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USWAG

May 20, 2004

VIA E-MAIL and Facsimile

Ms. Lorraine Hunt
Office of Information and Regulatory Affairs
Office of Management and Budget, NEOB, Room 10202
725 17th St., N.W.
Washington, DC 20503

Re: Draft Report to Congress on the Costs and Benefits of Federal Regulation;
Notice and Request for Comments

Dear Ms. Hunt:

The following comments on the 2004 Draft report to Congress on the Costs and Benefits of Federal Regulation ("Draft Report") (69 Fed. Reg. 7987 (Feb. 20, 2004)) are submitted on behalf of the Utility Solid Waste Activities Group ("USWAG"). USWAG was formed in 1978, and is an association primarily dedicated to assisting members in the management of wastes and the beneficial use of materials associated with the generation, transmission, or sale of electricity. USWAG is comprised of approximately 80 electric utility operating companies and associations, including the Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), and the American Gas Association ("AGA"). Collectively, USWAG members represent more than 85% of the total electric generating capacity of the U.S., and service more than 95% of the nation's consumers of electricity and over 93% of the nation's consumers of natural gas.

These comments address the Draft Report's request for suggestions identifying "specific reforms to regulations, guidance documents or paperwork requirements that would improve manufacturing regulation *by reducing unnecessary costs, increasing effectiveness, enhancing competitiveness, reducing uncertainty and increasing flexibility.*" Id. at 56 (emphasis added).

USWAG members are regulated under several federal environmental programs and support OMB's efforts, given the large impact of federal regulations on the electric utility industry, to seek public nomination of promising regulatory reforms relevant to the manufacturing sector. Consistent with these objectives, identified below are several regulations that are candidates for reform, including several under the Environmental

Protection Agency's ("EPA") regulatory program for polychlorinated biphenyls ("PCBs") at 40 C.F.R. Part 761.

The first regulatory reform suggestion requests that EPA either clarify, or if necessary amend, its regulations to make clear that all remediation wastes containing < 50 ppm PCBs can be managed in the same manner, including being disposed in a municipal solid waste landfill. Inexplicably, EPA apparently only allows for certain subsets of such wastes to be disposed of in this manner, while requiring identical wastes to be disposed in more expensive TSCA regulated landfills. There is no environmental or programmatic rationale for this discrepancy. It results only in the needless expenditure of significant resources to send low-concentration PCB wastes to fully regulated TSCA landfills, while other *identical* wastes can be disposed in an environmentally sound manner in municipal solid waste landfills.

The second regulatory reform suggestion calls for the rescission of a regulation set forth at 40 C.F.R. § 761.35 (entitled "storage for reuse") that imposes record keeping requirements and potential disposal obligations on entities storing electrical equipment for reuse. For the reasons discussed below, USWAG urges that this regulation be rescinded as applied to the gas and electric utility industry (NAICS numbers 2211, 2212 and 4862).

The third regulatory reform suggestion calls for reexamination and modification of EPA's Oil Pollution Prevention and Response regulation, commonly known as the Spill Prevention Control and Countermeasure Plans or SPCC rule, 40 C.F.R. Part 112. This rule was promulgated in 1973 (38 Fed. Reg. 34165), and was significantly amended in 2002 (67 Fed. Reg. 47042). Before the 2002 amendments were scheduled to go into effect, EPA became aware of numerous unintended burdens resulting both from the amendments and from the original rule that led the Agency, at its own initiative, to postpone the compliance date by 18 months. 68 Fed. Reg. 18890 (April 17, 2003). During this period, EPA intended to develop guidance to clarify some of the issues raised by the regulated community and to disclose plans for further rulemaking to address other issues that are not amenable to resolution via interpretive guidance. To date, EPA has been unable to announce how it intends to address these issues, and has merely been able to disclose its intent to extend the compliance deadline one more time. After so many false starts at seeking to bring down the high cost of compliance with SPCC regulation, we respectfully urge OMB to make major reform of this program one of the Administration's high priorities.

These issues are discussed below.

I. PCB Remediation Wastes – 40 C.F.R. § 761.61

A. Regulating Agency -- Environmental Protection Agency; Office of Prevention, Pesticides, and Toxic Substances; PCB Program Office.

