sup> The EPA has been delegated the authority to regulate non-transportation-related onshore facilities and offshore facilities landward of the coastline, under section 311(j)(1)(C).<sup>2</sup>

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<sup>1</sup> 33 U.S.C. 1321(j)(1)(C).

<sup>2</sup> Under Executive Order 12777 (56 FR 54757, October 22, 1991), the President delegated various responsibilities identified in section 311(j) of the CWA, including the responsibility to regulate non-transportation related onshore facilities to EPA, and the responsibility to regulate non-transportation-related offshore facilities landward of the coast line to the Department of the Interior (DOI). DOI has redelegated the authority to regulate non-transportation-related offshore facilities landward of the coast line to EPA through a Memorandum of Understanding (MOU), effective February 3, 1994, between DOI, the U.S. Department of Transportation (DOT), and

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### *B. Legislative background*

The term “hazardous substance” is defined in CWA section 311(a)(14).

Section 311(b)(2)(A) authorizes regulations designating hazardous substances, which when discharged in any quantity into waters subject to CWA jurisdiction,<sup>3</sup> present an imminent and substantial danger to public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

Once a chemical (i.e., “element and compound”) is designated as a CWA HS, as described in Section II.C, the corresponding quantity is established by regulation under the authority of CWA section 311(b)(4).<sup>4</sup> Section 311 of the CWA prohibits discharges of CWA HS

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EPA (see 40 CFR part 112, Appendix B). An MOU DOT and EPA (36 FR 24080, November 24, 1971) established the definitions of transportation- and non-transportation-related facilities for the purposes of Executive Order 11548 (see 40 CFR part 112, Appendix A).

<sup>3</sup> CWA 311(b)(3) provides that the discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act (43 USC § 1331 et seq.) or the Deepwater Port Act of 1974 (33 USC § 1501 et seq.); or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States [including resources under the Magnuson-Stevens Fishery Conservation and Management Act (16 USC § 1801 et seq.)], in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act), where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and (B) where permitted in such quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful.

<sup>4</sup> CWA section 311(b)(4) provides for the President to, by regulation, determine for the purposes of this section, those quantities of oil and any hazardous substances, the discharge of which may be harmful to the public health

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in quantities that may be harmful in section 311(b)(3), except where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful.

### *C. Regulatory background*

In March 1978, EPA designated a list of CWA HS in 40 CFR part 116. EPA established reportable quantities for those substances in 40 CFR part 117 in August 1979 (see, for example, 43 FR 10474, March 13, 1978; 44 FR 50766, August 29, 1979). In September 1978, EPA proposed to establish requirements for Spill Prevention, Control, and Countermeasure (SPCC) Plans to prevent and contain CWA HS discharges from facilities subject to permitting requirements under the National Pollution Discharge Elimination System (NPDES) program of the CWA (43 FR 39276, September 1, 1978). The Agency proposed to require owners and operators to develop CWA HS SPCC Plans that included, among other things, general requirements for appropriate containment, drainage control and/or diversionary structures; and specific requirements for the proper storage of liquids and raw materials, preventive maintenance and housekeeping, facility security, and training for employees and contractors. The EPA did not

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or welfare or the environment of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.



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finalize that proposed CWA HS SPCC regulation. There is no information in the record to explain the reason(s) the 1978 proposal was not finalized.

#### *D. Litigation background*

On July 21, 2015, the Environmental Justice Health Alliance for Chemical Policy Reform, People Concerned About Chemical Safety, and the Natural Resources Defense Council filed a lawsuit<sup>5</sup> against EPA for failing to comply with the alleged duty to issue regulations to prevent and contain CWA HS discharges originating from non-transportation-related onshore facilities, including aboveground storage tanks, under CWA section 311(j)(1)(C).

On February 16, 2016, the United States District Court for the Southern District of New York entered a Consent Decree between EPA and the litigants establishing a schedule under which EPA is to sign “a notice of proposed rulemaking pertaining to the issuance of the Hazardous Substance Regulations” and take final action after notice and comment on said notice of proposed rulemaking.<sup>6</sup>

#### *E. Additional information collection*

The Agency’s initial data gathering efforts to support this action focused on assessing the scope of historical CWA HS discharges, identifying relevant industry practices, and identifying

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<sup>5</sup> Complaint for Declaratory and Injunctive Relief, *Environmental Justice Health Alliance from Chemical Policy Reform v. EPA*, 15-cv-5705 (Southern District of New York (S.D.N.Y.) July 21, 2015).

<sup>6</sup> *Env'tl. Justice Health All. for Chem. Reform v. U.S. EPA*, No. 15-cv-05075, ECF No. 46 (S.D.N.Y. Feb. 16, 2016).



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regulatory requirements related to preventing and containing CWA HS discharges. The EPA also used available data to estimate the universe of potentially regulated entities subject to this action. To supplement this data, the EPA developed a voluntary survey for states, territories and tribes, focused on collecting information on the universe of potentially-regulated facilities' CWA HS discharges over a 10-year period.

On June 22, 2018, EPA issued the voluntary survey directed at State and Tribal Emergency Response Coordinators (respondents with custodial responsibility for data representing the potentially affected “facility universe” that produce, store, or use CWA HS), as well as state, tribal, and territorial government agencies with custodial responsibility for data on CWA HS impacts to drinking water utilities and fish kills potentially caused by discharge(s) of CWA HS. The EPA received relevant responses from 15 states: Alabama, California, Delaware, Hawaii, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, Oregon, Rhode Island, and Texas. A full analysis of the voluntary survey data can be found in Appendix B of the RIA, included in the docket for this action.

The Agency made the voluntary survey data available in regulations.gov at Docket ID: EPA-HQ-OLEM-2017-0444, provided notice of its availability on the EPA website for this action, and provided direct notice to the litigants in the S.D.N.Y. litigation that the data was

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available. Additionally, the EPA published a Notice of Data Availability (NODA)<sup>7</sup> making the survey data received available for public review and comment. The Agency considered the supplemental data received in response to the survey, and the related public comments, to further inform this final action.

### **III. This Action**

The EPA is finalizing this action as proposed, establishing no new regulatory requirements under the authority of CWA section 311(j)(1)(C) at this time. In making this determination, the Agency analyzed data on both the frequency and reported impacts of identified CWA HS discharges, and supplemented this analysis with information received in response to the voluntary survey. Additionally, the EPA identified an analytical framework of program elements that include prevention, containment, and mitigation provisions commonly found in regulatory programs for discharge and accident prevention.

Based on the reported frequency and impacts of identified CWA HS discharges, and on an evaluation of the existing framework of EPA discharge, containment and accident prevention regulatory requirements, the Agency has determined that, at this time, this existing framework adequately serves to prevent and contain CWA HS discharges. While recognizing there may be

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<sup>7</sup> Clean Water Act Hazardous Substances Spill Prevention Proposed Action Under Clean Water Act Section 311(j)(1)(C); Notification of Data Availability—Responses to 2018 Clean Water Act Hazardous Substances Survey (OMB Control No. 2050–0220); 84 FR 4741, February 19, 2019.

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other applicable regulations and standards relevant and of value in preventing and containing CWA HS discharges, the Agency ultimately focused on programs within, and regulations promulgated under, its authorities, and for which the requirements more directly address the key prevention, containment and mitigation program elements identified. In general, the Agency recognizes that other federal programs, as well as other state programs and industry standards, may also be effective in preventing and containing CWA HS discharges.

This Section highlights comments received on the proposed approach to this action and summarizes Agency responses to those comments. While discussion in preamble and supporting documents for this action reflect comments received characterizing various regulatory programs, the Agency notes that specific requirements and applicability for all cited prevention programs are contained in the relevant statutes and regulations. For a full discussion of the comments received and of Agency responses, see *Comment and Response Document - Clean Water Act Hazardous Substances Spill Prevention Final Action*, available in the docket for this action.

#### *A. General Comments*

The EPA proposed to establish at this time no new regulatory requirements under the authority of CWA section 311(j)(1)(C). This determination was based on an analysis of identified CWA HS discharges, and an evaluation of the existing framework of EPA regulatory requirements relevant to preventing and containing CWA HS discharges.

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Several commenters supported EPA's proposed determination not to issue new regulatory requirements under CWA section 311(j)(1)(C), agreeing that existing federal and state agency programs, and other industry standards are effective in preventing discharges of CWA HS to waters subject to CWA jurisdiction. Several commenters supported the key prevention program elements the Agency identified to analyze the existing framework of regulations that serve to prevent and contain CWA HS discharges. Several commenters also stated new requirements would conflict with existing regulations, create redundancy, and would have "minimal incremental value." Several commenters stated compliance with regulatory programs is not 100 percent, with new provisions not preventing discharges because of regulatory programs violations irrespective of regulation, and that requiring all facilities to protect from worst-case events would likely be expensive or not technically feasible. Several commenters agreed the Agency has discretion to interpret CWA section 311(j)(1)(C) as having already been satisfied by existing EPA regulations.

The Agency agrees with comments supporting this action that new regulatory requirements at this time would have minimal incremental value. The EPA based its determination on an analysis of the frequency and impacts of reported CWA HS discharges to waters subject to CWA jurisdiction and on an evaluation of the existing framework of EPA regulatory requirements relevant to prevention and containment of CWA HS discharges. While

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this action is based on the existing EPA regulatory framework, the Agency agrees there are other federal and state agency programs and other industry standards that may be effective in preventing and containing discharges of CWA HS. Further, EPA has the discretion to determine that CWA section 311(j)(1)(C) has been satisfied by existing EPA regulations issued since 1972. The EPA is taking this final action in compliance with the Consent Decree. Finally, nothing in this action precludes future EPA regulatory actions under CWA section 311(j)(1)(C).

In contrast, some commenters opposed the approach of establishing no new regulatory requirements under CWA section 311(j)(1)(C) at this time. Some commenters asserted CWA section 311(j)(1)(C) explicitly requires EPA to issue hazardous-substance spill-prevention regulations for non-transportation-related onshore facilities, and that EPA lacks the authority to ignore a statutory mandate. Additionally, commenters stated the regulatory analysis for the proposed approach failed to adequately show how existing programs/regulations serve to functionally provide the spill-prevention protections mandated in the CWA, asserting that the supporting cost/benefit analyses provided insufficient justification. One commenter stated that the existing framework of the EPA regulatory requirements fails to prevent toxic spills as demonstrated by the recent chemical spill into West Virginia's Elk River, stating that existing federal regulations would not prevent that exact scenario. One commenter stated EPA's proposal to take no action is inappropriate and would leave water bodies, drinking water sources, and

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communities at risk. Another commenter stated the EPA should perform a second regulatory analysis to determine gaps where the current regulations lack protection that may have led to the identified discharges, and how the current regulations could be improved to prevent future spills.

Further, one commenter stated that the EPA lacks critical information on the universe of potentially regulated facilities (e.g., location, chemicals stored, current spill-prevention measures), without which the central claim for this action cannot be reasonably evaluated or supported. Another commenter questioned why the Agency did not wait for the voluntary survey results before issuing the proposed action, further stating that existing regulatory programs lack useful prevention or preparedness guidance for industry or communities to follow. The commenter offered that instead, the EPA should build upon the framework of the spill-prevention rules it has already issued under section 311(j)(1)(C) for oil.

Finally, several commenters recommended establishing new prevention measures specific to safeguard drinking water from threats, including information sharing and timely notification with downstream utilities to plan for and respond to potential hazards. One commenter stated that, lacking a federal mandate, there is no guarantee that hazardous substance spills will not occur, with another commenter stating that federal minimum requirements must be sufficient to facilitate additional protections at the regional level and particularly for tribal lands.

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The Agency disagrees with commenters stating that the existing EPA regulatory framework fails to provide the spill-prevention protections mandated under the CWA. In the 40 years since CWA section 311(j)(1)(C) was enacted by Congress, multiple statutory and regulatory requirements have been established under different Federal authorities which serve, both directly and indirectly, to prevent and contain CWA HS discharges. While the Agency has the authority to regulate CWA HS under CWA section 311(j)(1)(C), it has determined that at this time CWA 311(j)(1)(C) has been satisfied as to CWA HS by the existing EPA regulatory framework. It is important to note that this action is not guided by a cost-benefit analysis. Rather, the action is based on the determination that further regulation would provide only minimal incremental value. The EPA has based its determination on an analysis of the frequency and impacts of reported CWA HS discharges to waters subject to CWA jurisdiction, and on its evaluation of the existing framework of EPA regulatory requirements relevant to prevention and containment of CWA HS discharges. The Agency also disagrees that there are no federal regulations currently in place to prevent discharges similar to past scenarios and that this final action leaves water bodies, drinking water sources, and communities at risk. The Agency believes its analyses support the conclusion that the existing framework of requirements identified within EPA's regulatory programs serves to address key prevention elements. The



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Agency further points to its review of discharge history, which identified discharges that would not have been prevented regardless of applicable regulatory requirements already in place.

Regarding the voluntary survey, the Agency's original intent was to collect information on current prevention practices and other facility specific information that would inform the selection of prevention program elements for the proposed action (e.g., storage capacity, types of storage equipment). However, as survey development progressed, EPA revised the survey's focus to instead inform the estimate of the universe of potentially-subject facilities and of the impacts associated with the 10-year CWA HS discharge data. This change in approach to the survey, in conjunction with the court ordered deadline to issue a proposed action, did not allow the Agency to await the survey results before publishing the proposed action. The Agency has considered the data received through the voluntary survey when revising its regulatory analysis to further inform this final action.

The Agency disagrees with the comment that without a federally mandated regulation there would be no guarantee that hazardous substance spills will not occur. The existing framework of regulatory requirements upon which this final action is based provides the federal baseline for EPA programs relative to the prevention and containment CWA HS discharges. Additionally, there are other federal programs under statutes administered by other Agencies and Departments that also add to the current federal baseline of existing regulatory requirements, all

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of which provide discharge protections applicable to states, including tribal lands. The EPA recognizes the concerns regarding threats to drinking water systems. To this end, the Agency notes that, in addition to the regulatory structure already identified herein, recent statutory amendments to the Emergency Planning and Community Right-To-Know (EPCRA) focus on notifications to State drinking water primacy agencies, as well as on providing community water systems with hazardous chemical inventory data.<sup>8</sup>

Again, while this final action is based on the existing EPA regulatory framework, the Agency recognizes there are, in addition to other federal programs, state agency programs and other industry standards that may be effective in preventing discharges of CWA HS. Finally, nothing in this action precludes future EPA regulatory actions under CWA section 311(j)(1)(C).

#### *B. Comments on CWA HS Discharge History and Impacts Analysis*

##### *1. Analytic approach to frequency of CWA HS discharges*

For the proposed action, the Agency analyzed CWA HS discharges reported to the National Response Center (NRC) over a 10-year period to estimate the frequency of discharges.

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<sup>8</sup> The EPA has published a factsheet on its website providing information on America's Water Infrastructure Act of 2018 (Public Law No: 115-270) amendments for State Emergency Response Commissions (SERCs), Tribal Emergency Response Commissions (TERCs), and Local Emergency Planning Committees (LEPCs). [https://www.epa.gov/sites/production/files/2019-04/documents/awia\\_epcra\\_fact\\_sheet\\_draft\\_508\\_serf\\_terc\\_lepc\\_final\\_4-10-19.pdf](https://www.epa.gov/sites/production/files/2019-04/documents/awia_epcra_fact_sheet_draft_508_serf_terc_lepc_final_4-10-19.pdf)

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Specifically, for the period of 2007-2016, the EPA identified 2,491 NRC reports (less than one percent of all reports to the NRC for that period) as CWA HS discharges originating from non-transportation-related sources, with 117 of those non-transportation-related discharges having reported impacts<sup>9</sup>.

Several commenters supported the Agency's analysis of CWA HS discharges, and agreed with the Agency's conclusion that, given the relatively small number of discharges and reported impacts, the framework of existing EPA regulations adequately serves to prevent, contain and mitigate CWA HS discharges. Three commenters specifically supported the use of NRC data as likely the best readily available source of relevant information. Some commenters noted the Agency's analysis that less than one percent of releases originated from non-transportation sources, with only a fraction of those originating from non-transportation sources resulting in impacts. Some commenters also stated that unreported spills would not come from the already highly regulated facilities that would likely be subject to any new spill prevention program, but rather would result from illegal dumping or other unknown causes; these commenters stated that additional SPCC-type regulations would not address such discharges. One commenter stated that while the impacts for some discharges over the 10-year period may have been significant, they

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<sup>9</sup> The causes of the 117 CWA HS identified discharges with reported impacts are: 74 as Unknow/Illegal Dumping/Other; 17 as Equipment Failure; 4 as Natural Phenomena; 10 as Operator Error; 12 as Fire/Explosion. See Table 7 of the proposed action at 83 FR 29517, June 25, 2018.

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are a small number on which to justify a major new federal regulatory framework. Yet another commenter asserted that new requirements for onshore facilities would have little environmental benefit, but would create significant costs, given the limited number of hazardous substance spills to waters.

The Agency agrees that the frequency and reported impacts of CWA HS discharges identified, and as supplemented by the voluntary survey data, does not support issuing new regulatory requirements under the authority of CWA section 311(j)(1)(C) at this time. However, discharge history does serve as the basis for determining applicability of certain requirements within existing EPA regulations. While this final action does not establish any new requirements, the Agency reiterates that the CWA prohibits discharges of CWA HS in quantities that may be harmful, with exceptions only where otherwise permitted or under such circumstances or conditions as the President may, by regulation, determine not to be harmful, irrespective of whether facilities are subject to hazardous substance spill prevention regulations.

Alternatively, several commenters opposed the approach used by EPA to identify CWA HS discharges to water, with one commenter stating that underreporting to the NRC is more likely than over-reporting, thereby resulting in an incomplete and unreliable data set. The commenter further stated the EPA exacerbated NRC data limitations by only focusing on CWA HS spills reported to reach waterways with reported impacts. Additionally, this commenter

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expressed concern that CWA HS discharges resulting from natural phenomena are likely to increase in frequency in the future (e.g., hurricane activity).

One commenter stated that EPA's approach of looking at retrospective data to predict the future is "a fraught endeavor" that does not quantify that risk. The commenter suggested that the most relevant data for the Agency to consider would be CWA HS spills with potential to reach water, rather than those reported to reach water with impacts. The commenter stated the EPA did not consider the proximity of facilities to water and that the Agency rejected comments on the proposed Information Collection Requests supporting this approach. Further, another commenter stated that without confirming NRC data, the Agency cannot "provide a conclusive picture of the amount, causes, or ultimate impact of a hazardous substance release."

The Agency recognizes the limitations of the NRC database. As noted in the FR Notice for the proposed action, the NRC database is based on notifications of CWA HS discharges and thus, is dependent on the reporting individual(s) for completeness and accuracy of the information provided. NRC reports are generally received and documented immediately following an incident, often before a facility has accurate and complete information about the discharge. There is no requirement to update the information reported to the NRC; sometimes, the information available in the database includes inaccuracies regarding the substance reported, the quantity reported, the source, and the nature or impacts of the discharge, among other

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elements of the report. Further, some discharges may not be reported to the NRC, or the NRC may be notified of discharges that do not equal or exceed the reportable quantity.

Despite these limitations, the Agency looked to the NRC database as the best readily available source of relevant information on CWA HS discharges in the United States. Further, the Agency disagrees that discharges are necessarily more likely to be underreported than overreported. The EPA has no information to assess or characterize the uncertainty associated with information reported to the NRC, the extent of under-reporting (failure to report a discharge), or the extent of overreporting (discharges reported that are not subject to notification requirements). While EPA recognizes that past discharge history does not necessarily predict future discharges, the Agency believes the NRC data can provide insight into the extent of CWA HS discharge for the purposes of establishing the need for new regulatory requirements.

The EPA considered both CWA HS reported discharges with the potential to reach waters as well as CWA HS discharges reported to have reached water. The analysis identified 9,416 reports of CWA HS discharges out of all NRC reports received (3.3 percent) for the period of 2007 to 2016. Of these CWA HS discharge reports, the Agency further refined the analysis by identifying 3,140 discharges reported to have reached water. Within that universe, 2,491 (less than one percent of the reports) were identified as CWA HS discharges identified from non-transportation-related sources. Each refined data set informed the proposed action.

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The Agency could not identify an appropriate method to quantify those facilities that would not have the potential to discharge to waters subject to CWA jurisdiction for this final action. Further, the EPA took a conservative approach and assumed that any CWA HS facility, regardless of its proximity to waters subject to CWA jurisdiction, would have the potential to discharge CWA HS to such waters. Finally, the Agency disagrees that it did not try to confirm NRC data for the amounts, causes, or ultimate impacts of reported hazardous substance releases. Part of the Agency's purpose in analyzing the data received from the voluntary survey was to identify new, potentially relevant discharges and impacts that could not be matched to those identified from the NRC data in the proposed action.

## *2. Analytic approach to quantifying impacts of CWA HS discharges*

The EPA analyzed the NRC data to examine how many of the CWA HS discharges to waters from non-transportation-related facilities had reported impacts. The Agency supplemented its analysis of this NRC impact data with reported impact data for identified CWA HS discharges from the National Toxic Substance Incidents Program (NTSIP).<sup>10</sup> Impacts

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<sup>10</sup> The Agency for Toxic Substances and Disease Registry's NTSIP collects and combines information from many resources to protect people from harm caused by spills and leaks of toxic substances. NTSIP gathers information about harmful spills into a central place. People can use NTSIP information to help prevent or reduce the harm caused by toxic substance incidents. NTSIP can also help experts when a release does occur. See <https://www.atsdr.cdc.gov/ntsip/> for additional information.



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reported to NRC and NTSIP include evacuations, injuries, hospitalizations, fatalities, waterway closures, and water supply contamination. The analysis for the proposed action showed that, out of the 2,491 identified CWA HS discharges reports from non-transportation-related sources to water, 117 included one or more of these impacts over the 10-year period analyzed.

