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U.S. Environmental Protection Agency
EPA Docket Center
Attention Docket ID No. EPA-HQ-OLEM-2018-0024
Mailcode: 28221T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

**Re: Comments on Proposed Action: Clean Water Act Hazardous
Substances Spill Prevention; Docket ID No. EPA-HQ-OLEM-2018-0024**

Dear Sir or Madam:

This letter provides comments of the undersigned organizations on EPA's above-referenced proposal to establish no new requirements applicable to hazardous substances under Clean Water Act ("CWA") section 311, published on June 25, 2018, 83 Fed. Reg. 29,499 (the "Proposed Action"). We agree with EPA's conclusion in the Proposed Action that the existing framework of regulatory requirements serves to prevent and contain discharges of hazardous substances, and no additional requirements under CWA § 311(j)(1)(C) are necessary or appropriate. In these comments, we expand upon the legal justification for the Proposed Action and ask that EPA include a similar expanded discussion in the preamble to its final action. Many of the undersigned organizations also intend to file individual comments on the Proposed Action.

Many of the undersigned organizations have a long history of participation in EPA's outreach efforts during its development of the Proposed Action. These organizations own and operate facilities that are subject to various federal, state, and local regulatory permit and discharge requirements. Thus, we are very familiar with the full range of existing programs reviewed by EPA in the Proposed Action and the essential program elements they contain. For example, EPA correctly concluded that the Spill Prevention, Control, and Countermeasure ("SPCC") program that applies to oil, including mixtures of hazardous substances and oil, contains a range of requirements that include a general review of facility hazards, personnel training, incident investigation, and emergency response planning. These aspects of EPA's SPCC regulations serve to underscore the existence of the essential program elements in current requirements. Other programs, like industry effluent limitations guidelines ("ELGs") and Best Management Practices ("BMPs"), also contain requirements for routine or continuous monitoring and regular reviews of Safety Data Sheets. Our facilities' regular and continuous compliance with these programs evidences our substantial familiarity with the essential program elements discussed in the Proposed Action, as well as our significant interest in any potential new CWA

today, there is no reason to assume that Congress intended to require EPA to promulgate additional, standalone regulations citing the authority granted under section 311(j)(1)(C), when subsequent statutory and regulatory programs have accomplished Congress' original intent.

Additionally, section 311(j)(1)(C) is directed to the President, as the head of the executive branch, not to EPA specifically. It therefore is appropriate to consider requirements promulgated by or enforced by all executive branch agencies, not just EPA, when assessing whether the purpose and letter of section CWA § 311(j)(1)(C) have been met.¹ The statute does not dictate any particular form of regulations the President must issue, and it contemplates regulations being issued and evolving over time, rather than created by a particular deadline.²

Thus, EPA has discretion to interpret section 311(j)(1)(C) as having been fulfilled by regulatory programs EPA and other federal agencies have adopted over the past 45 years, an interpretation to which courts will likely give deference. Although EPA never clearly states in the Proposed Action that it has concluded that existing requirements under federal law satisfy any obligation the President had to issue regulations under CWA § 311(j)(1)(C)³, that is the import of EPA's Proposed

The Proposed Action addresses a situation in which the adoption of other statutes and regulations over a long period have met Congress' regulatory intent. Such a situation renders unnecessary regulations that a literal reading of the statute would require. In similar previous situations, EPA has exercised its *de minimis* authority, with the courts' approval. For example, in *State of Ohio v. EPA*, the D.C. Circuit approved EPA's promulgation of a *de minimis* exemption from a statute requiring periodic review of certain Superfund sites.⁶ EPA's regulation required periodic review only of sites where hazardous substances remained at levels precluding unrestricted use of and exposure to the site (thus exempting sites at which hazardous substances remained, but at lower levels, pursuant to EPA remediation guidelines), even though the statute literally requires periodic review for any site at which "any hazardous substances" remain.⁷

Importantly, under the *de minimis* doctrine, an agency can decline to take a regulatory action when the totality of circumstances indicates that issuing the regulation would provide no significant benefit – not just when there would be no benefit at all. Especially when a new regulation would, as in the present action, result in significant compliance costs, the agency should assess whether the regulatory benefits (here, the potential avoidance of some spills) would be *de minimis*, even if some benefit could presumably result.⁸

EPA correctly considered whether a regulation imposing additional requirements intended to improve spill prevention and containment would, "in context,"⁹ produce "incremental advantages" over existing statutory and regulatory authorities.¹⁰ The law does not require an agency to promulgate additional layers of regulatory requirements when the improvement over the *status quo* would be insignificant.¹¹

⁶ 997 F.2d 1520, 1534-36 (D.C. Cir. 1993).

