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EPA OFFERS A BIT OF (SPCC) RELIEF

Environmental attorney interprets the latest changes to a 30-year old regulation

The Environmental Protection Agency continues to amend and revise the Spill Prevention Control and Countermeasure (SPCC) Rule, one that has been on the books for over 30 years. Here, Washington environmental attorney Bonni Kaufman offers an analysis of the impact of the amended regulations.

EPA's recent proposed revisions to the SPCC rule will be helpful to aviation companies that are currently required to install secondary containment, such as dikes or catchment basins, around parked refueler trucks. The proposed rule provides that secondary containment may be accomplished through other measures that will prevent releases of oil from reaching navigable waters, such as spill kits and storm drain covers. EPA has also issued SPCC Guidance which provides more detailed information regarding compliance with SPCC

rules for mobile refuelers, loading areas, and when secondary containment will be considered impracticable.

On December 5, 2005, the Administrator of the United States Environmental Protection Agency, Stephen L. Johnson, signed two proposed amendments to the SPCC rule that was finalized on July 17, 2002. The first extends the date for amendment and implementation of SPCC plans until October 31, 2007. The second streamlines the SPCC rules for facilities that store less than 10,000 gallons of oil;

addresses oil filled equipment; exempts motive power containers from SPCC regulation; and most importantly for the aviation industry, exempts airport mobile refuelers from the specifically sized secondary containment requirements.

Comments on the proposed rules must be submitted by February 10, 2006. In conjunction with the proposed revisions, EPA also issued its SPCC Guidance for its Regional Inspectors, to assist inspectors and the regulated community in determining and understanding applicable SPCC requirements. The text of the proposed rules and guidance can be found at www.epa.gov/oilspill.

BACKGROUND

The SPCC rule requires facilities that generally store more than 1,320 gallons of oil in above ground storage containers to prepare an SPCC plan that describes the actions the facility must take to prevent oil spills from tanks and equipment from reaching navigable waters. The SPCC rules almost always apply to airport facilities due to the storage of large quantities of fuel needed for transportation activities. Specific provisions of the current SPCC regulations require "mobile or portable containers" to have "secondary containment," such as a dike or catch-

ment 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)).

Beginning in 2001-2002, certain EPA regional offices determined that mobile refuelers that were used solely to fuel aircraft were "mobile or portable storage containers" subject to secondary containment requirements. 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 the refuelers were "parked" on the ramp or in the airport operations area. This meant that facilities needed to install berms or catchment basins around refueler parking areas — large enough to contain a spill from the largest compartment of the refueler. This was completely impracticable for refuelers engaged in fuel transfer operations on the ramp or refuelers in standby mode.

Repeated efforts by the aviation trade associations as well as Congressional pressure over the last few years resulted in EPA's recognition that secondary containment for refuelers was impracticable during fueling operations or when traveling to and from aircraft. However, EPA still required refuelers to have secondary containment when parked and not involved in fueling activities.

Many companies found such containment to be cost-prohibitive and impracticable, given space limitations in parking areas, the fact that many refuelers are parked overnight in the airport operations area, and that airport authorities could not approve installation of berms or other containment in airport operating areas due to fire safety codes that prohibit the pooling of flammable liquids. As a result, EPA proposed the recent revisions to the rule.

SUBSTANTIVE PROVISIONS

As a result of heavy industry pressure and EPA's presumed recognition that some aspects of the final SPCC rule promulgated in 2000 were too burdensome or impractical, EPA has proposed to amend the SPCC requirements to reduce the regulatory burden on certain facilities. Of most importance to the aviation industry is EPA's proposal to amend the SPCC regulations to exempt airport mobile refuelers from the "sized" secondary requirements of 40 CFR 112.8(c)(2) and (11). These provisions require facilities to position or locate mobile or portable oil storage

containers to prevent a discharge and to have "secondary containment, such as a dike or catchment basin, sufficient to contain the capacity of the largest single compartment or container."

While the refuelers would be exempt from the "sized" secondary containment requirements in 40 CFR 112.11, they would still be subject to the general secondary containments of section 112.7(c). Section 112.7 permits facilities to use certain types of active containment measures to generally prevent a discharge to navigable waters, rather than a specific type of contain-

**Of most importance:
EPA's proposal to exempt
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ment that can contain a spill from the largest compartment of a tank.