A commenter stated a new rule to address the small number of hazardous substances spills to waters would have significant costs but little environmental benefit, with another pointing to the small number of identified discharge reports on which to justify a major new federal regulatory framework. One commenter expressed concerns that the monetized damages still overestimated the direct costs associated with the discharges. The commenter supports reliance on other federal statutes and regulatory programs as the appropriate mechanisms to address other types of damages associated with chemical releases. The commenter further argues that damages are most accurately assessed in the analysis for this final action by limiting evaluation to direct impacts of CWA HS discharges. A commenter asserted that a chemical release reaching water does not necessarily mean that chemical caused other site impacts, including explosions, fires, and air and water quality issues. Further, the commenter pointed out that it is not clear whether some identified impacts, such as sheltering in place and fatalities, are directly caused by the hazardous substances reaching water; the commenter also questioned whether the EPA evaluated whether the impacts were directly caused by the CWA HS discharge.

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The commenter added that the 2014 fatality included in the Regulatory Impacts Analysis (RIA) for the proposed action appeared to have been caused by incidents unrelated to the discharge of a hazardous substance to water and stated that it is likely that the two other fatalities included in the Regulatory Impacts Analysis (RIA) for the proposed action were not directly caused by CWA HS reaching CWA jurisdictional water. This commenter suggested that it would be more appropriate for the fatality EPA included in its assessment of impacts in 2014 to be considered in an evaluation of chemical accidents subject to Occupational Safety and Health Administration (OSHA) or EPA Risk Management Program (RMP) regulations.

Further, the commenter raised the concern that the three fatalities EPA included in its analysis account for over 90 percent of the total monetized damages from hazardous substance discharges to water. The commenter noted that eliminating one of the three included fatalities from the analysis would decrease the monetized damages in the RIA by approximately one-third and urged the EPA to perform the type of cursory evaluation used in the review of the remaining impact data. Finally, a commenter stated that SPCC-type regulations would not address 74 incidents out of the 117 that were identified, given that the incidents resulted from illegal dumping or other unknown causes.

The Agency recognizes commenters' support for EPA's analysis, with several reiterating the findings of 117 CWA HS identified discharges with reported impacts such as evacuations,

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injuries, waterway closures, and water supply contamination. The Agency analyzed the NRC data to examine how many of the CWA HS discharges to water originating from non-transportation-related facilities had reported impacts. This information was supplemented with reported impact data for identified CWA HS discharges from the NTSIP. Impacts reported to NRC and NTSIP include evacuations, injuries, hospitalizations, sheltering in place, fatalities, waterway closures, and water supply contamination. The EPA recognizes that the reported impacts in the proposed action do not necessarily represent the only impacts arising from those discharges. The EPA also agrees with the commenters that the fatalities reported to the NRC database may not be the direct result of CWA HS discharges to water. For the final action, EPA supplemented the reported impacts data with additional information (e.g., fish kill events) from the voluntary survey. The Agency's analysis is further discussed in Section III.E below.

Alternatively, two commenters opposed the approach EPA used to quantify impacts of CWA HS discharges. One commenter took issue with the analysis, given that NRC and NTSIP do not require comprehensive reporting of impacts, and stated the analysis did not account for under-reporting. One commenter stated the Agency did not address significant health risks from exposure to hazardous substances. The commenter cited Agency for Toxic Substances and Disease Registry's (ATSDR, an agency of the U.S. Department of Health and Human Services) information for some of the most commonly spilled hazardous substances, and further asserted

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the EPA ignored health risks in favor of a numerical analysis based on incomplete and unreliable data.

Associated with comments on impacts, some commenters stated that there are disparate impacts on communities of color and low-income communities resulting from hazardous substance discharges, and that comprehensive regulation would provide critical protections for communities. Commenters further stated that EPA's no action approach maintains existing environmental injustices associated with CWA HS discharges. These comments are further discussed in Section III.H.2 of this FR notice. Parallel to those comments, some commenters recommended the EPA continue gathering States and Tribal information, stating concerns that this final action and the economic analysis fail to consider the potential environmental and treaty rights impacts to the rights of Indian Tribal Governments. These impacts include the potential impacts to Indian Tribal Governments, sheltering in place, waterway closures, water supply contamination, environmental impacts, lost productivity, emergency response costs, transaction costs, and property value impacts not reflected in NRC data. Further discussion on these comments are found in Section III.H.2 of this FR notice.

The Agency recognizes NRC reports are generally received immediately following an incident, often before a facility has accurate and complete information about the discharge. There is no requirement to update the information reported to the NRC; sometimes, the information

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available in the database includes inaccuracies regarding, among others, the substance reported, the quantity reported, the source, and the nature or impacts of the discharge. Further, some discharges may not be reported to the NRC, or the NRC may be notified of discharges that do not meet or exceed the reportable quantity. The EPA has no information to assess or characterize the uncertainty associated with information reported to the NRC, the extent of under-reporting (failure to report a discharge), or the extent of over-reporting (discharges reported that are not subject to notification requirements). As noted in the RIA, monetized historical impacts are also not necessarily direct consequences of CWA HS discharges to water. Based on the descriptions provided to the NRC on the monetized fatalities, EPA cannot confirm that the fatalities were the direct result of a CWA HS discharge to water; however, EPA erred on the conservative side and included these impacts as historical damages. Further comments on impacts and economic analysis are found below in Section III.H.1 of this FR notice; discussion on the regulatory impacts is found in Section IV of this FR notice.

The EPA also noted in the proposed action that there may be additional impacts (i.e., beyond evacuations, injuries, hospitalizations, fatalities, waterway closures, and water supply contamination) from the universe of CWA HS discharges to water originating from non-transportation-related facilities, which were not reported to the NRC or the NTSIP and thus, could not be quantified in this analysis. These may include the loss of productivity due to a

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facility or process unit shutting down because of a discharge, emergency response and restoration costs, transaction costs such as the cost of resulting litigation, damages to water quality, fish kills, or impacts to property values due to changes in perceived risk or reduced ecological services. For the proposed action, the EPA was not able to identify sources of data to quantify these impacts, other than the cited data from NRC or NTSIP and some limited information about fish kills that is made publicly available by a few states. However, EPA updated the discharge history and reported impacts in the proposed action with additional information the Agency received from the voluntary survey and from publicly available state data, further discussed in Section III. E of this FR notice.

Finally, relative to health risks from exposure to hazardous substances, the proposed action noted that the list of CWA HS and/or the criteria for listing or distinguishing hazards between CWA HS is outside the scope of this final action; that authority is provided in CWA section 311(b)(2)(A). Similarly, differentiating requirements based on listing and hazard considerations is also outside the scope of this final action.

### *3. Alternative approaches and supplemental information to refine impacts estimates*

The Agency requested comment on additional data sources, information, and approaches that allow it to further revise or refine the estimated impacts of CWA HS discharges from non-transportation-related sources, nationally.

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Several commenters provided data or suggestions for further analysis of discharge data, with one industry group searching the NRC database to identify relevant discharges from member facilities for the years 2010-2016 and contrasting the results with company-specific data; for the period reviewed the industry group stated that there were 18 relevant discharges from their member facilities, arguing this provides strong evidence there are sufficient existing requirements.

Some commenters provided additional information to support an analysis of the cost of water supply, noting Federal Emergency Management Agency's (FEMA) valuation for disruption of water service, and citing an analysis of the Charleston, WV incident that affected 300,000 residents and business due its impact on the community's drinking water supply. One commenter stated the Agency's cost-benefit analyses did not adequately account for potential drinking water utilities impacts, and that water supply contamination can be a major cost to communities (e.g., potential public health consequences for downstream utility intakes economic losses from cessation of potable water production and sewerage service interruption; impacts in distribution systems; cost of developing new raw water source if remediation is not possible; utility advisory outreach), requesting the EPA include these types of monetary costs in its assessment. Further, the commenter asked the EPA to provide information on regulatory gaps that allowed these instances of water contamination.



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Finally, a commenter noted the EPA and the states need to continually improve risk assessment, planning, and implementation to protect populations in high-risk areas that experience greater exposure and disease burdens. The commenter stated the NRC data are unreliable and urged the EPA to develop more robust and credible data before weighing costs and benefits of alternatives to a no action determination.

The Agency acknowledges that some commenters performed a search of the NRC database for their specific industry group and concluded that the small number of discharges identified for their specific industry group suggests that existing requirements are sufficient. For its proposed action, the EPA considered CWA HS discharges with the potential to reach water as well as CWA HS discharges reported to have reached water. The analysis identified 9,416 reports of CWA HS discharges (3.3 percent of the total received) for the period of 2007 to 2016. Of these CWA HS discharge reports, the Agency further refined the analysis by identifying 3,140 reports that were reported to have reached water (see discussion below on NRC data limitations). Within that universe, 2,491 (less than one percent of the reports) were identified as CWA HS discharges reported to have originated from non-transportation-related sources. Each refined data set informed the proposed action; the Agency has supplemented that analysis with the data and information received from the voluntary survey in support of this final action, further discussed in Section III. E of this FR notice.

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As noted in the FR notice for the proposed action, the Agency looked to the NRC database as the best readily available source of information on CWA HS discharges in the United States. The EPA also notes that some commenters agreed that the NRC data is likely the best readily available source of relevant information. In addition, EPA also developed a voluntary survey to collect information from states, tribes and territories focused on the universe of potentially regulated facilities and on CWA HS discharges. Again, the use of relevant survey responses to further inform this final action is further discussed in Section III. E.

#### 4. *Most-Frequently Discharged CWA HS*

The Agency analyzed the NRC reporting data to identify those CWA HS most frequently discharged. Of the currently designated CWA HS,<sup>11</sup> 13 accounted for 90 percent of all identified CWA HS discharges to water originating from non-transportation-related facilities, while accounting for 80 percent of the 117 identified CWA HS discharged with reported impacts.

Commenters generally supported the Agency's examination of most frequently discharged CWA HS, with one commenter highlighting that less than one percent of the identified discharges originated from non-transportation sources. Another commenter specifically noted members of its organization use, handle, or store three of the top 13 CWA HS, with most spills captured in the NRC with no reported impacts.

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<sup>11</sup> At 40 CFR part 116

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The EPA acknowledges commenters supporting the analysis to identify the most frequently discharged CWA HS. To be conservative in its analysis, the Agency focused on those discharges that impacted water, with no additional determination of whether the waters impacted were subject to CWA jurisdiction. The Agency could not identify an appropriate method to quantify those facilities that would not have the potential to discharge to waters subject to CWA jurisdiction for this final action.

#### 5. *NRC data limitations and alternatives*

The Agency recognized the limitations of using the NRC database as its source of information on CWA HS discharges in the United States in support of the proposed action. The NRC database is dependent on reporting individuals for comprehensiveness and accuracy of information provided. In addition, EPA has no information to assess the uncertainty associated with NRC information, including the extent of under-reporting, or the extent of over-reporting. In addition, there may be additional impacts beyond those reported to the NRC that could not be quantified by EPA.

Several commenters supported EPA's use of NRC data as being the best readily available source of relevant information. One commenter noted that while facilities are required to report almost immediately, failure to report is subject to potential penalties, resulting in conservative reporting of regulated discharges. The commenter stated that members of this commenter's

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organization compared their records to NRC data, revealing few discrepancies and a tendency toward over-reporting. The Agency acknowledges the support for the use of the NRC database to inform this action and notes that discharge notification requirements are outside the scope of this final action.<sup>12</sup>

In contrast, several commenters highlighted limitations to the NRC data, with one stating that the identified CWA HS discharges used in support of the proposed action is under-inclusive and provides limited impacts information given it relies on self-reporting. Another commenter noted the EPA has previously used stronger language to describe underreporting limitations, with statements to the data representing the minimum number of spills. Additionally, the commenter stated, reports are received immediately after an incident, with no update requirement, and may not accurately convey the nature and extent of the discharge, including the substance reported, the quantity reported, the source, and the nature or impacts. Some commenters stated the NRC data may provide a snapshot of how often, where, and when hazardous substances are released, but lacking confirmation, it cannot provide a conclusive picture of the amount, causes, or ultimate impact of a hazardous substance release. One commenter also expressed concerns the NRC data may misrepresent the nature of discharges and suggested further analysis to ensure

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<sup>12</sup> Under CWA section 311 regulations, the notice of a discharge of a reportable quantity requirement for CWA HS is found at 40 CFR 117.21, and the liabilities for removal requirement at 40 CFR 117.23.

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that reportable quantities were exceeded, releases were to jurisdictional waters, and to clarify any over- or under-reporting during the initial report.

The EPA has no information to assess or characterize the uncertainty associated with information reported to the NRC, the extent of under-reporting (e.g., failure to report a discharge), or the extent of over-reporting (e.g., discharges reported that are not subject to notification requirements). The Agency's analysis focused on those discharges that impacted water, but no additional determination was conducted to determine whether the waters impacted were subject to CWA jurisdiction. EPA could not identify an appropriate method to quantify those facilities that would not have the potential to discharge to jurisdictional waters for this final action.

However, recognizing these limitations, the Agency looked to the NRC database as the best readily available source of information on CWA HS discharges in the United States. The Agency notes that, for example, 40 CFR 117.21 requires immediate notification of discharge of a reportable quantity of a CWA HS by any person in charge of a vessel or an onshore or an offshore facility as soon as he or she has knowledge of any discharge of a designated hazardous substance. Additionally, the EPA also developed a voluntary survey directed at states, tribes and territories to collect information on the universe of potentially regulated facilities and on CWA HS discharges. The Agency supplemented the proposed action analysis with data and

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information from relevant survey responses to further inform the final action. The analyses of the data received from the voluntary survey is further discussed in Section III. E of this FR notice.

### *C. Comments on Affected Universe Analysis*

#### *1. Analytic approach to determine affected universe*

For the proposed action, the Agency used EPCRA Tier II information to estimate the universe of potentially affected facilities by identifying those with CWA HS onsite. The EPA reviewed Tier II reports submitted for 2014, 2015, or 2017 (the latest available) in 16 states and extrapolated the data nationwide based on NAICS codes and U.S. Census data. The Agency noted data limitations, including the wide range of trade names used for many chemicals and chemical mixtures, as well as the applicability thresholds established in 40 CFR 370.10, which then references the Threshold Planning Quantities for Extremely Hazardous Substances listed in 40 CFR 355, Appendix A and B for EPCRA Tier II reporting. The analysis assumed the fraction of facilities in each NAICS sector with CWA HS facilities is the same across all states and extrapolated accordingly.

One commenter claimed that using Tier II data would underestimate facilities potentially subject to hazardous substance spill prevention regulation, stating that EPA has not attempted to determine the number of facilities that would be subject to hazardous substance spill prevention regulations under CWA section 311(j)(1)(C). Because EPA extrapolated the data from 16 states

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to potentially covered facilities nationwide, and given the EPCRA Tier II reporting thresholds (i.e., amounts greater or equal to 10,000 pounds, or lower established thresholds for Extremely Hazardous Substances) the commenter asserts only facilities with relatively large storage quantities of hazardous substances are required to report under EPCRA Tier II. In contrast, the commenter notes, CWA section 311(b) requires reports of discharges of much smaller amounts. With some reportable quantities as low as one pound under the CWA, the commenter notes the Agency did not solicit information from non-Tier II facilities that could potentially be subject to a CWA HS spill prevention rule, further asserting the analysis does not provide a rational basis for the determination not to issue regulations. Another commenter stated the number of aboveground storage tanks around the country containing hazardous substances is unknown, and no existing program assembles information on these tanks, their condition, the hazardous substances they contain, or whether they threaten water resources.

The Agency acknowledged the uncertainties associated with the estimate of potentially regulated facilities in the proposed notice. First, due to the wide range of trade names used for many chemicals and chemical mixtures, it was unclear whether approximately 20 percent of the facilities in the Tier II reports reviewed had a CWA HS onsite. Second, Tier II reports are required for substances present at any one time in an amount greater than or equal to 10,000 pounds, or lower established thresholds for chemicals defined as Extremely Hazardous



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Substances in 40 CFR part 355, Appendix A. The estimated number of potentially regulated facilities would depend on whether regulatory requirements establish applicability criteria with either higher or lower thresholds than those established in 40 CFR part 355, Appendix A. There are approximately 400,000 facilities that are subject to EPCRA Tier II reporting, including those with CWA HS onsite. These facilities are required under 40 CFR part 370 to report annually to the State Emergency Response Commission (SERC), Local Emergency Planning Committees (LEPC) and the fire department with jurisdiction over the facility. These facilities are also required to provide access for site inspections and information on the location of hazardous chemicals present to the fire department with jurisdiction over the facility. The Agency recognizes it has no information to assess or characterize non-Tier II facilities, and that the CWA HS reportable quantities for some of the designated CWA HS are measurably lower than the Tier II reporting thresholds. The Agency recognizes that it did not base the estimated universe of potentially regulated facilities on applicability criteria, including one specific to the RQ for the CWA HS. However, the Agency used EPCRA Tier II information as the best available data for estimating the potential universe in both the proposal and in this final action.

The Agency is unaware of specific data at a national level on aboveground storage tanks that contain hazardous substances, or of any specific program that compiles this information. However, the EPA disagrees with the assertion that this final action would result in a threat to

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water resources. In the 40 years since CWA section 311(j)(1)(C) was enacted by Congress, multiple EPA statutory and regulatory requirements have been established which generally serve, directly and indirectly, to prevent and contain CWA HS discharges. Based on EPA's analysis of the frequency and impacts of reported CWA HS discharges, EPA determined that the existing framework of EPA regulatory programs and implementing regulations at this time is serving to adequately prevent and contain CWA HS discharges, and thus is not finalizing any new spill prevention and containment regulatory requirements under CWA section 311(j)(1)(C).

## *2. Alternative approaches and supplemental information to refine affected universe*

In the proposed action, EPA solicited additional data or information that could be used to revise, refine, or reduce the uncertainty of the estimated affected facility universe and CWA HS storage volume locations relative to water sources.

One commenter pointed to information submitted to the Agency through comments for identifying potential candidates for prioritization for risk evaluation under the amended Toxic Substances Control Act (TSCA), stating that the offered approaches for that effort could inform an assessment of the volume of chemical substances stored near ground and surface water drinking water sources. Pointing to baseline data called for in section 311, the commenter stated the EPA has hydrological data on surface waters and aquifers critical for targeting source water protection, which can be used to evaluate risk when compared against chemical storage data

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collected in Tier II reports. The commenter also stated the Agency's approach underestimates the potential universe of facilities, offering that a review of the EPA data shows 10 states reported 60 percent of these discharges, with none among the 16 states used to estimate facility universe; comparatively, the 16 states with Tier II data represented 19 percent of CWA HS discharges to water. The commenter recommended that the Agency work directly with those states that may have a greater frequency of incidents and/or a greater proportion of CWA HS facilities to determine the potential universe.

The Agency could not identify, for the purposes of this final action, an appropriate method to estimate the number of facilities that would not have the potential to discharge to waters subject to CWA jurisdiction. Therefore, EPA estimated the universe of potentially subject facilities using a conservative approach and assumed that all CWA HS facilities identified in this rulemaking have the potential to discharge CWA HS to waters subject to CWA jurisdiction. For further discussion refer to the Response to Comments document for this action, located in the docket.

Additionally, EPA issued a voluntary survey to states, tribes and territories to collect relevant information, including information on the universe of potentially regulated facilities and on CWA HS discharges. EPA used relevant survey responses to further inform the final action. Based on the voluntary survey information received, EPA updated the universe of potentially

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subject facilities; the revised estimate changed by less than one percent from the original estimate.

#### *D. Comments on Review of Existing Regulatory Programs*

##### *1. Program Elements*

The Agency evaluated eleven EPA regulatory programs to determine whether they addressed the following program elements: safety information, hazard review, mechanical integrity, personnel training, incident investigations, compliance audits, secondary containment, emergency response plan, and coordination with state and local responders.

Several commenters expressed general support for EPA's identification of the nine program elements, agreeing these elements would comprise the core procedures, methods and equipment of a discharge prevention program for CWA HS, and that regulatory programs with these nine program elements would similarly achieve the objective of preventing and containing CWA HS discharges to water. Other commenters expressed support for EPA's identification of provisions within the existing EPA regulations that address discharge and accident prevention, control and mitigation of CWA HS discharges. Some commenters also agreed that new regulatory action would be a redundant mandate relative to the costs and administrative resources potentially required for implementation and enforcement when it would likely result in little commensurate benefit to human health and the environment. One commenter specifically

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noted the identified nine program elements are currently part of at least two or more existing rules, and that the identified program elements are covered under a minimum of ten other federal regulations.

The Agency agrees with the commenters that the identified nine program elements are key to prevention, containment, and mitigation of CWA HS discharges. The EPA identified these elements as an analytical framework of provisions commonly found in discharge and accident prevention regulatory programs. To this end, the Agency reviewed existing EPA and other federal regulatory programs, state regulatory programs, and industry standards to assess current discharge prevention practices and technologies. The Agency agrees the nine program elements identified and which are commonly reflected in EPA regulatory programs provisions, at this time adequately serve to prevent, contain, or mitigate CWA HS.

In contrast, one commenter asserted the examination of existing regulatory mechanisms conflates hazardous substance accident prevention with emergency response, and that the regulatory programs in place mainly focus on the follow-up to releases, rather than on spill prevention. Another commenter urged the EPA to expand its discussion to include the numerous other federal statutory and regulatory programs that have the effect, either directly or indirectly, of helping to prevent and contain discharges of hazardous substances. The commenter stated that focusing the analysis of regulatory programs on the nine program elements is too narrow and

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fails to consider how other regulatory programs with broader purposes, such as NPDES permits, as well as statutory and regulatory programs establishing liability for hazardous substance discharges, effectively impose additional “program elements” on facilities. The commenter stated these broad programs and liability provisions create strong incentives for facilities to implement appropriate measures to avoid uncontained hazardous substance spills and provide substantial additional support for the Agency’s determination that additional rules would provide only de minimis regulatory benefit.

