Hodgens Engineering Service
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Friday, December 14, 2007

EPA Docket,
Environmental Protection Agency,
Mail code: 2822T,
1200 Pennsylvania Ave., NW.,
Washington, DC 20460.

RE: US EPA 40 CFR PART 112 PROPOSED AMENDMENTS
DOCKET ID NO. EPA–HQ–OPA–2007–0584

The following comments are offered. Experience of the author includes having been licensed as a professional engineer in eight States and having developed over 450 SPCC plans in compliance with 40 CFR part 112 in twelve States over the past 14 years.

1. Farms with a larger storage capacity than identified in the proposal should be exempted due to the inherent nature of activities being reliant on wise stewardship of soil and water resources. The revised standard might include distance or elevation to flowing water (not "navigable water" or intermittent stream), increased per container limit (*e.g.* no single container greater than 5000 gallon capacity and total facility capacity less than 20,000 gallons in all containers sized 1000 gallons or larger), or simple requirements defining secondary containment requirements without additional SPCC regulations.
2. Exemption of heating oil tanks should be extended from single-family residences to any facility that is normally occupied on a daily basis with storage capacity not exceeding 5000 gallons in containers not exceeding 1000 gallons. Rationale for this is the regular and routine presence of persons that work or occupy such establishments and permits inclusion of multi-family units, businesses and other similar establishments that do not have the staffing ability to satisfy the full SPCC requirements.
3. Proposal should expand exemption beyond single-family residences. There is no apparent reason why a small commercial enterprise such as a garage, office building, convenience store, duplex or quadruplex should be any more likely to experience a release from its small heating oil AST than a single family residence.
4. It is believed that the requirement that most State engineering licensing boards require a State-licensed PE to develop any SPCC plan (regardless of the EPA exemption or classification as a "qualified facility) was not adequately considered in the economic cost for compliance with the regulation. Several States have only recently determined SPCC planning to be the practice of engineering that requires State licensure. Promoting or encouraging development of (Tier II) SPCC plans by non-licensed engineers violates codes in many States. Without exception, *when an answer is provided* to the question posed Engineering Licensing Boards in several States whether one must be licensed as PE by their State to develop a SPCC Plan, the answer is "yes". Of course, there are several States, including ND that did not provide an answer to the question. It would seem that the proposal to allow such activity violates Executive order 13132
5. EPA regional SPCC officials are on record as having indicated that there is "…no place in the State of xx where a facility would be exempt from regulation due to location…. All sites drain

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and ultimately discharge to navigable waterways." Of course, the courts have ruled that water bodies formerly determined to be regulated merely by the presence of migratory waterfowl (*i.e.* no direct hydraulic connection to navigable waterways) are not regulated by 40 CFR Part 112. As a PE, there are numerous sites that I believe have no reasonable likelihood of being able to discharge to navigable waters, but due to categorical EPA regional guidance that such **cannot** be the case, I do not want to run the risk of certifying this to my client's ultimate detriment. It therefore seems appropriate that some further clarification be provided in regulation of what is regulated and what can be considered exempt.

6. Proposed regulation commentary States: "Additionally, changes to the facility diagram are considered administrative in nature and do not require PE certification." As it related to non-engineer "certified" plans, this conflicts with:

   112.5 Amendment of SPCC Plan by owners or operators.
   If you are the owner or operator of a facility subject to this part, you must: (a) Amend the SPCC Plan for your facility …Examples of changes that may require amendment of the Plan include, but are not limited to: **commissioning or decommissioning containers;** replacement, reconstruction, or **movement of containers**; reconstruction, replacement, or installation of piping systems; construction or demolition that might alter secondary containment structures; changes of product or service; or revision of standard operation or maintenance procedures at a facility and (c) Except as prvd'd in § 112.6,have a PE certify any technical amendment to your Plan in accordance with § 112.3(d).

   Further, documents prepared by an Engineer may not be legally altered.

   To allow operators to alter the facility diagram does not seem to make sense. Why have an engineer involved in the first place, if it is believed that operators can determine the ramifications of altering tank storage location, number or type?

