

June 10, 2004

Mr. Thomas P. Dunne  
Acting Assistant Administrator for the Office  
of Solid Waste and Emergency Response  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

*Re: Spill Prevention, Control and Countermeasure (SPCC) Rule; 67 Fed. Reg. 47042 (July 17, 2002); Recommendation for Adoption of Interim Final Rule*

Dear Mr. Dunne :

The Environmental Protection Agency (EPA) has advised the regulated community that EPA will soon issue a *Federal Register* notice to extend the compliance deadline for the requirements imposed by the July 2002 amendments to the Spill Prevention, Control and Countermeasure (SPCC) rule. The Office of Advocacy of the U.S. Small Business Administration applauds this action to allow time for EPA to develop much-needed guidance and for regulated facilities to come into compliance. We are writing to urge the EPA to address major areas of the SPCC rule that warrant immediate rulemaking action to solve problems not addressed by an extension of the effective date of the 2002 amendments. Pending completion of a further rulemaking, we recommend that EPA issue an interim final rule to provide immediate regulatory relief from certain costly and/or impractical requirements involving: (1) small facilities, (2) integrity testing, (3) motive power and oil-filled equipment and, (4) asphalt cement and hot-mix asphalt.

As the office responsible for monitoring agency compliance with the Regulatory Flexibility Act, the Office of Advocacy is a staunch proponent of strict adherence to the notice and comment requirements of the Administrative Procedure Act. In this particular instance, Advocacy believes the EPA can properly issue an interim final rule under the "good cause" exception to the Administrative Procedure Act. The need for expeditious regulatory relief is substantial, and as explained below, the interim measures we recommend would not reduce the stringency of the elements of EPA's SPCC rule that provide the environmental protection today, which will be refined or reaffirmed by the further rulemaking.

## I. Advocacy Background

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small business before federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Section 612 of the Regulatory Flexibility Act (RFA) requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.<sup>1</sup> The RFA requires federal agencies to consider the impacts of their regulatory proposals on small entities, and determine whether there are effective alternatives that would reduce the regulatory burden on small entities.

On August 13, 2002, President George W. Bush signed Executive Order 13272 that requires federal agencies to implement policies protecting small entities when writing new rules and regulations.<sup>2</sup> This Executive Order highlights the President's goal of giving "small business owners a voice in the complex and confusing federal regulatory process"<sup>3</sup> by directing agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities. In addition, Executive Order 13272 authorizes Advocacy to provide comment on draft rules to the agency that has proposed the rule, as well as to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.<sup>4</sup> Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>5</sup>

## II. SPCC Background

The SPCC rule is designed to prevent discharge of oil into navigable waters of the United States, and to contain those spills after they occur. Facilities subject to this rule must prepare and implement plans that prevent such discharges and respond to spills. The rule applies to all non-transportation related facilities with aboveground storage capacity greater than 1,320 gallons. This includes hundreds of thousands of small businesses, farmers, manufacturers and electrical facilities.<sup>6</sup> We have worked with EPA to identify small business concerns related to this rule since shortly after the amendments were published in July 2002. We welcomed EPA's October 2003 announcement that it was preparing to make changes to the SPCC requirements through guidance and revised regulatory requirements. Advocacy believes the SPCC rule can be refined

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<sup>1</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

<sup>2</sup> Exec. Order. No. 13272 § 1, 67 Fed. Reg. 53,461 (2002).

<sup>3</sup> White House Home Page, *President Bush's Small Business Agenda*, (announced March 19, 2002) (last viewed January 28, 2004) <<http://www.whitehouse.gov/infocus/smallbusiness/regulatory.html>>.

<sup>4</sup> E.O. 13272, at § 2(c).

<sup>5</sup> *Id.* at § 3(c).

