

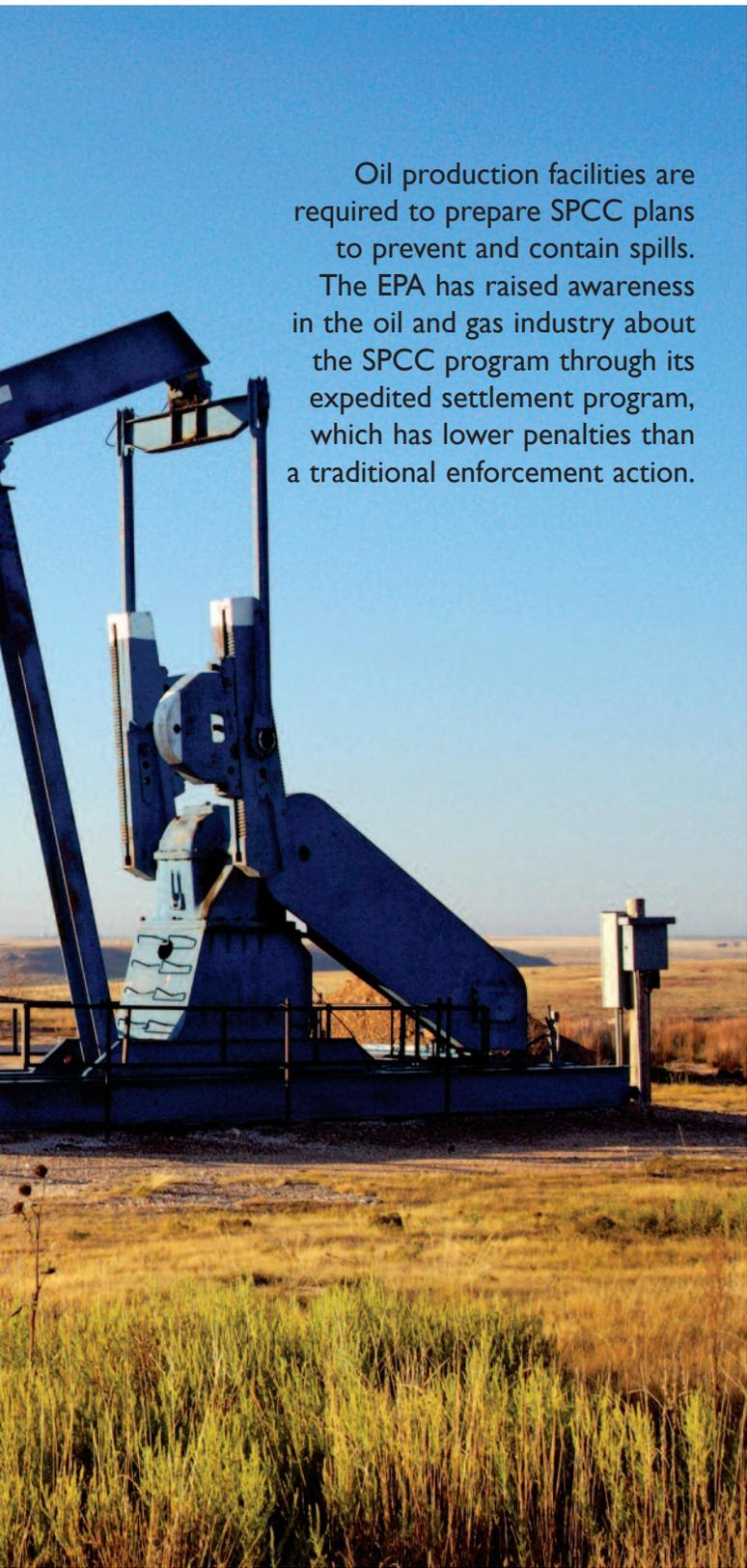


The Long and Winding Road

The EPA's Amendments to the Oil Spill Prevention, Control, and Countermeasure Rules

BY CONSTANCE COURTNEY WESTFALL





Oil production facilities are required to prepare SPCC plans to prevent and contain spills. The EPA has raised awareness in the oil and gas industry about the SPCC program through its expedited settlement program, which has lower penalties than a traditional enforcement action.

AFTER A LENGTHY DELAY, characterized by some as “absurd,”¹ the U.S. Environmental Protection Agency’s (EPA) 2002 amendments to the Spill Prevention, Control and Countermeasure (SPCC) rules look like they will finally go into effect for most of the regulatory community on Nov. 11, 2011. Generally, the SPCC regulations require the preparation and implementation of a plan to prevent discharges of oil into navigable waters and to contain such discharges if they occur. With substantial penalties for violations of the SPCC regulations and for oil spills, noncompliance can be very costly.

Who is Regulated?

A non-transportation² facility is subject to the SPCC regulations if (1) it can be reasonably expected to discharge oil to navigable waters;³ and (2) the storage capacity exceeds the 1,320 gallon threshold for aboveground storage tanks.⁴ [40 C.F.R. §112.1; see also *In re Pepperell*, 9 E.A.D. 83, 2000 WL 576426 at 9 (EPA EAB 2000).]

Background

The initial enabling statute, the Water Quality Improvement Act of 1970,⁵ established a national policy against discharges of oil into navigable waters of the United States.⁶ This legislation resulted from public reaction to a 1969 blowout from an offshore platform near the coast of Santa Barbara, Calif., causing the largest oil spill in United States history at that time. The current version is found in Section 311 (“Oil and Hazardous Substance Liability”) of the Federal Water Pollution Control Act, which is commonly referred to as the Clean Water Act (CWA).