7. Definition of loading/unloading rack still remains too subjective. There is no apparent distinction between a facility with a loading rack (as defined in the proposed regulation) and one where filling/emptying is accomplished by direct connection to the same tanks, assuming the number of tanks, frequency of transfers, product contained and volume of transfers remain the same? The distinction seems arbitrary. This can be seen in that loading racks that serve only USTs at 40 CFR part 280 or 281 facilities have never been regulated.

8. Consideration should be given to including the requirement that SPCC plans incorporate the following specific federal spill and operational regulations due to their close similarity in requirements, not just a general reference to more stringent State rules (§112.7 (j)):

   DOT Carrier Requirements for Spills (49 CFR 130)
   DOT Spill Reporting (49 CFR 171.15 and 16)
   DOT Transportation Security Planning (49 CFR 172)
   DOT HAZMAT INCIDENT REPORT (Form DOT F 5800.1)
   EPA Stormwater Discharge Permitting/Exclusion Notification

9. Many State engineering licensing boards require PE licensure to develop SPCC plans, regardless of EPA's contention that facilities between 1321 and 10,000 are "qualified" and do

not require PE certification. To identify the absence of the need for development by a PE appears to contravene the intent of Executive Order 13132, if not the letter of the Order.

10. Use of the terminology "can then have a licensed PE review and **certify** those portions of the SPCC Plan that…" indicates a failure in understanding Professional Engineering licensing requirements based on my experience of licensure in 8 States. The terminology that has been in place since the inception of the regulation and which continues to be used is in error and conveys an erroneous understanding Professional Engineering.

    Engineering "**certification**" lacks meaning outside of this regulation and needs definition. Engineering licensing boards permit engineers to "**seal**", not "certify" *their own work.* I am aware of no State that allows engineers to "seal" the work of another, unless the work was performed under the direction of the responsible Engineer. Reconciliation of this inconsistency might be able to be accomplished through a national engineering organization such as NSPE and/or with the several licensing agencies, perhaps through the NCEE. Perhaps an alternative to this that may be acceptable to State licensing agencies would be something like the following which is found in ND Code Title 28 for Engineers:

    > §**28-02.1-08-03.8c:** A registrant may not affix the registrant's seal or signature to documents having titles or identities excluding the registrant's name unless:
    >
    > > The registrant is providing the registrant's opinion as to the compliance of the document with specific identified rules or statutes and it is clearly identified that the registrant only reviewed the document and had no technical control over the contents of the document. (http://www.ndpelsboard.org/admin/title-28.pdf)

11. In evaluating discharge history for classification as a "qualified facility", EPA apparently does not consider discharges due to natural disasters, war or terrorism to be fully foreseeable. If one understands that vandalism is synonymous with terrorism, it then appears that the combined industry-wide cost being committed to fence facilities results in a negative cost-benefit relationship. Reports are that many operators are incurring multiple thousand-dollar expenses to needlessly fence sites to prevent vandalism/terrorism. This combined with the relatively small potential and undocumented history of significant discharges due to vandalism/terrorism indicates that smaller facilities are being forced to provide and plan for a relatively unjustifiable expense. Even with the proposed modification of required security measures, additional clarification needs to be provided to identify that fencing may serve limited security benefits and that limited resources can be better used elsewhere.

    Additionally, inconsistency in application of fencing requirements has been seen between adjacent EPA regions in that fencing is categorically required in one State, and a mile away alternative measures to provide equivalent environmental protection are that do not include fencing are permitted. There are two issues here:

    - Inconsistency in agency application of the regulation resulting from the absence of an objective standard, and
    - Onerous and financially burdensome security requirements that produce limited benefit.

    To redress this, refinement of the requirements for security for smaller facilities might be appropriate. In light of the historic apparent mandate to fence the facility, this may consist of increased latitude in the engineer's need to specify fencing on facilities that have a cumulative capacity of say, 100,000 gallons or less in containers sized 20,000 gallons or less. Specifically

stating that fencing is required for such facilities would clearly indicate the intent, I would think. Perhaps this may need to be further qualified to say that it must be greater than one mile from a flowing stream as identified on a current USGS topographic map by a solid line (thereby excluding intermittent streams). This level of security would protect against terrorism that would have the potential to create a large impact. As vandalism/terrorism targeting small targets is not likely, this would not seem to pose a significant or unacceptable increased risk. Additionally, as secondary containment is a requirement, the relative risk is to the environment is small.

