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EPA Amends Its Oil Pollution Prevention Regulations for the Fourth Time in Seven Years

Summary

For the fourth time since 2002, EPA has amended its oil pollution prevention ("SPCC") regulations that have been in existence since 1973. Converting the program from a poorly drafted, inflexible "one-size-fits-all" regulation into a more streamlined program, tailored to the characteristics of specific industries or the volume of oil likely to be present at a facility, EPA has completed a 20 year regulatory transformation of a program that affects nearly every facility in the country that uses or stores oil, even in relatively small quantities. With confirmation of most of the changes adopted by EPA at the close of the Bush administration, the winners of this series of regulatory amendments include:

- Facilities with limited storage capacities and a history of successful management of oil;
- Electric utilities with thousands of facilities containing oil-filled equipment;
- Nuclear power plants whose emergency diesel generator tanks no longer will face duplicate regulation by two Federal agencies;
- Facilities using tanker trucks to deliver and transfer oil for fueling and for other purposes; and
- Facilities that use hot mix asphalt containers or apply pesticides.

Although some of the biggest changes benefit these facilities, all SPCC-regulated industries will benefit to some extent from the changes adopted by EPA in this series of amendments.

Background

EPA published the fourth in a series of amendments to its Spill Prevention, Control, and Countermeasures Rules (SPCC) on November 13, 2009. 74 Fed. Reg. 58784. Amendments to the SPCC program were issued in 2002, 2006, 2008 and 2009. By this action, EPA completed a 20 year rulemaking to revamp and clarify its 1973 oil pollution prevention regulations. However, because of widespread criticism of the 2002 amendments, EPA postponed the compliance deadline for these amendments until November 10, 2010, while it undertook a massive revision of the program. That revision has now been completed.

The SPCC regulations apply to any facility engaged in certain specified activities which could discharge oil in harmful quantities into navigable waters of the United States or adjoining shorelines. Facilities with 1320 gallons or less of aggregate aboveground storage capacity are excluded as well as containers with less than 55 gallons and underground storage tanks that are regulated by EPA or the states under EPA's underground storage tank program.

What led EPA to undertake a wholesale rewrite of the SPCC rules was the realization that the rules were poorly drafted and ambiguous. There was little doubt, for example, that bulk storage tanks were regulated, but did the regulations also apply to machinery or equipment that contained oil for operational purposes rather than for storage? Even EPA gave conflicting answers to the question, "Am I regulated?" Noncompliance was widespread.

One of the major criticisms of the 1973 SPCC regulations was its "one-size-fits-all" approach to oil pollution prevention. Whether you were a large or a small facility, once you met the regulatory threshold and could not rule out the potential for a discharge of oil to navigable waters or adjoining shorelines, you were required to (1) prepare a site-specific SPCC plan that had to be approved and certified by a professional engineer, (2) install secondary containment or alternatively, if containment was impractical, prepare and implement an oil spill contingency plan, and (3) comply with detailed operational requirements that were expressed in terms of what you "should" do, not what you "must" do. As a result, the SPCC rules were confusing and largely unenforceable.

The 2009 amendments are in fact the Obama administration's reconsideration of the 2008 amendments promulgated by the Bush administration shortly before leaving office. Except for three provisions in the

2008 rule that have been dropped by the new administration, all other amendments adopted in 2008 have now been reaffirmed and they will go into effect on January 14, 2010. However, the compliance deadline – currently November 10, 2010 – may change again. EPA has announced on its web site that it will shortly propose another deadline extension.

Changes Affecting SPCC-Regulated Industries in General

The big winners in the 2009 rule are facilities with limited oil-storage capacity that will have the option of complying with an alternative streamlined regulatory program. Starting with the 2006 amendments, EPA carved out of the universe of SPCC-regulated facilities a separate category called “qualified facilities.” These are facilities with aggregate oil storage capacity of 10,000 gallons or less which have achieved a three-year record of having neither a single oil discharge of more than 1000 gallons nor two discharges exceeding 42 gallons in any 12 month period. These “qualified facilities” (to be known as Tier II facilities) may self-certify their SPCC plans and avoid the cost of hiring a professional engineer (with some limited exceptions).

The 2008 and 2009 amendments provided additional relief to what might be described as mini-facilities (*i.e.*, facilities that meet the eligibility criteria described above but also have no single container exceeding 5000 gallons). These mini-facilities, known as Tier I facilities have the option of using an SPCC-template in the form of a checklist of SPCC regulatory requirements appropriate for small facilities in lieu of preparing and certifying an SPCC plan. This template is known as Appendix G and appears at the end of 2009 amendments.