The EPA promulgated SPCC regulations in 1973.⁷ While the regulations required the certification of the facility’s plan by a licensed professional engineer, the bulk of the regulations were written in permissive language, using “should” rather than “shall” or “must.”

The heart of the substantive requirements was contained in Section 112.7, “Guidelines for the Preparation and Implementation of a Spill Prevention, Control, and Countermeasure Plan.” In addition to the secondary containment, drainage, inspection, security, and training requirements, Section 112.7 contained facility-specific requirements for: (1) bulk storage tanks; (2) transfer operations, pumping, and in-plant process; (3) tank car and tank truck loading/unloading racks; (4) onshore oil production facilities; (5) onshore oil production bulk storage tanks; (6) onshore oil production facilities facility transfer operations; (7) onshore oil drilling and workover facilities; and (8) offshore

oil drilling, production, or workover facilities. The specifics of the plan were essentially left to the discretion of the facility owner/operator and the licensed professional engineer. The vanguard of the rules, then and now, is “good engineering practice.”

In 1980, the EPA acknowledged that members of the regulated community had been interpreting compliance with Section 112.7 as optional because of the use of “should” and “guidelines.”⁸ To eliminate this confusion, the EPA proposed regulations that substituted “requirements” and “shall” for “guidelines” and “should.” However, the EPA subsequently abandoned this rulemaking, determining that these modifications were unwarranted.⁹

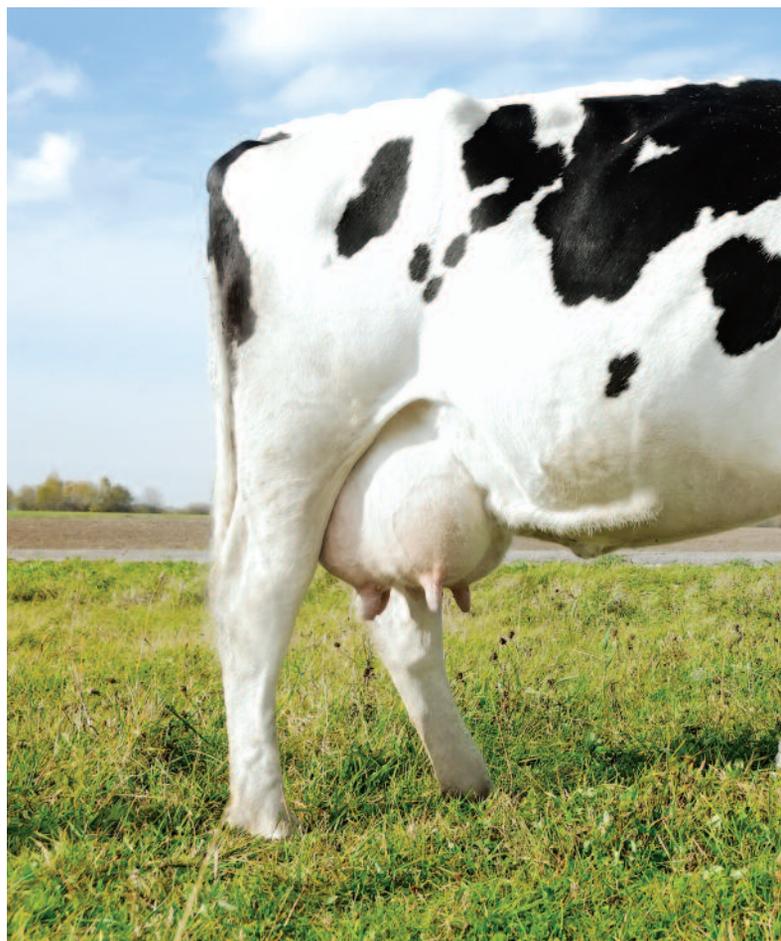
In the aftermath of a sizeable oil spill¹⁰ from an aboveground tank that affected drinking water supplies and more than 2.7 million people, the EPA formed a task force in 1988 and recommended that the guidelines be made mandatory to “require certain practices rather than only encourage them.”¹¹ The U.S. General Accounting Office (GAO), in investigating this spill, as well as a large subsequent spill,¹² concurred.¹³ Another significant recommendation was to revise the regulations to include spill response procedures in the SPCC plans.¹⁴

In response to the findings of the EPA Task Force and the GAO Report, the EPA proposed amendments to the SPCC regulations in 1991, essentially resurrecting the 1980 proposal.¹⁵ Further revisions were proposed in 1993 to comply with the 1990 Oil Pollution Act’s¹⁶ mandate that facilities posing a “substantial harm,” a subset of SPCC facilities,¹⁷ prepare and submit facility response plans (FRPs). In 1994, the EPA finalized the FRP portion of the rulemaking without touching the SPCC regulations.¹⁸ To reduce the “information collection burden,” another proposal was made in 1997.¹⁹ Finally, in 2002, the EPA, citing to the 1991, 1993, and 1997 proposals, finalized amendments to the SPCC regulations. The amendments were controversial and the EPA has repeatedly delayed compliance.