This distinction on level of security should be applied to all small and medium sized facilities not just to "qualified facility" status, because as indicated previously, most State engineering licensing agencies that I have polled do not identify any distinction between smaller and larger facilities when it comes to the requirement of the need for licensure for SPCC preparation.

12. Capacities have been used to define thresholds for regulation. In the current climate of facility consolidation, there are still many older facilities that operate using vessels sized based on storing large inventory of products. Currently, there are still sites that do not have SPCC plans that should have them.

    To the extent that there is a move to lessen regulatory burden for smaller operations by the "tiered qualified facility" approach, consideration to regulation of sites based on actual oil storage, not container capacity should be done. 15,000-gallon containers may rarely store more than a few thousand gallons. Appropriate environmental protective measures may be able to be applied using actual volumes of inventory stored at smaller facilities, not just the container size. This would be based on documented inventory records that would need to be included in the SPCC plan. A special "Plan Preamble" might be required to alert operator that any change above a certain inventory requires updating the SPCC plan.

13. Elimination of Tier I facilities from compliance with 112.7(h) does not appear to make sense merely due to "typical" absence of a rack. A better method would be to include the absence of such a rack in the definition of a "qualified facility". Similar modification of "qualified facility" definition should be undertaken for the remaining requirements of 112.8 that are eliminated because they "are not likely" or "tend" to not exist.

    Regulations should be a little more definitive than relying on assumptions or likelihood. An EPA generated checklist to permit rapid and simple identification of facility being "qualified" would then be appropriate to aid user to comply with the regulation, perhaps contained in the guidance document or proposed Appendix G Template.

14. Qualified facilities are proposed to have templates or self-certified plans that are certified by persons who may likely have very little experience in regulatory compliance. Over the past 15 years I have observed that even other Licensed Professional Engineers are unfamiliar with the proper development of SPCC Plans. It therefore seems that merely relying on users to keep a copy of self-prepared plans on hand will **not** go very far in increasing compliance as has been suggested. Remediation of this flawed belief may be able to be accomplished by developing the Appendix G template on-line for submission to EPA (though no review or approval by EPA of the plan is to be performed.) This provides several benefits:

    - Makes regulated parties responsible to someone other than their conscience for compliance,

- Provides a copy of such record for EPA to use, if ever needed, for responding to specific issues that might arise should there be a release that does not warrant dispatch of personnel to the site, and
- Avoid the generation of paper copies that could consume time in filing and maintaining.

A similar submission requirement for self-certified plans may be required except that the plan must be submitted in portable document format (pdf) and be limited in size to whatever is appropriate. Such pdf generating software is freely available, can be purchased or the service to generate it in pdf could be purchased. If I recall correctly, Adobe may even have an on-line pdf generating service for a nominal fee, or even for free.

Identification of qualified facilities for submission would need to be based on a readily available standard, such as Latitude and Longitude. Programming should be provided to permit clicking on a map to locate the site to generate the lat/long in the form to be submitted. This would avoid data entry error that would be commonplace if typing the information were to be performed. This may be able to be incorporated into the software for the template, being available through GoogleEarth and TerraServer as well as possibly the USDA NRCS soil data maps on-line.

Alternatively, it may be sufficient to require submission of a notification or certification of SPCC plan completion similar to what is required for facilities that are exempt from Stormwater Discharge Permitting.

15. Requiring Tier II self-certifiers to certify the same thing that requires the involvement of a Professional Engineer in other facilities, namely that "the Plan has been prepared in accordance with accepted and sound industry practices and standards" indicates that they are representing that they are:

    "a person who is qualified to practice engineering by reason of special knowledge and use of the mathematical, physical, and engineering sciences and the principles and methods of engineering analysis and design acquired by engineering education and engineering experience, both of which are satisfactory to the board"

    This quote is typical of what many States definitions for engineer *that must be Licensed by the State* to provide the indicated service. Some States may allow exemption for self-engineering where the plan is developed by an operator for their own use. I am not aware of any State that would exempt the practice of engineering (which is generally understood to include development of Pollution Prevention Plans, including SPCCs) for SPCCs using someone else's template (e.g. Appendix G) or that was not actually written by the certifier.