B. Citation -- 40 C.F.R. § 761.61

C. Authority -- Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.

D. Description of Problem -- EPA's PCB Program Office interprets the regulations to impose different disposal requirements for sites that contain soils and other materials contaminated by spills of PCBs – referred to as “PCB remediation wastes” – even when such wastes are *identical* in nature, depending upon the type of cleanup performed. In particular, EPA asserts that PCB remediation wastes containing *less* than 50 ppm PCBs (the concentration threshold for regulating the disposal of PCBs) from “self-implementing” cleanups can be disposed in a municipal solid waste landfill, but identical wastes from other types of cleanups must be disposed in a fully regulated TSCA landfill. This makes no sense from an environmental or risk perspective. Rather, it has resulted only in regulated entities – including federal agencies and state and municipal governments – spending significant sums from tight operating budgets to dispose of wastes with extremely low levels of PCBs in costly TSCA landfills, when EPA has determined that such wastes can be safely disposed in a less costly municipal solid waste landfill.

By way of background, spills of PCBs at concentrations of < 50 ppm are not regulated for disposal under the federal PCB regulations. See 40 C.F.R. § 761.50(a)(4) (stating that only spills of PCBs at \geq 50 ppm constitute the “disposal” of PCBs). EPA has taken the position, however, that if a material is contaminated by PCBs from a source of \geq 50 ppm PCBs, the contaminated material (referred to as “PCB remediation waste,” see definition at 40 C.F.R. § 761.3) remains fully regulated under the PCB regulations, even if the concentration of PCBs in the waste is *below* 50 ppm. EPA has done so because it theorizes that, absent this “anti-dilution” principle, regulated entities would “dispose” of PCBs at concentrations of \geq 50 ppm by intentionally spilling PCBs onto soil and then manage the diluted levels of PCBs in the soil as unregulated material. This theory ignores the fact that such “intentional dilution” would constitute a separate violation of EPA's PCB disposal regulations, so that any purported “incentive” to dilute is countered by the real threat of enforcement for improper disposal. EPA's dogmatic adherence to its “anti-dilution” theory has resulted in literally hundreds of millions of tons of low-level PCB remediation wastes requiring disposal in highly regulated and costly

TSCA landfills. For example, TSCA landfill disposal costs (not including transportation) may range from \$100-\$150/per 55-gallon drum, while costs for disposing of a 55-gallon drum in a municipal solid waste landfill can be as low as \$5.00 a drum.

In promulgating amendments to its PCB disposal regulations in 1998, EPA took steps to address the problems caused by its “anti-dilution” theory, including the huge costs incurred by the regulated community to dispose of wastes containing < 50 ppm PCBs in TSCA landfills. EPA revised its disposal requirements for PCB remediation wastes by promulgating new 40 C.F.R. § 761.61 and new § 761.50(b)(3). The opening paragraph of section 761.61 states that “[a]ny person cleaning up and disposing of PCBs under this section *shall do so based on the concentration at which the PCBs are found.*” (Emphasis added.) There are no exceptions or caveats to this statement. Section 761.50(b)(3)(ii)(B) (“PCB remediation waste”) says that “any person responsible for PCB waste at as-found concentrations \geq 50 ppm” must dispose of it in accordance with § 761.61. Notwithstanding these new provisions, EPA still does *not* allow regulated entities to dispose of *all* PCB remediation wastes “based on the concentration at which the PCBs are found,” but in fact regulates the disposal of identical PCB remediation wastes differently based on the “cleanup” option chosen for remediating a site. This approach is inconsistent with the plain language in § 761.61 and § 761.50(b)(3), and increases significantly the cost of complying with the federal PCB regulations.

Section 761.61 is comprised of three separate cleanup and disposal options in subparagraphs (a), (b) and (c). Only subparagraph (a) explicitly authorizes disposal of remediation wastes containing as-found concentrations of < 50 ppm PCBs in a municipal solid waste landfill. The text of subparagraph (a) is somewhat difficult to follow due, in part, to repeated cross-references to other sections of the PCB regulations. In the end, though, if the regulatory labyrinth is correctly followed, this subparagraph explicitly authorizes bulk PCB remediation wastes (*e.g.*, soils) containing as-found concentrations of < 50 ppm PCBs to be disposed in a municipal solid waste or non-hazardous waste landfill. See 40 C.F.R. § 761.61(a)(5)(i)(B)(2)(ii), cross-referencing § 761.61(a)(5)(v)(A).