The Agency disagrees with the commenters that the analysis of EPA regulations focused on nine select program elements was too narrow. The Agency recognizes there may be other provisions captured within additional regulations with broader purposes, including those establishing liability for CWA HS discharges, that may either directly or indirectly be effective for the prevention, containment, and mitigation of CWA HS discharges. However, EPA identified the nine program elements as an analytical framework of key provisions specific to discharge and accident prevention regulatory programs. The Agency reviewed existing EPA and other federal regulatory programs, state regulatory programs, and industry standards to assess current discharge prevention practices and technologies. The EPA also reviewed past CWA HS discharges to identify key elements that would serve to prevent, contain or minimize impacts from future CWA HS discharges. While some of these key elements may be also considered as

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response measures, the Agency believes it is also important to note provisions that focus on expeditiously containing discharges. The Agency believes regulatory requirements addressing these nine key program elements adequately serve to prevent, contain, or mitigate CWA HS discharges.

The discussion that follows addresses comments on each of the nine prevention program elements identified. The Agency recognizes that no single program element or regulatory provision may individually prevent and contain CWA HS discharges from occurring. However, this action is not based on any individual provision and/or program preventing CWA HS discharges, but rather on how the cumulative framework of key prevention elements, as implemented through existing EPA regulatory programs, adequately serves to prevent, contain, or mitigate CWA HS discharges under section 311(j)(1)(C).

#### *i. Safety Information*

The EPA identified safety information as one of the key provisions within prevention regulations. Prevention planning includes owners/operators maintaining and reviewing chemical and process safety information for their facility. Knowing and understanding the hazards associated with CWA HS helps maintain the overall safety of facility operations and reduces the potential for CWA HS discharges.



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The Agency originally determined in the proposed action that the safety information program element is addressed in three out of the eleven EPA regulatory programs identified: RMP, Pesticide Worker Protection Standard, and EPCRA Hazardous Chemical Inventory Reporting regulation. Upon notice and comment review, the Agency identified two additional regulatory programs that addressed this element: NPDES Pretreatment standards and TSCA Polychlorinated Biphenyl (PCB) regulation. The EPA had also identified that safety information is addressed in at least two OSHA regulations (OSHA PSM, OSHA Hazard Communication Standard (HCS)), and in regulatory requirements under the Mine Safety and Health Administration (MSHA), and the Pipeline and Hazardous Materials Safety Administration (PHMSA). For more information on other federal programs and corresponding regulations, please see the *Background Information Document: Review of Relevant Federal and State Regulations* (hereafter referred to as *BID*) and the *Supplemental Background Information Document: Additional Review of Relevant EPA Federal and State Regulations* (hereafter referred to as *Supplemental BID*) in the docket to this action (Docket ID No. EPA-HQ-OLEM-2018-0024).

One commenter opposed the determination to establish no new requirements, stating that prevention provisions are not adequately covered under existing regulations and that a prevention provision alone does not actively prevent unlawful discharges. The commenter posited that while

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maintaining safety information on-site makes it more likely that fully-trained personnel and emergency response officials will understand the risks and be able to appropriately respond to releases, the three regulatory programs identified in this category mostly relate to response situations. The commenter noted it is up to the facility to provide adequate training to ensure proper handling of hazardous substances, and stated the identified rules seem to focus on emergency response mechanisms rather than spill prevention. The commenter noted RMP standards focus on potential off-site impacts and worst-case scenarios (40 CFR 68.12); the Pesticide Worker Protection Standards emphasize response protocols more than preventative measures (40 CFR 170.230 and 170.311); and EPCRA safety information standards require Safety Data Sheets (SDS) (29 CFR 1910.1200(g)) which, while required to contain information about handling and storage, exposure controls/personal protection, and disposal and transportation information, mainly provide general chemical composition and emergency response information.

While the Agency recognizes the regulations specifically identified as existing safety information requirements may also focus on emergency response, these regulations also include requirements more broadly relevant to prevention and preparedness. For example, as highlighted in the supporting documents for the proposed action, the RMP regulation requires owners or operators to compile and maintain general safety information, including: an SDS, maximum

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intended inventory of equipment in which the regulated substances are stored or processed, and safe operation conditions. The RMP regulation also requires owners to compile process safety information for regulated substances, such as toxicity information. Similar safety information requirements that address preparedness and prevention were also identified for the Pesticide Worker Protection Standard and for the EPCRA Hazardous Chemical Inventory Reporting Regulation.

#### *ii. Hazard Review*

Hazard review was identified by the Agency as one of the key provisions within prevention regulations. It is intended to identify potential chemical or operational hazards present in a process and allowing for the prevention, containment, and/or mitigation of discharges. A hazard review provides information key for the proper design, construction, and operation of facility equipment/systems (e.g., identifying corrosion risks to be mitigated by ensuring storage container compatibility) and for choosing engineering controls (e.g., identifying overfill risks to be addressed by installing alarms/automatic shutoffs).

The Agency originally determined that the hazard review program element is addressed in eight out of the 11 EPA regulatory programs identified: NPDES Multi-Sector General Permit (MSGP) for Industrial Stormwater (2015), RMP, SPCC, Pesticide Management, Resource Conservation and Recovery Act (RCRA) Generators, RCRA Treatment, Storage and Disposal

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Facilities (TSDF), Underground Storage Tanks (UST), and EPCRA Hazardous Chemical Inventory Reporting. Upon notice and comment review, the Agency identified five additional regulatory programs that addressed this element: NPDES Pretreatment standards, TSCA PCB regulation, Effluent Guidelines and Standards for Transportation Equipment Cleaning Point Source Category, Effluent Guidelines and Standards for Construction and Development Point Source Category, and Pulp and Paper Effluent Guidelines. The EPA had also identified that hazard review is addressed in at least two OSHA regulations (OSHA PSM, OSHA Hazardous Waste Operations and Emergency Response Standard (HAZWOPER)), MSHA, PHMSA, and Surface Mining Control and Reclamation Act (SMCRA). For more information on other federal programs and corresponding regulations please see the *BID* and the *Supplemental BID* in the docket to this action.

One commenter stated the bulk of prevention provisions fall under hazard review, mechanical integrity, and personnel training, stating these are the most-covered prevention provisions along with personnel training, and a step in the right direction for promulgating spill prevention regulations. The commenter pointed to hazard review consisting of controls that, for example, support container integrity and prevent overfills, to varying degrees across the eight regulatory programs identified.

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The Agency believes that, at this time, existing regulations adequately cover prevention provisions relative to CWA HS, including hazard review requirements. For example, as highlighted in the supporting documents for the proposed action, both the RMP and the SPCC regulations include general hazard review and process hazards identification requirements; RMP requires facilities, depending on applicability, to either develop a hazard review or a process hazard analysis, and the SPCC regulation requires regulated facilities to develop spill prevention, control and countermeasure plans including equipment and processes review. Similarly, other hazard review requirements such as identification of engineering or administrative controls, compatibility of stored materials with tanks and equipment, and overfill prevention were identified in existing EPA programs.

### *iii. Mechanical Integrity*

Mechanical integrity programs to ensure proper equipment operation and maintenance, identified by the Agency as one of the key provisions of prevention regulations, not only serve to prevent and contain CWA HS discharges, but also serve to ensure operational reliability and safe operation at a facility. Mechanical integrity provisions may include procedures for inspections, testing, and appropriate corrective action by qualified personnel to prevent equipment failures before they cause a discharge.

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The Agency originally determined that the mechanical integrity program element is addressed in eight out of the 11 EPA regulatory programs identified: NPDES MSGP for Industrial Stormwater (2015), RMP, SPCC, Pesticide Management, RCRA Generators, RCRA TSD, UST, and Pulp, Paper, and Paper Board Effluent Guidelines. Upon notice and comment review, the Agency identified five additional regulatory programs that addressed this element: NPDES Pretreatment standards, TSCA PCB regulation, and CWA Effluent Guidelines and Standards for Ore Mining and Dressing Point Source Category, CWA Effluent Guidelines and Standards for Concentrated Aquatic Animal Production Point Source Category, and CWA Effluent Guidelines and Standards for Pesticide Chemicals. The EPA had identified that mechanical integrity is addressed in at least one OSHA regulation (OSHA PSM), and in regulatory requirements under PHMSA and SMCRA. For more information on other federal programs and corresponding regulations please see the *BID* and the *Supplemental BID* in the docket to this action.

One commenter noted mechanical integrity requirements for regular testing of components and corrective actions, and that these prevention controls are implemented based on revealed potential hazards and encourage good engineering practices to prevent discharges and mechanical failures. The commenter stated these control options have room for expansion, and

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that the process of discovering potential breaches in safety and correcting those works well as a preventative safety measure.

The Agency believes that, at this time, existing regulations adequately cover prevention provisions relative to CWA HS, including requirements for facilities to maintain mechanical integrity of equipment that is critical for safe operations. Requirements range from general mechanical integrity programs, inspections and testing, and corrective action resulting from inspections and tests. As highlighted in the supporting documents for the proposed action, for example, the RMP regulation requires facilities to inspect equipment at a frequency recommended by the manufacturer or industry standards and also to keep records of inspections. Similarly, the SPCC regulation has mechanical integrity and inspection requirements for bulk containers for certain plan holders.

#### *iv. Personnel Training*

Personnel training programs to ensure employees and/or contractors are aware of safe operating procedures, chemical hazards, discharge prevention and containment measures, and response procedures aim to reduce operator errors that could lead to CWA HS discharges. These programs also strengthen implementation of other prevention program elements, such as hazard review or mechanical integrity, by ensuring employees understand the operational hazards at the facility and the procedures for safe operations established by those program elements.



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The Agency originally determined that the personnel training program element is addressed in seven out of the 11 EPA regulatory programs identified: RMP, SPCC, Pesticide Worker Protection Standard, RCRA Generators, RCRA TSDF, UST, and CWA Effluent Guidelines and Standards for Pulp, Paper and Paperboard Point Source Category. Upon notice and comment review, the Agency identified two additional regulatory program that addressed this element: NPDES Pretreatment standards and CWA Effluent Guidelines and Standards for Concentrated Aquatic Animal Production Point Source Category. The Agency had identified that personnel training is addressed in at least three OSHA regulations (OSHA PSM, OSHA HAZWOPER, OSHA HCS), and in regulatory requirements under MSHA and PHMSA. For more information on other federal programs and corresponding regulations please see the *BID* and the *Supplemental BID* in the docket to this action.

One commenter noted that personnel training can reasonably decrease the chance that employee negligence would cause a release. The commenter stated however, that the regulatory programs identified seem to focus on employee understanding of release emergency response mechanisms rather than emphasizing spill prevention training, and again pointed to the RMP standards focus on worst-case scenarios and on off-site impacts, and the Pesticide Worker Protection Standards emphasizing response protocols over prevention measures.

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While the Agency recognizes the regulations specifically identified with existing personnel training requirements may also focus on emergency response, these regulations also include requirements more broadly relevant to prevention and preparedness. For example, as highlighted in the supporting documents for the proposed action, the RCRA TSDF and Generators Regulations require that facility personnel are trained in hazardous waste management procedures, including equipment monitoring, automatic waste feed cut-off systems, alarm systems, response to fires or explosions, response to ground-water contamination incidents, and emergency shutdown of operations. Similarly, personnel training requirements were identified in other existing EPA programs, ranging from specific prevention and response procedures to prevent, contain, and mitigate CWA HS discharges, to more general provisions for the proper handling of chemical hazards and the safe operation of equipment to prevent accidents.

#### *v. Incident Investigations*

The Agency identified incident investigation provisions as a key to prevention regulations, as they focus on examining causes of discharges to apply lessons learned and inform prevention and containment activities going forward. While the Agency recognizes these may also be considered a response measure, provisions for incident investigations also result in

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improvements to process design, operational methods, and procedures with the goal of preventing future incidents.

The Agency originally determined that the incident investigation program element is addressed in three out of the 11 EPA regulatory programs identified: RMP, SPCC, and CWA Effluent Guidelines and Standards for Pulp, Paper and Paperboard Point Source Category. Upon notice and comment review, the Agency identified one additional regulatory programs that addressed this element: MSGP for Industrial Stormwater (2015). The EPA also found that incident investigation is addressed in at least one OSHA regulation (OSHA PSM), and in regulatory requirements under MSHA and PHMSA. For more information on other federal programs and corresponding regulations please see the *BID* and the *Supplemental BID* in the docket to this action.

One commenter stated that incident investigation should not be classified as a prevention provision but that rather it would more appropriately be considered a response measure. The commenter stated that, for example, RMP requires investigations of catastrophic releases or near misses of catastrophic releases, but the investigations do not actively prevent releases from happening. The commenter further stated that owners and operators are often forced to respond to new or unusual types of releases that have never occurred at their sites; therefore, incident investigation reports may prove useless at times. Finally, the commenter noted that the Agency

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appears to be on the verge of eliminating many of the provisions of the RMP regulation that have any possible link to accident prevention or investigation.

As highlighted in the supporting documents for the proposed action, the incident investigation provisions under the SPCC regulation require an analysis of the cause of the discharge, including corrective actions and additional preventive measures to minimize the possibility of recurrence. Similar incident investigation requirements for prevent corrective actions were also identified for the RMP regulation and for the CWA Effluent Guidelines and Standards for Pulp, Paper and Paperboard Point Source Category.

Finally, RMP regulation provisions that the Agency is contemplating to amend are not expected to impact the core requirements of the regulation that have served to reliably prevent accidents since its issuance in 1996. While the RMP Amendments, 82 FR 4594 (January 13, 2017), added various new provisions to the prevention program requirements in subparts C and D of the RMP Rule, and while the Agency is conducting a reconsideration of these additions, the Agency did not propose and is not contemplating eliminating the prevention program requirements altogether. The RMP Amendments themselves acknowledge the pre-Amendments RMP Rule was “effective in preventing and mitigating chemical accidents.” 82 FR at 4600.

#### *vi. Compliance Audits*

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Compliance audit provisions were identified as a key to prevention regulations as a mechanism to evaluate and measure a facility's compliance with regulatory requirements. A compliance audit provision can provide facility management with a mechanism for oversight of implementation of discharge prevention practices, including documentation and follow-up actions. These provisions require facilities to identify compliance deficiencies or opportunities for improvement.

The Agency originally determined that the compliance audit program element is addressed in one of the regulatory programs identified: RMP. Upon notice and comment review, the Agency identified two additional relevant regulatory programs that addressed this element: CWA NPDES MSGP for Industrial Stormwater and CWA Effluent Guidelines and Standards for Pulp, Paper and Paperboard Point Source Category. The EPA also found that compliance audits are addressed in at least one other federal regulation: OSHA PSM.

One commenter stated compliance audits alone do not prevent releases, and further noted they were only identified as an RMP requirement. The commenter states that while compliance audits are not immaterial, their use could be expanded to ensure facilities stay in compliance with any current or future prevention requirements. The commenter agreed the compliance review discussed in the notice is appropriate to determine whether a facility has deficiencies and to correct those deficiencies, and that third-party audits could be useful to learn to what extent

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facilities need to correct shortcomings in prevention mechanisms, recognizing that discovery of those deficiencies could help prevent future hazardous releases.

The Agency recognizes that while specific requirements for compliance audits were identified under RMP, CWA Effluent Guidelines and Standards for Pulp, Paper and Paperboard Point Source Category, and CWA NPDES MSGP for Industrial Stormwater (see the *Supplemental BID* in the docket to this action for additional details), there are other regulations with compliance duty provisions that may also serve to prevent and contain CWA HS spills. For example, applicable to all NPDES Permits are “duty to comply” requirements (see 40 CFR 122.41: Conditions applicable to all permits) requiring compliance with all conditions of issued permits. Finally, the Agency agrees that compliance audits may also be considered a response measure. Nonetheless, in implementing these provisions facilities may identify deficiencies or opportunities for improvements to process design and operational methods and may also identify procedures with the goal of preventing future discharges as well.

#### *vii. Secondary Containment*

Secondary containment provisions were identified by the Agency as a key to prevention regulations, serving as a second line of defense in the event of a failure of the primary containment, such as bulk storage containers, plant equipment, portable containers, or piping. Secondary containment provides a temporary measure until appropriate actions are taken to

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permanently abate the source of the release. Provisions may include passive or active containment measures such as specific sizing requirements to contain worst-case discharges, or design specifications to address impervious construction. When properly designed and maintained, secondary containment can prevent discharges to waters subject to CWA jurisdiction.

The Agency originally determined that the secondary containment program element is addressed in seven out of the 11 EPA regulatory programs identified: CWA NPDES MSGP for Industrial Stormwater (2015), SPCC, Pesticide Management Regulation, RCRA Generators, RCRA TSDF, UST, and CWA Effluent Guidelines and Standards for Pulp, Paper and Paperboard Point Source Category. Upon notice and comment review, the Agency identified four additional regulatory programs that addressed this element: NPDES Pretreatment standards, TSCA PCB Regulation, and the CWA Effluent Guidelines and Standards for Ore Mining and Dressing Point Source Category and the CWA Effluent Guidelines and Standards for Pesticide Chemicals. The EPA had also identified that secondary containment requirements are addressed in at least two OSHA regulations (OSHA PSM, OSHA HAZWOPER), and in regulatory requirements under the MSHA and the SMCRA. For more information on other federal programs and corresponding regulations please see the *BID* and the *Supplemental BID* in the docket to this action.



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One commenter noted that, because the identified secondary containment provisions call for the use of liners, double-walled tanks, berms, drip pans, gutters, and other collection systems, they can be fairly described as prevention measures. The commenter also asserted that regulating the types of containers in which hazardous substances are stored may help to prevent leaks from occurring or prevent hazardous substances discharges to water and stated that expanding secondary containment into other standards such as RMP and EPCRA may also add layers of spill prevention.

While the EPA programs and corresponding regulations reviewed vary in their standards for the required secondary containment, seven of the 11 EPA programs originally reviewed were found to contain secondary containment provisions. For example, as highlighted in the supporting documents for the proposed action, the SPCC regulation requires onshore facilities to use at least one of the following: dikes, berms, or retaining walls sufficiently impervious to contain oil; curbing or drip pans; sumps and collection systems; culverting, gutters, or other drainage systems; weirs, booms, or other barriers; spill diversion ponds; retention ponds; or sorbent materials. Similarly, secondary containment requirements were identified in other existing EPA programs, ranging from passive measures, to equivalent devices, to approvals by Regional Administrators. Amending the regulations identified as part of the existing prevention and containment framework is outside the scope of this action. However, nothing in this action

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precludes future regulatory actions for regulations identified as part of the existing EPA regulatory framework.

#### *viii. Emergency Response Plan*

Emergency response plan requirements were identified by the Agency as a key provision for prevention regulations, focusing facility owners/operators to gather information and develop procedures needed to adequately respond in advance of a discharge. These plans identify steps for facility personnel to mitigate the severity and environmental impacts of a discharge, as well as for appropriate notifications to local, state and federal authorities (including notifications to potential drinking water receptors). While the Agency recognizes these may also be considered a response measure, emergency response planning provisions may also include procedures for expeditiously containing discharges.

The Agency originally determined that the emergency response plan program element is addressed in eight out of the eleven EPA regulatory programs identified: NPDES MSGP for Industrial Stormwater (2015), RMP, SPCC, Pesticide Worker Protection Standard, RCRA Generators, RCRA TSDF, UST, and EPCRA Emergency Planning and Notification regulations. Upon notice and comment review, the Agency identified three additional regulatory programs that addressed this element: NPDES Pretreatment standards, TSCA PCB regulation, and CWA Effluent Guidelines and Standards for Pesticide Chemicals. The EPA had also identified that the

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emergency response plan program element is addressed in at least three OSHA regulations (OSHA Emergency Action Plans, OSHA PSM, OSHA HAZWOPER), and in regulatory requirements under MSHA, PHMSA, and SMCRA. For more information on other federal programs and corresponding regulations please see the *BID* and the *Supplemental BID* in the docket to this action.

One commenter recognized that emergency response planning is critical to protecting the health, safety, and welfare of the public. However, the commenter stated that while emergency response plans provide for immediate response to releases of hazardous materials, they do nothing to actively prevent releases from occurring, similarly to safety information, making their consideration irrelevant in an action regarding spill prevention.

Most of the EPA programs identified by the Agency have emergency response planning requirements for facilities to plan what immediate actions they will take in the event of a discharge. For example, as highlighted in supporting documents for the proposed action, the MSGP for Industrial Stormwater requires permitted facilities to develop plans for effective response to spills, including procedures for expeditiously stopping, containing, and cleaning up leaks, spills, and other releases and to execute such procedures as soon as possible. Similarly, notification procedures are also frequently addressed by the identified EPA programs and corresponding regulations. Separately, 40 CFR 117.21 requires immediate notification to the

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NRC of discharge of a reportable quantity of a CWA HS from vessels or onshore or offshore facilities as soon as there is knowledge of it<sup>13</sup>. The NRC serves as an emergency call center that fields initial reports for pollution and railroad incidents and forwards that information to appropriate federal/state agencies for response.

*ix. Coordination with State and Local Responders*

Coordinating with state and local responders is also identified by the Agency as key to prevention regulations. Coordination between facility personnel and state and/or local responders on emergency response plans allows for emergency responders' improved understanding of potential onsite hazards and better ensures an effective response following a discharge.