⁷ See also *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), in which the Supreme Court affirmed EPA's interpretation of the CWA's broad definition of "pollutant," which specifically includes "radioactive materials," as nonetheless allowing EPA to exclude from CWA regulations "source, byproduct, and special nuclear materials," because they are subject to regulation under the Atomic Energy Act.

⁸ Cf. *Michigan v. EPA*, 213 F.3d 663, 677-78 (D.C. Cir. 2000) (questioning whether emissions could be determined "significant" without considering costs of eliminating them).

⁹ See *Alabama Power*, 636 F.2d at 360.

¹⁰ See, e.g., 83 Fed. Reg. at 29,517.

¹¹ It is important to note that application of the *de minimis* doctrine does not require a complete congruence between the regulatory programs identified in the Proposed Action (and the additional statutory and regulatory authorities described in the next section of these

administered by other federal agencies, that contain one or more of the nine “program elements” that EPA says are “commonly found in discharge prevention and accident prevention regulatory programs.”¹⁵ But this analysis and the resulting federal regulatory programs EPA identified are much too narrow. By focusing only on an assessment of other regulatory requirements specifically directed at matters such as spill containment, employee training, and hazard identification and communication, EPA failed to consider how other regulatory programs with broader purposes (such as NPDES permits) as well as statutory and regulatory programs establishing liability for hazardous substance discharges, effectively impose additional “program elements” on facilities, either directly or indirectly.

These broad programs and liability provisions create strong incentives for facilities to implement appropriate measures to avoid uncontained hazardous substance spills. They provide substantial additional support for EPA’s proposed conclusion that existing programs have already satisfied CWA § 311(j)(1)(C) and that promulgating additional rules would provide only *de minimis* regulatory benefit. We provide a few examples of such programs below.¹⁶

In addition to these direct penalties for a hazardous substance spill that reaches a permitted outfall or is discharged to a “water of the U.S.” from an unpermitted point source,” a spill at an NPDES-permitted facility also can result in the facility’s wastewater treatment plant being unable to meet effluent limitations on other pollutants or can interfere with the management of sludge the wastewater treatment plant generates. While the Pulp and Paper Effluent Guidelines that EPA identified in the Proposed Action contain specific BMP requirements designed to avoid discharges from mill processes into the mill sewer system, that concern and response applies to other types of facilities as well. Many of the EPA ELGs for other point source categories effectively require or create a strong incentive for covered facilities to implement similar measures to prevent or contain spills that otherwise would go into the facility’s sewer and impact its wastewater treatment plant.

B. Pretreatment Program

Similar to NPDES-permitted facilities, a large number of industrial, commercial, and municipal facilities that might store or use significant quantities of hazardous substances are connected to sewers that transmit wastewater from their facility to a publicly owned treatment works (“POTW”), and thus are subject to EPA pretreatment standards under CWA § 307, including categorical pretreatment standards for some industry categories and the General Pretreatment Regulations at 40 C.F.R. pt. 403 applicable to all indirect dischargers. If a facility spills a hazardous substance that reaches the municipal sewer system and violates a categorical pretreatment standard or one or more of the prohibitions in 40 C.F.R. § 403.5, the facility is subject to civil penalties, which can exceed hundreds of thousands of dollars. Those prohibitions include introducing any pollutant into the sewer system that: creates a fire or explosion hazard; will cause corrosive structural damage, including any discharge with a pH lower than 5.0; will cause interference with the POTW; or will pass through the POTW and cause an exceedance of the POTW’s NPDES permit. Also, POTWs can and often do adopt local pretreatment programs and local limits pursuant to Part 403, which then become federally enforceable. Facilities may have a contractual obligation to the POTW, as well. The combination of these factors creates a substantial regulatory infrastructure which encourages industrial users of POTWs to avoid hazardous substance spills and to contain them if they occur.

It is important to note that the federal pretreatment program results in measures to prevent and contain hazardous substance spills that often are implemented in part through local regulation and enforcement. For example, pursuant to 40 C.F.R. pt. 403 and in line with longstanding EPA guidance¹⁷, POTWs often have great authority (as codified in local ordinances) to compel users to

¹⁷ EPA Office of Water, *Control of Slug Loadings to POTWs: Guidance Manual*, Feb. 1991.

prepare slug discharge control plans, install secondary containment or make other modifications to facilities, conduct training, and implement practices to prevent slug discharges to the POTW of hazardous substances and other harmful materials. Pretreatment ordinances typically contain provisions allowing the control authority to inspect the user's facilities to detect situations present that could result in slug discharges to the POTW. Follow-up actions under their legal authority, such as mandated approval of facility-specific slug discharge control plans and required construction of secondary containment and protected product and waste handling areas, have effectively prevented an untold number of POTW system upsets and pass-through situations nationwide. Importantly, these actions have at the same time protected surface waters by preventing discharges of stored and handled materials from industrial user's facilities, thereby performing the function of

prevention and containment of hazardous substances discharges as any additional SPCC-type regulations directed at hazardous substances would or could be.

