

Final Revisions Made to EPA's SPCC Rules, With Some Oil Facility Provisions Rescinded

by Anthony B. Cavender

Previous Client Alerts have discussed the Environmental Protection Agency's amendments to the July 17, 2002 major revisions to the Spill Control and Countermeasure (SPCC) rules.¹ On November 13, 2009, EPA published its latest changes.² The SPCC rules (located at 40 CFR Part 112) affect almost all non-transportation-related facilities that handle significant quantities of oil or petroleum products in their day-to-day operations and which, due to their location, could reasonably be expected to discharge harmful quantities of oil into navigable waters in the event of any release or spill. The effective date of these revisions is January 14, 2010, and the date by which these new SPCC rules must be implemented remains November 10, 2010.

Background

Pursuant to its authority under Section 311(j)(1)(c) of the Clean Water Act, EPA initially promulgated the SPCC rules in 1973. These rules remained more or less intact until 2002, when major revisions were made. A number of legal challenges were filed, and eventually resolved.³ Additional revisions were made in 2006 and 2007, and in 2005 EPA issued and made available to the public its "SPCC Guidance for Regional Inspectors."

The revisions made in a December 5, 2008 proceeding were scheduled to become effective on February 3, 2009. However, with the change in administrations, these rules were subjected to the new administration's Regulatory Review process, and their effective date was delayed while EPA considered objections

¹ These Client Alerts, dated December 19, 2008, February 5, 2009 and June 26, 2009 can be found at www.pillsburylaw.com.

² See 74 FR 58784.

³ See *American Petroleum Institute v. Johnson*, 541 F.Supp. 2d 165 (D.D.C. 2008).

that had been made to some of the new provisions which principally affected oil production facilities. EPA has now completed its review of these objections and the comments it received.

Actions Taken

EPA has decided not to modify the following provisions of the December 2008 rules:

- the exemption for hot-mix asphalt;
- the exemption for pesticide application equipment and related mix containers;
- the exemption for residential heating oil containers;
- the clarification that the definition of "mobile refueler" includes a nurse tank used on farms to store and transport fuel;
- the amendment to the rules' definition of "facility" which clarifies that contiguous or non-contiguous buildings, properties or structures may be considered separate facilities for SPCC purposes;
- the amendment of the facility diagram requirement;
- the new definition of "loading/unloading rack";
- the amendment of the general secondary containment requirements to clarify their scope;
- the extension of the "sized" secondary containment exemption applicable to mobile refuelers;
- the revised amendment of the facility security requirements;
- the amendment of the requirements applicable to personnel performing tests and inspections of SPCC-regulated containers;
- the amendment of the integrity testing requirements applicable to facilities handling animal fats and vegetable oil;
- the amendment of the term "production facility";
- the clarification that oil production drilling and workover activities are not subject to the SPCC;
- requirements applicable to onshore oil production facilities;
- the alternative compliance option for flow-through process vessels at oil production facilities;
- the definition of "produced water container" and an alternative compliance option for these facilities requiring general secondary containment and the service of a Professional Engineer;
- the exemption for certain intra-facility gathering lines subject to the jurisdiction of the U.S. Department of Transportation;
- specific requirements for flowline/intra-facility gathering line maintenance programs;
- the clarification of the term "permanently closed" as it applies to oil production facilities and containers so as to avoid any RCRA compliance issues;⁴
- the exemption for certain Nuclear Regulatory Commission-regulated underground storage tanks;

⁴ EPA notes, at page 58797, that since wastes associated with the exploration, production and development of crude oil are not RCRA hazardous wastes, the SPCC closure requirements should not be confused with the RCRA closure requirements.

- the designation of "Tier I Qualified Facilities" which will enjoy streamlined SPCC rule requirements;
- and the amendment to the SPCC compliance date for new oil production facilities that begin their operations after November 10, 2010.

EPA received no comments on its clarification that wind turbines meet the definition of oil-filled equipment and can be subject to the SPCC rules.

On the other hand, EPA decided to remove these December 2008 provisions from the final rules:

- the exclusion set forth at 40 CFR Section 112.7(h) which excluded farms and oil production facilities from the facility tank car and tank truck loading/unloading rack requirements;
- the alternative Qualified Facility Eligibility requirements for oil production facilities that would have been located at 40 CFR Section 112.3(g) and were based on the small number of producing wells, thus allowing such facilities to self-certify their SPCC compliance status without the service of a Professional Engineer;
- and the exception for the "Produced Water" containers used at oil production facilities that had been added to several sections of the rules and which would have excluded such containers from the SPCC rules.

On second thought, EPA was persuaded that the oil/water mixtures contained in such units could, upon their release or spill, result in a harmful discharge of oil to navigable waters, and that the number of such spills was actually increasing. Consequently, such produced water containers will not be excluded from the applicability of the rules, and their functions must be addressed in the facility's SPCC Plan.

Conclusions

These revisions to the SPCC rules have taken several years to complete, and the regulatory program they establish is comprehensive and complicated. EPA plans to provide the regulated community with ample time to digest their requirements, and to develop and implement plans that address their requirements.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work or the attorney below.

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