Under EPA’s interpretation of the rules, to qualify for the non-TSCA disposal option, entities must notify EPA prior to site cleanup regarding the nature of the contamination and prepare and submit a site characterization and cleanup plan, as well as specify procedures for certifying cleanup. *Id.* at § 761.61(a)(2)-(3). In addition, under this option, the applicable “cleanup” standards allow for leaving certain PCBs in place *above* background levels. For example, depending on the location of the spill and the method of remediation, up to 100 ppm PCBs may be left in place after the cleanup is complete. See *id.* at § 761.61(a)(4)(i)(A).

Different disposal requirements apply under § 761.61(b). Entities disposing of PCB wastes under subparagraph (b) do not have to notify EPA prior to disposal. However, unlike the cleanup provisions in subparagraph (a), which allows for certain concentrations of PCBs to remain in place, the PCB Program Office takes the position that entities remediating a site under § 761.61(b) must remove virtually all the PCBs for the site to be considered clean under the PCB disposal rules. See EPA PCB Question and Answer Document, September 2001 at 91 (interpreting the PCB cleanup standard under § 761.61(b) as requiring the removal of PCBs down to < 1 ppm). Further, notwithstanding the reference to “as-found concentrations” in the opening paragraph of § 761.61, the references to “as-found concentrations \geq 50 ppm PCBs” in § 761.50(b)(3)(ii), and the fact that the Program Office holds entities remediating a site under subparagraph (b) to a more rigorous cleanup standard, EPA also takes the position that *all* PCB remediation wastes generated under subparagraph (b) – even remediation wastes containing < 50 ppm PCBs – must be disposed of at TSCA regulated facilities. See 40 C.F.R. § 761.61(b)(1)-(2). Thus, the *identical* bulk remediation waste generated under § 761.61(a) containing < 50 ppm PCBs that EPA has determined can be safely disposed in a municipal solid waste landfill must, according to EPA, be disposed of in a more expensive TSCA landfill if generated by cleanups performed under § 761.61(b). Neither environmental nor risk objectives justify that result.

Finally, 40 C.F.R. § 761.61(c) allows regulated entities to request a risk-based variance from the cleanup and disposal standards set forth in §§ 761.61(a) and (b). While this variance provision arguably could be used to request allowances to dispose of remediation wastes containing < 50 ppm PCBs generated through cleanups conducted under authorities other than § 761.61(a) in a municipal solid waste landfill, it makes no sense to require entities to expend the resources to make such a request – which may be denied by EPA in any event – when identical wastes generated under § 761.61(a) can be routinely disposed in such landfills without a variance.

E. Proposed Solution -- EPA should clarify that, consistent with the opening paragraph of 40 CFR § 761.61 and 40 CFR § 761.50(b)(3)(ii), *all* PCB remediation waste containing < 50 ppm PCBs can be disposed of based on its as-found concentration in a municipal solid waste landfill. Indeed, this is what the opening paragraph to 40 C.F.R. § 761.61 and 40 C.F.R. § 761.50(b)(3)(ii) contemplate. EPA has already determined that such wastes can be safely managed in such landfills when generated under 40 C.F.R. § 761.61(a). There is no environmental or programmatic reason why wastes of *identical* chemical composition generated under different cleanup scenarios (e.g., under 40 C.F.R. § 761.61(b) or EPA’s PCB Spill Cleanup Policy))

cannot be managed in the same manner. Off-site disposal options and related costs should be predicated on the nature of the wastes being disposed, not on the "cleanup" option chosen for remediating a site. All PCB remediation wastes containing < 50 ppm PCBs should be able to be managed *and* disposed of based on their as-found concentration in a municipal solid waste landfill. EPA should either clarify that such disposal practices already are authorized under existing regulations or, if EPA deems it necessary, expressly amend its regulations to authorize this result.¹

II. Storage for Reuse Regulation -- 40 C.F.R. § 761.35

A. Regulating Agency -- Environmental Protection Agency; Office of Prevention, Pesticides, and Toxic Substances; PCB Program Office