Although the “qualified facility” alternative was largely promoted by small business interests and their government allies, this option is not limited to small businesses. Rather, any business – even a Fortune 100 company – is eligible as long as the specific facility falls below the oil storage capacity ceiling and satisfies the three-year no discharge criteria.

Other changes affecting industry in general include:

- Amending the definition of “facility” to clarify that the owner/operator has discretion in defining the boundaries of a facility by aggregating or disaggregating contiguous or non-contiguous buildings, properties, parcels, leases, structures, installations, pipes, or pipelines, so long as multiple devices in close proximity serving the same purpose are not separated where the effect would be to avoid applicability of the rule.
- Codifying earlier agency guidance that general secondary containment must be based on the typical failure mode and most likely quantity of oil that would be discharged, not on worst case assumptions. In addition, EPA codified guidance that general secondary containment may be either passive (*i.e.*, permanent installations such as dikes or berms) or active (*i.e.*, measures deployed by an operator either before oil handling operations begin or in response to a spill so long as the measure is designed to prevent an oil discharge from reaching navigable waters or adjoining shorelines).
- Exempting non-transportation-related tank trucks from the bulk storage tank sized secondary containment requirements but they remain subject to general facility secondary containment requirements. A similar exemption is available for flow-through process vessels at oil production facilities subject to additional inspection and corrective action measures.
- Providing greater flexibility in preparing a facility diagram.
- Clarifying that a loading/unloading arm is an essential component of a “loading/unloading rack”; a tanker truck or railcar using only flexible hoses to load/unload oil does not constitute a loading/unloading rack unless the hose is connected to a loading/unloading arm. The areas associated with such racks are subject to bulk storage sized secondary containment.
- Simplifying security requirements to reflect the facility’s characteristics and location. Compliance may be based on the streamlined security regulations previously applicable only to qualified small facilities.
- Authorizing use of industry standards to determine the qualifications of tank inspectors and testing personnel and the type and frequency of integrity testing. Facilities may now use integrity testing standards that had previously been available only to qualified small facilities. In some cases, an industry standard specifying solely visual inspection may satisfy the integrity testing requirement.
- Clarifying the definition of “permanently closed containers” and the effect of manmade structures on SPCC regulatory requirements.
- Exempting hot mix asphalt and pesticide application equipment and related mix containers from SPCC regulation.

Changes Affecting Specific SPCC-Regulated Industries

A number of provisions affect specific industries, such as electric utilities and natural gas pipelines. These changes include:

- Exempting emergency diesel general tanks at nuclear power plants regulated by the Nuclear Regulatory Commission from SPCC regulation.
- Clarifying that wind turbines qualify as oil-filled operational equipment and the less burdensome alternative program for such equipment.
- Exempting intra-facility gathering lines that are subject to DOT pipeline regulation from SPCC regulation.

Provisions that Reversed Burden Reduction Measures Granted in the 2008 Rule

Although most of the 2008 SPCC amendments adopted by the Bush administration EPA were affirmed by the Obama administration EPA, three provisions in the earlier rule were dropped:

- Removing the exemption from loading/unloading requirements previously granted to oil production facilities and to farms. The exemption had been based on the assumption that loading/unloading racks are not typically associated with facilities in these industries. EPA concluded that an industry-specific exemption is unnecessary because the regulation would be inapplicable in any event if such racks are not present at those industries' facilities.
- Removing alternative qualified facility criteria for oil production facilities. EPA reversed itself because the alternative criteria posed a higher risk of oil discharge due to the absence of any limit on the accumulated oil storage capacity at such facilities – other industries' qualified facilities are subject to a 10,000 gallons oil storage capacity limit.
- Removed the SPCC exemption for produced water containers because EPA determined that these containers typically contain oil that can result in discharges that cause harm. EPA did provide an alternative to bulk storage sized secondary containment for produced water containers if the facility removes free-phase oil on a regular basis and complies with additional protective requirements.

Unfinished Business

Although publication of the 2009 amendments brings this series of rulemakings that grew out of the amendments adopted in 2002 to an end, EPA acknowledges that there is still unfinished business.

- First, EPA plans to propose another extension of the compliance deadline.
- Second, EPA admits that further inter-agency discussions are necessary to address issues of potential duplicative regulation of oil and natural gas pipelines by EPA and DOT stemming from a joint agency memorandum adopted in February 2000.
- Third, EPA plans to revise and update the SPCC Guide for Regional Inspectors to reflect rule changes adopted in 2006, 2008 and 2009.
- Fourth, although not mentioned in the notice, a number of industries have raised concerns about the broad definition of "oil" and the potential application of the SPCC rules in circumstances not generally thought to trigger SPCC regulation.

For more information on steps to take to achieve compliance with this series of amendments or to participate in the administrative proceedings that are certain to follow, please contact Bill Weissman or Aaron Wallisch.

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