

SUMMARY FOR PAPER #10
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**OOPS – ACCIDENTS HAPPEN:
OIL POLLUTION PREVENTION AT ONSHORE
PRODUCTION FACILITIES**

by

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The U.S. Environmental Protection Agency first promulgated the requirement that owners or operators of certain onshore oil and gas production facilities prepare and implement an oil spill prevention, control and countermeasure (“SPCC”) plan in 1973. Although this requirement now is almost 40 years old, the future will bring significant new developments for SPCC Plans that will be of importance to owners and operators of onshore production facilities.

In order to place these potential developments in their proper context, a brief summary of the current status of the SPCC plan requirement is necessary.

1. Section 311 of the Clean Water Act prohibits, among other things: “The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) . . . which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States . . . in such quantities as may be harmful as determined by the President” Clean Water Act § 311(b)(3), 33 U.S.C. § 1321(b)(3).
2. Section 311 of the Clean Water Act authorizes, among other things, the President to issue regulations “establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and other hazardous substances . . . from onshore facilities . . . and to contain such discharges” Clean Water Act § 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C).
3. In 1973, the President, acting through the United States Environmental Protection Agency, promulgated a regulation (“Oil Pollution Prevention: Non-Transportation Related Onshore and Offshore Facilities”, 38 Fed.Reg. 34164-31170 (December 11, 1973) (“1973 SPCC Rule”)) pursuant to the authority in Section 311(j) requiring oil-producing facilities which, due to their location, could reasonably be expected to discharge oil in harmful quantities into or upon navigable waters of the United States to develop spill prevention, control, and counter-measure (“SPCC”) plans. 40 CFR 112.3.
4. EPA proposed revisions to the 1973 Rule in 1991 and adopted modified revisions in 2002. “40 CFR Part 112: Oil Pollution Prevention and Response;

Non-Transportation-Related Onshore and Offshore Facilities; Final Rule”, 67 Fed.Reg. 47042-47090 (July 17, 2002) (“2002 SPCC Rule”). The 2002 SPCC Rule included revisions to the requirements for SPCC Plans, some of which imposed new or more stringent compliance obligations than in the 1973 Rule.

5. The 2002 Rule became effective on August 16, 2002, and included compliance dates for preparing, amending, and implementing SPCC Plans. The compliance dates for the SPCC Plans, however, have been repeatedly extended.
6. In 2006, EPA finalized amendments to the 2002 Rule to address concerns raised by the regulated community. “Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Plan Requirements – Amendments”, 71 Fed.Reg. 77266-77293 (December 25, 2006).
7. In 2008, EPA again amended the SPCC regulations, “40 CFR Part 112: Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Rule Requirements – Amendments; Final Rule” 73 Fed.Reg. 74236 – 74323 (December 26, 2006), “to provide increased clarity, tailor requirements to particular industry sectors, and streamline certain requirements for a facility owner or operator subject to the rule.” 74 Fed. Reg. at 29137.
8. On February 3, 2009, EPA delayed by sixty days the effective date of the 2008 final rule, 74 Fed.Reg. 5900 (February 3, 2009) “to ensure that the rule reflects proper consideration of all relevant facts.” 74 Fed.Reg. at 5901. EPA requested public comment on the duration of the extension of the effective date and on the regulatory amendments contained in the 2008 final rule. 74 Fed. Reg. at 5900.
9. EPA received numerous comments on the regulatory amendments contained in the 2008 final rule and in June of this year EPA promulgated a final rule extending the effective date of the 2008 SPCC amendments to January 14, 2010. 74 Fed.Reg. 14736 (April 1, 2009). EPA also has extended to November 10, 2010, the compliance dates in 40 CFR § 112.3 for facilities to prepare or amend their SPCC Plans, and to implement those Plans. 74 Fed.Reg. 29136-29142 (June 19, 2009).
10. As of June, 2009, EPA had not decided how to proceed on the substance of the 2008 rule amendments, but expected to promulgate final revisions to the 2008 amendments, if any, in November of 2009. 74 Fed. Reg. at 29138.

In light of this summary of the current status of the SPCC Plan requirement, several future developments can be anticipated.

1. Compliance dates: Assuming EPA adheres to its current schedule, the compliance dates for preparation and implementation of SPCC Plans are described by EPA:

- The owner or operator of a facility that was in operation on or before August 16, 2002, must maintain its current SPCC Plan, make any necessary amendments to the current plan, and fully implement the plan by November 10, 2010.
- The owner or operator of a facility that came into operation after August 16, 2002, but before November 10, 2010, is required to prepare and implement an SPCC Plan by November 10, 2010.
- The owner or operator of a facility that becomes operational after November 10, 2010 and could reasonably be expected to have a covered discharge must prepare and implement an SPCC Plan before beginning operations. 74 Fed.Reg. 29138.

