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EPA STRETCHES ITS AUTHORITY

Attorney questions the agency's action calling for refueler secondary containment

On March 9, the Environmental Protection Agency issued its long-awaited response to the aviation industry's repeated inquiries and requests for clarification of the agency's regulation of aviation refueler trucks under the Spill Prevention Control and Countermeasure (SPCC) rule found in 40 CFR Part 112. The response made clear that the agency is now requiring secondary containment, such as dikes or catchment basins, around parked mobile refueler trucks.

Pursuant to the SPCC regulations, this containment must be sufficient to contain a spill of oil from the largest compartment of the parked truck. This development will have a major financial impact on the aviation industry, as airlines, fixed base operators (FBOs), and other fueling agents work to install secondary containment in refueler truck parking areas, or demonstrate to EPA's satisfaction that such secondary containment is impracticable.

PURPOSE OF SPCC RULES

Examining the purpose and intent of the SPCC regulations in the context of the airport environment, it appears that EPA has stretched its authority to regulate mobile refuelers by defining them (for the first time) as mobile or portable storage tanks, rather than the fuel delivery vehicles that they actually are. After all, the purpose of airport refueler trucks is to deliver fuel, not store it.

The SPCC program is administered by EPA's Office of Solid Waste and Emergency Response. It requires facilities that store more than minimal amounts of oil (typically more than 1,320 gallons of oil in above ground storage containers) to prepare an SPCC plan which outlines how the facility will prevent oil spills from certain oil tanks and oil-filled equipment.

The stated purpose of the SPCC regulations is to prevent the discharge of oil from oil storage facilities into the navigable waters of the U.S. and to ensure effective responses to such discharges. Even though a 1971 memorandum of understanding (MOU)

between DOT and EPA exempted "transportation-related facilities" from regulation under the SPCC rule, the SPCC regulations appear applicable to transportation service providers like airports, airlines, FBOs and fuel providers.

In 2001-2002, much to the surprise of the industry, EPA regional offices began issuing Notices of Violation to FBOs, fuelers, and airlines.

The aviation industry has long understood that SPCC regulations apply to airports and their tenants. Oil spill containment such as berms, basins, and quick drainage systems have been installed around above ground storage tanks, loading racks, and other oil-filled equipment at aviation facilities. Since EPA issued regulations in the early 1990s, the industry has developed and submitted SPCC plans certified by registered engineers that describe the oil storage areas of the facility, the means of secondary containment to capture oil spills, and the procedures for preventing and addressing releases of oil.

MOBILE OR PORTABLE STORAGE

Specific provisions of the SPCC regulations require facilities to "position or locate mobile or portable oil storage containers to prevent a discharge..." In addition, mobile or

portable oil storage containers are required to have "secondary containment, such as a dike or catchment basin, sufficient to contain the capacity of the largest single compartment or container with sufficient free board to contain precipitation" (40 CFR 112.8(11)).

Engineers, environmental personnel, and aviation consultants implementing SPCC regulations never dreamed that fuel delivery vehicles used to fuel aircraft would be considered "mobile or portable oil storage containers," subject to secondary containment requirements.

In 2001-2002, however, much to the surprise of the industry, EPA regional offices began issuing Notices of Violation to FBOs, fuelers, and airlines for failing to install secondary containment around their parked mobile refuelers, even when refuelers were "parked" on the ramp or in the airport operations area.

INDUSTRY EFFORTS

NATA, ATA, AAAE, and ACI-NA provided information to EPA to demonstrate that the agency's emerging interpretation that refueler vehicles were mobile containers was news to the industry and, in the case of airport operations, impracticable.

EPA promulgated its final rule revising the SPCC regulations on July 17, 2002. The final rule did not address the portable or mobile storage container debate, but EPA regional offices did appear to recognize that installation of secondary containment for refuelers when they were fueling aircraft was impracticable. They also seemed to recognize that such containment was impracticable on the ramp when refuelers were in standby status. Yet, EPA continued to maintain that secondary containment was required for "parked" refuelers, even though almost all spills occurred during fuel operations, *not* when the trucks were parked.