<sup>6</sup> *Spill Prevention Control and Countermeasure (SPCC) Issues, Alternatives and Recommendations (Draft Version 4)*, (September 2003) by Jack Faucett Associates for the Office of Advocacy under contract SBAHQ-00-D-006 at 8.

to exclude facilities or units containing oil that do not contribute to the problem the SPCC rule is intended to address, without diminution of the environmental benefits.

Over the past year, Advocacy has been working closely with EPA's Office of Emergency Prevention, Preparedness and Response, and its Oil Program Center. As you know, the stringency of some of the SPCC requirements prompted dozens of letters to EPA from Congress, the agricultural community, the electrical industry, the construction industry and manufacturers, among others. We commend Debbie Dietrich, Director of the Office of Emergency Prevention, Preparedness and Response, and Dave Evans, Director of the Oil Program Center, for listening to the small business concerns and their hard work in developing a responsive strategy while preserving the integrity of the oil spill rule. EPA staff has worked to meet the challenge of re-inventing a rule that suffers from widespread noncompliance and misunderstanding about the rule requirements.

Major concerns include the requirements to employ professional engineers, and to perform expensive engineering tests on containers where visual inspection would be adequate. In addition, Advocacy and others have asked EPA to reexamine the wisdom of specifying oil containment requirements for millions of pieces of equipment that use or contain oil and containers holding asphalt cement, where asphalt cement is known to be solid or semi-solid at normal temperatures. The adoption of the recommendations on these issues alone would result in one-time cost savings approaching one billion dollars, with no adverse impact on the SPCC rule.<sup>7</sup>

### **III. Recommended Regulatory Reforms**

In September 2003, Advocacy provided the EPA with a report developed for Advocacy by Jack Faucett Associates (JFA), outlining potential regulatory revisions in a number of important areas.<sup>8</sup> We believe several of the revisions discussed in the JFA report merit immediate consideration by EPA to provide relief pending further rulemaking. We understand that EPA is considering short term relief for several, if not all, of these areas, which we commend. Advocacy is recommending a regulatory approach that provides specific reforms in an interim final rule to provide immediate regulatory relief from onerous requirements pending further rulemaking relating to: (1) small facilities, (2) integrity testing, (3) motive power and oil-filled equipment, and (4) asphalt cement and hot-mix asphalt. We also suggest that EPA issue a proposal simultaneously with the interim final rule in order to solicit comments on the merits of the approach and the small business impacts, and to gather information for the longer term rulemaking. The longer term rulemaking efforts should address the issues of loading racks, wastewater treatment, and the definition of "impracticability," in addition to the issues discussed below.<sup>9</sup>

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<sup>7</sup> The small facility recommendation alone accounts for more than \$500 million in one-time savings. The other recommendations affecting over 300,000 facilities could easily approach \$500 million in costs savings.

<sup>8</sup> *Spill Prevention Control and Countermeasure (SPCC) Issues, Alternatives and Recommendations (Draft Version 4)*, (September 2003) by Jack Faucett Associates for the Office of Advocacy under contract SBAHQ-00-D-006.

<sup>9</sup> *Id.* at 12-13, and 16-17.

Our recommended regulatory approach is based on three core principles. First, we have identified areas for immediate regulatory relief for which the oil spill risk to navigable waters is very small, if not totally insignificant. Second, each of these areas affect large portions of the SPCC population, respectively accounting for either tens or hundreds of thousands of facilities. Third, where needed, we have designed a “safety net” of regulation that would provide basic minimum protection while EPA is engaged in a longer term effort to promulgate new regulations, using the appropriate notice and comment procedures. For example, we recommend that EPA require visual inspections and a contingency plan to protect against spills from oil-filled equipment pending final rulemaking in the area.<sup>10</sup>

#### **A. Small Facility – Interim Final Rule for Facilities with Less than 10,000 Gallons; Visual Inspection and Contingency Planning Required During Interim Period**

Advocacy believes its most significant recommendations address the small facility issue. Hundreds of thousands of small facilities, including farms and construction sites, are required by rule to obtain a professional engineer’s certification of the SPCC plan, a costly and impractical proposition for these small businesses.<sup>11</sup> As discussed below, we are urging the agency to exempt one tier of small facilities from these SPCC requirements, and allow the larger small facilities the option of using a standardized SPCC plan, designed for their industry (e.g. farms).

