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News & Insights

# EPA Publishes Clean Water Act "Worst-Case" Spill Rule

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On March 28, the U.S. Environmental Protection Agency (EPA) published its Final Rule: Clean Water Act Hazardous Substance Facility Response Plans (Final Rule) requiring facilities that handle hazardous substances to create Facility Response Plans (FRPs) addressing discharges of Clean Water Act (CWA) Hazardous Substances into federally regulated waters. This is EPA's inaugural FRP rule issued under CWA authorities, and has been widely referred to as the "worst-case" spill rule. While the CWA is a new statutory framework, the FRP requirement supplements (and arguably duplicates, in some instances) existing requirements under the Resource Conservation and Recovery Act (existing Contingency Plan requirements), the National Oil and Hazardous Substances Pollution Contingency Plan (existing "One Plan" requirements), and the Clean Air Act (existing – and recently updated – Risk Management Plan requirements).

The Final Rule, which was required in accordance with a 2019 Consent Decree between the EPA and environmental organizations, mandates affected facilities to prepare plans accounting for worst-case scenario discharges resulting from adverse weather conditions. To comply with the Final Rule, affected facilities must account for the increased frequency and severity of extreme weather events associated with climate change. As issued, the Final Rule relaxes some of the more stringent provisions from the proposed rule, though many new provisions, such as the substantial harm analysis requirement and endpoint modeling, remain. It is also complicated by the confusing landscape regarding navigable waters and waters of the United States, as applicability to the rule tees off proximity to a navigable water.

Per the Final Rule, the EPA believes more than 12,500 facilities nationwide will be subject to the rule, with slightly less than half required to submit an FRP.

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## APPLICABILITY

The Final Rule applies to land-based facilities in which CWA hazardous substances are made, used, stored, or otherwise handled, but the Final Rule does not apply to transportation-related facilities. Existing rules already regulate FRPs for oil facilities.

Of these land-based facilities, the Final Rule is applicable to those facilities that could reasonably be expected to cause substantial harm to the environment that meet certain criteria. First, facilities should assess the two screening criteria: (a) threshold quantity and (b) proximity to navigable waters. The screening criteria should be assessed concurrently and can be assessed in either order.

- *Threshold quantity:* Does the maximum quantity onsite for any CWA hazardous substance at any time meet or exceed 1,000 times the Reportable Quantity?
- *Proximity to navigable waters:* Is the facility boundary or nearest opportunity for discharge located within one-half mile of navigable waters or a conveyance to navigable waters?

If a facility meets *both* of the screening criteria, then the facility should assess whether it meets any of the four substantial harm criteria, each of which requires determination of the distance to the relevant endpoint that potential impacts must be evaluated against. These criteria are:

1) *Ability to cause injury to fish, wildlife and sensitive environments*: Is the facility located within a certain distance to an endpoint such that the worst case discharge of a CWA hazardous substance could injure fish, wildlife and sensitive environments?

2) *Ability to adversely impact a public water system*: This criterion includes five sub-criteria, and the inquiry should be conducted in collaboration with downstream public water systems. Facilities should assess whether a worst case discharge would:

a) Violate any National Primary Drinking Water Standard or State Drinking Water Regulation

b) Compromise the public water system's ability to comply with any National Primary Drinking Water Standard or State Drinking Water Regulation

c) Result in adverse health impacts in people exposed to the maximum concentration of the substance that could enter a drinking water distribution system

d) Contaminate public water system infrastructure; or

e) Impair the taste, odor or other aesthetic characteristic of water entering a drinking water system that could make the water unacceptable to consumers and could prompt the system to issue use restrictions

3) *Ability to cause injury to public receptors*: Is the facility located within a certain distance to an endpoint such that the worst case discharge could injure a public receptor (i.e. a park, recreational area, dock, or another public space)?

4) *Reportable discharge history*: Has the facility had a reportable CWA hazardous substance discharge under 40 CFR § 117.21 within the last five years that reached navigable waters?

If a facility meets *one* substantial harm criterion, then it must prepare, implement and submit an FRP to the EPA; however, the facility must still assess the other substantial harm criteria because all substantial harm criteria must be included in the FRP.

If the two screening criteria are met but none of the substantial harm criteria are met, the owner or operator must submit a Substantial Harm Certification Form, which also requires an assessment of all four substantial harm criteria. EPA included this graphic in the Final Rule:

The EPA's regional administrators also have the authority to require a facility to submit an FRP.

