Submitted via www.regulations.gov

August 24, 2018

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

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

Dear Sir or Madam:

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

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

regulatory requirements. Some of our organizations' individual comments expand upon the practical effect of these other regulatory programs.

As explained further below, EPA has discretion to interpret CWA § 311(j)(1)(C) as having already been satisfied by regulations issued by EPA and other federal agencies and the statutes they implement. EPA also has inherent discretion to decline to issue regulations that would carry significant regulatory burdens but would provide only *de minimis* regulatory benefit. EPA furthermore is entitled, and indeed is instructed by Executive Order, to avoid imposing additional regulatory requirements when the expected societal costs would exceed the predicted benefits of any additional regulation. Promulgating a new rule under those circumstances would be arbitrary and capricious, and the undersigned organizations support EPA's decision not to impose such regulations on the regulated community.

1. EPA Has Discretion To Interpret Existing Regulations As Having Fulfilled Any Duty To Promulgate Requirements for Prevention and Containment of Hazardous Substance Discharges.

The undersigned organizations appreciate EPA's effort to carefully analyze the potential overlap between existing requirements under statutes and regulations implemented by EPA and by other federal agencies, and the requirements that likely would be included in new regulations for prevention and containment of spills of CWA-listed hazardous substances that EPA could impose pursuant to CWA § 311(j)(1)(C). Considering whether a new regulation is needed or would merely duplicate the effect of existing mandates was a reasonable, and indeed necessary, component of the rulemaking process. It also is consistent with the directives of Executive Orders 12866, 13563, 13610, and 13777 for federal agencies to streamline regulations, consider alternatives to imposing new regulations, and identify for elimination "unnecessary" regulations.

It is of no import that the regulatory requirements EPA identifies in the Proposed Action (and others, described below) were not specifically designated as regulations issued under the authority of section 311(j)(1)(C), or were not issued by EPA. In fact, it would be arbitrary and capricious for EPA to ignore the statutory and regulatory programs that have been adopted in the 45 years since Congress enacted CWA § 311(j)(1)(C) that already achieve the same ends as any potential new regulation, regardless of whether they were issued with reference to section 311(j)(1)(C).

Virtually all of the other regulatory requirements EPA identified in the Proposed Action, as well as the additional statutory and regulatory requirements identified in these comments, did not exist in 1972, when CWA section 311(j)(1)(C) was enacted. In light of the existence and administration of these requirements

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

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

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

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[1] Note that the Proposed Action is inconsistent in its description of what role consideration of non-EPA regulatory programs played in EPA's proposed conclusion. *Compare*, *e.g.*, 83 Fed. Reg. at 29,502 ("Additionally, EPA identified relevant requirements in other Federal regulatory programs and determined that they further serve to prevent CWA HS discharges, providing additional support for this proposed action.") *with* 83 Fed. Reg. at 29,509 ("Although the analysis of existing EPA regulations is the basis for this proposal, EPA reviewed other Federal regulations with prevention requirements that may be applicable to CWA HS.") and 29,516 (requesting comments on "whether EPA should consider expanding the basis of the proposal to these Federal regulations" that "supplement the EPA regulatory program analysis"). The final action should state clearly that the effects of statutory and regulatory programs administered by federal agencies other than EPA in preventing and containing discharges of hazardous substances is part of the basis for EPA's conclusion that CWA § 311(j)(1)(C) has been satisfied. As addressed below, the Agency should also state more clearly that these programs meet the legislative intent of section 311(j)(1)(C).

[2] *See* CWA § 311(j)(1)(C) (regulations to be issued "as soon as practicable" after enactment of the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, "and from time to time thereafter").

[3] *See*, *e.g.*, 83 Fed. Reg. 29,502 ("EPA has determined that the existing framework of regulatory requirements serves to prevent CWA HS discharges"); *id*. at 29,516 ("[M]ultiple statutory and regulatory requirements have been established…that generally serve to, directly and indirectly, prevent CWA HS discharges….Based on EPA's analysis…EPA is not proposing additional regulatory requirements at this time.").

been fulfilled by other federal statutory and regulatory programs implemented subsequent to the 1972 enactment of section 311(j)(1)(C).