EPA RESPONDS

Finally, in March, Craig Matthiesen, an EPA associate director in the Office of Emergency Management, sent a letter to AAAE, providing EPA's final views on secondary containment for mobile refuelers. The letter states that mobile refuelers are "mobile or portable storage containers" subject to the SPCC rule requirements as originally promulgated in 1974,

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and that EPA has no plans to amend the SPCC requirements. However,

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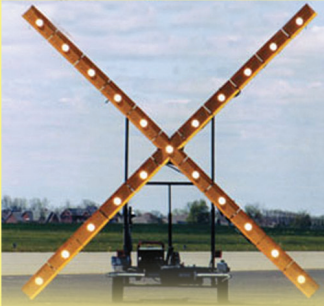


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it will issue comprehensive regional guidance in August 2005 that will address the flexibility in engineering design solutions to provide secondary containment for parked refuelers. Matthiessen's letter also provides the following key information regarding impracticability:

- When mobile refuelers are fueling, staged in operating locations so that they may initiate fueling, or traveling to and from aircraft, it may be impracticable for some facilities to meet the sized secondary containment requirement;
- Where it is impracticable, some facilities have used National Fire Protection Association design guidelines and/or good engineering design solutions to meet the sized secondary containment requirement;
- Good and reasonable engineering design solutions to provide secondary containment when mobile refuelers are not fueling, not staged, or not involved in fueling activity are based on site-specific conditions and will not be unilaterally specified by EPA; and
- While the applicability of design solutions must be evaluated by the facility owner and operator and certifying PE, facility owners and operators have some flexibility with regard to the secondary containment requirement.

INDUSTRY'S RESPONSE

As a result of EPA's response letter, persons in the industry with responsibility for health, safety, and environmental compliance issues have a lot of work ahead of them. It will be particularly difficult to implement EPA's position that "parked refuelers" must have sized secondary containment such as dikes or catch basins to contain spills from largest compartment of truck. (see 40 CFR 112.8(c)(11)).

Because EPA recognizes that it is impracticable to install secondary containment around refuelers that are engaged in fueling operations, facilities with 24-hour operations may be luckier — arguably the refuelers are always engaged in fueling activity because they are always on standby status. However, if a facility determines that it is impracticable to install secondary containment during fueling operations, it must meet the following requirements: 1) the facility's SPCC plan must demonstrate the impracticability, 2) the facility must have an oil spill contingency plan in accordance with 40 CFR Part 109, and 3) the facility must have a "written commit-

ment of manpower, equipment, and materials required to expeditiously control and remove any quantity of oil discharge that may be harmful, i.e. a contract in place with an emergency responder.

EPA regions will not delay enforcement actions until the comprehensive regional guidance is issued in August 2005. Therefore, facilities should immediately examine their refueler parking situation.

When considering impracticability arguments under SPCC rules, EPA focuses on space limitations and safety concerns that prevent secondary containment from being installed in specific areas. A second issue for engineers to consider is whether mobile refuelers can park in existing areas that already have secondary containment.

Finally, since EPA has emphasized the flexibility inherent in addressing secondary containment, engineers should ensure that SPCC plans address containment for refuelers in some fashion. As Matthiessen states in a recent interview, "You have to do something, and you have more flexibility than you think."

PLANNING IN THE FUTURE

EPA has extended the compliance dates for compliance with the final SPCC regulations, issued in 2002, until February 17, 2006 to amend an existing SPCC plan, and until August 18, 2006 to implement the plan. However,

because the agency's position is that secondary containment requirements have been in place for mobile refuelers since 1974, there is *no extension for compliance* with the secondary containment requirements for refuelers. Matthiessen indicates that EPA regions will not delay enforcement actions until the comprehensive regional guidance mentioned in his letter is issued in August 2005. Therefore, facilities should immediately examine their refueler parking situation.

They need to ensure that parked refuelers, which are "not engaged in, or traveling to, or returning from fueling activities," are parked in areas of secondary containment. Engineers and consulting firms need to develop creative and low-cost methods for the design and installation of secondary containment in these areas. These could consist of paneling systems, curbing, or temporary booms that can withstand heavy truck traffic and operator error.

While the ultimate solution to general secondary containment issues at airports may be to plumb the airport's entire stormwater collection system to a retention basin specifically designed to contain releases of oil (a solution that is already in place at some large airports), the implementation of such a solution is clearly beyond the means of most FBOs and fuelers. In the interim, SPCC plans will likely use a combination of measures to arrive at flexible site-specific solutions, including the installation of temporary or permanent containment around truck parking areas where it is practicable, or revisions to address impracticability where it is not. These include:

- Relying on measures such as staging spill response materials in areas where trucks are parked, storm drain covers, increased inspections, and additional training to alleviate or contain a release,

- Development of a 40 CFR 109 "strong oil spill response plan", demonstration of a formal relationship with an Oil Spill Response Organization (OSRO), and additional spill response training to provide strong oil spill response, and;

- A written pledge in the SPCC plan to work in good faith with the airport authority and other interested parties toward a permanent solution.

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(Editor's note: This article is not intended to constitute legal advice regarding SPCC requirements.)

About the Author

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She regularly counsels clients in the aviation industry on compliance with environmental regulatory requirements.

