

EPA Agrees to Rulemaking to Develop SPCC for Hazardous Substances

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In a groundbreaking settlement announced last week, the U.S. Environmental Protection Agency (“EPA”) agreed to initiate rulemaking to broaden the Spill Prevention, Control and Countermeasure (“SPCC”) program beyond oil to address other hazardous substances.¹ Responding with remarkable alacrity to a lawsuit filed in July by several environmental groups, the settlement establishes an aggressive schedule for EPA to issue the regulations under Section 311(j)(1) of the Clean Water Act (“CWA”). The rulemaking, which is to be finalized by mid- to late-2019 under the terms of the consent decrees, represents a massive expansion of the reach of the SPCC program and will impact thousands of facilities and manufacturing processes in numerous industries across the United States.

I. The Clean Water Act Background

The CWA contemplated the development of “hazardous substance SPCC” regulations over 40 years ago. The operative provision of the Act requires that, “as soon as practicable after October 18, 1972, . . . the President shall issue regulations . . . establishing procedures, methods, and equipment to prevent discharges of oil *and hazardous substances* from vessels and from onshore facilities and offshore facilities, and to contain such discharges”²

In fact, EPA proposed regulations in 1978 that would have applied SPCC-like requirements to onshore facilities operating under National Pollution Discharge Elimination System (“NPDES”) permits, requiring these facilities to develop and implement plans to prevent discharges of hazardous substances into or upon the navigable waters of the United States or adjoining shorelines.³ The proposal also included requirements for permittees to develop Best Management Practices (“BMP”) plans to prevent the release of toxic and hazardous pollutants to surface waters. EPA also indicated in its proposed rulemaking that it anticipated publishing additional regulations in the near future for all other facilities subject to EPA’s authority. However, the Agency never finalized the proposal or any other rule specifically setting up a program to address spills of hazardous substances.

Under the current SPCC program, facilities that have the capacity to store more than 1,320 gallons of oil above ground (or 42,000 gallons in underground tanks) must develop an SPCC plan that includes a description of containment, drainage control, and diversionary structures; proper liquid storage areas, container materials, and secondary containment; drainage for raw material storage areas; control for other site features that could produce runoff; secondary containment and treatment processes for truck and railcar liquid loading and unloading areas; and equipment that prevents discharges for in-plant transfer, processing, and materials handling areas. SPCC plans also must address issues such as preventative maintenance, facility security, and training. Plans must be reviewed and certified by a registered professional engineer.

II. Basis for the Environmental Groups' Lawsuit

The environmental groups' lawsuit was bolstered politically by a series of incidents that gained widespread media exposure. The short complaint filed by the groups cited four relatively recent chemical spills from above-ground storage tanks as examples of the need for regulation: a 2014 spill of 4-methylcyclohexane methanol in West Virginia's Elk River; a 2006 spill of sodium hypochlorite in Garyville, Louisiana; a 2007 spill of sodium hydroxide in Madera, California; and a 2013 spill of three chemicals in Petersburg, Virginia. The groups alleged that not only are onshore hazardous-substance storage facilities "subject to neither state nor federal regulation," there are also "thousands of self-reported hazardous-substance spills from onshore facilities each year," hundreds of which reach waters subject to CWA jurisdiction. In addition, the complaint asserted that "hazardous-substance spills from non-transportation-related onshore facilities pose a disproportionate threat to low-income communities and communities of color," including the four recent chemical spills mentioned above.

III. Preparation for Rulemaking

By the terms of the consent decree, EPA now is required to issue a proposed regulation within 18 months, though that deadline may be extended by 10 months if the agency decides to first issue an information collection request in support of the rulemaking. A final rule must be issued within 14 months of the proposed rule, meaning that regulations will be in place by the end of 2019 (unless the parties agree to an extension).

The pending rulemaking warrants the attention and involvement of a wide variety of potentially impacted industry stakeholders. A large number of facilities storing any of the hundreds of hazardous chemicals identified in 40 C.F.R. §116 could be required to develop SPCC plans for the first time. Key issues that will have to be addressed in the rulemaking include (1) the scope of "hazardous substances" covered; (2) the storage capacity threshold for a facility to be included; and (3) the specific elements that a "hazardous substance SPCC" plan must include. In particular, EPA will have to examine whether the current thresholds and SPCC plan requirements for oil are appropriately applied to "hazardous substances," which vary widely in terms of relative toxicity and other hazard characteristics.

In preparation for the rulemaking, stakeholders may want to consider compiling information on the chemicals stored at their facilities, the quantities typically stored, the size and location of storage tanks, spill history, and any existing spill containment procedures, equipment, or plans that may currently exist. Information on the identity and quantity of chemicals for some facilities may be available from Tier II Emergency and Hazardous Chemical Inventory reports filed annually under the Emergency Planning and Community Right-to-Know Act ("EPCRA").

We will continue to monitor rulemaking developments in this area and provide updates as necessary. If you have any questions, please feel free to contact [Joe Green](mailto:jgreen@kelleydrye.com) at 202.342.8849 or jgreen@kelleydrye.com.

[1] *Environmental Justice Health Alliance for Chemical Policy Reform, et al. v. U.S. Environmental Protection Agency*, Case No. 1:15-cv-05705 (S.D.N.Y. Feb. 16, 2016).

[2] 33 U.S.C. § 1321(j)(1)(C) (emphasis added).

[3] 43 Fed. Reg. 39,276 (Sept. 1, 1978).