EPA considers active containment measures to be measures that require deployment or other specific action by the owner or operator. They include measures that may be deployed either before an activity involving the handling of oil starts, or in reaction to a discharge, as long as the active measure is designed and can reasonably be implemented to prevent an oil spill from reaching navigable water. Active measures include temporary curbing, portable barriers, storm drain covers, sock mats, spill kits, or other land based action as long as they can be implemented in time to prevent the spilled oil from reaching navigable waters.

However, it does appear from the text of the proposed rule that EPA still expects that more passive secondary containment, such as barriers, contouring, or curbing will have to be installed when a truck is unmanned or parked without means for observation, or if sorbents or other measures will not prevent the spill from reaching navigable water in time. (See page 57 of the Proposed Rule, RIN 2050-AG23.) An active measure may still be appropriate, provided that the measure is capable of containing the oil discharge volume and rate, and is timely and properly constructed/deployed.) EPA's SPCC Guidance also acknowledges that in certain situations, any type of secondary containment may be impracticable due to geographic limitations and fire codes. If secondary containment is impracticable, the facility owner or operator must clearly explain in the SPCC plan why such secondary containment is impracticable, and 1) conduct periodic integrity and

leak testing of tanks, valves and piping; 2) provide a written commitment of manpower, equipment and materials required to expeditiously control and remove any quantity of oil that may be harmful; and 3) prepare an oil spill contingency plan following the provisions of 40 CFR part 109. (The recent EPA SPCC guidance provides a checklist of SPCC requirements eligible for impracticability determinations and a sample oil spill contingency plan that complies with 40 CFR Part 109.)

Another proposed revision to the SPCC rules that may assist the aviation industry is EPA's effort to clarify that motive power containers are specifically exempt from SPCC regulation. A motive power container is defined as an integral part of a motor vehicle, providing fuel for propulsion or providing some other operational function, such as lubrication of moving parts or for operation of hydraulic equipment. Motive power containers include construction vehicles, aircraft deicers (that have separate fuel storage for hydraulic lift operation), and other heavy equipment.

Additional proposed revisions include providing an option that would allow owners or operators of facilities that store less than 10,000 gallons of oil to self-certify their SPCC plans (in lieu of review and certification by a professional engineer) and allowing facilities that have certain types of oil-filled equipment to provide an alternative

to secondary containment, without a determination of impracticability.

EXTENDING THE DEADLINE; INSPECTOR GUIDANCE

- The current deadline for the preparation and certification of revised SPCC plans is February 17, 2006 and plans must be implemented by August 18, 2006. EPA proposes to extend the compliance dates for both plan amendment and implementation to October 31, 2007 to allow the facilities that may be affected by the proposed revisions to have sufficient time to evaluate and implement the revised requirements. However, it is very important for aviation interests to understand that EPA's position is that secondary containment requirements for mobile and portable containers have been in place since 1974, so there is no extension for compliance with secondary containment requirements for refuelers.

- In conjunction with the proposed revisions to the SPCC rule, EPA issued SPCC Guidance for Regional Inspectors, a guide for regional inspectors in implementing the SPCC rule, including environmental equivalence, impracticability and integrity testing. The Guidance is intended to establish uniformity among regional EPA inspectors on how certain provisions of the rule may be applied. Certain aspects of the Guidance are particularly helpful to the aviation industry as they clarify when secondary containment may be imprac-

ticable, what alternative measures can be taken, and when a mobile refueler is considered unmanned. In addition, the Guidance provides a description and analysis of the more specific compliance requirements for loading and unloading areas, oil water separators, bulk storage tanks, environmental equivalence, and the geographic scope of a facility. However, certain aspects of the Guidance that discuss mobile refuelers are inconsistent with the proposed revisions to the SPCC rule and will likely be revised.

This article is not intended to and does not constitute legal advice regarding SPCC requirements.

About the Author

Bonni F. Kaufman is senior counsel in the Public Policy and Regulation Group of Holland & Knight, LLP's Washington, D.C. office, where she focuses on the practice of environmental law.

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

