



# Clean Water Act Hazardous Substance Facility Response Plans Final Rule

**CLEAN  
WATERWAYS**

April 9-11, 2024  
DUKE ENERGY CONVENTION CENTER  
CINCINNATI, OH

Incident Prevention & Response for Inland Regions & Waterways

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# Agenda

- Background
- Applicability
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- Communities with Environmental Justice Concerns
- Climate Change



# Background: Statutory and Regulatory

Under section 311(j)(5) of the [Clean Water Act](#) (CWA), the President:

- “shall issue regulations which require an owner or operator of a . . . facility . . . to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.”

Oil requirements promulgated in 1994: [Facility Response Plans \(FRP\)](#) under [Subpart D of 40 CFR 112](#).

EPA had not previously proposed worst-case discharge planning regulations for CWA hazardous substances (HS) under 311(j)(5).

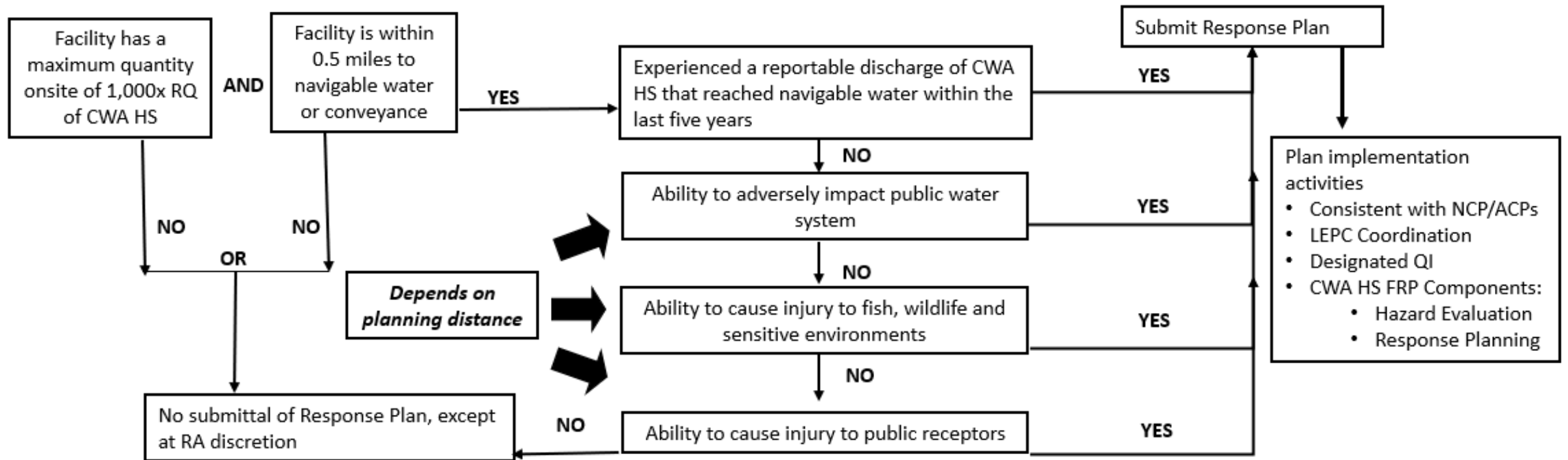


# Background: Timeline



# Final Applicability Criteria

\* Facility – onshore non-transportation-related



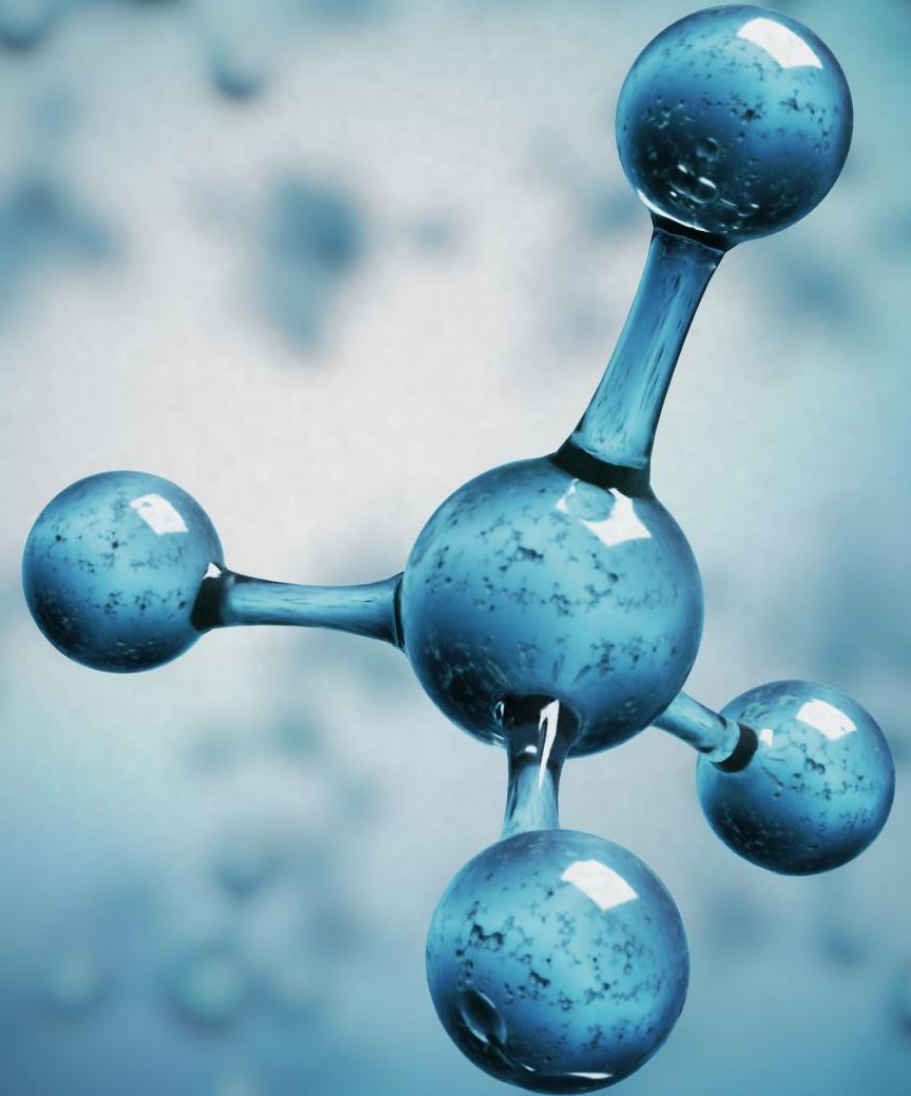
## Major Changes from Proposal

- RQ multiplier lowered from 10,000x to 1,000x
- Threshold and worst case discharge quantities based on maximum quantity on site, not capacity
- Worst case discharge scenarios for each CWA HS on site above threshold quantity
- FRP must cover only CWA HS on site above threshold quantity
- 1- & 2-hour Response Actions
- FRP must include ERAP
- Recertify every 5 years, not resubmit

