August 24, 2018

**By electronic submission to Regulations.gov**

Acting Administrator Wheeler

U.S. Environmental Protection Agency

1200 Pennsylvania Ave. NW

Washington, DC 20460

Re: Comments on Docket ID No. EPA-HQ-OLEM-2018-0024, Clean Water Act Hazardous Substance Spill Prevention – Proposed Action

Acting Administrator Wheeler,

The undersigned environmental justice, public health, and environmental organizations support robust spill-prevention regulations for above-ground tanks and other non-transportation-related onshore facilities that store or use hazardous substances. Although Congress mandated the issuance of such regulations over 45 years ago, EPA has never complied. EPA’s “proposed action,” *see* 83 Fed. Reg. 29,499, 29,499 (June 25, 2018), is nothing more than a continued abdication of its statutory duty, at the expense of public health and environmental protection.

EPA should reject its current proposal to issue no regulations under the Clean Water Act to prevent and contain spills of hazardous substances from non-transportation-related onshore facilities. First, Clean Water Act section 311(j)(1)(C) explicitly requires EPA to issue hazardous-substance spill-prevention regulations for those facilities, and EPA lacks the authority to ignore that statutory mandate. Second, even if EPA could second-guess Congress’ clear instruction to regulate (and it cannot), the reasons the agency gives for its “do nothing” proposal are illogical, conclusory, and unsupported by the record. EPA lacks critical information about the facilities that it is refusing to regulate, including where they are located, what chemicals they store, and what spill-prevention measures, if any, they are already taking. EPA has not shown that the problem Congress sought to rectify when it required hazardous-substance spill-prevention regulations has been fully addressed. Nor has the agency shown that the patchwork of existing federal regulations that touch on spill prevention serve as an adequate stand-in for the comprehensive hazardous-substance spill-prevention regulations mandated under Clean Water Act section 311(j)(1)(C).

Our communities, drinking water supplies, and waterways deserve the protections that Congress mandated nearly a half-century ago. We urge the EPA to reject its do-nothing proposal, collect more information through the pending information collection request process, and then issue a rule that would provide robust hazardous-substance spill protections for people around the country, particularly those in low-income communities and communities of color that bear the brunt of the risks of and burdens from hazardous-substance spills and other chemical disasters. In designing this hazardous-substance spill-prevention regulation, EPA should build upon the framework of the spill-prevention rules it has already issued under section 311(j)(1)(C) for oil. Any hazardous-substance spill-prevention regulation should include provisions focused on preventing spills in the first instance, containing spills quickly and effectively when they do occur, and ensuring the public is informed about the spill risks before they occur and notified immediately when spills do occur.

**I. EPA’s proposed do-nothing approach violates the Clean Water Act’s clear command that EPA “shall issue regulations” to prevent hazardous-substance spills.**

In section 311(j)(1) of the Clean Water Act (CWA) of 1972, Congress directed that “as soon as practicable, . . . the President shall issue regulations . . . establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges.” Pub. L. No. 92-500, § 311(j)(1), 86 Stat. 816, 868 (1972) (codified at 33 U.S.C. § 1321(j)(1)(C)). A year later, President Nixon delegated this responsibility to issue spill-prevention and -containment regulations for non-transportation-related onshore facilities to EPA. Exec. Order No. 11,735 § 1(4), 38 Fed. Reg. 21,243, 21,243 (Aug. 7, 1973).

Given that delegation, the CWA’s mandate to EPA is clear: EPA “*shall* *issue* *regulations* . . . establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of . . . hazardous substances” from non-transportation-related onshore facilities, “and to contain such discharges.” 33 U.S.C. § 1321(j)(1)(C) (emphasis added). Congress’ use of the term “shall” in CWA section 311(j)(1) contains no prerequisite or condition and is unquestionably mandatory. *See* *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661–62 (2007); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress’ “use of a mandatory ‘shall’ . . . to impose discretionless obligations”); *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (“[A]ny contention that the relevant provision of [the Endangered Species Act] is discretionary would fly in the face of its text, which uses the imperative ‘shall.’”). While in some circumstances the word “shall” can be interpreted to be permissive, rather than mandatory, this is not one of them. In CWA section 311, Congress used the phrase “may issue” three times, *see* 33 U.S.C. §§ 1321(b)(6)(B)(2), (b)(6)(I), (j)(5)(B), and the phrase “shall issue” (or “shall also issue”) three times, *see id.* §§ 1321(j)(1), (j)(5)(A)(i), (j)(5)(A)(ii). “When a statute distinguishes between ‘may’ and ‘shall,’ it is generally clear that ‘shall’ imposes a mandatory duty.” *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (citing *United States v. Thoman*, 156 U.S. 353, 359–60 (1895)); *see also Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 671 (D.C. Cir. 2016) (“[W]hen a statutory provision uses both ‘shall’ and ‘may,’ it is a fair inference that the writers intended the ordinary distinction.”).

EPA’s proposal to issue “no new regulatory requirements,” 83 Fed. Reg. at 29,501, violates the CWA’s explicit mandate that the agency “shall issue” hazardous-substance spill-prevention regulations for non-transportation-related onshore facilities (hereafter “hazardous-substance spill-prevention regulations”). Buried deep in its proposed Regulatory Impact Analysis, EPA’s rationale for its do-nothing approach appears to be that, because existing EPA regulations issued under other statutory authorities provide some protection against some hazardous-substance spills at some non-transportation-related onshore facilities, “no additional requirements are necessary.” *See* EPA, Proposed Regulatory Impact Analysis—Clean Water Act Hazardous Substances Spill Prevention (“RIA”) 12 (May 17, 2018), EPA-HQ-OLEM-2018-0024-0111. But whether regulations are “necessary” is not EPA’s decision to make. Congress already determined that hazardous-substance spill-prevention regulations are “necessary” when it mandated their issuance. EPA cannot “second-guess Congress’ calculations.” *Pub. Citizen v. FTC*, 869 F.2d 1541, 1557 (D.C. Cir. 1989) (“[A]gencies surely do not have inherent authority to second-guess Congress’ calculations.”); *see also* *Fed. Power Comm’n v. Texaco Inc.*, 417 U.S. 380, 400 (1974). To do so would “undermine core separation of powers principles.” *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 414 (D.C. Cir. 2013) (Kavanaugh, J. concurring).

This is not a case where Congress has instructed EPA to study a problem and issue new regulations as it deems “necessary.” *See, e.g.*, 42 U.S.C. § 6912(b) (instructing EPA to “review[] and, where necessary, revise[]” RCRA regulations “not less frequently than every three years.”); *id.* 7614(d)(6). Nor is this a case where Congress has instructed EPA to evaluate whether existing regulations issued under other authorities provide sufficient protections before issuing new regulations. *See, e.g.*, 33 U.S.C. § 1317(a)(2) (requiring EPA to “take into account,” *inter alia*, “the extent to which effective control is being or may be achieved under other regulatory authority” before issuing effluent standards for toxic pollutants under the CWA). When Congress intends to give EPA (or any agency) discretion regarding whether to issue a regulation, it does so explicitly. And Congress did not grant such discretion in CWA section 311(j)(1).

Rather, Congress has clearly and unconditionally commanded that EPA “shall issue” hazardous-substance spill-prevention regulations. “To the extent that this constrains agency discretion . . ., this is the congressional design” and EPA must comply. *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007); *see also* *In re Aiken Cty.*, 725 F.3d 255, 259 (D.C. Cir. 2013). In addition, just as EPA cannot merely “say no” to Congress’ command, it cannot rely on a spotty patchwork of regulatory actions taken under other authorities (see *infra* part II.C) to avoid its obligation to issue comprehensive hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C). *See Massachusetts*, 549 U.S. at 532–34 (rejecting EPA’s refusal to regulate greenhouse gases when the agency based its decision on considerations “divorced from the statutory text”); *Pub. Citizen v. NRC*, 901 F.2d 147, 157 (D.C. Cir. 1990) (rejecting NRC’s claim that its voluntary guidance “satisf[ied] the congressional command to establish training ‘requirements.’”); *NRDC v. FDA*, 884 F. Supp. 2d 127, 151 (S.D.N.Y. 2012) (holding “[t]he statute does not empower the agency to choose a different course of action in lieu of” its statutory duty, and “the fact that the [agency] ‘is engaging in other ongoing regulatory strategies,’ does not relieve it of its statutory obligation.” (citations omitted)).

Indeed, EPA’s do-nothing proposal for hazardous-substance spill prevention would, if adopted, leave the agency in the exact same position it was in when it was sued for its failure to comply with CWA section 311(j)(1)(C) in 2015. *See* Compl., *Envtl. Justice Health All. for Chem. Policy Reform v. EPA*, 15-cv-5705, Dkt. No. 1 (S.D.N.Y. filed July 21, 2015). At that time, EPA’s hazardous-substance spill-prevention regulations were already more than 40 years overdue. EPA settled that case through a court-enforceable consent decree that required the agency to propose and take final action pertaining to hazardous-substance spill-prevention regulations under the CWA. *See* Consent Decree, *Envtl. Justice Health All. for Chem. Policy Reform v. EPA*, 15-cv-5705, Dkt. No. 46 (S.D.N.Y. entered Feb. 6, 2016). By proposing to issue *no* hazardous-substance spill-prevention regulations, EPA is both perpetuating its now-45-plus-year abdication of its statutory duty and also making a mockery of the judicial process that required this rulemaking. Indeed, if EPA finalizes its proposal, that final action will not only be arbitrary and capricious under the Administrative Procedure Act, but will also re-open the courthouse door for another unreasonable delay suit to compel EPA to comply with its statutory duty to issue hazardous-substance spill-prevention regulations.

This is not to say EPA is without discretion in this rulemaking. It has the discretion to select among reasonable regulatory requirements to prevent and contain hazardous-substance spills from non-transportation-related onshore facilities. But what EPA cannot do, no matter its rationale or policy preferences, is reject the premise that hazardous-substance spill-prevention regulations are required. Congress has already made that decision. And EPA lacks the authority to second-guess it. EPA’s proposed do-nothing approach accordingly violates the CWA and would be arbitrary, capricious, and contrary to law if finalized.