16. If operator ease is intended with the creation of a Tier I, then Tier II should also permit the creation of a plan using a similar modified EPA Template.

17. The preamble discusses the operator or owner identifying selection of the appropriate method and size of secondary containment and requires them to consider elements "in accordance with good engineering practice" in "qualified facilities." This makes about as much sense as advising a bullet-wound victim to remove the bullet "in accordance with good medical practice"! Granted, there is a point where one need not be a licensed physician to remove a splinter, but in the SPCC regulation, if it is believed that a non-engineer can adequately use "good engineering practice" to protect the environment from a discharge from a 5000 gallon

tank, why would they not be able to apply the same expertise for a 50,000 gallon tank. I think that the entire regulation would need to be rewritten to simplify, correct and clarify conditions for users who may only be needing to address this requirement a limited number of times. Self-certifiers should not be required to make any "engineering" judgment (at least as identified by most State Engineering Licensing Agencies). Accordingly, the "self-certification" statement should not be modeled after what EPA desires to see a Licensed PE provide.

The requirement for a PE to "certify" a plan should be clarified (perhaps as suggested in the ND statute) to define how this certification differs from States codes and Statutes relative to Licensure.

If there is no desire to clarify and properly identify the responsibility of Licensed Professional Engineers (realizing that EPA does not have a statutory definition of such an individual), then EPA should define which States require the in-State licensure by the engineer to develop SPCC plans. If EPA wants to rely upon another non-related government to facilitate their ends, they should use the same terminology, requirements or standards if not communicate with the other government on which they are relying to ensure absence of conflict between statutes!

18. While "navigable waters of the U.S." has a statutory definition, such terminology is alien to most people. If the qualified facility Tiers are intended to be useful, this should be simplified or redefined to something more readily understood. One potential standard might be "a flowing watercourse that is defined on a current USGS 7.5 topographic quadrangle map as an intermittent (broken line) or continuous (solid line)." Alternatively, if that is not protective enough, an acceptable distance measured along the line of travel of flow to such a stream may be appropriate.

19. As proposed, there may be expected to be an increased number of persons developing (self-certified) plans. Even if EPA were to clarify and simplify the requirements for non-engineers, it is expected that there will be an increased need for public access to EPA for site-specific guidance. Will the time frame for compliance accurately reflect the possible delays resulting from the limited ability of EPA to respond to such requests for service? Similarly, will there be educational forums offered for owners to understand the requirements to permit them to self-certify? To date, feedback that I have received from operators that have attended EPA sponsored SPCC educational forums has generally been confusion. It is not expected that 'more of the same' will accomplish the needed education.

20. Over the years, the term "industry standard" as it applies to integrity testing has changed due to new standard development. EPA should provide identification of specific acceptable industry standards for all integrity test procedures. This would eliminate the need for operators of "qualified facilities" to have an understanding of and evaluate test method. (EPA has already identified one such standard by repeatedly referencing STI SP001).

    This is needed, in part, due to my first hand knowledge of dozens, and possibly hundreds of "integrity" tests that have been performed under the guise of satisfying SPCC requirements, that are just tightness tests. These tests neither satisfy the facility SPCC plan requirement nor the regulatory requirement for integrity testing. While this specific situation may have been the result of an inept test provider or engineer, there is even less chance that an operator of a facility that has a self-certified plan will be able to determine the appropriate technical requirement to

satisfy the regulation. It is a lot easier to see if a method is on an EPA list. If EPA is unwilling to determine what is considered an acceptable test procedure, perhaps arrangements can be made with trade organizations (*e.g.* STI) to perform that function.

21. I support extension of "streamlined" regulatory provisions to all facilities.

22. The rationale for regulation of non-toxic AVFO that are fit for human consumption is not clear. While a discharge that reaches water may be considered to result in contamination, it may not necessarily be pollution, as the water has not become unfit, or dangerous for human use as with toxic or petroleum products. If there are oils that have been determined to be non-toxic, perhaps they should all be exempted from SPCC regulation. At the very least, the regulation should include identification of oils that have been determined to be non-toxic whether they are AVFO or not. This listing would promote development of more economical and appropriate means for controlling their spills. Perhaps such non-toxic oils should be regulated at higher thresholds.