The Controversy

In the 2002 SPCC amendments, the EPA took a fairly straightforward set of regulations and made it “difficult to read and understand.”²⁰ The controversy arose, in part, from the breadth of the scope of the regulations. Most envisioned the SPCC regulations, which had been in effect for almost 30 years at that point, as applying to the storage of petroleum in tanks. Relying on the statute’s language,²¹ the EPA promulgated regulations that applied to animal fats, fish oil, vegetable oil,²² other non-petroleum oils,²³ equipment using oil, mixtures of water and oil, certain oil/water separators, and containers, rather than tanks, containing 55 or more gallons of oil.²⁴ The EPA acknowledged that facilities might not have realized that they were subject to the SPCC rules.²⁵ For example, the list of industries potentially regulated (by the North American Industry Classification System, or NAICS,²⁶ code) cited expansion from 13 categories to 30 during the course of the rulemaking.²⁷

By the EPA’s count, the 2002 regulations made more than 30 major changes. [67 Fed. Reg. 47043-51.] This article highlights some of those changes.

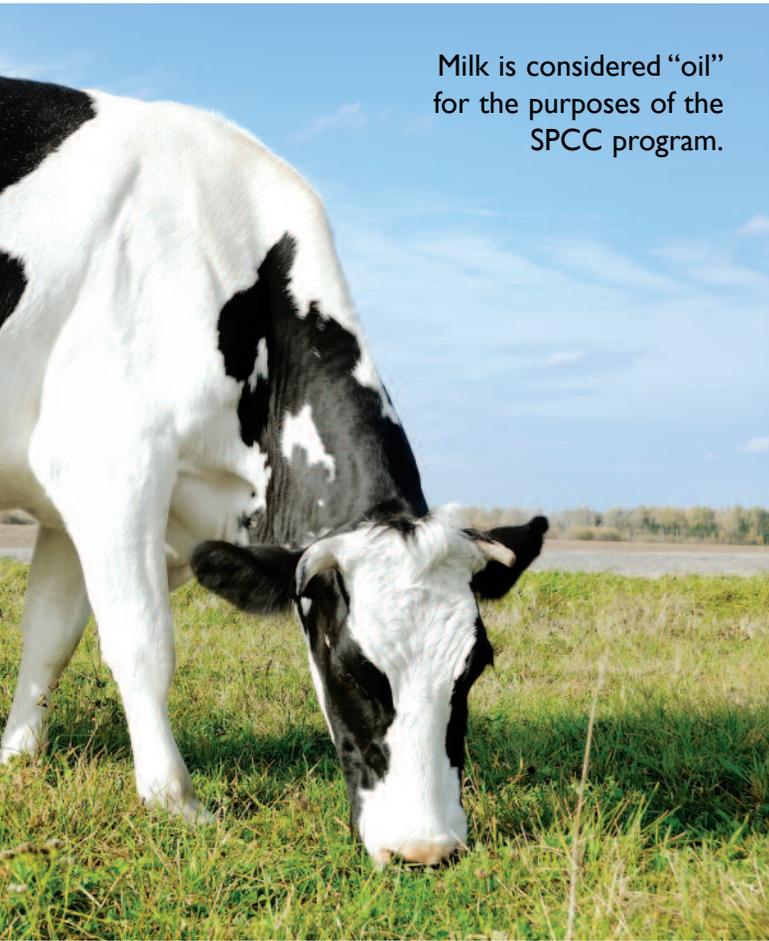


Generally, the EPA took the substantive provisions in former Section 112.7 and split them out into general requirements (Section 112.7) and four separate categories based on facility-type:

- (1) onshore facilities (except production facilities) — Section 112.8;
- (2) onshore production facilities — Section 112.9;
- (3) onshore oil drilling and workover facilities — Section 112.10; and
- (4) offshore oil drilling production or workover facilities — Section 112.11.

The EPA then duplicated this set of regulations for animal fats and vegetable oils (AFVOs).²⁸ [Sections 112.12–112.15.] (Sections 112.13–112.15 were deleted during a subsequent rulemaking, with the EPA acknowledging that oil production facilities, drilling, and workover facilities do not handle, store, or transport AFVOs).²⁹ The use of adequate secondary containment³⁰ to retain oil spills, thereby preventing a release of oil into the environment, remains a key component, but spill notification and response procedures were added to address a release. [Section 112.7(a)(3).]

While changing the language from “guidelines” to “requirements” and “should” to “must,” the EPA curiously took the position that this modification was not substantive because it had always interpreted the language in the 1973 regulations as mandatory.³¹ As discussed earlier, this does not appear to be fac-



Milk is considered “oil” for the purposes of the SPCC program.

tually accurate. Perhaps the EPA took this stance with its enforcement cases in mind.

To deal with deletion of the permissive language (“guidelines” and “should”), the EPA included an “environmental equivalence” provision.³² [Section 112.7(a)(2).] This provision allows deviation from most of the requirements, except for secondary containment, inspections and recordkeeping, and other non-technical requirements, if the owner/operator explains the reason for the deviation and substitutes an equivalent environmental protection. [Section 112.7(a)(2).]

The downside to the flexibility is the risk that the EPA might disagree with a facility’s approach and penalize the facility. Because the SPCC plan is not submitted to the EPA for approval, the first time it is reviewed may be during an inspection or in the aftermath of an oil spill.

The 2002 amendments rely on the use of industry standards³³ and allow the use of usual and customary business records to document tests or inspections, instead of keeping duplicate records. [Section 112.7(e).] In reality, unless the usual and customary records track the regulatory provisions, these records might not satisfy an EPA inspector.