**II. Even if EPA could second-guess Congress’ mandate for hazardous-substance spill-prevention regulations, the reasons it gives for doing so do not support its proposed do-nothing approach.**

1. **Spill and facility data do not support EPA’s proposed do-nothing approach.**

Even assuming EPA has discretion to defy Congress’s command that it “shall issue” hazardous-substance spill-prevention regulations (and, as discussed above, EPA does not have that discretion), EPA has not shown that existing spill and facility data support its proposed (in)action.

By its own admission, EPA does not know where the relevant facilities (or relevant CWA hazardous substances) are located. Nor does it know what hazardous-substance spill-prevention measures, *if any*, are being taken at those facilities. And it does not articulate with any specificity what a reasonable set of hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C) would look like. These are all important parts of the problem before EPA. And, without this information, EPA cannot reasonably evaluate—let alone support—the central claim in its do-nothing proposal: that the existing patchwork of regulations functionally provides the spill-prevention protections that Congress has mandated in CWA section 311(j)(1)(C).

What EPA does know, as it readily admits, is that there are myriad “uncertainties” and “limitations” in the information underlying its proposal. 83 Fed. Reg. at 29,503, 29,519; RIA 8 (“There are many sources of significant uncertainty in this RIA, including in the estimates of potentially regulated facilities, historical discharges, baseline compliance behavior, baseline damages, and potential benefits of Options 2 and 3.”). EPA, however, is largely to blame for this deficit of reliable information. EPA’s refusal, for nearly a half-century, to issue hazardous-substance spill-prevention regulations has left the agency at a loss for where such regulations, if issued now, would apply and how those regulations would or would not interact with existing regulatory requirements. EPA cannot hide behind its self-inflicted ignorance, caused by its decades-long refusal to issue statutorily mandated regulations, to justify its further refusal to issue statutorily mandated regulations. That is the height of irrationality.

EPA nonetheless appears allergic to collecting the data it needs before deciding how to act in this case. The agency determined that an Information Collection Request (ICR) was “necessary” to support of this rulemaking over two years ago. *See* EPA, Bi-Annual Update #1 (Aug. 16, 2016), available at https://www.epa.gov/sites/production/files/2016‑08/

documents/biannual\_update\_1\_aug-16-16.pdf. But EPA has not issued that ICR. Instead, it has plowed ahead based only on “readily available source[s] of information,” 83 Fed. Reg. at 29,503, that systemically underestimate potentially covered facilities and understate past occurrence of CWA hazardous-substance spills. And, based on guess-work from these insufficient data, EPA proposes to do nothing, with only a nod to perhaps taking action at a later, unspecified date, should it receive relevant information in response to future ICRs. *Id.* 29, 503. EPA’s head-in-the-sand approach is baffling, and the conclusions it draws from that approach are arbitrary, capricious, and unsupported in the record.

**1. Tier II data underestimate the universe of facilities that would be subject to hazardous-substance spill-prevention regulations**

EPA has not attempted to determine the number of facilities that would be subject to a hazardous-substance spill-prevention regulation, should the agency issue such a rule. EPA relies on Tier II Reports as a proxy for covered facilities, estimating based on reports from a subset of states that there are 108,000 facilities nationwide. 83 Fed. Reg. at 29,519.

Looking only at facilities required to submit Tier II reports, however, underestimates the number of facilities that could be covered by a hazardous-substance spill-prevention regulation. The Emergency Planning and Community Right-to-Know Act (EPCRA) Reporting Rule (40 C.F.R. part 370) requires a facility to submit annual inventory reports, called “Tier II Reports,” if a facility possesses hazardous chemicals at defined threshold amounts: 500 pounds for “extremely hazardous substances,” 40 C.F.R. § 370.10(a)(1), and 10,000 pounds for other hazardous substances, *id.* § 370.10(a)(2). Thus, only facilities that have relatively large stores of hazardous substances are required to submit Tier II reports.

In contrast, CWA section 311(b) prohibits discharges of CWA hazardous substances and requires reports of discharges of much smaller amounts than the threshold amounts for Tier II reports. *See* 40 C.F.R. § 117.3. For example, EPA’s proposal identifies polychlorinated biphenyls (PCBs) as the CWA hazardous substance with the highest number of discharges and impacts. 83 Fed. Reg. at 29,502 tbl.2. The reportable quantity for PCBs under the CWA is a mere one pound. 40 C.F.R. § 117.3. But, under EPCRA, a facility need not report that it is storing PCBs unless it has 10,000 times that amount on hand. *See id.* § 370.10(a)(2). In short, many facilities that do not submit Tier II reports could be the source of reportable discharge under the CWA. And, were EPA to comply with its statutory mandate, many facilities that do not submit Tier II reports could be subject to a hazardous-substance spill-prevention rule. EPA concedes this limitation with its approach. *See* 83 Fed. Reg. at 29,519.[[1]](#footnote-1) But EPA nevertheless has irrationally declined to solicit any information from such non-Tier II facilities before proposing its do-nothing rule. Even assuming (incorrectly) that EPA could refuse to issue hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C), such willful ignorance does not provide a rational basis for defying Congress.

**2. National Response Center data understate the risk of future hazardous-substance spills**

EPA purports to have “analyzed the frequency and *reported impacts* of the *identified* CWA [hazardous substance] discharges.” 83 Fed. Reg. 29,501 (emphases added). But the list of identified hazardous-substance discharges EPA used is under-inclusive and its data about impacts is limited. “EPA analyzed CWA [hazardous-substance] discharges reported to the National Response Center (NRC) over a 10-year period to estimate the frequency of CWA [hazardous-substance] discharges and to understand the reported impacts of these discharges . . .” 83 Fed. Reg. at 29502. This dataset is incomplete from the start because, as EPA acknowledges, “some discharges may not be reported to NRC” due to the NRC’s reliance on self-reporting of spills. *Id.* at 29,503. EPA has used much stronger language to describe these limitations in the past. *See* U.S. EPA Office of Emergency Management, Oil Storage on U.S. Farms: Risks and Opportunities for Protecting Surface Waters 28, EPA-530-R-15-002 (June 2015) (describing the “significant limitations of using . . . NRC data to evaluate spill risk.”). Indeed, EPA has admitted that NRC data should “represent the minimum number of spills” because “it is likely that they greatly underestimate the actual number of spills because of significant underreporting.” 62 Fed. Reg. 54,508, 54,527 (Oct. 20, 1997).

There are many other limitations to using the NRC database, as EPA is aware. First, NRC Reports are generally received immediately after an incident, before a facility has an accurate picture of the extent of the discharge, and there is no requirement to update the report to correct inaccuracies. 83 Fed. Reg. at 29,503. For example, a spill that is initially reported as not reaching water may later reach water, and there is no requirement that the NRC database be updated to reflect such subsequent developments. The database is also at times inaccurate regarding “the substance reported, the quantity reported, the source, and the nature or impacts of the discharge.” *Id.* Each of these pieces of information is critical to understanding the actual risks and effects from hazardous-substance spills. In EPA’s own words, NRC data cannot be considered complete because

[s]pill incidents are not always reported due to lack of awareness of the reporting requirements or the information provided is preliminary and incomplete, making it difficult to conclusively establish the source, cause, and impacts of the discharge. For example, a spill may be reported to the NRC and described only as a “mystery sheen” that upon further investigation turns out to have originated from a tank at a facility. The NRC report will not reflect the latter information. Incidents that do not prompt activation of state or federal government responders may not get investigated or recorded in other sources (e.g., newspaper, state or Federal emergency response reports), making it difficult to confirm the circumstances, magnitude, and impacts of a discharge.

Oil Storage on U.S. Farms at 28–29; *see also* RIA 34–35.

EPA further exacerbates the limitations of the NRC data by parsing that data in a flawed attempt to hone in on only hazardous-substance spills that were reported to reach waterways and had reported impacts. *Id.* at 29,502. In doing so, it manages to take the number of hazardous-substance spills reported to NRC from the already understated total of over 9000 spills down to around 2500 spills reported to have reached water, down again to just 117 spills reported to have reached water and had “reported impacts.” *Id.* But if the purpose of looking at retrospective data is to attempt to predict the future (which is already a fraught endeavor because “historical CWA HS discharges do not predict future incidents,” *id.* at 29,502 n.10),[[2]](#footnote-2) EPA’s slices of NRC data do not quantify that risk. As explained above, NRC data is incomplete and unreliable when it comes to whether reported spills reach water. And this unreliability is almost certainly a one-way ratchet: it is far more likely that spills reaching water will be *underreported* rather than *overreported.*

Given the limitations of NRC data, the most relevant data for EPA to consider would be spills of CWA hazardous substances *with the potential* to reach water. EPA, however, refused to consider “the proximity of facilities to water,” RIA 8, 36, and explicitly rejected comments suggesting that it should consider data on all spills, rather than just spills that are reported to have reached water, *see, e.g.*, EPA Response to Comments on Proposed Information Collection Request 12–13 (2018), EPA-HQ-OLEM-2017-0444-0015.

EPA’s review of “reported impacts” for CWA hazardous-substance spills that reached water faces the same issues. Neither NRC data nor National Toxic Substances Incidents Program data reviewed by EPA require comprehensive reporting of negative impacts, such as “loss of productivity due to a facility or process unit shutting down as a result of a discharge, emergency response and restoration costs, transaction costs such as the cost of resulting litigation, damages to water quality, fish kills, or impacts to property values due to changes in perceived risk or reduced ecological services.” 83 Fed. Reg. at 29,503. Despite these shortcomings, EPA relies on this unreliable data for purposes of characterizing the risks of future spills as well as the benefits[[3]](#footnote-3) of any spill-prevention regulations. Such slapdash analysis, without attempting to account for the documented existence of underreporting, does not provide a rational basis for defying a Congressional command to regulate.