# Screening Criterion: Threshold Quantity

Any CWA hazardous substance on site (in aggregate and including mixtures) at or above 1,000x Reportable Quantity at any time

- 296 CWA hazardous substances as listed in [40 CFR 116.4](#)
- Reportable Quantities as listed in [40 CFR 117.3](#)
- Will be added to [EPA's List of Lists](#)





## Mixture Rule

If mixed with oil, regulated as oil.

Otherwise, CERCLA mixture rule, no *de minimus* quantity.

- If all quantities known, meets threshold quantity when the maximum quantity onsite meets or exceeds the threshold quantity of any CWA hazardous substance in the mixture.
- If unknown quantities, meets the threshold when maximum quantity onsite meets or exceeds the quantity for the CWA hazardous substance with the lowest threshold quantity.



## Screening Criterion: Distance to Navigable Water

- Facility is within one-half (0.5) mile of navigable water
- Navigable water is defined through [Waters of the United States \(WOTUS\) 40 CFR 120](#)
  - Statutory authority is “based on location”

# Applicability: Ability to Cause Substantial Harm to the Environment

CWA: Covered facility is “[an] onshore facility that, because of its location, **could reasonably be expected to cause substantial harm to the environment** by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone”

1. Ability to adversely impact public water system (PWS)
2. Ability to cause injury to fish, wildlife, and sensitive environments (FWSE)
3. Ability to cause injury to public receptors
4. Reportable discharge history

# Substantial Harm Criterion: Ability to Adversely Impact PWS

Outcome-based; must work with PWS to determine (if possible)