The Agency originally determined that the program element for coordinating with state and local responders is addressed in four out of the eleven EPA regulatory programs identified: RMP, SPCC, RCRA Generators, RCRA TSDF, and EPCRA Emergency Planning and Notification. Upon notice and comment review, the Agency identified one additional relevant regulatory programs that addressed this element: NPDES Pretreatment standards. The EPA had also identified that coordination with state and/or local responders is addressed in at least one OSHA regulation (OSHA HAZWOPER), and in regulatory requirements under PHMSA. For

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<sup>13</sup> Anyone witnessing an oil spill, chemical release or maritime security incident should call the NRC hotline at 1-800-424-8802. <http://www.nrc.uscg.mil/>

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more information on other federal programs and corresponding regulations please see the *BID* and the *Supplemental BID* in the docket to this action.

One commenter stated that, regarding coordination with state or local emergency responders, EPCRA puts the EPA on the right path toward meaningful spill prevention regulation. The commenter noted that SERCs and LEPCs use the information provided to them under EPCRA to make their own arrangements with facilities, while RMP and RCRA provide for information coordination with emergency response personnel including fire departments and police. The commenter also recognized that coordinated efforts with third parties would likely make the planning process more efficient for facilities and lead to better operational practices, and that sharing knowledge can increase confidence that release prevention mechanisms will work as intended. This commenter also submitted comments to the NODA published in the **Federal Register** on February 19, 2019 (Docket number EPA-HQ-OLEM-2017-0444). The commenter expressed concerns that the Agency is focused on accident response rather than prevention, adding that accidental release prevention is not about emergency response, but is about efforts within the facility to identify sources of potential accidental releases and then to design their facility, or modify their operations, to prevent the releases. The commenter also stated facilities need good emergency preplanning done in conjunction with local first responders and the LEPC.

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As highlighted in supporting documents to the proposed action, LEPCs include representatives from the local community such as police, fire, civil defense, public health professionals and facility representatives. The LEPCs develop an emergency response plan for the community and provide information about chemicals in the community to citizens. Under EPCRA section 312(f), the facility owner or operator subject to Tier II reporting is required to provide access to the fire department to conduct an on-site inspection of the facility. Further, the facility is also required to provide the location information on hazardous chemicals at the facility. While the Agency agrees coordinating with state and local responders may also be considered a response measure, such coordination prior to any discharge could also help to contain and/or mitigate the impacts of a discharge (e.g., allow for a timely shutdown of downstream drinking water intakes).

## *2. Existing EPA Regulatory Programs*

### *i. NPDES MSGP for Industrial Stormwater*

The NPDES MSGP for Industrial Stormwater includes requirements that address six of the nine identified program elements: hazard review, mechanical integrity, incident investigations, compliance audits, secondary containment, and emergency response plan.

Some commenters supported EPA's analysis of the NPDES MSGP's coverage of the program elements, with one commenter also recommending that EPA recognize that the NPDES

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MSGP for Industrial Stormwater also has requirements for incident investigations and compliance audits. The commenter stated that the current version of the NPDES MSGP requires permitted facilities to review and revise its Stormwater Pollution Prevention Plan (SWPPP) and to initiate immediate and follow-up corrective actions in the event of certain conditions or incidents, including an unauthorized release or discharge, a discharge that violates an effluent limit, a visual assessment that shows evidence of stormwater pollution, benchmark exceedances, or certain issues relating to stormwater control measures. The commenter asserted that permitted facilities are also required to immediately document the existence of any of above- described conditions, including an incident evaluation and a description of any measures taken to prevent the reoccurrence of the condition. The commenter stated that the NPDES MSGP for Industrial Stormwater includes requirements for facilities to document and report the cause of any incident or release, implement corrective actions, and revise its SWPPP to minimize the chance of future incidents or releases.

The commenter asserted that the NPDES MSGP for Industrial Stormwater requires investigations and reporting that amount to a compliance audit. As part of the requirements, facilities must conduct inspections quarterly, and facilities must document their findings. Further, the commenter noted that facilities must also submit an Annual Report to EPA, which includes a summary of the past year's routine facility inspection documentation, a summary of the past



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year's corrective action documentation, and a description of any incidents of noncompliance, or a statement that the facility is compliant with the permit. Lastly, the commenter stated that facilities must review and revise their SWPPPs upon incidents of non-compliance and document the conditions triggering the incident of non-compliance and actions taken to minimize or prevent reoccurrence of releases.

The Agency agrees with the commenters that requirements for incident investigations and compliance audits are included in the NPDES MSGP for Industrial Stormwater. This analysis is detailed in the *Supplemental BID* in the docket to this action.

Other commenters did not support EPA's analysis of the NPDES MSGP for Industrial Stormwater relative to this action, stating that the NPDES MSGP is not intended to address spill-prevention for hazardous substances, but rather to mitigate pollution from stormwater discharges across industrial facilities. A commenter stated that hazardous substance spills are not a type of stormwater discharge under the NPDES MSGP nor are they a type of "allowable non-stormwater discharge" covered under the NPDES MSGP. The commenter stated that the provisions that touch on spill prevention are extremely high-level and are not tailored to hazardous substances under the CWA. The commenter further stated that these provisions, while perhaps detailed enough for the context of permitting stormwater discharges under the NPDES program, are far

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from adequate to satisfy the CWA's separate command that EPA issue specific spill-prevention regulations for hazardous substances.

The commenter also stated that the NPDES MSGP cross-references spill-prevention plans under the SPCC regulation 12 times, with no suggestion the SPCC regulation, which is issued under the same statutory mandate and authority at issue in this rulemaking, is satisfied through compliance with the MSGP's spill-prevention guidelines. Furthermore, the commenter stated that the MSGP applies only in a few states, most territories, and most of Indian country, and that a permit that applies to such a small part of the United States cannot serve as the basis for EPA's refusal to issue the nationwide hazardous-substance spill-prevention regulations mandated by Congress.

The Agency disagrees with these commenters because, as part of compliance with the NPDES MSGP, facilities are required to prepare a SWPPP prior to submitting a Notice of Intent (NOI) for permit coverage. The SWPPP is intended to document the selection, design, and installation of control measures to meet the permit's effluent limits plus document the implementation (including inspection, maintenance, monitoring, and corrective action) of the permit requirements. The SWPPP must be prepared in accordance with good engineering practices and to industry standards. While the Agency recognizes that the SWPPP is not directly intended to address emergency and/or unanticipated oil discharges, as is the case with an SPCC

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plan, the core elements of a SWPPP enhance CWA HS discharge spill prevention. Additionally, in cases where the facility is subject to the SPCC requirements under 40 CFR 112, a facility's SWPPP can reference the relevant SPCC plan for oil spill prevention requirements.

#### *ii. RMP Regulation*

The RMP regulation includes requirements that address eight of the nine program elements: safety information, hazard review, mechanical integrity, personnel training, incident investigations, compliance audits, emergency response plan, and coordinating with state and/or local responders.

Some commenters supported EPA's analysis of the RMP regulation, stating that to the extent that discharges of hazardous substances to water are caused by chemical accidents at RMP-regulated facilities/substances, EPA should consider these discharged substances already comprehensively federally regulated. Another commenter asserted that RMP requires many steel mills to develop risk management plans to address the potential risks of a chemical spill and procedures for responding to an accidental release. The EPA acknowledges the commenters' support.

Another commenter did not support EPA's review of the RMP regulation, stating that the RMP Rule covers only some of the CWA HS, and that of the 13 most commonly spilled CWA HS identified by EPA, only four (ammonia, chlorine, hydrochloric acid, and nitric acid) are

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covered under the RMP regulation. The commenter also stated that even for those hazardous substances, the threshold quantity for RMP is significantly higher than the CWA's reporting requirements for spills. The commenter further stated that EPA should evaluate the protections in the RMP Rule, including the risk evaluation, accident prevention, response planning, training, auditing, and incident investigation components within the RMP, and determine whether and how they can be adapted to apply the full suite of CWA HS. The commenter also stated that EPA relies on the incident investigation and compliance audit portions of the RMP Rule, while the agency is simultaneously proposing to remove those protections from the RMP Rule.

The Agency recognizes there is not a complete overlap between the RMP regulation protections and the universe of potentially regulated CWA HS facilities. However, this action is not based on any individual provision and/or standalone regulatory program preventing CWA HS discharges, but rather on how the cumulative framework of key prevention and containment elements, as implemented through those existing EPA regulatory programs identified, meet the requirement to regulate CWA HS under section 311(j)(1)(C).

The Agency examined current discharge prevention practices and technologies within existing EPA regulations that would be relevant to the prevention, containment, and mitigation of CWA HS discharges. The EPA also reviewed past CWA HS discharges to identify key elements that would serve to prevent, contain or mitigate impacts from CWA HS discharges in

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the future. Based on these analyses, the Agency identified the RMP regulation as a discharge prevention program within the framework of existing accident prevention regulations.

As discussed in the FR notice to the proposed action, EPA analyzed the NRC data to identify those CWA HS most frequently discharged. The EPA updated this analysis to include the additional information from the voluntary survey. Of the currently designated CWA HS<sup>14</sup>, 13 substances accounted for most identified discharges, as well as most identified discharges with reported impacts: Polychlorinated Biphenyls, Sulfuric Acid (>80%), Sodium Hydroxide, Ammonia, Benzene, Hydrochloric Acid, Chlorine, Sodium Hypochlorite, Toluene, Phosphoric Acid, Styrene, Nitric Acid (fuming), and Phosphorus. These 13 CWA HS make up approximately 89 percent of all identified CWA HS discharges to water from non-transportation-related facilities and 83 percent of the 265 identified CWA HS discharges with reported impacts. The EPA's analysis also found the 13 most frequently discharged CWA HS are subject to multiple regulatory programs which serve to prevent and contain CWA HS discharges. For example, sulfuric acid (covered by RMP if fuming) is also regulated by the Underground Storage Tank regulation, EPCRA Regulations, and the NPDES MSGP for Industrial Stormwater. The

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<sup>14</sup> See 40 CFR 116.4: The elements and compounds appearing in Tables 116.4 A and B are designated as hazardous substances in accordance with section 311(b)(2)(A) of the Act. This designation includes any isomers and hydrates, as well as any solutions and mixtures containing these substances. Synonyms and Chemical Abstract System (CAS) numbers have been added for convenience of the user only. In case of any disparity the common names shall be considered the designated substance."

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Agency recognizes the currently designated CWA HS and RMP regulated substances may not completely overlap. However, the Agency is taking this action based on the framework of key prevention elements, as implemented through the cumulative requirements identified within existing EPA regulations that are applicable to the universe of CWA HS and regulated facilities.

Finally, the commenter mischaracterizes the chemical accident prevention provisions in 40 CFR part 68 (RMP Rule) as they are since the RMP Amendments (82 FR 4594, January 13, 2017) and as EPA has proposed to revise them in the RMP Reconsideration proposal (83 FR 24850, May 30, 2018). The RMP Rule has had provisions for incident investigations and compliance audits since it was adopted in 1996 (61 FR 31688, 31717, June 20, 1996). The RMP Amendments added additional provisions addressing these topics, and the RMP Reconsideration proposal has proposed to rescind or modify these additions. The proposal is taking comment on reverting to the pre-RMP Amendments provisions on these issues and not altogether removing the incident investigation or compliance audit requirements.

### *iii. SPCC Regulation*

The SPCC regulation includes requirements that address six of the nine program elements: hazard review, mechanical integrity, personnel training, incident investigations, secondary containment, and emergency response plan.

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Several commenters supported EPA's analysis of the SPCC regulation, stating that EPA correctly concluded that the SPCC program applies to oil, including mixtures of hazardous substances and oil, and contains a range of requirements that include a general review of facility hazards, personnel training, incident investigation, and emergency response planning. Several commenters stated that many states also have established protective, state-specific SPCC regulations to prevent discharges of oil and hazardous substances and to address them when they occur.

One commenter stated that many mining companies also treat substances with hazard characteristics similar to regulated oil-based products, comparable to those covered under a site's SPCC plan, as a best management practice. One commenter discussed that the SPCC regulation, including plans, secondary containment areas, and countermeasures, provides protection against hazardous substance discharges. One commenter stated that the SPCC regulation already requires facilities to develop and implement SPCC plans, conduct appropriate tank inspection and testing in accordance with standards set by organizations such as the American Petroleum Institute and the Steel Tank Institute, install both general and sized secondary containment to prevent oil spills, and provide proper notification in the event of a spill.

Several commenters stated that the scope of the existing SPCC regulation includes mixtures of oil, such as PCB-containing transformer oil. According to the commenters, this is



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noteworthy given that in EPA's review, PCBs were associated with more than 50 percent of CWA HS discharges to water. A commenter further stated that the Agency should specifically find that it has already directly fulfilled Congress' legislative mandate. A commenter noted that a majority of facilities in the electric power industry that possess CWA HS of any significant volume are also subject to SPCC plan regulations and must comply with these provisions. These regulations significantly impact these facilities' potential to discharge hazardous substances, even if these hazardous substances do not, by themselves, trigger the SPCC requirements.

A commenter discussed that SPCC regulations, which address oil, and EPA's current proposed action, which addresses hazardous substances, serve the same legislative purpose: preventing these materials from being discharged and containing these discharges if they occur. The commenter noted that a single mixture could have duplicative regulations that address the exact same congressional intent and the exact same risk.

Alternatively, several commenters opposed EPA's analysis of the SPCC Rule. One commenter stated that the analysis does not appear to address a significant protective regulatory gap. The commenter noted that SPCC rules do not apply to facilities with aggregate aboveground storage tank capacity of 1,320 gallons or less, and only counts containers of oil with 55 gallons of capacity or greater when determining storage tank capacity. The commenter stated that many potential PCB-containing oil containers, such as transformers, may not be covered by SPCC

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protections, and therefore may not have been adequately assessed by this analysis. Several commenters stated that SPCC applies only to “oil” or “oil mixed with other substances,” thus facilities or tanks storing hazardous substances – but not oil – are not subject to the rule. Commenters also stated that the SPCC rule is an ideal model for a spill prevention and response regulation for hazardous substances and contains features that can be adopted into a robust hazardous substance spill prevention regulation.

The EPA agrees with the comments that the SPCC prevention program elements serve as part of the larger framework of existing regulatory requirements identified in the proposed action, providing a holistic approach to CWA HS discharge prevention and containment. The EPA is basing this approach on an analysis of the frequency and impacts of reported CWA HS discharges, and on an evaluation of the existing framework of EPA regulatory requirements relevant to prevention, containment, and mitigation of CWA HS discharges. Additionally, the Agency recognizes other federal and state agency programs, as well as other industry standards, may also be effective in preventing and containing CWA HS discharges.

The EPA acknowledges that the SPCC program applicability is generally limited to certain containers of oil and oil mixed with other substances, including oil mixed with CWA HS, as further defined in the SPCC regulations themselves. While recognizing that containers and related equipment with only CWA HS are not regulated under SPCC as per the SPCC

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regulations, the Agency believes the application of SPCC prevention program elements still serves as a model for good engineering practice within SPCC regulated facilities and can provide collateral improvements resulting in overall spill prevention. The Agency agrees with certain commenters that collateral improvements, such as drainage and containment elements of the SPCC regulation, can be applied on a facility-wide basis, which can also serve to prevent, contain and mitigate discharges from CWA HS containers. Likewise, where CWA HS and oil handling activities (e.g., operations, piping, storage containers) are co-located, the prevention elements of the SPCC program can also serve to prevent, contain and mitigate CWA HS discharges. This may also be important where containers and related equipment may be interchangeably used for both oil and CWA HS service: for example, operations, piping, and storage containers that meet the regulatory applicability and threshold requirements would be subject to the SPCC regulation.

The EPA disagrees with those commenters that state the SPCC program, as part of the existing EPA regulatory framework, fails to functionally provide the spill prevention protections mandated under section 311 of the CWA. In the 40 years since CWA section 311(j)(1)(C) was enacted by Congress, EPA has established multiple statutory and regulatory requirements under different federal authorities that generally serve, directly and indirectly, to adequately prevent and contain CWA HS discharges. The Agency has identified the SPCC program as part of the

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larger framework of existing EPA regulations that implement cumulative discharge prevention requirements applicable to the universe of CWA HS and regulated facilities.

The EPA acknowledges the SPCC regulation applies to certain containers of oil and oil mixed with other substances, including oil mixed with CWA HS. While containers designated for use with only CWA HS (i.e., containers not used interchangeably with oil) are not subject to the SPCC regulation, the Agency believes SPCC elements can serve to prevent and contain discharges where the operator chooses to apply the SPCC provisions facility wide. For example, elements of the SPCC regulation such as drainage and containment can be applied to include CWA HS containers and operations, thereby also serving to prevent discharges from CWA HS containers. Likewise, where CWA HS and oil handling activities (e.g., operations, piping, storage containers) are co-located, the prevention elements of the SPCC program can also serve to prevent and contain CWA HS discharges.

The EPA also acknowledges that certain smaller facilities and containers may not be subject to SPCC because of its threshold applicability requirements, and that there may not be a complete overlap between SPCC protections and the universe of potentially regulated CWA HS facilities. However, this final action is not based on any individual provision, applicability threshold, and/or standalone regulatory program for the prevention of CWA HS discharges. The final action is based rather on the cumulative framework of key prevention elements, as

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implemented through the existing EPA regulatory programs identified, that have been demonstrated to adequately serve to prevent and contain CWA HS discharges.

*iv. Pesticide Management and Disposal Regulation/ Pesticide Agricultural Worker Protection Standard*

The Pesticide Management and Disposal regulation includes requirements that address three of the nine program elements: hazard review, mechanical integrity, and secondary containment. EPA reviewed the Pesticide Agricultural Worker Protection Standard and found that the program includes requirements which address three of the nine program elements: safety information, personnel training, and emergency response plan.

One commenter opposed EPA's analysis of the Pesticide Management Regulation and the Pesticide Agricultural Worker Protection Standard, stating that those regulations only apply to specific businesses in the agricultural industry, as the requirements only apply to chemicals that meet the definition of "pesticide" under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The commenter stated that according to EPA analysis for the proposed action, a little less than one-third of CWA HS may be used as pesticides. However, the commenter noted that the FIFRA definition requires that the substance also be "intended for" pesticide use, and unless the CWA HS is actually "intended for" use as a pesticide, the Pesticide Management Rule

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and the Pesticide Agricultural Worker Protection Standard spill-prevention requirements do not apply.

The EPA agrees that the applicability criteria of the Pesticide Management regulation and the Pesticide Agricultural Worker Protection Standard may be limited to a subset of CWA HS and a subset of facilities. The EPA also recognizes that the applicability criteria for some of the regulatory programs which serve, in part, as the basis for this action do not rely solely on chemical identity but include other factors. The regulatory programs discussed in the proposed action were selected because they include discharge or accident prevention requirements and were identified as regulating at least either some CWA HS or some facilities that produce, store, or use CWA HS. The Agency's analysis indicates that, for all nine program elements, there are existing cumulative regulatory requirements for accident and discharge prevention relevant to CWA HS under the framework.

*v. RCRA Standards Applicable to Generators of Hazardous Waste/ RCRA  
Treatment, Storage, and Disposal Facilities (TSDF) Standards*

The RCRA Standards applicable to generators of hazardous waste includes requirements that address six of the nine program elements: hazard review, mechanical integrity, personnel training, secondary containment, emergency response plan, and coordination with state and/or local responders. EPA reviewed RCRA TSDF Standards and found that the program includes

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requirements that address six of the nine program elements: hazard review, mechanical integrity, personnel training, secondary containment, emergency response plan, and coordination with state and/or local responders.

Some commenters agreed with EPA's analysis of the RCRA regulations, stating that RCRA regulations require identification and safe storage, inspection, and shipping of wastes that are identified as hazardous due to ignitability, corrosivity, reactivity, or toxicity. The commenters also noted that the regulations subject storage and accumulation of wastes onsite to accumulation time limits; that hazardous waste containers and storage tanks, inspections, secondary containment, training, and spill response are addressed in the regulations; and that RCRA addresses pre-transportation packaging and labeling requirements for any hazardous wastes being shipped offsite. Some commenters stated that industrial facilities are subject to cradle-to-grave regulations governing the generation, storage, treatment, and disposal of hazardous waste, and that these regulations take into consideration the size and nature of wastes generated and create comprehensive regulatory framework for preventing and responding to releases.

One commenter supported EPA's analysis approach and suggested that RCRA TSDF Standard meets all nine requirements of the program elements either based on direct regulatory requirements or requirements that accomplish the same goals as required under the CWA HS language. The commenter listed other regulations beyond the 40 CFR parts 264 and 265



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standards which TSDFs may also currently follow and stated those directly address requirements for each of the program elements. The commenter noted that TSDFs are required to follow OSHA safety information requirements to have SDSs available for any products that are kept or used at the facility. The commenter further noted that the proper operation of a TSDF requires that the facility know and understand the hazards associated with any material handled, which is accomplished with a detailed waste analysis plan required under 40 CFR 264.13.

The commenter noted that the requirements for incident investigations are met three ways: (1) Immediately after a release, the emergency coordinator must provide for treating, storing, or disposing of recovered waste, contaminated soil or surface water, or any other material that results from a release (40 CFR 264.56(g)); (2) 40 CFR 264.56(i) requires documentation in the operating record of every time the contingency plan is implemented; and (3). TSDFs employ methods to prevent reoccurrence that include management team investigations of any releases. The commenter stated that if a release or incident is significant, the permitting authorities will often require an incident investigation, and that facilities regulated by OSHA PSM are also required to conduct an incident investigation when a significant event occurs under 29 CFR 1910.119(m).

Regarding compliance audits, the commenter stated that 40 CFR 264.73 requires every TSDF to keep an operating record. These records are maintained at the facility and are available

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for inspection. The commenter noted that in addition, facilities are required to immediately report any releases to the environment to the local authorities or the NRC and submit a written report to the Regional Administrator within 15 days of an incident.