**3. EPA should develop and distribute ICRs to fill its data gaps before taking final action**

Despite these deficiencies in facility and spill data—most of which are readily acknowledged by EPA—EPA has proceeded apace with its do-nothing proposal, rather than seeking out or collecting more data to inform a reasoned decision. EPA’s admission that it has looked at “the best *readily available* source of information on CWA [hazardous-substances] discharges in the United States, *id.* at 29,503 (emphasis added), betrays its failure here: that the agency looked at information it could quickly and easily obtain, without regard to whether more information was needed to determine whether it could eschew its obligations under section 311(j)(1)(C).

To understand the bare-minimum baseline of information EPA should have sought out, one need look no further than the agency’s plans to develop an ICR, which EPA itself has admitted are “necessary” to “support the rulemaking.” *See* Bi-Annual Update #1. EPA explains in its proposal that it intends

to supplement the information that this action is based on with an additional information collection. This information collection would be a voluntary survey of U.S. states, tribes, and territories that would request information on the number and type of facilities with CWA HS onsite; historical discharges of CWA HS; the ecological and human health impacts of those discharges; and existing state, territory, and Tribal programs that address discharge prevention of CWA HS.

*Id.* at 29,501. The information described above, and its obvious relevance to this rulemaking, underscores the thin, arbitrary basis for EPA’s do-nothing proposal. Taking EPA at its word that it will actually issue this ICR (despite its failure to do so for more than two years), the information in this ICR is largely data that EPA does not currently have, but needs in order to fully evaluate all important aspects of the problem.[[4]](#footnote-4) Yet, without that information, EPA has plowed ahead with a proposal to issue no regulations, and decided it will consider the results of ICR later and then perhaps “us[e] the results . . . to further inform this regulatory action.” *Id.* EPA’s approach of issuing a proposal with its head still stuck in the sand betrays a process with a predetermined result, rather than the type of open-minded approach to rulemaking that the Administrative Procedure Act requires.

EPA should follow through on the ICR process to collect the information is has admitted is “necessary” and, once it receives that information, make it available for public comment with enough lead time for the agency to receive and evaluate comments before taking final action. *See* 83 Fed. Reg. at 29,503.

**B. EPA’s proposed do-nothing approach understates the risk of hazardous-substance spills, particularly for low-income communities and communities of color**

By definition, spills of hazardous substances that reach water “present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.” 33 U.S.C. § 1321(b)(2)(A). Contrary to Congress’ goal “that there should be *no* *discharges* . . . of hazardous substances,” *id.* § 1321(b)(1) (emphasis added), EPA treats the hundreds of hazardous-substance spills that are reported to the NRC each year (and the many more that are not) as inevitable and carrying negligible consequences. EPA does not address the significant health risks from exposure to hazardous-substances.

According to the Agency for Toxic Substances and Disease Registry, exposure to some of the most commonly spilled hazardous substances—including ammonia, benzene, hydrogen sulfide, sulfuric acid, hydrogen cyanide, and hydrochloric acid—is known to cause a range of acute and chronic health problems including severe burns, impairment of nervous system functions, corrosion of the respiratory and gastrointestinal organs, cancer, and even death. *See* *Agency for Toxic Substances and Disease Registry Toxic Substances Portal*, https://www.atsdr.cdc.gov/substances/ index.asp; *see also* Decl. of Dr. Kristi Pullen ¶¶ 9–20, *Envtl. Justice Health All. for Chem. Policy Reform v. EPA*, 15-cv-5705, Dkt. No. 41 (S.D.N.Y. filed Dec. 11, 2015). The list of hazard traits grows significantly longer when looking at all CWA hazardous substances and includes, among others, reproductive toxins, developmental toxins, carcinogens, neurotoxins, and respiratory toxins, dermatoxins, and nephrotoxins. *See* Pullen Decl. ¶ 21. EPA largely ignores these serious health risks from hazardous-substance spills, in favor of purely numerical analysis based on unreliable and incomplete spill data.

EPA’s suggestion that hazardous-substance spills are not a problem is particularly troubling given the disparate impact that hazardous-substance spills have on communities of color and low-income communities. NRC data from 2005 to 2014 show that hazardous-substance spill occurrence across the United States is positively correlated in a statistically significant manner with communities that are made up of higher percentages of people of color. *See* Pullen Decl. ¶¶ 25, 27. To be sure, the fact that communities of color and low-income communities bear a disproportionate share of the risks of and effects from chemical disasters, like hazardous-substances spills, is not news. *E.g.*, U.S. General Accounting Office, Siting of Hazardous Substance Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities, GAO-83-168 (June 1, 1983); United Church of Christ Justice & Witness Ministries, Toxic Wastes and Race at Twenty: 1987–2007 (2007). Nor would issuing comprehensive hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C) solve the persistent problem of environmental injustice in America. But such regulations, as shown *infra* Part II.C, would provide protections for communities across the United States. And the greatest relief would accrue to those communities closest to covered facilities which, the data show, are more likely to be communities of color and low-income communities that are also facing cumulative risks and burdens to their health from exposure to harmful chemicals from other sources.

Given the clear environmental justice issues at play, it is striking that EPA claims that Executive Order 12,898 is not applicable. *See* 83 Fed. Reg. at 29,520. That Executive Order provides that

To the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations . . . .

Exec. Order No. 12,898 § 1-101, 58 Fed. Reg. 7629 (Feb. 11, 1994). EPA claims the Executive Order does not apply because the agency’s proposal “does not establish an environmental health or safety standard and imposes no regulatory requirements.” 83 Fed. Reg. at 29,520. But this justification gets the analysis anticipated by the Executive Order on environmental justice backward. By proposing no new action, and in effect perpetuating the status quo, EPA maintains the existing, documented environmental injustices associated with CWA hazardous spills, and further ignores the meaningful opportunity to address “disproportionately high and adverse human health or environmental effects” through the action that EPA could have taken, and indeed, is mandated to take.

Executive Order No. 12,898 loses meaning if agencies need only consider disproportionate impacts to environmental justice communities when proposing to take affirmative regulatory action, but not when refusing to do so. That is particularly true here. For even assuming (incorrectly) that EPA has the authority to refuse to issue hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C), the *default* presumption in this rulemaking is still that EPA will, consistent with Congress’ command, “issue regulations.” 33 U.S.C. § 1321(j)(1). EPA therefore must consider whether deviating from that presumption by refusing to issue hazardous-substance spill-prevention regulations will have disproportionate impacts on communities of color and low-income communities. Based on the spill data available, combined with the robust evidence that chemical facilities are disproportionately located near communities of color and low-income communities, *see, e.g.*, Envtl. Justice Health All. for Chem. Policy Reform, Who’s In Danger? Race, Poverty, and Chemical Disasters (2014), it is apparent that EPA’s proposed refusal to regulate would have disproportionate impacts on environmental justice communities. EPA should acknowledge and consider those disparate impacts in its analysis and adopt a final rule that provides robust public health and environmental protections for these environmental justice communities.

**C. Existing regulations do not support EPA’s do-nothing approach**

Even assuming EPA has discretion to defy Congress’s command that it “shall issue” hazardous-substance spill-prevention regulations (and, as discussed above, EPA does not have that discretion), EPA has not shown that the “existing framework of [its] regulatory requirements relevant to preventing and continuing CWA HS discharges” supports its do-nothing approach. *E.g.*, 83 Fed. Reg. at 29,501. To the contrary, a close look at the patchwork of laws EPA has identified shows that existing regulations do not provide baseline spill-prevention and -response requirements that apply to *all* hazardous substances at *all* onshore facilities under EPA’s jurisdiction. EPA’s proposal implicitly recognizes this shortfall. *See* 83 Fed. Reg. at 29,505 (explaining that it identified programs “identified as regulating *at least some* CWA HS; *or* regulating *at least some* facilities that produce, store, or use CWA HS” (emphases added)); *id.* at 29,514 (“[T]he applicability criteria for some of the regulatory programs do not rely solely on chemical identity, but include other factors (*e.g.*, whether the substance is a waste, the industrial category of the facility) . . . .”). So does the agency’s Background Information Document. *See* Background Information Document: Review of Relevant Federal and State Regulations (“BID”) 6, EPA-HQ-OLEM-2018-0024-0111 (Mar. 12, 2018) (“Variations among program requirements limit the conclusions that may be drawn regarding the extent of existing discharge prevention regulatory coverage relevant to CWA HS.”).

Below, we provide the analysis EPA should have done, and discuss why, both individually and collectively, the “regulatory requirements” EPA has identified do not justify the agency’s proposed do-nothing approach to CWA hazardous-substance spill prevention.

1. **CWA Multi-Sector General Permit for Industrial Stormwater**

EPA’s National Pollution Discharge Elimination System (NPDES) Multi-Sector General Permit for industrial stormwater (MSGP) does not support EPA’s do-nothing proposal. As an initial matter, the MSGP is not a spill-prevention rule. The MSGP is intended to mitigate pollution from *stormwater* runoff across industrial facilities. *See* MSGP § 1.1.2. Hazardous-substance spills are not a type of stormwater discharge under the permit. Nor are they a type of “allowable non-stormwater discharge” covered under the MSGP. *See id.* § 1.1.3.1 (listing general “allowable non-stormwater discharges for all sectors of industrial activity”); *id.* § 8.G.4.2.10 (listing as a “prohibited” non-stormwater discharge any “[t]oxic or hazardous substances from a spill or other release”); *id.* § 8.J.4.2.10 (same). As EPA explained back in 1984, spill-prevention rules and NPDES regulations serve different purposes and “do not replace” each other. *See* 49 Fed. Reg. 37,998, 38,014 (Sept. 26, 1984); *see also* 44 Fed. Reg. 32,854, 32,896 (June 7, 1979) (explaining that “while both [best management practices under NPDES permits] and SPCC Plans have many common features, their emphasis is different.”).

