

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

ENVIRONMENTAL JUSTICE HEALTH)	
ALLIANCE FOR CHEMICAL POLICY)	
REFORM; PEOPLE CONCERNED ABOUT)	
CHEMICAL SAFETY; NATURAL)	
RESOURCES DEFENSE COUNCIL, INC.,)	
)	
Plaintiffs,)	
)	
v.)	15-cv-5705
)	ECF Case
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY; GINA)	
MCCARTHY, in her official capacity as)	
Administrator of the United States)	
Environmental Protection Agency,)	
)	
Defendants.)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs bring this case to compel Defendants United States Environmental Protection Agency (EPA) and Gina McCarthy, in her official capacity as EPA Administrator, to do what Congress mandated that EPA do over forty years ago: issue regulations to prevent and contain hazardous-substance spills from non-transportation-related onshore facilities, including above-ground storage tanks.

2. In section 311(j)(1) of the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the Clean Water Act), Congress directed that “as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations . . . (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances . . . from onshore facilities . . . , and to

contain such discharges.” Pub. L. No. 92-500, § 311(j)(10), 86 Stat. 816, 868 (codified at 33 U.S.C. § 1321(j)(1)).

3. The following year, the President delegated to the EPA Administrator the authority and responsibility under section 311(j)(1)(C) to issue regulations to “prevent discharges of oil and hazardous substances from non-transportation-related onshore facilities . . . , and to contain such discharges.” Exec. Order No. 11,735, § 1(4), 38 Fed. Reg. 21,243 (Aug. 7, 1973).

4. In the intervening decades, Defendants never issued regulations to prevent and contain hazardous-substance spills from non-transportation-related onshore facilities (hereinafter, “hazardous-substance spill regulations”). Defendants’ failure to comply with its non-discretionary duty under section 311(j)(1)(C) is actionable under the Clean Water Act, 33 U.S.C. § 1365(a)(2), and exposes the public, particularly low-income communities and communities of color, to environmental and health risks from preventable hazardous-substance spills.

5. In light of these facts, EPA’s delay in issuing hazardous-substance spill regulations under section 311(j)(1)(C) is unreasonable.

6. Plaintiffs therefore urge this Court to compel EPA to issue the hazardous-substance spill regulations required by section 311(j)(1)(C).

THE PARTIES

The Plaintiffs

7. Plaintiff Environmental Justice Health Alliance for Chemical Policy Reform (EJHA) is a collective of over thirty community-based environmental justice organizations, located in thirteen states. These organizations work to hold industry accountable for its disproportionate impacts on people of color and low-income communities. EJHA uses

intergenerational organizing strategies to transform its members' local areas into healthy, sustainable, and just communities for youth, elders, and families.

8. Plaintiff EJHA brings this action on behalf of its members. EJHA's members have been and continue to be injured by Defendants' failure to issue the hazardous-substance spill regulations required under section 311(j)(1)(C).

9. Plaintiff People Concerned About Chemical Safety (PCACS) is a not-for-profit community organization based in West Virginia's Kanawha Valley. PCACS is dedicated to the protection of the health and safety of all who reside, work, and study in the vicinity of local chemical plants. PCACS promotes environmental justice and chemical safety through community organizing, education, and outreach. PCACS is a member of EJHA.

10. PCACS brings this action on its own behalf as an organization that is dedicated and devotes significant resources to addressing issues of chemical safety for communities in the heavily industrial Kanawha Valley. PCACS has been and continues to be injured by Defendants' failure to issue the hazardous-substance spill regulations required under section 311(j)(1)(C). Defendants' failure frustrates and impairs PCACS's organizational mission by causing PCACS to divert and expend significant resources to educate policy makers and the public about the need for above-ground storage tank spill-prevention regulations at the state level. Had Defendants complied with their Congressional mandate to issue federal hazardous-substance spill regulations, PCACS could allocate those resources to other organizational priorities, including the development of a broader chemical release prevention program that has been a long-term institutional priority for PCACS since 2009. PCACS put off work on the chemical release prevention program while focusing on above-ground storage tank spill-prevention regulations.

11. Plaintiff Natural Resources Defense Council, Inc. (NRDC) is a national, not-for-profit environmental and public health membership organization with around 300,000 members. NRDC engages in research, advocacy, media, and litigation related to protecting public health and the environment.

12. NRDC brings this action on behalf of its members. NRDC's members live near above-ground storage tanks that contain hazardous substances and are fearful that spills from those tanks will contaminate surrounding ground, surface, and drinking waters that they use and enjoy. Defendants' failure to issue hazardous-substance spill regulations increases the risk of harmful spills from these unregulated tanks. NRDC's members therefore have been and continue to be injured by Defendants' decades-long failure to issue hazardous-substance spill regulations as required under section 311(j)(1)(C).