2. Covered facilities: Although there may be a relative high degree of certainty regarding the compliance dates themselves, considerable uncertainty remains in determining which onshore facilities are subject to those compliance dates.

The Clean Water Act generally prohibits, with certain exceptions, the “discharge of any pollutant.” Clean Water Act § 301(a), 33 U.S.C. § 1311(a). “Discharge of any pollutant” means “any addition of any pollutants to navigable waters . . .” *Id.* § 502(12), 33 U.S.C. 1362(12). The Clean Water Act defines “navigable waters” to mean “the waters of the United States, including the territorial seas.” *Id.* § 502(7), 33 U.S.C. 1362(7). EPA’s regulatory definitions over the years have been expansive, but the U.S. Supreme Court has signaled on two occasions that the term “navigable waters” imposes real limitations on the authority of the United States to regulate discharges into waters of the United States. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engr’s*, 531 U.S. 511, 121 S.Ct. 674, 148 L.Ed.2d 576 (2001) (“SWANCC”); *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006).

Following the Supreme Court’s divided opinion in *Rapanos*, EPA and the U.S. Army Corps of Engineers (“Corps”) issued a 2007 guidance memoranda for EPA regions and Corps districts in light of jurisdictional uncertainties created by the *Rapanos* decision. “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*”, available at <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf>.

In 2008, EPA and the Corps issued revised guidance on the same subject. “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*”, available at http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.

In addition to the uncertainties in the definition of “navigable waters” following the *Rapanos* decision, the jurisdictional standard is further complicated because Section 311 of the Clean Water Act has its own regulatory definition of “navigable waters.” In 1973, EPA promulgated a separate regulatory definition of “navigable waters” that were subject

to Section 311(j) requirements. 1973 SPCC Rule, 38 Fed.Reg. at 34165. The 2002 SPCC Rule included a different definition of navigable waters, 2002 SPCC Rule, 40 C.F.R. § 112.2(1), which was challenged by the American Petroleum Institute. In 2008 the United States District Court for the District of Columbia vacated the 2002 definition and restored the 1977 SPCC Rule definition, pending further rulemaking or other agency action. *American Petroleum Institute v. Johnson*, 541 F.Supp.2d 165, 187 (D.D.C. 2008).

Unlike the discharge prohibition in Section 301 which is limited to discharges of pollutants to navigable waters, the prohibition in Section 311 includes not only discharges “into or upon navigable waters of the United states, adjoining shorelines . . .”, but also discharges “which may affect natural resources belonging to, appertaining to, or under exclusive management authority of the United States . . .”. Clean Water Act §311(b)(3), 33 U.S.C. § 1321(b)(3). This is confirmed in EPA regulations which provide that Part 112 also applies to discharges that may affect natural resources belonging to, appertaining to, or under the exclusive management of the United States. 40 C.F.R. § 112(b). The preamble to the 2002 SPCC Rule also notes that the final rule “extends the geographic scope of EPA’s authority beyond discharges to navigable waters and adjoining shorelines . . .” 67 Fed.Reg. at 47058.

SPCC plans are required for facilities “subject to this section”, 40 C.F.R. 112(3), which may have the effect of including within the universe of facilities required to prepare and implement SPCC Plans not only facilities whose oil spills have the potential to discharge to navigable waters, but also facilities far from navigable waters whose spills have the potential to affect federal natural resources. At other times, however, the language in the preamble and the 2008 SPCC Rule promulgation suggest SPCC Plans are limited to facilities with the potential to discharge into navigable waters. Environmental groups have suggested that the SPCC Rule be revised to make clear that SPCC Plans are required for all facilities described in 40 C.F.R. § 112(b) and not just facilities with a potential for discharge into navigable waters. *See* Comments submitted by Jon P. Devine Jr., Natural Resources Defense Council; Ed Hopkins, Sierra Club; and David Baron, Earthjustice; dated December 14, 2007, EPA Document Number EPA-HQ-OPA-2007-0584-0018.1.

3. Substantive Requirements: EPA’s purpose in promulgating the 2008 SPCC Rule was to provide “increased clarity, to tailor requirements to particular industry sectors, and to streamline certain requirements for those facility owners or operators subject to the rule. 73 Fed.Reg. at 74236. In addition to several general provisions applicable to all facilities, including elimination of the requirement that SPCC Plans be certified by a Professional Engineer if the facility meets criteria for qualified facilities, 40 C.F.R. § 112.6, the 2008 SPCC Rule includes several provisions unique to oil production facilities. 40 C.F.R. § 112.8, *see discussion at* 73 Fed.Reg at 74270-74292. Of these, EPA in 2009 indicated that it was specifically interested in receiving comments on optional approaches for produced water containers and criteria for identification of oil production facilities that are qualified and eligible to prepare self-certified SPCC Plans. 74 Fed.Reg. at 5901.