Although the MSGP does contain provisions that touch on spill prevention, those provisions are extremely high-level and are not tailored to hazardous substances under the Clean Water Act. *See, e.g.*, MSGP §§ 2.1.2.4, 5.2.3.3. The *entirety* of MSGP section 2’s spill-prevention and -response provision reads:

You must minimize the potential for leaks, spills and other releases that may be exposed to stormwater and develop plans for effective response to such spills if or when they occur in order to minimize pollutant discharges. You must conduct spill prevention and response measures, including but not limited to, the following:

* Plainly label containers (e.g., “Used Oil,” “Spent Solvents,” “Fertilizers and Pesticides”) that could be susceptible to spillage or leakage to encourage proper handling and facilitate rapid response if spills or leaks occur;\*
* Implement procedures for material storage and handling, including the use of secondary containment and barriers between material storage and traffic areas, or a similarly effective means designed to prevent the discharge of pollutants from these areas;
* Develop training on the procedures for expeditiously stopping, containing, and cleaning up leaks, spills, and other releases. As appropriate, execute such procedures as soon as possible;
* Keep spill kits on-site, located near areas where spills may occur or where a rapid response can be made; and
* Notify appropriate facility personnel when a leak, spill, or other release occurs.

*Id.* § 2.1.2.4. These provisions, while perhaps detailed enough for the context of permitting stormwater discharges under the NPDES program, are far from adequate to satisfy the CWA’s separate command that EPA issue specific spill-prevention regulations for hazardous substances. Indeed, the provisions do not address hazardous substances at all, much less “establish[]procedures, methods, and equipment and other requirements for equipment” to prevent hazardous-substance spills. *See* 33 U.S.C. § 1321(j)(1)(C). The provisions do not even set forth the basic requirement that storage containers or tanks for hazardous substances be suitable for the substances at issue and the conditions of storage. *Cf.* 40 C.F.R. § 112.9(c)(1) (prohibiting the “use [of] a container for the storage of oil unless its material and construction are compatible with the material stored and the conditions of storage”).

Were there any doubt that the MSGP is not intended to displace (or capable of displacing) specific spill-prevention rules, the MSGP cross-references spill-prevention plans under the Oil Spill Prevention Control and Countermeasure (SPCC) Rule twelve times, with no suggestion that that the SPCC Rule—issued under the same statutory mandate and authority at issue in this rulemaking—is satisfied through compliance with the MSGP’s barebones spill-prevention guidelines. This makes sense. While the MSGP spends less than a page setting forth its general spill-prevention guidelines, MSGP § 2.1.2.4, the SPCC Rule spans *88 pages* in the Code of Federal Regulations, *see* 40 C.F.R. part 112. EPA clearly did not intend the high-level MSGP to supplant the SPCC Rule’s specific spill-prevention regulations for *oil*; it is arbitrary and capricious for EPA to now suggest that the MSGP does exactly that with respect to the agency’s obligation to issue specific spill-prevention regulations for the over 300 chemicals listed as hazardous substances under the CWA.

Finally, the MSGP applies only in a few states, most territories, and most of Indian country. *See* MSGP app. C. A permit that applies to such a small part of the United States cannot serve as the basis for EPA’s refusal to issue the nationwide hazardous-substance spill-prevention regulations mandated by Congress. Although EPA alleges, in a footnote, that the MSGP is “representative of stormwater permits in general,” 83 Fed. Reg. at 29,506 n.16, it provides no support for that statement. But again, even assuming the MSGP were “representative” of spill-prevention measures being taken at under stormwater discharge permits at industrial sites across the country, it still would not support EPA’s proposal. Simply put, the MSGP’s high-level guidelines for general spill-prevention measures are neither in form nor substance a replacement for the specific hazardous-substance spill-prevention regulations that EPA is required to issue under the CWA. The MSGP therefore does not support EPA’s do-nothing approach.

**2. Clean Air Act Risk Management Program (RMP Rule)**

The RMP Rule does not support EPA’s do-nothing proposal. While the purported goal of the RMP Rule—prevention and minimization of harm from chemical disasters under the Clean Air Act, *see* 42 U.S.C. 7412(r)(1)—aligns with Congress’s goal in mandating hazardous-substance spill-prevention regulations under the CWA, *see* 33 U.S.C. § 1321(b)(1), the RMP Rule’s narrow protections are no substitute for a standalone hazardous-substance spill-prevention rule.

The RMP Rule applies to facilities with more than a threshold amount of one of 77 toxic substances or 63 flammable substances in a single “process”. 83 Fed. Reg. at 29,507; *see also* 40 C.F.R. § 68.3 (defining “process”); *id.* § 68.130(a) (list of “toxic substances”), (c) (list of “flammable substances”). As EPA has conceded, however, the RMP Rule covers only “some” of the approximately 330 hazardous substances listed under the CWA. *See* 83 Fed. Reg. at 29,507; BID 16. Indeed, a comparison of the lists of covered substances shows that *less than 8%* (only 26) of CWA hazardous substances are regulated substances under the RMP Rule.[[5]](#footnote-5) *Compare* 40 C.F.R. § 116.4 tbl. A, *with* *id.* § 68.130 tbl.1, *and* *id.* § 68.130 tbl.2. And of the 13 most commonly spilled hazardous substances identified by EPA, *see* 83 Fed. Reg. at 29,502 tbl.2, *only four* (ammonia, chlorine, hydrochloric acid, and nitric acid) are covered under the RMP Rule. Even for those hazardous substances, the threshold quantityfor the RMP Rule is significantly higher than the CWA’s reporting requirements for spills. For example, for chlorine the reporting requirement for spills under the CWA is 10 pounds, but the RMP Rule does not apply to a facility unless it has more than 2500 pounds of chlorine in a single “process”. *Compare* 40 C.F.R. § 68.130 tbl.1 (setting threshold quantity of chlorine at 2500 pounds under RMP Rule), *with* *id.* § 117.3 tbl. (setting the reportable quantity of chlorine spill at 10 pounds); *see also* 83 Fed. Reg. 29,507 (“[T]he requirements in the rule apply to processes.”). In other words, while EPA has concluded that a spill of as little as 10 pounds of chlorine “may be harmful” to public health or the environment, *see* *id.* § 117.1(a), the RMP Rule does not impose any requirements on a facility unless it has *250 times* that amount in a single process.

This is not to say the RMP Rule is irrelevant to this rulemaking. Indeed, EPA should evaluate the protections in the RMP Rule, including the risk evaluation, accident prevention, response planning, training, auditing, and incident investigation components within the RMP Rule, and determine whether and how they can be adapted to apply the full suite of CWA hazardous substances.[[6]](#footnote-6) The RMP Rule’s limited protections vis-à-vis spill prevention for CWA hazardous substances, however, do not support EPA’s no-action proposal here.

**3. CWA Oil Spill Prevention Control and Countermeasure Rule (SPCC)**

The SPCC Rule is irrelevant to whether EPA should issue a hazardous-substance spill-prevention rule for a simple reason: it “applies only to oil” or “oil mixed with other substances.” 83 Fed. Reg. at 29,507; *see also* BID 7 (“[T]he SPCC Rule in 40 CFR Part 112 applies to oil.”); 40 C.F.R. § 112.2 (defining “oil”). In other words, facilities or tanks storing hazardous substances—but not oil—are not subject to the SPCC Rule. *See also* 33 U.S.C. § 1321(b)(2) (defining “hazardous substance” in part as “such elements and compounds” meeting specific criteria “other than oil as defined in this section”).

The SPCC Rule is, however, an ideal model for a spill-prevention and -response regulation for hazardous substances. *See also infra* Part III. EPA issued the SPCC Rule under *the same authority*—and mandate—that applies to this rulemaking for hazardous substances. *See* 33 U.S.C. § 1321(j)(1)(C); *see also* 38 Fed. Reg. 34,164, 34,164 (Dec. 11, 1973) (describing SPCC Rule as “required by an[d] pursuant to section 311(j)(1)(C)”); BID 17 (“Section 311(j)(1)(C) of the CWA, 33 U.S.C. 1251 [sic], *requires* the President to issue regulations establishing procedures, methods, equipment, and other requirements to prevent discharges of oil from vessels and facilities and to contain such discharges.” (emphasis added)). And the SPCC Rule has numerous features that could be adopted into a robust hazardous-substance spill-prevention rule. *See generally infra* Part III. As described by EPA, the SPCC Rule requires non-transportation-related onshore facilities storing certain amounts of oil to develop and implement SPCC plans for oil spill prevention and response, “including a facility diagram, oil discharge predictions, secondary containment or diversionary structures, overfill prevention, requirements for inspections, transfer procedures, personnel training, and a five-year plan review.” 83 Fed. Reg. at 29,507. But those protections, being limited to “oil,” do not extend to “hazardous substances,” and thus do not support EPA’s proposal to not issue spill-prevention regulations for hazardous substances.

**4. FIFRA Pesticide Management Rule**

The Pesticide Management Rule (40 C.F.R. part 165), issued under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), does not support EPA’s no-action proposal. As an initial matter, the Rule only applies to specific types of businesses in the agricultural pesticide industry. *E.g.*, 40 C.F.R. §§ 165.20(b), .30(b), .80(b). Moreover, while the Rule dictates container-design and secondary-containment requirements, *see* *id.* §§ 165.25(a), 165.85, those requirements only apply to chemicals that meet FIFRA’s definition of a “pesticide,” 83 Fed. Reg. at 29,508; BID 18. While, according to EPA, a little less than 1/3 of CWA hazardous substances “*may* be used as pesticides,” *see* 83 Fed. Reg. at 29,508 (emphasis added), FIFRA’s definition of “pesticide” requires that a substance also be “intended for” use as a pesticide. *See* 7 U.S.C. § 136(u). Thus, unless the CWA hazardous substance is actually “intended for” use as a pesticide, the Pesticide Management Rule’s spill-prevention requirements do not apply. *Cf.* BID 7 (noting the Pesticide Management Rule “applies to specific containers or areas where containers are stored”).