##### *1. Three-tiered Regulatory Approach (After Completion of Full Rulemaking Procedures)*

There are several hundred thousand farms, car dealers, construction sites and other “small” facilities with small amounts of oil storage, in excess of the current 1,320 gallon threshold. Such facilities are unlikely to need the services of a professional engineer, at a cost of up to \$7,000 to prepare an SPCC plan for a small facility. In our view, small facilities with simple layouts and tanks that are not interconnected (e.g. farms, car dealerships or construction sites) do not require site visits, nor the help of a professional engineer (PE). For such facilities, Advocacy recommends that EPA use a standardized plan. This change alone would save facilities more than \$500 million in consulting costs.<sup>12</sup> Advocacy recommends that EPA establish a three-tier structure for small facilities in place of the PE certification requirement in a future rulemaking.<sup>13</sup> The proposed alternative sets up a tiered structure based on a facility’s total regulated storage as follows:

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<sup>10</sup> We do not assume that the final rulemaking will require any regulation of oil-filled or electrical equipment. An analysis of all the appropriate regulatory alternatives, including no regulation, should be conducted for a formal EPA proposal at a later time.

<sup>11</sup> *Spill Prevention Control and Countermeasure (SPCC) Issues, Alternatives and Recommendations (Draft Version 4)*, (September 2003) by Jack Faucett Associates for the Office of Advocacy under contract SBAHQ-00-D-006 at 8.

<sup>12</sup> *Proposed Reforms to the SPCC Professional Engineer Certification Requirement: Designing a More Cost Effective Approach for Small Facilities*, (June 2004) by Jack Faucett Associates for the Office of Advocacy under contract SBAHQ-00-D-006, at 9.

<sup>13</sup> *Proposed Reforms to the SPCC Professional Engineer Certification Requirement: Designing a More Cost Effective Approach for Small Facilities* (June 2004) by Jack Faucett Associates for the Office of Advocacy under contract SBAHQ-00-D-006, at 22-23.

- Tier I: 1,321 to 5,000 Gallon Facilities - No written plan required, but must implement compliance with all applicable substantive provisions of the rule.
- Tier II: 5,001 to 10,000 Gallon Facilities - Written plans required, but no PE-certification requirements. Collaborative EPA/industry “best practices” model plans tailored to sectors having a significant number of similar small facilities.
- Tier III: 10,001 Gallon and Above Facilities - Written PE-certified plans.<sup>14</sup>

In order to establish this regulatory approach for these facilities, EPA should employ full notice and comment rulemaking procedures. However, since the burden on hundreds of thousands facilities is so large in the near future, immediate interim relief is warranted given the time required to complete a formal rulemaking.

### *2. Short Term Interim Relief: Exempt Facilities with Less than 10,000 Gallons*

In the interim, we suggest that EPA promulgate an interim final rule that excludes small facilities with storage of less than 10,000 gallons (the first two tiers of a three-tier approach) from SPCC plan requirements, pending completion of the full notice and comment rulemaking for small facilities. In order to provide the safety net in the interim period, we recommend that EPA require: (1) regular visual inspections of containers, (2) replacement or retirement of leaking tanks, and (3) compliance with the Part 109 contingency plan requirements or their equivalent.<sup>15</sup>

In this manner, the SPCC rule would address the reality of the extremely low compliance rate among small facilities, and would work toward creating a rule that small facilities would be likely to comply with. Such a move would enhance, rather than detract from, environmental protection.