As with the original 1973 rules, if the licensed professional engineer determines that secondary containment is impracticable, the owner/operator must prepare a contingency plan and a written commitment of manpower, equipment, and materials to

expeditiously control and remediate the spilled oil.³⁴ With more components subject to the secondary containment provisions, owner/operators are required to prepare contingency plans for their facilities. Oil production facilities, for instance, with flowlines that do not have secondary containment, trigger this requirement.³⁵ The 2002 regulations also added inspection procedures. By way of example, for bulk storage containers without secondary containment, the owner/operator must conduct both periodic integrity testing of the containers and periodic integrity and leak testing of the valves and piping. [Section 112.7(c).]

The EPA changed the time frames for preparing and implementing SPCC plans and amendments to plans. Under the 1973 regulations, a new facility had six months to prepare the plan and another six months to implement it.³⁶ For amendments to a plan, an existing facility had six months to implement an amendment.³⁷ The 2002 regulations require a new facility to have the plan in place before beginning operations. [Section 112.3(b).] The timing for amendments, however, was loosened, allowing six months for preparation and another six months for implementation. [Section 112.5(a).]

In responding to the obligatory legal challenge to the regulations,³⁸ the EPA realized that further rulemaking would be required.³⁹ The SPCC regulations went into a standstill and have remained that way for the past nine years.

The Holding Pattern

The 2002 amendments went into effect on Aug. 16, 2002. Originally, existing facilities had six months to amend their plans and another six months to implement. New facilities had until a year from the effective date, Aug. 18, 2003. The 2002 preamble provided a detailed timetable⁴⁰ for the preparation and implementation of SPCC plans under the 2002 standards, 67 Fed.Reg. 47082-83, which almost immediately became irrelevant as the EPA began delaying compliance, extending the deadline nine times.

Only recently has the first subset of facilities been required to prepare or bring their existing plan into compliance with the new standards. FRP facilities, offshore drilling, production or workover facilities, and facilities with an offshore component had a Nov. 10, 2010, deadline. [75 Fed. Reg. at 63102 (to be codified at §112.3(a)(2)).]

For most other facilities,⁴¹ the deadline is Nov. 10, 2011. Facilities operating before the 2002 amendments were to continue implementing their existing plan, based on the original 1973 regulations.⁴² New facilities — those that began operations after the effective date of the 2002 amendments — have yet to comply with the SPCC regulations.⁴³

The EPA explained that it was not delaying the effective date of the amendments. Rather, a more stringent/less stringent analysis came into play. If the 2002 rules and subsequent amendments imposed new or more stringent compliance obligations than the 1973 regulations, the compliance date extensions applied. Provisions that provided regulatory relief were not affected by the extensions and became applicable when the rule or amendment became effective. [68 Fed. Reg. 18890, 18893 (April 17, 2003).]

The EPA noted that the compliance date extensions applied to all facilities, existing and new. [*Id.* at 18893.]

As a result, the 1973 regulations, with their permissive language now interpreted as mandatory, remain relevant. The EPA prepared SPCC inspection checklists including the more stringent 2002 provisions, but marked most of these “n/a.”⁴⁴ The issues posed by this bifurcated system in the enforcement context have yet to be fleshed out.

The Amendments to the Amendments

The EPA reconsidered the rules, amending the regulations in 2006, 2008, and 2009, after numerous proposals, settlements, court decisions, requests for information, and one stay.⁴⁵ Generally, the amendments provided relief by complete exemptions (*e.g.*, hot-mix asphalt⁴⁶), partial exemptions (*e.g.*, mobile refuelers from sized secondary containment requirements⁴⁷), or reduction in requirements for certain equipment or facilities.⁴⁸ The EPA allowed smaller facilities (Tier II) with less than 10,000 gallons of oil and a satisfactory spill history⁴⁹ to self-certify, avoiding the expense of a licensed professional engineer. [Section 112.6(a).] For the smallest facilities (Tier I), those that qualify as Tier II and have no individual containers with a capacity greater than 5,000 gallons, the EPA provided a SPCC plan template to complete and implement. [Section 112.3(g)(1); Appendix G.] In some instances, however, the amendments are more stringent than the 2002 regulations. For example, the flowline maintenance program at oil production facilities morphed from one that was “general in nature and offers the owner/operator a great deal of discretion in determining how to best prevent discharges from each flowline”⁵⁰ to a detailed set of prescriptions.⁵¹

There also were a few instances in which the EPA revisited basic program requirements, like simplifying the security requirements, providing more flexibility in integrity testing of bulk containers, and modifying the definition of “facility.” For security⁵² and integrity testing,⁵³ the EPA extended to all facilities the streamlined requirements it had promulgated for the Tier I and Tier II facilities. The definition of “facility” was modified to give the owner/operator discretion to determine what constitutes its SPCC facility,⁵⁴ with the EPA noting that this decision could not be made “in a manner so as to simply avoid applicability of the rule.”⁵⁵

It now appears that the SPCC rulemaking is complete, and Nov. 11, 2011, is an actual deadline, with the exception of milk and milk product containers.⁵⁶ Unfortunately, a set of regulations that began as “difficult to read and understand” became even more so, riddled with exceptions and qualifications, as the EPA sought to balance the concerns of the many interested parties.