The EPA acknowledges these commenters' support that RCRA regulations contribute to the existing framework of prevention requirements that apply to CWA HS when these substances are also considered hazardous waste. The RCRA Standards Applicable to Generators of Hazardous Waste at 40 CFR part 262 establishes cradle-to grave hazardous waste management standards and include general preparedness and prevention requirements as well as specific requirements for containers and tank systems.

The Agency recognizes the commenters' support for the inclusion of the RCRA TSDF Standard as part of the existing regulatory framework upon which this action is based; 40 CFR parts 264 and 265 establish minimum national standards for the acceptable management of hazardous waste. These standards include both facility-wide requirements such as good housekeeping provisions and unit-specific technical requirements designed to prevent the release of hazardous waste into the environment.

The Agency did not identify TSDF Standard requirements specific to the safety information, incident investigation, and compliance audits prevention program elements. Nonetheless, EPA recognizes other applicable regulations and standards at these TSDF facilities

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may address these elements. For example, the commenter cited OSHA's Hazard Communication Standard (29 CFR 1910.1200) as a requirement for TSDFs that may serve to meet the safety information program element. While relevant and of value in CWA HS discharge prevention, the Agency ultimately focused on programs within its authorities, and for which the requirements more directly address the key prevention program elements. In general, the Agency recognizes other federal, state, and industry programs and standards may also be effective in preventing CWA HS discharges.

Further, the Agency notes the citations highlighted by the commenter (i.e., 40 CFR 264.56(g) and (i)) are not requirements specific to incident investigations, but rather to immediate emergency response and written incident reports within 15 days to the EPA Regional Administrator. These provisions differ from those of the incident investigation program element identified for this action, which focuses on identifying the cause of an incident to implement corrective actions to prevent future recurrences. Finally, the Agency disagrees that regulatory requirements for compliance audits are captured under the citations offered by the commenter for operating record requirements at 40 CFR 264.73. While useful to review if performing a compliance audit, it is not itself a compliance audit requirement. This likewise applies to the incident reports requirements cited by the commenter at 40 CFR 264.56(d)(2)) and (i) are not themselves compliance audits.

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Alternatively, a commenter disagreed with EPA's analysis of the RCRA standards for generators of hazardous waste and the RCRA TSDF Standards, stating that the regulations address only a small part of the spill-prevention problem for CWA HS. The commenter stated that the regulations apply only to generators of hazardous waste, as defined under RCRA, and only some unquantified number of CWA HS would qualify as 'hazardous' under RCRA. In addition, the commenter stated that the generator requirements apply only to "waste" and that definition does not cover chemicals that are being created, stored for use, or used at a facility. The commenter further stated that by focusing only on "waste", the hazardous waste facility regulations capture only a sliver of the spill-prevention problem Congress intended CWA HS spill-prevention regulations to address.

The Agency recognizes that RCRA regulations apply to CWA HS when the CWA HS are considered hazardous wastes. However, the Agency identified these RCRA provisions regulations areas as part of a broader framework of existing regulations that address CWA HS. While there is not a complete overlap between these specific RCRA regulations and the universe of potentially regulated CWA HS facilities, this action is not based on any individual regulation and/or standalone regulatory program preventing CWA HS discharges, but rather on how the cumulative framework of key prevention elements, as implemented through those existing EPA

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regulatory programs identified, have been demonstrated to adequately serve to prevent and contain CWA HS discharges.

*vi. Technical Standards and Corrective Action Requirements for Owners and Operators of USTs*

The Technical Standards and Corrective Action Requirements for Owners and Operators of USTs at 40 CFR Part 280 (UST regulation) include requirements that address five of the nine program elements: hazard review, mechanical integrity, personnel training, secondary containment, and emergency response plan.

One commenter opposed EPA's analysis of the UST, stating that the regulation only addresses a subset of the facilities for which Congress has mandated that the President issue hazardous-substance spill-prevention regulations under the CWA. The commenter specified that the UST regulation, issued pursuant to a statutory mandate in RCRA, applies only to underground tanks, which it defines, subject to several exceptions, as any one tank, or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 percent or more beneath the surface of the ground. The commenter added that portions of the UST regulation apply to so-called 'hazardous substance UST systems,' which generally includes UST systems storing more than 110 gallons

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of any CWA HS. The commenter stated that the UST regulation does not apply to above-ground storage tanks or any other non-transportation-related onshore facilities that do not meet the definition of an underground storage tank.

Relative to the UST regulations authorized by the Solid Waste Disposal Act, as amended (commonly known as RCRA), the EPA agrees the applicability criteria may be limited to a subset of CWA HS and a subset of facilities handling CWA HS. EPA also recognizes that the applicability criteria for some of the regulatory programs which serve, in part, as the basis for this action do not rely solely on chemical identity but include other factors as well. For example, EPA noted in the proposed action that requirements for USTs apply to CWA HS when present in UST systems greater than 110 gallons in capacity. The regulatory programs discussed in the proposed action were selected because they include discharge or accident prevention requirements and were identified as regulating at least some CWA HS; or regulating at least some facilities that produce, store, or use CWA HS. The Agency's analysis indicated that, for all nine program elements, there are existing cumulative regulatory requirements for accident and discharge prevention and containment relevant to CWA HS under various EPA programs.

*vii. EPCRA Emergency Planning and Notification*

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The EPCRA Emergency Planning and Notification regulations include requirements that address two of the nine program elements: emergency response plan and coordination with state and local responders.

Several commenters supported EPA's analysis of the EPCRA Emergency Planning and Notification regulations. One commenter stated that these programs cover all CWA HS that may be found at a steel mill and require detailed notification to emergency responders and reporting for each such chemical. Another commenter agreed with EPA's assessment of existing regulatory coverage, explaining that the EPCRA Emergency Planning and Notification regulations establish a Threshold Planning Quantity (TPQ) for Extremely Hazardous Substances (EHS) present at a mine site, and require that, if an EHS is present above the TPQ, information be submitted to the SERC. The commenter also noted that additionally, under EPCRA, emergency release notifications for EHS or Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) hazardous substances are required. EPA acknowledges commenters' support of EPA's analysis of the EPCRA regulations, including as applied to CWA HS at specific facilities.

Some commenters opposed EPA's analysis of the EPCRA Emergency Planning and Notification regulations, stating that a majority of CWA HS are not covered by the Emergency Planning Rule's requirements. One commenter asserted that the EPCRA Emergency Planning Rule's requirements to facilitate development of state and local emergency response plans apply,



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with limited exception, only to facilities with an EHS above threshold planning quantities onsite, and stated that fewer than 20 percent of CWA HS are listed EHS under EPCRA. The commenter stated that of the 13 most commonly spilled CWA HS, only five (ammonia, chlorine, hydrogen chloride, nitric acid, and sulfuric acid) are listed as EHS under EPCRA regulations.

Another commenter discussed EPCRA requirements generally and stated that there was a lack of clarity in how the analysis of protection provided by EPCRA regulations ensures that water quality will not be compromised. The commenter stated that EPCRA applies to substantial quantities of a limited universe of hazardous substances and is intended to prevent large scale community harm from a catastrophic air release, not prevent chronic community and ecological harm via water quality degradation through a drainage release pathway, and urged EPA to clarify and reassess the analysis in this proposed rulemaking and to eliminate any protective factors from the analysis that do not directly affect risk to water quality.

EPA disagrees that the applicability criteria of the EPCRA notification requirements is limited to a subset of CWA HS for emergency release notification. The emergency release notification requirements under 40 CFR part 355 apply to facilities that produce, use, or store a hazardous chemical, and that also release a reportable quantity of either an EHS or a designated CERCLA hazardous substance; all CWA HS are defined as CERCLA hazardous substances.

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EPA agrees the applicability criteria of the EPCRA emergency planning requirements are limited to a subset of CWA HS. The emergency planning requirements under 40 CFR part 355 apply to facilities with an EHS onsite in amounts equal to or greater than its designated TPQ. The list of EHS is codified in Appendices A and B of 40 CFR part 355 and includes substances that are also designated as CWA HS. Although the EPCRA emergency planning requirement is for facilities that handle EPCRA EHS, many LEPCs now also include planning for other hazardous chemicals that are reported on the Tier II form under section 312 of EPCRA.

The applicability criteria for the identified regulatory programs, which serve in part as the basis for this action, do not always rely on chemical identity, and includes other factors. Thus, the Agency recognizes that while all the identified regulations include at least some CWA HS within their applicability criteria, the extent to which they serve to prevent and contain CWA HS discharges may be impacted by how broadly or narrowly they regulate those substances within any specific facility. However, the Agency again notes that this final action is not based on any individual provision and/or program preventing CWA HS discharges, but rather on how the cumulative framework of key prevention elements, as implemented through existing EPA regulatory programs, has been demonstrated to adequately serve to prevent, contain and mitigate CWA HS discharges.

*viii. EPCRA Hazardous Chemical Inventory Reporting*

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The EPCRA Hazardous Chemical Inventory Reporting regulation includes requirements that address two of the nine program elements: safety information and hazard review.

Several commenters supported EPA's analysis of the EPCRA Hazardous Chemical Inventory Reporting regulation as it relates to the safety information and hazard review. One commenter, however, asserted that there is potentially another prevention program element under the EPCRA Hazardous Chemical Inventory Reporting regulation that was not identified as relevant in EPA's analysis: incident investigations. The commenter explained that pursuant to the EPCRA regulation found at 40 CFR 355.40(a), a facility must include in its immediate notification several pieces of information that require incident investigation including: the chemical name or identity of any substance involved in the release; an estimate of the quantity of any such substance that was released into the environment; the time and duration of the release; the medium or media into which the release occurred; and any known or anticipated acute or chronic health risks associated with the emergency. The commenter also noted that, except for releases that occur during transportation, the facility must provide a follow-up written emergency notice including: (1) a description of any actions taken to respond and contain the release; (2) state any known or anticipated acute or chronic health risks associated with the release; and (3) where appropriate, provide advice regarding the medical attention necessary for exposed individuals. The commenter further stated that incident investigation typically includes

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identification of the incident, a determination of why the incident occurred, and a determination of appropriate actions to remedy the incident or prevent future incidents. The commenter asserted that the EPCRA Hazardous Chemical Inventory Reporting Regulations require these components so that the facility can submit a mandatory report. As a facility is required to create a notification that includes the above parameters, it must first investigate the incident to determine what the release was, how it occurred, and identify appropriate follow-up actions.

The Agency recognizes these commenters' support for this action. However, the Agency disagrees with the commenters that the EPCRA Hazardous Chemical Inventory Reporting Regulations, in essence, require incident investigations. The highlighted notification requirements the commenter offers as relevant to incident investigation provisions (e.g., chemical name, estimate of quantity released, media release occurred into, necessary medical attention) focus on facility reporting requirements to state and local officials, including information on releases at the facility which must also be made available to the public. For hazardous chemicals designated under the OSHA and its implementing regulations, the EPCRA hazardous chemical inventory reporting provisions require facilities to provide their stored amounts and storage location, as well as their potential hazard(s). The Agency believes that while the information within the reporting requirements highlighted by the commenter may also be included as part of incident investigations, the focus of an incident investigation is to

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determine the cause of a CWA HS discharge, to identify ways to prevent recurrence, to document the investigation's findings, and to implement appropriate corrective actions. Again, while the EPCRA provisions highlighted in this section do not include requirements for incident investigation, LEPCs may use an actual event to update the LEPC emergency response plan and to plan for any potential events in the future. As stated in the above section of this document, many LEPCs focus their emergency planning efforts on all OSHA hazardous chemicals, which include EPCRA EHSs.

In contrast, some commenters disagreed with EPA's analysis of the EPCRA Hazardous Chemical Inventory Reporting rules. One commenter urged EPA to address limitations regarding the implementation of EPCRA. The commenter explained that according to an article by Benjamin et al. (2018)<sup>15</sup>, while EPCRA requires industry to report the storage, use, and releases of hazardous substances to federal, state, and local governments, it is often the most difficult data for utilities to obtain for an entire geographic area because of restrictions mandating how requests must be submitted, and because data can be accessed only after a request is fulfilled. The commenter noted that the article by Benjamin et al. singles out the requirement where requests made under EPCRA must be made by individual facility name and address, which

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<sup>15</sup> Benjamin, J., Smith, E., Kearns, M., Rosen, J., and Stevens, K. (2018). Improving Water Utilities' Access to Source Water Protection and Emergency Response Data. *Journal AWWA*. 110:2. E33-E44.

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requires utilities to have knowledge of all facilities in their area that may have chemical storage tanks on site. These restrictions mean that utilities often do not have all the information they need to prepare for the possibility of a future spill. Another commenter also noted that there is no requirement in any current regulation for facilities to alert downstream utilities once a spill has occurred.

Another commenter stated that the EPCRA Hazardous Chemical Inventory Reporting requirements have a limited reporting regime, and that EPA should establish a more robust reporting regime for CWA HS, including requiring reporting directly to EPA, as well as local and state authorities. The commenter also stated that while reporting is critical, it alone does not prevent spills.

As the Agency highlighted in the proposed action, the EPCRA Hazardous Chemical Inventory Reporting regulation establishes reporting requirements for facilities to provide state and local officials with information on hazardous chemicals present at the facility. The information submitted by the facilities must also be made available to the public. These reporting requirements under 40 CFR part 370 were identified to reflect both the Safety Information and Hazard Review program elements. As part of prevention planning, owners/operators must maintain and review safety information about the chemicals they handle, as well as the equipment involved in their operations. Knowledge and understanding of this information could

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serve to maintain overall safe operations, reducing the potential for CWA HS discharges.

Likewise, the hazard review process is intended to identify potential chemical or operational hazards present in a process. The task of identifying potential hazards could inform changes in operations that would prevent, contain and mitigate CWA HS discharges.

The Agency disagrees the EPCRA Hazardous Chemical Reporting requirements should include directly reporting to EPA. The purpose of these requirements is to provide the public with important information on the hazardous chemicals in their communities, raising community awareness of chemical hazards and aiding in the development of State and local emergency response plans. The Agency believes such a requirement would unnecessarily increase burden on a reporting facility when the intent is to ensure local communities are aware of chemical hazards.

The Agency recognizes that while all the identified regulations include at least some CWA HS within their applicability criteria, the extent to which they serve to prevent, contain and mitigate CWA HS discharges may be impacted by how broadly or narrowly they regulate those substances within a facility. However, EPA disagrees that the applicability criteria of the EPCRA Hazardous Chemical Inventory Reporting regulation cover a limited universe of hazardous substances. The applicability of EPCRA reporting requirements under 40 CFR part 370 is tied to the OSHA HCS (29 CFR 1910.1200(g)). This OSHA standard requires that, for each hazardous chemical, the chemical manufacturer, distributor, or importer provide Safety Data Sheets (SDSs)



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to downstream users to communicate information on their hazards. Given that OSHA requires SDSs for all designated CWA HS, the EPCRA Inventory reporting requirements under 40 CFR part 370 apply to facilities handling any designated CWA HS.

The EPA recognizes recent statutory amendments to EPCRA to require state and tribal emergency response commissions to notify the applicable State agency (i.e., the drinking water primacy agency) of any reportable releases and provide community water systems with hazardous chemical inventory data. The EPA published a factsheet on its website<sup>16</sup> which provides information on these amendments for SERCs, Tribal Emergency Response Commissions (TERCs), and LEPCs.

The Agency again notes that this action is not based on any individual provision and/or program preventing CWA HS discharges, but rather on how the cumulative framework of key prevention elements, as implemented through existing EPA regulatory programs, adequately serves to prevent and contain CWA HS discharges.

*ix. Pulp, Paper and Paperboard Effluent Guidelines*

As highlighted in the proposed action, the CWA Effluent Guidelines and Standards for Pulp, Paper and Paperboard Point Source Category include requirements that address six of the

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<sup>16</sup>[https://www.epa.gov/sites/production/files/2019/04/documents/awia\\_epcra\\_fact\\_sheet\\_draft\\_508\\_serc\\_terc\\_lepc\\_final\\_4-10-19.pdf](https://www.epa.gov/sites/production/files/2019/04/documents/awia_epcra_fact_sheet_draft_508_serc_terc_lepc_final_4-10-19.pdf)

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nine program elements: hazard review, mechanical integrity, personnel training, incident investigations, compliance audits, and secondary containment.

A commenter supported EPA's analysis of the CWA Effluent Guidelines and Standards for Pulp, Paper and Paperboard Point Source Category, and suggested inclusion of additional program elements. The commenter advocated that the regulation includes requirements for all nine program elements, and that EPA should recognize the requirements related to safety information, hazard review, compliance audits, emergency response plan, and coordinating with state/local responders.

The EPA agrees with the commenter that the CWA Effluent Guidelines and Standards for Pulp, Paper and Paperboard Point Source Category have requirements on hazard review and compliance audits; however, the Agency did not identify requirements specific to safety information, emergency response plans, and coordinating with state/local responders on emergency response plans.

In contrast, a commenter disagreed with EPA's analysis of the CWA Effluent Guidelines and Standards for Pulp, Paper and Paperboard Point Source Category because the guidelines address only a subset of non-transportation-related onshore facilities that store or use CWA HS.

The EPA disagrees with the comment because the Best Management Practice (BMP) requirements of 40 CFR § 430.03 and related effluent limitations found in 40 CFR § 430.24 and

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40 CFR § 430.54 (for specific CWA HS that may be present in effluents from Subpart B and E mills) serve to prevent and contain discharges of CWA HS. For the other mill subcategories under 40 CFR § 430, and require permit limits for specific CWA HS (related to the use of certain biocides) unless the permittee has certified to the permit-issuing authority that they are not using these certain biocides.

*x. Other EPA Regulatory Programs*

Several commenters highlighted other EPA regulations not considered for the proposed action as having applicable discharge prevention requirements, including multiple regulations governing aboveground and underground storage tanks. Specifically, the commenters characterized requirements within other EPA programs they believe provide further accident discharge prevention requirements, as follows:

- NPDES Permits: Some commenters asserted that NPDES permits contain effluent limitations and other conditions designed to ensure that any discharges from the point source do not cause or contribute to a violation of an applicable water quality standard, including narrative standards. One commenter asserted that while the Pulp and Paper Effluent Guidelines that EPA identified in the proposed action contain specific BMP requirements designed to avoid discharges from mill processes into the mill sewer system that concern and response applies to other types of facilities as well. A commenter

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asserted many of the EPA effluent guidelines for other point source categories effectively require or create a strong incentive for covered facilities to implement similar measures to prevent or contain spills that otherwise would go into the facility's sewer and impact its wastewater treatment plant.

- NPDES SWPPPs: A commenter asserted that many facilities are required to develop SWPPP under the requirements of their individual NPDES permits. The commenter asserted that under these requirements, facilities are required to conduct site-wide evaluations and identify all potential pollutant sources, describe maintenance and inspection procedures for points of discharge, and maintain robust records of inspections and any required follow-up maintenance of BMPs.
- NPDES Pretreatment Program: Some commenters asserted that because a large number of facilities that may store or use hazardous waste substances are subject to EPA pretreatment standards under CWA § 307, this creates a substantial regulatory infrastructure which encourages industrial users of POTWs to avoid hazardous substance spills and to contain them if they occur.
- CWA Citizen Suit Provision: A commenter asserted that the CWA's frequently used citizen suit provision allows any citizen to commence a civil action against a mining

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company for an unpermitted point source discharge into a navigable water, which provides for additional incentives to avoid unplanned discharges resulting from spills.

- CERCLA: Some commenters asserted that facilities likely to be affected by additional CWA HS regulations are already aware of potential liability under CERCLA, which creates a strong incentive for companies to monitor and control the potential release of hazardous substances.
- RCRA Corrective Action Program and RCRA Imminent Hazard Provisions: Some commenters asserted that CWA HS may also be subject to cleanup requirements for releases of hazardous waste, under the Resource Conservation and Recovery Act (“RCRA”) Corrective Action program, and under the imminent hazard provisions of RCRA § 7003 for releases of hazardous and non-hazardous solid waste. A commenter asserted that, like CERCLA, RCRA cleanup liability has created a strong incentive for companies to monitor and control the potential release of hazardous substances.
- Toxic Release Inventory (TRI): A commenter asserted that there is large overlap between CWA HS and chemicals reported under TRI, which already requires extensive inventory reporting. A commenter stated that EPA should recognize that TRI and similar federal and state reporting requirements can be as effective in motivating facilities to prevent and contain hazardous substance discharges as can traditional command-and-

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control regulations such as the alternatives considered in the Proposed Action, if not more so.

- TSCA: A commenter noted that TSCA directly regulates PCBs (along with SPCC), and that certain of these regulations specifically address the regulatory program elements identified by EPA as pertaining to CWA HS discharges and are designed with the express intent to contain any potential discharge from escaping into the environment.
- Safe Drinking Water Act (SDWA): A commenter stated that the potential for hazardous substance releases is addressed through regulations promulgated pursuant to the SDWA.

The EPA recognizes that other of its regulatory programs may also create incentives for implementing prevention, containment and mitigation measures. However, for the purposes of this final action the Agency identified specific EPA regulatory programs that contain requirements to address the key prevention program elements. For example, the Agency's review of its existing regulatory programs included the Effluent Guidelines requirements for the Pulp, Paper, and Paperboard Industry promulgated at 40 CFR Part 430; this specific review was included because of its provisions for spill prevention and control measures and the requirement to develop a BMP. The relevant BMPs (Subparts B and E of part 430) to prevent spills and leaks

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of spent pulping liquor, soap, and turpentine apply specifically to direct and indirect discharging pulp, paper, and paperboard mills with pulp production.

