



American
Petroleum
Institute



AFPM



AMERICAN
EXPLORATION
& PRODUCTION
COUNCIL



July 26, 2022

Rebecca Broussard
Office of Emergency Management (Mail Code 5104A)
United States Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue Northwest
Washington, DC 20004
Email: Broussard.rebecca@epa.gov

**RE: US EPA'S Proposed Rule for Clean Water Act Hazardous Substance Worst Case Discharge Planning Regulations
[Docket ID No. EPA-HQ-OLEM-2021-0585]**

Dear Ms. Broussard:

This letter provides the response of the American Petroleum Institute (API), the American Fuel and Petrochemical Manufacturers (AFPM), the American Exploration and Production Council (AXPC), and the International Liquid Terminals Association (ILTA), collectively hereafter "the Association," to EPA's proposed rule for Clean Water Act (CWA) hazardous substance worst case discharge planning regulations (87 FR 17890, March 28, 2022, EPA Docket ID No. EPA-HQ-OLEM-2021-0585), hereafter "Proposed Rule." API represents nearly 600 companies involved in all aspects of the oil and natural gas industry (exploration, production, refining, marketing, and transportation). AFPM is the leading trade association representing the makers of the fuels that keep us moving, the petrochemicals that are the essential building blocks for modern life, and the midstream companies that get our feedstocks and products where they need to go. AXPC is a national trade association representing 29 of the largest independent oil and natural gas exploration and production companies in the United States. AXPC companies are among leaders across the world in the cleanest and safest onshore production of oil and gas. ILTA represents 80 companies operating liquid terminals in all 50 states and in over 40 countries. ILTA members' facilities provide critical links between all modes of transportation for liquid commodities, such as crude oil, petroleum products, chemicals, renewable fuels, fertilizer, vegetable oils, and other food-grade materials. ILTA's membership also includes about 400 companies that supply equipment and services to the terminal industry.

The Association's member company facilities, in all states and territories of the United States (U. S.), manage oil and CWA hazardous substances which may be subject to the proposed rule published in 87 FR 17890 (March 28, 2022). The Association appreciates the opportunity to file comments in this letter and attached, concerning the Proposed Rule.

This issue is important to our membership, and it will have a significant impact on their operations, as we believe their many facilities will have the potential to trigger one or more of the substantial harm criteria in the Proposed Rule. The Association recognizes the value of emergency response planning and preparation, including drills. The Association's members currently devote substantial resources to their emergency response programs, providing training and implementation opportunities to employees and in coordination with designated emergency responders.

The Proposed Rule is overreaching, extremely complex, unclear in many respects, uncertain and difficult to implement, and includes requirements that far exceed the scope of what is necessary to protect against the risk of substantial harm



American
Petroleum
Institute



AFPM



AMERICAN
EXPLORATION
& PRODUCTION
COUNCIL



in the event of a worst-case discharge. Because of the overly broad scope of these requirements, compliance with the Proposed Rule is likely to burden the regulated community and result in unnecessary costs, without advancing the objective of focusing emergency planning requirements on those facilities that have the greatest potential to cause substantial harm to human health and the environment. The Association's comments address key issues associated with the new requirements in the Proposed Rule. In addition, The Association is also attaching detailed comments and has requested clarification or additional information on several aspects of the Proposed Rule. The Association encourages EPA to make appropriate revisions to the Proposed Rule, as set forth in these comments

Key Issues of the Proposed Rule

1. **Justification** – EPA does not provide adequate justification for this Proposed Rule.
 - a. A similar response-focused rule proposed by the United States Coast Guard (USCG), entitled “Marine Transportation-Related Facility Response Plans for Hazardous Substances,” (65 FR 17416, March 31, 2000) was ultimately withdrawn based on findings that the proposed rule was not appropriate to the current state of spill response in the chemical industry, in addition to overlapping with many existing local, state, and international regulatory schemes and current industry practices.
 - b. In 2016, EPA conducted public input meetings regarding the proposed rulemaking for spill prevention of Clean Water Act Hazardous Substances (CWA HS) and concluded the following: “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.” [84 FR 46100]
 - c. In 87 FR 17894, EPA documented that between 2010 and 2019, EPA identified 2,489 non-transportation-related CWA hazardous substance discharges that either reached water or may have reached water, but the status was unknown. Of those discharges, impacts were reported for 131, and of the 131, only 52 could be linked to EPA jurisdictional facilities, 6 discharges reached water, and 44 may have reached water but the status was unknown. There were no fatalities due to a CWA hazardous substance discharge. In fact, EPA appears to base the entire regulatory scheme on a single incident over the 10-year review period: a toluene barge that lost 50 gallons into the Mississippi River. The Regulatory Impact Analysis (RIA) shows that the costs of compliance vastly outweigh the risk reduction.
2. **Overlapping Regulations and the Need for Exemptions** - There are numerous overlapping regulations that focus on CWA HS management and response requirements. These overlapping regulations already provide multiple layers of protection - likely even over-regulation - through duplicative controls and responses. If EPA decides to finalize the Proposed Rule, we strongly encourage EPA to exempt substances that are already subject to response planning and management under the Oil Pollution Act of 1990 (OPA90), Occupational Safety and Health Administration's (OSHA) Process Safety Management (PSM), and EPA's Risk Management Plan (RMP) rules. EPA should exempt (or accept management and response measures currently in place for) all 40 CFR 116.4 substances that are already regulated as oils under 40 CFR 112. Without this exemption, many materials such as produced water, condensates, gasoline, distillates, etc. would be subject to duplicative regulation as both an oil and a CWA HS, resulting in regulatory uncertainty, inappropriate duplication of enforcement actions and penalties, and increased regulatory cost and burden without commensurate benefit in increased protection of the environment.



American
Petroleum
Institute



AFPM



AMERICAN
EXPLORATION
& PRODUCTION
COUNCIL



3. **Cost Impact on Regulated Community** - EPA estimates 102,917 facilities storing CWA HSs. EPA assumes 2,233 facilities would trigger the threshold capacities and would thus, require further evaluation using the substantial harm criteria. Of these facilities, EPA projects 1,659 facilities would determine that they meet the substantial harm requirements and would require preparation and submittal of Chemical Facility Response Plans (FRP). This number is grossly underestimated. Preliminary feedback based on threshold capacity values with member companies indicates that many, if not most, of refining, petrochemical, and terminal facilities subject to 40 CFR 112.20 will also be subject to the new rule. There are 137 refineries in the U.S., 13,500 chemical manufacturing facilities, and over 650,000 SPCC-regulated companies in the U.S. Conservatively, The Association believes of these 10,000 - 30,000 facilities will be subject to this Proposed Rule as it is currently written. EPA estimates 11 hours per facility for “Rule Familiarization”. The Association believes that not only is this estimate not valid, but the number of facilities that will have to become familiar with the rule and accurately determine applicability is grossly underestimated. EPA estimates that a single facility’s regulatory burden to prepare and submit an initial Chemical FRP is 604 man-hours. Because of overlap with Oil FRPs and RMPs, the agency reduced this manpower estimate to 392 hours at a cost of \$26,428. Due to the differences in the regulations, the need to develop planning distances based on endpoints, and to conduct a hazard analysis, the reduction of 212 hours or 35 percent of the manpower estimate is neither accurate nor merited. EPA has underestimated facility impact by 54 percent. Furthermore, EPA’s estimated cost equates to an hourly rate of \$67.41, but for work of this nature, requiring a higher-level Subject Matter Expert (SME), industry rates generally range from \$125 - \$165 per hour. Overall, the association believes EPA’s analysis of the overall regulatory burden underestimates both the number of facilities impacted and the cost to perform both initial applicability determinations and to prepare and maintain Chemical FRPs under this proposed new rule.
4. **Definition of Container and a Need for De Minimis Container Size** - The open-ended definition of a container as “any device or portable device” is inconsistent with the definitions in 40 CFR 112. The Association believes that EPA’s intent in defining containers is the same as 40 CFR 112, because the Agency describes containers in the preamble [87 FR 17902] as “common containers include storage tanks, process vessels, railcars, and other onsite shipping containers not in transportation” [87 FR 17902]. The definition of a container needs to be clearly defined in the Proposed Rule so that the regulated community can identify exactly what is and what is not a container. The Association suggests breaking containers down into bulk storage (fixed, portable, and mobile), manufacturing (process) equipment, and operational equipment in order to be consistent with 40 CFR 112. EPA needs to clearly define the capacity of containers that do not pose a risk to the environment, similar to the approach that the Agency promulgated for 40 CFR 112. Setting a “de minimis” capacity of the containers, *i.e.*, 55-gallon, as with the SPCC program, is necessary for determining the maximum (storage) capacity onsite and which containers are regulated. In lieu of setting a minimum container size for each reportable quantity (RQ) group, the Association proposes a single, fixed de minimis container size of 55 gallons.
5. **Threshold Applicability and Worst-Case Discharge should be limited to Bulk Storage Containers** - CWA HS may be present in production, mid-stream, refining, and petrochemical plants as raw materials, products, process intermediates, byproducts, wastes, process catalysts, lubricants, or fuels. These hazardous substances can be neat (pure) chemicals but may be present in additives, corrosion inhibitors, and other process chemicals used in production, refining, product enhancements, water treatment, wastewater treatment, etc. Also, many process streams may change their composition during the manufacturing process, either creating or consuming hazardous substances during processing. Such chemistry, and compositional changes, might be variable and would be extremely difficult if not impossible to characterize. The Association recommends that regulated CWA hazardous substances should be limited to materials that are stored in bulk storage containers and EPA should not regulate CWA HS-filled manufacturing and operational equipment due to the above concerns. EPA should



American
Petroleum
Institute



AFPM



AMERICAN
EXPLORATION
& PRODUCTION
COUNCIL



add the definition for Bulk CWA HS Storage to be consistent with the approach in 40 CFR 112 where “**Bulk CWA HS Storage**” is a bulk storage container used to store CWA HS. These containers are used for purposes including, but not limited to, the storage of CWA HS prior to use, while being used, or prior to further distribution in commerce. CWA HS-filled electrical, operating, or manufacturing equipment are not a bulk storage container.”

6. **Threshold Applicability and use of Maximum Quantity versus Maximum Capacity** - EPA should follow the framework developed under the Superfund Amendments and Reauthorization Act (SARA) 312 reporting for calculating and reporting hazardous substances for the purpose of thresholding calculations in the CWA HS FRPs. Following Emergency Planning & Community Right-to-Know Act’s (EPCRA) reporting requirements, maximum quantity commonly means either the safe fill capacity of a container or the actual volume of chemical managed on-site. Utilizing existing annual reports of maximum quantity onsite will reduce the regulatory burden and uncertainty of thresholding calculations and increase the transparency to EPA of sites that should be submitting FRPs on the basis of the threshold. By leveraging the existing data in the SARA 312 reports, EPA will drive consistency with the data submitted to the State or Tribal Emergency Response Commission (SERC or TERC), Local or Tribal Emergency Planning Committee (LEPC or TEPC), and local fire departments.
7. **Mixtures and De Minimis Concentrations** - Some proprietary mixtures may not list “all of the CWA HS constituent(s)”, especially when a de minimis concentration is not considered. The Association recommends EPA follow the framework developed for EPCRA at 40 CFR 370.14(c), which exempts hazardous components in a mixture with concentrations under 0.1 percent by weight for carcinogens and 1 percent by weight for all other hazardous components of the mixture. Following the framework for EPCRA calculating and reporting mixtures will allow consistency in developing threshold capacities, and consistency for local emergency response authorities familiar with Tier II reports. The Association proposes that EPA include this de minimis concentration of 0.1% by weight for carcinogens and 1% by weight for all other hazardous substances, consistent with information available per Global Harmonized System (GHS) for Safety Data Sheets (SDS), as well as precedent in existing regulations under SARA 312.
8. **Use of Endpoints to determine Substantial Harm Applicability** - EPA proposes to codify parameters and toxic endpoints to be used by facility owners when determining whether a WCD CWA HS discharge could cause injury to Fish, Wildlife, and Sensitive Environments (FWSE) and to Public Receptors (PR). The Proposed Rule is developing a precedent in setting the endpoints for FWSE at 10% of the LC50 and PRs at 10% of the LD50 assigned to each RQ category. This approach is highly restrictive for a spill scenario and appears to be an unjustified one-size-fits-all approach for different water body classifications and uses by public receptors. At a minimum, EPA needs to clarify the technical basis for the established LC50 and LD50 for each RQ category, and the technical basis for using 10 percent of these values to set endpoints. If a facility believes the endpoints for a particular hazardous substance are overly stringent, the facility should have the opportunity to submit for approval a justification for alternative endpoints.
9. **Planning Distances** - Per 118.10(b)(3)(iii), EPA is requiring that planning distance calculations for the WCD be evaluated for numerous adverse weather conditions. The ability to calculate and develop realistic scenarios for all of these conditions is impracticable, and in some cases, severe weather may render an event *less* harmful. The requirement creates a manpower and cost burden to the facility with very little benefit. It is imperative, as noted in earlier comments, that EPA defines which conditions to model, including concise assumptions for such weather conditions, in order to establish clear guidance for industry and to prevent regional administrators from developing varying interpretations nationally. Additionally, the Association is not aware of predictive models that are readily available for these types of conditions. The Association strongly recommends that the analysis



American
Petroleum
Institute



AFPM



AMERICAN
EXPLORATION
& PRODUCTION
COUNCIL



of adverse conditions be limited to a vulnerability paper study reviewing different scenarios so the facility can better understand their impact on providing the necessary response. This approach is used in the Oil FRPs, and it should be used in determining the planning distances under the Proposed Rule to maintain consistency and ensure practicability in preparing response plans. The Association strongly advises that the approach in EPA's Oil FRP rule be used for this, *i.e.*, Chezy Manning calculation (Attachment C-III - Calculation of the Planning Distance, 2.1 - The facility owner or operator must use the following formula, or a comparable formula as described in § 112.20(a)(3) to calculate the planning distance for oil transport on moving navigable water:).

- 10. WCD Determination if Multiple Substances trigger Threshold Applicability** - 87 FR 17911 states "Therefore, the facility owner or operator need only to define one worst-case discharge quantity regardless of how many CWA hazardous substances are present onsite. However, an FRP will need to identify and plan for all CWA hazardous substances with a maximum capacity on site that meets or exceed the threshold quantity." This requirement is unclear; for instance, is EPA seeking the substance with the largest amount based on the lowest RQ and container size, or is EPA seeking the substance in the largest container regardless of RQ? The Association believes this requirement is seeking the CWA HS in the largest container since WCD scenarios are typically based upon the largest container on a facility, but clarity is needed. EPA needs to add clarity for facilities that trigger threshold maximum capacities for multiple CWA HS and for multiple substances with different RQ values. Additionally, what does EPA mean regarding "plan for all" CWA HS with a maximum capacity on site that meets or exceed the threshold quantity, as stated in the preamble? The Association believes that the intent of the Proposed Rule is to identify the highest WCD quantity of all the threshold values that trigger the maximum capacities, and not to plan for every substance.
- 11. Format and Content of FRP** - The Association recommends the training, resource planning, record keeping, documentation retention, and industry standards of the Oil FRP be mirrored in the Proposed Rule, as many companies will already have an Oil FRP, and this will allow for ease of inclusion and minimize conflicting regulations.
- 12. Other Overreaching Concerns:** Of similar importance to the above, and detailed in the attached, the Association raises the following concerns:
 - a. Concern that the definition of Navigable Water is currently undergoing regulatory revision, potentially affecting the implementation of this Proposed Rule, and affecting the universe of facilities considered in the Proposed Rule's cost/benefit analysis. EPA should wait until a definition is finalized and the public has an opportunity to comment on the impacts of these revisions to the Proposed Rule before finalizing.
 - b. The new Proposed Rule requires a contract with Spill Response Organizations (SRO). The Proposed Rule, however, does not take into consideration that nationally, most facilities in this space only have equipment suitable for oil response. The Proposed Rule should provide a phase-in period, *i.e.*, 12-months, to allow SROs and facility owners to acquire the necessary equipment. Furthermore, as OPA90 has done, EPA needs to develop equipment requirements (types, quantities, operational area capacities/capabilities) and response requirements (volume/number of items, timeframes), *e. g.*, 1,000' of boom within an hour onsite as under the Oil FRP rule, to prevent compliance uncertainties on day one.
 - c. The Proposed Rule heavily emphasizes planning for adverse weather conditions. The Proposed Rule; however, does not provide clarity as to either the meaning or the constraints of "adverse." Failing to



American
Petroleum
Institute



AFPM



AMERICAN
EXPLORATION
& PRODUCTION
COUNCIL



provide clear guidance will result in different definitions and varying expectations among the EPA regions. The approach in the Proposed Rule doesn't take into consideration, for example, that a drought condition might be more damaging than a hurricane, due to higher dilution during a hurricane. As noted above, these considerations should be limited to a tabletop exercise, not a factor for determining overall planning distance.

- d. Under the Proposed Rule the definition of containers and piping is different than the 40 CFR 112 Oil Rule, notwithstanding EPA's obvious intent to mirror much of that framework. As many of the facilities to be regulated under this Proposed Rule will have a Spill Prevention, Control & Countermeasure (SPCC) Plan, and possibly an FRP, prepared under 40 CFR 112, it makes sense to keep such definitions consistent. For example, the current Proposed Rule states: "For this action, interconnected containers are defined containers that are connected via pipes, hoses, or other conveyance to allow movement of a CWA hazardous substance between containers." Under the SPCC rule, however, EPA states: "For onshore storage facilities and production facilities, permanently manifolded oil storage tanks are defined as tanks that are designed, installed, and/or operated in such a manner that the multiple tanks function as one storage unit (*i.e.*, multiple tank volumes are equalized)." Such definitions came out of many detailed conversations with the EPA and industry during the SPCC rule promulgation, and the Association believes they should be applied to this Proposed Rule as well to ensure regulatory consistency.

Conclusions:

Our members have learned much from the twenty-five years of oil spill response plan rulemakings with four federal agencies and from the preparation and implementation of these oil spill response plans. We have vast experience within the petroleum industry to share with the EPA as it moves forward in developing these hazardous substance regulations.

The Association appreciates the opportunity to provide detailed, practicable, and constructive comments on this issue. Lessons learned from the SPCC rulemaking in 2002 showed that working on these issues as part of the rule development will reduce potential implementation issues for both the regulated community and the EPA.

Please contact me at (202) 682-8399, claff@api.org, when you wish to discuss these comments or if you would like any additional information concerning the issues raised in these comments. We understand this Proposed Rule is a result of a consent decree, and the timing is set for final action in September 2024.



American
Petroleum
Institute



AFPM



AMERICAN
EXPLORATION
& PRODUCTION
COUNCIL



Sincerely,

Roger E. Claff
Senior Policy Advisor
American Petroleum Institute

Wendy Kirchoff
Vice President, Regulatory Policy
American Exploration and Production Council

Jeff Gunnulfsen
Senior Director
Security & Risk Management Issues
American Fuel and Petrochemical Manufacturers

Michael Stroud
Vice President of Government Affairs & General Counsel
International Liquid Terminals Association

Comments on Proposed New Regulation

CLEAN WATER ACT HAZARDOUS SUBSTANCE
WORST-CASE DISCHARGE PLANNING RULE

CONTRIBUTING ASSOCIATIONS:

AMERICAN PETROLEUM INSTITUTE
AMERICAN EXPLORATION AND PRODUCTION COUNCIL
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
INTERNATIONAL LIQUID TERMINALS ASSOCIATION

**PART 118—CLEAN WATER ACT HAZARDOUS SUBSTANCES WORST CASE
DISCHARGE PLANNING REGULATIONS as proposed in 87 FR 17890 (March 28, 2022)**

American Petroleum Institute, American Exploration and Production Council, American Fuel & Petrochemical Manufacturers, and International Liquid Terminals Association (**hereafter, referred to as “the Association”**) appreciate the opportunity to file the following comments on EPA's proposed rulemaking for **Clean Water Act (CWA) Hazardous Substance (HS) Worst Case Discharge (WCD) Planning Regulations (87 FR 17890, March 28, 2022, hereafter, referred to as “Proposed Rule”**). The Association has set forth a detailed set of comments and has requested clarification or additional information on numerous aspects of the Proposed Rule. The Association encourages EPA to make appropriate revisions to the Proposed Rule, as set forth in these comments.

§ 118.1 Purpose.

This part establishes Clean Water Act (CWA) hazardous substance facility response plan requirements for the owner or operator of any non- transportation-related onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging CWA hazardous substances into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.

Comment 1a

- EPA's “Clean Water Act Hazardous Substance Worst Case Discharge Planning Regulations” proposed in 87 FR 17890 was preceded by a similar “response” focus rule proposed by the United States Coast Guard (USCG). That rule, entitled “Marine Transportation-Related Facility Response Plans for Hazardous Substances” (65 FR 17416, March 31, 2000) was ultimately withdrawn. After much review and discussion, USCG concluded, as documented in 84 FR 2799, that “further analysis by the Coast Guard and the Chemical Transportation Advisory Committee (CTAC) has shown that implementation of the rules as laid out in the 2000 NPRM would not significantly increase response effectiveness at this time.” This analysis resulted in the USCG withdrawing “this rulemaking in 2019 based on findings that the proposed rules are no longer appropriate to the current state of spill response in the chemical industry.” The Association believes that the response capabilities of Marine Transportation-related facilities are not significantly different than non-transportation onshore facilities. As such, the Association strongly encourages EPA to review the final findings by the USCG. Based on the final decision by USCG, and because conditions have not changed since 2019, EPA should not proceed to finalize this proposed rule. If the Agency does move forward with this rulemaking, the Association encourages EPA to consider our comments and requests that EPA address this question: What has changed since 2019 and how is EPA justifying this rulemaking?