D. Release Reporting

Many industrial facilities are subject to annual Toxic Release Inventory (“TRI”) reporting under section 313 of the Emergency Planning and Community Right To Know Act (“EPCRA”) when they release more than a specified amount of a listed chemical during the year, including releases to water or land. The TRI toxic chemical list currently contains 595 individually listed chemicals and 33 chemical categories. There is a great deal of overlap between the TRI list and the CWA hazardous substances list. Thus, many if not most of the hazardous substance discharges that a potential new regulatory program under CWA § 311(j)(1)(C) would be designed to try to prevent would also, if uncontained, trigger TRI reporting.

As EPA and numerous others have observed, the requirement to file TRI reports, which are frequently scrutinized and published by interest groups, local governments, and other stakeholders, has been a powerful incentive over the past 30 years for companies to reduce their use and storage of hazardous chemicals and improve their practices to prevent releases. EPA should recognize that TRI and similar federal and state reporting requirements can be as effective in motivating facilities to prevent and contain hazardous substance discharges as can traditional command-and-control regulations such as the alternatives considered in the Proposed Action, if not more so.

In addition, inventory reporting already requires many facilities to identify and track their storage and disposition of hazardous substances. For example, companies in the construction industry already are filing Tier II Emergency and Hazardous Chemical Inventory reports annually. CERCLA hazardous substances listed under 40 C.F.R. Table 302.4 and the extremely hazardous substances listed under 40 C.F.R. pt. 355 Appendix A and B are subject to reporting under EPCRA section 304. Given the overlap between the list of CWA hazardous substances and the CERCLA/EPCRA lists, new regulations that EPA might issue under CWA § 311(j)(1)(C) not only would be redundant with incentives facilities such as construction sites already have to minimize storage and releases of hazardous substances, but they also would present substantial potential for confusion about overlapping requirements.

4. It Would Be Arbitrary and Capricious for EPA To Promulgate Additional Spill Control Regulations Where the Cost Would Far Exceed the Anticipated Benefits.

In the Proposed Action, EPA explains briefly its conclusion that “the benefits

As EPA notes, Executive Order 12866, issued in 1993 and still in effect, instructs agencies to: (1) “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs,” unless prohibited by law, and (2) “in choosing among alternative regulatory approaches, . . . select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity) unless a statute requires another regulatory approach.” Executive Order 13563, issued in 2011 and still in effect, reaffirmed the 1993 order and even more strongly embraces quantitative benefit-cost balancing. Nothing in the CWA prevents EPA from following those directives when considering establishing an additional regulatory program under CWA § 311(j)(1)(C).

EPA should state strongly in its final action that cost-benefit balancing does not justify any additional regulations addressing CWA hazardous substance releases. As EPA noted, there may not be any incremental benefit of additional rules; just because EPA issues a new regulation intended to reduce the chance of an uncontained spill does not mean that facilities will have any significantly greater incentive to prevent and contain spills than already exists. A new regulation might not, in practice, require facilities to do anything different than they are already doing to comply with existing requirements.

It is certain, however, is that a new rule imposing new procedural and substantive requirements for onshore facilities would have significant costs, as the Regulatory Impact Analysis indicates. It does not require a highly detailed and validated analysis to know that imposing new requirements on hundreds of thousands of onshore facilities can reasonably be expected to have costs far in excess of the benefits from potentially reducing the relatively small number of reported hazardous substance spills.²²

ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.”). (Note that in *Michigan* all nine justices agreed that, unless the statute states

5. Conclusion

Existing regulatory and statutory programs have already satisfied any requirement to issue regulations under CWA § 311(j)(1)(C). Moreover, the Proposed Action represents a rational exercise of EPA's inherent authority to eschew unnecessary, redundant regulations and to avoid imposing new requirements where the incremental benefits would not justify the incremental costs.

The undersigned organizations encourage EPA to invoke this authority and to issue a final action finding that no additional regulatory requirements are warranted under CWA § 311(j)(1)(C). When EPA does so, it should provide a more-comprehensive discussion of its legal authority and how it applied its analysis of existing requirements within that legal context, as outlined in these comments.

If you have any questions about these comments or wish to discuss these issues further, please contact our counsel, Russell Frye, at 202-572-8267 or rfrye@fryelaw.com.

Sincerely,

American Chemistry Council
American Forest & Paper Association
American Fuel & Petrochemical
Manufacturers
Associated General Contractors of
America
National Mining Association
Utility Solid Waste Activities Group
U.S. Chamber of Commerce

cc: Desk Officer for EPA, OMB-OIRA

eliminate all risk.”).