Importantly, the Final Rule's FRP rules require more from a facility than the rule as proposed. Once a covered facility determines it must submit an FRP, the owner or operator's FRP must address *all* CWA hazardous substances onsite above the threshold quantity.

## TIMING

A covered facility must submit a response plan within three years of the effective date (i.e., May 2027). The Final Rule was published March 28, 2024, and will become effective May 28, 2024.

## WHAT IS A FACILITY RESPONSE PLAN?

An FRP is a plan created by the facility and submitted to the EPA which describes processes and procedures to respond to a discharge of Hazardous Substances into federally regulated waters. The Final Rule establishes specific criteria which must be included in the FRP, and are included at 40 CFR 118.11. These criteria were informed by existing requirements for oil facility FRPs and have characteristics of the Risk Management Program. While the FRP must account for worst-case scenario situations, the FRP must also account for small and medium discharges.

Specifically, FRPs must:

- Be consistent with the National Contingency Plan of 40 CFR Part 300, and include review and affirmation that relevant plans were reviewed during development.
- Identify a Qualified Individual to implement response actions and open communications with agencies.

- Include specific response resources, including contractors who would assist with releases.
- Describe equipment testing, training, unannounced drills and response actions to ensure safety and prevent discharges.
- Describe emergency response information, including a hazard evaluation for worst-case discharge based on chemical-specific risk analyses.
- Outline the reportable discharge history.
- Identify and describe response personnel and contracts evidencing proper equipment and response resources.
- Include a list of required notifications.
- Describe information on potential discharges that would be provided to response personnel in the event of a release.
- Describe response equipment.
- Include evacuation plans.
- Describe procedures and equipment to detect discharges and monitor air releases resulting from discharges.
- Describe response actions, including immediate response, environmental monitoring data to be collected, and actions to be taken in the immediate term, an hour after discharge detection, and two hours after discharge detection.
- Include plans for disposal of contaminated cleanup materials.
- Describe containment measures.
- Describe training procedures and self-inspections.
- Include an Emergency Response Action Plan.

The response plan must be recertified every five years. In addition, the Final Rule requires coordination with local emergency response officials and response training drills that include private response personnel.

## ENVIRONMENTAL JUSTICE IMPLICATIONS

In addition to the more than 5,400 facilities that are expected to be required to submit an FRP, the Final Rule includes a process that allows EPA regional administrators to identify facilities and require the development of an FRP even if other criteria are not met. When a regional administrator is exercising their discretion on whether to require a facility to submit an FRP, the Final Rule allows regional administrators to consider whether there is potential to adversely impact environmental justice (EJ) communities. Facilities near EJ communities should be aware.

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When releasing the Final Rule, the EPA cited particular concerns about EJ communities, noting that EJ communities are disproportionately located in proximity to industrial facilities. This is in line with the EPA's 2024 - 2027 National Enforcement and Compliance Initiatives, which all incorporate EJ considerations. Notably, the EPA conducted 61% of its on-site inspections in fiscal year 2023 in EJ communities. If you do not understand the community demographics around your facility, EPA has EJ Screen, a screening and mapping tool.

## NEXT STEPS

While the Final Rule does not require compliance until 2027, potentially affected facilities should begin assessing its applicability, as many of the FRP requirements will take time (and capital) to develop. In addition, facilities should understand that this will be a freestanding plan, though EPA expects it will be considered comprehensively with other already-existing facility planning documents like the Integrated Contigency Plan, Risk Management Plan and One Plan, if applicable. So, care should be taken to develop a plan that aligns with those plans and does not create a conflict. As many regulated entities are already aware, while the FRP is a new requirement, the EPA has longstanding experience in scrutinizing facility plans, so ensuring plans are comprehensive and include all required components is also important.

As with all EPA rules in the current environment, the Final Rule will almost certainly be challenged. Facilities should be cognizant of the impacts of future litigation. Stinson attorneys are closely monitoring this rulemaking, and are knowledgeable in and available to assist with understanding and evaluation of the EPA's Final Rule, applicability determinations and Environmental Justice implications.

For more information on the Clean Water Act "Worst-Case" Spill Rule, please contact Brittany Barrientos, Aimee Guzman Davenport, Andrew Davis, Quint Doan, Kristen Ellis Johnson, Kyle Foote, Betsy Smith, Sarah Lintecum Struby, Claire Williams, Zachary Wright or the Stinson LLP contact with whom you regularly work.

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