Comment 1b

- EPA conducted public input meetings in 2016 regarding the proposed rulemaking for spill prevention of Clean Water Act Hazardous Substances (CWA HS). As a result of the public meetings, “EPA proposed no new regulatory requirements under the authority of CWA section 311(j)(1)(C) at this time.” [84 FR 46100] This notice concluded that “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.” The Agency’s 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. The Association believes that this analysis and determination confirmed that the existing framework was appropriate for prevention. Also noted in EPA’s 2019 Regulatory Impact Analysis, Clean Water Act Hazardous Substances Spill Prevention Final Action, EPA writes “The discharges themselves have highly variable impacts that are difficult to predict, and even a robust regulatory program where none existed before could not reasonably be expected to be 100 percent effective and eliminate all risk.” The Association believes there is no justification for developing an onerous regulation for “response” measures that will have significant costs with very little benefit to the regulated community. EPA must explain what has changed since 2019 and justify its decision.

Comment 1c

- There are numerous overlapping regulations that focus on managing CWA HS including response requirements. In EPA’s 2019 Regulatory Impact Analysis, Clean Water Act Hazardous Substances Spill Prevention Final Action, EPA writes “... multiple overlapping and diverse federal regulatory requirements relevant to preventing CWA HS discharges already exist”. These overlapping regulations were also identified by USCG in the CTAC reviews:
 - Oil Pollution Act of 1990 (OPA 90) – EPA at 40 CFR 112, USCG at 33 CFR 154, PHMSA at 49 CFR 194
 - EPA’s National Pollutant Discharge Elimination System (NPDES) 40 CFR 122 addresses priority pollutants
 - OSHA’s Process Safety Management Standard (PSM) 29 CFR 1910.119
 - EPA’s Chemical Accident Prevention Provisions 40 CFR 68 and Risk Management Plan (RMP) Subpart G
 - EPA’s Resource Conservation and Recovery Act (RCRA) 40 CFR 260
 - EPA’s Underground Storage Tanks (USTs) 40 CFR 280
 - EPA’s Emergency Planning and Community Right-to-Know Act (EPCRA) 40 CFR 355 and 370 (Tier II Reporting)
 - EPA’s EPCRA, Section 313, Toxic Release Inventory (TRI)
 - Toxic Substances Control Act (TSCA) of 1976
 - America’s Water Infrastructure Act of 2018 (AWIA)

These overlapping regulations currently provide appropriate controls and responses; additional requirements would be duplicative, creating costs with no benefits. If EPA decides to regulate CWA HS, then we strongly encourage EPA to exempt the substances that are subject to response planning and managed under OPA90, PSM, and RMP rules, as a minimum

Comment 1d

- EPA correctly recognizes in Section 2 of the Technical Background Document (TBD) that facilities with oil FRPs or RMPs may have a significant overlap with the required program elements of the proposed rule. The agency should consider modifying existing regulations to include CWA HS, similar to the approach taken by the USCG on the OPA90 amendments promulgated post-BP Horizon. Alternatively, EPA should exclude from the scope of this rule any materials at a facility that are already incorporated into an oil FRP or RMP as well as PSM.

Comment 1e

- EPA properly recognizes the potential overlap and decided not to regulate substances managed in underground storage tanks that are regulated under 40 CFR 280. The outcome of this decision was to add an “exception” under 40 CFR §118.8(a)(4). We support this approach but EPA should make a similar decision for oils that are regulated under 40 CFR 112. EPA has not explained or justified limiting this exception to only USTs.

Comment 1f

- In 87 FR 17894, EPA documented that between 2010 and 2019, EPA identified 2,489 non-transportation-related CWA HS discharges that either reached water or were classified as unknown as whether they reached water. Of those, 131 had reported impacts and of the 131, only 52 could be linked to EPA jurisdictional facilities. Water supply contamination made up 50 of those incidents (6 reported discharges that were known to have reached the water, and 44 were classified as unknown as to whether discharges had reached navigable water), and 2 incidents related to closed waterway traffic corridors. There were no fatalities due to a CWA hazardous substance discharge. EPA appears to base the entire regulatory scheme on a toluene barge that lost 50 gallons into the Mississippi River, which is one event in the 10-year review period. The Regulatory Impact Analysis (RIA) shows that the costs of compliance vastly outweigh the risk reduction. Based on these findings, EPA has not justified imposing additional regulations.

§ 118.2 Definitions.

Adverse weather means weather conditions that make it difficult for response equipment and personnel to clean up or respond to discharged CWA hazardous substances, accounting for the potential for increased and more severe extreme weather events and other impacts due to climate change, and that must be considered when identifying response systems and equipment in a response plan for the applicable operating environment.

Comment 2a

- EPA has expanded the definition to include “severe extreme weather events and other impacts due to climate change”. These events should be limited to likely events, not potential events, and set boundaries for highly unlikely worst-case types of weather events. EPA should develop an actual definition or examples of what is covered and to what extent does “severe extreme weather events” mean, *e.g.*, 100-year flood, typical large hurricane event for an area, typical heavy snow event for an area, normal drought conditions for an area (*e.g.*, 7Q10 flow or the lowest 7-day average flow that occurs on average once every 10 years).

Comment 2b

- Most of these types of weather events will impact more than one facility and are often beyond the control of individual facilities. Impacts of weather events would be best suited at the Area Contingency Plan level which can address local risks. Historical impacts on a regional level would need to be considered in determining the level of risk for these types of severe storms that can affect a facility. By incorporating these weather-related risks into the Area Contingency Plans, the Plan Holders can consistently identify response systems and equipment.

Comment 2c

- While these types of adverse weather events can impact response activities and should be evaluated, the reviews should be limited to vulnerability paper studies and should not require detailed modeling calculations. Further, adverse weather conditions often improve the factors contributing to the dissipation or dilution of released chemicals: heavy rain adds to the dilution (lowering the water concentration) and high wind will remove vapors and gases more quickly. Therefore, evaluating “all” scenarios including those in adverse weather conditions is an unnecessary burden for the plan holder especially if the plan has to predict/model endpoints and planning distances as proposed in this rulemaking.

Comment 2d

- EPA should clarify the type of adverse weather event that is most relevant to a toxic endpoint concentration, which forms the planning basis of this rule. EPA is proposing a definition for distance to endpoint as the distance a CWA hazardous substance will travel before dissipating to an endpoint that will no longer cause injury to public receptors or fish, wildlife, and sensitive environments (FWSE). EPA should address whether the most significant impacts on public receptors or FWSE occur during wet weather or dry (drought) weather.

Comment 2e

- Climate change, according to the United Nations, refers to long-term shifts in temperature and wind patterns. Any change in weather patterns and temperatures would occur over a long period of time, far greater than the 5-year cycle of the proposed FRP. EPA needs to clarify the precise procedure by which facilities are to address climate change in establishing planning distances, specify the climate change-induced adverse weather effects facilities are to consider in establishing planning distances and specify the constraints, including chronological constraints, pertaining to these weather effects.

Container means any device or portable device in which a CWA hazardous substance is processed, stored, used, transported, treated, disposed of, or otherwise handled.

Comment 3a

- The open-ended definition of a container as “any device or portable device” is inconsistent with the definitions in 40 CFR 112. EPA’s intent in defining containers appears to be the same as in 40 CFR 112 because the Agency describes containers in the preamble [87 FR 17902] as “common containers include storage tanks, process vessels, railcars, and other onsite shipping containers not in transportation” [87 FR 17902]. The definition of a container needs to be clearly specified in the rule so that the regulated community can identify what is and what is not a container. “Containers” should be broken down into bulk storage (fixed, portable, and mobile), manufacturing (process) equipment, and operational equipment, consistent with the definitions in 40 CFR 112.

Comment 3b

- CWA HS may be present in production, mid-stream, refining, and petrochemical plants as raw materials, products, process intermediaries, byproducts, wastes, process catalysts, lubricants, or fuels. These hazardous substances can be neat (pure) chemicals but may be present in additives, corrosion inhibitors, and other process chemicals used in production, refining, product enhancements, water treatment, wastewater treatment, etc. Also, many process streams may change their composition during the manufacturing process, either creating or consuming hazardous substances during processing. Such chemistry, and compositional changes, might be variable and would be extremely difficult if not impossible to characterize. Regulated CWA hazardous substances should be limited to materials that are stored in bulk storage containers and EPA should not regulate CWA HS-filled manufacturing and operational equipment due to the above concerns. EPA should add the definition for Bulk CWA HS Storage to be consistent with the approach in 40 CFR 112 where **Bulk CWA HS Storage** means a bulk storage container where any CWA HS is used to store CWA HS. These containers are used for purposes including, but not limited to, the storage of CWA HS prior to use, while being used, or prior to further distribution in commerce. CWA HS-filled electrical, operating, or manufacturing equipment are not a bulk storage container.

Comment 3c

- EPA needs to clearly define the capacity of a container similar to that used in the SPCC program. This is necessary for determining the worst-case (storage) capacity onsite. EPA’s intent appears to be “shell capacity” as it is discussed in the preamble, which refers to “calculating applicability using container shell capacity could be viewed as a more conservative approach to determine whether a facility has reached the threshold quantity of CWA hazardous substances” 87 FR 17902. If EPA is using shell capacity, EPA should clearly define the storage capacity of a container using the plain language of shell capacity as found in the definition.

Comment 3d

- EPA needs to clearly define the capacity of small containers that do not pose a risk to the environment, similar to the approach that the Agency promulgated for 40 CFR 112. Setting a “de minimis” capacity of the containers, *i.e.*, 55-gallon, as with the SPCC program, is necessary for a practical determination of the maximum (storage) capacity onsite and for a determination of which containers are regulated and which are not. In lieu of setting a minimum container size for each RQ group, a de minimis container size should be 55 gallons. As stated by USEPA in 67 FR 47066, “the 55-gallon container is the most widely used commercial bulk container, and these containers are easily counted. Containers below 55 gallons in capacity are typically end-user consumer containers. Fifty-five-gallon containers are also the lowest size bulk container that can be handled by a human. Containers above that size typically require equipment for movement and handling. A discharge from 55-gallon containers generally poses a smaller risk to the environment. Furthermore, compliance with the rules for these containers could be extremely burdensome for an owner or operator and could upset manufacturing operations, while providing little or no significant increase in protection of human health or the environment.” EPA should apply the same approach for CWS hazardous substances and set a minimum container size of 55 gallons. This measure will allow facilities to concentrate on their response to discharges from sources most likely to present a significant risk to human health and the environment. If EPA elects to include container sizes based on RQ groups, EPA should use a size that is “equal or less than the RQ amount”. This approach is supported in 87 FR 17898 which states that “For a facility to cause substantial harm to the environment, it would need to reasonably be expected to cause a discharge in a quantity larger than the RQ and would therefore need to have the capacity to store significantly larger quantities on site.” These sizes would be more confusing than the 55-gallon limit, especially considering density calculations needed to convert pounds to gallons, creating variable sizes. Thus, there should be a universal provision to exclude containers that are less than 55 gallons of capacity.

Comment 3e

- In §118.10(a)(3), EPA is requiring the facility to calculate the worst-case discharge quantity for substances in pipes or interconnecting pipes. This interpretation implies that EPA is defining piping as a container. EPA should remove the discussion of piping under §118.10(a)(3) as piping associated with containers should not be considered as containers and should not be regulated as such because piping has different operating considerations than a container.

CWA Hazardous Substance means any hazardous substance designated in 40 CFR part 116.

Comment 4a

- Names of the 296 hazardous substances vary and can be expressed using synonyms or other chemical names. EPA should consider aiding the regulated community by updating the “List of Lists” to include the RQs of CWA HS Chemicals (*e.g.*, the Consolidated List of Chemicals Subject to EPCRA, CERCLA, and Section 112(r) of the CAA). This would assist the regulated community when planning and also reporting hazardous substances’ names and their isomers or hydrates so there is consistency in communication across regulatory frameworks.

Comment 4b

- Naming pure substances is complex enough, but the identification of hazardous substances in products that are proprietary (trade secret) formulations, and hazardous substances in various complex mixtures, will be a significant challenge for the regulated community. EPA should follow the framework developed under SARA 312 for thresholding and reporting proprietary substances, trade secrets, and mixtures during planning and response actions.

Comment 4c

- EPA should provide a provision (*i.e.*, timing for amendments) in the rule for situations when EPA amends the 40 CFR 116.4 list of hazardous substances or if the Reportable Quantities (RQs) in 40 CFR 117.3 are updated. This timing provision is necessary to allow the regulated community sufficient time to review and analyze the new substance or the revised Reportable Quantity (RQ).

Comment 4d

- CWA HS may be present in production, mid-stream, refining, and petrochemical plants as raw materials, products, process intermediaries, byproducts, wastes, process catalysts, lubricants, or fuels. These hazardous substances can be neat (pure) chemicals but may be present in additives, corrosion inhibitors, and other process chemicals used in production, refining, product enhancements, water treatment, wastewater treatment, etc. Also, many process streams may change their composition during the manufacturing process, either creating or consuming hazardous substances during processing. Such chemistry, and compositional changes, might be variable and would be extremely difficult if not impossible to characterize. The Association recommends that regulated CWA hazardous substances should be limited to materials that are stored in bulk storage containers and EPA should not regulate CWA HS-filled manufacturing and operational equipment due to the above concerns.

Contract or other approved means is defined as:

(1) A written contractual agreement with a spill response organization that identifies and ensures the availability of the necessary personnel and equipment within appropriate response times;

Comment 5a

- Currently most Oil Spill Removal Organizations (OSROs) are staffed and stocked with equipment specific to oil discharges (*i.e.*, booming and skimming equipment). It will likely be necessary for these organizations to expand their capacities if they're also going to respond to CWA HS discharges. EPA should provide a phase-in timing for Spill Response Organizations (SROs) to develop their capabilities, including identification of the available resources and personnel for CWA HS discharges. EPA should allow existing OSROs to serve as SROs in the interim as well as provide a time schedule in which OSROs and regulated facilities must acquire the necessary equipment to avoid compliance issues on day one, *i.e.*, 12 months from the issuance of the final rule.

Comment 5b

- The Association strongly encourages EPA/USCG to develop a list of SROs similar to the list of approved USCG OSROs. EPA should also recognize existing OSROs as qualified response organizations so they can serve as SROs in the interim.

(2) A written certification by the owner or operator that the necessary personnel and equipment resources, owned or operated by the facility owner or operator, are available to respond to a discharge within appropriate response times;

Comment 6a

- The Association does not support the “written certification” approach for the CWA HS Facility Response Plans (Chemical FRPs) as resources and personnel to respond within appropriate response times may be subject to varying conditions and a certification is not appropriate for these scenarios. The Association suggests that the wording be changed from “written certification” to “full approval” similar to the wording in 40 CFR 112.7 – “The Plan must have the full approval of management at a level of authority to commit the necessary resources to fully implement the Plan.” Requiring “written certification” does not make legal sense in these applications whereas “approval” is the actually needed requirement.

Endpoint means the concentration at which a worst case discharge no longer has the ability to cause injury to public receptors or fish, wildlife, and sensitive environments as in Appendix B or adversely impact a public water system as in § 118.3(c)(2).

Injury means a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource or public receptor resulting either directly or indirectly from exposure to a discharge, or exposure to a product of reactions (e.g., more hazardous degradation products, ignition, or reaction) resulting from a discharge.

Comment 7a

- The Association's concern is related to the imprecise definition of “injury” proposed. While the definition of Injury in the Proposed Rule is similar to the definition at 40 CFR 112, the Proposed Rule extends the definition to public receptors. By defining injury as "measurable adverse change ... [to] a natural resource or public receptor...", the definition is expanded to areas where the public could potentially be present. The term “injury” is not an appropriate term to use in this context as it can have many meanings for public receptors. Because the proposed rule extrapolates to an “endpoint” at the modeled geographic point of compliance and is simply a mathematical estimation of some fraction of a reportable quantity, there is no proof of “injury” to a “public receptor” at that geographic endpoint. Assessing injury to public receptors is overbroad and not well defined. The Association proposes that EPA remove public receptors from the definition of injury, or at least refine the definition to focus more carefully on actual harm to water quality.

Interconnected containers mean containers that are connected via pipes, hoses, or other conveyance (either permanent or temporary) to allow movement of a CWA hazardous substance between containers.

Comment 8a

- This definition implies that containers that have piping to and from them are interconnected. The Association feels that this definition is too open-ended and needs more clarity. This definition of “Interconnected containers” needs to be consistent with the wording found in 40 CFR Part 112, Subchapter D, Section 1.2. for Worst Case

Discharge Planning - "For onshore storage facilities and production facilities, permanently manifolded oil storage tanks are defined as tanks that are designed, installed, and/or operated in such a manner that the multiple tanks function as one storage unit (*i.e.*, multiple tank volumes are equalized)." However, process vessels that are interconnected by piping should not be considered permanently manifolded as they serve as separate vessels and are not equalized. Thus, interconnected containers should only apply to bulk storage tanks that are permanently manifolded together (as defined in 40 CFR 112) and are designed, installed, and/or operated in such a manner that the multiple tanks function as one storage unit.

Maximum capacity onsite means the total aggregate container capacity for each CWA hazardous substance present at all locations within the entire facility at any one time.

Comment 9a

- The Association finds that the definition and approach to developing the "maximum capacity" are very confusing and subject to gross misinterpretations. First, the definition is dependent on how containers are defined (SEE COMMENT- 3a); secondly, the definition is dependent on a minimum size container and the definition of container capacity (SEE COMMENTS -3b and 3d), and thirdly; the definition is dependent on the compositions of the CWA hazardous substances within mixtures located not just in storage but also in the various process vessels and operational equipment. EPA needs to be very clear on how to calculate these capacities. Based on the current definition, the regulated community will not be able to provide consistent calculations of these capacities.

Comment 9b

- In 87 FR 17903, "EPA solicits comment on the proposed approach, the definition of permanently closed containers, using maximum quantity onsite rather than maximum capacity onsite for applicability threshold quantity calculations, the number of facilities that may be regulated under the proposed approach versus using maximum quantity onsite, and potential alternative approaches with supporting rationale and data." The Association does not support the approach of using maximum capacity as it is not consistent with the EPCRA Section 312 Tier 2 Inventory Reports that are submitted annually for the purpose of emergency response planning. The Association believes that a simpler and more accurate reflection of a potential quantity that could be released is to leverage existing SARA 312 data. In this application, the Association supports using "maximum quantity" similar to what is reported under SARA 312 Tier 2 reports. The inconsistency of using the calculated "maximum capacity" under the Proposed Rule will lead to misinterpretations from local authorities and the local public. Instead, EPA needs to incorporate the approach and subsequent reporting requirements currently in place under EPCRA Section 312(a).

Comment 9c

- EPA should follow the framework developed under SARA 312 reporting for calculating and reporting hazardous substances for the purpose of thresholding calculations in the CWA HS FRPs. Following EPCRA's reporting requirements, maximum quantity commonly means the safe fill capacity of a container, or the actual volume of chemical managed on-site. Utilizing existing annual reports of maximum capacity onsite will

reduce the regulatory burden of thresholding calculations and increase the transparency to EPA of sites that should be submitting FRPs on the basis of the threshold.

Comment 9d

- By leveraging the existing data in the SARA 312 reports, EPA will drive consistency with the data submitted to the State or Tribal Emergency Response Commission (SERC or TERC), Local or Tribal Emergency Planning Committee (LEPC or TEPC), and local fire department.

Navigable waters mean waters of the United States, including the territorial seas, as defined in 40 CFR 120.2, adjoining shorelines, and the exclusive economic zone. Exclusive economic zone means the zone contiguous to the territorial sea of the United States extending to a distance up to 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.

Comment 10a

- This definition is different than the definition in 40 CFR 112. Further, the definition of navigable waters is currently under revision by the EPA and the Army Corps of Engineers (see Proposed Rule, 86 FR 69372). The definition affects the universe of facilities considered in the Proposed Rule's cost/benefit analysis. The Association recommends that this rule should not be finalized until EPA and the Army Corps have finalized the definition of navigable waters in order for that definition to be incorporated into this rule. The definition of navigable waters needs to be consistent across all regulations and jurisdictions. There should not be multiple definitions of navigable waters as it will cause too much confusion to the regulated community.

Public receptors mean parks, recreational areas, docks, or other public spaces inhabited, occupied, or used by the public at any time where members of the public could be injured as a result of a worst case discharge to navigable waters.

Comment 11a

- “Public receptors” is a new definition that is not part of the Oil Facility Response Plans as required under 40 CFR 112 (Oil FRPs). The Agency does not provide adequate justification for adding a definition of “public receptors” to this rulemaking and recommends its removal, as it is not consistent with the Oil FRPs and the likelihood that long-duration exposures to humans will occur during a discharge is minimal. The Association believes EPA should mirror the requirements of 112.20(h)(4) – Vulnerability Analysis (Sec. 1.4.2).

Comment 11b

If EPA retains the “public receptors” definition, EPA must provide clearer descriptions of public receptors, especially the “other public spaces inhabited” and “or used by the public at any time” as these descriptions could be applied inconsistently across the regulated community. For example, a presently unoccupied (but available for rental) wedding venue on a scenic shoreline could be “used by the public” at some time, but if not likely to involve water contact, it is not reasonable to include this facility as part of this definition. Additionally, the Association requests clarity on harm and what is solely economic “harm.” For instance, the loss of use of a shoreline playground or boat ramp for a day due to a short-term time-limited emergency response action

is not reasonable to consider as harm under this definition, particularly during an adverse weather event like a hurricane that would deprive its use anyway.

§ 118.3 Applicability.

(a) Threshold quantity. The maximum capacity onsite for any CWA hazardous substance listed at 40 CFR 116.4, at any one time, meets or exceeds 10,000 times the Reportable Quantity in pounds (kilograms) found at 40 CFR 117.3. Do not include any exemptions identified in § 118.8 or permanently closed containers in this determination. To calculate the threshold quantities of CWA hazardous substances in mixtures, follow the procedures in § 118.9; and

Comment 12a

- The regulatory language of “do not include any exemptions” should be rephrased to “do not include any of the items exempted by §118.8(b) in thresholding calculations” to increase clarity and avoid confusion. The text “do not include any exemptions” could be interpreted as either (a) the quantity must be calculated without consideration of exemptions, thus all items including exempted items should be included in the calculation or (b) the quantity should be calculated on the basis of excluding exempted items. Without clarification this language is confusing. The Proposed Rule as written omits the reference to “any exceptions” in the Applicability section at §118.3. EPA needs to add “exceptions” as discussed in §118.8(a) to the requirement in §118.3(a). The Association proposes the language be changed to: “Do not include any of the items excepted or exempted by §118.8 in thresholding calculations”.