Conclusion

A wide range of businesses are subject to the SPCC regulations, including wind power, oil production and exploration, farms, ranches, restaurants, office buildings, electrical utilities, aviation, dairies, automotive services, forestry, universities, hospitals, construction, mining, and manufacturing. The Nov. 11,

2011, deadline is fast approaching. Attorneys should be aware of the broad scope of these regulations. With penalties that were dramatically increased by the Oil Pollution Act (OPA), the price of noncompliance can be steep, particularly if there is a spill.

Notes

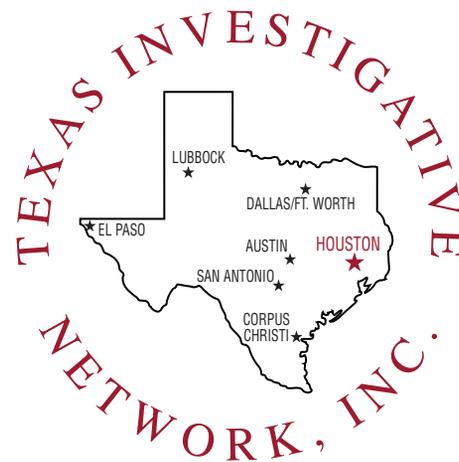
- 71 Fed. Reg. 8462, 8464 (Feb. 17, 2006).
- The EPA shares jurisdiction for implementing oil spill regulations with the Department of the Interior (DOI) and the Department of Transportation (DOT). See Exec. Order No. 12777, 56 Fed. Reg. 54757 (Oct. 22, 1991). The DOT was delegated authority over transportation-related onshore facilities, deepwater ports, and vessels, where the DOI has jurisdiction over certain offshore facilities, including pipelines. The agencies have entered into Memorandums of Understanding (MOU) regarding their jurisdiction. See 36 Fed. Reg. 24080 (Nov. 24, 1971) (portions included as Appendix A to 40 CFR part 112.); 40 CFR Part 112 Appendix B (2010); 59 Fed. Reg. 34102 (July 1, 1994). The jurisdictional lines are sometimes blurry and a facility may be subject to more than one agency’s jurisdiction. See *e.g.*, 74 Fed. Reg. 58803-04 (Nov. 13, 2009) (referencing joint EPA/DOT guidance memorandum “Jurisdiction over Breakout Tanks/Bulk Oil Storage Tanks (Containers) at Transportation-Related and Non-Transportation-Related Facilities.”)
- The definition of “navigable waters” became unsettled after the Supreme Court’s decisions in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Rapanos v. United States*, 126 S. Ct. 2208 (2006). See *e.g.*, *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex 2006) (oil did not reach navigable waters).
- Originally, SPCC applicability was triggered if any aboveground storage tank exceeded 660 gallons, which resulted in a market for 650-gallon tanks. 38 Fed. Reg. 34165; 67 Fed. Reg. 47041, 47066 (July 17, 2002). The 2002 amendments deleted this provision. 67 Fed. Reg. at 47044. Underground storage tanks (USTs) are also subject to the SPCC regulations if the capacity exceeds 42,000 gallons. 40 C.F.R. §112.1(d)(2). However, USTs are exempt from SPCC requirements if they are regulated by 40 C.F.R. Parts 280 or a State-approved equivalent program. *Id.*
- Pub. L. 91-224, 84 Stat. 94, 96 (1970) (“[t]he President shall issue regulations... establishing procedures, methods, and requirements for equipment to prevent discharges of oil from vessels and from onshore facilities and offshore facilities”). This language, with minor changes and the addition of hazardous substances, was reintegrated into the Federal Water Pollution Control Act Amendments of 1972 (“FWPCA 1972 Amendments”) as Section 311(j)(1)(C). See Pub. L. 92-500, 86 Stat. 816, 868 (1972).
- This provision currently reads: “The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the continuous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act).” 33 U.S.C.A. §1321(b)(1) (West 2001). See Water Quality Act §11(b)(1), 84 Stat. at 96; FWPCA 1972 Amendments §311(b)(1), 86 Stat. at 863; Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566, 1593 (1977).
- The EPA called them the “Oil Pollution Prevention Regulations,” which never caught on. 38 Fed. Reg. 34163 (Dec. 11, 1973) (codified at 40 C.F.R. Part 112). The regulations were amended in 1974 to provide for civil penalties and procedures and in 1976 (clarifications). 39 Fed. Reg. 31602 (Aug. 29, 1974); 41 Fed. Reg. 12657 (March 26, 1976).
- 45 Fed. Reg. 33813, 33817 (May 20, 1980). The EPA also proposed requiring the Plan be in narrative form, expressing dissatisfaction with preprinted checklist forms they were seeing at many facilities: “The Agency feels strongly that a check-the-blank type form with no narrative description does not represent a well-thought-out Spill Prevention Plan and is contrary to the spirit and intent of the regulation.” *Id.* at 33817. Ironically, in the recent rulemaking, the EPA itself enacted a check-the-blank SPCC template for certain facilities. 40 C.F.R. Part 112 Appendix G.
- 56 Fed. Reg. 54611, 54613 (Oct. 22, 1991) (“Based on a subsequent decision by the Agency that the proposed modifications to 40 CFR Part 112 were not required at that time, the revisions proposed on May 20, 1980, were not finalized.”). The Agency’s reasons changed over time. In 1997, the EPA stated that the “1980 proposal was never finalized because the Agency believed these proposed changes needed additional justification.” 62 Fed. Reg. 63811, 63813 (Dec. 2, 1997).
- A tank at Ashland Oil facility in Floreffe, PA split apart (“brittle fracture”) and collapsed while it was being filled, releasing about 1 million gallons of diesel to Monongahela and Ohio Rivers. Fifteen water intakes were subsequently shut



- down, and numerous communities along the Ohio River were forced to discontinue or filter water supplies. U.S. Environmental Protection Agency, The Oil Spill Prevention, Control, and Countermeasures Program Task Force Report at 1-2 (May 13, 1989)[hereinafter "SPCC Task Force Report"]. The 2002 amendments included a provision addressing brittle fracture. 40 C.F.R. §112.7(i).
11. SPCC Task Force Report at ES-5-ES-6 & 2-7. One of the findings included the following:

Finding. Compliance with many aspects of the SPCC regulations is currently performed on a discretionary basis. Many aspects of the current regulations are guidelines rather than mandatory requirements.