While the Pesticide Management Rule’s requirements for container design and secondary containment may serve as a model for parts of a spill-prevention rule that applies to all CWA hazardous substances, they are no substitute for such a rule. The Pesticide Management Rule’s protections for a subset of CWA hazardous substances in the limited context of pesticide use does not support EPA’s proposal to not issue spill-prevention regulations for all CWA hazardous substances.

**5. Pesticide Worker Protection Standard**

The Pesticide Work Protection Standards (40 C.F.R. part 170), issued under FIFRA, do not support EPA’s do-nothing approach. These worker-safety requirements apply only to “chemicals that meet the [FIFRA] definition of pesticide,” 83 Fed. Reg. at 29,508; BID 18, at specific types of “agricultural establishments,” *e.g.*, 40 C.F.R. §§ 170.102, .202, .303. As described above, FIFRA’s definition of pesticide requires that a substance be “intended for” use as a pesticide, *see* 7 U.S.C. § 136(u). Thus, unless the CWA hazardous substance is actually “intended for” use as a pesticide and located at a covered agricultural establishment, the Pesticide Worker Protection Standard is not triggered.

The Pesticide Worker Protection Standard’s protections, applicable to only a subset of CWA hazardous substances in the limited context of pesticide use at a small subset of non-transportation-related onshore facilities does not support EPA’s proposal to not issue spill-prevention regulations that would apply to all CWA hazardous substances at all non-transportation-related onshore facilities.

**6. RCRA Standards for Generators of Hazardous Waste**

The Resource Conservation and Recovery Act (RCRA) standards for generators of hazardous waste do not support EPA’s no-action proposal. These regulations on their face only apply to generators of “hazardous waste,” as defined under RCRA. As EPA concedes, only “some” unquantified number of CWA hazardous substances would qualify as “hazardous” under RCRA. 83 Fed. Reg. at 29,508. And, more importantly, “RCRA regulations apply only to *waste materials* (as opposed to raw materials or intermediate products).” *Id.* (emphasis added); *accord* *id.* at 29,516 (“Their applicability depends on whether a waste is present, and whether that waste meets the regulatory definition of hazardous waste.”). RCRA’s narrow definition of “hazardous waste” includes only “discarded materials,” 40 C.F.R. § 261.2(a)(1)—that is, materials that are “abandoned,” “recycled,” or “considered inherently waste-like,” *id.* § 261.2(a)(2)(i). The definition generally does not cover chemicals—whether or not CWA hazardous substances—that are being created, stored for use, or used (or reused, *see id.* § 261.2(e)(1)) at a facility. In other words, even for those CWA hazardous substances that might be deemed “hazardous” under RCRA, spill-prevention requirements for generators do not kick in until a facility is done using the hazardous substance and discards it. *See, e.g.*, *id.* § 262.251(a) (duty to minimize unplanned releases applies only for “hazardous wastes”); *id.* § 262.260(b) (contingency plan requirements apply only to “minimize hazards” from unplanned release of “hazardous wastes”).

By focusing only on “waste,” RCRA’s generator regulations address only a small part of the spill-prevention problem for CWA hazardous substances. They therefore do not support EPA’s proposal to not issue CWA hazardous-substance spill-prevention regulations.

**7. RCRA Standards for Owners/Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities**

The RCRA standards for owners and operators of hazardous-waste facilities similarly do not support EPA’s no-action proposal. Like RCRA’s hazardous-waste generator regulations, the hazardous-waste facility regulations are underinclusive because they apply only to “hazardous waste” and not to the storage of or industrial processes involving the use of CWA hazardous substances prior to those substances being “discarded.” Once again, by focusing only on “waste,” the hazardous-waste facility regulations capture only a sliver of the spill-prevention problem Congress intended CWA hazardous-substance spill-prevention regulations to address. They therefore do not support EPA’s proposal to not issue CWA hazardous-substance spill-prevention regulations.

**8. RCRA Underground Storage Tank Rule (UST Rule)**

The UST Rule does not support EPA’s do-nothing proposal. Issued pursuant to a statutory mandate in RCRA, *see* 42 U.S.C. § 6991b(a), the UST Rule applies only to underground tanks, which it defines, subject to several exceptions, as “any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 percent or more beneath the surface of the ground.” 40 C.F.R. § 280.12. Portions of the UST Rule apply to so-called “hazardous substance UST systems,” *see* *id.* § 280.42, which generally includes UST systems storing more than 110 gallons of any CWA hazardous substance, *see id* § 280.12; 83 Fed. Reg. 29,509 (“All designated CWA HS are also defined as CERCLA hazardous substances.”). The UST Rule does not, however apply to *above-ground* storage tanks, or any other non-transportation-related onshore facilities that do not meet the definition of an “underground storage tank.”

Because the UST Rule addresses under RCRA only a discrete subset of the facilities for which Congress has mandated that EPA issue hazardous-substance spill-prevention regulations under the CWA, it does not support EPA’s proposal to not issue *any* hazardous-substance spill-prevention regulations under the CWA.

**9. EPCRA Planning Rule**

The Emergency Planning and Notification Rule (40 C.F.R. part 355), issued under EPCRA, does not support EPA’s no-action proposal. The Planning Rule’s minimal requirements to facilitate development of state and local emergency response plans, *see* 40 C.F.R. § 355.20, apply, with limited exception, only to facilities with an “extremely hazardous substance” above threshold quantities onsite, *id.* § 355.10(a). Fewer than 20% of CWA hazardous substances are listed “extremely hazardous substances” under EPCRA. *See* 83 Fed. Reg. at 29,509. And of the 13 most commonly spilled CWA hazardous substances (as determined by EPA), *see* 83 Fed. Reg. at 29,502 tbl.2, *only 5* (ammonia, chlorine, hydrogen chloride, nitric acid, and sulfuric acid) are listed as “extremely hazardous substances.” In other words, the majority of CWA hazardous substances—including most of the most commonly spilled CWA hazardous substances—are not covered by the Planning Rule’s emergency planning requirements.[[7]](#footnote-7) Applying to such a small subset of CWA hazardous substances, the EPCRA Planning Rule does not support EPA’s do-nothing proposal.

1. **EPCRA Reporting Rule**

The EPCRA Reporting Rule (40 C.F.R. part 370) does not support EPA’s do-nothing approach. As relevant to this rulemaking, the EPCRA Reporting Rule applies to facilities that are required by the Occupational Safety and Hazard Administration to prepare and have available a material safety data sheet, and that handle or store hazardous chemicals above threshold amounts. The threshold for the several dozen CWA hazardous substances considered “extremely hazardous substances” under EPCRA is 500 pounds. 40 C.F.R. § 370.10(a)(1). For all other CWA hazardous substances, the threshold is 10,000 pounds. *Id.* § 370.10(a)(2); 83 Fed. Reg. at 29,509. Facilities subject to the Reporting Rule must submit material safety data sheets and annual hazardous chemical inventory reports to state and local emergency response committees. *See* 40 C.F.R. part 370 subpart C.

The EPCRA Reporting Rule applies to many non-transportation-related onshore facilities handling or storing CWA hazardous substances above the applicable threshold amount. The Rule’s limited reporting regime does not, however, support EPA’s proposal to refuse to issue regulations to prevent and contain hazardous substance spills. As described later, *see infra* Part III.A, EPA should establish a more robust reporting regime for CWA hazardous substances—in particular, requiring reporting directly to EPA as well as local and state authorities. While a facility’s disclosure of the presence of hazardous substances is critical for the surrounding community’s ability to assess risk before any spill (and effectively respond after), reporting alone does not prevent spills, and cannot justify EPA’s do-nothing proposal here.

1. **Pulp and Paper Effluent Guidelines**

The Pulp and Paper Effluent Guidelines (40 C.F.R. part 430) apply only to a “pulp, paper, or paperboard mill.” 40 C.F.R. § 430.00(a); *see also* BID 7 (“applicability is restricted to the pulp, paper, or paperboard industry.”). Because those Guidelines regulate only a small subset of non-transportation-related onshore facilities that store or use CWA hazardous substances, they do not support EPA’s proposal issue *no* CWA hazardous-substance spill-prevention regulations for *any* category of industrial sources.

Moreover, although the Pulp and Paper Effluent Guidelines do impose best management practice (BMP) requirements for covered facilities, those requirements apply only to “*spent* pulping liquors, soap, and turpentine.” 40 C.F.R. 430.03(d)(2)–(3) (emphases added). On their face, the Guidelines do not apply to *any* CWA hazardous substance that does not constitute (or constitute part of) a “pulping liquor,” “soap,” or “turpentine.” Nor do they apply to a pulping liquor, soap, or turpentine that is being stored, but has not yet been used—that is, “spent”—in the pulping process. The Pulp and Paper Effluent Guidelines, by applying to only a sliver of CWA hazardous substances at a fraction of non-transportation-related onshore facilities, does not support EPA’s no-action proposal.

1. **State regulations**

Although EPA has made clear that existing state regulations “do not serve as a basis for [its] proposal,” 83 Fed. Reg. at 29,516, it is critical to note that EPA has identified *only* 14 states that “regulate the proper handling and storage of chemicals to prevent accidents and discharges,” *id.* 29,510 & n.18. This fact, along with the BID’s acknowledgement that the “the scope, purpose, and type of the programs and corresponding regulations [for these states] vary significantly,” BID 32, underscores the continued need—recognized by Congress over forty-five years ago—for nationwide hazardous-substance spill-prevention regulations that provide a guaranteed protections for all communities across the entire country. Indeed, no state—based on the information in the docket—appears to provide for all CWA hazardous substances the full panoply of spill-prevention program elements identified by the EPA in its proposal, *See* 83 Fed. Reg. at 29,504 tbl.3.