Comment 12b

- Additional exceptions/exemptions should be added to §118.8(a) and §118.8(b) to avoid duplication and overlapping regulation, e.g., substances found in the oil, as oil is already part of §112.20. SEE COMMENTS 1c and 37c.

Comment 12c

- The Association finds that the approach to developing the “maximum capacity” is very confusing and subject to gross misinterpretations and varying interpretations by the regulated community. First, the maximum quantity is dependent on how containers are defined (SEE COMMENT- 3a); secondly, the maximum quantity is dependent on the definition of the type of container and its capacity (SEE COMMENTS –3b and 3d), and thirdly; the maximum quantity is dependent on the compositions of the CWA hazardous substances within mixtures located not just in storage but also in the various process vessels and operational equipment. EPA needs to be very clear on how to calculate these maximum capacities. Based on the current provision as written, the regulated community will not be able to provide consistent calculations of these capacities.

Comment 12d

- In 87 FR 17903, “EPA solicits comment on the proposed approach, the definition of permanently closed containers, using maximum quantity onsite rather than maximum capacity onsite for applicability threshold quantity calculations, the number of facilities that may be regulated under the proposed approach versus using maximum quantity onsite, and potential alternative approaches with supporting rationale and data.” The Association does not support this approach of using “maximum capacity” as it is not consistent with the EPCRA Section 312 Tier 2 Inventory Reports that are submitted

annually. The Association believes that a simpler approach is to leverage existing SARA 312 data. For this application, The Association supports using "maximum quantity" similar to what is reported under SARA 312 Tier 2 reports. The inconsistency of using the calculated "maximum capacity" under the Proposed Rule will lead to misinterpretations from local authorities and the local public. Instead, EPA needs to recognize the approach in the calculation of "maximum quantity" and subsequent reporting requirements (e.g., same definitions, exemptions, methods, trade secrets, mixtures, etc.) under EPCRA Section 312(a). By thresholding on the basis of Maximum Quantity Onsite per EPCRA 312 reporting, EPA would benefit from annual updates to the threshold quantities and a more accurate basis for determining spill potential than by utilizing the capacity of an unused tank. The regulated community would benefit from the reduced calculation burden by having only one dataset to satisfy both EPCRA and CW HS FRP rules. The public would also benefit by having one set of emergency response data that is more reflective of a facility's actual potential for spill based on actual quantities on site.

Comment 12e

- EPA is soliciting comments on the 10,000 X RQ multiplier approach. Of the multipliers discussed, the Association supports using 10,000 X RQ. However, this approach does not take into consideration the size of containers, which may lead to misleading analysis. For example, if a site has numerous containers that are small in size (e.g., quarts, gallons), the number of containers could trigger the threshold value but would have minimal impact on the worst-case discharge quantity. For this reason, a "de minimis" or minimum container size of 55 gallons should be used, and those "de minimis" containers should be excluded on the basis that small containers pose a negligible risk to the environment while providing little or no significant increase in protection of human health or the environment. The Association also proposes that EPA utilize the language in 40 CFR 370.14(c) to establish a "de minimis" concentration below which a hazardous substance would not be included in thresholding or subsequent worst-case discharge calculations. EPA's language should be aligned with a reference to 40 CFR 370.14(c) or by inserting of the relevant language into the proposed rule: "You do not have to count a hazardous non-carcinogenic chemical present in a mixture if the concentration is less than or equal to 1%, or less than or equal to 0.1% for a hazardous carcinogenic chemical."

Comment 12f

- The Association believes "at any one time" refers to the highest daily amount which can vary by season, batch operations, and by production lines. Per SARA 312, the maximum amount is the maximum on any single day during the reporting period. EPA should acknowledge this to drive consistency with the reporting requirements (e.g., same definitions, exemptions, methods) of EPCRA Section 312(a).

Comment 12g

- In many cases, a CWA hazardous substance may only be onsite one time, for a duration of less than 6 months. EPA should recognize these situations and provide a provision in the rule to address where a substance is present but not part of regular activities. This approach would be similar to the provision in the SPCC rule under 40 CFR 112.5(a) which states "An amendment made under this section must be prepared within six

months, and implemented as soon as possible, but not later than six months following preparation of the amendment.”

Comment 12h

- EPA needs to describe the scenarios where multiple CWA HSs may trigger the threshold quantities (which may occur for mixtures) and how these substances would be addressed under the Proposed Rule. The preamble 87 FR 17898 states “If a facility’s container capacity meets or exceeds the threshold quantity for anyone CWA hazardous substance and the facility is within one-half mile of navigable waters, then the facility owner or operator must determine if the facility meets at least one substantial harm criterion proposed in this action. If so, the entire facility would be subject to the CWA hazardous substance FRP requirements proposed in this action for **all CWA hazardous substances stored or used at the facility.**” (Emphasis added by The Association). The inclusion “for all CWA hazardous substances stored or used at the facility” needs additional clarity. The Association thinks EPA’s intent was to remind the regulated community that all CWA hazardous substances needed to be considered when evaluating the Worst-Case Discharge, and not that EPA intended the facility to undertake calculations and modeling for all present CWA hazardous substances. If the intent was the latter, this proposed approach appears to be very burdensome especially considering the calculations and endpoint determinations that need to be documented for each substance. The Proposed Rule lacks specific instruction regarding how to address multiple substances that trigger their threshold value. Assuming that a facility is within one-half of a mile of navigable waters, does each substance have to be analyzed to determine if it also triggers one or more of the substantial harm criteria under §118.3(c)? Once one substantial harm criterion is identified, does the regulated community have the burden of documenting quantities of the remainder of the chemicals relative to thresholds? The Association recommends that EPA clarify that only one qualifying substantial harm criterion needs to be documented. The Association further recommends that if multiple substances trigger the threshold maximum capacities EPA add another step to identify the substance that meets the “worst-case discharge quantity” per §118.10(a) and perform the determinations for substantial harm for only that substance. This approach would be simpler and reduce the excessive burden on the facility owner.

Comment 12i

- The preamble states “if the facility meets at least one substantial harm criterion proposed in this action. If so, the entire facility would be subject to the CWA hazardous substance FRP requirements proposed in this action for all CWA hazardous substances stored or used at the facility.” (87 FR 17898) EPA implies that if one substance triggers a threshold, then all the substances will be regulated. Does “all” mean those substances that trigger their 10,000xRQ threshold maximum capacities or does it mean “all” CWA HS at the facility, regardless of quantity or capacity? Based on the preamble discussion and the lack of clarity in the proposed rule, the calculation of threshold values and analyses for substantial harm needs to be clearly defined. Again, EPA needs to add clarity in addressing scenarios for multiple triggers of threshold values and limit the substantial harm determinations to only the worst-case discharge quantity.

Comment 12j

- The preamble 87 FR 17898 contains Figure 1, which clarifies EPA's approach to establishing applicability criteria for CWA HS worst-case discharge FRP subject facilities. The Association found Figure 1 to be a helpful aide to understand EPA's intent for the regulated community. The Association requests that EPA expand this Figure to further help the regulated community understand all of the steps needed to both assess the applicability and also to establish worst-case discharge. Upon review of Figure 1 and reading of the Proposed Rule, the Association's interpretation for the full process is described below; The Association requests that EPA verify whether the Association's interpretation of the steps that a regulated entity would need to take to assess the applicability and develop a WCD scenario are correct.
 - Step 1: Assess the maximum on-site capacity (or quantity if the Association's suggestions are accepted) and compare it to the 10,000x RQ for all 296 CWA HSs.
 - If the Association's suggestions are accepted, facilities would exclude materials subject to response planning and managed under OPA90, PSM, or RMP rules.
 - Step 2: Determine if the facility is within 0.5 miles of a navigable water or a conveyance to navigable water.
 - Step 3: Review the 5-year history of reportable discharges that reached water.
 - Step 4: Determine the largest container (or interconnected containers on-site) that contains a material with a CWA HS. This is the worst-case spill scenario.
 - Step 5: Determine the planning distance for the worst-case spill scenario (The Association proposed a time-based equation or site-specific model).
 - If any FWSE, PWSs, or public receptors are located within this planning distance, Substantial Harm is established.
 - No additional calculations are required for the other CWA HSs once substantial harm has been established for the Worst-Case Discharge.
 - Step 6: Develop an FRP based only on the CWA HSs present in the Worst-Case Discharge.
 - Step 7: Develop drill scenarios based on the worst-case discharge [EPA to provide clarity].

Comment 12k

- Per 87 FR 17910, "EPA solicits comment on these approaches to develop a substantial harm criterion for facilities that transfer CWA hazardous substances over water, including whether EPA should include a criterion for facilities transferring CWA hazardous substances over water, what threshold quantity would be appropriate for these facilities, and whether EPA should consider a blanket determination that these facilities pose both significant and substantial harm to the environment. EPA further requests data or information on the number and types of facilities conducting CWA hazardous substance over-water transfers currently operating in the United States." The Association does not support a substantial harm criterion for over waters transfers to or from containers. These transfers are highly variable, and the agency lacks information on these activities. Additionally, US Coast Guard withdrew its part of the rulemaking in 2019 which pertains to "Marine Transportation-Related Facility Response Plans for Hazardous Substances" (84 FR 2799).

(b) Proximity to navigable waters. The facility is located within one-half mile of navigable waters or a conveyance to navigable waters; and

Comment 13a

- EPA needs to provide a definition of “a conveyance to navigable waters”. If as an example, a conveyance is over 80 miles and will take over 27 hours to enter into navigable water, is the facility regulated? Conveyance to navigable waters should be limited to reasonable distances and set some boundaries for these distances. In Appendix C to Part 112, Section 5.6 provides more clarity in that it states, “if it is in close proximity to storm drains that flow to navigable waters”. The Association looks to see an actual definition of what is covered and what extent of conveyance is intended in this definition (e.g., What time duration is used to make the determination of when something will reach navigable waters – is it within 24 hours, indefinite, etc.?).

Comment 13b

- EPA noted in the preamble that using the “one-half mile of navigable waters or a conveyance to navigable waters” approach was based on the EPA’s review of the Oil FRP requirements, see 87 FR 17903. The Association disagrees with this observation. In Appendix C to Part 112, Section 5.5 states “A facility owner or operator whose nearest opportunity for discharge is located within 0.5 miles of a navigable water must complete the planning distance calculation (D3) for the type of navigable water near the facility or use a comparable formula.” Section 5.5 does not mention conveyance and it is used with distances greater than 0.5 miles (per Section 5.6). The Oil FRPs uses distances as discussed in Section 5.4 and Figure C-1 Appendix C to Part 112 to determine proximity to navigable waters, and inputs for a timeframe to consider, e.g., 27-hour non-high-volume port and 15-hours high volume port. The Association recommends that EPA follow the same approach as provided in the Oil FRPs regulations.

Comment 13c

- See COMMENT 10a on the definition of Navigable water and the use of this definition in the rule.

Comment 13d

- EPA should clarify whether “conveyance to navigable waters” intends to automatically capture all facilities with NPDES permitted outfalls and all discharges to third-party wastewater treatment plants with NPDES permitted outfalls.

(c) Substantial harm criteria. The facility meets one or more of the following substantial harm criteria:

Comment 14a

- EPA has identified that Substantial Harm is established if one or more criteria are met. Later in the proposed rule at §118.4(c), EPA states that the documentation for this determination needs to be retained. The Association requests that EPA clarify whether the regulatory community is responsible for completing an analysis of all four of substantial harm criteria or just one, following the sequence in §118.3(c). For example, if a facility determines that substantial harm is possible due to the potential impact on an FWSE, then would the analysis for the other criteria be necessary? This approach is also implied in Figure 1 of 87 FR 17898. The Association requests clarity in that once a

substantial harm criterion is identified as met, no additional calculations are required. Additionally, §118.3(c) is unclear regarding which HS should be evaluated for substantial harm and what capacity should be used. The Association believes that EPA should add another step to determine the worst-case discharge volume to the substantial harm applicability determination. We believe this was the intent as noted in 87 FR 17912, which states “In §118.10, EPA is proposing to require facilities to develop one worst case discharge scenario for the container with the largest capacity of a CWA hazardous substance with a maximum capacity onsite that meets or exceeds the threshold quantity in one container or group of interconnected containers. This would capture the worst-case discharge at the facility for CWA hazardous substances and be used to both determine applicability and for the FRP hazard evaluation.”

Comment 14b

- The Association suggests that Substantial Harm be determined on the basis of planning distance, similar to the approach used in Oil FRPs. EPA stated on 87 FR 17900 that “EPA recognizes that use of planning distance in the applicability determination may better target facilities with the potential to cause substantial harm...” and continues with “This approach would be more complicated for the regulated community to implement, relative to the use of a single threshold multiplier (e.g., 10,000), and for EPA to evaluate and enforce”. The Association disagrees that this approach is more complicated for the regulated community to implement, provided that EPA accepts the planning distances as discussed in Attachment C-III, Appendix C to Part 112, as a calculation methodology for all CWA HS parameters and clearly identifies the receptors that, if located within the planning distance, would trigger Substantial Harm Criteria. The Association contends that this methodology may also be easier for EPA to evaluate and enforce, as the methodology would likely be more consistent across facilities and would minimize the facility-specific model validations EPA would have to evaluate. In 40 CFR 112 Appendix C-III, section 1.2, EPA states that the formulas developed by EPA were “designed to be simple to use. However, facility owners or operators may calculate planning distances using more sophisticated formulas, which take into account broader scientific or engineering principles, or local conditions.” The Association proposes that EPA utilize a similar approach as described in 40 CFR 112 Attachment C-III, paragraph 1.2 for the Proposed Rule.

Comment 14c

- In lieu of requiring facilities to select methodologies and develop planning distances based on adverse impact to FWSEs or public drinking water supply (PWS), EPA should consider the approach used in the Oil FRPs. The Oil FRPs use formulas to calculate planning distances as discussed in Attachment C-III, Appendix C to Part 112. These formulas are used to evaluate distances that “cause injury to fish and wildlife and sensitive environments or disrupt operations at a public drinking water intake.” Per 40 CFR 112 Appendix C-III paragraph 1.1. Attachment C-III provides transport mechanisms over land, on still water, and for tidal-influenced and moving navigable waters. These formulas are recognized by plan holders and are used in the Oil FRPs unless a comparable formula is developed and provided by the Plan Holder. The Association believes these formulas are suited for developing planning distances for Chemical FRPs instead of using the highly variable option of endpoints and water modeling. The Association also encourages EPA to develop timeframe inputs consistent with the Oil FRPs, e.g., 27-hour to non-high-volume port and 15-hours high volume port. The

Association recommends that EPA follow the same approach as provided in the Oil FRPs regulation which will allow consistency in planning and also give the option to/flexibility to use "a comparable formula".

Comment 14d

- The formula for oil transport on moving navigable waters included in 40 CFR 112 is based on the velocity of the water body and the time interval for the arrival of response resources. The Association contends this approach is compatible with the objective of identifying receptors that could be impacted during a worst-case discharge and planning, preventing, mitigating, and responding to a worst-case spill of CWA hazardous substances to moving navigable waters. This approach will be a more conservative approach to determining planning distance as it will not take into account changes to the substances as they are transported in the navigable water. The Association believes a conservative planning distance of 27 hours (24-hour arrival + 3-hour deployment) provides conservatism for response times for all of the hazardous substance classes and consistency with rules that are familiar to the regulated community. The Association requests EPA to clarify if there is any objection to using the methodologies in 40 CFR 112 Appendix C for moving water bodies.

(1) Ability to cause injury to fish, wildlife, and sensitive environments. The facility is located at a distance to an endpoint as calculated using a planning distance in § 118.10(b) such that a worst case discharge from the facility could cause injury to fish, wildlife, and sensitive environments. For identification of fish, wildlife, and sensitive environments, facilities shall use the applicable Area Contingency Plan prepared pursuant to section 311(j)(4) of the Clean Water Act, in addition to identifying other areas pursuant to the definition in § 118.2;

Comment 15a

- EPA needs to acknowledge that not all navigable waters identify fish, wildlife, and sensitive environments (FWSE) and public receptors in their Area Contingency Plans (ACPs). This is especially true for ACPs developed for inland water bodies. What is EPA's expectation if this is the case? EPA should recognize these situations and provide flexibility in these determinations. One acceptable alternative is to use the same criteria as the Oil FRP's vulnerability analysis development, 112.20(h)4 and Section 1.4.1 of Appendix F.

Comment 15b

- "EPA proposes to codify parameters and toxic endpoints to be used by facility owners when determining whether a worst-case CWA hazardous substance discharge could cause injury to FWSE." 87 FR 17897. The proposed rule is developing a precedent in setting the endpoints for FWSE at 10% of the LC50 on the scientific basis of adult fathead minnow tests. If EPA does not agree to utilize a planning distance basis similar to that used in Oil FRP requirements in 40 CRF 112, EPA should provide flexibility to the regulated community by identifying endpoints for individual chemicals as opposed to a class of chemicals and incorporating the user identified endpoint concentration upon approval by EPA. The approach in the Proposed Rule appears to be a one-size-fits-all solution, which we believe is not justified for different water body classifications and uses. One example of where an alternate endpoint is in the best interest of the environment, the regulated community, and public, is in the event of a sulfuric acid or

sodium hydroxide spill, which per EPA's analysis represents 14% of all CWA hazardous substances between 2010 and 2019, and after PCBs represent the most frequently spilled CWA HSs [87 FR 17894]. In the case of an acid or caustic spill, the true endpoint would be a pH concern. Since pH is impacted by the buffering capacity of water and would be highly specific to the water body and facility location, a site-specific pH endpoint would offer a stronger scientific basis than an acid or base concentration endpoint determined elsewhere. Should EPA continue to use endpoint concentrations for the planning basis, adding flexibility for a facility to propose an alternate endpoint gives facilities an opportunity, but not an obligation, to reference toxicological data for species more appropriate for the potentially impacted water body.

Comment 15c

- EPA should clarify whether the proposed fathead minnow-based endpoints for FWSE are appropriate for use in scenarios where the potentially impacted waterbody is brackish or marine.

Comment 15d

- EPA appears to be conflating definitions of the term “endpoint” to mean, on one hand, the point of compliance (geographic “endpoint” of a plume release), and on the other hand, the target environmental effect (the “toxic endpoint,” *e.g.*, lethality as used in preamble Table 8, or other injury to FWSE, such as kidney effects, immune system dysfunction, etc.). Clarity in definitions is essential to the understanding of the proposed rule as well as a reasonable expectation of fair and equitable implementation. We strongly recommend EPA use different terms for these two meanings.

Comment 15e

- 87 FR 17904 states “To determine whether a facility could cause substantial harm to an FWSE, EPA is proposing that facilities self-determine formulas and/or methodologies to use for overland transport and transport in water for planning distance, using EPA-provided parameters and the lethal concentration 50 percent (LC50) toxicity intervals provided by EPA (Table 7).” The Association proposes that EPA identify or develop formulas, models, or other methodologies that can accurately determine these endpoints if the rule moves forward based on endpoints and not time-distance calculation as employed in the EPA's Oil FRP rule. Development of such formulas, models, or methodologies would create consistency in the regulated community's plans to the benefit of EPA, the regulated community, and the public.

Comment 15f

- 87 FR 17905 “EPA solicits comment on the various model parameters, in-water and overland transport models, scenarios, and variables which should be included in a potential planning distance calculation as well as whether EPA should develop a comparable tool to the RMP*Comp system for worst-case discharges of CWA hazardous substances.” The Association supports this approach; however, the Oil FRP already has the formula to determine planning distance. If the agency decides to take another approach, The Association urges the EPA to develop a model which is vetted via an industry-supported coalition group. During the interim, alternate means of estimating the endpoints should be proposed by EPA, or modeling of these endpoints should be waived until a “model” is developed.

Substantial harm criteria. (2) Ability to adversely impact a public water system. The facility is located at a distance to an endpoint such that a discharge from the facility could adversely impact a public water system. Ability to adversely impact a public water system includes a concentration of a CWA hazardous substance reaching a public water system which:

Comment 16a

- Accurate prediction of adverse impacts (*i.e.*, MCL values at the point of compliance for a Public Water System) will be difficult to develop, especially under all discharge scenarios, including adverse weather conditions. CWA hazardous substances will be diluted the further they travel away from the source. Furthermore, if the PWS is unable or unwilling to participate in the calculation, the regulated community is unlikely to have the site-specific knowledge of the PWS's equipment and capabilities to accurately assess the impact on the PWS, or whether substantial harm is likely to occur based on concentration endpoints at the PWS point of compliance. The Association suggests EPA propose risk-based response time and a calculation methodology for the regulated community to provide a uniform approach to assessing planning distance and potential for substantial harm potential to a Public Water System. Specifically, The Association proposes a standard risk-based planning time (*i.e.*, 27 hours for non-high-volume ports or 15 hours for high-volume ports as consistent with Oil FRPs), from which the regulated community will calculate a planning distance and subsequent response plans.

Comment 16b

- 87 FR 17906 states that facilities would be required to coordinate with PWSs to determine whether concentrations from worst-case CWA HS discharge would adversely impact them and whether the facility owner or operator would be required to evaluate if the discharge would compromise the ability of a PWS to comply with federal and state standards. Appendix A (87 FR 17934) asks the Plan Holder to document attempts to coordinate with the PWS. If the PWS does not collaborate with the owner or operator, the owner/operator cannot accurately make this assessment. EPA needs to have provisions in the rule to provide relief from the regulatory burden in these cases if EPA does not adopt a standard risk-based planning timeframe to which all must adhere.

Comment 16c

- EPA should clarify expectations for assessing impacts to PWSs in scenarios where the impacted water body is marine or brackish and not used as a water supply because drinking water standards do not apply.