Recommendation. The Task Force recommends changes in the SPCC regulations, particularly to 40 CFR Part 112.7, that would specify mandatory compliance with many of the guidelines in the current regulations.
 12. In 1988, a mechanical failure of roof drainage system, combined with a Shell employee leaving an open valve unattended, allowed 400,000 gallons of oil to flow into the drainage system, bypass the containment area, and flow undetected into the Carquinez Strait and then into San Francisco Bay. See U.S. General Accounting Office, *Inland Oil Spills — Stronger Regulation and Enforcement Needed to Avoid Future Incidents* (February 1989) at 12-13 [hereinafter "GAO Report"].
 13. GAO Report at 19-21. In discussing some of the Section 112.7 provisions, the GOA found that "EPA attorneys and program officials consider these provisions guidelines or recommendations — not requirements. The Regional Counsel for EPA Region III said that if a tank operator did not follow the guidelines, it could not be said to have violated the regulations." *Id.* at 17.
 14. The GOA Report stated: "The regulations do not require that tank owners and operators include in their SPCC plans provisions to deal with oil escaping in large quantities beyond the facility boundaries." GOA Report at 19.
 15. 56 Fed. Reg. at 54613; 62 Fed. Reg. at 63813.
 16. The Oil Pollution Act (OPA) was enacted in response to the Exxon Valdez oil spill. In addition to the FRP requirement, OPA strengthened Section 311 of the CWA by increasing penalties and restructuring the administrative penalty process. See Pub. L. 101-380, 104 Stat. 484 (1990).
 17. At least as the EPA interpreted the OPA. 58 Fed. Reg. 8823 (Feb. 17, 1993). One commentator lamented that the statute's language was so broad that any onshore facility "that could discharge oil to a storm drain or storm sewer may need to prepare a response plan." R.V. Randle, *The Oil Pollution Act of 1990: Its Provisions, Effects and Intent*, Oil Pollution Deskbook 13 (Envtl. L. Inst. 1991)(relying on pre-*Rapanos* and *SWANCC* definition of navigable waters). However, every SPCC facility must determine whether it must prepare a FRP by completing the "Certification of the Applicability of the Substantial Harm Criteria" and maintain this certification at the facility. §112.20(e). Generally, a FRP is required if the facility (i) has an oil storage capacity of 42,000 gallons or more and transfers oil over water to or from vessels; or (2) has an oil storage capacity of at least 1 million gallons and meets the substantial harm criteria set forth in Section 112.20(f)(1)(ii). 40 C.F.R. §112.20(f)(1).
 18. 59 Fed. Reg. 34069 (July 1, 1994)(codified at 40 C.F.R. §§112.20 and 112.21).
 19. 62 Fed. Reg. 63811 (Dec. 2, 1997).
 20. South-Midcontinent Region of Petroleum Technology Transfer Council, *Produced Water and Associated Issues* Section 8, http://www.ogs.ou.edu/PTTC/pwm/pw_s8.htm (last accessed March 12, 2011).
 21. Oil is defined as "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoils." Section 311(a)(1); 33 U.S.C.A. §1321(a)(1). EPA interprets this definition to "include all types of oil, in whatever form, solid or liquid. That includes synthetic oils, mineral oils, vegetable oils, animal fats, petroleum derivatives, etc." 67 Fed. Reg. at 47076.
 22. The animal fat and vegetable oil industry fought the applicability of the regulations on a number of fronts: (i) challenging the Facility Response Rule (*Natl Oilseed Processors Ass'n vs. U.S. Envtl Protection Agency*, No. 94-1643 (D.D.C. filed Sept. 2, 1994), (ii) lobbying for the passage of the Edible Oil Regulatory Reform Act (Pub. L.104-55 (1995); 33 U.S.C.A. § 2720) which requires agencies to differentiate between animal fats/vegetable oils and other oils, e.g., petroleum, in enforcement and rulemaking); and (iii) filing an administrative "Petition of Reconsideration and Stay of Effective Date" for the Facility Response Plan rule, which was denied. 62 Fed. Reg. 54507 (Oct. 20, 1997). The EPA, however, did ultimately revise the FRP regulations in a 2000 rule-making, in response to legislation directing it to issue regulations amending 40 C.F.R. part 112 no later than March 31, 1999. Pub. L. 105-276. EPA promulgated a separate approach for calculating planning volumes for a worst case discharge in the FRPs for animal fat and vegetable oil facilities. 65 Fed. Reg. 40776 (June 30, 2000).
 23. Other non-petroleum oils include creosote, silicone fluids, coal tar, pine oil, turpentine, and tall oils. 67 Fed. Reg. at 47075.
 24. See e.g., Office of Fossil Energy, U.S. Dept. of Energy, *Assessment of the Potential Costs and Energy Impacts of Spill Prevention, Control, and Countermeasures Requirements for U.S. Oil and Natural Gas Production* at 2 (Aug. 17, 2006).
 25. 67 Fed. Reg. at 47052.
 26. NAICS refers to the North American Industry Classification System. NAICS replaces the Standard Industrial Classification (SIC) code.
 27. Compare 67 Fed. Reg. at 47042 (13 listed) with 74 Fed. Reg. 58783, 58766 (Nov. 13, 2009)(30 listed).
 28. Specifically, Subpart C, which originally consisted of Sections 112.12-112.15, is entitled "Requirements for Animal Fats and Oils and Greases, and Fish and Marine Mammal Oils; and Vegetable Oils, Including Oils from Seeds, Nuts, Fruits, and Kernels." 67 Fed. Reg. 47149-47151.
 29. 70 Fed. Reg. 73524, 73527 (Dec. 12, 2005); 71 Fed. Reg. 77266, 77285, 77293 (Dec. 26, 2006).
 30. See Section 112.7(c). The sized secondary containment requirements are determined on a facility-specific basis. For instance, the secondary containment for oil production facility bulk storage containers is more stringent than the 1973 regulations, requiring not only that the secondary containment hold the capacity of the largest container, but also have sufficient freeboard for precipitation. Section 112.9(c)(2).
 31. 67 Fed. Reg. at 47052.
 32. See 56 Fed. Reg. at 54620.
 33. The required P.E. certification was expanded. For example, in addition to attesting that he is familiar with the regulations, he also must state that industry standards were considered. 40 C.F.R. §112.3(d)(1)(iii). If none are applicable, manufacturer's instructions should be followed, and if there are none, then the P.E. is obligated to use good engineering practice. 67 Fed. Reg. at 47057.
 34. While not as onerous as a Facility Response Plan (FRP), the Contingency Plan must follow the provisions in 40 CFR §109.5, which is rather awkward since it is designed for state, local, and regional agencies. If the facility has already prepared a FRP, it may rely on the FRP to satisfy this requirement.
 35. See e.g., Office of Emergency Response, U.S. Envtl. Protection Agency, *SPCC Guidance for Regional Inspectors Appendix F (2005)(Model Contingency Plan for Oil and Gas Production Facilities)*. Use of the EPA's Model Plans should be judicious as the EPA uses these as vehicles to extend its jurisdiction and impose