1. **Industry standards**

EPA has disclaimed reliance on industry standards (primarily, those of the National Fire Protection Association and International Fire Code, *see* BID 30 tbl.3-1) as a basis for its do-nothing proposal. 83 Fed. Reg. at 29,516. This is appropriate. Courts have consistently held that the existence of voluntary standards and programs cannot supplant a statutory mandate for an agency to regulate. *See Massachusetts*, 549 U.S. at 533; *Pub. Citizen*, 901 F.2d at 157.

1. **Conclusion**

As shown *supra* Part II.C.1.–11, existing EPA regulations do not individually justify the agency’s proposed do-nothing approach. Nor do they, analyzed collectively, support EPA’s proposal: eleven wrongs do not make a right.

EPA essentially concedes as much in its proposal. EPA explains that it identified regulations that regulate “at least some” CWA hazardous substances or “at least some facilities that produce, store, or use” CWA hazardous substances. 83 Fed. Reg. at 29,505. EPA’s BID goes further, explaining that “[v]ariations among program requirements limit the conclusions that may be drawn regarding the extent of existing discharge prevention regulatory coverage relevant to CWA [hazardous substances].” BID 6. And this itself is an understatement: variations among the program requirements limit EPA’s ability to conclude that existing regulations cover all CWA hazardous substances at all non-transportation-related onshore facilities *because* *they unequivocally do not provide such coverage*.

EPA nonetheless claims that its analysis of existing regulations— distilled into a table where each regulation gets a “check mark” if it “includes provisions addressing *at least one* *sub-element* of the program element,” *see* 83 Fed. Reg. at 29,511 tbl.5 (emphasis added)—“indicates that, for all nine program elements, there are existing *cumulative* EPA regulatory requirements under various programs for accident and discharge prevention *relevant to* CWA [hazardous substances],” *id.* at 29,510 (emphases added). But EPA has not provided evidence or analysis supporting its claim that existing regulatory requirements are truly “cumulative” (i.e., redundant or duplicative) for each “program element.” Nor has the agency explained how accident prevention programs that are “relevant to” CWA hazardous substances can supplant the agency’s explicit statutory obligation to issue spill-prevention and -containment regulations forall CWA hazardous substances.

EPA’s shallow analysis of the collective coverage of existing EPA regulations repeats the errors in its analysis of each regulation in isolation: it ignores that some regulations only tangentially reference spill-prevention, *supra* Part II.C.1, others cover only oil, pesticides, hazardous “waste”, or less than 10 percent of CWA hazardous substances, *supra* Part II.C.2-.7, and still others cover only a subset of non-transportation-related onshore facilities, *supra* Part II.C.8, .11. Repackaging these individually insufficient regulations into a table, *see* 83 Fed. Reg. at 29,511 tbl.5, or counting how many regulations “address[]” each “program element[]”, *see* 83 Fed. Reg. at 29,512–14, is no substitute for the analysis EPA should have done (and should do): determining what comprehensive hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C) should require, and then determining whether existing regulations already mandated equivalent spill-prevention measures for certain types of facilities or specific CWA hazardous substances. By refusing to establish a baseline for what hazardous-substance spill-prevention regulations should require before evaluating the current regulations, EPA is attempting to paper over significant gaps in the existing regulatory framework. That is arbitrary and capricious.

Finally, EPA provides no evidence to support its conclusory claim that “the majority of the identified CWA [hazardous substance] reported discharges to water from non-transportation-related sources have been discharges of chemicals currently subject to discharge or accident prevention regulatory requirements.” 83 Fed. Reg. at 29,516. Nor have they explained how the fact that, under the status quo, hundreds of CWA hazardous-substance spills are self-reported each year, supports their proposal to *not* issue any hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C). To the contrary, the fact that hazardous-substance spills still occur with such frequency indicates that there remains a regulatory role for comprehensive hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C).

In short, the patchwork of existing EPA regulations identified by the agency does not support its proposal to defy Congress’ command that it “shall issue regulations” to prevent hazardous-substance spills.

**D. EPA must issue hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C)**

As explained *supra* Part I, EPA lacks the authority to defy Congress and refuse to issue hazardous-substance spill-prevention regulations. But even if EPA *did* have such unprecedented authority, the record does not support EPA’s proposed do-nothing approach. Hazardous-substance spills continue to occur regularly across the United States, despite the CWA’s explicit goal “that there should be *no discharges* of . . . hazardous substances into or upon the navigable waters of the United States [or] adjoining shorelines.” 33 U.S.C. § 1321(b)(1) (emphasis added). And EPA’s own analysis shows that existing regulations that touch on hazardous-substance spill prevention do not cover all relevant facilities and all CWA hazardous substances.In short, the record does not support EPA’s implicit claim that the problem that Congress sought to rectify when it passed CWA section 311(j)(1)(C) has been addressed through alternative and equivalent means. Absent that showing, and even assuming (baselessly) that EPA had authority to second-guess statutory mandates, it would be arbitrary, capricious, and contrary to law for EPA to reject Congress’ command that the agency “shall issue” hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C).

**III. EPA should issue a rule with comprehensive spill-prevention protections**

We urge EPA to issue what the agency refers to as a “prevention program” in its proposal. *See* 83 Fed. Reg. at 29,516. As described *supra* Part II.C., existing regulations do not provide a comprehensive, nationwide hazardous-substance spill-prevention protections. Comprehensive regulations are what the CWA requires, and what the EPA must issue here. *See* 33 U.S.C. § 1321(j)(1)(C) (requiring regulations that, at minimum, “establish[] procedures, methods, and equipment and other requirements for equipment” to prevent spills). A comprehensive “prevention program” should, at the very least, aim to accomplish three goals: (1) prevent spills in the first instance; (2) ensure spills that do occur are contained and cleaned up expeditiously; and (3) ensure the public has the information it needs to avoid harm from spills.

Despite EPA’s misguided proposal to issue no hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C), the agency’s analysis in its proposal and the BID provides the basic framework for what the specific provisions in comprehensive “prevention program” would look like. At a high level, a prevention program should include provisions to address all nine of the “program elements” EPA identifies in its proposal—(1) safety information; (2) hazard review; (3) mechanical integrity; (4) personnel training; (5) incident investigations; (6) compliance audits; (7) secondary containment; (8) emergency response plans; and (9) response plan coordination—as well as the additional “administrative program elements” EPA has identified: (10) developing a plan in accordance with good engineering practices; (11) updating the plan as operations or equipment changes; (12) and record-keeping to document compliance. *See* 83 Fed. Reg. at 29,511 tbl.3, 29,516. Many of these requirements could modeled after the SPCC Rule’s oil spill-prevention and -containment requirements. *See* 40 C.F.R. part 112. Indeed, EPA should use the longstanding and familiar SPCC Rule as a starting point for its hazardous-substance spill-prevention regulations.

We urge EPA to issue hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C) that contain the following requirements:

**A. Reporting to EPA**

Any hazardous-substance spill-prevention regulation should require covered facilities to report annually to EPA the types and quantities of CWA hazardous substances the facility produces, uses, stores, or otherwise handles (hereafter, “stores,” “stored,” or “storing”) on site. EPA does not currently know the universe of non-transportation-related onshore facilities where CWA hazardous substances are stored. *See* 83 Fed. Reg. at 29,519. The agency therefore does not know where a hazardous-substance spill-prevention rule—when issued—would apply. Any hazardous-substance spill-prevention rule should remedy this problem by requiring each covered facility to report at least annually to EPA the hazardous substances it is storing, and in what quantities. Depending on the thresholds EPA identifies for each of the 300-plus CWA hazardous substances, *see infra* Part III.H, for many facilities, the reporting could be satisfied by submitting to EPA the Tier II reports they are already required to submit to state and local emergency response officials under ECPRA. For covered facilities that are not subject to Tier II reporting requirements, EPA could require a similar or even identical form of reporting for CWA hazardous substances. Whatever form of reporting EPA requires, the agency should make the information collected easily available online for public inspection.

**B. Spill-prevention, -control, and -countermeasure planning**

The cornerstone of any regulations under CWA section 311(j)(1)(C) should focus on *prevention of spills in the first instance*. Any hazardous-substance spill-prevention rule EPA issues should therefore require each covered facility to develop a spill-prevention and -response plan that, among other things, identifies risks of spills at the facility and sets forth measures the facility has or will undertake to address those risks and respond to spills when they occur. EPA can, and should, use the planning requirements in the SPCC Rule (which apply to facilities that store oil) as a model for planning requirements for facilities that store hazardous substances. *See* 40 C.F.R. § 112.3. For example, facilities storing hazardous substances should be required to “prepare in writing and implement” a plan, *id.*, that is consistent with “good engineering practices,” *id.* § 112.7, and that describes in detail where and how the facility stores hazardous substances (and in what quantity), *id.* § 112.7(a)(3), how the facility will prevent and contain hazardous-substance spills, *id.* § 112.7(c), and how the facility’s actions comply with other spill-prevention and -response requirements in the regulation, *see, e.g.*, *id.* § 112.7(a). As part of the planning process, facilities should also be required to conduct a “hazard review.” *See* 83 Fed. Reg. at 29,504. And relevant personnel should be trained on how to implement the spill-prevention, -containment, and -response practices set forth in the plan. *Id.* § 112.7(f); *see also* 83 Fed. Reg. at 29,504.

EPA should require that final plans be approved by management of the facility, *see* 40 C.F.R. § 112.7, as well as by a professional engineer, § 112.7(d). EPA should also require that each plan be updated every five years, or whenever there “is a change in the facility design, construction, operation, or maintenance”—including a change in hazardous substances stored—“that materially affects its potential for a discharge,” whichever is sooner. *See id.* § 112.5; s*ee also* 83 Fed. Reg. 29,516 (noting that a comprehensive “prevention program” would include “administrative program elements” such as developing and updating spill-prevention plans). Finally, EPA should require that all final plans be submitted to both the agency and local and state emergency planning committees.