Substantial harm criteria. (3) Ability to cause injury to public receptors. The facility is located at a distance to an endpoint as calculated using a planning distance in § 118.10(b) such that a discharge to navigable water from the facility could cause injury to a public receptor as defined in § 118.2; or

Comment 17a

- EPA proposes to codify parameters and toxic endpoints to be used by facility owners when determining whether a worst-case CWA hazardous substance discharge could cause injury to Public Receptors (PRs). The proposed rule is developing a precedent in setting the endpoints for PRs at 10% of the LD50. This approach seems very restrictive for a spill scenario. This approach appears to be a one-size-fits-all which we believe is

not justified for different water body classifications and uses by public receptors. The Association's concern is related to other comments here on vague "injury" language. Injury is defined as "measurable adverse change ... [to] a natural resource or public receptor..." and public receptors refer to areas where the public could be present. An injury by this definition does not relate to any adverse effects on wildlife or humans but serves as the basis for how to define the impacted area. But the term injury used here concerns fish and wildlife, so is EPA considering natural resources to be solely comprised of fish and wildlife? In which case, The Association's concern is how to determine the injury, as well as what is meant by injury, e.g., contact, adverse reaction, death. The Association assumes injury refers to death based on Table 1 (87 FR 17934), which bases endpoint thresholds based on LD50 data. There is also a rectangle/square definition scenario with substantial harm and injury. Injury to public receptors is a criterion for substantial harm, but substantial harm is not necessarily injury.

Comment 17b

- "The basis for public receptors uses a toxicity threshold at 10% of the RQ concentration value for mammalian oral toxicity. A substance was rated as toxic based on its LC50 or lethal dose 50 percent (LD50) value, which is the concentration or dose of a substance which causes the death of 50 percent of a defined experimental animal population." 87 FR 17907. The Association asks for clarification on the basis of 10% of LD50. It appears that 10% was applied to the upper toxicity and not the midpoint between the upper and lower. EPA should provide flexibility to alternatively identify the endpoints for each individual CWA HS on a site-specific basis. As an example, if sodium hydroxide is spilled into a river is the endpoint really 50 mg/L versus a pH impact?

Comment 17c

- In practice, since EPA is proposing on-water exposures to humans as "public receptors" with an ingestion-based concentration (e.g., in mg/L based on Table 8, 87 FR 17908), with appropriate near-shore exposure duration and pattern expected for any of these "public receptor" locations, The Association believes that most public receptors are not applicable since ingestion would be limited or nonexistent in these scenarios. Further, if a facility's Chemical RP process would typically include involving the local health authorities during a WCD event, jurisdiction for prescribing public space closures in proximity to on-water emergencies should be acknowledged: rather than calculating sub-mg/L dilution water concentrations during an emergency, simply avoiding the potential for public exposure/contact by means of park, beach, dock, etc. closure is much more likely to be a realistic element of response. Rarely would a calculated hypothetical "public receptor" exposure be a driver for prompt and effective access controls.

Comment 17d

- While it may sound reasonable to "use the same parameter and toxic endpoints" for the public as for FWSE, in practice this is unlikely to be appropriate. Simple contact with many of the examples (from Table 3) of CWA chemical discharges, particularly if diluted by the time any concentration reached a public receptor a half-mile away, would not be expected to result in injury: ingestion and inhalation pathways would be expected to drive on-water risks of public "injury," which needs to be defined to be useful. The rule goes on to propose the Table 8 thresholds (appropriately focused on ingestion and

stating that EPA assumes inhalation exposures are covered by the CAA), but the need for this evaluation at all is unclear.

Comment 17e

- EPA should understand that present-day Area Contingency Plans already identify sensitive receptors and that inhalation pathways (*i.e.*, air monitoring) associated with public receptors are more likely to require monitoring. Typical existing WCD preparation would not include water monitoring at “public spaces” as dynamic and release-specific (tide, wave, flow, dilution, etc.) processes generally make it unnecessary, particularly given that an on-water release would include securing the waterway so that emergency procedures can occur. Deploying limited resources to measure water concentrations and verifying that the Table 8 limits are not exceeded would be unnecessary, particularly if the simple “avoid exposure” approach (by closing public spaces on the water in proximity to the release) is taken.

Comment 17f

- Some spill response techniques (*i.e.*, application of a vapor suppressive surfactant or dispersant “blanket” over a spill of benzene to avoid inadvertent ignition of flammable) involve the use of additional chemical and mechanical methods that (as designed) change the on-water composition of the spilled material. In cases where such methods involve certain chemical reactions (*i.e.*, elimination of oxygen), the product applied to the emergency release could be greater than the 10% of the LC50 values shown in Table 8. This seems to be a disconnect between the stated point-of-compliance endpoint and the known effective product requirements to achieve a response that does not result in sudden and catastrophic loss of life (*e.g.*, fire or explosion) and should be carefully re-evaluated.

Substantial harm criteria. (4) Reportable discharge history. The facility has had a reportable CWA hazardous substance discharge under § 117.21 within the last five years.

Comment 18a

- The Association agrees that reportable discharge history should be limited to releases that reach navigable waters. Based on Figure 1 at FR 17898, the Association understands EPA's intent to be reportable discharge history as limited to releases that reached navigable waters. The Association requests EPA to confirm this in §118.3(c)(4).

Comment 18b

- Releases with RQs that impact air and not water, such as through a flare (H₂S or ammonia) should explicitly be excluded from the reportable discharge history. We believe EPA's intent under this provision appears to be limited to discharges to water, but additional clarification should be provided to prevent different regional or site-by-site interpretations.

Comment 18c

- Reportable discharges of hazardous substances contained in NPDES effluents should be excluded from these criteria, as these substances are regulated under 40 CFR 122.

Comment 18d

- Reportable discharges of oil containing CWA hazardous substances should be excluded from these criteria, as these substances are regulated under 40 CFR 112.

Comment 18e

- Is the “last five years” from the effective date of the rule or is it a rolling 5-year dataset? It is the Association's understanding that this criterion is used for initially regulated facilities and the intent is not a trigger for newly regulated facilities. This time frame needs to be clearly defined so there is no confusion.

Comment 18f

- If EPA applies these criteria as a rolling 5-year dataset, does the Substantial Harm Certification form need to be updated if a reportable discharge occurs? If so, it appears that a facility that has triggered the threshold quantity and proximity to navigable water would also trigger the substantial harm criteria for reportable discharge history, thus requiring a Chemical FRP. The reportable discharge history criteria should not be the determining factor if a facility is in or out of the proposed regulation.

Comment 18g

- If a reportable discharge of a chemical occurs and triggers this substantial harm criterion does this HS become the regulated substance and does the facility need to develop planning distances based on this chemical and also continue to develop a worst-case discharge quantity? The Association believes this analysis is missing from the Proposed Rule's threshold applicability determination.

Comment 18h

- If a facility has triggered substantial harm criteria solely due to their reportable discharge history, and that facility completes five years without any discharge, would the requirement to have a CWA HS FRP then no longer be applicable to the facility, and would the facility be able to withdraw from the requirements of this Proposed Rule immediately? EPA should allow companies to be relieved from these requirements if they have the appropriate performance history.

§ 118.4 General requirements.

(a) Preparation and submission of facility response plans. The owner or operator of any facility meeting the applicability requirements of § 118.3 shall prepare and submit a facility response plan to the EPA, according to the following provisions:

(1) Initially regulated facilities. The owner or operator of a facility in operation on the effective date of the final rule that satisfies the criteria in § 118.3 or that is notified by the Regional Administrator pursuant to § 118.5 shall prepare and submit a facility response plan that satisfies the requirements of this section to the Regional Administrator within 12 months of meeting the criteria or notification.

Comment 19a

- EPA needs to clearly define what it means by “meeting the criteria” for purposes of triggering the 12-month FRP deadline. Does this mean the date that the Substantial Harm Certification form was submitted per §118.4(c) or does it mean something else, *i.e.*, a letter of acknowledgment? This terminology needs to be clearly defined so there is no confusion.

Comment 19b

- Timing for “initially regulated facilities” is unclear. The Association assumes the timing is up to 12 months for completing and submitting the Substantial Harm Certification Form under §118.4(c)(1) which then triggers the “meeting the criteria” and another up to 12 months for initially regulated facilities to prepare the Chemical FRP, giving the facility a total of 24 months. If this is the case, we support this provision.

(2) Newly regulated facilities. The owner or operator of a facility in operation after the effective date of the final rule that satisfies the criteria in § 118.3 or that is notified by the Regional Administrator pursuant to § 118.5 shall prepare and submit a facility response plan that satisfies the requirements of this section to the Regional Administrator within six months of meeting the criteria or notification, but no sooner than 12 months after the effective date of the final rule.

Comment 20a

- Timing for newly regulated facilities is unclear. The Association assumes up to 1 month for completing and submitting the Substantial Harm certification form under §118.4(c)(1) which then triggers the “meeting the criteria” and another up to 6 months for newly regulated facilities to prepare the Chemical FRP, giving the facility a total of 7 months. If this is the case, we do not support this provision as this is not adequate time to prepare the Chemical FRP. Once a facility triggers “meeting the criteria”, providing up to 12 months to prepare the Chemical FRP is necessary for newly regulated facilities, due to the complexity of self-determining planning distance formulas and/or methodologies to use for calculating the planning distance, which the Association anticipates would require external contracting with third-party consultants.

(3) Newly constructed facilities. For a newly constructed facility that commences operation after the effective date of the final rule, and is required to prepare and submit a facility response plan based on the criteria in § 118.3, the owner or operator shall submit the facility response plan to the Regional Administrator prior to the start of operations, but no sooner than 12 months after the effective date of the final rule. Adjustments to the facility response plan to reflect changes that occur at the facility during the start-up phase of operations must be submitted to the Regional Administrator after an operational trial period of 60 days.

Comment 21a

- An initial “preliminary” plan can be prepared prior to the startup of operations but threshold values and other logistics may change once the operations reach normal conditions. We believe that “an operational trial period of 60 days” is not realistic and this should be increased to one year. We understand that the proposed timing is the same for Oil FRPs, but the Association believes the Chemical FRP will be more complex and thus, would need a minimum of 12 months to prepare and submit a final plan for newly constructed facilities.

(4) Facilities regulated as a result of a planned event or change. For a facility required to prepare and submit a facility response after the effective date of the final rule as a result of a planned change in design, construction, operation, or maintenance so that the facility now meets the criteria in § 118.3, the owner or operator shall submit the facility

response plan to the Regional Administrator before the portion of the facility undergoing the planned change commences operations, but no sooner than 12 months after the effective date of the final rule (adjustments to the facility response plan to reflect changes that occur at the facility during the start-up phase of operations must be submitted to the Regional Administrator after an operational trial period of 60 days).

Comment 22a

- Timing as a result of a “planned event or change” will require submission of the FRP prior to commencing operations. This may not be practicable for minor changes such as operational or maintenance activities. EPA should limit this provision to significant changes (e.g., capital projects resulting in new process units, new storage tanks, etc.).

Comment 22b

- Additionally, a timeframe of how long a “planned event or change” lasts should be defined, as these may be temporary during a changeover, experimental, etc., and it would be burdensome to go through this full process of updating the Chemical FRP if something is very short-lived. The Association suggests using a timeframe of 6 months or greater for determining a “planned event or change”.

Comment 22c

- An initial “preliminary” plan can be prepared prior to the startup of operations but threshold values and other logistics may change once the operations reach normal conditions. We believe that “an operational trial period of 60 days” is not realistic and this should be increased to one year. We understand this timing is the same for Oil FRPs, but the Association believes Chemical FRPs will be more complex and thus, would need a minimum of 12 months to prepare and submit the final FRP.

(5) Facilities regulated as a result of an unplanned event or change. For a facility required to prepare and submit a facility response plan after the effective date of the final rule, as a result of an unplanned event or change in facility characteristics that renders the facility subject to the criteria in § 118.3, the owner or operator shall submit the facility response plan to the Regional Administrator within six months of the unplanned event or change, but no sooner than 12 months after the effective date of the final rule.

Comment 23a

- Timing because of an “unplanned event or change” requires submission of FRP within 6 months. This provision refers to “renders the facility subject to the criteria in §118.3” where we believe it should use the same terminology as in §118.4(a)(1), which states “meeting the criteria”. The Association recommends that EPA change the wording from “that renders the facility subject to the criteria in §118.3” to “meeting the criteria in §118.3”.

Comment 23b

- What is the difference between a facility with an “unplanned event or change” under §118.4(a)(5) versus a newly regulated facility under §118.4(a)(2)? The Association recommends changing the timing from 6 months to 1 year after “meeting the criteria”, as unplanned events will not have been prepared for, and will take longer to manage and develop plans as a result of the “unplanned event or change.” Additionally, EPA should add clarity to their interpretation of “unplanned event or change”.

(b) Facility response plan amendments.

(1) The owner or operator of a facility for which a facility response plan is required under this part shall revise and resubmit revised portions of the facility response plan within 60 days of each facility change that materially may affect the response to or potential for a worst case discharge, including:

(i) A change in the facility's configuration that materially alters the information included in the facility response plan;

(ii) A change in the CWA hazardous substance maximum capacity onsite (e.g., commissioning or decommissioning of containers; replacement, reconstruction, or movement of containers) that materially alters the required response resources;

(iii) A material change in capabilities of the spill response organization(s) that provide equipment and personnel to respond to discharges of CWA hazardous substances described in § 118.11(a)(3);

(iv) A material change in the facility's discharge mitigation and response equipment or emergency response procedures; and

(v) Any other changes that materially affect the implementation of the facility response plan.

Comment 24a

- This 60-day timeframe for updates to the impacted section of the FRP is shorter than the 90 days provided under SARA 311 to update information (*i.e.*, LEPC et. al.) on changes to chemical inventory and Safety Data Sheets (SDS). Sixty days is also insufficient time to update planning distances, coordinate with PWSs, and assess impacts. EPA should follow the 90-day framework developed under SARA 312 for changes in chemical inventories and reporting hazardous substances to keep in alignment with already established programs that the industry is familiar with. Additionally, complicating the timeline to update plans with changes received from vendors on third-party SDSs is that the 90-day framework applies to the supplier and their SDS, but the supplier is not obligated to send updated SDS until their next shipment or upon customer request. Therefore, a receiving facility may not get a new SDS until their next shipment, even though the vendor updated their SDS within the 90-day requirement. As a minimum, 90 days should be provided to revise and resubmit revised portions of the facility response plan.

Comment 24b

- The list from (i) to (v) is too broad and can be misinterpreted by the many triggers. 87 FR 17921 states "Materially change means introduction of a new process, new equipment, or regulated substance, an alteration of process chemistry that results in any change to safe operating limits, or other alteration that introduces a new hazard or affects the facility's potential for a discharge." This preamble discussion is an example of changes that are too open-ended. The Association recommends that a "facility change that materially may affect the response to or potential for a worst-case discharge" needs to be limited to "facility change that materially may affect the worst-case discharge determination" and not a change in any other CWA hazardous substance maximum capacity onsite.

(2) Except as provided in paragraph (b) of this section, amendments to information in the facility response plan (such as personnel, contact information, or changes in the spill

response organization(s)) that do not result in a material change in response capabilities do not require review and approval by the Regional Administrator. Facility owners or operators shall provide a copy of such changes to the Regional Administrator as the revisions occur.

Comment 25a

- The Association acknowledges that changes that do not result in a material change or change in response capabilities can be made by the facility as they occur; however, the need to provide a copy of changes to the RA as they occur is an administrative burden on the facility. The Association suggests that the changes would be submitted to EPA as part of an annual revision, and thus we recommend changing the wording from “as the revisions occur” to “as part of an annual review”.

(3) The owner or operator of a facility that submits changes to a facility response plan as provided in the preceding paragraphs of this section shall provide the EPA-issued facility identification number (where one has been assigned, such as Facility Registry Service number) with the changes.

(4) The Regional Administrator shall review and approve or disapprove changes to a facility response plan submitted pursuant to the requirements in paragraph (b)(1) of this section for a facility that he or she has determined pursuant to § 118.5(c) to have the potential to cause significant and substantial harm to human health or the environment.

Comment 26a

- The rule needs to set parameters on timing for EPA's review and approval of submitted changes to the Chemical FRP. This has been an issue with the Oil FRPs in that EPA reviews and approvals have not been provided in a timely manner. USCG regulations provide deadlines for the agency to conduct its reviews and provide approvals. EPA should follow the USCG's framework developed under 33 CFR 154.1065 for agency reviews and approvals.

(c) *Substantial harm certification form submission.* If the facility meets the criteria in § 118.3(a) and (b), the owner or operator must:

(1) Complete and submit to the EPA Regional Administrator the substantial harm certification form in Appendix A to this part within 12 months of the effective date of the final rule or, for new facilities, within one month of meeting the criteria in § 118.3(a) and (b), but not sooner than 12 months after the effective date of the final rule. Owner or operators must retain their completed Appendix A and supporting documentation for the duration that the CWA hazardous substance maximum capacity onsite is at or exceeds the threshold quantity and for an additional 10 years.

Comment 27a

- The Proposed Rule requires the substantial harm certification form to be submitted to the agency when criteria in §118.3(a) and (b) have been met, even if no substantial harm is identified. This requirement is different than the requirement in 40 CFR 112.20(e), where “the operator shall complete and maintain at the facility the certification form”. Additionally, if substantial harm is triggered, the Oil FRP rule does not require separate or pre-submission of the form. The form is submitted as part of the Oil FRP as required in Sections 2.2 and 2.3 in Appendix F to Part 112—Facility-Specific Response Plan. The Association recommends that the submission requirements should be the same as the Oil FRP rule.

Comment 27b

- EPA needs to clarify the timing associated with “meeting the criteria”. Does this mean the date that the Substantial Harm Certification form was submitted per §118.4(c) or does it mean something else, *e.g.*, a letter of acknowledgment? constructing a tank? filling a tank? This terminology needs to be clearly defined so there is no confusion.

Comment 27c

- The Association supports 12 months of the effective date of the final rule for initially regulated facilities. However, within one month for all other “new facilities” is not practicable or achievable based on the amount of information required in the form. The Association supports 12 months for newly regulated facilities and facilities with “unplanned events or changes”. For newly constructed facilities, it does not make sense to submit the form within one month of meeting the criteria if the FRP must be prepared prior to operations. This timing framework needs to be clearly defined so there is no confusion. EPA needs to break down the timing on submission dates using the same grouping as presented in §118.4(a)(1) to (5) – initially regulated, newly regulated, newly constructed, planned changes, and unplanned changes.

(2) Attach to the form documentation, calculations, and any other information necessary to demonstrate the reliability and analytical soundness of the substantial harm determination as well as a review of potential receptors that could be impacted as a result of a CWA hazardous substance discharge.

Comment 28a

- The form requires the facility to list names, CAS number, and maximum capacities (lbs.) stored onsite for each CWA hazardous substance. The Association suggests that this information should be limited to listing those CWA hazardous substances that equal or exceed 10,000 x RQ, and are not already regulated elsewhere; for example, chemicals found in gasoline are already addressed under the Oil FRP rule and should not be required to be listed here. The form should also identify the one hazardous substance that triggers the WCD along with the basis for determining the WCD capacity. This list will change, and thus will need to be updated frequently.

Comment 28b

- The Association suggests that EPA makes this form simple like the form used for Oil FRPs. The chemical substantial harm determination form as written will become a burden to the regulated community to maintain, especially if the facility demonstrates no

substantial harm. A simpler form would also benefit the EPA Regional office by having consistent information and format available for review.

(3) Submit to the EPA Regional Administrator updates to the substantial harm certification every five years, or within 60 days of a change at or outside the facility that impacts the facility's potential to cause substantial harm to the environment in accordance with the criteria in § 118.3.

Comment 29a

- This part of the Proposed Rule refers to 60 days which is different than the one month cited in § 118.4(c)(1). This timing framework needs to be clearly defined so there is no confusion.

Comment 29b

- EPA needs to define “every five years”. Does EPA mean “plan approval date”, “last submission date”, or something other? This period needs to be better defined.

Comment 29c

- Re-submitting the substantial harm certification “every five years” is not consistent with the Oil FRPs program. Under the Oil FRPs requirements, the form does not require a re-submittal unless there is a change that impacts the facility's potential to cause substantial harm to the environment. The Association does not understand the intent of providing these re-submittals as it will cause confusion and potential non-compliance issues. The Association recommends removing “every five years” from the rule.

Comment 29d

- A 60-day period is insufficient time to accurately update the calculations and planning distances, coordinate with PWSs, and assess the impacts of changes to substantial harm, particularly if the change to substantial harm is unplanned. An example of an unplanned change to substantial harm would be vendor updates to an SDS increasing the percentage of a CWA HS, thus changing the triggering CWA HS quantity. The timeframe for submitting the update to the substantial harm criteria should be revised to be consistent with the timing allotted for FRP amendments.

118.4(d) Assertion of claims of confidential business information.

(1) Except as provided in paragraph (2) of this section, an owner or operator of a facility required to submit a facility response plan or otherwise provide information under this part may make a claim of confidential business information for any such information that meets the criteria set forth in § 2.302 of this chapter.

(2) Notwithstanding the provisions of 40 CFR part 2, an owner or operator of a facility subject to this part may not claim as confidential business information the following information:

(i) Data required by § 118.11 (b); and

(ii) Data required in Appendix A of this part, excluding the supporting documentation.

(iii) Notwithstanding the procedures specified in 40 CFR part 2, an owner or operator asserting a claim of CBI with respect to information contained in its facility response plan as per § 118.11, shall submit to EPA at the time it submits the facility response plan the following:

(A) The information claimed confidential, provided in a format to be specified by EPA;

(B) A sanitized (redacted) copy of the facility response plan, with the notation “CBI” substituted for the information claimed confidential, except that a generic category or class name shall be substituted for any chemical name or identity claimed confidential; and

(C) The document or documents substantiating each claim of confidential business information, as described in paragraph (e) of this section.

(e) Substantiating claims of confidential business information.

(1) An owner or operator claiming that information is confidential business information must substantiate that claim by providing documentation that demonstrates that the claim meets the substantive criteria set forth in § 2.302 of this chapter.