2. EPA Has Inherent Authority To Conclude that Promulgation of Additional Requirements Under CWA § 311(j)(1)(C) Would Provide *De Minimis* Regulatory Benefit.

When EPA issues its final action, the Agency should spell out in greater detail the way it reached the conclusion that no new regulation under CWA § 311(j)(1)(C) is warranted, with specific reference to agencies' authority to eschew regulatory action that would not produce any significant regulatory benefit. Even if the text of CWA § 311(j)(1)(C) unambiguously required EPA to issue standalone spill prevention and control regulations for hazardous substances based solely on that statutory provision, EPA still would have authority to depart from a literal application of the statute, based on its inherent authority to avoid promulgating a rule that would provide insignificant, or "*de minimis*," regulatory benefit. While the Proposed Action lays out that basis for choosing not to establish a new federal regulatory program, EPA does not clearly indicate that it is relying on its *de minimis* authority.

Although a statutory directive appears unequivocal on its face, an agency still may refrain from applying the statutory mandate "as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimis*."[4] In fact, the Supreme Court recently suggested an agency may be obligated to assess whether regulation would produce more than *de minimis* benefit.[5]

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[4] *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979; *Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005) (unless statute is "'extraordinarily rigid … Congress is always presumed to intend that 'pointless expenditures of effort' be avoided.") (quoting *Alabama Power*, 636 F.2d at 360); *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U. S. 214, 231 (1992) ("[*D*]*e minimis non curat lex*. . . is part of the established background of legal principles against which all enactments are adopted"). *See also, e.g., Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451, 465-66 (1996), where the D.C. Circuit upheld an EPA regulation that excludes certain categories of federal activities, as well as those activities that do not affect "major" emission sources, from the State Implementation Plan conformity determinations that Clean Air Act (CAA) section 176(c)(1) literally requires for "any activity" of the federal government. The Court relied on *Alabama Power*'s statement that "categorical exemptions from the requirements of a statute may be permissible" to avoid imposing requirements on activities that "in context may fairly be considered *de minimis*." *Id*. at 466.

[5] *See Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2449 (2014) (EPA may impose requirements on source's emissions "only if the source emits more than a *de minimis* amount") (emphasis added).

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

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

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

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

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

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

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

[10] *See*, *e.g.*, 83 Fed. Reg. at 29,517.

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

EPA also correctly considered whether discharges would actually be reduced in practice just because additional regulations were promulgated, as it would be arbitrary to assume that a new layer of regulation would deter an outcome when numerous similar existing regulations would not. Importantly, of the 2491 CWA hazardous substances discharges that EPA identified as originating from onshore, non-transportation-related facilities during 2007-2016, more than half resulted from unknown causes or illegal dumping.[12] We concur with EPA's observation that additional regulatory requirements are unlikely to prevent such discharges: "There is no reason to believe that a redundant prohibition on such dumping would alleviate the problem of those who already disregard existing regulations."[13]

Thus, EPA should clearly state, when it takes final action concluding that no new regulations are necessary under CWA § 311(j)(1)(C), that EPA is acting pursuant to its inherent authority to depart from what might be a literal application of the statute but would provide only *de minimis* additional regulatory benefit.[14]

3. Additional Statutory and Regulatory Programs Help Prevent and Contain Hazardous Substance Spills.

The undersigned organizations urge EPA, in its final action, to expand its discussion to include the numerous other federal statutory and regulatory programs that have the effect, either directly or indirectly, of helping to prevent and contain discharges of hazardous substances.

In the Proposed Action, EPA describes a number of existing regulatory programs that EPA administers, as well as a number of regulatory programs

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comments) and the substances and scenarios EPA might address in new regulations adopted under CWA § 311(j)(1)(C). For example, there could be *de minimis* regulatory benefit to a new set of regulations where an existing program contained similar provisions covering most, but not every one, of the CWA hazardous substances.

[12] *See* 83 Fed. Reg. at 29,517, Table 7.

[13] *Id*. at 29,516.