1. Violates any National Primary Drinking Water Standard (NPDWS) or State Drinking Water Regulation (SDWR), such as an exceedance of a MCL
2. Compromises the ability of the PWS to produce water that complies with any NPDWS or SDWR
3. Results in adverse health impacts in people exposed to the maximum concentration that could enter a drinking water distribution system
4. Contaminates public water system infrastructure, including but not limited to intake structures, treatment facilities, and drinking water distribution systems, or premise plumbing systems to a degree that requires remediation to restore system components to acceptable performance
5. Impairs the taste, odor, or other aesthetic characteristic of the water entering a drinking water distribution system to a degree that could make the water unacceptable to consumers and that could prompt the public water system to issue use restrictions

# Substantial Harm Criterion: Ability to Cause Injury to FWSE



May include wetlands, national and State parks, critical habitats for endangered or threatened species, wilderness and natural resource areas, marine sanctuaries and estuarine reserves, conservation areas, preserves, wildlife areas, wildlife refuges, wild and scenic rivers, recreational areas, national forests, Federal and State lands that are research national areas, heritage program areas, land trust areas, historical and archaeological sites and parks, include unique habitats such as aquaculture sites and agricultural surface water intakes, bird nesting areas, critical biological resource areas, designated migratory routes, and designated seasonal habitats.

Requires planning distance calculations

Endpoints in Appendix B based on 96-hour LC50  
FWSE in Area Contingency Plans (intended to be updated)

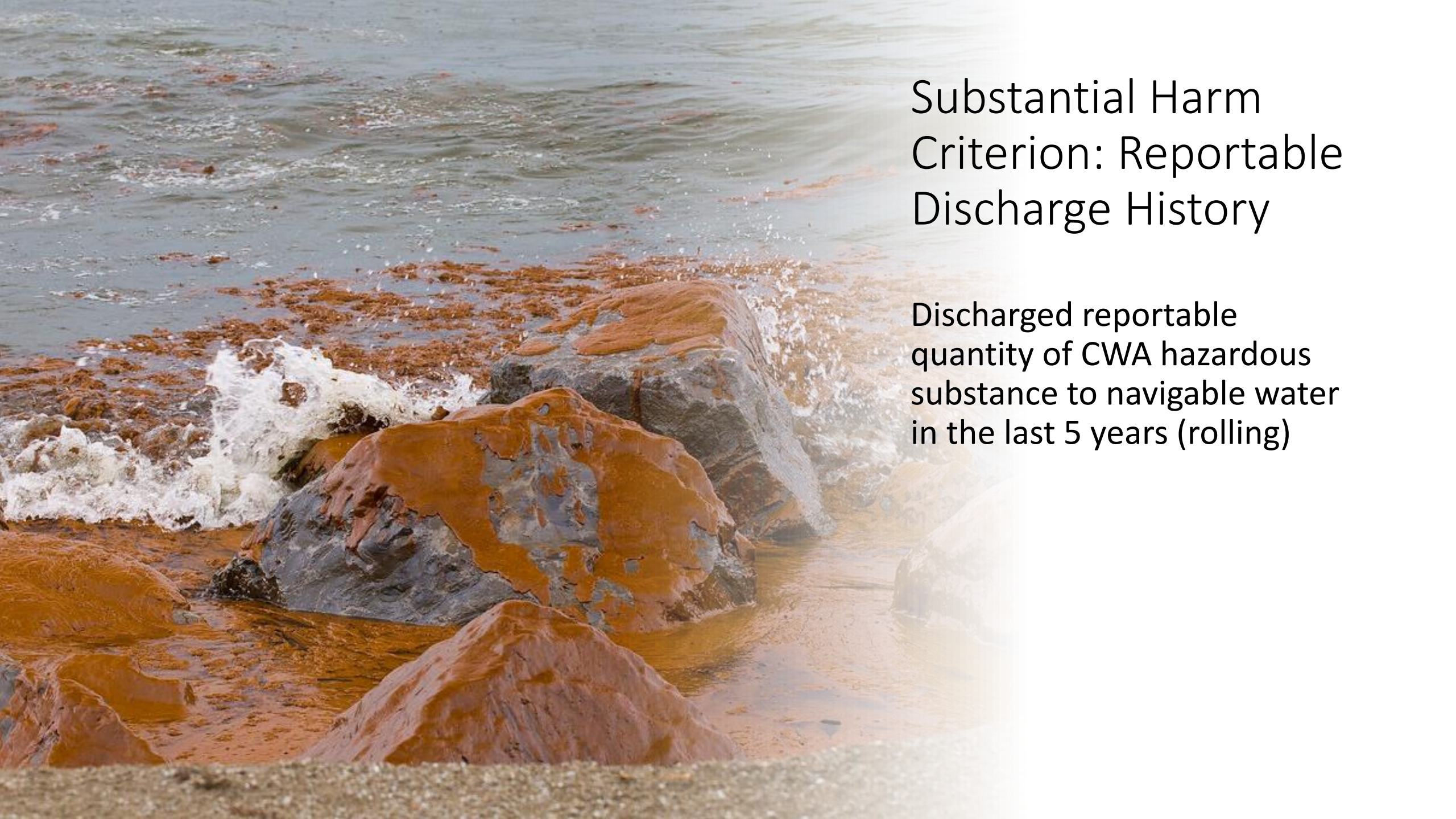
# Substantial Harm Criterion: Ability to Cause Injury to Public Receptors