(2) Information that is submitted as part of the substantiation may be claimed confidential by marking it as confidential business information. Information not so marked will be treated as public and may be disclosed without notice to the submitter. If information that is submitted as part of the substantiation is claimed confidential, the owner or operator must provide sanitized and unsanitized versions of the substantiation.

(3) The owner, operator, or senior official with management responsibility at the facility shall sign a certification that the signer has personally examined the information submitted and that based on inquiry of the persons who compiled the information, the information is true, accurate, and complete, and that those portions of the substantiation claimed as confidential business information would, if disclosed, reveal trade secrets or other confidential business information.

Comment 30a

- EPA should recognize the need for keeping information regarding “locations of chemical storage facilities” confidential similar to the provisions in EPCRA Section 312 reports. Under EPCRA Section 324, a facility may elect to withhold location information on a specific chemical from disclosure to the public. This information should be handled as sensitive security information (SSI), like a USCG Facility Security Plan (FSP).

Comment 30b

- The Association has concerns about EPA allowing the public access to all or some of the submitted data from facility owners. Some regulated facilities are also currently regulated under CFATS/MTSA Security Regulations and could be exposing vulnerabilities under the proposed regulations. EPA needs to recognize the sensitivity of the information and develop safeguards to limit access to the information.

§ 118.5 Regional Administrator determination of substantial harm and significant and substantial harm.

(a) Regional Administrator authority to require facility response plans. The Regional Administrator may at any time require the owner or operator of any non-transportation-related onshore facility to prepare and submit a facility response plan under this section after considering the factors in paragraph (b) of this section. If such a determination is made, the Regional Administrator shall notify the facility owner or operator in writing and shall provide a basis for the determination. If the Regional Administrator notifies the owner or operator in writing of the requirement to prepare and submit a facility response plan under this section, the owner or operator of the facility shall submit the facility response plan to the Regional Administrator within six months of receipt of such written notification but no sooner than 12 months after the effective date of the final rule.

(b) Regional Administrator substantial harm determination. To determine whether a facility could, because of its location, reasonably be expected to cause substantial harm to the environment by a discharge, or substantial threat of a discharge, of CWA hazardous substances to navigable waters, the Regional Administrator may consider the following:

- (1) Type of transfer operation(s);**
- (2) CWA hazardous substance quantity and category as determined in 40 CFR 117.3 stored onsite;**
- (3) Proximity to fish, wildlife, and sensitive environments and other areas determined by the Regional Administrator to possess ecological value;**
- (4) Ability to adversely impact public water systems as described in § 118.3(c)(ii);**
- (5) Location in a source water protection area;**
- (6) Ability to cause substantial harm to public receptors due to a worst case discharge to navigable waters;**
- (7) Lack of passive mitigation measures or systems, including those that enhance resilience to climate change;**
- (8) Potential for a worst case discharge to adversely impact communities with environmental justice concerns;**
- (9) Potential vulnerability to adverse weather conditions resulting from climate change;**
- (10) Reportable discharge history; or**
- (11) Other site-specific characteristics and environmental factors that the Regional Administrator determines to be relevant to protecting the public or environment from harm by discharges, or a substantial threat of discharge, of CWA hazardous substances into or on navigable waters.**

Comment 31a

- This provision in §118.5(a) gives the Regional Administrator (RA) very broad authority in determining if a facility must prepare and submit an FRP. The factors in §118.5(b) are too broad and open-ended and can be arbitrarily applied and misused by the RA in classifying a facility as a substantial harm facility. Additionally, this can create discrepancies between regions. While §118.5(b) sets forth some factors that the RA may consider in determining whether a facility, due to its location, can “reasonably” be expected to cause substantial harm, the determination in §118.5(a) should also state that the RA needs to provide a reasonable basis for the determination. Additionally, §118.5(b)(11) should state, other site-specific characteristics and environmental factors that the RA “reasonably” determines to be relevant.

Comment 31b

- The provisions in §118.5(b) need to be clearer. This is particularly needed for the criteria listed in §118.5(b)(9) “Potential vulnerability to adverse weather conditions resulting from climate change” which has no boundaries or constraints to establishing either adverse weather conditions or a facility’s vulnerability. EPA should also provide clearer descriptions of “other site-specific characteristics and environmental factors” as these descriptions could be applied arbitrarily and inconsistently by the RA.

Comment 31c

- Six months to prepare and submit an FRP is not adequate time due to the complexity of threshold quantities and the extent of planning requirements. The Association requests a minimum of 12 months to prepare and submit an FRP if the RA requires the owner or operator facility to prepare and submit a facility response plan under this section.

(c) Regional Administrator responsibilities for significant and substantial harm facilities. The Regional Administrator shall review facility response plans submitted by facilities meeting the applicability requirements of § 118.3 to determine whether the facility could, because of its location, reasonably be expected to cause significant and substantial harm to the environment by a discharge, or a substantial threat of discharge, of CWA hazardous substances into or on the navigable waters based on the factors identified in paragraph (d) of this section. If such a determination is made, the Regional Administrator shall notify the owner or operator of the facility in writing and:

- (1) Promptly review the facility response plan;**
- (2) Require amendments to any facility response plan that does not meet the requirements of this section;**
- (3) Approve any facility response plan that meets the requirements of this section; and**
- (4) Review each facility response plan periodically thereafter on a schedule established by the Regional Administrator.**

Comment 32a

- “Promptly review” is an open-ended timing expression and can mean one 1-week, 1-month, 6-months, or 1-year. The rule needs to set limits on the timing for EPA to “promptly review” and approval of the submitted plan. Timing has been an issue with the Oil FRPs in that those reviews and approvals have not been provided in a timely manner. USCG regulations provide deadlines for the agency to conduct its reviews and provide approvals. EPA should follow the USCG’s framework developed under 33 CFR 154.1065 for agency reviews and approvals.

Comment 32b

- The rule needs to set a time period for the agency to “review each facility response plan periodically.” EPA needs to provide clearer descriptions of these timeframes, especially the terms “periodically” and “on a schedule established by the Regional Administrator” as these terms could be applied inconsistently by the RA across regions. For consistency, using every five years from the date of plan approval would be sensible, as five years would be consistent with other agencies; for instance, USCG FRPs, which are resubmitted every five years from the last approval date.

(d) Regional Administrator significant and substantial harm determination. To determine whether a facility could, because of its location, reasonably be expected to cause significant and substantial harm to the environment by discharging a CWA hazardous substance into or on the navigable waters, the Regional Administrator shall consider the factors in paragraph (b) of this section and § 118.3(c), as well as the following:

- (1) Frequency of past reportable discharges;**
- (2) Proximity to navigable waters;**
- (3) Age of containers and equipment;**
- (4) Potential for hazards such as flooding, hurricanes, earthquakes, or other disasters that could result in a worst case discharge; and**

(5) Other facility-specific and Region- specific information, including local impacts on public health.

Comment 33a

- This determination using the listed factors §118.5(d)(1) through (5) is too open-ended, giving the Agency latitude to decide if a facility is a Significant Harm (SH) or Significant and Substantial Harm (SSH). The triggers for SSH need to be clearly identified for making this determination and these triggers should be provided to the RAs for consistent applications across the regions.

Comment 33b

- Significant and Substantial Harm factors need to be consistent across regulations. The factor under §118.5(d)(4) adds natural disasters to the existing definition found in 40 CFR Chapter I Subchapter D Part 112. Natural disasters are difficult to use as a determining factor because of their uncertainties in predicting impacts. EPA needs to provide clearer descriptions of these hazards, especially how their potential could result in a worst-case discharge, as well as how the hazard is relevant to a toxicological endpoint, as these factors could be applied inconsistently by the RA.

§ 118.6 Appeals process.

(a) Owner or operator request to reconsider requirement to prepare a facility response plan. In the event the owner or operator of a facility does not agree with the Regional Administrator's determination that the facility could, because of its location, reasonably be expected to cause substantial harm or significant and substantial harm to the environment by discharging CWA hazardous substances into or on the navigable waters, or that amendments to the facility response plan are necessary prior to approval, such as changes to the worst case discharge planning quantity, the owner or operator may submit a request for reconsideration to the Regional Administrator and provide additional information and data in writing to support the request. The request and accompanying information must be submitted to the Regional Administrator within 60 days of receipt of notice of the Regional Administrator's original decision. The Regional Administrator shall consider the request and render a decision as soon as practicable.

Comment 34a

- The requirement to prepare an FRP needs to be stayed until the Agency decision is final. The 6 month timing under §118.5(a) should not begin until EPA makes the final decision. Further, The Association does not feel 6 months is adequate timing and recommends a 12-month time for FRP preparation and submittal both under §118.5(a) and also applicable under §118.6(a).

(b) Owner or operator request to reconsider facility classification status. In the event the owner or operator of a facility believes a change in the facility's classification status is warranted because of an unplanned event or change in the facility's characteristics (i.e., substantial harm or significant and substantial harm), the owner or operator may submit a request for reconsideration to the Regional Administrator and provide additional information and data in writing to support the request. The Regional Administrator shall consider the request and render a decision as soon as practicable.

(c) Appeal process following Regional Administrator decision. After a request for reconsideration under paragraph (a) or (b) of this section has been denied by the Regional Administrator, an owner or operator may appeal a determination made by the Regional Administrator. The appeal shall be made to the EPA Administrator and shall be made in writing within 60 days of receipt of the decision from the Regional Administrator that the request for reconsideration was denied. A complete copy of the appeal must be sent to the Regional Administrator at the time the appeal is made. The appeal shall contain a clear and concise statement of the issues and points of fact in the case. It also may contain additional information from the owner or operator, or from any other person. The EPA Administrator may request additional information from the owner or operator, or from any other person. The EPA Administrator shall render a decision as soon as practicable and shall notify the owner or operator of the decision, at which time the owner or operator must submit a Facility Response Plan within 60 days.

Comment 35a

- The requirement to prepare a Chemical FRP needs to be stayed until the Agency's decision is final. The Association does not feel 60 days is adequate timing and recommends a 12-month time for FRP preparation and submittal.

§ 118.7 Petitions.

(a) Any person, including a member of the public or any representative from a Federal, state, or local agency who believes that a facility subject to this section could, because of its location, reasonably be expected to cause substantial harm to the environment by a discharge, or substantial threat of a discharge, of CWA hazardous substance into or on the navigable waters may petition the Regional Administrator to determine whether the facility meets the criteria in section § 118.3. Such a petition shall include a discussion of how the factors in § 118.3 apply to the facility in question. The Regional Administrator shall consider such petitions and respond as soon as practicable.

Comment 36a

- The Association supports this provision which will limit members of the public in determining if a facility can reasonably be expected to cause substantial harm based on the factors in §118.3. Additionally, such determinations, if agreed by the regional administrator should require full disclosure of reviewed materials and clear reasoning behind the decision.

Comment 36b

- In addition to the plan development timeframes already in the proposed rule, the Association recommends that the subject facility should have 90 days to review and respond to such a ruling prior to being committed to moving forward with planned development.

§ 118.8 Exceptions and exemptions.

(a) Exceptions. This part does not apply to the owner or operator of any facility, equipment, or operation that is not subject to the jurisdiction of the EPA under section 33 U.S.C. 1321(j)(5)(C), as follows:

(1) Any onshore facility, that due to its location, could not reasonably be expected to have a discharge, or substantial threat of a discharge, as described in § 118.3. This determination must be based solely upon consideration of the geographical and location aspects of the facility (such as proximity to navigable waters, land contour, drainage, etc.) and must exclude consideration of manmade features such as dikes, equipment, or other structures, which may serve to restrain, hinder, contain, or otherwise prevent a discharge.

(2) Any equipment, or operation of a vessel or transportation-related onshore facility which is subject to the authority and control of the U.S. Department of Transportation, and which provides movement or conveyances of CWA hazardous substances in interstate or intrastate commerce by rail, pipeline, highway vehicle, or vessel. For modes other than pipeline, this exception is limited to movement under active shipping papers prior to arrival at a final destination pursuant to 49 CFR 171– 180.

(3) Any equipment, or operation of a vessel or onshore or offshore facility which is subject to the authority and control of the U.S. Coast Guard or the U.S. Department of the Interior, as defined in the Memorandum of Understanding between the Secretary of Transportation, the Secretary of the Interior, and the Administrator of EPA (40 CFR part 112, Appendix B).

(4) Any underground storage tank and connected underground piping, underground ancillary equipment, and containment systems, at any facility, that is subject to all of the technical requirements of part 280 of this chapter or a state program approved under part 281 of this chapter.

Comment 37a

- There are numerous overlapping regulations that focus on the management of CWA HS including response requirements. These overlapping regulations currently provide appropriate controls and responses which do not need to be duplicated causing over-regulation. If EPA decides to regulate CWA HS, then we strongly encourage EPA to exempt the substances that are subject to response planning and managed under the OPA90 OSHA's PSM, and EPA's RMP rules. EPA should exempt (or accept) all 40 CFR 116.4 substances that are already regulated as oils under 40 CFR 112. Without this exemption, many materials such as produced water, condensates, gasoline, distillates, etc. would also be regulated as a CWA HS, resulting in regulatory uncertainty, inappropriate duplication of enforcement actions and penalties, and increased regulatory cost and burden without commensurate benefit in increased protection of the environment.

Comment 37b

- For facilities that include marine transportation and DOT pipeline activities, EPA needs to clearly identify the change in jurisdictional boundaries. This "jurisdictional" change would need to be made in coordination with US DOT PHMSA and USCG to ensure consistency and avoid regulatory overlap. The Association recommends using the current definitions as noted in the SPCC Guidance for Regional Inspectors

Memorandum of Understanding (MOU) documents, and that they be explicitly noted in the rule.

Comment 37c

- The list of exceptions needs to be expanded to include substances managed under other regulations such as Facility Response Plans (40 CFR 112), PSM, RMP, hazardous waste, and the NPDES programs. EPA has set a precedent in this Proposed Rule for exempting USTs regulated under 40 CFR 280. See 87 FR 17911 which states “EPA is proposing in §118.8(a)(4) to accept USTs as defined in 40 CFR part 280 from the regulatory requirements in this action. This proposed exception aims to reduce the burden of overlapping regulatory requirements.” This is the same justification that can be applied to excluding the other overlapping regulations.

Comment 37d

- The limitations outlined in §118.8(a)(1) on the ability to claim an exemption are unjustified and seem to conflict with other Federal Laws. §118.8(a)(1) states “This determination [of non-applicability] must be based solely upon consideration of the geographical and location aspects of the facility (such as proximity to navigable waters, land contour, drainage, etc.) and must exclude consideration of manmade features such as dikes, equipment, or other structures, which may serve to restrain, hinder, contain, or otherwise prevent a discharge.” This inability to account for existing mitigation measures, that in many cases are required by federal and/or state law, is inappropriate. EPA allows the use of man-made structures in 40 CFR 112 Appendix C where it states, “Factors to be considered in assessing oil transport over land to storm drains shall include the topography of the surrounding area, drainage patterns, man-made barriers (excluding secondary containment structures), and soil distribution and porosity.” EPA’s regulatory analysis must take into account those mitigation measures already in place, particularly those mandated under Federal law, i.e., SPCC. Doing otherwise creates a false basis on which to mandate compliance with additional, duplicative requirements.

(b) Exemptions. For the purposes of determining whether the maximum capacity onsite meets or exceeds the threshold quantity of a CWA hazardous substance or substances, under § 118.3(a), at the facility, the following exemptions apply:

(1) Articles. CWA hazardous substances contained in articles need not be considered when determining whether the maximum capacity onsite meets or exceeds the threshold quantity.

(2) Uses. CWA hazardous substances, when in use for the following purposes, need not be included in determining whether the maximum capacity onsite meets or exceeds the threshold quantity:

(i) Structural components. Use as a structural component of the facility;

(ii) Janitorial. Use of products for routine janitorial maintenance;

(iii) Foods, drugs, cosmetics. Use by employees of foods, drugs, cosmetics, or other personal items containing the CWA hazardous substance;

(iv) Process water or cooling water. Use of CWA hazardous substances present in process water or non-contact cooling water as drawn from the environment or municipal sources;

(v) Compressed air. Use of CWA hazardous substances present in air used either as compressed air or as part of combustion; and

(vi) Retail and personal uses. Use for personal, family, or household purposes, or present in the same form and concentration as a product packaged for distribution and use by the general public. Present in the same form and concentration as a product packaged for distribution and use by the general public means a CWA hazardous substance packaged in a similar manner and present in the same concentration as the substance when packaged for use by the general public, whether or not it is intended for distribution to the general public or used for the same purpose as when it is packaged for use by the general public.

Comment 38a

- Solid and gaseous substances and mixtures should be exempted, as they pose very little risk in reaching navigable water. The rule should be limited to CWA hazardous substances that are present in the liquid phase at temperatures ranging between 0° and 35°C and at or near atmospheric pressure.

Comment 38b

- Since process water is not defined in the proposed rule, it is unclear what is included in process water as listed under §118.8(b)(2)(iv). Does process water mean potable and non-potable water used in manufacturing and utility operations or does it mean process wastewater (contact or non-contact) generated from industrial operations (e.g., desalter brine, sour waters, condensates, etc.) and discharged under NPDES Permits? The Association requests more clarity on the definition of process waters and the use of CWA hazardous substances that are present in these streams.

Comment 38c

- CWA hazardous substances are present in municipal and industrial wastewaters. These streams are permitted under an NPDES program and thus, should be exempt from the regulations as they are already regulated under 40 CFR 122. Regulatory overlap for these substances would lead to confusion as to which applicable regulations apply, compliance uncertainty, and the possibility of double fines and penalties. The Association recommends that EPA explicitly exempt sanitary (municipal) and industrial wastewater discharged under an NPDES permit or a POTW user agreement.

Comment 38d

- Should EPA leverage the existing EPCRA regulations, the exemptions under 40 CFR 370.13 would be applicable. Many of these exemptions are similar to those listed in the proposed §118.8. The Association supports these exemptions.

§ 118.9 Mixtures.

For the purposes of determining the CWA hazardous substance maximum capacity onsite at the facility of CWA hazardous substance(s), under § 118.3(a), the following provisions apply to CWA hazardous substances mixtures:

(a) If the quantity of all of the CWA hazardous substance constituent(s) of the mixture or solution is known, the mixture meets the threshold quantity when the maximum capacity onsite, as defined in § 118.2, meets or exceeds the threshold quantity of any CWA hazardous substance in the mixture by extrapolating the amount of each constituent to the full capacity of the container.

Comment 39a

- Some proprietary mixtures of substances may not list “all of the CWA hazardous substance constituent(s)”, especially when the requirement does not have a de minimis level. The Association recommends that EPA follow the framework developed for EPCRA at 40 CFR 370.14(c), which exempts hazardous components in a mixture with quantities in concentrations under 0.1 percent for carcinogens and 1 percent for all other hazardous components of the total weight of the mixture. Following the framework for EPCRA calculating and reporting mixtures will allow consistency in developing threshold capacities, and consistency to the local emergency response authorities familiar with Tier II reports.

Comment 39b

- Chemical compositions are provided in Safety Data Sheets (SDSs) developed by manufacturers based on “chemical analyses or by knowledge of material”. In 2012, **OSHA's Hazard Communication Standard (HCS)** adopted the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). The GHS includes criteria for the classification of health, physical and environmental hazards, as well as specifying what information should be included on hazardous chemicals labels and SDSs. The Hazard Communication Standard (HCS) (29 CFR 1910.1200(g)) requires that the chemical manufacturer provide SDSs for each hazardous chemical to communicate information on these hazards. Section 3 of the SDS identifies the ingredient(s) contained in the product indicated, including impurities and stabilizing additives. This section includes information on substances, mixtures, and all chemicals where a trade secret is claimed. EPA should recognize that the required information for mixtures includes: the chemical name and concentration (*i.e.*, exact percentage) of all ingredients which are classified as health hazards and are present above their cut-off/concentration limits; or present a health risk below the cut-off/concentration limits. The concentration (exact percentages) of each ingredient must be specified except concentration ranges may be used in the following situations: (1) a trade secret claim is made; (2) there is batch-to-batch variation; or (3) the SDS is used for a group of substantially similar mixtures. EPA should recognize SDSs as the basis for mixture determinations. Substances not reported because they are present below their reporting values should be exempted from the CWA HS proposed rulemaking. In those cases where their composition range is reported, the facility should use the same composition as used in the EPCRA reports. Again, following the framework for both OSHA's Hazard Communication Standard and EPCRA in calculating and reporting mixtures will ensure consistency in developing threshold capacities.

Comment 39c

- The calculation for the threshold capacity is different than the calculation of the worst-case discharge quantity. EPA's requirement for calculating the maximum capacity for mixtures is not consistent with terminology in the rule which states “to the full capacity of the container”. If EPA elects to use the EPCRA calculating and reporting framework, EPA will need to correct this statement.

(b) If the quantity of one or more of the CWA hazardous substance constituent(s) of the mixture or solution is unknown, the mixture meets the threshold when the maximum capacity onsite of the mixture or solution meets or exceeds the quantity for the CWA hazardous substance established in section § 118.3(a) with the lowest threshold quantity by extrapolating the amount of the known constituent(s) to the full capacity of the container.

Comment 40a

- The SDS should provide the list of hazardous substances by composition and in those cases where the substances are not listed or are less than the one (1) percent “de minimis” concentration (or 0.1 % for carcinogens), the user should assume the substance is not present. Again, the Association recommends that EPA should follow the framework for EPCRA regarding calculating and reporting mixtures, allowing consistency in the developing threshold quantities using mixtures.

Comment 40b

- In cases where one or more CWA HS concentrations are not provided in the SDS or are present, but the concentrations are unknown, this requirement in the Proposed Rule is very confusing as written and will be subject to misinterpretations and applications. EPA needs to provide clarity on the terms “with the lowest threshold quantity” and “by extrapolating the amount of the known constituent(s) to the full capacity of the container”. The Association believes that the term “with the lowest threshold quantity”, EPA is providing guidance that if two HSs are unknown, the facility should use the HS with the lowest RQ, even though the maximum volumes will be the same. Does this apply in determining threshold applicability or for determining the worst-case discharge quantity? The term “by extrapolating the amount of the known constituent(s) to the full capacity of the container” implies that the full capacity of the container needs to be used. The Association disagrees with this approach, especially if other fractions of the container are identified (*i.e.*, 50 percent is a non-hazardous substance). EPA needs to consider these scenarios and re-write this provision.

