



American Public Power Association

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HAND DELIVERY

EPA Docket Center
U.S. Environmental Protection Agency
EPA West, Suite B-102
1301 Constitution Ave., N.W.
Washington, D.C. 20460

Re: Comments on EPA's Proposal to Extend the Compliance Deadline for the July 2002 Spill Prevention Control and Countermeasure Amendments, **Docket No. OPA-2004-0003, 69 Fed. Reg. 34014 (June 17, 2004)**

Dear Sir or Madam:

“Public power” is the term used to describe the more than 2,000 municipal and other state and local community-owned electric utilities that provide electricity for approximately 40 million Americans. These public power systems are among the most diverse of the electric utility sectors, representing utilities in small, medium and large communities in 49 states (all but Hawaii). Seventy-five percent of public power systems are located in cities with populations of 10,000 or less. Overall, public power accounts for about 16 percent of all kilowatt-hour sales to consumers.

APPA was created in 1940 as a non-profit, non-partisan organization. Its purpose is to advance the public policy interest of its members and their consumers, and to provide member services to ensure adequate, reliable electricity at a reasonable price with the proper protection of the environment.

APPA would like EPA to keep in mind the following important facts as it considers the Association's comments:

- Ninety percent of “public power utilities” meet the SBREFA definition of sales of retail of \$4 million MWh annually and serve populations of **50,000 customers or less**,¹
- “Public power” includes a mix of generation from sustainable resources, including hydro-power, wind, and other renewable fuels,
- Many “public power” utilities, particularly larger utilities, have begun to offer “green pricing” programs to their consumers,

¹ Based on staff discussion with counsel for the SBA's Office of Advocacy.

- Over 56 percent of the coal-fired units owned by “public power” are less than 20 years old, and
- “Public power” has numerous utility-specific programs to protect the environment reflecting the diverse interests of the constituencies served by individual units.

APPA is writing in support of the proposed one year extension on SPCC plan implementation. APPA is a member of USWAG Utility Solid Waste Activities Group “USWAG” and endorses their more detailed comments.

When the 2002 SPCC amendments were initially promulgated, the rule prescribed February 17, 2003, as the deadline for facilities in operation on or before August 16, 2002, to amend their plans to conform to new requirements in the amendments, and August 18, 2003, as the deadline for those facilities to implement the amended plans. (*See* 67 Fed. Reg. at 47143.) Almost immediately after promulgation, it became apparent to the regulated community and to EPA that far-reaching unintended consequences would ensue from some of the provisions in the amendments and even from statements in the preamble attempting to interpret portions of the pre-2002 SPCC rule that remained in effect after 2002. Shortly thereafter, some members of the regulated community filed legal actions challenging portions of the 2002 amendments. (*See* 69 Fed. Reg. at 34015.) This led EPA on two previous occasions to extend the compliance deadlines while the Agency proceeded to develop interpretive guidance or, where notice and comment rulemaking is necessary, to develop regulatory amendments. (*See* 68 Fed. Reg. 1348) (Jan. 9, 2003) (interim final rule extending deadlines by 60 days); (68 Fed. Reg. 18890) (April 17, 2003) (final rule extending deadlines by 18 months).

APPA member companies are very concerned with the question about whether oil-filled electrical and operating equipment must comply with SPCC requirements. The EPA has publicly acknowledged that the SPCC rule will undergo material change in a future rulemakings.² Agency officials have repeatedly advised the industry that EPA does not expect the regulated community to commit significant resources to comply with a rule that the Agency intends to change. The regulated community therefore has received positive signals from EPA officials that it need not incur the massive burdens of the amended SPCC rules at facilities containing such equipment during this interim period, but it has received no legal assurances that doing so would avoid enforcement risk.