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

Requires planning distance calculations

Endpoints in Appendix B based on LD50





# Substantial Harm Criterion: Reportable Discharge History

Discharged reportable  
quantity of CWA hazardous  
substance to navigable water  
in the last 5 years (rolling)

# Worst Case Discharge Scenarios

Use endpoints in Appendix B for FWSE/public receptors

**Quantity:** max in a single container or multiple interconnected containers

**Planning Distance:** must consider

*Overland transport including:*

- Nearest opportunity for discharge into or on the navigable waters
- Ground conditions (topography, draining, etc.)
- Properties of CWA HS

*In-water transport including:*

- Point of entry to navigable waters
- Flow rate and duration of the discharge
- Direction of the discharge at the point of entry
- Surface versus underwater entry
- Conditions of the receiving water

*Adverse weather conditions:* calculated based on adverse winds, currents, and/or river stages, over a range of seasons, weather conditions, and river stages.

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





# Applicability: Exceptions and Exemptions

## Exceptions

- Anything in transportation (DOT PHMSA)
- Under USCG or DOI authority
- Underground Storage Tanks under [40 CFR 280](#)

## Exemptions:

- Articles
- Uses:
  - Structural components
  - Janitorial
  - Foods, drugs, and cosmetics
  - Process/cooling water
  - Wastewater treated by POTWs
  - Compressed air
  - Retail/personal use
  - RCRA HazWaste ([40 CFR 264](#), [265](#), [262 Subpart M](#))

# Major Rule Provisions: RA Authority

EPA Regional Administrator (RA) can require FRPs based on:

1. Type of transfer operation(s)
2. CWA hazardous substance quantity, category, characteristics
3. Proximity to FWSE
4. Ability to adversely impact PWS
5. Location in a source water protection area
6. Ability to cause injury to public receptors
7. Lack of passive mitigation measures or systems
8. Potential to adversely impact communities with environmental justice concerns;
9. Potential vulnerability to adverse weather conditions resulting from climate change
10. Density of facilities with CWA hazardous substances onsite in the immediate area
11. Reportable discharge history
12. Other site-specific characteristics and environmental factors that the RA determines to be relevant to recovery, shoreline protection, and cleanup.

EPA RA determines if a facility can cause significant and substantial harm to environment – these plans must be approved by EPA

1. Frequency of past reportable discharges
2. Proximity to navigable waters or a conveyance to navigable waters
3. Age or condition of containers and equipment;
4. Potential for hazards such as flooding, hurricanes, earthquakes, or other disasters that could result in a worst case discharge
5. Other facility- and Region-specific information, including local impacts on public health

# Major Rule Provisions: Appeals and Petitions

## **Appeals**

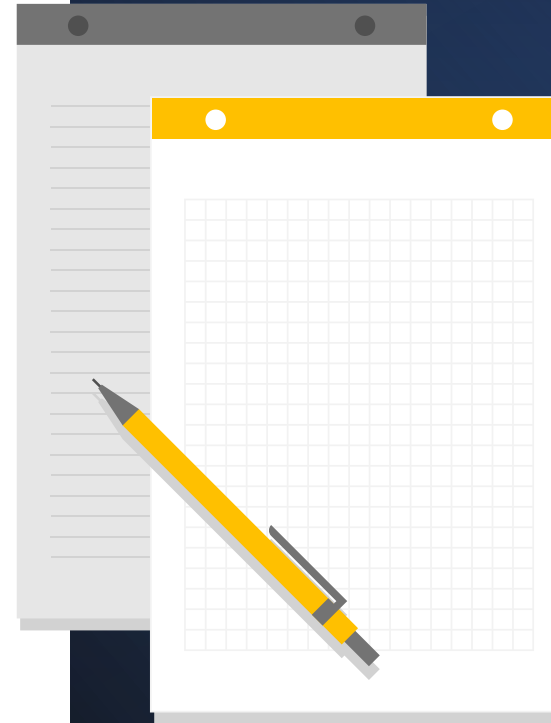
- Facility O/O can appeal that it meets applicability criteria or RA determination of sub or sig/sub harm, or amendments
- Facility O/O can appeal classification or status as sub or sig/sub harm
- Appeal can go up to EPA administrator