**C. Mechanical integrity, inspections, and investigations**

Any hazardous-substance spill-prevention regulations should also contain mechanical integrity requirements for hazardous-substance storage tanks. Most critically, the regulations should require that the material and construction of any storage tanks used to store hazardous substances be suitable for the hazardous substance at issue as well as the conditions of storage. *See, e.g.*,40 C.F.R. §§ 112.8(c)(1), 112.9(c)(1). Trade associations, such as the American Petroleum Institute and Steel Tank Institute, have established specific design standards for tanks and tank appurtenances (including, for example, pipes). EPA should adopt standards, including requirements for double-wall tank design, overfill-prevention devices or measures, and leak-detection devices, for all tanks and containers used to store hazardous substances. *Cf.* *id.* §§ 280.42(b), .43–.44 (UST Rule requirements for hazardous-substance underground tanks and release detection).

In addition to container- and tank-design standards, EPA should require periodic—at least on an annual basis—inspection of all hazardous substance storage areas by a third-party professional engineer for damage or wear on storage containers or tanks, as well as the functioning of other spill-prevention or ‑containment devices or structures. This inspection should include integrity testing for all bulk storage containers or tanks. *See, e.g.*, *id.* §§ 112.8(c)(6), 112.12(c)(6); *cf. id.* § 68.73(d). EPA should also require, either as part of the inspection or as a separate process, a regular compliance audit regarding the facility’s compliance with applicable non-mechanical spill-prevention requirements (including provisions of the facility’s spill-prevention plan). *Cf.* *id.* §§ 68.58, .79 (requiring compliance audits under the RMP Rule). The results of each inspection and audit should be certified by the professional engineer, signed by facility management, and maintained on-site, with the spill-prevention and ‑containment plan, for at least three years. *See* *id.* § 112.7(e). These inspection and audit provisions are critical to ensuring that the protections promised by robust mechanical integrity requirements are realized in practice.

EPA should also require third-party incident investigations immediately following any reportable hazardous-substance spill. *See, e.g.*, 40 C.F.R. § 112.4(a). EPA should require that these investigations culminate in a written report identifying the cause of the spill, corrective action already taken by the facility, and recommendations for additional corrective action to avoid recurrence, including, if necessary, amendment of the facility’s spill-prevention plan. *Id.* §§ 112.4(a), (d). EPA should require that such reports be provided to all facility staff with responsibilities related to spill-prevention, ‑containment, or -response, and submitted to EPA as well as the relevant local and state emergency response committees. *Id.* These investigation provisions are critical to ensuring that facilities learn from prior mistakes and continue moving toward the CWA’s ultimate goal of no hazardous substance spills. *See* 42 U.S.C. § 1321(b)(1).

**D. Secondary containment**

In addition to ensuring hazardous substances are stored in appropriate containers or tanks, any hazardous-substance spill-prevention regulation should also require secondary containment for all hazardous-substance storage containers or tanks. As evidenced by the fact that more than half of the EPA regulations analyzed in the proposal contain some form of secondary-containment requirements, *see* 83 Fed. Reg. 29,511, secondary containment is a critical line of defense against spills that occur from sometimes-unavoidable instances of mechanical failure and human error. The regulations EPA discusses in its do-nothing proposal do not specify secondary-containment requirements for all non-transportation-related onshore facilities storing hazardous substances. EPA should fill that critical gap in this rulemaking.

EPA should model its secondary-containment requirements here on those in the SPCC Rule for oil. The SPCC Rule requires facilities, *inter alia*, to “[c]onstruct all bulk storage container installations so that you provide a secondary means of containment for the entire capacity of the largest single container and sufficient freeboard to contain precipitation.” 40 C.F.R. § 112.8(c)(2). The EPA should mandate similar secondary containment for all areas at covered facilities where hazardous substances are stored, and require that the method of secondary containment chosen be consistent with “good engineering practices” and suitable for the hazardous substances stored at the facility. In particular, EPA should require that all secondary containment systems “be capable of containing [the hazardous substance at issue] and . . . be constructed so that any discharge from a primary containment system, such as a tank or pipe, will not escape the containment system before cleanup occurs.” *See id.* § 112.7(c). Given that CWA hazardous substances, by definition, “present an imminent and substantial danger to the public health or welfare” when released to water, *see* 33 U.S.C. § 1321(b)(2), EPA should expand the SPCC Rule’s secondary-containment requirements to explicitly require that all containment systems are impervious, to also prevent the percolation of spilled hazardous substances into the soil and, ultimately, groundwater.

**E. Public notification of spills**

Any hazardous-substance spill-prevention regulation should require covered facilities to immediately notify the public, including but not limited to local and state emergency response commissions, EPA, local public health agencies, and local public water providers, in the event of any leak, spill, or other release of a CWA hazardous substance. Prompt public notification following a spill is necessary both to ensure the spill is quickly contained and cleaned up and to ensure that public health impacts from the spill are minimized.

EPA’s spill-notification requirements for the hazardous-substance spill-prevention regulations should build upon those already established under the EPCRA Planning Rule’s reporting requirements. Those requirements already apply to all CWA hazardous substances, *see supra* Part II.C.9, but only require reporting to local and state emergency response commissions. 40 CFR § 355.42(a). The Planning Rule’s requirements should be expanded for CWA hazardous substances to also require reporting to EPA, local public water providers, and local public health agencies. EPA should require that each facility’s spill-prevention and -containment plan include a list of the necessary individuals or institutions to notify in the event of a CWA hazardous-substance spill. *See, e.g.*, 40 C.F.R. 112.7(a)(3)(iv) (requiring SPPC Rule plans to contain contact list of individuals to call in event of a spill); 40 C.F.R*.* part 112 app.F § 1.3.1 (example of an emergency notification list in a facility response plan for oil spills). EPA should also require each facility to identify, in its plan, the name or names of individuals at the facility who are responsible for providing such notification.

**F. Bonding, pre-funding, or pre-arranging spill response**

EPA should also require covered facilities to either post bond for, pre-fund, or otherwise pre-arrange for response and cleanup activities that would arise from foreseeable spills. EPA has issued similar requirements for so-called “substantial harm” facilities storing oil. *See, e.g.*, 40 C.F.R. part 112 app.E § 3.1 (“A facility owner or operator shall identify sufficient response resources available, by contract or other approved means . . . to respond to a small discharge.”); *id.* § 4.1 (“A facility owner or operator shall identify sufficient response resources available, by contract or other approved means . . . to respond to a medium discharge of oil for that facility.”); *id.* § 4.5 (“[T]he plan shall, as appropriate, identify sufficient quantity of containment boom available, by contract or other approved means . . . to arrive within the required response times for oil collection and containment and for protection of fish and wildlife and sensitive environments.”); *id.* § 5.1 (“A facility owner or operator shall identify and ensure the availability of, by contract or other approved means . . . sufficient response resources to respond to the worst case discharge of oil to the maximum extent practicable.”). Any hazardous-substance spill-prevention regulations should include similar requirements to ensure that response efforts in the event of a spill are swift and that the public is not left footing the bill.

**G. Applicability criteria and thresholds**

Despite providing no indication of the applicability criteria or thresholds it would propose for a hazardous-substance spill-prevention regulation, EPA has requested comment on “appropriate applicability criteria or thresholds” for the alternative regulatory options it “considered.” 83 Fed. Reg. at 29,516.

As an initial matter, EPA’s hazardous-substance spill-prevention regulation must cover all non-transportation-related onshore facilities that store CWA hazardous substances. Beyond that, EPA will need to identify applicability thresholds for each of the 300+ CWA hazardous substances. These thresholds may apply to the entire regulation, such that a facility that is over the threshold for a single CWA hazardous substance must comply with all requirements under the regulation. *See, e.g.*, 40 C.F.R. § 68.130(b) tbl.1 (listing threshold quantities for RMP Rule). Or EPA may consider setting applicability thresholds for separate subparts of the regulation; for example, while reporting and spill-planning requirements may be triggered for the entire facility at one threshold for a given CWA hazardous substance, the secondary-containment requirements may be triggered for given tanks or storage areas based at a different threshold. EPA should also consider applying lower applicability thresholds for facilities located in especially sensitive areas, such as locations where a hazardous-substance spill could affect water bodies that serve as public-drinking water supplies, support subsistence fishing, or otherwise constitute sensitive habitats for important fish, wildlife, or plant species.

Because EPA has proposed to issue no hazardous-substance spill-prevention regulations, it is difficult to provide definitive recommendations on the most appropriate applicability thresholds for hazardous-substance spill-prevention regulations at this time. But EPA should start with the general presumption that the applicability thresholds should match the chemical-specific thresholds for reporting hazardous-substance spills under 40 C.F.R. § 117.3. It would be illogical for EPA to require a facility to *report* a spill of hazardous substance at a given level, but not to take any precautions to *prevent* and *respond* to such a spill.

**H. CWA hazardous substances list**

Related to the applicability criteria, EPA should undertake a rulemaking to update and expand the list of hazardous substances covered under the CWA.[[8]](#footnote-8) The CWA’s current list of hazardous substances includes only around 330 of the nearly 85,000 chemicals manufactured, stored, and used in the United States today.[[9]](#footnote-9) The list, however, has not been expanded for decades, even as new information has shown that chemicals harmful to public health and the environment are being stored near and spilled into waterways and public drinking supplies around the country. For instance, 4-methylcyclohexanemethanol—the chemical at issue in the Freedom Industries spill that left 300,000 people in West Virginia without safe water for over a week—is not listed as a hazardous substance under the CWA. Nor are PFOA, PFOS, or other PFASs, despite EPA’s recent recognition—in response to public outcry over decades of spills and intentional dumping—that these persistent and harmful chemicals should be designated as hazardous substances.[[10]](#footnote-10) The public should not have to wait for chemical disasters or public health crises before EPA does its job and updates its long-neglected list of CWA hazardous substances. *See* 33 U.S.C. § 1321(b)(2) (requiring EPA to “revise as may be appropriate” its list of CWA hazardous substances to reflect “such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines . . . present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches”). EPA should take this opportunity to evaluate and expand its list of CWA hazardous substances to reflect the full threat that chemical spills pose to communities, drinking water supplies, and waterways across the United States.