Comment 40c

- EPA should clarify the following example of an actual SDS for a cleaning solution. The SDS indicates that the cleaning solution chemical is: 40-50% water; 1-10% chromic acid; 1-10% sodium sulfate; and 30-40% sulfuric acid. Based on the current Proposed Rule language, since the exact quantity of one or more CWA hazardous substances is unknown and given as a range, how is EPA proposing the regulated community interpret this SDS? One interpretation of the proposed language is that the entire capacity of a tank containing this cleaning solution would have to be assumed to be chromic acid. Another interpretation is that the quantity of chromic acid is known not to be more than 10% and the quantity of sulfuric acid is known not to be more than 40%. Listing of chemical concentrations as ranges is common in SDSs. EPA should recognize these situations and allow the facility to use a value that it can support by knowledge of the product. In many cases, the value will be the upper range in concentration.

Comment 40d

- EPA should provide guidance on how to determine the quantity of an unknown constituent in a mixture when most of the mixture is known with certainty. As an example, we know the capacity of the entire mixture is 1000 pounds, and 2 percent of

the 1,000 pounds of the mixture is unknown and includes a hazardous substance. The Association believes the HS capacity to be 20 pounds, not 1000 pounds. If EPA agrees with this analysis, the Association suggests that EPA provides the following guidance:

- 1) Determine the maximum capacities (or quantities based on the Association comments) of the known constituents of the mixture. This is done by calculating the capacity for the total mixture, in pounds, then in turn multiplying this capacity by the known mass fractions of those constituents.
- 2) Determine the capacities of the unknown constituents of the mixture. This is done by first summing the mass fractions of the known constituents, then subtracting this sum from 1. Then multiply this mass fraction by the capacity of the mixture. Each unknown hazardous constituent is at most this amount.
- 3) Find the RQs for all constituents, known and unknown. Multiply each by 10,000. Compare, chemical by chemical, the RQs with the calculated capacities.

This calculation can be done facility-wide, to determine threshold quantity, or for a container, to determine worst-case discharge quantity.

§ 118.10 Worst case discharge.

Facilities are required to model a worst case discharge scenario; calculate endpoint distances to fish, wildlife, and sensitive environments and public receptors; and compare endpoint concentration(s) against calculated concentration(s). The worst case discharge scenario represents the single CWA hazardous substance maximum capacity onsite that meets or exceeds the threshold quantity set in § 118.3(a) that equals the largest quantity following the below parameters:

(a) Determination of worst case discharge quantity. The worst case discharge quantity shall be the greater of the following:

(1) For CWA hazardous substances in separate containers, the maximum capacity of a single container;

Comment 41a

- This requirement needs clarity regarding the definition of containers and a description of the “maximum capacity” of that container. See COMMENTS 3a and 3b.

Comment 41b

- 87 FR 17911 states “Therefore, the facility owner or operator need only to define one worst-case discharge quantity regardless of how many CWA hazardous substances are present onsite. However, an FRP will need to identify and plan for all CWA hazardous substances with a maximum capacity on site that meets or exceed the threshold quantity.” This requirement is unclear especially if it is the substance with the largest amount based on the lowest RQ and container size or if it is the substance in the largest container regardless of RQ. The Association believes this requirement appears to be and should be, the CWA HS in the largest container since worst-case discharge scenarios are usually based upon the largest container at a facility for quantity planning purposes. EPA needs to add clarity for facilities that trigger threshold maximum capacities for multiple CWA HS and especially if these multiple substances have different RQ values. Additionally, what does EPA mean regarding “plan for all” CWA HS with a maximum capacity on site that meets or exceed the threshold quantity, as stated in the preamble? The Association believes that the intent of the proposed rule is to identify the highest WCD quantity of all the threshold values that trigger the maximum

capacities and not to “plan” for every substance. The Association agrees with EPA’s proposal to assess only one worst-case scenario and not have multiple worst-case scenarios based on hazard classification.

Comment 41c

- The proposed rule is unclear on how to address multiple CWA HS. Some language in the report is not clear if it means the largest container of the lowest RQ substance or just the largest container on site. EPA needs to provide clear language on how to determine the worst-case discharge.

Comment 41d

- The Association understands based on text in 87 FR 17912 that the “largest container” to be used to calculate the Worst-Case Discharge is based on the largest capacity of a CWA HS in a container. The Association requests EPA to provide clarification via a scenario in which there are two containers:
 - o Container 1 is a 1,000,000-gal. container with 10% Benzene and no other CWA HS
 - o Container 2 is a 500,000-gal. container that is 100% Benzene

The Association requests clarification as to which container represents the Worst-Case Discharge. The Association is inclined to believe the Worst-Case Discharge is the 500,000-gal. container.

(2) For CWA hazardous substances in interconnected containers, the maximum capacity of a group of interconnected containers; or

Comment 42a

- The definition of “interconnected containers” needs to be clearly defined as discussed in COMMENT 8a. Interconnected containers should be limited to permanently manifolded storage tanks that are designed, installed, and/or operated in such a manner that the multiple tanks function as one storage unit (*i.e.*, multiple tank volumes are equalized) during normal, routine, continuous, steady-state operations. Infrequently used interconnections, and emergency interconnections, should not be the basis for establishing “interconnected containers”. Process vessels that are interconnected by piping should not be considered interconnected as they serve as separate vessels and do not meet the definition of “equalized”. EPA should add clarity to the Proposed Rule in either the definition section or this part of the Proposed Rule stating that interconnected containers should only apply to bulk storage tanks that are equalized.

(3) For substances in pipes, the maximum capacity of a pipe or interconnected pipes, and the owner or operator must provide evidence in the facility response plan that containers with common piping or piping systems are not operated as one unit.

Comment 43a

- It is difficult to understand EPA’s intent for calculating the WCD capacity for pipes or piping systems. Is the intent similar to the DOT regulations on pipelines where one calculates the potential amount from a release in piping? This appears to be a burden and hardship for the plan owner to identify the amount of piping (length, diameters) within the system and calculating the volume. This scenario is not included in the Oil FRPs outside of asking for total throughput. Further, constituents may appear, or

disappear, at various points through a process line, and compositions in piping are likely not known – or highly variable – in many instances (to get from pipe volume to mass requires the mixture density and the hazardous substance mass fraction.... both are very likely unknown in the mid-process stream). The Association recommends that EPA remove this requirement from the rule and base the worst-case discharge on the largest container.

Comment 43b

- If EPA elects to include this “maximum capacity” calculation for pipes or interconnected pipes, EPA needs to provide clearer guidance on calculating quantities, especially the “interconnected pipes” as these calculations and descriptions could be applied inconsistently across the regulated community (e.g., are there exemptions for pipes under x diameter or x length?).

Comment 43c

- The rule requires that the owner/operator “must provide evidence in the facility response plan that containers with common piping or piping systems are not operated as one unit.” EPA needs to clearly describe what its expectations are on what is sufficient “evidence” and what it means by “not operated as one unit”, especially when the owner/operator has multiple vessels/containers all interconnected with piping. For example, two tanks, interconnected with valves open, with one filling from empty, are NOT “operating as one unit” until a steady state is achieved. But eventually, both would leak if one were ruptured. Again, the Association recommends that EPA remove this requirement from the rule and base the worst-case discharge on the largest container.

(4) For mixtures of CWA hazardous substances, assume the entire capacity of the container, interconnected containers, or pipes or interconnected pipes hold(s) the CWA hazardous substance with the lowest RQ.

Comment 44a

- With this approach, a facility may have multiple hazardous substances with the same maximum capacities and the same “lowest RQ” group. EPA needs to provide clearer guidance on which hazardous substance should be the basis for the Chemical FRP, especially when the multiple substances have the same RQ, in order that this determination could be applied inconsistently across the regulated community. This approach assumes the entirety of the mixture is comprised of the substance in the lowest RQ group (or most toxic), especially in cases where it comprises a small fraction of the overall mixture and is extremely conservative to the point that any assumptions or estimates of potential risk may lead to misinterpretations. Additional clarity by EPA using examples will help in this guidance.

Comment 44b

- The Association is soliciting additional clarity for the following scenario. If a facility has a 1,000,000-gallon capacity container, of which it is known that 50% is not a CWA HS and the remaining volume has an unknown fraction of a CWA HS, then the worst-case planning volume should be based on the 500,000 gallons. In this case, the specific ratios might be unknown, but if there is some definition around the non-hazardous CWA portion, can that amount be used to reduce the hazardous portion? We believe the way this provision is written that the answer is yes. We suggest EPA provide additional clarity

by giving some examples or by stating in §118.9 that only the unknown quantity of a mixture needs to be accounted as a CWA hazardous substance.

(b) Planning distance determinations. To determine the distance to endpoints for fish, wildlife, and sensitive environments, public water systems, and public receptors as referenced in § 118.3(c), a facility shall use a methodology, model, or other technique that accounts for facility-specific conditions and accounts for the stated requirements in this paragraph. A facility may use proprietary models, provided that the owner or operator allows EPA access to the model, submits documentation that demonstrates the reliability and analytical soundness of the methodology used, and describes the model's features to local emergency planners, upon request.

(1) Endpoints for fish, wildlife, and sensitive environments are provided in Appendix B of this part.

(2) Endpoints for public receptors are provided in Appendix B of this part.

Comment 45a

- In lieu of developing planning distance for the WCD quantity, The Association recommends that EPA consider the approach used in the Oil FRPs. The Oil FRPs use formulas to calculate planning distance as discussed in Attachment C-III, Appendix C to Part 112. These formulas are used to determine distances that could injure fish and wildlife and sensitive environments (FWSE) and public drinking water intakes. Attachment C-III provides transport mechanisms over land, on still water, tidally influenced waters, and flowing (moving) navigable waters. These formulas are recognized by plan holders and are used in the Oil FRPs unless a comparable formula is developed and provided by the Plan Holder. The Association believes these formulas are suited for developing planning distances for Chemical FRPs instead of using the highly variable option of endpoints and water modeling. The Association also encourages EPA to develop inputs for a timeframe that is consistent with the Oil FRPs, e.g., 27-hour to non-high-volume port and 15-hours high volume port. The Association recommends that EPA follow the same approach as provided in the Oil FRPs regulation allowing consistency in planning and also giving the option to use “a comparable formula” if another formula is more appropriate.

Comment 45b

- 87 FR 17905 states “EPA is proposing in §118.10(b) that owners or operator shall use any methodology(ies) or formula(s) that accurately reflect the conditions at the facility location and that consider parameters provided by EPA for overland transport and transport over water.” It is challenging to develop a planning distance that accurately reflects conditions under normal streamflow; to plan for adverse conditions would be extraordinarily difficult. Rather than take the approach of the proposed rule that specifies modeling and identifying endpoints for each hazardous substance (a costly exercise that could potentially prove to be incorrect for the given scenario and/or rarely, if ever used), a more practical approach is recommended. One practical approach would be for the agency or USCG to develop tools for response planning that could be executed at the time of the spill based on that spill's circumstances using the information that is publicly available. These tools could address solubility in water, vapor pressure, specific gravity, odor threshold, and toxicity data supplied by the Chemical Data Guidebook for Bulk Shipment by Water (Blue Book). Further, factors like humidity, wind speed, ambient

water/air temperature, and current are all fairly easily obtainable from meteorological sources and/or from vessel/facility accounts.

Comment 45c

- EPA conducted a search for tools or equations that could be used to calculate a planning distance. The Agency prioritized tools, models, and equations with the following specifications: Developed by EPA; Publicly available; Off-the-shelf; Reduced form; and can estimate or model the transport of some, most, or all CWA hazardous substances over land and water. A comparison of available models is provided on page 23 of the Technical Background Document (TBD). EPA's conclusion is that "no one model was found to include all the components necessary for modeling relevant to calculating a planning distance for each of the 296 CWA regulated hazardous substances." In light of this finding, the Association recommends that the agency withdraw the detailed model requirements including calculating endpoints and determining planning distances. If EPA wishes to proceed with the use of a model such as the RMP*Comp as discussed in the preamble (87 FR 17905), EPA should develop an advisory peer group to develop the predictive tools that the agency and the NRC can use in evaluating releases to navigable waters. Or, as an alternative, use what is already done in the Oil FRP rule. Putting the burden on the regulated community to develop a model is an impossible task at this stage of rulemaking.

Comment 45d

- EPA is requiring methodology, models, or other techniques to determine a planning distance to endpoints for FWSE and public receptors as referenced in §118.3(c). Per the Technical Background Document to Support Rulemaking Pursuant to CERCLA Section 102: Volume 1, published in 1985, EPA identified RQ classifications on the basis of aquatic toxicity, mammalian toxicity, and other parameters such as chronic toxicity, and selected a single RQ based on most conservative effect. EPA further stated in 50 FR 13466 the following: "As has been stated, the RQs are not intended to represent judgments by the Agency as to the specific degree of hazard associated with certain releases. The actual hazard will vary with the circumstances of the particular release and may other factors other than the size of the release will influence the government's response. The single RQ approach was adopted to provide a relatively simple reporting system that does not unduly burden either EPA or the regulated community. Since releases into more than one medium often occur, the single RQ approach will prevent confusion. Section 102(a) of CERCLA expressly authorizes the Administrator to set a single quantity for each hazardous substance, and the legislative history emphasizes the virtues of simplicity and administrative conveniences (see Sen. Rep. 848, 96th Cong., 2d Sess. 29 (1980). Moreover, the Agency simply does not have the resources to obtain the vast quantity of technical data required to develop RQs that, on the one hand, are tailored to fit every release situation, and that, on the other hand, are consistent, equitable, and adequately protective of public health and welfare and the environment." The Association has several observations on this basis.
 - EPA's original intent of the RQs was "not intended to represent judgments by the Agency as to the specific degree of hazard associated with certain releases; however, EPA is now requesting that facilities utilize endpoints built on the basis of RQs to represent judgments as to the specific degree of hazard.
 - EPA's single RQ approach was adopted to provide a relatively simple reporting system; however, modeling on the basis of these RQs by a self-identified

methodology will unduly burden EPA with the need to validate methodologies, methods, or models as well as the regulated community in defining such representations of an endpoint calculation.

- EPA is requesting precise modeling for all endpoints when the RQs are based on the most conservative aquatic toxicity, mammalian toxicity, or other factors.
- EPA has previously noted that legislative history emphasizes the virtues of simplicity and administrative conveniences; however, the existing rule is not leveraging the simplicity of a discharge calculation used in the Oil FRP rule.
- The Association did not find the 1985 Technical Background Document or any other updated document in the docket. The technical basis for the mammalian toxicity data should be clearly presented to allow review and comment of the derivation of endpoints and applicability of this information to the current rule.
- EPA needs to provide the technical basis and justification behind taking 10 percent of the LD50 and LC50 benchmarks. This information was not provided in the Proposed Rule.

(3) In determining the distance to endpoints, owners or operators shall consider the following parameters:

(i) Factors affecting overland transport including:

(A) Nearest opportunity for discharge to navigable waters;

(B) Ground conditions which may include topography of the surrounding area, drainage patterns, land use coverage, impervious cover, soil distribution or porosity, and soil absorption rate or soil saturation during adverse weather conditions; and

(C) Properties of the CWA hazardous substance, which may include evaporation rate based on wind speed; atmospheric stability, ambient temperature, pressure, and humidity; reactivity with rainwater and/or other substances; ignitability and explosive potential; flooding; and pooling.

(ii) Factors affecting in-water transport including:

(A) Point of entry to navigable water;

(B) Flow rate and duration of the discharge;

(C) Direction of the discharge at the point of entry;

(D) Surface versus underwater entry; and

(E) Conditions of the receiving water including the velocity of the navigable water which may be affected by: Slope of the river; hydraulic radius; turbulence and potential for cross-channel mixing; Manning's Roughness coefficient; differentiation of still, tidal or moving waters; currents; wave height; tidal influence; and water temperature and salinity.

(iii) Adverse weather conditions, which shall be calculated based on adverse winds, currents, and/or river stages, over a range of seasons, weather conditions, and river stages.

(iv) Properties of the CWA hazardous substance such as solubility in water, speciation in water, density (relative to water), polarity, vapor pressure, reactivity with water and common solutes in natural waterbodies, human toxicity, mammalian toxicity, aquatic toxicity, and flammability.

Comment 46a

- It appears that EPA is requesting that the planning distance calculations for the worst-case discharge be evaluated for numerous adverse weather conditions as required in §118.10(b)(3)(iii). The ability to calculate and develop realistic scenarios for all of these conditions is impracticable, and in some cases, adverse weather conditions serve to reduce impact, not increase it. This requirement creates a manpower and cost burden to the facility with very little benefit. It is imperative, as noted in earlier comments, that EPA defines which specific conditions to model, including concise assumptions and limiting constraints in order to establish clear guidance for industry and to prevent regional administrators from developing varying interpretations nationally.

Comment 46b

- Additionally, the Association is not aware of predictive models that are readily available for these types of conditions. The Association strongly recommends that the analysis of the adverse conditions be limited to a vulnerability paper study to review different scenarios in order that the facility can better understand their impact on providing the necessary response. This approach is used in the Oil FRPs, and it should not be used in determining the planning distances.

§ 118.11 Facility response plan requirements.

(a) General requirements. A written plan that complies with other Federal contingency plan regulations or is consistent with the approach in the National Response Team's Integrated Contingency Plan Guidance ("One Plan") and that includes the elements provided in this section shall satisfy the requirements. The owner or operator may augment an existing plan with these required elements. All facility response plans must include the following:

(1) Consistency With National Contingency Plan and Area Contingency Plans. Plans must be consistent with the requirements of the National Oil and Hazardous Substance Pollution Contingency Plan (40 CFR part 300) and applicable Area Contingency Plans prepared pursuant to section 311(j)(4) of the Clean Water Act.

(i) The owner or operator shall review relevant portions of the National Oil and Hazardous Substances Pollution Contingency Plan and applicable Area Contingency Plan annually and, if necessary, revise the facility response plan to ensure consistency with these plans.

Comment 47a

- The Association supports the use of the "one plan" concept but feels that the "complex facility" approach is more practicable where the Chemical FRP can be cross-referenced to parts of the Oil FRP as necessary. The Association suggests using the approach provided in the SPCC under 40 CFR 112.7: "If you do not follow the sequence specified in this section for the Plan, you must prepare an equivalent Plan acceptable to the Regional Administrator that meets all of the applicable requirements listed in this part, and you must supplement it with a section cross-referencing the location of requirements listed in this part and the equivalent requirements in the other prevention plan."

(2) Qualified individual. Identify the qualified individual having full authority to implement response actions and require immediate communications between that individual and the appropriate Federal official and the persons providing personnel and equipment, with a description of duties including:

- (i) Activate internal alarms and hazard communication systems to notify all facility personnel;**
- (ii) Notify all response personnel, as needed;**
- (iii) Identify the character, exact source, amount, and extent of the discharge, as well as the other items needed for notification;**
- (iv) Notify and provide necessary information to the appropriate Federal, state, and local authorities with designated response roles, including the National Response Center, State Emergency Response Commission or Tribal Emergency Response Commission, and Local Emergency Planning Committee or Tribal Emergency Planning Committee;**
- (v) Notify and provide necessary information to public water systems that may be impacted by a discharge;**
- (vi) Assess the interaction of the discharged CWA hazardous substance with water, solutes in water, water treatment chemicals, and/or other substances stored at the facility and notify response personnel at the scene of that assessment;**
- (vii) Assess the possible hazards to human health and the environment due to the discharge. This assessment must consider both the direct and indirect effects of the discharge (i.e., the effects of any toxic, irritating, or asphyxiating gases that may be generated, or the effects of any hazardous surface water runoffs from water or chemical agents used to control fire and heat-induced explosion) and initiate appropriate monitoring;**
- (viii) Implement prompt response actions to contain and respond, to the maximum extent practicable, to the CWA hazardous substance discharged;**
- (ix) Coordinate rescue and response actions as previously arranged with all response personnel;**
- (x) Use authority to immediately access company funding to initiate cleanup activities;**
- (xi) Direct cleanup activities until properly relieved of this responsibility; and**
- (xii) Acquire and maintain incident commander training requirements consistent with 29 CFR 1910.120(q)(6)(v).**

Comment 48a

- To improve clarity, the Association suggests the rule language at §118.11(a)(2) be adjusted to identify when communication is required from a QI to the EPA. The Association suggests the language be changed to “Identify the qualified individual having full authority to implement response actions. Following a release of a CWA Hazardous Substance to navigable water in excess of the Reportable Quantity, require immediate communications between that individual and the appropriate Federal official and the persons providing personnel and equipment. Include into the FRP the following description of duties for a QI:”

Comment 48b

- The rule outlines additional requirements under (xii) for a Qualified Individual (QI) to be trained as an Incident Commander (IC) per HAZWOPER regulations. The Association does not support this requirement for additional training for the QI, which requires IC training per 29 CFR 1910.120(q)(6)(v). In many cases, the QI at the facility will not be the IC. The role of IC may follow later as the Incident Command System (ICS) response team is put together. We support using the same regulatory requirement for QIs in the Oil FRPs.

Comment 48c

- In the notification requirements under (v) “Notify and provide necessary information to public water systems that may be impacted by a discharge”, the QI has the responsibility to notify the PWS, but the notification should be limited to the information on the notification form. The Association suggests that “necessary information” be removed from the rule as it is open-ended.