## **Petitions**

- Any member of public can petition RA to consider if facility could cause sub harm to environment
- Petition must discuss why and will be made available to facility O/O and O/O has opportunity to reply

# Facility Response Plans: General Requirements

- Consistent with NCP and ACPs - Review annually and revise
- ID Qualified Individual (trained to Incident Commander)
- ID and ensure by contract or other means private personnel and equipment
- Describe the training, equipment testing, periodic unannounced drills, and response actions
- Update facility response plan periodically and resubmit to the Regional Administrator for approval of each significant change



# Facility Response Plans: Plan Elements

- Facility information
- Owner/operator information
- Reportable discharge history: to water, 5 years
- Response personnel and equipment: private personnel and equipment necessary to respond to the maximum extent practicable to WCD or threat of WCD
- Hazard evaluation
- Notifications
- Discharge information
- Personnel roles and responsibilities
- Evacuation plans (+diagrams)
- Discharge detection systems
- Response actions
- Disposal plans
- Containment measures
- Training procedures
- Exercise procedures
- Self-inspection
- Emergency Response Action Plan (ERAP)

# Response Actions – 1 and 2-hour Requirements

## 1-hour:

- Complete notifications
- Mobilize facility response personnel for immediate response actions
- Identify the scale of the incident, coordinate with SRO on response actions
- Complete WCD scenario cross-check and potential effects and start tactical planning;
- Ensure containment and neutralization systems are operational;
- Coordinate facility evacuation;
- Coordinate with drinking water authorities;
- Mobilize response equipment coordinate with local police and fire officials.

- Initiate community evacuation plan,
- Evaluate if downstream/upstream public receptors that could be impacted and may require evacuation

## 2-hour:

- Deploy response resources identified in the response plan:
  - Containment and recovery devices (such as containment dams, culvert plugs, underflow dams, containment booms, skimmer equipment or acid/base neutralization resources);
- Initiate any water, soil, and air monitoring as outlined in the response plan.

# Substantial Harm Certification Form

Facilities that meet the screening criteria but not the substantial harm criteria need to submit a Substantial Harm Certification Form (Appendix A) to EPA

Facilities submitting FRPs can submit their forms along with the full plans

The background image shows a residential street with several houses. In the distance, a large industrial facility is visible, featuring two prominent cooling towers and several smokestacks. The scene is set against a hazy, overcast sky. The text is overlaid on the left side of the image.

# Communities with Environmental Justice Concerns

- Industrial facilities and ASTs disproportionately located in communities with environmental justice concerns.
- WCD of CWA hazardous substances on communities depends on discharge circumstances and facility's positioning up or downstream from public water system intakes that serve large and diverse communities.
- RAs have authority to make determinations on a case-by-case basis based on, among other things, potential impacts of a worst case discharge on communities with environmental justice concerns.
- Facilities must examine potential impacts to communities with environmental concerns in their FRP hazard evaluation.



# Climate Change

- A worst case discharge: the largest foreseeable discharge in adverse weather conditions, which is inclusive of conditions due to climate change.
- RAs have authority to make determinations on a case-by-case basis based on, among other things, concerns related to climate change risks.
- Facilities must examine climate change impacts in their FRP hazard evaluation.



# Facility Response Plans: Compliance Dates



FRPs due 3 years  
after effective date  
of final rule

**June 1, 2027**



Substantial Harm  
Certification Forms  
due 3 years after  
effective date of  
final rule

**June 1, 2027**



After initial  
period:

FRPs due within 6  
months of meeting  
criteria

Substantial Harm  
Certification forms  
due within **60 days**  
of meeting criteria



Recertify plans  
and Substantial  
Harm Certification  
Forms every 5  
years



Amendments  
(material  
changes) within  
60 days



# Questions?

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## More Information:

<https://www.epa.gov/hazardous-substance-spills-planning-regulations>