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- obligations that did not make it into the rulemaking. See e.g., Model Plan at §1.4 (references “seeps into groundwater”). The Fifth Circuit has specifically stated that groundwater is not “navigable waters of the United States.” *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), citing *Exxon Corp. v. Train*, 554 F.2d 1310, 1322 (5th Cir. 1977).
36. 40 C.F.R. §112.3(b)(2001).
37. 40 C.F.R. §112.5(a)(2001). The EPA interpreted this provision to require the preparation of the amendment on the same day as the triggering event. *In re Ashland Oil*, 4 EAD 485, 92 WL 235125 (EPA EAB 1992).
38. *Am. Petroleum Inst. v. Leavitt*, Nos. 02-2247 PLF & 02-2254 PLF (D.D.C. filed Nov. 14, 2002); 69 Fed. Reg. 29728 (May 25, 2004)(clarification of rule pursuant to settlement); *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 165 (D.D.C. 2008)(EPA’s definition of “navigable waters” in SPCC regulations vacated for failure to offer reasoned explanation for the definition in violation of the Administrative Procedures Act, in light of relevant Supreme Court decisions, see *supra* n. 3); 73 Fed. Reg. 71941 (Nov. 26, 2008)(reinstating 1973 definition of navigable waters).
39. EPA noted that “[The D.C. District court cases have] made clear that EPA (and other executive agencies) needs to operate within the parameters of existing policy framework. Policy interpretations need to be consistent with the properly promulgated notice and comment rules that are on the books. Where a given policy issue or question has not previously been interpreted, if an interpretation can be made within the construct of a rule that was finalized, agencies have discretion to do that. But having done that once, if EPA wanted to change the interpretation of a given provision, the agency must then embark upon additional rulemaking.” Summary of Spill Prevention, Control and Countermeasure Stakeholder Meeting at 4 (March 31, 2004).
40. The EPA recently resurrected this language to argue that facilities in existence prior to Aug. 16, 2002 with no SPCC Plan to maintain do not qualify for the compliance extension and must immediately comply with the new regulations. 75 Fed. Reg. 45572, 45575 n.3 (Aug. 3, 2010); 75 Fed. Reg. 63093, 63099-100 (Oct. 14, 2010).
41. For facilities handling milk, the deadline will be one year from the date of the final rule addressing milk and milk product containers. 75 Fed. Reg. at 63102 (to be codified at §112.3(c)).
42. Specifically, Section 112.3(a)(1) now provides:
Except as otherwise provided in this section, if your facility, or mobile or portable facility, was in operation on or before Aug. 16, 2002, you must maintain your Plan, but must amend it, if necessary to ensure compliance with this part, and implement the amended Plan no later than Nov. 10, 2011. If such a facility becomes operational after Aug. 16, 2002 through Nov. 10, 2011, and could reasonably be expected to have a discharge as described in §112.1(b), you must prepare and implement a Plan on or before Nov. 10, 2011.
- 75 Fed. Reg. at 63102.
43. One legal analyst summarized the situation:
Delays of the compliance deadline for the SPCC Plans have resulted in a bifurcated enforcement arena in which the owner or operator of an oil production facility that was in operation prior to Aug. 16, 2002, is subject to enforcement sanctions if she has not prepared and implemented an SPCC Plan that complies with the 1973 requirements. But the owner or operator of a facility that began operating after that date would not be subject to similar sanctions because such activities have not yet been required to prepare or implement any SPCC Plan.
- B. Jeffery, *Oops! — Accidents Happen: Oil Pollution Prevention at Onshore Production Facilities*, 49 Washburn L. J. 493, 496 (2010).
44. EPA is apparently enforcing some of the 2002 provisions on the ground that they should have been in a SPCC plan prepared under the 1973 standards as “good engineering practice,” even if they were not specifically set out in the 1973 regulations. 67 Fed. Reg. at 47097.
45. The 2008 amendments were promulgated in the waning days of the Bush administration. They were stayed pursuant to a White House memorandum entitled “Regulatory Review” and an Office of Management and Budget entitled “Implementation of Memorandum Concerning Regulatory Review.” 74 Fed. Reg. 4435 (Jan. 26, 2009). The 2008 amendments were initially stayed for 60 days, and then until Jan. 14, 2010. 74 Fed. Reg. 5900 (Feb. 9, 2009); 74 Fed. Reg. 14736 (April 1, 2009). After review, the EPA deleted three provisions from the 2008 amendments: (1) exemption for the oil production industry and farms from the loading/unloading rack requirements in Section 112.7(h); (2) expansion of the exemption for small facilities (Tier II) to include certain oil production facilities; and (3) exemption for certain produced water containers. 74 Fed. Reg. at 58786.