B. Citation -- 40 C.F.R. § 761.35

C. Authority -- Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.

D. Description of Problem -- This regulation imposes restrictions on the storage for reuse of "PCB Articles," which includes a wide-range of electrical equipment critical to the reliable supply of electricity to millions of entities throughout the United States, including federal (civilian and military), state, municipal, local, commercial, and residential consumers of electricity.² The regulation limits the storage of such equipment to five years, unless a waiver is granted at the sole discretion of EPA or unless the equipment is consolidated (from many discrete locations within an utility's service area) in a centralized facility designed to hold PCB wastes (so-called "storage for disposal" facilities). Consolidating PCB Articles in a "storage for disposal" facility is impractical in many cases because such equipment must be kept on hand at service centers and similar dispersed locations throughout utility transmission and distribution systems to

¹ USWAG is authorized to state that the General Electric Company joins in this comment Section I above regarding "PCB Remediation Wastes."

² PCB Articles are defined as "any manufactured article, other than a PCB Container, that contains PCBs and whose surface(s) has been in direct contact with PCBs" (at concentrations \geq 50 ppm PCBs). 40 C.F.R. § 761.3. This includes, for example, capacitors, transformers, electric motors, switches, bushings and other PCB-containing equipment critical to the reliable transmission and distribution of natural gas and electricity.

ensure quick access to spare equipment to replace equipment damaged in storms, accidents or system failures.

In developing the storage for reuse rule, EPA readily acknowledged the many reasons in which extended storage for reuse of PCB Articles is warranted, explaining that “there are many legitimate instances which warrant the storage of PCB equipment for many years for the purpose of reuse as spares for critical components of electrical systems.” 59 Fed. Reg. 62788, 62821 (Dec. 6, 1994) (emphasis added). EPA emphasized there would be many circumstances within the utility industry where storage for reuse of PCB-containing equipment—well beyond five years—is warranted, due to the longevity of equipment and the unique functions that the varied equipment serves in providing reliable electrical service to the public. As the Agency explained:

There are many compelling reasons for allowing the storage for reuse of PCB Articles. Since transformers, for example, can easily have an active service life of more than 40 years, disposing of this equipment prematurely based upon an arbitrary time limit would not be economically prudent nor serve any environmental goals. Placing such a piece of electrical equipment in storage for reuse to be used as a spare or in emergency situations is both prudent and economically sound.

Id. at 62822 (emphasis added).

EPA also conceded that the real focus of the rule was certain businesses, including brokers, junk yard dealers and service jobs which, “by their nature...accumulate larger quantities or volumes of PCBs” than do owners or users of the equipment, such as utilities. Id. Concerned that this former group of entities engaged in sham storage, EPA explained that it is “these situations which the Agency is seeking to control by limiting the time allowed for storage for reuse and imposing other safeguards.” Id. Recognizing, at the same time, that the rule may not be appropriate for all industries (e.g., utilities), EPA specifically requested “comment on the inclusion of site-specific or nationwide exemption or waiver provisions in addition to the [rule’s] proposed waiver provision.” Id.

In response to EPA’s request for comment on this issue, USWAG argued for an exemption for PCB Articles retained in storage for reuse by the utility industry, emphasizing that utilities require an inventory of spare PCB Articles. Virtually every other entity that commented on the issue agreed that application of the storage for reuse rule to utilities was both unnecessary and impractical. For example, the U.S. Department of Energy filed detailed objections to the rule, arguing it would require utilities to abandon perfectly useable and critical equipment with no attendant environmental benefits and

unnecessarily threaten the reliable provision of power to the public. The Connecticut Department of Environmental Protection went a step further and explicitly supported the need for a variance for utilities, noting the large number of electrical equipment that utilities must keep on-hand as spares. A broad range of municipalities and private utilities took similar positions, questioning the need for imposing the new restrictions on utilities.

EPA nonetheless promulgated the final rule without an exemption for utilities and without a single word responding to the requests of utilities and others for a variance. EPA failed to refute, contradict, or respond to the evidence in the record demonstrating that there is no legitimate basis for imposing storage for reuse requirements on utilities. The utility industry challenged the rule and the United States Court of Appeals for the Fifth Circuit remanded the rule to EPA, without vacature, because EPA failed to respond to the comments of USWAG and others urging the Agency to exempt utility systems from the rule. Central and South West Services, Inc. v. EPA, 220 F.3d 683, 692 (5th Cir. 2000).