The EPA identified similar requirements under five CWA Effluent Guidelines and Standards. For the Ore Mining and Dressing Point Source Category standard, EPA found that these effluent guidelines contain requirements for two program elements: mechanical integrity and secondary containment. For the Transportation Equipment Cleaning Point Source Category standard, EPA found that these effluent guidelines contain requirements for one program element: hazard review. For the Construction and Development Point Source Category standard, EPA found that these effluent guidelines contain requirements for one program element: hazard review. For the Concentrated Aquatic Animal Production Point Source Category standard, EPA found that these effluent guidelines contain requirements for two program elements: mechanical integrity and personnel training. Finally, for Pesticide Chemicals standard, EPA found that these effluent guidelines contain requirements for three program elements: mechanical integrity, secondary containment, and emergency response plans. For further details on these requirements, please see the *Supplemental BID*.

Likewise, the Agency is aware that some individual NPDES permits may include SWPPPs, which in turn may contain requirements for the development of spill prevention and response plans as part of BMPs. However, because the entities issuing these permits have



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discretion whether to require any specific BMPs that may include a spill prevention plan on an individual facility basis, the Agency is not considering them as part of the basis for this final action. The Agency recognizes that, similar to the discretionary nature of certain program elements for NPDES Pretreatment Standards, individual entities may have, on a case-by-case basis, requirements that may also serve to prevent and contain CWA HS discharges. In contrast, for facilities subject to the SPCC regulation under 40 CFR part 112, the requirement to prepare an SPCC Plan and to implement an SPCC program is non-discretionary. Nonetheless, the Agency recognizes provisions under other programs may serve to further support the framework of regulatory requirements that would serve to prevent and contain CWA HS discharges.

Regarding the NPDES Pretreatment Program, EPA agrees with the commenters and identified requirements for seven of the program elements: safety information, hazard review, mechanical integrity, personnel training, secondary containment, emergency response plan, and coordinating with state/local responders. For details on these requirements, please see the *Supplemental BID* in the docket for this action.

While EPA did not point to specific program elements under CWA Citizen Suit, CERCLA and/or RCRA cleanup liability, or TRI and/or similar federal and state reporting requirements as program elements in EPA's discharge and accident prevention programs, the Agency recognizes that these provisions may also serve as a deterrent to CWA HS discharges.

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Regarding TSCA PCB regulations, EPA agrees with the commenter and identified requirements for five of the program elements: safety information, hazard review, mechanical integrity, secondary containment, and emergency response plans. For details on these requirements, please see the *Supplemental BID* in the docket for this action.

Regarding SDWA regulations, EPA did not include SDWA in its program review. There are no specific regulations regarding CWA HS in SDWA. However, under the provisions of the 1996 SDWA Amendments (P. L. 104-182, Section 1453), states exercising primary enforcement responsibilities for public water systems were required to complete source water assessments by the end of 2003. Source Water Assessments developed by states were intended to assist local governments, water utilities, and others in identifying and prioritizing risks, mitigation options, and preparedness measures.

The Agency recognizes that several EPA regulations address aboveground and underground storage tanks, for example the UST regulations. The proposed action, *BID* and *Supplemental BID* include background on EPA regulations for aboveground and underground storage tanks that would apply to CWA HS.

Table 2 summarizes the provisions relevant to program elements identified in EPA regulatory programs reviewed both in the *BID* and in the *Supplemental BID*, that adequately serve to prevent and contain CWA HS discharges.

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**Table 2**

**EPA Programs and Corresponding Regulations that Address the Nine Program Elements**

	Program Elements <sup>a</sup>								
	Safety Information	Hazard Review	Mechanical Integrity	Personnel Training	Incident Investigations	Compliance Audits	Secondary Containment	Emergency Response Plan	Coordination with State and Local Responders
<b><i>Reviewed in the Supplemental BID:</i></b>									
CWA NPDES Pretreatment Standards	✓ <sup>b</sup>	✓ <sup>b</sup>	✓ <sup>b</sup>	✓ <sup>b</sup>			✓ <sup>b</sup>	✓ <sup>b</sup>	✓ <sup>b</sup>
TSCA PCB Regulation	✓	✓	✓				✓	✓	
CWA Effluent Guidelines and Standards: Ore Mining and Dressing Point Source Category			✓				✓		
CWA Effluent Guidelines and Standards: Transportation Equipment Cleaning Point Source Category		✓							
CWA Effluent Guidelines and Standards:		✓							

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	Program Elements <sup>a</sup>								
	Safety Information	Hazard Review	Mechanical Integrity	Personnel Training	Incident Investigations	Compliance Audits	Secondary Containment	Emergency Response Plan	Coordination with State and Local Responders
Construction and Development Point Source Category									
CWA Effluent Guidelines and Standards: Concentrated Aquatic Animal Production Point Source Category			✓	✓					
CWA Effluent Guidelines and Standards: Pesticide Chemicals Point Source Category			✓				✓	✓	
<b>Originally Reviewed in BID</b>									
CWA NPDES MSGP for Industrial Stormwater (2015)		✓	✓		✓ <sup>SBID</sup>	✓ <sup>SBID</sup>	✓	✓	
CAA RMP Regulation	✓	✓	✓	✓	✓	✓		✓	✓

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	Program Elements <sup>a</sup>								
	Safety Information	Hazard Review	Mechanical Integrity	Personnel Training	Incident Investigations	Compliance Audits	Secondary Containment	Emergency Response Plan	Coordination with State and Local Responders
CWA SPCC Regulation		✓	✓	✓	✓		✓	✓	
FIFRA Pesticide Management Regulation		✓	✓				✓		
FIFRA Pesticide Worker Protection Standard	✓			✓				✓	
RCRA Generators Regulation		✓	✓	✓			✓	✓	✓
RCRA TSDF Regulations		✓	✓	✓			✓	✓	✓
SWDA UST Regulation		✓	✓	✓			✓	✓	
EPCRA Emergency Planning and Notification Regulation								✓	✓

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	Program Elements <sup>a</sup>								
	Safety Information	Hazard Review	Mechanical Integrity	Personnel Training	Incident Investigations	Compliance Audits	Secondary Containment	Emergency Response Plan	Coordination with State and Local Responders
EPCRA Hazardous Chemical Inventory Reporting Regulation	✓	✓							
CWA Effluent Guidelines and Standards for Pulp, Paper and Paperboard Point Source Category		✓ <sup>SBID</sup>	✓	✓	✓	✓ <sup>SBID</sup>	✓		
<sup>a</sup> A check mark indicates that the regulatory program includes provisions addressing at least one sub-element of the program element. <sup>b</sup> Note that these requirements are at the discretion of the regulatory authority. ✓ <sup>SBID</sup> indicates EPA added this check mark after public comment review.									

Though not shown in Table 2, the Agency also reviewed associated program elements or specific requirements, identified as sub-elements (e.g., under the emergency response plan program element, sub-elements include requiring information about appropriate medical treatment of exposures and procedures for notifying downstream receptors). While inclusion of

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the sub-elements varies considerably across programs, EPA found the majority were addressed in at least one EPA program and corresponding regulation, with most addressed in several programs. A detailed analysis of the EPA regulations that address the nine program elements is contained in the *BID* for the proposed action, as well as in the *Supplemental BID* for this final action, both of which are available in the docket.

This analysis identifies relevant prevention requirements for the existing regulatory framework currently applicable to facilities that manufacture, store, produce, use, or otherwise handle CWA HS. The Agency acknowledges, however, that it does not necessarily gauge the extent to which each prevention element is addressed by the specific provisions. The precise relevance and coverage of existing regulatory requirements to the nine program elements will depend on site-specific information, which is not always available for a nation-wide analysis. The basis for the final action relies on existing EPA framework of regulatory requirements coupled with the frequency and impacts of reported CWA HS discharges.

#### *xi. Other Federal and State Regulations*

While they were not the basis for the Agency's decision for this final action, EPA identified OSHA Regulations, MSHA Regulations, PHMSA Hazardous Materials Regulations, and Office of Surface Mining Reclamation and Enforcement (OSMRE) Regulations spill



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prevention requirements that may be applicable to CWA HS. EPA also identified several state regulations addressing spill prevention requirements that may be applicable to CWA HS.

Several commenters agreed with EPA's analysis of other federal and state regulations. Many of these commenters offered additional federal and state programs that they believe serve to prevent and contain CWA HS. Alternatively, one commenter noted that EPA identified only 14 states that regulate the proper handling and storage of chemicals to prevent accidents and discharges, and that no state appears to provide for all CWA HS the full panoply of spill-prevention program elements identified by EPA in its proposal.

The Agency acknowledges the comments providing additional federal and state regulations that may serve to prevent and contain CWA HS. However, the basis for this final action are the existing EPA regulatory requirements relevant to prevention and containment. Nonetheless, the Agency recognizes that other federal and state regulatory programs, as well as other non-regulatory programs and industry standards, may be applicable and relevant to CWA HS discharge prevention, containment and mitigation.

#### *E. Comments on Additional Efforts to Gather Data*

The Agency signaled in the proposed action its intent to supplement the information used as the basis for its determination with an additional information collection through a voluntary survey. The voluntary survey was distributed to U.S. states, tribes, and territories and requested

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information on EPCRA Tier II facilities, discharges and impacts of hazardous substances to surface waters from 2007 to 2016, and existing state programs in place to help prevent and mitigate the impacts of discharges of hazardous substances to surface waters. The EPA anticipated using the results of the survey to further inform this regulatory action.

Several commenters offered comments on the proposed action in support of the Agency's voluntary survey effort. Some of the commenters stated the Agency should have waited to issue the proposed action until it had the information from the voluntary survey, with one questioning how the EPA could reach the determination that no regulation was needed without first consulting the States, Tribes, and territories who have developed such programs and regulate hazardous substance facilities. Commenters also requested that EPA make the information received through the voluntary survey available for public comment before taking final action.

As previously noted in this FR notice, on June 22, 2018, the Agency issued a voluntary survey directed at State and Tribal Emergency Response Coordinators (respondents with custodial responsibility for data representing the potentially affected "facility universe" that produce, store, or use CWA HS), as well as state, tribal, and territorial government agencies with custodial responsibility for data on CWA HS impacts to drinking water utilities and fish kills potentially caused by discharge(s) of CWA HS. The EPA received relevant responses from 15 states: Alabama, California, Delaware, Hawaii, Indiana, Kentucky, Maryland, Massachusetts,

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Minnesota, Missouri, New Hampshire, New Mexico, Oregon, Rhode Island, and Texas. The Agency made available the data it obtained in response to the voluntary survey through Regulations.gov at Docket ID: EPA-HQ-OLEM-2017-0444, provided notice of its availability on the EPA website for this action, and provided direct notice to the litigants in the S.D.N.Y. litigation that the data was available. Additionally, on February 19, 2019, the EPA published a NODA making the survey data received available for public review and comment.

Three comments submitted on the NODA supported the additional data gathering efforts and the public availability of the responses. One commenter stated that making spill data available allows the public to hold the EPA and industries accountable for hazardous waste spillage, and citizens to make informed decisions on where they live or how their environment may be impacting them. One stated that, while it is important to provide this data to the public, it is more important to enact regulations that monitor how hazardous substances enter water, further citing hydraulic fracturing as just one way these hazardous materials enter our waterways. EPA agrees with the comments that support making the voluntary data publicly available.

The Agency considered the supplemental data received in response to the survey and associated public comments to further inform this final action. The Agency analyzed the data received through the voluntary survey to identify new, potentially relevant discharges and

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impacts (i.e., could not be matched to those identified in the proposed action), as well as to refine the facility universe analysis.

### 1. *Discharge estimates and impacts analysis*

The Agency compared the number of newly identified discharges, and discharges with newly identified reported impacts, to a subset of discharges of CWA HS from non-transportation-related sources presented in the proposed action, for the 13 states analyzed<sup>17</sup>. From the NRC data, the Agency had identified 2,491 potentially relevant discharges and 117 discharges with impacts nationwide. The EPA identified an additional 159 discharges and 148 discharges with impacts, from the 13 states. For the revised total including data from the voluntary survey, EPA identified a subset of 265 discharges with impacts from a total of 2,650 historical, in-scope CWA HS discharges. Impacts included fish kills, evacuations, injuries, hospitalizations, fatalities, sheltering in place, waterway closures, water quality alerts/events/advisories, and water supply contamination.

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<sup>17</sup> Data from the 13 states analyzed includes data from 10 states that responded to the voluntary survey and fish kill data from three states which EPA had received for the proposed action. A full analysis of the voluntary survey data can be found in Appendix B of the Regulatory Impacts Analysis, included in the docket for this action.

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## *2. Facility universe estimates*

To estimate the universe of facilities that would potentially be subject to the proposed action, the Agency reviewed EPCRA Tier II reports submitted by 16 states and extrapolated the data nationally based on NAICS codes. EPA received Tier II reports submitted by two states from the ICR. EPA already had Tier II reports from one of these states – Minnesota. The Agency added the Tier II reports from the second state, Delaware, to the analysis to estimate a revised facility universe. Using Tier II reports for 2014, 2015, or 2017 (the latest available) submitted to 17 states, there are an estimated 108,000 potentially regulated facilities nationwide. A full analysis of the voluntary survey data can be found in Appendix B of the RIA, included in the docket for this action.

## *F. Comments on Alternative Regulatory Options Considered*

### *1. Prevention Program*

The Agency considered proposing a CWA HS discharge prevention and containment program that would include provisions to address all nine prevention program elements: safety information, hazard review, maintenance/mechanical integrity, personnel training, incident investigations, compliance audits, secondary containment, emergency response plan, and coordination with state and local responders. Following an analysis of the existing framework and of the frequency of CWA HS discharges and the causes and impact of such discharges, EPA

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chose not to propose this approach, in part because the data suggest that the existing framework of regulatory requirements adequately serves to prevent and contain CWA HS discharges. The EPA requested comment on whether to develop a CWA HS prevention program.

Many commenters supported adoption of a Prevention Program, with the Agency receiving similar comments in a mass mailer that facilities handling hazardous substances should develop comprehensive plans to prevent discharges into water. One commenter further urged EPA to issue regulations that at a minimum prevent spills, ensure spills are contained and cleaned up expeditiously, and ensure the public has the information that the commenter believes it needs to avoid harm. The commenter stated that an ideal prevention program would include all nine program elements. Additionally, the commenter stated that a prevention program should include: annual reporting of Tier II type information to EPA for facilities covered and not covered by EPCRA Tier II; an SPCC-like plan approved by facility management that is updated every five years or as the result of changes at the facility (e.g., stored materials); mechanical integrity standards and annual inspection of all storage areas, tanks, and secondary containment devices and structures by a third-party professional engineer (PE), compliance audits every three years by a PE, and third-party incident investigations reports provided to EPA, state, and local emergency response committees; secondary containment measures aligned with “good engineering practices” and suitable for the hazardous substances stored; public notification of

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spills, including notification to local and state emergency response commissions, EPA, local public health agencies, and local public water providers, and the identification of individuals responsible for notification; and financial bond requirements for covered facilities to pre-fund, or otherwise pre-arrange for response and cleanup activities. Another commenter urged EPA to reconsider the option of a prevention program that would credit a company's prevention efforts in compliance with another federal or state regulation, stating that such a program would ensure a coordinated prevention program that addresses the production, storage, and use of hazardous substances.

The EPCRA Inventory reporting regulation establishes reporting requirements for facilities to provide state and local officials with information on hazardous chemicals present at the facility, including CWA HS. The information submitted by the facilities must be submitted to the LEPC, the SERC, and the local fire department. The EPA believes that an additional burden of annual reporting of similar information to the Agency would not further reduce CWA HS discharges and their impacts.

The Agency identified CWA HS discharges in the NRC data where a CWA listed hazardous substance, such as PCBs, were mixed with oil (e.g., transformer oil). The Agency included the SPCC regulation in its review of regulatory programs that address discharge or accident prevention requirements because, while applicable to oil, it also regulates oil mixed



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with other substances, including CWA HS. Storage and handling of PCB-laden transformer oil containers are subject to several of the regulatory elements of the SPCC regulation when a facility meets the applicability criteria of 40 CFR part 112. The SPCC regulation requires facilities to submit a report to the Regional Administrator and to certain state regulatory agencies after certain oil discharges impacting jurisdictional waters (40 CFR 112.4). The report includes information to assist the EPA with evaluating the efficacy of the SPCC plan and to identify potential amendments to the plan that may be required. The elements in the report include information related to the oil discharge's cause, corrective actions taken, failure analysis, and other preventative measures to minimize the reoccurrence of the discharge. Overall, the SPCC regulation includes various elements to prevent oil discharges, including discharges of oil mixed with CWA HS, including a facility diagram, oil discharge predictions, secondary containment or diversionary structures, bulk storage overflow prevention, requirements for piping and bulk container inspections, transfer procedures, reporting requirements, discharge response/planning elements, personnel training, PE review of amendments and a five-year plan review. Many of these elements were also identified in other EPA regulatory programs. For example, EPA identified six other EPA regulations that have secondary containment provisions as key program elements because, when properly designed and maintained, secondary containment systems can prevent discharges to waters subject to CWA jurisdiction. While the Agency recognizes the

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SPCC regulation has PE plan certification, secondary containment, and mechanical integrity and inspections for bulk containers requirements for certain plan holders, the SPCC regulation does not otherwise require: 1) mechanical integrity standards and annual inspection of all oil storage areas, all containers, and secondary containment devices and structures by a third-party PE; 2) compliance audits every three years by a PE; and 3) third-party incident investigations with the cause of the spill, corrective action, and recommendations for additional corrective action, with such reports provided to EPA, state, and local emergency response committees. Notwithstanding the applicability of its provisions, EPA believes the SPCC regulation is a critical regulatory program that, along with the other EPA regulatory programs identified, serve as existing cumulative EPA regulatory requirements for accident and discharge prevention relevant to CWA HS.

The Agency agrees that notification of discharges is a key element in a prevention program. There are existing notification requirements under EPA regulations (and other federal regulations) that already serve this need. For example, 40 CFR 117.21 provides that any person in charge of a vessel or an onshore or an offshore facility shall, as soon as he has knowledge of any discharge of a CWA HS in quantities equal to or exceeding in any 24-hour period the reportable quantity, immediately notify the appropriate agency of the United States Government of such discharge (see 33 CFR 153.203). As highlighted in the proposed action, the EPCRA

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Emergency Planning regulation (Emergency Planning and Notification, 40 CFR Part 355)

requires emergency notification in the event of a release of a regulated chemical, including CWA HS. Furthermore, facility owners/operators must already designate a facility representative to provide notice to the LEPC (40 CFR 355.20(b)). The emergency release notification requirements in 40 CFR part 355 apply to facilities that produce, use, or store a hazardous chemical, and that also release a reportable quantity of either an EHS or a CERCLA hazardous substance, including all CWA HS. These EPA regulations serve as part of the basis for this action.

The EPA did not identify a program element in the regulatory programs that the Agency reviewed that requires covered facilities to post bond, pre-fund, or otherwise pre-arrange for response and cleanup activities. The Agency believes that CWA 311 already sufficiently addresses responsible party liability in cases of a discharge or a substantial threat of discharge.

Finally, the Agency chose not to finalize new regulations under CWA(j)(1)(C) following an analysis of the existing framework of EPA regulatory provisions, the frequency of CWA HS discharges and the causes and impacts of such discharges. This analysis suggests that the existing framework of EPA regulatory requirements adequately serves to prevent, contain and mitigate CWA HS discharges.

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## *2. Targeted Prevention Requirements*

The Agency considered proposing a limited set of requirements designed to prevent and contain CWA HS discharges and identified the following requirements that could be effective: hazard review, mechanical integrity, personnel training, and secondary containment. However, the Agency believes that these provisions would add only minimal incremental value under a new regulation. While EPA did not propose this approach, EPA sought comment on whether it should adopt a narrowly targeted regulatory approach to prevent, contain and mitigate CWA HS discharges.

One commenter urged EPA to adopt a comprehensive prevention program instead of targeted prevention requirements, stating that simply because the NRC database does not list reported causes of spills that correspond directly to some spill prevention measures such as incident investigations, compliance audits, notification requirements, and emergency response planning is not a reasonable basis for EPA to reject those measures. In addition, this commenter wrote that EPA's basis for rejecting the targeted prevention approach is unreasonable, stating the Agency cannot refuse to issue regulations because some requirements issued under other statutory provisions apply to some hazardous substances at some facilities.

The Agency's review of cause data in the NRC database for past CWA HS discharges identified four key program elements for the targeted program that the Agency believed could

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more immediately address the identified discharge causes. The Agency did not reject spill prevention elements such as incident investigations, compliance audits, notification requirements, and emergency response planning on the basis that the NRC database does not identify reported causes of spills that could be prevented by that program element. Rather, the Agency did not finalize a targeted requirement approach because provisions reflective of key program elements frequently exist in EPA regulatory programs and because the Agency believes further regulation would provide only minimal incremental value.

3. *Alternative Approach - Incorporate existing discharge prevention provisions established under other statutory authorities under a CWA section 311(j)(1)(C) program*

The Agency requested comments on the concept of establishing a prevention program under CWA section 311(j)(1)(C) authority that incorporates existing discharge prevention provisions already established under other statutory authorities.

Three commenters expressed support for minimizing regulatory redundancies of a HS spill prevention regulation through recognizing actions from other regulatory requirements. One commenter agreed that EPA can and should minimize regulatory redundancies when the requirements under the new hazardous substance spill prevention regulations would be redundant of existing requirements. At the same time, the commenter asserted that EPA must maintain comprehensive hazardous substance spill prevention protection and stated that a patchwork of

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rules could create unforeseen gaps or loopholes. The commenter stated that alternative compliance would allow partial compliance with the new regulation by compliance with portions of existing regulations. The commenter also stated that any limitation in the scope of the hazardous substance spill prevention regulation based on redundancy or substituted compliance must be based on a specific comparison of each applicable regulation's requirements and effects. Finally, the commenter noted that they cannot comment on the reasonableness of any substitutions until EPA first determines the requirements under a new spill prevention regulation.