**I. Substituted compliance**

While existing federal regulations do not provide the comprehensive hazardous-substance spill-prevention protections Congress required in CWA section 311(j)(1)(C), some of those federal regulations do provide some level of spill-prevention protection for specific types of facilities or specific CWA hazardous substances. EPA can and should “minimize regulatory redundancies,” *see* 83 Fed. Reg. at 29,516, if and when the requirements under the new hazardous-substance spill-prevention rule would truly be redundant of already existing regulatory requirements. But, as described above, EPA cannot, by dint of identifying a patchwork of rules that apply to some CWA hazardous substances and some facilities, abdicate its duty to issue spill-prevention rules for all CWA hazardous substances at all facilities. *Supra* Part II.C. So too here. Any limitation of the hazardous-substance spill-prevention regulation’s scope based on redundancy or substituted compliance must be based on a specific comparison of each applicable regulation’s requirements and effects.

To conduct this analysis, however, EPA must first determine what the new hazardous-substance spill-prevention regulations will require. *See supra* Part II.C.14. Only then can it compare those requirements—and the protections they would provide—to existing regulatory requirements to determine whether there are redundancies, and whether alternative compliance (that is, allowing compliance with parts of the new regulation by means of compliance with an existing regulation) is appropriate. For example, EPA may determine that underground storage tanks complying with the UST Rule need not also comply with hazard review, mechanical integrity, personnel training, secondary containment, or response planning provisions of a new hazardous-substance spill-prevention rule, but must comply with the provisions of the new rule that lack a parallel in the UST Rule (for example, auditing and spill investigation; reporting). Until EPA has determined the content of its hazardous-substance spill-prevention regulations, however, we cannot definitively comment on the reasonableness of any such substituted-compliance determinations.

**J. “Targeted prevention requirement”**

We urge EPA to adopt comprehensive hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C), rather than what the agency refers to as “targeted prevention requirements.” *See* 83 Fed. Reg. at 29,516. As described above, the patchwork of existing EPA regulations that touch on hazardous-substance spill prevention do not support EPA’s current proposal to, contrary to its statutory duty, issue no new regulations at all. *See* *supra* Part II.C. Nor do those existing EPA regulations support EPA’s alternative “targeted prevention” proposal that would only include requirements for hazard review, mechanical integrity, personnel training, and secondary containment. The NRC spill data cited by EPA clearly show that those categories of requirements must be included to address the “reported causes” of reported spills. *See, e.g.*, 83 Fed. Reg. at 29,517 (noting that hazardous-substance spills caused by equipment failure, natural phenomena, operator error, and fire/explosion could all be “potentially addressed by a hazard review”). But the fact that the NRC database does not list “reported causes” of spills that correspond directly to other spill-prevention measures, such as incident investigations, compliance audits, notification requirements, and emergency response planning, is not a reasonable basis to reject those provisions. As described above, the appropriate analysis is whether the hazardous-substance spill-prevention regulations EPA would otherwise issue are completely duplicative of already existing EPA regulations. And that is not the case, as existing EPA regulations fail to provide for *all* CWA hazardous substances at *all* non-transportation-related onshore facilities the full suite of spill-prevention “program elements” described by EPA, *see* 83 Fed. Reg. at 29,503–05, much less the more robust, detailed protections we urge EPA to adopt above.

EPA’s specific rationale for rejecting the four program elements in its “targeted prevention” approach is unreasonable for the same reasons. For example, the fact that several existing EPA regulations contain secondary-containment requirements, *see* 83 Fed. Reg. at 29,517, is irrelevant given that none of those regulations (nor all of them, taken together) set forth “procedures, methods, and equipment and other requirements” for the full suite of facilities and hazardous substances EPA must regulate under CWA section 311(j)(1)(C). In short, even assuming EPA could refuse to issue hazardous-substance spill-prevention regulations (and it cannot), it cannot do so based on the mere fact that *some* types of spill-prevention requirements issued under *other* statutory provisions apply for *some* hazardous substances at *some* non-transportation-related onshore facilities.[[11]](#footnote-11)

**IV. Conclusion**

We urge EPA to discard its illegal plan to continue abdicating its statutory duty to issue hazardous-substance spill-prevention regulations under the CWA. EPA should return to the drawing board and issue a rule, modeled on the SPCC Rule for oil, that would establish a comprehensive hazardous-substance spill-prevention regulations under CWA section 311(j)(1)(C). Comprehensive regulations are the only option that would ensure that all communities across the United States receive the public-health and environmental protections that Congress mandated over forty-five years ago.

<<Signatures>>

1. EPA also concedes that the Tier II data may underestimate the number of Tier II facilities storing, using, or handling CWA hazardous substances because “it was unclear whether approximately 20 percent of the facilities in the Tier II reports reviewed had a CWA [hazardous substance] on site.” 83 Fed. Reg. at 29,519. [↑](#footnote-ref-1)
2. Indeed, at least for hazardous-substance spills caused by natural phenomena, it is likely that—absent new spill-prevention regulations—spills will increase in frequency. Because of climate change, hurricanes are moving more slowly and dumping more rain in concentrated areas. *See* James P. Kossin, *A Global Slowdown of Tropical-Cyclone Translation Speed*, 558 Nature 104 (2018). Hurricane Harvey, which deluged Harris County, Texas (home of one in every twenty hazardous-substance spills from non-transportation-related onshore facilities in the United States), and resulted in numerous releases of hazardous substances, is a prime example of this phenomena. *See* Chelsea Harvey, *Hurricanes are Moving More Slowly and Causing More Damage*, E&E News (Jun 7, 2018). Moreover, studies are predicting that extreme rainstorms will increase in frequency in the future. *See* Scott Waldman, *Whopper Rainstorms to Increase Fivefold under Climate Change — study*, E&E News (Dec. 6, 2016). [↑](#footnote-ref-2)
3. But, notably, *not* environmental or drinking-water benefits or avoided costs to the local economy, which the agency arbitrarily refused to calculate. *See* 83 Fed. Reg. at 29,518 tbl.9; RIA 33. The 2014 Freedom Industries spill, for example, reportedly cost Charleston-area businesses more than $60 million dollars. *See* Press Release, Center for Business & Economic Research (CBER), CBER Calculates Impact from Chemical Spill into Elk River (Feb. 04, 2014), available at http://mediad.publicbroadcasting.net/p/wvpn/files/201402/

   CBER\_PR\_WaterUsageBan\_02.04.14.pdf. [↑](#footnote-ref-3)
4. EPA’s envisioned ICR is itself incomplete, however, because it does not request information from potentially regulated facilities regarding their current practices (whether required by law or not) designed to prevent and contain spills of hazardous substances. 83 Fed. Reg*.* at 29,503. Without knowing what facilities are doing on the ground, it is significantly more difficult to evaluate what spill-prevention measures will be most effective. [↑](#footnote-ref-4)
5. Those substances are (by CAS No.) 50000, 67663, 74895, 74908, 74931, 75047, 75070, 75150, 75445, 75503, 78795, 107028, 107131, 107153, 108054, 124403, 506774, 7647010, 7647010, 7664393, 7664417, 7664417, 7697372, 7782505, 7784341, 10025873. [↑](#footnote-ref-5)
6. We note the irony, however, that EPA’s proposal relies on the incident investigation and compliance audit portions of the RMP Rule, *see* 83 Fed. Reg. at 29,511, while the agency is simultaneously proposing to remove those protections from the RMP Rule, *see* 83 Fed. Reg. 24,850 (May 30, 2018). [↑](#footnote-ref-6)
7. As EPA recognizes, all CWA hazardous substances are covered by the Planning Rule’s spill-notification requirements. 83 Fed. Reg. at 29,509; *see also* 40 C.F.R. part 355 subpart C. Facilities that release CWA hazardous substances are already required to report those spills under the CWA. *See* 40 C.F.R. § 117.21. But the Planning Rule does require follow-up notifications that are not required under existing CWA spill reporting regulations. *See* *id.* § 355.40(b). The Planning Rule’s initial and follow-up reports, however, go to local emergency coordinators and state emergency response commissions, but not directly to any federal agency, local water supply agencies, or local public health agencies. This gap in reporting is one of the primary reasons that EPA currently lacks current and comprehensive nationwide data on spills (including follow-up), and underscores the need for EPA to undertake a robust ICR before it proceeds further with this rulemaking. [↑](#footnote-ref-7)
8. We recognize that EPA has stated that the list of CWA hazardous substances is “outside the scope of this action,” 83 Fed. Reg. at 29,514, but there is no reason that needs to be the case, and we urge EPA to at least consider undertaking regulatory action to update the CWA hazardous substance list in the near future. [↑](#footnote-ref-8)
9. EPA’s website on the Toxic Substances Control Act inventory notes that the inventory now includes “about 85,000 chemicals.” *See TSCA Chemical Substance Inventory*, EPA, https://www.epa.gov/tsca-inventory/about-tsca-chemical-substance-inventory (last visited Aug. 8, 2018). [↑](#footnote-ref-9)
10. *See* Press Release, U.S. EPA Ne. Region, EPA Seeks Public Input for National Plan to Manage PFAS at First Community Engagement Event (June 19, 2018), *available at* https://www.epa.gov/newsreleases/epa-seeks-public-input-national-plan-manage-pfas-first-community-engagement-event (“EPA is beginning the necessary steps to propose designating PFOA and PFOS as ‘hazardous substances’ through one of the available statutory mechanisms, including potentially CERCLA Section 102.”) [↑](#footnote-ref-10)
11. And, as described above, to the extent EPA determines that a given regulation provides—for a specific hazardous substance or specific facility—one or more protections equivalent to those a comprehensive hazardous-substance spill-prevention rule would provide, that is a basis for allowing substituted compliance for those particular provisions, not for refusing to issue the comprehensive hazardous-substance spill regulations altogether. That is the equivalent of throwing the baby out with the bath water. [↑](#footnote-ref-11)