E. Proposed Solution -- It has been close to four years without a response from EPA since the storage for reuse rule was remanded to the Agency. Nor does it appear that EPA has even established any internal timetable for responding to the remand (for example, there is no schedule for responding to the remand in EPA's latest regulatory agenda for TSCA rulemakings, see 68 Fed. Reg. 73540 (Dec. 22, 2003)). The bottom line is that the utility industry remains indefinitely saddled with a rule that was promulgated in violation of the Administrative Procedure Act and on which virtually all commenters agreed made no sense to apply to the utility industry in the first place.

For these reasons, USWAG recommends the proposed solution is for EPA to rescind the rule as applied to the utility industry. To date, EPA has not provided a reasoned explanation as to why this regulation is necessary for utility storage of spare equipment. In the meantime, utilities are coping with burdensome requirements that make little sense as applied to electric and gas operating systems. For example, utilities across the country recently had to apply for variances from the rule's five-year storage limit for literally thousands of pieces of equipment across the country being held in storage for reuse. The paperwork burden and resources devoted to completing this exercise were significant, without any recognizable environmental benefit.

III. Oil Pollution Prevention and Response Regulation – 40 C.F.R. Part

A. Regulating Agency – Environmental Protection Agency; Office of Solid Waste and Emergency Response; Oil Program Center.

B. Citation – 40 C.F.R. Part 112.

C. Authority – Clean Water Act § 311, 33 U.S.C. § 1321.

D. Description of Problem – In 2001, USWAG communicated with EPA and OMB to express the industry's concerns with amendments to the SPCC rule that had been signed by the outgoing EPA Administrator in the final days of the Clinton Administration but had not been published in the *Federal Register*. See Letter from USWAG to Honorable Christine Todd Whitman and Honorable Donald R. Arbuckle dated May 9, 2001. The amendments that Governor Whitman promulgated a year later failed to address the basic defects with the program as they affect the power industry, and, with few exceptions, tracked the amendments that had been signed by former EPA Administrator Carol M. Browner in January 2001. In the past year, EPA staff signaled an interest in addressing our concerns and invited USWAG to submit proposed solutions for the Agency's consideration. We have done so and will describe our recommendations below.

OMB should recognize, as an EPA official tacitly acknowledged just two months ago, that the SPCC regulations are widely misunderstood and not followed – especially among smaller businesses. This widespread noncompliance is the result of ambiguous drafting by EPA in 1973 and its failure at the time to articulate the full implications of the rule. As issues surfaced after 1973, EPA would make ad hoc interpretive decisions that were not published in the *Federal Register* or put out for public comment even though the effect of the new interpretations was to expand the program far beyond what the regulated community had foreseen and had addressed in comments in the original rulemaking.

For electric utilities, a major concern is with the possible impact of the rules on oil-filled electrical equipment. The phrase “electrical equipment” never appeared in the original 1973 rule and none of the preamble discussion in either the proposed or final rule discussed the applicability of the rules to such equipment or any past experience with such equipment that justified regulation.

USWAG raised its concern with EPA in conjunction with its publication of proposed SPCC amendments in 1991. 56 Fed. Reg. 54612 (Oct. 22, 1991). But instead of developing a factual record for determining whether regulation of this equipment was necessary at all, the Agency simply assumed they were regulated and

sought to ameliorate a few of the harshest aspects of the program with some fine tuning around the edges of the issue. See, e.g., 40 C.F.R § 112.2 (definition of “bulk storage container” excludes electrical, operating and manufacturing equipment). The Agency never addressed the basic question why this equipment warranted regulation or how much the regulation would cost. In order for OMB to appreciate how the SPCC regulation, as amended, would impose high compliance costs to address low risk operations, a somewhat detailed background is necessary.

1. Background. There are more than 3000 electric utility systems located throughout the United States. Generally, these systems operate three major categories of facilities that may contain above-ground tanks and equipment that might be affected by the SPCC program: electric generating stations, transmission and distribution facilities, and multi-purpose service yards.