Another commenter urged EPA to reconsider the option of a prevention program that would credit a company's prevention efforts in compliance with another federal or state regulation, stating that a program that works with other regulations would ensure a coordinated prevention program that addresses the production, storage, and use of hazardous substances beyond those substances that end up in the waste stream. This alternative would require additional study of the causes and impacts of hazardous substances spills, informing an effective spill prevention, control, and countermeasure program.

As discussed elsewhere in this notice, one commenter supported EPA's targeted prevention requirements alternative and recommended that EPA collect data and further explore requiring facilities to comply with either the NPDES MSGP or the SPCC rule. This commenter believed that EPA's data successfully demonstrate that the targeted program elements are already

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in place in the NPDES MSGP, SPCC rules, and UST requirements. Facilities that already comply with the NPDES MSGP would need to take no further action; facilities that already comply with the SPCC regulations would be expected to adapt their SPCC plans as necessary to ensure that they address hazardous substances as well.

One commenter who submitted a comment to the NODA published in the **Federal Register** on February 19, 2019 (Docket number EPA-HQ-OLEM-2017-0444) stated that EPA already has experience with an available program focused on accident prevention in the Clean Air Act Section 112(r): Accidental Release Prevention / Risk Management Plan. The commenter stated that this program already requires OSHA's PSM standard as the accident prevention program as well as additional hazard assessment, management, and emergency response requirements for Program 3 facilities. The commenter added that there is no reason that EPA could not tier the CWA accident prevention rule just as it did for RMP and would not need to create a new program when it can adapt an existing program.

The EPA disagrees with the commenter's assertion that any limitation of the scope of CWA HS spill prevention regulation based on redundancy or substituted compliance must be based on a specific comparison of each applicable regulation's requirements and effects, and that the commenter would not be afforded the opportunity to comment on the reasonableness of any substitutions until EPA first determines the requirements under a new spill prevention regulation.



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The Agency set forth to determine whether new regulatory requirements under CWA section 311(j)(1)(C) would be appropriate to prevent, contain and mitigate CWA HS discharges. The EPA identified an analytical framework of discharge prevention, containment, and mitigation provisions, or program elements, found in discharge and accident prevention regulatory programs. The EPA then conducted a review of existing EPA regulatory programs to determine which ones include these program elements and apply to CWA HS. The EPA believes it is reasonable to expect variations in the scope and provisions of existing EPA regulatory programs for accident and discharge prevention, even as the Agency's analysis showed there is an existing framework of cumulative requirements that adequately serves to prevent, contain and mitigate CWA HS discharges. Furthermore, the Agency reviewed cause data in the NRC database for past CWA HS discharges and identified four key program elements for the target program that can more immediately address the identified discharge causes in consideration of targeted prevention requirements. The Agency chose not to finalize this option because these provisions were frequently identified in existing EPA regulatory programs and because the Agency believes it would provide only minimal incremental value by requiring these provisions in a new regulation. The Agency also requested information that it may use to revise or supplement the Agency's analysis regarding any facilities which are using, storing, producing, and/or otherwise handling CWA HS. While the Agency received additional information on reported impacts of CWA HS

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through the voluntary survey, the Agency did not receive information that pointed to a need for additional review of the causes of hazardous substance discharges. Based on the reported frequency and impacts of identified CWA HS discharges, and the Agency's evaluation of the existing framework of EPA regulatory requirements relevant to preventing CWA HS discharges, EPA has determined that the existing cumulative framework of regulatory requirements adequately serves to prevent and contain CWA HS discharges, and therefore, the alternative approach to incorporate existing discharge prevention provisions established under other statutory authorities under a CWA section 311(j)(1)(C) program is not necessary at this time.

As discussed above, the Agency considered an alternative approach for targeted accident prevention provisions; such an approach could also serve as the basis for a tiered approach similar to the RMP regulation. However, the Agency's determination not to issue any new regulatory requirements at this time is not based solely on an evaluation of the existing framework of EPA regulatory requirements relevant to discharge prevention and containment, but also on the analysis of the reported frequency and impacts of identified CWA HS discharges. One commenter opposed the possibility of promulgating "drop-in" requirements for hazardous substances into the existing SPCC framework. The commenter noted that the SPCC provisions would be expanded to apply to hundreds of different substances whose physical and chemical properties are as varied as the facilities and equipment employed to manage them. Additionally,

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the commenter raised concerns that there likely are thousands of facilities, especially those that are operated by small businesses, that may store chemicals but do not store oil and would come into the SPCC program for the first time. The commenter saw the costs of SPCC “drop-in” requirements significantly outweighing any corresponding benefit.

The EPA agrees that promulgating “drop-in” requirements for CWA HS whose physical and chemical properties vary into an existing SPCC framework tailored to oil would expand the current SPCC facility universe to include facilities not previously subject to 40 CFR part 112. The EPA did not propose a “drop-in” requirement and therefore did not include such analysis in the RIA for the proposed action.

#### *4. Alternative Approach - Applicability criteria for alternative options considered (facilities, thresholds)*

The Agency requested comments on appropriate applicability criteria or thresholds for alternative options, if the Agency were to finalize an alternative option that established a regulatory program that applied to facilities producing, storing, processing, using, transferring or otherwise handling CWA HS.

One commenter noted that EPA did not provide applicability criteria or thresholds in the proposed action. In the absence of such criteria, the commenter suggested that EPA set an applicability threshold for each non-transportation-related onshore facility that stores CWA HS

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matching the chemical-specific thresholds for reporting hazardous substance spills under 40 CFR §117.3. The commenter suggested two alternative methods of applying these thresholds: set the thresholds to apply to the entire regulation, such that a facility that is over the threshold for a single CWA HS must comply with all requirements; or set different applicability thresholds for separate subparts of the regulation. The commenter stated that EPA should consider setting more stringent thresholds for facilities in sensitive areas, such as those where a spill could affect water bodies that serve as public drinking water supplies, recreation sites, or ecologically sensitive habitats. The commenter asserted that, in addition to reporting requirements, regulated facilities must take precautions to prevent and respond to discharges.

The Agency recognizes there are various approaches to setting applicability criteria or thresholds for a prevention regulatory program, such as those based on reportable quantities under 40 CFR 117.3. However, given that the Agency is not finalizing either a prevention program, targeted requirements, or any other alternative regulatory option, it is not establishing any applicability criteria in this final action. Each of the EPA prevention programs identified as part of the existing prevention and containment framework already have specific applicability criteria. This framework of existing EPA regulatory requirements adequately serves to prevent and contain CWA HS discharges. Therefore, EPA believes there is no need to establish

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additional or superseding applicability criteria or thresholds under CWA section 311(j)(1)(C) at this time.

#### *5. Alternative Approach - Other suggested options*

In response to the Agency's request for comments on any alternative approaches not specifically identified in the proposed action, six commenters suggested alternative spill prevention program options in addition to those presented in the proposed action.

Two commenters suggested approaches that would address the potential impact of discharges on drinking water systems. One commenter recommended that EPA clearly define a drinking water utility as an authorized recipient of EPCRA Tier II information to support emergency planning, notification, and response. The commenter stated that such changes would mitigate the potential impact on treatment operations and require that the potentially impacted community water systems receive timely notification of a hazardous substance release under section 311 of the CWA. This commenter also noted the importance of prevention measures such as mitigating risks and consequences of hazardous substance releases. They requested a comprehensive assessment of the full universe of CWA HSs that would include additional applicability to both SPCC and TSCA. Another commenter expressed that EPA should further investigate alternatives that are both feasible and cost-effective, without being an economic burden. They urged EPA to develop a mandatory notification process for downstream utilities

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following a hazardous chemical spill, to facilitate utilities obtaining EPCRA information, and to clarify existing requirements and develop guidance for utilities to better utilize the program.

One commenter suggested EPA establish improved enforcement and stricter consequences for facilities, noting that enforcement should include facility inspection for secondary containment and third-party audits, and provide consequences for facilities that do not honor water quality standards. The commenter also expressed concern that water providers do not have necessary information to determine the location of potential chemical contamination sources, and consequently cannot develop adequate response programs or procedures. The commenter suggested that EPA could develop a GIS interface to better disclose such facilities to utilities and the public so that facilities and communities could prepare response plans for worst case scenarios.

Noting the number of CWA HS spills, another commenter recommended a flexible plan where States create State Implementation Plans to reduce the number of hazardous substance spills, without harming economic growth.

One commenter stated that EPA should promulgate a rule requiring detailed spill prevention requirements including: plans that are publicly disclosed, have enforcement criteria, include regular internal and external inspections of storage tanks containing hazardous substances; specify regular third-party inspections and safety audits; primary storage

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specification such as tank design and size limitations based on the type of chemical); secondary containment; immediate public notification; bonds for or pre-fund response and cleanup costs; and public disclosure of the location and size of aboveground storage tanks, their last inspection date, and the identity of the hazardous substance.

Another commenter suggested an alternative that includes spill mitigation and prevention activities in line with the inspection and documentation of accident prevention programs identified by the U.S. Chemical Safety Board. The commenter suggested strategic coordination between facility owners/operators and third parties such as local emergency response officials and LEPCs.

The EPA recognizes recent statutory amendments to EPCRA to require state and tribal emergency response commissions to notify the applicable State agency (i.e., the drinking water primacy agency) of any reportable releases and provide community water systems with hazardous chemical inventory data. The EPA published a factsheet<sup>18</sup> on its website that provides information on these amendments for SERCs, TERCs, and LEPCs.

For the purposes of this action, the term “hazardous substance” is defined in CWA section 311(a)(14). The EPA has promulgated a list of CWA HS in 40 CFR part 116. To estimate

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<sup>18</sup> [https://www.epa.gov/sites/production/files/2019-04/documents/awia\\_epcra\\_fact\\_sheet\\_draft\\_508\\_serf\\_terc\\_lepc\\_final\\_4-10-19.pdf](https://www.epa.gov/sites/production/files/2019-04/documents/awia_epcra_fact_sheet_draft_508_serf_terc_lepc_final_4-10-19.pdf)



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the universe of potentially subject facilities, EPA took a conservative approach and assumed that all facilities identified through the EPCRA Tier II data as having CWA HS would have the potential to discharge to jurisdictional waters. The Agency could not identify, for the purposes of this final action, an appropriate method to estimate, and exclude from the analysis, the number of facilities that would not have the potential to discharge to waters subject to CWA jurisdiction.

The Agency disagrees with comments relative to the flexible plans, including States establishing State Implementation Plans to reduce the number of hazardous substance spills. CWA section 311(j)(1)(C) authorities are not delegable to states. However, nothing in the final action prevents states from developing their own prevention programs.

Note that for all EPA regulatory programs identified the Agency enforces regulatory requirements in accordance with its specific statutory authorities. While EPA did not identify a specific program element relative to posting bonds, pre-funding, or otherwise pre-arranging for response and cleanup activities, the Agency believes that CWA 311 already addresses responsible party liability in cases of a discharge or a substantial threat of discharge. Finally, while CWA 311(j)(1)(C) authorities are not delegable to states, nothing in the final action prevents states from developing their own prevention programs.

As highlighted in the FR Notices and supporting documentation to the proposed and final action, the identified framework of EPA programs already includes requirements similar to those

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highlighted by the commenters. For example, the RMP regulation requires facilities that use certain listed, regulated substances to develop and implement a risk management program, and to submit to EPA an RMP Plan for all covered processes. The RMP must be reviewed and revised, as appropriate, and the RMP Plan summarizing the facility's program must be resubmitted every five years. Likewise, the SPCC regulation requires an SPCC Plan comprised of several elements, including a facility diagram, oil discharge predictions, secondary containment or diversionary structures, overfill prevention, requirements for inspections, transfer procedures, personnel training, and a five-year plan review, mechanical integrity and inspections for bulk containers, secondary containment, and PE plan certification requirements for certain plan-holders. Finally, the Agency addresses in this document similar statements about what some commenters believe should be included in detailed spill prevention requirements in the discussion of the individual prevention programs elements, as well as in the discussion of each existing EPA regulatory program identified as part of the framework (e.g., public disclosure of plans; public disclosure of the location and size of aboveground storage tanks, their last inspection date, and the identity of the hazardous substance; storage tank compatibility and specification; enforcement criteria, including regular internal and external inspections of hazardous substance-containing storage tanks, regular third-party inspections and safety audits; secondary containment; immediate public notification of discharges; and bonds for, or pre-funding of, response and cleanup costs).

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The Agency identified nine program elements that are commonly contained in EPA regulatory programs provisions, and that adequately serve to prevent, contain, or mitigate CWA HS. The EPA believes these key program elements capture mitigation actions such as employee training, maintenance cycles, management of change, and programs to properly manage contractors and similar programs the commenter stated are identified by the U.S. Chemical Safety Board. For example, the *BID* and *Supplemental BID* describe the personnel training element as training programs for employees and/or contractors help ensure they are aware of proper and/or safe operating procedures, chemical hazards, discharge prevention and containment measures, and response procedures. The EPA believes a training program that aims to reduce operator errors that could lead to CWA HS discharges and educate operators on the proper implementation of discharge prevention measures would capture the employee training action identified by the commenter.

The Agency believes a framework for strategic coordination between facility owners/operators and third parties, such as local emergency response officials and LEPCs, already exists under programs such as EPCRA. The EPCRA Emergency Planning and Notification regulation<sup>19</sup> requires regulated facilities to provide information necessary for developing and implementing state and local emergency response plans. It also requires

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<sup>19</sup> Emergency Planning and Notification, 40 CFR Part 355

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emergency notification in the event of a release of a regulated chemical. The facility owner/operator must designate a facility representative who will participate in the local emergency planning process as a facility emergency response coordinator and provide notice to the LEPC. The LEPCs include representatives from the local community (including elected state and local officials; police, fire, civil defense, and public health professionals; facility representatives; and community group representatives). The LEPCs develop an emergency response plan for the community and provide information about chemicals in the community to citizens. Where there is no active LEPC, different entities such as fire departments, emergency management agencies, police departments, or public health agencies may be planning for and/or assisting in an incident response. Likewise, the EPCRA Inventory reporting regulation<sup>20</sup> establishes reporting requirements for facilities to provide state and local officials with information on hazardous chemicals present at the facility. The information submitted by the facilities must also be made available to the public.

#### *G. Comments on Legal Authority*

CWA section 311(j)(1)(C) directs the President to issue regulations establishing procedures, methods, and equipment; and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore

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<sup>20</sup> Hazardous Chemical Reporting: Community Right to Know, 40 CFR Part 370

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facilities, and to contain such discharges. 33 U.S.C. 1321(j)(1)(C). The President has delegated to EPA the authority to regulate non-transportation-related onshore facilities (see Section 2(b)(1) of Executive Order 12777, Implementation of Section 311 of the Federal Water Pollution Control Act of October 18, 1972, as Amended, and the Oil Pollution Act of 1990). Pursuant to section 2(i) of Executive Order 12777, DOI has redelegated CWA section 311(j)(1)(C) authority to regulate non-transportation related offshore facilities landward of the coastline to EPA.

On July 21, 2015, the Environmental Justice Health Alliance for Chemical Policy Reform, People Concerned About Chemical Safety, and the Natural Resources Defense Council filed a lawsuit against EPA for failing to comply with an alleged duty to issue regulations to prevent and contain CWA HS discharges originating from non-transportation-related onshore facilities, including aboveground storage tanks, under CWA section 311(j)(1)(C). On February 16, 2016, the United States District Court for the Southern District of New York entered a Consent Decree between EPA and the litigants establishing a schedule under which EPA is to sign “a notice of proposed rulemaking pertaining to the issuance of the Hazardous Substance Regulations,” and requiring EPA to take final action after notice and comment on the notice. The EPA issued a notice of proposed rulemaking on June 25, 2018 (83 FR 29499) in which, based on the existing framework of EPA regulatory requirements, in conjunction with an analysis of the frequency and impacts of reported CWA HS discharges, the Agency did not

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propose any new spill prevention and containment regulatory requirements under CWA section 311(j)(1)(C) at this time.

Several commenters stated that the Agency has the discretion and inherent authority to interpret CWA section 311(j)(1)(C) as having already been fulfilled by other federal statutory and regulatory programs implemented after the CWA's amendment of the Federal Water Pollution Control Act in 1972. Some commenters further asserted it would be arbitrary and capricious for the EPA to ignore the statutory and regulatory programs that have been adopted in the 40 years since, and that already achieve the same ends as any potential new regulation, regardless of whether they were issued with reference to section 311(j)(1)(C). Some commenters pointed to a "de minimis doctrine" that allows an agency to decline to take a regulatory action when the totality of circumstances indicates that issuing the regulation would provide no significant benefit, and not just when there would be no benefit at all. One commenter questioned whether EPA holds the authority to unilaterally revise section 311 of the CWA to include products outside the provision's current scope and applicability, and without the direction of the Congress. Another stated that while the Consent Decree required that EPA issue proposed rules to further regulate the prevention and containment of hazardous substance spills under CWA section 311(j)(1)(C), neither the litigation nor the Consent Decree included any input from the many stakeholders that would be affected by the promulgation of such rules, and

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notably did not involve any of the entities that would be subject to potential new regulations.

Other commenters pointed to case law in support of the Agency's proposed action.

Based on an evaluation of the existing framework of EPA regulatory requirements, and the reported frequency and impacts of CWA HS discharges, the Agency is not finalizing any new spill prevention and containment requirements under CWA section 311(j)(1)(C) at this time. EPA believes there would be only minimal incremental value in requiring new prevention regulatory provisions. Further, there is no reason to believe that establishing what may be redundant provisions would alleviate discharges from facilities that disregard existing regulations. For this determination, the Agency evaluated statutory and regulatory programs adopted since Congress enacted CWA section 311(j)(1)(C), contrasting existing requirements relevant to preventing CWA HS discharges with the frequency and reported impacts of CWA HS discharges. The Agency believes it has a demonstrated record of acting in accordance with the law and of meeting its obligations relative to CWA section 311(j)(1)(C).

The President delegated to the EPA Administrator those functions in CWA section 311(j)(1)(C) pertaining to establishing procedures, methods, and equipment and other requirements for equipment to prevent and to contain discharges of oil and hazardous substances from non-transportation-related onshore facilities (Section 2(b)(1) of Executive Order 12777, Implementation of Section 311 of the Federal Water Pollution Control Act of October 18, 1972,



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as Amended, and the Oil Pollution Act of 1990); the Department of the Interior has redelegated the authority to regulate non-transportation-related offshore facilities landward of the coastline to EPA (see 40 CFR part 112, Appendix B). Therefore, this action considers requirements promulgated by EPA when assessing whether the existing regulatory framework adequately serves to prevent, contain and mitigate CWA HS discharges.

The Agency does not have the authority to unilaterally revise CWA statutory language. EPA is taking this action to comply with the Consent Decree and the requirements of CWA section 311(j)(1)(C). The Agency provided an opportunity for public notice and comment on its approach to CWA HS regulations under section 311(j)(1)(C). EPA acknowledges commenters supporting this approach. The Agency has appropriately considered cost and benefit implications for this action in accordance with Executive Order 12866. The Agency developed this action in accordance with the Administrative Procedure Act (APA) and consistent with applicable Executive Orders.

Alternatively, some commenters asserted that the proposed action requiring no new requirements violates the CWA mandate that the President “shall issue regulations . . . establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of . . . hazardous substances” from non-transportation-related onshore facilities, “and to contain such discharges.” One commenter stated that the current regulatory

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framework does not fully mitigate the risk of CWA HS discharges when hazardous substances are stored in close proximity to drinking water sources. Some commenters asserted that when Congress intends to give EPA discretion regarding whether to issue a regulation, it does so explicitly, and that Congress did not grant such discretion in CWA section 311(j)(1)(C). Some commenters stated the proposed approach to not issue new regulatory requirements under CWA section 311(j)(1) is not consistent with the intent of the Consent Decree. Other commenters pointed to existing case law to oppose the Agency's proposed action.

In the 40 years since CWA section 311(j)(1)(C) was enacted by Congress, multiple statutory and regulatory requirements under different federal authorities have been established that generally serve to, directly or indirectly, prevent and contain CWA HS discharges. The EPA recognizes the need for prevention requirements; to this end, the Agency specifically identified existing regulatory requirements for procedures, methods, and equipment to prevent and contain discharges of hazardous substances from non-transportation-related facilities located both onshore and offshore landward of the coastline. Given this existing framework of EPA regulatory programs, and the analysis of frequency and impacts of reported CWA HS discharges, the Agency believes there would be only minimal incremental value in promulgating new prevention regulations. The Agency again notes this action is not based on any individual provision and/or standalone regulatory program preventing CWA HS discharges. The analysis

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demonstrated how the cumulative framework of key prevention and containment elements, as implemented through those existing EPA regulatory programs identified, meet the requirement to regulate CWA HS under section 311(j)(1)(C). The Agency considered whether it was appropriate to issue new regulatory requirements under CWA section 311(j)(1)(C) for hazardous substances and determined, as provided in the final action and supported by the record, that at this time EPA has met its statutory obligations.

The EPA is taking this action to comply with the Consent Decree and with CWA section 311(j)(1)(C). The Agency has provided an opportunity for public notice and comment on the approach to satisfy the CWA requirements under section 311(j)(1)(C). The Agency developed this action in accordance with the Administrative Procedure Act (APA) and consistent with applicable Executive Orders. The Agency analysis demonstrates that there would be only minimal incremental value at this time in promulgating new regulatory requirements.