23. Regarding manmade structures, it is understood, as is indicated in the discussion, that secondary containment is an important foundation for SPCC planning and that dikes cannot be used as grounds for claiming exemption. In the course of developing plans for nearly 500 facilities, I can recall a handful that reasonably could **not** be expected to have a discharge that could reach navigable waters. These were sites that were constructed in excavated areas or low areas, had at some time past had a railroad or roadway embankment constructed that required pumping to permit drainage from the site, or were on extremely flat land miles from any defined waterway. In each of these cases, my engineering judgment determined they were exempt, but due to EPA action initiated against the client, or fear of same, a plan was developed.

    Additional discussion and clarification is needed for locationally exempt facilities. While a dike could be reasonably expected to possibly fail, a roadbed or absence of drainage would be reasonable for exclusion. The rationale may be that erosion or damage could not occur that would permit alteration of the exempting conditions. Of course if the roadbed was removed, then manmade conditions result in the need to develop a plan. The argument offered by Regional EPA that this could occur makes about as much sense as saying a facility cannot be located somewhere because there is a remote possibility that someone could construct a dam at some time and cause the site to be within the floodplain, submerged, or endangered if the imaginary dam breached!

    A 50 or 100-year-old 10 to 20 foot high embankment that is as wide at the base as a dam should be considered grounds sufficient to warrant exemption without fear of government reprisal. It is therefore recommended that manmade structures that predate construction of an otherwise regulated facility should be considered for locational exemption if the following exists:

    - Resulting area drainage from a 25 year/24 hour storm for the facility must be mechanically discharged, and cannot be discharged without human intervention (opening a valve or other gravity discharge is not sufficient), and
    - If the volume restrained by the structure is greater than the entire facility storage capacity plus contributing runoff from the 25 year-24 hour storm.

While this may be a very small subset of facilities, it is apparent that codification of exemption of this type of facility is needed to overcome excessive regulation and clarify the requirements for over-zealous regulators. Locationally exempt facilities might also be required to have a Statement signed by a Licensed PE defining why the facility is exempt and maintained on file in the same manner as a Plan, or alternatively, submitted to the Regional Office of EPA for filing, approval or concurrence.

24. Has there been a modification of the regulation that reflects the court action on the "Migratory Waterfowl Rule"? If not, why is that not contained in this amendment to clarify the meaning of waters where this regulation has jurisdiction?

25. STI SP001 is identified as an acceptable industry standard for integrity testing. In the Standard, it states:

> "**LEAK TESTING METHOD (LTM)** – a point in time test method to determine if an AST is liquid tight. Leak testing is not preventive in the sense that it provides an indication only if the AST integrity has already been breached. **Therefore, it may be used as a tank integrity measure**." (Emphases added)

Therefore, leak testing is considered to be acceptable to EPA as an integrity test. Is this correct? If so, why is it not defined in the list of acceptable industry standards?

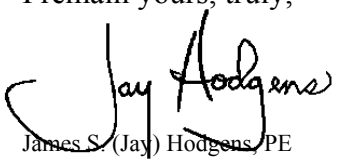
26. Comments in the July 17,2002 Federal Register publication of amendments to the final rule includes the following:

> *"Response to comments.* We agree with commenters [*sic*] that it is unnecessary that the PE be registered or licensed in the State in which the facility is located because any abuses will be corrected by the licensing jurisdiction. We also agree that such a requirement might unnecessarily reduce the availability of PEs and increase the cost of certification without any tangible benefits."

This implies that registration in the State where a SPCC Plan is developed is unnecessary. As such, the necessary coordination required by Executive order 13132 has not been properly performed. Because of EPA's unclear comments on this issue, and the inability of Licensing Boards to respond to questions about whether State licensure is required for SPCC Planning, it is incumbent on EPA to identify which States do and which do not require licensure by the State.

Thank you for consideration of these comments.

I remain yours, truly,



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