(3) Response resources. Identify, and ensure by contract or other approved means, the availability of private personnel and equipment necessary to respond to the maximum extent practicable to a worst case discharge of CWA hazardous substances (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge;

Comment 49a (Repeat of COMMENT 5a)

- Currently most Oil Spill Removal Organizations (OSROs) are staffed and stocked with equipment specific to oil discharges (*i.e.*, skimming equipment). It will likely be necessary for these organizations to expand their capacities if they are going to respond to CWA HS Discharges. EPA should provide a phase-in timing for SROs to develop their capabilities, including identification of the available resources and personnel. EPA should allow existing OSROs to serve as SROs in the interim. We strongly encourage EPA/USCG to develop a list of SROs like the list of approved USCG OSROs. EPA should recognize existing OSROs as qualified to serve as SROs in the interim as well as provide a grace period, *i.e.*, 12 months, for companies and contractors to secure necessary resources.

Comment 49b (Repeat of COMMENT 5b)

- The Association strongly encourages EPA/USCG to develop a list of SROs similar to the list of approved USCG OSROs. EPA should also recognize existing OSROs as qualified response organizations so they can serve as SROs in the interim.

Comment 49c

- The concept of predicting cascading failures is extremely burdensome without knowing what would be acceptable. The Oil FRPs include scenarios, such as the probability of a chain reaction of failures (Section 1.5.1.2, Appendix F to 40 CFR 112), that shape response efforts required by the facility. These types of scenarios are much different and require a different approach, than a simple equipment failure. Similar to Oil FRPs, Chemical FRPs should address scenarios for fires and/or explosions. The Association believes that listing onsite fire equipment and noting local resources, *i.e.*, the fire department should suffice for this requirement. If EPA requires an analysis to address cascading failures, EPA needs to define the risk EPA is trying to mitigate.

Comment 49d

- This proposed rule places a lot of emphasis on having response contractors. In some scenarios, contractor support may not be applicable to the type of response needed. For example, a chemical spill may be entirely miscible with water, in which case the response to a spill into a water body would be different than a spill into a ditch. There may be no need to have a response contractor in the former case, as a miscible product spilled into a water body would be immediately irretrievable. The same would apply for a release of a gaseous product, where the only response would consist of notifying local

emergency agencies and conducting air monitoring. EPA needs to recognize these scenarios in the proposed rule.

Comment 49e

- How does a facility determine if the contractor has enough or the correct equipment to be able to respond to a spill? EPA needs to provide guidance on identifying the necessary response resources that are acceptable to the Agency.

(4) Training, testing and drills. Describe the training, equipment testing, periodic unannounced drills, and response actions of persons at the facility to be carried out under the plan to ensure facility safety and to mitigate or prevent the discharge, or the substantial threat of a discharge; and,

Comment 50a

- For responders in the field, HAZWOPER training is usually sufficient, also additional training is provided as appropriate. The facility should determine the level of training for its responders as necessary based on their roles and responsibilities. Response personnel, not “in-the-field” should not necessarily require HAZWOPER training, but their training needs should be calibrated to their roles and responsibilities. The Association believes that training needs to be flexible and determined based on on-site logistics and responders’ roles and responsibilities.

Comment 50b

- The Association supports EPA’s discussion concerning §118.13 (c) which states that a “program that follows the National Preparedness for Response Exercise Program (PREP) will be deemed as compliant with the drill and exercise requirements of this section”. For facilities regulated for both Oil FRPs and Chemical FRPs, EPA should provide credit for the completion of similar drills and exercises. The site should not be burdened to conduct an equivalent number of exercises/drills for each Oil and for Chemical FRP. This approach is already recognized in the current PREP requirements where one can run a USCG drill instead of an EPA drill as long as all PREP requirements have been satisfied.

(5) Plan updates. Review and update facility response plan periodically and resubmit to the Regional Administrator for approval of each significant change.

Comment 51a

- EPA needs to change the wording for “each significant change” to “change that may materially affect the response to or potential for a worst-case discharge” per §118.4(b)(1). This change will make plan re-submittals consistent and would be much clearer for facility operators.

Comment 51b

- The rule needs to set a time period for the owner/operator to “review and update facility response plan periodically.” EPA needs to provide clearer descriptions of the terms “periodically” and “each significant change”, as these terms could be applied inconsistently by the regulated community. For consistency, reviews every five years from the date of plan approval would be sensible and consistent across agencies. For instance, USCG FRPs are resubmitted every five years from the date of plan approval.

EPA should follow the USCG's framework developed under 33 CFR 154.1065 for reviews and submittals.

(b) Emergency response information. The facility response plan shall include:

(1) Facility information. Facility details including the facility name; latitude and longitude; street address, with city, state, and zip code; telephone number; and facility location information described in a manner that would aid a reviewer and a responder in locating the facility;

(2) Owner or operator information. Contact information to include name and preferred contact method;

(3) Hazard evaluation. Hazard evaluation for worst case discharge and risk-based decision support system shall include:

(i) Chemical-specific information, including the response considerations, health hazards, fire hazards, chemical reactivity, hazard classifications, and physical and chemical properties; potential effects of a CWA hazardous substance worst case discharge on the ability to adversely impact a public water system; ability to cause injury to fish, wildlife, and sensitive environments; and ability to cause injury to public receptors; impacts to communities with environmental justice concerns; and impacts of climate change, including but not limited to increased flooding or subsidence, sea level rise, wildfires, and increased vulnerability to and changes in the frequency of natural disasters. Illustrative diagrams of the hazard evaluation should be included in the hazard evaluation.

(ii) This section of the plan must outline processes that will help responders make decisions relating to the identification, evaluation, and control of risks to human health and the environment following a CWA hazardous substance discharge. The processes outlined below do not need to be scenario-specific but can be generic in nature. At a minimum, the processes must include all the following:

(A) Risk identification—describe the process that will be used to determine the extent and route of CWA hazardous substance exposure to humans and the environment including location of containers and their contents;

(B) Risk characterization—describe the process that will be used to establish relative degrees of risk and prioritizing risks;

(C) Risk control—describe the process that will be used to determine feasible response methods to mitigate CWA hazardous substance discharge impacts on human health and the environment; and

(D) Risk communication—describe the process that will be used to communicate information resulting from paragraphs (A), (B), and (C) of this section to parties internal and external to response activities.

Comment 52a

- In 87 FR 17916, the preamble states “The hazard evaluation should include CWA hazardous substance-specific information for all CWA hazardous substances with a maximum capacity onsite that meets or exceeds the threshold quantity, including cautionary response considerations, health hazards, fire and explosion hazards, chemical reactivity, hazard classifications, and physical and chemical properties.” The preamble implies that “all” substances need to be evaluated. The Association recommends that the scope should be limited to the WCD scenario using the one hazardous substance that meets this criterion and is the basis for the WCD scenario.

Comment 52b

- This “risk-based decision support process” as described in §118.11(b)(3)(ii) of the rule is very detailed and is completely different than the methodology used in the Oil FRP analysis under Section 1.4, Appendix F to 40 CFR 112. Use of the methodology outlined in EPA’s FRP rule with the ability to refer to the SDS, CHRIS manual, DOT Emergency Response Guide (ERG), or USCG blue book for hazard evaluations will promote consistency in the hazard evaluations. The Association recommends that §118.11(a)(3) be re-written to use the same language as Section 1.4, Appendix F to 40 CFR 112.

(4) Reportable discharge history. Discharges reported under 40 CFR part 117.21 that reached navigable water with additional data including date, time, and discharge duration; CWA hazardous substance(s) discharged; estimated quantity discharged in pounds; quantity discharged that reached navigable water in pounds; the type of discharge event and its source; weather conditions; on-site impacts; offsite impacts; initiating event; description of how the discharge was detected; clean-up actions taken, steps taken to reduce the possibility of recurrence; and contributing factors;

Comment 53a

- EPA needs to set a time period for documenting reportable discharge history information. Since records are to be retained for five years, the time period should be limited to this duration. This period should also be consistent with the requirements under §118.3(c)(4). The Association recommends that EPA revise the rule to add “within the last five years”.

Comment 53b

- Reportable discharges of hazardous substances contained in NPDES effluents should be excluded from this criterion, as these substances are regulated under 40 CFR 122.

Comment 53c

- Reportable discharges of oil containing hazardous substances should be excluded from this criterion, as these substances are regulated under 40 CFR 112.

(5) Response personnel and equipment. The identity and a description of response personnel and equipment and response action implementation necessary to respond to the maximum extent practicable to a worst case discharge of a CWA hazardous substance described in § 118.10, and to mitigate or prevent a substantial threat of a worst case discharge;

Comment 54a

- The rule requires the facility to identify response personnel. Additional response support activities may include modeling specialists, sampling/monitoring personnel, toxicologists, etc. We suggest that response support personnel such as air modelers, water modelers, water and air sampling and analyses, be identified as a source (e.g., central engineering, xyz Engineering firm, etc.) and not by a person since they will be situationally dependent.

Comment 54b

- The Association suggests the equipment list be limited to equipment on-site that is applicable to response actions for CWA hazardous substances. Additional equipment such as monitoring and sampling equipment should be specified as “can be made

available” but should not become part of the list that must be inspected, deployed, etc. for the drills/exercises.

Comment 54c

- Listing of response equipment is also addressed in §118.11(a)(10), which is more descriptive. The Association recommends removing “equipment” from this provision.

(6) Contracts. Evidence of contracts or other approved means as per the definition in § 118.2 to ensure the availability of proper response personnel and equipment;

Comment 55a (Repeat of COMMENT 5a)

- Currently most Oil Spill Removal Organizations (OSROs) are staffed and stocked with equipment specific to oil discharges (*i.e.*, skimming equipment). It will be necessary for these organizations to expand their capacities for responding to CWA HS Discharges. EPA should provide a phase-in timing for Spill Response Organizations (SRO) to develop their capabilities, including identification of the available resources and personnel. EPA should allow existing OSROs to serve as SROs in the interim, as well as provide a grace period, *i.e.*, 12 months, for companies and contractors to secure necessary resources.

Comment 55b (Repeat of COMMENT 5b)

- We strongly encourage EPA/USCG to develop a list of SROs similar to the list of USCG-approved OSROs. EPA should recognize existing OSROs as qualified to serve as SROs in the interim.

Comment 55c

- As with the USCG's OSRO certification program, OSROs that are USCG approved are exempt from listing out all resources in a plan. The annual PREP letter prepared by the OSRO should suffice for training/testing documentation as this practice is acceptable for EPA's Oil FRP rule. The Association recommends that EPA make the same provisions for SROs.

(7) Notifications. A list of the identities, contact information, and preferred communication method(s) of individuals or organizations to be notified in the event of a discharge so that immediate communications and liaising

Comment 56a

- The Association recommends that all notifications should follow the same approach as Oil FRPs in Section 1.3(A)(1) and (2), Appendix F of 40 CFR 112. The requirements for Oil FRPs were developed for both oil and hazardous substances and should be implemented as such for the Chemical FRPs. [see Section 1.3(A), Appendix F of 40 CFR 112 - The information provided in this section shall describe what will be needed in an actual emergency involving the discharge of oil or a combination of hazardous substances and oil discharge.]

Comment 56b

- The intent of adding “preferred communication” is not necessary as we believe all communication will be conducted using the telephone. We do not envision using radios, text messaging, or emails. EPA should remove this requirement from the rule.

(10) Response equipment information. A description of the facility's response equipment, the location of the equipment, last inspection or response equipment test date, inspection frequency, last deployment drill date, deployment frequency, response times, and equipment testing;

Comment 57a

- The Association suggests the equipment list be limited to equipment on-site that is applicable to response actions for CWA hazardous substances. Additional equipment such as monitoring and sampling equipment should be specified as “can be made available” but should not be part of the list that must be inspected, deployed, etc. for drills/exercises.

Comment 57b

- Response equipment available for hazardous substances that are “floaters” and other response equipment identified in Oil FRP, need only be listed in one location, allowing the facility the ability to cross-reference to the Oil FRP. This approach will avoid updating the same information in multiple places and avoid dual compliance issues. The Association recommends that EPA add a statement to this effect in the rule.

(11) Evacuation plans. Facility-wide plans for evacuation including a diagram and a reference to and coordination with community evacuation plans, as appropriate, and considering locations of CWA hazardous substances and their risks when discharged; anticipated flow direction; water conditions; emergency response personnel and equipment arrival routes; limitations on evacuation routes; transportation of injured personnel to nearest emergency medical facility; location of alarm/notification systems; check-in areas for evacuation validation; command center location; and location of shelter at the facility as an alternative to evacuation;

Comment 58a

- The preamble in 87 FR 17919 states “Additionally, almost all covered facilities will likely be required to comply with OSHA’s emergency action plan requirements at 29 CFR 1910.38, which include procedures for evacuation plans and exit route assignments for personnel onsite and overlap with some of the proposed requirements”. To avoid duplication, EPA should allow facilities the ability to cross-reference out of the FRP to OSHA’s emergency action plans that are in conformance with 29 CFR 1910.38, or other relevant documents.

Comment 58b

- The Association recommends that the requirements for evacuation plans follow the same approach as Oil FRPs in Section 1.3.5, Appendix F of 40 CFR 112. The requirements for Oil FRPs are also applicable for hazardous substances, allowing consistency across regulations.

Comment 58c

- In large facilities, there can be multiple evacuation paths through the facility. A diagram's usefulness may be limited in a response scenario since weather and other conditions will impact the exact path. The Association believes including a diagram with significant features makes sense, but explicit pathways do not make sense. EPA should allow flexibility in developing evacuation plans appropriate for the facility and in conformance with OSHA's emergency action plan requirements.

(12) Discharge detection systems. Procedures and equipment used to detect discharges, as well as detect and monitor any hazardous air releases resulting from discharges to navigable water, including personnel or automatic discharge detection for regular and afterhours operations by CWA hazardous substance, reliability checks, and inspection frequency;

Comment 59a

- The Association recommends that the requirements for discharge detection systems should follow the same approach as Oil FRPs in Section 1.6, Appendix F of 40 CFR 112. The requirements for Oil FRPs were developed for both oil and hazardous substances and should be implemented as such for the Chemical FRPs. [Section 1.6.1, Appendix F of 40 CFR 112 - In this section, facility owners or operators shall describe the procedures and personnel that will detect any discharge of oil or release of a hazardous substance.]

Comment 59b

- The Association suggests the list of discharge detection systems be limited to equipment on-site that is applicable to response actions for CWA hazardous substances and not related to facility operations.

Comment 59c

- Air release monitoring (e.g., H₂S detectors, VOC monitors, etc.) and wastewater pollutants monitoring within a facility are employed for personnel safety and environmental awareness. These monitoring systems are outside the scope of EPA authority under this regulation. EPA should confirm that "personnel or automatic discharge detection for regular and after-hours operations" is also limited to spill response activities.

(13) Response actions. Response actions to be carried out by facility personnel or contracted personnel under the facility response plan to ensure the safety of the facility and to mitigate or prevent discharges described in § 118.10 or the substantial threat of such discharges, including immediate response actions for personnel safety, personal protective equipment use, facility personnel responsibilities by job title, facility personnel actions, facility personnel information gathering assignments for response personnel, and facility responsibilities to mitigate a CWA hazardous substance incident. For air or water sampling or monitoring, include personnel responsibilities for recordkeeping, procedures for sharing real time data with response personnel and the public, personal protective equipment requirements, and safety procedures;

Comment 60a

- Response actions appear to be very descriptive, requiring supporting data and rationale. We suggest making these actions generic and applied based on the real case scenario. This generic approach is used in Oil FRPs.

Comment 60b

- Air and water sampling plans are part of the 21st Century Area Contingency Plans and can be found as annexes to these plans. There are plans to elevate these to the Regional Response Plan Level. USEPA's Region 6 RRT VI is already moving in this direction and should be referenced by these FRPs. The Association recommends that this should be managed by a reference to these plans if they are available.

(14) Disposal plans. Plans to dispose of contaminated cleanup substances, if appropriate to the material, including how and where the facility intends to recover, reuse, decontaminate, treat, and/or dispose of substances after a discharge has taken place and plans for temporary storage of recovered substances as well as the appropriate permits required to manage recovered substances according to local, state, and Federal requirements. The disposal plan must account for recovered product; contaminated soil and water; contaminated equipment and substances, including drums, tank parts, valves, and shovels; personal protective equipment; decontamination solutions; adsorbents; and spent chemicals;

Comment 61a

- The Association sees that the requirement for disposal plans of hazardous substances follows the same approach as provided in Oil FRPs Section 1.7.2, Appendix F of 40 CFR 112. The Association supports this approach.

Comment 61b

- In the preamble on page 87 FR 17919, EPA states “These plans must be prepared in accordance with Federal (*i.e.*, RCRA), state, and local regulations, where applicable. For example, a facility could follow the EPA publication, A Guidance Manual: Waste Analysis at Facilities that Generate, Treat, Store, and Dispose of Hazardous Wastes and Pre-Incident All-Hazards Waste Management Plan Guidelines: Four-Step Waste Management Planning Process.” In lieu of developing detailed discussions of appropriate permits and waste management practices, the FRP should simply state, “in accordance with Federal (*i.e.*, 40 CFR 260), state, and local regulations, where applicable”.

(15) Containment measures. Measures to provide adequate containment and drainage of discharged CWA hazardous substances including containment volumes, draining routes from storage and transfer areas, substances used to construct drainage troughs, number and types of valves and separators used in the drainage system, sump pump capacities, containment capacity of weirs and booms and their locations, and other cleanup substances;

Comment 62a

- The Association supports this provision if the intent is similar to the Oil FRP rule as noted under Section 1.7.3, Appendix F of 40 CFR112. EPA needs to define the term

“adequate containment” to prevent industry confusion and differences in interpretations by the regions.

(16) Training procedures. Training procedures as per § 118.13;

Comment 63a

- In the preamble on page 87 FR 17920, EPA states “In this rulemaking, EPA is proposing in §118.13(b) to reference OSHA’s 29 CFR 1910.120 training specific to hazardous substances, while also ensuring that training is conducted not only for facility personnel, but for private personnel, casual laborers, and volunteer responders.” The rule does not clearly define the training program for facility response personnel. The preamble implies that OSHA’s 29 CFR 1910.120 training specific to hazardous substances is required for facility personnel, but facility personnel are not specifically mentioned in §118.13(b). Instead, §118.13(b) specifies the requirements for volunteers or casual laborers and private response personnel. EPA needs to address this omission in the rule to eliminate confusion by the regulated community.

Comment 63b

- The Association believes that the requirements of 29 CFR 1910.120 are not applicable to all facility response personnel. Response support personnel not in contact with CWA hazardous substances such as modelers, office risk-based planners, etc. should not be required to have this level of training. The Association recommends that EPA add flexibility to the rule by adding “or as appropriate for the responders’ roles and responsibilities”. This would be consistent with the Oil FRP rule.

Comment 63c

- The training requirement for volunteer or casual laborers will prevent the use of these personnel in the response. The facility may say that these personnel should be trained in accordance with the requirements of 29 CFR 1910.120, but the facility should not be responsible for the recordkeeping of non-company personnel. This would be consistent with the Oil FRP rule.

Comment 63d

- The training requirement for private response personnel, *e.g.*, OSRO personnel, external spill management team personnel, and specialty on-call type responders, will prevent the use of these personnel in the response. The facility may say that these personnel should be trained in accordance with the requirements of 29 CFR 1910.120, but the facility should not be responsible for the recordkeeping of non-company personnel. This would be consistent with the Oil FRP rule.

(17) Exercise procedure. Exercise procedures as per § 118.13 and the schedule set under § 118.12(c); and

Comment 64a

- The rule refers to “the schedule set under §118.12(c)” which in turn refers to consulting with the appropriate state, and local emergency response officials to establish appropriate schedules and plans for drills and exercises. The Association believes that the schedule is set by the PREP manual and not by the state, and local emergency

response officials. The Association recommends EPA remove the reference to §118.12(c) from this part of the rule.

(18) Self-inspection. Written procedures and records of inspections for including an inspection checklist and method to record the inspection date and findings, to be retained for five years.

Comment 65a

- We do not understand the applicability of this requirement. If self-inspection is limited to response, not prevention (*i.e.*, container inspections), we see the scope limited to response equipment which is already covered in the above (10). Otherwise, tank and pipe integrity programs are already addressed in the Association and STI standards, OSHA's PSM standard, and the EPA's RMP rule.

§ 118.12 Coordination Activities.

The facility response plan shall be coordinated with the local emergency response plan developed by the Local Emergency Planning Committee or Tribal Emergency Planning Committee under section 303 of title III of the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 11001 et seq.). Upon request, the owner or operator shall provide a copy of the facility response plan to the Local Emergency Planning Committee, Tribal Emergency Planning Committee, State Emergency Response Commission, or Tribal Emergency Response Commission. The owner or operator of a facility shall coordinate response needs with local emergency planning and response organizations to determine how the facility is addressed in the community emergency response plan and to ensure that local response organizations are aware of the CWA hazardous substances at the facility, their quantities, the risks presented, and the resources and capabilities provided by the facility to respond to a worst case discharge of a CWA hazardous substance.

(a) Coordination shall occur at least annually, and more frequently if necessary, to address changes at the facility, in the facility response plan, and/or in the community emergency response plan.

(b) Coordination shall include providing to the appropriate state, local, or Tribal emergency planning and response organizations the facility response plan, updated emergency contact information, and other information necessary for developing and implementing the local emergency response plan.

(c) Coordination shall include consulting with appropriate state, local, or Tribal emergency response officials to establish appropriate schedules and plans for drills and exercises required under § 118.13. The owner or operator shall request an opportunity to meet with the Local Emergency Planning Committee or Tribal Emergency Planning Committee (or equivalent) and/or local fire department as appropriate to review and discuss those materials.

(d) The owner or operator shall document coordination with appropriate state, local, or Tribal authorities, including:

(i) The names of individuals involved and their contact information (phone number, email address, and organizational affiliations), dates of coordination activities, and nature of coordination activities and

(ii) Signed agreements on activities and resources, identified by the facility, in the facility response plan to be performed by the appropriate state, local, or Tribal emergency response organizations.