### **B. Integrity Testing – Visual Inspection Only for Drums, Totes and Tanks Inside Buildings and Tanks Outside Buildings with Containment Areas**

The second key issue warranting expeditious revisions involves the integrity test requirements for containers. It is widely acknowledged by industry experts that integrity testing for small shop-built tanks and drums is unnecessarily expensive, and is not technically feasible for drums and totes. At the Environmental Roundtable held by the Office of Advocacy on May 21, 2004, the National Paint and Coatings Association noted that integrity testing for their industry’s tanks would cost \$20 million. Advocacy recommends that EPA allow visual inspection without the need for obtaining a costly PE certification for small tanks and containers under specified conditions.<sup>16</sup> We recommend that EPA allow visual inspection on an interim final basis for: (1)

<sup>14</sup> This small facility approach was also adopted in the proposal submitted to EPA by Douglas Greenhaus, National Automotive Dealers of America and other trade groups in January 2004.

<sup>15</sup> During the interim period, the safety net would include the additional clean-up and spill response requirements in 40 Part 110. This liability for clean-up and response would exist without any applicable SPCC rule requirements in 40 CFR Part 112 (the Part containing the SPCC requirements).

<sup>16</sup> Under the current rule, each facility can obtain a “deviation” from the integrity testing requirement, as long as the professional engineer finds that the visual inspection procedure offers the “equivalent” environmental protection as the integrity tests.

all drums and totes, (2) all outside containers on pedestals, saddles or supports, with containment at actively managed sites and (3) all tanks inside buildings which are actively managed.<sup>17</sup>

These recommendations are based on multiple considerations. First and foremost, there is little observed risk from tanks inside buildings and outside buildings with containment. The primary objective of integrity testing is to prevent failure from brittle fracture, which cannot be diagnosed from a visual inspection. However, brittle fracture is not a serious issue for small shop-built tanks, as opposed to field-built tanks, and thus visual inspection on a regular basis at actively managed sites is more than adequate protection. Furthermore, the restriction to sites under active management insures more rapid detection of leaks and spills. Second, under EPA's recent settlement involving this rule, visual inspection requires PE approvals of a "deviation" from the rule's integrity requirements. We estimate that our recommended rulemaking change would eliminate this time consuming and expensive requirement at a minimum of 50,000 facilities, given the large universe of affected facilities. These conditions are narrowly drawn deliberately to avoid the need for the PE's judgment.<sup>18</sup> Third, with respect to drums and totes alone, the Department of Transportation has established inspection requirements at 49 CFR §§175.28, 180.352 and 180.605. There are no known industry integrity tests for drums and totes, which effectively makes the current requirement inapplicable for drums and totes.

With regard to the specific recommendations regarding tanks inside and outside buildings, these are based on a modification of the settlement terms. EPA found that it could consider visual inspection of containers that are on saddles or supports, or on certain specific types of liners as providing the "environmentally equivalent" level of protection under §112.7(a)(2). EPA has advised the regulated community that the settlement terms could be considered a "conservative" interpretation of the current rules, allowing such deviations on an "environmentally equivalent" basis.<sup>19</sup> We urge EPA to consider that tanks on sites involving active management, with containment for outside tanks and or inside buildings with floors, is only a small modification of EPA's current "conservative" approach. Furthermore, the extremely low spill rate from such scenarios confirms the merits of this approach. This interim approach will save hundreds of millions of dollars, pending the adoption of a potentially more refined scheme after the completion of full rulemaking procedures.

### **C. Exemptions for Motive Power and Oil-Filled Equipment – Interim Final Rule**

After the promulgation of the July 2002 amendments, EPA began to focus more on the application of this rule to "motive power" vehicles and oil-filled equipment generally. The agency has recently determined that it did not intend to cover tanks that are used to provide "motive power" to tractors, forklifts, mobile cranes, and other mobile equipment.<sup>20</sup> EPA realized

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<sup>17</sup> *Spill Prevention Control and Countermeasure (SPCC) Issues, Alternatives and Recommendations (Draft Ver. 4)*, (September 2003) by Jack Faucett Associates for the Office of Advocacy under contract SBAHQ-00-D-006 at 3-7.