The Defendants

13. Defendant EPA is an agency of the United States government. EPA is responsible for administering the provision of the Clean Water Act at issue in this case.

14. Defendant Gina McCarthy, EPA Administrator, is the highest ranking official in the EPA. Administrator McCarthy is responsible for issuing the hazardous-substance spill regulations required under Clean Water Act section 311(j)(1)(C). Plaintiffs sue Administrator McCarthy in her official capacity.

JURISDICTION AND VENUE

15. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1361, and 33 U.S.C. § 1365(a).

16. This Court has authority to issue declaratory relief pursuant to 28 U.S.C. §§ 2201-2202.

17. Venue is proper in this district because this action is brought against an agency of the United States and an officer of the United States acting in her official capacity and under color of legal authority, plaintiff NRDC resides in the Southern District of New York, and no real property is involved in this action. *See* 28 U.S.C. § 1391(e)(1).

18. Plaintiffs have provided Defendants with at least sixty-days written notice of the violations of law alleged herein in the form and manner required by the Clean Water Act, 33 U.S.C. § 1365(b)(2); 40 C.F.R. § 135.3(b). A copy of Plaintiffs' notice letter is attached as Exhibit A to this Complaint.

STATUTORY AND REGULATORY FRAMEWORK

19. Congress passed the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

20. As part of the Clean Water Act, Congress directed that “as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations . . . (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances . . . from onshore facilities . . . , and to contain such discharges.” 33 U.S.C. § 1321(j)(1).

21. In 1973, the President delegated to the EPA Administrator the authority and responsibility to issue regulations under section 311(j)(1)(C) to prevent and contain discharges of hazardous substances from non-transportation-related onshore facilities. Exec. Order No. 11,735, § 1(4), 38 Fed. Reg. 21,243 (Aug. 7, 1973). In 1991, the President reaffirmed that delegation to the EPA Administrator. *See* Exec. Order No. 12,777, § 2(b)(1), 56 Fed. Reg. 54,757, 54,760 (Oct. 22, 1991).

22. Section 311(j)(1)(C) accordingly imposes on Defendants a non-discretionary duty to issue hazardous-substance spill regulations.

23. To ensure that EPA complies with Congressional mandates in the Clean Water Act, like the one found in section 311(j)(1)(C), the Act allows “any citizen” to “commence a civil action on his own behalf . . . (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 33 U.S.C. § 1365(a).

FACTS

24. Since 1973, the EPA Administrator has had a non-discretionary duty under section 311(j)(1)(C) to issue regulations to prevent and contain discharges of oil and hazardous substances from onshore facilities, including above-ground storage tanks. Exec. Order No. 11,735, § 1(4), 38 Fed. Reg. 21,243 (Aug. 7, 1973); Exec. Order No. 12,777, § 2(b)(1), 56 Fed. Reg. 54,757, 54,760 (Oct. 22, 1991).

25. EPA itself has long recognized that the duties imposed by section 311(j)(1)(C) are non-discretionary. *See, e.g.*, 38 Fed. Reg. 34,164, 34,164 (Dec. 11, 1973).

26. Despite this recognition, EPA has only satisfied half of Congress’s mandate under section 311(j)(1)(C). EPA has issued, and occasionally revised, spill prevention and containment countermeasure plan regulations to prevent and contain discharges of oil from non-transportation-related onshore facilities. *See generally* 40 C.F.R. pt. 112. But EPA has not issued any regulations under section 311(j)(1)(C) to prevent and contain discharges of hazardous substances from non-transportation-related onshore facilities. As a result, onshore facilities that store hazardous substances are often left unregulated, exposing the public and the environment to serious harms from spills.

27. In 1978, EPA proposed hazardous-substance spill regulations under section 311(j)(1)(C) that would have applied to onshore facilities operating under National Pollution Discharge Elimination System permits. 43 Fed. Reg. 39,276 (Sept. 1, 1978). EPA also announced that it “anticipated” it would propose “in the near future” hazardous-substance spill regulations for “all other facilities subject to the authority of the” EPA under section 311(j)(1)(C). 43 Fed. Reg. at 39,276.

28. EPA never finalized its proposed hazardous-substance spill regulations under section 311(j)(1)(C). Nor has it ever proposed hazardous-substance spill regulations that would apply to all onshore facilities.

29. EPA’s failure to issue the required hazardous-substance spill regulations leaves many onshore hazardous-substance storage facilities, including above-ground storage tanks, subject to neither state nor federal regulation. This regulatory vacuum has grave environmental and social-justice ramifications.