Comment 66a

- The logistics in §118.12(a) through (d) regarding the coordination of the Chemical FRP with the LEPC are overly stringent. The provision requires that the FRP shall be provided to the LEPC “upon request” in §118.12 but the rest of the rule (a) – (d) is very detailed in the required coordination activities using “shall” as the command. What happens if the LEPC does not request a copy of the Chemical FRP and does not want to follow parts (a) – (d), is the facility out of compliance with the rule? In many cases, the LEPC does not acknowledge our plans. EPA needs to remove these requirements or change the wording to allow flexibility in coordinating the plan with the LEPC.

Comment 66b

- We suggest that the coordination should follow the requirements in EPA's RMP rule.

Comment 66c

- Section §118.12(a) requires coordination with the LEPC at least annually. Facilities subject to the requirements at 40 CFR 68 are obligated to conduct annual coordination with LEPCs or local emergency response officials to clarify response needs, emergency plans, roles, and responsibilities. EPA needs to ensure the recordkeeping requirements for annual LEPC coordination meetings are streamlined between rules to prevent burdening the LEPCs and facilities with overlapping recordkeeping requirements.

Comment 66d

- §118.12(c) “refers to consulting with the appropriate state, and local emergency response officials “to establish appropriate schedules and plans for drills and exercises”. The Association believes that the schedule is set by the PREP manual, and not by state and local emergency response officials. The Association recommends that EPA removes the reference to §118.12(c) from this part of the rule. The Association does support conducting joint drills with the LEPC.

Comment 66e

- What is the intent for the requirement under §118.12(d)(ii) which requires “Signed agreements on activities and resources, identified by the facility”? The Association does not support the need to obtain “signed agreements” with the LEPC.

§ 118.13 Facility response training, drills, and exercises.

(a) The owner or operator of any facility required to prepare a facility response plan under § 118.3 shall develop and implement a facility response training program and a drills and exercise program that satisfy the requirements of this section. The owner or operator shall describe the programs in the facility response plan as provided in § 118.11.

(b) The facility owner or operator shall develop a facility response training program to train those personnel involved in CWA hazardous substance response activities.

Comment 67a

- In the preamble on page 87 FR 17920, EPA states “In this rulemaking, EPA is proposing in §118.13(b) to reference OSHA's 29 CFR 1910.120 training specific to hazardous substances, while also ensuring that training is conducted not only for facility personnel, but for private personnel, casual laborers, and volunteer responders.” The rule does not clearly define the “facility response training program for facility response personnel”. The

preamble implies that OSHA's 29 CFR 1910.120 training specific to hazardous substances is required for facility personnel. EPA needs to address this omission, "for facility response personnel," to eliminate potential confusion by the regulated community.

Comment 67b

- The Association believes that the requirements of 29 CFR 1910.120 are not applicable to all facility response personnel. For example, response support personnel not in contact with CWA hazardous substances, such as modelers, office risk-based planners, etc., should not be required to have this level of training. The Association recommends EPA add flexibility to the rule by adding "or as appropriate for the responders' roles and responsibilities". This would be consistent with the Oil FRP rule.

(1) A facility owner or operator must identify the method to be used for training any volunteers or casual laborers used during a response to comply with the requirements of 29 CFR 1910.120.

Comment 68a

- The training requirement for volunteer or casual laborers will prevent the use of these personnel in the response. The facility may say that these personnel should be trained in accordance with the requirements of 29 CFR 1910.120, but the facility should not be responsible for the recordkeeping of non-company personnel. This would be consistent with the Oil FRP rule.

(2) The facility owner or operator is responsible for ensuring that all private response personnel are trained to meet the Occupational Safety and Health Administration standards for emergency response operations in 29 CFR 1910.120.

Comment 69a

- The training requirement for private response personnel, *e.g.*, SRO personnel, OSRO personnel, external spill management team personnel, and specialty on-call type responders, will prevent the use of these personnel in the response. The facility may say that these personnel should be trained in accordance with the requirements of 29 CFR 1910.120, but the facility should not be responsible for the recordkeeping of non-company personnel. This would be consistent with the Oil FRP rule.

(3) The facility response plan shall include a description of the training program as described in § 118.11.

(4) The facility response plan shall include logs of CWA hazardous substance facility response plan meetings, type of response training and dates, personnel responsibilities during a response action, and drills and exercises. These logs will be maintained as an annex to the facility response plan. Logs will be kept for five years following each training session.

Comment 70a

- The Association recognizes that EPA is following the Oil FRP's recordkeeping requirements under Section 1.8.3 (Appendix F to 40 CFR 112) for maintaining training records "as an annex to the facility response Plan". However, this approach was changed in the promulgation of the SPCC rule to "Records of inspections and tests kept

under usual and customary business practices will suffice for purposes of this paragraph" [40 CFR 112.7(e)]. The Association is recommending that EPA should allow the same flexibility in this rulemaking.

(c) The facility owner or operator shall develop a program of facility response drills and exercises, including evaluation procedures. A program that follows the National Preparedness for Response Exercise Program (PREP) will be deemed as compliant with the drill and exercise requirements of this section. An alternative program or deviations from the PREP exercise requirements may also be developed by the owner or operator and are subject to approval by the Regional Administrator.

(1) Drills and exercises shall, when appropriate, be coordinated with local public emergency response officials and these officials shall be invited to participate.

Comment 71a

- The types of exercises need to be defined and should include tabletop exercises, deployment of on-site equipment, and an exercise timeline similar to OPA90 plans, in which a worst-case scenario must be exercised once every three years. The exercise schedule should also include other scenarios for the other two years in the triennial cycle. Since small and medium discharge scenarios are not identified in the rule, the facility should have the option to develop scenarios that are appropriate unless clearly defined as in the Oil FRP rule, *e.g.*, small 50 barrel, medium 857 barrel. Because PREP is written for oil spills, the Association suggests that EPA should provide flexibility in exercising other scenarios in the triennial period.

Comment 71b

- The Association supports using PREP for exercises and drills as the activities are effective and well understood. However, EPA needs to allow credit for drills and exercises conducted under Oil FRPs to avoid unnecessary duplication. If a drill/exercise is conducted exclusively for Chemical FRPs, EPA should acknowledge these credits and relax these credits in 40 CFR 112.20 for Oil FRPs and vice versa for Chemical FRPs. The Association recommends that EPA provide an addendum to the PREP manual to clearly define the expectations for conducting drills and exercises for Chemical FRPs and should include credit for conducting these activities under either regulation.

Comment 71c

- EPA has noted in the preamble the differences between oil recovery and recovery of CWA Hazardous Substances. Oil recovery preparedness is already assessed by existing GIUEs. EPA should focus on the recovery and preparedness for non-oil materials when conducting inspections and exercises. If oils are not expressly excluded, then inspections and preparation drills may not adequately assess the preparation and response for soluble chemicals spills. EPA can still utilize the full list at 40 CFR 116 but exclude any substance containing CWA HSs already covered by an Oil FRP.

Appendix A to Part 118: Certification Form

Comment 72a

- The regulated community is familiar with the format of the certification of applicability of the Substantial Harm Criteria at 40 CFR 112 Attachment C-II. A simpler form would also benefit the EPA Regional office by having consistent information and formats available

for review. The Association proposes that EPA limit the information in the proposed Certification Form to yes/no questions on the applicability criteria and reserve the detailed information and backup calculations to the actual FRP for facilities that are obligated to have FRPs.

Comment 72b

- The Substantial Harm Certification Form in Appendix A does not follow the flow logic in Figure 1 of the preamble (87 FR 17898). Figure 1 lists the order of substantial harm criteria differently than the Form, putting reportable discharges as the first criterion. Figure 1 also implies that if one criterion is met (YES), you submit the FRP, and you do not have to evaluate the other criteria. EPA should review Figure 1 and the Form for consistency. Additionally, the Association suggests that the Form should be submitted with the Chemical FRP and that the FRP will be the documentation supporting the decisions in the Form. Therefore, the backup documentation is not needed as part of the Form. For those sites that do not trigger Questions 3 – 6, we suggest that the Form should not be submitted to the agency and kept onsite similar to the requirement in 40 CFR 112.20(e) (See COMMENT 27a).

Comment 72c

- If a facility contains CWA HS greater than the threshold quantity, Question 1 requires the facility to list names, CAS no., and maximum capacities (lbs.) stored onsite for each CWA hazardous substance. Question 1 as written appears to require listing of all 296 CWA hazardous substances regardless of whether the threshold quantity has been met. The Association suggests that this information should be limited to listing those CWA hazardous substances that equal or exceed 10,000 x RQ, and are not already regulated elsewhere, *i.e.*, chemicals found in gasoline that are already addressed under the Oil FRP rule. EPA should clarify their intent by rephrasing the last sentence in question 1 to “If so, list the names, CAS no., and the maximum quantities (lbs.) of CWA hazardous substances present in the worst-case discharge that are greater than the CWA Reportable Quantity (RQ) × 10,000”.

Comment 72d

- In Question 1, the list of CWA hazardous greater than or equal to the CWA Reportable Quantity (RQ) × 10,000 is likely to change periodically as facilities change the chemicals kept on site and thus will need to be updated frequently. To mitigate frequent changes and provide EPA with the most relevant information, the Association suggests the certification form be limited to the hazardous substance(s) that triggers the WCD.

Comment 72e

- If the answer to Question 3 is yes, the Association interprets the requested information for the CWA hazardous substances to be limited to the CWA hazardous substances present in the worst-case discharge. EPA should either eliminate the inclusion of the request or clarify its intent by changing the last phrase to “Names, CAS no. and worst-case discharge quantity (lbs.) for the CWA hazardous substance(s) that would be released in the worst-case discharge scenario.”.

Comment 72f

- For Question 4, EPA should consider developing a table with all of the CWA HSs, the National Primary Drinking Water Standards, and MCLs to assist the regulated community with developing this analysis.

Comment 72g

- For Question 4, item (iii) regarding results in adverse health impacts of people exposed to the maximum concentration that could enter a drinking water system is unclear. Did EPA intend for MCLs in finished water to be used for this assessment? If not, can EPA provide specific concentrations for each chemical that would result in adverse health impacts? This would assist the regulated communities and local water treatment facilities with determining whether the water treatment processes would reduce the concentrations present at the intake of the water treatment plant to acceptable quantities in the finished water/drinking water distribution system.

Comment 72h

- For Question 4, there are five conditions that EPA questions for impact on a Public Water System (note EPA seems to have misnumbered these five, where the last item is labeled “iv” instead of “v”). The issuance of use restrictions based upon the potential for impairment of taste, odor, or aesthetic characteristics is potentially broadly variable among Public Water Systems. The Association proposes that this requirement be removed from the substantial harm certification form, on the basis that while issuing a use restriction on water is a public impact, there is no standard set of concentrations known to impact taste, odor, or appearance of water for CWA Hazardous Substances, thus decision to impose such a restriction is likely widely variable between Public Water Systems. Further, a Public Water System could decide to restrict use at a lower concentration than what was planned in a real scenario, which could create scenarios where Substantial Harm was not assessed or certified but could happen in an actual event. The Association does agree with retaining use restrictions in actual events that occur in a reportable discharge history. Should EPA choose to retain the requirement, the Association proposes that in the Substantial Harm Certification form, the item be changed from:
 - “(iv) Impairs the taste, odor, or other aesthetic characteristics of the water entering a drinking water distribution system to a degree that could make the water unacceptable to consumers and that could prompt the public water system to issue use restrictions” to:
 - “(v) Prompt the public water system to issue use restrictions”

Comment 72i

- Question 4 asks if any of the five conditions impacting a Public Water System are met. Does the facility need to assess all five conditions, or can the analysis stop once the potential for substantial harm is determined? If all five are required, and the Public Water System does not participate in the analysis, the Association notes that EPA states on FR 17906 “...if a public water system does not respond to requests to coordinate, facility owners or operators may be in a position to make the determination without the support and expertise of water system staff. In these instances, the regulated facility would measure compliance at the water treatment facility intake.” While that addresses item (i), how does EPA propose to assess the remaining items without Public Water System participation?

Comment 72j

- If the answer to Question 5 is yes, the Association interprets the requested information for the CWA HS to be limited to the CWA hazardous substances present in the worst-case discharge. EPA should either eliminate the inclusion of the request or clarify its intent by changing the last phrase to: “Names, CAS no. and worst-case discharge quantity (lbs.) for the CWA hazardous substance(s) that would be released in the worst-case discharge scenario.”

Comment 72k

- For Question 5 on historical reportable CWA hazardous discharges, the Association presumes the certification statement is asking only for discharges to water and requests that EPA add that clarification by changing the first sentence of the question to “Has the facility experienced a discharge of CWA hazardous substance discharge that reached navigable water greater than the reportable quantity within the last five years?”.

Comment 72l

- For Question 5, historical discharges of CWA HS might not have associated documentation of all known impacts to FWSE, public receptors, or public water systems. For discharges that occurred prior to the effective date of this rule, would EPA accept answers of “unknown impact” or “impact not documented”?

Comment 72m

- For Question 5 regarding discharges of CWA HS that occur after the effective date of this rule, how does EPA propose sites obtain the information to assess these impacts? On FR 17908, EPA states “40 CFR 117.21 outlines requirements to report CWA hazardous substance discharges.”; however, neither the requirement nor method of how to record the impacts on FWSE, public receptors, and public water systems are listed in this part. Is there regulatory language to provide guidance on tracking this information or is the expectation to provide anecdotal records? Does EPA anticipate that the information following a reportable spill will be collected by the facility or will it be collected by EPA? As an example, if a reportable spill caused a downstream Public Water System to shut down its intake, it is anticipated that the facility would know, understand, and record that fact. However, if the reportable spill also results in the water system's granular activated carbon (GAC) vessels being exhausted more rapidly than normal, or accelerates fouling in a vessel, is that an “adverse impact” on the PWS, and if so, is the facility expected to follow-up with the Public Water System to document this information? Or are the adverse impacts limited to the five items in Question 4 of this Certification?

Appendix B to Part 118—Toxicity Endpoints for Calculating Planning Distance for Fish, Wildlife and Sensitive Environments and Public Receptors

Comment 73a

- “EPA proposes to codify parameters and toxic endpoints to be used by facility owners when determining whether a worst-case CWA HS discharge could cause injury to FWSE.” 87 FR 17897. The proposed rule is developing a precedent in setting the endpoints for FWSE at 10% of the LC50 on the scientific basis of adult fathead minnow tests. If EPA does not agree to utilize a planning distance basis similar to that used in Oil FRP requirements in 40 CFR 112, EPA should provide flexibility to the regulated

community to identify endpoints for individual chemicals (rather than classes of chemicals) and incorporate user-identified endpoint concentrations upon EPA approval. The approach in the proposed rule appears to be a one-size-fits-all solution, which we believe is not justified for different water body classifications and uses. One example of where an alternate endpoint is in the best interest of the environment, the regulated community, and the public, is in the event of a sulfuric acid or sodium hydroxide spill, which per EPA's analysis represents 14% of all CWA hazardous substance spills between 2010 and 2019 [FR 17894]. In the case of an acid or caustic spill, the true endpoint would be a pH. Since pH is impacted by the buffering capacity of water and would be highly specific to the water body and facility location, a site-specific determined alternative would afford a stronger scientific basis for endpoint determination than a specified concentration of the acid or base. Should EPA continue to use endpoint concentrations, adding the flexibility for a facility to propose an alternate endpoint, the facility an opportunity, but not an obligation, to reference toxicological data for species that may be more appropriate for the potentially impacted water body.

Comment 73b

- EPA proposes to codify parameters and toxic endpoints to be used by facility owners when determining whether a worst-case CWA HS discharge could cause injury to Public Receptors (PRs). The proposed rule is developing a precedent in setting the endpoints for PRs at 10% of the LD50. This approach seems very restrictive for a spill scenario. This approach appears to be a one-size-fits-all which we believe is not justified for different water body classifications and uses by public receptors. The Association's concern is related to other comments here on vague language. Injury, for instance, is defined as "measurable adverse change ... [to] a natural resource or public receptor..." and public receptors refer to areas the public could be present. By definition, then, an injury doesn't relate to any adverse effects on wildlife or humans but serves as the basis for how we would define the impacted area. But the term injury is used regarding fish and wildlife, so are EPA's natural resources to be comprised solely of fish and wildlife? In which case, the Association's concern is how to determine the injury, as well as what is meant by injury, e.g., contact, adverse reaction, death. The Association assumes injury refers to death based on Table 1 (87 FR 17934), which bases endpoint thresholds based on LD50s. There is also a rectangle/square definition scenario with substantial harm and injury. Injury to public receptors is a criterion for substantial harm, but substantial harm is not necessarily injury.

Comment 73c

- EPA recognized that in their findings of LC50/LD50 that "there are several limitations associated with LC50/LD50s. Many different values for different species create challenges in choosing one value. Even with the same species, under the same conditions, and with the same chemical contaminant, the resulting LC50/LD50s can be highly variable, complicating the selection of an appropriate value for hazard communication or for the derivation of a threshold (*i.e.*, an acute exposure guideline level). LC50/LD50s are applicable to both FWSE receptors and human health, though in some cases there is uncertainty associated with the application of uncertainty factors for extrapolation to humans." (TSD, page 79). For these reasons alone, EPA should withdraw setting endpoints for the 296 hazardous substances.

Regulatory Impact Analysis: Clean Water Act Hazardous Substance Worst Case Discharge Planning Regulations (March 8, 2022)

Facility Universe (page xi, and section 2)

Comment RIA-1

- EPA estimates 102,917 facilities storing CWA HSs. EPA assumes 2,233 facilities would trigger the threshold capacities and would thus, require further evaluation using the substantial harm criteria. Of these facilities, EPA projects that 1,659 facilities would determine that they meet the substantial harm requirements and would require preparation and submittal of Chemical Facility Response Plans (FRP). This number is grossly underestimated. Preliminary feedback based on threshold capacity values with member companies indicates that many, if not most, of refining, petrochemical, and terminal facilities subject to 40 CFR 112.20 will also be subject to the new rule. There are 135 refineries in the U.S., 13,500 chemical manufacturing facilities, and over 650,000 SPCC-regulated companies in the U.S. Conservatively, the Association believes of these 10,000 - 30,000 facilities will be subject to this proposed rule as it is currently written.

Historical Discharges (page xi, and section 3)

Comment RIA-2

- In a ten-year period from 2010 to 2019, EPA identified 131 NRC-reported discharges with impacts. Of the 131 NRC-reported discharges with impacts, EPA identified that 52 could be linked to a non-transportation-related facility that would be within EPA's jurisdiction for action. This number of reported discharges is significantly small compared to the number of facilities (102,917) that are storing hazardous substances. The number of reported discharges does not justify the need to add a significant cost burden to the regulated community.

Comment RIA-3

- The majority of the "most frequently" reported discharges are PCBs as shown in Table 3-1 (greater than 50 percent or 1358 discharges). Other discharges included sulfuric acid, sodium hydroxide, hydrochloric acid, sodium hypochlorite, and chlorine which are chemicals commonly used in water and wastewater treatment. These chemicals, other than PCBs, will dissolve into the water phase, will be quickly dispersed, and will be difficult to remove. Response activities will be limited to containing the release before it reaches the navigable water. Developing response plans for these chemicals do not justify the need to add a significant cost burden to the regulated community.

Summary of Costs (page xi, and section 4)

Comment RIA-4

- EPA estimates that the regulatory burden for a facility to prepare and submit an initial Chemical FRP is 604 man-hours. However, because of the overlap with Oil FRPs and RMPs, the agency reduced this manpower estimate to 392 hours at a cost of \$26,428 per Chemical FRP. The Association believes that due to the differences in the regulations, the need to develop planning distances based on endpoints, and to conduct

a comprehensive hazard analysis, the reduction of 212 hours (35 percent of the manpower estimate) is not merited. The impact on a facility is underestimated by 54 percent.

Comment RIA-5

- EPA assumptions for the cost of manpower using *Environmental Engineers* at a rate of \$67.41/hour is an underestimation for the experienced subject matter experts needed to develop the plan. We believe the costs should be in the range of \$125 - \$165 per hour based on our professional experience and knowledge for experienced plan writers. The Association members anticipate that plans would be developed with support from third-party consulting firms and not developed in-house; thus, consultant rates should be used in EPA's economic analysis.

Comment RIA-6

- EPA assumes that 2,233 facilities would trigger the threshold capacities and would require further evaluation of the substantial harm determination. Of these facilities, 1,659 facilities would determine that they meet the substantial harm requirements and would require the preparation and submittal of Chemical FRPs. The Association believes that 11 hours per facility for "Rule Familiarization" is an invalid assumption. The Association further believes the number of facilities that would need to become familiar with the rule to accurately determine applicability, and the cost across the industry for rule familiarization and thresholding at a minimum should be based on the number of facilities that have Oil FRPs. Even this number may be low based on the fact that the threshold quantities differ between Oil FRPs and Chemical FRPs and many facilities will have to familiarize themselves with the rule and determine their applicability irregardless of the existence of an Oil FRP.

Comment RIA-7

- The agency's burden estimates of 37 hours for reviewing and approving plans grossly underestimate the agency's needs. In addition, initially regulated facilities will be required to submit plans within 12 months of the effective date of the rule, so the burden is within the first year, not over a three-year period. The Association believes that the agency does not have the manpower to oversee the program during the initial phase and thus, delays and inefficiencies in manpower usage will result. Further, EPA needs to consider the impacts on other environmental regulatory programs if manpower and resources need to be pulled into FRP reviews and approvals. EPA will need to issue comprehensive implementation guidance for this rule, clearly specifying its regulatory interpretations, constraints on acceptable submissions, and the FRP review process. Judging by the experience with implementation guidance for the SPCC Rule, implementation guidance will be a substantive undertaking.

Summary of Benefits (page xi, and section 4)

Comment RIA-8

- EPA estimates a one-time cost of \$44 million to the regulated community and a recurring cost of \$25 million. Again, the Association believes that these costs are grossly underestimated based on the above comments. The Association believes that chemical response plans are likely to mitigate several categories of damages, but the degree to which the proposed action would actually mitigate specific types of damages is unknown.

As EPA states “it is difficult to predict the frequency of the “low probability, high consequence” type of events that the rule is aimed at mitigating, and thus, difficult to predict the number of future discharges that could be mitigated by the proposed action.” (RIA page xii).