[14] EPA's judgment that promulgating additional requirements under CWA § 311(j)(1)(C) would result in *de minimis* regulatory benefits is entitled to deference. The D.C. Circuit has indicated that the same standard used in reviewing an agency's interpretation of an ambiguous statutory provision – namely, deferring to a "permissible" agency interpretation – should be used in reviewing an agency's decision to create a *de minimis* exception. *Environmental Defense Fund,* 82 F.3d at 467, citing *State of Ohio v. EPA*, 997 F.2d 1520, 1535 (D.C. Cir. 1993), *Western Nebraska Resources Council*, 943 F.2d 867, 870 (8th Cir. 1991), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

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

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

A. National Pollutant Discharge Elimination System ("NPDES") Permits

Tens of thousands of industrial, commercial, and governmental facilities are required to have an NPDES permit because they discharge (or may discharge) pollutants through a point source to waters of the United States. Many NPDES-permitted facilities are industrial, commercial, and governmental establishments that handle large amounts of chemicals, and therefore would be covered by any new spill control and containment regulations EPA might issue under CWA § 311(j)(1)(C).

NPDES permits contain effluent limitations and other conditions designed to ensure that any discharges from the point source do not cause or contribute to a violation of an applicable water quality standard, including narrative standards. An uncontained spill from a facility that reaches "waters of the U.S." may violate a specific numerical effluent limitation in the NPDES permit, cause an exceedance of a whole effluent toxicity limit, cause a violation of a narrative effluent limitation, or constitute an unauthorized discharge if it does not flow through a permitted outfall. These NPDES permit violations carry potential civil penalties, which can be imposed in either a state or federal enforcement action or a citizen lawsuit, that can easily run into hundreds of thousands or even millions of dollars.

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[15] 83 Fed. Reg. at 29,503.

[16] All of the requirements discussed below in this section came into effect after CWA § 311(j)(1)(C) was enacted in 1972, so Congress was not aware of the effects these requirements would have in effectively mandating or encouraging prevention and containment of hazardous substance discharges.

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

B. Pretreatment Program

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

It is important to note that the federal pretreatment program results in measures to prevent and contain hazardous substance spills that often are implemented in part through local regulation and enforcement. For example, pursuant to 40 C.F.R. pt. 403 and in line with longstanding EPA guidance[17], POTWs often have great authority (as codified in local ordinances) to compel users to

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

prepare slug discharge control plans, install secondary containment or make other modifications to facilities, conduct training, and implement practices to prevent slug discharges to the POTW of hazardous substances and other harmful materials. Pretreatment ordinances typically contain provisions allowing the control authority to inspect the user's facilities to detect situations present that could result in slug discharges to the POTW. Follow-up actions under their legal authority, such as mandated approval of facility-specific slug discharge control plans and required construction of secondary containment and protected product and waste handling areas, have effectively prevented an untold number of POTW system upsets and pass-through situations nationwide. Importantly, these actions have at the same time protected surface waters by preventing discharges of stored and handled materials from industrial user's facilities, thereby performing the function of regulations under CWA § 311(j)(1)(C).

C. Spill Cleanup Liability

Liability for the cleanup of releases under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and similar federal and state laws is perhaps the greatest incentive for facilities proactively to adopt measures and practices to prevent and contain discharges of hazardous substances. By definition, substances listed under CWA § 311 are also hazardous substances under CERCLA § 101(14). CWA hazardous substances may also be subject to cleanup requirements for releases of hazardous waste, under the Resource Conservation and Recovery Act ("RCRA") Corrective Action program, and for releases of hazardous and non-hazardous solid waste, under the imminent hazard provisions of RCRA § 7003.

Facilities likely to fall within the scope of additional regulations EPA might contemplate under CWA § 311(j)(1)(C) are already aware of potential liability under CERCLA and/or RCRA for claims related to hazardous substance releases. Such releases can result in imposition of millions of dollars of cleanup costs, liability for natural resources damages, diminished property values, and more. There are examples across various industries of billion-dollar liabilities for contaminated sediment removal or encapsulation, groundwater pumping and treating, soil vapor extraction, and shoreline cleanup.