30. According to U.S. Coast Guard data, there are thousands of self-reported hazardous-substance spills from onshore facilities each year. Hundreds of those spills reach bodies of water, where, by definition, they “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).

31. A recent spill in West Virginia provides a concrete example of the need for hazardous-substance spill regulations. In January 2014, an above-ground storage tank owned by Freedom Industries ruptured, spilling over 5000 gallons of 4-methylcyclohexane methanol into the Elk River. The spill contaminated the local water supply and left some 300,000 people without potable water for nearly a week. The spill also brought to national attention the fact that

large, above-ground storage tanks containing dangerous chemicals near drinking water supplies are often unregulated and thus allowed to fall into disrepair.

32. The Freedom Industries spill follows other significant spills from above-ground storage tanks over the last decade, including a 2006 spill in Garyville, Louisiana (2500 gallons of sodium hypochlorite), a 2007 spill in Madera, California (13,000 gallons of sodium hydroxide (caustic soda)), and a 2013 spill in Petersburg, Virginia (257,782 pounds of iron chloride, 32,595 pounds of ammonium chloride, and 73,754 pounds of hydrochloric acid).

33. U.S. Coast Guard data indicate that hazardous-substance spills from non-transportation-related onshore facilities pose a disproportionate threat to low-income communities and communities of color. The data show a broad, nationwide trend that hazardous-substance spills from above-ground storage tanks are more likely to occur in majority non-white counties than majority white counties. The spills noted above reflect this trend: Madera, California, is over seventy-five percent Hispanic or Latino. Petersburg, Virginia, is nearly eighty percent African American. And Garyville, Louisiana, was over fifty-percent African American at the time of its spill. In each of those communities, over one quarter of the population lives below the poverty line.

34. Documents obtained by NRDC under the Freedom of Information Act, 5 U.S.C. § 552, reveal that EPA again considered issuing hazardous-substance spill regulations for above-ground storage tanks under section 311(j)(1)(C) in the immediate aftermath of the Freedom Industries spill. But EPA has not done so, and continues to defy Congress's command that it issue hazardous-substance spill regulations.

35. EPA's forty-plus-year failure to comply with a Congressional mandate to protect human health and the environment by issuing hazardous-substance spill regulations is

inexcusable and has allowed preventable hazardous-substance spills to continue to occur.

Plaintiffs therefore seek a declaration that EPA has delayed unreasonably in even initiating the rulemaking process for hazardous-substance spill regulations under section 311(j)(1)(C).

Plaintiffs also seek an injunction ordering that EPA begin that rulemaking process without delay, and setting an expeditious, enforceable schedule for EPA to complete rulemaking.

CLAIM FOR RELIEF

36. Plaintiffs incorporate by reference all preceding paragraphs.

37. EPA has delayed unreasonably in issuing the regulations required by the Clean Water Act to prevent and contain hazardous-substance spills from non-transportation-related onshore facilities. *See* 33 U.S.C. § 1321(j)(1)(C).

38. EPA's failure to issue these required regulations constitutes a failure to perform a non-discretionary act or duty in violation of the Clean Water Act, 33 U.S.C. § 1365(a)(2).

REQUEST FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment against EPA as follows:

A. Declaring that EPA's forty-plus-year failure to issue regulations under 33 U.S.C. § 1321(j)(1)(C) to prevent and contain hazardous-substance spills from non-transportation-related onshore facilities is unreasonable and a violation of a non-discretionary duty under the Clean Water Act, 33 U.S.C. § 1365(a)(2);

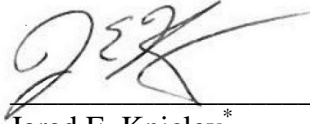
B. Compelling EPA to begin rulemaking and issue regulations to prevent and contain hazardous-substance spills from non-transportation-related onshore facilities, as required under 33 U.S.C. § 1321(j)(1)(C), by Court-imposed deadlines;

C. Awarding Plaintiffs their costs and reasonable attorneys' fees; and

D. Granting such other and further relief as the Court deems just and proper.

Dated: July 21, 2015
Washington, DC

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Knicley', with a horizontal line drawn underneath it.

Jared E. Knicley*
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
T: (202) 513-6242
F: (202) 289-1060
jknicley@nrdc.org
* *Pro Hac Vice* motion pending

Mitchell S. Bernard (MB 5823)
Natural Resources Defense Council
40 West 20th Street
New York, NY 10011
T: (212) 727-4469
F: (212) 727-1773
mbernard@nrdc.org
Counsel for Plaintiffs