The applicability of the individual prevention programs or regulatory requirements varies depending on the covered CWA HS and on the scope of coverage over specific facilities that produce, store, or use the regulated CWA HS. While the Agency recognizes this variability, the analysis shows the identified EPA regulatory programs address the universe of CWA HS. Furthermore, this action is not based on any individual provision, applicability thresholds, and/or standalone regulatory program for the prevention of CWA HS discharges. Rather, this action is

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based on the cumulative framework of key prevention elements, as implemented through the existing EPA regulatory programs identified herein, that have demonstrated at this time to offer adequate protections to prevent and contain CWA HS discharges at the universe of potentially CWA regulated facilities.

#### *H. Comments on Economic Analysis and Executive Orders*

##### *1. Economic Analysis*

The EPA prepared an economic analysis of the potential costs and benefits associated with the three regulatory options considered for the proposed action. Several commenters agreed with EPA's conclusion for the proposed action that the existing framework of regulatory requirements serves to prevent and contain CWA HS discharges and that the benefits may not justify the costs of any of the targeted program elements. One commenter stated that EPA reasonably concluded that additional regulations to address releases of CWA HS were liable to be extremely costly to implement with little or no spill prevention benefit, redundant of existing regulations, and/or in conflict with existing regulations. Another commenter stated that additional new requirements would increase cost and recordkeeping requirements without any environmental benefits, while yet another commenter stated that no regulatory program, regardless of how stringent it is, will prevent all discharges from regulated facilities, and EPA is not obligated to impose regulations with that objective in mind.

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One commenter stated that a new rule that would impose new procedural and other substantive requirements would have significant costs and that the benefits may not justify these costs. The commenter asked EPA to explain more fully EPA's authority to consider costs and benefits before deciding to adopt new regulations. The commenter also stated that just because EPA issues a new regulation intended to reduce the chance of an uncontained spill does not mean that facilities will have any significantly greater incentive to prevent and contain spills than already exists. This commenter stated that EPA should emphasize in its final action that cost-benefit balancing does not justify any new regulations addressing CWA HS releases.

Two commenters stated that EPA is not prohibited by law from considering costs and benefits of proposed rules and that recent case law has shown that EPA has the discretion to do so. One of the commenters stated that the Supreme Court has further shown that, if EPA fails to consider cost in determining whether to regulate – and in particular, whether to add new regulations on top of existing requirements – it is vulnerable to an arbitrariness challenge. The commenter stated that the Supreme Court found that even though there was no explicit statutory mandate to consider costs and benefits, issuing a rule without doing so was arbitrary and capricious, and unreasonable. In addition, these commenters noted that EO 12866 and EO 13563 instruct agencies to consider quantitative cost-benefit balancing and that nothing in the CWA prevents EPA from following those directives.

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One commenter agreed with EPA's conclusion that existing federal and state regulations and industry standards already contain the regulatory standards that EPA would impose but disagreed with EPA's assessment about the burdens associated with duplicative regulation. This commenter stated that while EPA suggests that the burdens of duplicative regulations are fairly minor, this might be accurate only with perfect coordination among states, federal agencies, and industry standard-setting organizations. In practice, this commenter noted, it is more likely that requirements will be inconsistent or contradictory, resulting in few if any burden reductions in having to comply with two separate regulatory programs. This commenter disagreed with EPA's statement that the cost assessments are significant overestimates because many facilities will already be fulfilling these requirements under a wide variety of existing regulations and urged EPA to reconsider its conclusion about the regulatory burdens associated with duplicative regulations.

One commenter expressed appreciation for EPA's efforts to evaluate the monetized damages associated with CWA HS discharges but was concerned that the monetized damages overestimated the direct costs associated with the discharges. The commenter also noted that other federal statutes and regulatory programs are appropriate mechanisms to address other types of damages associated with chemical releases, and damages caused by discharges of CWA HS are most accurately assessed by limiting evaluation to those impacts directly caused by

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discharges of CWA HS to water. The commenter asserted that just because a chemical release reaches water does not necessarily mean that the chemical reaching the water caused the other site impacts. The commenter asserted that it is not clear whether some impacts, such as sheltering in place and fatalities, are caused directly by hazardous substances reaching water. The commenter added that the 2014 fatality included in the Regulatory Impacts Analysis (RIA) appeared to have been caused by incidents unrelated to the discharge of a hazardous substance to water and it is likely that the other two fatalities were not directly caused by CWA HS reaching jurisdictional waters. This commenter suggested that the fatality in 2014 which EPA included in its assessment of impact in the RIA for the proposed action should not be included, and that it would be more appropriate for the fatality in EPA's assessment of impacts in 2014 to be considered in an evaluation of chemical accidents subject to OSHA or RMP regulations. The commenter noted that in its review, removing one of the three included fatalities would decrease the monetized damages in the RIA by approximately one-third. Furthermore, the commenter stated that removing all three fatalities from the cost data in the RIA would reduce EPA's annualized cost impacts by 90 percent. The remaining estimated annualized cost of impacts from hazardous substance discharges across the nation would then be below EPA's estimated cost of compliance for a single large facility.



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The Agency acknowledges the commenters' support for its determination not to promulgate new regulations at this time. EPA has determined that the regulatory alternatives it considered would create only minimal incremental value and is not finalizing new regulatory requirements at this time. Regarding the comment that the monetized damages overestimated the direct costs associated with the discharges, EPA agrees with the commenter that not all the monetized impacts may be the direct result of CWA HS discharges to water and stated such in the RIA for the proposed action. For example, the number of individuals evacuated represents evacuees from the facility resulting from the reported incident. EPA has no information regarding whether the evacuations were caused by the discharges to water.

EPA also agrees with the commenters that the fatalities reported to the NRC database may not be the direct result of CWA HS discharges to water. For example, the information reported to the NRC database on the 2014 fatality states, "Caller is reporting an 18-gallon release of transformer oil onto the ground and into storm drain along Connecticut Ave which leads to the Reynolds Canal. Transformer exploded and released the material from the bottom of the unit." Based on this description, EPA cannot confirm that the reported fatality in 2014 was the direct result of a CWA HS discharge to water. However, EPA is being conservative to ensure inclusivity and is attributing the fatalities to a CWA HS discharge to water. As described in the Discharge Universe Limitations section of the RIA for the final action, while the NRC database

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is the best available source of information on CWA HS discharges in the United States, EPA recognizes the limitations of this database. Because the NRC database may contain inaccuracies due both to under- and over-reporting, and because EPA has no information to assess the extent to of any under- or over-reporting, EPA used the NRC data as reported. The RIA for the final action reiterates this limitation as it relates to reported fatalities and other reported impacts.

In addition to the monetized damages, the RIA discusses other quantitative and qualitative damages. Quantified, but not monetized, damages include sheltering in place, waterway closures, water contamination, and fish kills. Damages that were described qualitatively in the RIA due to a lack of data include other potential water quality impacts, lost productivity due to a facility or process shutting down resulting from a discharge, emergency response costs, and property value impacts.

A commenter opposed EPA's consideration of costs and benefits, stating that EPA's analysis is incomplete because it does not consider environmental impacts and associated impacts to treaty resources. This commenter stated that the economic assessment does not account for the following: sheltering in place, waterway closures, water supply contamination, environmental impacts, lost productivity, emergency response costs, transaction costs, and property value impacts. The commenter noted that the Elk River Spill contaminated the drinking water of over 300,000 people, closed schools, essentially eliminated the local economy, and

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caused an estimated \$61 million in losses to local business. This commenter urged EPA to reevaluate the costs associated with a hazardous substance spill to incorporate the suite of economic, social, environmental, and cultural costs. The commenter also noted that EPA must fulfill its Trust Responsibility in protecting the treaty-protected resources of the Makah Tribe, in part via the CWA, and the current regulatory and economic analysis does not consider the impacts to treaty resources from a hazardous substance discharge.

Two commenters provided additional information to support an analysis of the cost of water supply contamination and stated their dissatisfaction with EPA's calculations. These commenters noted that FEMA's valuation for disruption of water service is \$111 per person per day (2018 dollars; \$93/person/day in 2008 dollars) and identified an upper bound estimate of \$238 per person per day (2018 dollars; \$208/person/day in 2008 dollars). These commenters also cited an analysis conducted on the high-profile incident in Charleston, WV, where the costs to the community were approximately \$19 million per day for the first four days following the incident, totaling \$61 million. One of these commenters stated that while the chemical substances that affected 300,000 residents and business in Charleston, WV are not listed as CWA HS, the impact on that community is unquestionable, and is due almost exclusively to the spill's impact on the community's drinking water supply.

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One commenter did not believe EPA's cost-benefit analyses adequately accounted for the potential impacts to drinking water utilities and communities. The commenter believed that water supply contamination can be a major cost to a community, since costs are incurred by the utility and its rate payers as well as taxpayers. The commenter further described several costs that can be incurred when drinking water supplies are disrupted, including: extensive remediation and potential public health consequences when downstream utilities draw in contaminated water through surface water intakes; economic losses from cessation of potable water production and sewerage service interruption; cracks, collapses in the distribution system, loss of fire protection, and pipe bursts due to depressurization in mains and pipes without water in distribution system; cost to community of developing new raw water source if remediation is not possible; and outreach costs incurred by utilities when spill occurs to inform customers of advisories. This commenter noted that EPA identified 49 instances of water contamination and requested that EPA provide further details of their cost-benefits analysis and explain why impacts like water supply contamination were excluded from the monetized damages summary. The commenter encouraged EPA to include the monetary costs of this water contamination in its assessment of costs.

The EPA disagrees with these comments opposing its approach not to finalize new regulatory requirements, as the analysis pointed to minimal incremental value. Additionally,

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EPA based its decision on the frequency and impacts of reported CWA HS discharges to jurisdictional waters and an analysis of the existing framework of EPA regulatory requirements. In addition, the Agency recognizes there are other federal and state agency programs and other industry standards that may be effective in preventing discharges of CWA HS.

A regulatory impact analysis (RIA) is included in the record. However, because EPA was unable to determine the number of potentially regulated facilities currently undertaking various prevention activities in the baseline, EPA was unable to estimate either total costs per facility or total program costs across facilities.

As discussed in Section III.B, to estimate historical CWA HS discharges and impacts, EPA reviewed release notifications received by the NRC. The NRC is the designated federal point of contact for reporting all oil, chemical, radiological, biological, and etiological releases into the environment anywhere in the United States and its territories. The EPA supplemented the NRC database with data on impacts from the ATSDR's NTSIP, which collects and combines information about harmful releases from many sources into a central location. In June 2018, EPA requested additional information through the CWA HS Spill Prevention Information Collection Request (ICR). EPA sent a voluntary survey to states, tribes, and U.S. territories requesting information on EPCRA Tier II facilities, discharges of hazardous substances to surface waters from 2007 to 2016, as well as existing state programs in place to help prevent and

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mitigate the impacts of discharges of hazardous substances to surface waters. The EPA received data from 15 states in response to the survey. The NRC, NTSIP, and voluntary survey data sources were used to estimate historical damages in the RIA for the final action.

The EPA acknowledges the RIA for the proposed action did not monetize the following historical damages: sheltering in place, waterway closures, and water supply contamination (e.g., economic losses from cessation of potable water production and sewerage service disruption); nor did it quantify historical damages from environmental impacts, lost productivity, emergency response costs, transaction costs, and property value impacts. The EPA does not have the data required to monetize or quantify these historical damages, respectively. For example, the NTSIP database provided information on whether sheltering in place was ordered (via a yes/no field) but did not provide information on the number of people sheltered or the duration of the sheltering. Therefore, EPA was unable to monetize this impact in the RIA for the proposed or final action.

With respect to water supply contamination, in FEMA's 2009 BCA Reference Guide, FEMA values the economic impacts of complete loss of potable water service as \$93 per person per day. However, EPA has no data on the size of the affected populations or the duration of any water supply contamination reported in the NRC database to enable it to apply FEMA's valuation of the economic impact of a complete loss of potable water service. EPA's information on water supply contamination, based on NRC data, indicates whether a drinking water source

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was contaminated by a release. However, the NRC data does not indicate whether there was a resulting loss of potable water service, and if so, the duration of the event. Similarly, two states reported impacts to public water systems through the voluntary survey but did not report on the population impacted or the duration of any shutdown. Therefore, EPA cannot apply FEMA's valuation of loss of water service to monetize the historical damages associated with water supply disruptions and contaminations from CWA HS discharges reported to the NRC.

The EPA recognizes that additional benefits that were not quantified may result from avoided discharges of CWA HS. As discussed in the RIA for the proposed action, these benefits include avoided impacts to water quality, avoided lost productivity due to a facility or process unit shutting down as a result of a discharge, avoided emergency response costs associated with responding to a CWA HS discharge, avoided transaction costs (such as the cost of litigation that may result if the public is impacted by a CWA HS discharge), and avoided property value impacts for nearby properties that may result due to changes in perceived risk, appeal, or reduced ecological services after a CWA HS discharge. The EPA does not have data to enable the Agency to quantify or monetize these potential avoided damages.

To supplement the NRC and NTSIP data used for the proposed action, EPA conducted a voluntary survey to obtain additional information from states, tribes and U.S. territories, including information on CWA HS discharges and fish kills. The EPA received data on two



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additional injuries without hospitalizations, which were added to the historical damages in the RIA for the final action; however, after rounding, the total monetized damages over the 10-year period remained \$33.1 million in 2016 dollars (see the RIA for the final action for discussion of damages from Maryland fish kill events).

## 2. Executive Orders

Commenters supported EPA's proposed action as consistent with President Trump's Executive Orders 13771, Reducing Regulation and Controlling Regulatory Costs and 13777, Enforcing the Regulatory Reform Agenda, which mandated that agencies across the federal government identify two regulations to repeal for every new significant regulation proposed. One commenter stated that EPA's proposed action for hazardous substances is responsive to these EOs, ensuring that additional, unnecessary regulatory requirements are not imposed. Another commenter stated that any expansion of a current SPCC rule not only usurps the states' regulatory authority but seems to be at odds with President Trump's Executive Order 13777, Enforcing the Regulatory Reform Agenda, as the order explicitly directed agencies to identify regulations that are unnecessary or impose costs that exceed benefits.

The EPA acknowledges the comments supporting its decision not to finalize new regulatory requirements. The Agency is basing this decision on the frequency and impacts of

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reported CWA HS discharges and a review of existing framework of EPA regulatory requirements to prevent and contain CWA HS discharges.

With regard to Executive Order 13132, a commenter stated that EPA should reconsider its proposal to take no further action and work within the scheme of cooperative federalism established by the CWA and consult with the states and tribes to establish an effective prevention, control, and countermeasures program that meets the charge of section 311(j)(1)(C) of the CWA. The commenter added that under its CWA authority, EPA may, at any time, consult with a state on an initiative under the CWA and may request to establish a government-to-government consultation with tribes potentially impacted by upstream activities.

The Agency disagrees that it should reconsider its decision to take no further action at this time. In addition to the opportunity to comment on the proposed action, EPA provided an opportunity for states and tribes to provide additional data through a voluntary survey EPA sent to states, tribes, and U.S. territories in June 2018. The survey requested information on EPCRA Tier II facilities, information on discharges of hazardous substances to surface waters from 2007 to 2016, as well as existing state programs in place to help prevent and mitigate the impacts of discharges of hazardous substances to surface waters. EPA received data from 15 states in response to the survey, which was analyzed and included in the RIA for the final action. EPA acknowledges that while further consultation may be allowed under the CWA, it is not required.

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Additionally, cooperative federalism does not directly apply to this section of the statute, which contemplates a direct federal program that does not allow for delegation of authority to states.

A commenter opposed EPA's determination that this action would have no significant impacts on Indian tribes under E.O. 13175: Consultation and Coordination with Indian Tribal Governments, especially with over 42 hazardous substance sites in Washington State alone. The commenter stated that EPA's determination has profound impacts on the United States Federal Government and EPA's fundamental ability to fulfill its Trust Responsibility in protecting the treaty protected resources of the Makah Tribe. The commenter stated that failing to incorporate environmental impacts to Treaty Resources results in a failure to consider the potential impacts to the rights of Indian Tribal Governments of a hazardous substance spill. The commenter further stated that federally-recognized Indian Tribes are sovereign governments and are required to be given the opportunity to determine whether an action will have an impact on their sovereign interests via government-to-government consultation as stated in the EPA Policy on Consultation and Coordination with Indian Tribes.

The Agency disagrees with this comment on the Agency's determination that this action would have no significant impacts on Indian tribes. Tribes were provided the opportunity to comment on EPA's proposed action through a tribal consultation call on July 19, 2018. During the consultation call, EPA presented information on the proposed action. The Agency received

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tribal input on multiple issues, including resource impacts, existing state regulations and the proposed action's supporting analysis (e.g., concerns regarding information gaps). After taking these and other comments, and the survey data, into consideration, and based on an analysis of the frequency and impacts of reported CWA HS discharges and the existing framework of EPA regulatory requirements, the Agency is not finalizing new regulatory requirements at this time.

With regard to E.O. 12898: Environmental Justice, some commenters opposed EPA's approach in the proposed action based on environmental justice concerns. A commenter asserted that overwhelmingly, and across the country, low-income and communities of color are living adjacent to hazardous substance sites, putting them at greater risk for human health and environmental impacts as a result of a hazardous substance spills. The commenter further asserted that continuing with the status quo of minimal regulation of these hazardous substance facilities is not only directly contrary to the Consent Decree issued to the EPA by the US District Court in New York, it is antithetical to the very mission of the EPA as an agency. The commenter specifically highlighted the poor health outcomes of Indian communities.

Another commenter stated that the people who are most likely to be impacted by these kinds of events are low-income communities and communities of color because they are disproportionately located near facilities storing hazardous materials that pollute our air, land and water. The commenter added that failure to implement rules that prevent spills of hazardous

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substances that protect vulnerable communities only exacerbates the unequal protection that EPA provides to our communities.

A commenter stated that, despite Congress' goal of no hazardous waste discharges, EPA treats the hundreds of hazardous substance spills that are reported to the NRC each year (and the many more that are not) as inevitable and inconsequential, and that EPA does not address the significant health risks from exposure to hazardous substances. The commenter asserted that some of the most commonly spilled hazardous substances are known to cause a range of acute and chronic health problems, and that EPA often ignores serious health risks from hazardous substances spills in favor of numerical analysis based on incomplete and unreliable spill data. This commenter stated that hazardous substance spills have a disparate impact on communities of color and low-income communities. Further, the commenter disagreed that E.O. 12898 is not applicable, stating that by proposing no additional action, EPA maintains the existing, documented environmental injustices associated with CWA HS spills. This commenter urged EPA to consider these disparate impacts and adopt a final rule that provides robust public health and environmental protections for environmental justice communities. Similarly, another commenter stated that the EPA and the states have a moral and legal obligation to gather more data on documented and potential environmental justice impacts to better understand and mitigate the risks associated with non-transportation related facilities.

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The EPA disagrees with these comments. Executive Order 12898 (59 FR 7629, February 11, 1994) directs that, to the greatest extent practicable and permitted by law, each Federal agency make the achievement of environmental justice (EJ) part of its mission. Executive Order 12898 provides that each federal Agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures such programs, policies, and activities do not have the effect of (1) excluding persons (including populations) from participation in; or (2) denying persons (including populations) the benefits of; or (3) subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The EPA considered in the development of this action whether it would have a disproportionately high and adverse human health or environmental effects on minority, low-income populations and/or indigenous peoples, as specified in Executive Order 12898. In its analysis for this final action, the Agency identified an existing framework of EPA regulatory requirements which adequately serves to prevent and contain CWA HS discharges. In addition, the Agency has identified only a small number of discharges that might be affected by a new regulation (see Section II.A) and there are insufficient data about this universe to assess any disproportionate impact of such discharges on individual communities, including environmental justice communities. Furthermore, the Agency has concluded that any final regulatory action

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under this CWA authority would have a minimal incremental effect on spills of CWA HS with the potential to reach water. Thus, EPA concludes that the final action likely does not have disproportionately high and adverse human health or environmental effects on minority, low-income populations and/or indigenous peoples, as specified in Executive Order 12898. The Agency is not finalizing new regulatory requirements at this time, and therefore, the final action does not disproportionately affect environmental justice communities.

#### **IV. Statutory and Executive Order Reviews**

Additional information about these statutes and Executive Orders can be found at <https://www2.epa.gov/lawsregulations/laws-and-executive-orders>.

##### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

##### *B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs*

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

##### *C. Paperwork Reduction Act (PRA)*



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This action does not impose an information collection burden under the PRA because this action does not impose any regulatory requirements or contain any information collection activities.

*D. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities because this action does not impose any regulatory requirements.

*E. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

*F. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

*G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175 because it does not impose any regulatory requirements. Thus, Executive Order 13175 does not

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apply to this action. Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, the EPA consulted with tribal officials during the development of this action.

Tribes were provided opportunities to comment on EPA's proposed action through a tribal consultation call on July 19, 2018. During the consultation call, EPA presented information on the proposed action. The Agency received tribal input on multiple issues, including resource impacts, existing state regulations and the proposed action's supporting analysis (e.g., concerns regarding information gaps). The Agency considered this input in its decision not to finalize new regulatory requirements at this time.

#### *H. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks*

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children, since this action imposes no regulatory requirements.

#### *I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

#### *J. National Technology Transfer and Advancement Act (NTTAA)*

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This rulemaking does not involve technical standards.

*K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority*

*Populations and Low-income Populations*

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard.

The Agency is not establishing at this time new CWA HS prevention and containment regulatory requirements under CWA section 311(j)(1)(C). Therefore, the final action does not establish an environmental health or safety standard, imposes no regulatory requirements with costs or benefits, and does not disproportionately adversely affect environmental justice communities as specified in Executive Order 12898.

*L. Congressional Review Act (CRA)*

This action is subject to the CRA, and the EPA will submit a rule report to each House of

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the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Dated: \_\_\_\_\_.

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Andrew R. Wheeler,

Administrator.