<sup>18</sup> A PE would still be required, however, to approve a deviation for a facility with outdoor tanks on the ground where there is no containment, because this would fall outside the rule, even as amended as suggested in this letter.

<sup>19</sup> Presentation by Dave Evans, Director, EPA Oil Program Center, to Advocacy's Environmental Roundtable on May 21, 2004.

<sup>20</sup> Motive power equipment generally means vehicle fuel, lubrication or hydraulic systems necessary to operate the vehicle itself, and/or to operate equipment on board the vehicle (e.g. cranes, compressors, drills). EPA addressed this topic recently. Slide 6 (modified after March 31) from the March 31, 2004, EPA presentation at the SPCC

that it did not make sense for the SPCC rule to cover retail dealerships selling tractors, or to include construction sites under SPCC simply because of the fuel tanks in the tractors and cranes that moved around the site. The agency found that it was not very practicable to require containment around vehicles that regularly move about the site. We welcome the agency's recent move to exclude such motive power vehicles from SPCC, and believe that this exclusion should also be included in an interim final rule, because of the low risk and the high short term costs (and unnecessary confusion) in the continued regulation of such vehicles.

In addition, there is the closely related issue of the regulation of oil-filled equipment generally (which overlaps some with motive power), and more specifically, the subset of electric equipment. As with motive power, EPA soon realized after July 2002 that it did not adequately address the vast scope of the regulation of all oil-filled equipment. We recommend that EPA should exclude all oil-filled equipment in the interim, as it develops the notice and comment rulemaking.

Electrical equipment is the best known example of oil-filled equipment, and EPA already noted this issue in the 1999 advance notice of proposed rulemaking.<sup>21</sup> The agency recognizes that millions of electrical units are covered by the current rule, with potentially very minor risk. As the Utility Solid Waste Activities Group (USWAG) has documented, electrical equipment has demonstrated a low spill risk historically.<sup>22</sup> USWAG has proposed a three-tier system which is analogous to the small facility approach recommended by our office and the informal small facility coalition.<sup>23</sup> The costs of general containment at the utility facilities alone at approximately 50,000 electrical substations would be easily exceed tens of millions of dollars, if this rule were applied to all electrical equipment.<sup>24</sup>

Again, Advocacy recommends, similar to the approach for small facilities, that EPA impose a visual inspection requirement and a contingency planning requirement during the interim period. Furthermore, such an approach is also broadly applicable to all oil-filled equipment in the interim period. Although the spill record for all oil-filled equipment has not been as well defined as for electrical equipment, it is still commonly recognized that oil-filled equipment is also relatively low risk. The best approach calls for the use of the "safety net" pending a full rulemaking on this issue.<sup>25</sup> Exclusion of motive power tanks and oil-filled equipment allows the

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meeting in Crystal City, Virginia states the current EPA position: "We will consider proposed rulemaking to exempt bulk oil storage containers on a vehicle used exclusively to provide fuel for propulsion or other movement of the same vehicle and may consider exemptions for equipment on the same vehicle where oil is used for operational purposes ("mixed use vehicles"), such as a gas tank for a car and its associated oil, or a fuel tank for a tractor and its associated hydraulic equipment."

<sup>21</sup> 64 Fed. Reg. 17227 (April 8, 1999).

<sup>22</sup> The December 1991 USWAG comments estimated a 0.003 percent per year discharge rate to navigable waters from oil-filled electrical equipment.

<sup>23</sup> USWAG presentation by James Roewer and William Weissman before the Office of Advocacy's May 21, 2004, Environmental Roundtable.

<sup>24</sup> Telephone interview with William Weissman, Piper Rudnick, LLP, USWAG counsel, June 9, 2004.

