

EPA Proposes Tanking New "SPCC" for Hazardous Substances Regulation

[Joseph J. Green](#)

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Reversing course from an Obama-era EPA agreement to initiate a rulemaking to impose spill prevention, countermeasure and control (SPCC) requirements for hazardous substances, EPA announced on June 19th that it believes that existing regulations are adequate to meet its obligations under the Clean Water Act (CWA) and no new regulatory program is needed:

Based on the reported frequency and impacts of identified CWA [hazardous substance] HS discharges, and the Agency's evaluation of the existing framework of EPA regulatory requirements relevant to preventing CWA HS discharges, EPA has determined that the existing framework of regulatory requirements serves to prevent CWA HS discharges. Additionally, EPA identified relevant requirements in other Federal regulatory programs and determined that they further serve to prevent CWA HS discharges, providing additional support for this proposed action.

In an example of the "sue and settle" policy that the current Administration has sought to curtail, in February 2016, EPA agreed in a consent decree with environmental groups to initiate rulemaking to expand the SPCC program beyond oil to address other hazardous substances. The settlement established an aggressive schedule for EPA to issue regulations under CWA Section 311(j)(1) by mid- to late-2019.

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, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine navigation laws . . . 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" While EPA did promulgate SPCC regulations addressing the storage of oil and petroleum products such as gasoline and diesel fuel, the Agency proposed (in 1978), but never finalized regulations applicable to the storage of hazardous substances.

The SPCC regulations for oil and petroleum products apply to facilities that have the capacity to store more than 1,320 gallons of oil above ground (or 42,000 gallons in underground tanks). They require the development of SPCC plans that include 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 preventative maintenance, facility security,

and training. Plans must be reviewed and certified to by a registered professional engineer, and updated every five years, or more frequently, if material changes are made to the facility or its oil storage capacity.

In suing EPA over the failure to adopt a version of SPCC for hazardous substances, environmental groups cited a series of chemical spill incidents that gained widespread media exposure over the last decade. 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."

Environmental groups already are condemning the proposed decision not to proceed with a rulemaking, and litigation is highly likely to follow if the proposal is finalized.

A 60-day comment period will commence as soon as the proposal is formally published in the *Federal Register*.