One possible solution to this dilemma is for EPA to conclude that the July 2002 amendment to 40 C.F.R. § 112.1(b) made oil-filled equipment subject to SPCC requirements. Such an interpretation would simplify the regulatory status of such equipment, at least for the next year, while EPA proceeds with developing a rule to address the permanent status of such equipment. This interpretation provides only a

² The EPA also discussed this at the U.S. Small Business Administration briefing in May, 2004.

short-term solution for the equipment universe while the Agency considers in a more deliberate manner how to address this equipment for the longer period needed to complete the rulemaking. The EPA can rely on the fact that conflicting statements and actions by individual EPA staff prior to 2002 led the Agency to resolve the prior uncertainty by stating unequivocally in 2002 that oil-filled equipment is now covered by the rule. EPA clarified the uncertainty by adding the term “using” to the list of activities in section 112.1(b) that may trigger SPCC regulation. It is a familiar principal of administrative law that new language in rules apply prospectively. [*See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988).].

A second option, complementary to the first, is the adoption of interim relief from current SPCC requirements pending the completion of the rulemaking. Such a proposal has been submitted to EPA by the U.S. Small Business Administration Office of Advocacy (“SBA”). Letter from Thomas M. Sullivan & Kevin Bromberg, SBA, to Thomas P. Dunne, Acting Assistant Administrator, OSWER, dated June 10, 2004. USWAG strongly encourages EPA to act on this sound proposal on an expedited basis. Although SBA proposes that EPA immediately promulgate an interim final rule, we recognize that even such summary procedures will take time and therefore suggest that EPA adopt both approaches in sequence.

APPA understands that EPA has a third approach under consideration. According to EPA’s newly published Semiannual Regulatory Agenda, EPA plans later this month

to issue a proposed rule extending by an additional two years the compliance deadline for certain groups of the regulated community. EPA is considering additional measures to ease the compliance burden of smaller facilities, and for oil-filled and motive power equipment.

69 Fed. Reg. 38154, 38297 (June 28, 2004).

Note: APPA believes that two years additional is on top of the one year extension, meaning three years extension to electrical equipment.

This notice also lists other issues that may be addressed in future rulemaking that presumably would be covered by the proposed two-year extension. It is unclear from the notice whether this proposed extension would be limited to compliance with the 2002 amendments or would apply broadly to the entire SPCC program.

The advantage of the first option is that it provides an immediate short-term solution for oil-filled equipment without precluding the other two options on a more long-term basis. The advantage of the SBA proposal for interim relief is that it makes no distinction between SPCC requirements in the original 1973 rule and the 2002 amendments and it would remain in effect until EPA completes the proposed rulemaking. The two-year extension mentioned in the EPA regulatory agenda notice has the benefit of covering more issues, but it is unclear whether it applies to SPCC requirements in the 1973 rule. Moreover, by limiting its duration to two-years rather than to the completion

of the rulemaking, EPA may simply face another round of extension rulemakings in two years.

Finally, APPA asks the EPA to reaffirm the statement it made in the preamble to the April 17, 2003, extension that the extension applies to “new or more stringent compliance obligations” imposed by the July 2002 amendments and not to provisions in the amendments that provide regulatory relief. (68 Fed. Reg. at 18893.) Although we fully agree with EPA on this interpretation, many of our members and the constituents of our member associations have repeatedly asked us to clarify EPA’s intent on this point. It was helpful to have EPA’s unambiguous preamble statement, and we anticipate that the same question will arise when EPA promulgates the proposed extension.

APPA appreciates this opportunity to comment on the proposed one-year extension, and would like to take this opportunity to thank the staff of the Oil Program Center for their hard work in addressing the concerns of the regulated community and their willingness to approach these difficult issues with an open mind. If we can be of further assistance, please contact Theresa Pugh at 202-467-2943 or perhaps USWAG’s Executive Director, Jim Roewer (202-508-5645; jim.roewer@uswag.org), or USWAG’s counsel, Bill Weissman (202-861-3878; william.weissman@piperrudnick.com).

Sincerely,

Theresa Pugh
Manager, Environmental Services

TAP/bjl

Enclosure: APPA comments to OMB regarding May 3rd comments on regulations needing review

cc: Mr. Thomas P. Dunne, Acting Assistant Administrator for OSWER, US EPA
Mr. Craig Matthiessen, Acting Oil Program Director (5203G)
Mr. Hugo Fleischman (5203G)
Mr. Mark Howard (5203G)
Mr. Jim Roewer, USWAG
Mr. Keith Belton, OMB-OIRA
Mr. Thomas Sullivan, SBA
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