46. See §§ 112.1(d)(2)(ii)(C) and (d)(8).
47. There are two different types of secondary containment requirements, the general secondary containment requirements in Section 112.7(c) and sized containment provisions applicable to specific type of facility. For instance, Section 112.8(c)(2), applicable to bulk storage containers, requires sized secondary containment that can hold the capacity of the largest container along with sufficient freeboard for precipitation. General secondary containment, under Section 112.7(c), can be sized (e.g., berms, dikes) or “passive,” but it can also be “active” by the placement of sorbents or a drip pan, for example, to contain a release. EPA clarified this distinction in the 2008 rulemaking, revising Section 112.7(c). 73 Fed. Reg. at 74261-74262, 74304. The mobile refuelers are considered bulk storage containers and, without the exemption, would have to have sized containment.
48. For example, new oil production facilities now have six months after commencement of operations to prepare and implement the SPCC Plan. Section 112.3(a)(3).
49. To qualify, the facility must not have had (i) a single discharge exceeding 1,000 gallons or (ii) two discharges exceeding 42 gallons within any 12-month period during the preceding three years or since becoming subject to the SPCC program, if it has not operated for three years. Section 112.3(g)(1)–(2). The gallon amount refers to oil that actually reaches navigable waters, not the total amount spilled. 71 Fed. Reg. 77266, 77272 (Dec. 26, 2006). This is a one-time determination, made at the time the SPCC Plan is certified. *Id.* However, if the facility does not qualify at that time, it is not necessarily foreclosed from qualifying in the future. *Id.*
50. 72 Fed. Reg. at 58407.
51. In the 2008 and 2009 amendments, the EPA exempted flowlines from the secondary containment requirement, essentially a regulatory presumption that secondary containment for flowlines was impracticable so that the P.E. would no longer need to make this determination. In doing so, the EPA stated a strong flowline maintenance program was necessary. 72 Fed. Reg. at 58407. The strong flowline maintenance program applies, however, even if the facility has secondary containment for its flowlines. Section 112.9(d)(4).
52. The 2002 amendments basically took the 1973 regulations and made them mandatory, e.g., fully fence and lock and/or guard entrance gates when the facility is unattended. The 2008 amendments allow the owner/operator to address specific objectives:
Describe in your Plan how you secure and control access to the oil handling, processing, and storage areas; secure master flow and drain valves; prevent unauthorized access to starter controls on oil pumps; secure out-of-service and loading/unloading connections of oil pipelines; and address the appropriateness of security lighting to both prevent acts of vandalism and assist in the discovery of oil discharges. §112.7(g).
53. The 1973 guidelines provided for integrity testing of bulk storage containers. When promulgated as a requirement in 2002 (visual and non-destructive integrity testing), this became a hotly contested provision. The 2008 amendments allow reliance on industry standards for the integrity testing requirements. §112.8(c)(6).
54. Specifically, facility is defined in §112.2 as “any mobile or fixed, onshore or offshore building, property, parcel, lease, structure, installation, equipment, pipe, or pipeline (other than a vessel or a public vessel) used in oil well drilling operations, oil production, oil refining, oil storage, oil gathering, oil processing, oil transfer, oil distribution, and oil waste treatment, or in which oil is used, as described in Appendix A to this part. The boundaries of a facility depend on several site-specific factors, including but not limited to, the ownership or operation of buildings, structures, and equipment on the same site and types of activity at the site. Contiguous or non-contiguous buildings, properties, parcels, leases, structures, installations, pipes, or pipelines under the ownership or operation of the same person may be considered separate facilities. Only this definition governs whether a facility is subject to this part.”
55. 73 Fed. Reg. at 74245.
56. See n. 41 *supra* (one year from the date of the final rule addressing milk and milk product containers).



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