EPA Consent Agreement Sets Schedule for Hazardous Substance Spill Response Rulemaking (**Updated**)

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EPA has agreed, in a draft settlement, to conduct a rulemaking regarding the establishment of regulations to address potential "worst case" spills of hazardous substances similar to the existing "Facility Response Plan" (FRP) program for oil. In a consent decree reached with the Natural Resources Defense Council (NRDC) and other environmental groups, published in the *Federal Register* on February 3, the agency agreed to issue a proposed rulemaking within two years of the final date of the consent decree "pertaining to the issuance of the Hazardous Substance Worst Case Discharge Planning Regulations." A final rule would be required within 30 months of the proposal.

The consent decree follows litigation filed by the environmental groups in March 2019:

Plaintiffs allege that EPA had a duty under Clean Water Act ("CWA") section 311 (j)(5)(A)(i), 33 U.S.C. § 1321(j)(5)(A)(i), to issue regulations that require an owner or operator of a non-transportation-related onshore "facility described in subparagraph (C) 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 . . . a hazardous substance" (the "Hazardous Substance Worst Case Discharge Planning Regulations") by August 18, 1992.

The litigation was initiated by NRDC, Clean Water Action, Environmental Justice Health Alliance, and the Just Transition Alliance, based on the agency's alleged failure to move forward with what the groups consider long-overdue and nondiscretionary regulations:

Despite its duty to issue worst-case hazardous-substance spill regulations by August 1992, EPA missed its deadline. These regulations are now more than twenty-five years overdue. EPA's decades-long failure to issue worst-case hazardous-substance spill regulations therefore violates the Agency's nondiscretionary duty.

By failing to act, the groups contend that EPA

... leaves the communities closest to the most dangerous chemical facilities in the country without any assurance that those facilities are - as Congress mandated - adequately planning to prevent and respond to catastrophic chemical spills, including those caused by floods, fires, and hurricanes. These communities, which are disproportionately low-income or communities of color, are entitled to all the protections for public health, drinking water supplies, and the environment Congress mandated in the Clean Water Act.

The new settlement agreement follows in the wake of EPA's September 2019 final decision to reverse course from an Obama-era agreement to initiate a rulemaking to impose "Spill Prevention, Control and Countermeasure" (SPCC) requirements for hazardous substances. EPA based that decision on its belief that existing regulations are adequate to meet its obligations under the Clean

Water Act (CWA) and no new regulatory program is needed. See my prior post for more details on EPA's determination.

The plaintiffs now are relying on a separate provision of the CWA that is the basis for the FRP program for oil, which applies to a smaller universe of facilities than does the SPCC program. While "hazardous substances" are mentioned in the same CWA provision, EPA has never established a hazardous substance-specific Clean Water Act spill response program.

Under the FRP for oil, facilities that could reasonably be expected to cause "substantial harm" to the environment by discharging oil into or on navigable waters are required to prepare and submit Facility Response Plans. "Substantial harm" is defined as a facility (1) with total oil storage capacity greater than or equal to 42,000 gallons and is involved in activities that transfer oil over water to/from vessels; *or* (2) with total oil storage capacity greater than or equal to 1 million gallons and meets one of the following conditions: (i) does not have sufficient secondary containment for each aboveground storage area; (ii) is located at a distance such that a discharge from the facility could cause "injury" to fish, wildlife, and sensitive environments; (iii) is located at a distance such that a discharge from the facility would shut down a public drinking water intake; or (iv) has had, within the past five years, a reportable discharge greater than or equal to 10,000 gallons.

While the settlement requires EPA to conduct a rulemaking, the direction and content of that rulemaking are not prescribed. EPA is taking comment on the draft settlement agreement until March 4, 2020.