<sup>25</sup> The pending deferral of the 2002 rule amendments may have the effect of deferring all electrical and all oil-filled equipment from regulation, as many assert that EPA did not regulate such equipment before the 2002 amendments. However, a separate interim rule specifically addressing all oil-filled equipment will provide EPA and the regulated community with a clear delineation of the requirements of the rule for that universe.

regulated firms and EPA to focus on efforts that truly result in risk reduction, and not devote valuable resources to nonproductive activity.

#### **D. Exclusion of Asphalt from SPCC - Interim Final Rule**

An additional major issue that also warrants immediate relief is the exclusion of asphalt cement and hot-mix asphalt from all SPCC-related requirements.<sup>26</sup> It has long been recognized that the storage of liquid asphalt cement and hot-mix asphalt is not a significant threat to U.S. waters. A recent review of the spill data at the National Response Center showed that less than 0.1% of all spills involved asphalt, and a much smaller number involved tanks or containers. Perhaps most importantly, according to industry experts, and consistent with this spill data, asphalt and hot-mix asphalt are solid to semi-solid at normal temperatures, and would not flow far beyond the immediate spill area. Indeed, the fact that 2.1 million miles of asphalt-based roads are not disappearing is a testament to the inability of asphalt cement to migrate significantly. Engineers routinely certify that asphalt cannot reach navigable waters, thus permitting SPCC plans to exclude the need for general containment now specified in the rule. Thus, the Office of Advocacy recommends that asphalt cement and hot-mix asphalt not be subject to any SPCC requirements. We recommend addressing this in an interim final rule pending further rulemaking.

There are hundreds of thousands of construction jobs started each year, a large portion of which involves paving projects. The asphalt-related SPCC requirements are a major cost to this vital portion of the U.S. economy. Construction sites that otherwise would not be subject to SPCC coverage at all, are covered due to the large capacity of the asphalt cement and hot-mix containers on site. Thus, Advocacy believes the appropriate relief is twofold : (1) eliminate asphalt cement and hot-mix asphalt from the calculation of the 1,320 gallon site-based threshold, and (2) eliminate all requirements relating to the asphalt cement and hot-mix asphalt containers and silos. Again, we recommend that EPA require visual inspections and contingency planning as a safety net during the interim period, pending final rulemaking relief for this issue. Also, as noted above, relieving facilities from burdensome and unnecessary requirements frees up time and resources for the SPCC requirements that do warrant resources and attention.

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<sup>26</sup> This has been discussed extensively in correspondence with the agency. See Letter from National Asphalt Paving Association and Associated General Contractors of America to Peter Truitt, EPA, April 14, 2004; Abt Associates Memorandum to Peter Truitt, EPA, February 26, 2004; Gary Fore, National Asphalt Paving Association, Memorandum to Peter Truitt, February 26, 2004; Letter from Norbert Dee, National Petrochemical and Refiners Association to Dave Evans, EPA, June 3, 2004.



#### **IV. Conclusion**

We are very pleased to be able to offer these specific recommendations to EPA on this important issue. EPA has the opportunity to reduce the costs of the SPCC rule by hundreds of millions of dollars, increase compliance with the SPCC rule requirements and focus efforts on measures that will prevent more oil spills reaching navigable waters. We look forward to working with the agency on the interim final rule, other rulemaking efforts, and guidance materials. Thank you for your consideration and please do not hesitate to contact me or Kevin Bromberg of my staff at 202-205-6964 or kevin.bromberg@sba.gov.

Sincerely,

Thomas M. Sullivan  
Chief Counsel for Advocacy

Kevin Bromberg  
Assistant Chief Counsel

Enclosure: "Proposed Reforms to the SPCC Professional Engineer Certification Requirement: Designing a More Cost Effective Approach for Small Facilities" (June 2004) by Jack Faucett Associates for the Office of Advocacy under contract SBAHQ-00-D-006, available at <http://www.sba.gov/advo/>

cc w/o enclosure:

Dr. John Graham, Administrator, Office of Information and Regulatory Affairs, OMB