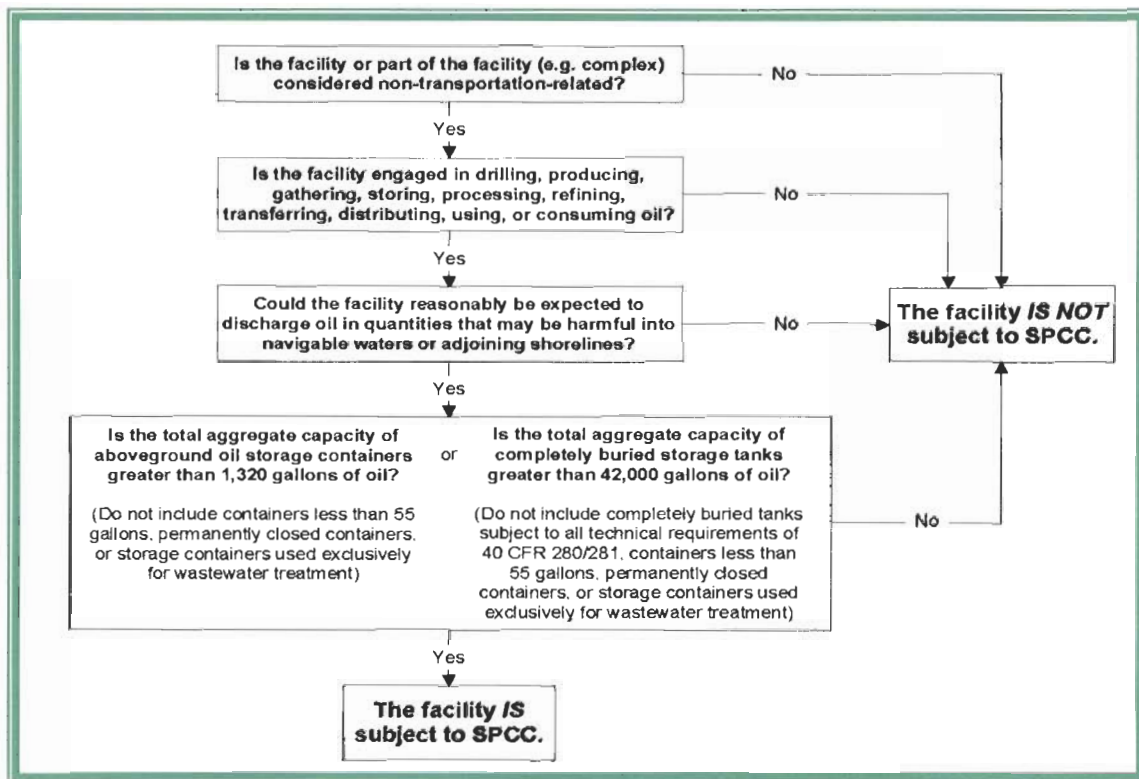


SPCC Rule Changes May Impact 2009 Plans

RECENT PROPOSED SPCC RULE CHANGES

For several years owners and operators of Spill Prevention, Control and Countermeasure (SPCC) regulated facilities have been required to develop, implement and maintain a SPCC plan in accordance with EPA regulations. Owners and operators of regulated facilities are subject to the SPCC rules if they meet the criteria outlined in the flow chart below:



On October 01, 2007, the Environmental Protection Agency (EPA) signed a proposed amendment to the SPCC rule in 40 CFR part 112. Among other things, the EPA is proposing to:

- 1) Exclude oil production facilities from the loading/unloading rack requirements;
- 2) Exempt flow-through process vessels at oil production facilities from the sized secondary containment requirements, while maintaining secondary containment and requiring additional oil spill prevention measures;
- 3) Extend the time frame by which a new oil production facility must prepare and implement an SPCC plan;
- 4) Exempt flow lines and intra-facility gathering lines at oil production facilities from all secondary containment requirements, while establishing more specific oil spill prevention requirements.

Comments to the EPA were due December 14, 2007. The proposed rule has not yet been promulgated as a final rule.

RECENT SPCC COURT RULINGS

On March 31, 2008, the United States District Court in the District of Columbia vacated the (EPA's) 2002 revision of the Clean Water Act (CWA) definition of "navigable waters" in response to a lawsuit brought by the American Petroleum Institute (API) and Marathon Oil Company in November 2002.

The November 2002 lawsuit is one in a long string of court cases on the subject, including one that was decided by the U.S. Supreme Court in 2006 (*Rapanos v. United States*). Based on that 2006 Supreme Court decision, the District Court essentially reverted back to the original definition of "navigable waters" (1973 definition) which is far less broad and arbitrary than the one promulgated by EPA in 2002.

The EPA's 2002 definition is: *"Navigable waters" means the waters of the United States, including the territorial seas.*

(1) *The term includes:*

- (i) *All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide;*
- (ii) *All interstate waters, including interstate wetlands;*
- (iii) *All other waters, including intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use degradation, or destruction of which would affect interstate or foreign commerce including any such waters*
 - (a) *That are or could be used by interstate or foreign travelers for recreational or other purposes; or*
 - (b) *From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or,*
 - (c) *That are or could be used for industrial purposes by industries in interstate commerce;*
- (iv) *All impoundments of waters otherwise defined as waters of the United States under this section;*
- (v) *Tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;*
- (vi) *The territorial sea; and*
- (vii) *Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (1) of this definition."*

The original 1973 definition is: *The term "navigable waters" of the United States means "navigable waters" as defined in Section 502(7) of the [Clean Water Act], and includes:*

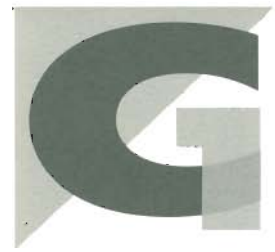
- (1) *All navigable waters of the United States as defined in judicial decisions prior to passage of the 1972 Amendments of the [Clean Water Act] and tributaries of such waters;*
- (2) *Interstate waters;*
- (3) *Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and*
- (4) *Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.*

The Court found for the plaintiffs who argued that the EPA violated the Administrative Procedures Act by promulgating the new definition "without a rational explanation – and hence arbitrarily, capriciously, and without observance of procedure required by law."

The decision by the District Court will likely impact oil and gas industry members that, under the vacated definition, would have had to prepare SPCC Plans if they could reasonably be expected to discharge oil to "navigable waters" of the United States. Due to the EPA's SPCC rule changes pending since October 2007, and the recent court ruling, it is possible that numerous operators may be relieved of the cost and need to prepare a SPCC Plan by July 2009.

Please watch for updates when new information becomes available.

Insights is intended to provide discussion and information concerning environmental issues, and is not intended to provide legal advice. Readers should contact Jeff Simsa at Gosling Czubak (800) 968-1062 to discuss specific situations. © 2008 GCES



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