CERCLA and RCRA cleanup liability undeniably has created a strong incentive for companies to monitor and control potential releases of hazardous substances. In light of the size of potential cleanup costs, not to mention ancillary costs such as business interruption and damage to reputation, EPA can reasonably conclude that in most if not all cases, potential CERCLA or RCRA liability – which did not exist when CWA § 311 was enacted – is at least as effective in encouraging

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

D. Release Reporting

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

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

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

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

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

would not justify the costs in any alternative other than the proposed alternative" of not promulgating additional regulations directed at preventing and containing discharges of CWA hazardous substances, in light of the regulatory programs already in place.[18] The undersigned organizations concur, and we ask EPA to state that conclusion more forcefully and explain more fully EPA's authority to consider the projected costs and benefits before deciding to adopt any new regulations under CWA § 311(j)(1)(C).

Nothing in CWA § 311 indicates or even suggests that EPA is prohibited by law from weighing the costs and the benefits of proposed rules for prevention and containment of hazardous substances spills, and assuring that the benefits of regulation would justify the costs – a policy objective that EPA rightly considered in arriving at the Proposed Action. In the past, agencies have sometimes been quick to interpret relevant statutory language authorizing regulations to preclude weighing costs versus benefits when considering whether and how to regulate an activity. But recent case law, particularly from the Supreme Court, has made clear that EPA has broad discretion to interpret its statutes to allow cost-benefit balancing, unless the statute expressly prohibits it.[19]

Moreover, the Supreme Court has further shown that, if EPA fails to consider cost in determining whether to regulate – and in particular, whether to add new regulations on top of existing requirements – it is vulnerable to a challenge that its action was arbitrary and capricious.[20] In *Michigan v. EPA*, the Court found that even though there was no explicit statutory mandate to consider costs and benefits, issuing a rule without doing so was unreasonable.[21]

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[18] 83 Fed. Reg. at 29,519. The Proposed Action is somewhat inconsistent in how it states this conclusion: For example, EPA states that it "believes there would be only minimal incremental value in requiring these provisions in a new regulation," but also states that "the benefits of any of the targeted provisions described above may not justify the associated costs." *Id*. at 29,517 (emphasis added, footnote omitted). EPA should clearly and unequivocally state, in its final action, the conclusion that any additional regulation under CWA § 311(j)(1)(C) would have significant costs that would far outweigh anticipated benefits.

[19] *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222-26 (2009) (interpreting CWA § 316(b)) ("It is eminently reasonable to conclude that [the statutory provision's] silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree." *Id*. at 222.).

[20] *See Michigan v. EPA*, 135 S. Ct. 2699 (2015) (EPA unreasonably refused to consider cost in determining, pursuant to CAA § 112(n), whether regulation of electric utility emissions under CAA § 112 was "appropriate and necessary" in light of pre-existing restrictions on power plant emissions under other CAA programs).

[21] *Id.* at 2708 ("Consideration of cost reflects the understanding that reasonable regulation

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

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

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

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ordinarily requires paying attention to the advantages and the disadvantages of agency decisions."). (Note that in *Michigan* all nine justices agreed that, unless the statute states otherwise, EPA must consider cost at some stage of the regulatory process.) *See also Entergy*, 556 U.S. at 234-35 (Breyer, J., concurring in part and dissenting in part) (EPA had always taken position that, although the CWA provision in question did not require analysis of costs and benefits, it would not be "reasonable" to interpret the statute to require a technology whose cost is wholly disproportionate to the environmental benefit gained from its application).

[22] And, as EPA noted, imposing such costs in fact would not prevent many of those spills from occurring anyway. *See*, *e.g.*, 83 Fed. Reg. at 29,516 ("no reason to believe a redundant prohibition…would alleviate the problem of those who already disregard existing regulations"); 29,519 (there would be "only minimal incremental value in requiring these provisions [frequently identified in existing regulatory programs] in a new regulation"); *id.* ("Even a robust regulatory program where none existed before would not be expected to

5. Conclusion

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

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

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

Sincerely,

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

cc: Desk Officer for EPA, OMB-OIRA

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eliminate all risk.").