Generating stations store varying quantities of oil used either as a fuel or in lubrication systems. In the case of oil-fired generating stations, these utilities store bulk quantities of oil in above-ground storage tanks. These facilities typically have SPCC plans because of the quantity of oil stored in such tanks.

Numerous pieces of equipment used in the distribution of electricity, such as transformers, circuit breakers, and voltage regulators, utilize mineral oil or other oils as dielectric fluid to provide insulation and cooling. In comments submitted to EPA in 1991, we estimated that electric utilities operate approximately two million pieces of electrical equipment at 48,000 substations where the total volume of oil contained in the equipment exceeds the SPCC volume threshold. Industry growth and greater emphasis on service reliability since 1991 has certainly increased the number of potentially affected substations, though the modest increase in the regulatory threshold incorporated into the 2002 amendments has undoubtedly excluded a few smaller substations. In addition, large pieces of electrical equipment, primarily distribution transformers, are found in a variety of locations (often on the property of utility customers) such as substreet vaults, office buildings, shopping centers, and industrial complexes. We estimated in 1991 that nearly 50,000 of these distribution transformer installations contain oil above the SPCC regulatory threshold, but the increased threshold adopted in 2002 has reduced the number of such installations subject to the rules. Nevertheless, many thousands of substations and distribution transformer locations would be subject to the SPCC regulations in their present form.

As pointed out above, since the SPCC rules were promulgated in 1973, electric utilities have believed that these regulations do not apply to electrical equipment. The trigger for regulation in 40 C.F.R. § 112.1(b) prior to the 2002 amendments described a

range of activities typical of oil storage and production facilities but atypical of electrical equipment installations. Unlike the oil in storage tanks, electrical equipment uses oil operationally to provide cooling and insulation rather than for storage, a fact EPA acknowledged in its 1991 proposed amendments. See 56 Fed. Reg. at 54623. Indeed, EPA's own 1991 Regulatory Impact Analysis omitted electrical equipment in its calculation of the burdens imposed by the SPCC regulations. That omission was not remarkable because only three years earlier EPA had explicitly excluded electrical equipment, hydraulic lifts, and other equipment that utilizes oil operationally from its 1988 underground storage tank regulations. 40 C.F.R. § 280.10(b)(3); see 53 Fed. Reg. 37082, 37111-12 (Sept. 23, 1988). Whatever the interpretation of the 1973 rules, the 2002 amendments clearly swept electrical equipment into the program by amending § 112.1(b) to add "using" oil or oil products to the list of activities that trigger regulation.

Prior to 2002, EPA regional offices periodically inspected utility facilities for SPCC compliance and in a few cases they asserted that the 1973 SPCC rules were applicable to oil-containing electrical equipment. The typical utility response was to advise the EPA region why the utility believed that the regulations were inapplicable to such equipment, and uniformly, until 1995, the EPA regional offices took no further action. The industry has never questioned the applicability of the Part 110 rules to discharges of oil from such equipment and utilities typically have strong oil spill contingency plans in place.

The addition of electrical equipment to a program largely designed to address the risks associated with large volume oil storage at tank farms is unsound public policy. Neither EPA nor OMB has ever conducted a full regulatory impact analysis of the costs and benefits of regulating electrical equipment under the SPCC program. We therefore offer the suggestions in section E that we believe will allow EPA to promulgate a good rule in which the costs and benefits are more closely in sync.

2. Electrical Equipment Poses Low Environmental Risk. The fundamental problem with the SPCC program is EPA's failure to differentiate between regulated facilities that pose a high level of risk to surface waters and those, like electric utility substations containing oil-filled electrical equipment, that generally pose little risk to waters. One of the most significant features of electrical equipment is that it is essentially self-monitoring. A loss of dielectric fluid leads to failure of the device and an interruption in the transmission of electrical power. Such interruptions are immediately responded to, which minimizes the chance that any release that does occur would reach navigable waters. Substation electrical equipment is typically equipped with remotely monitored

low level and high temperature alarms, and any problem that triggers these alarms would be responded to immediately.

In addition, substation electrical equipment is often surrounded by a gravel bed, which is designed to act as a passive fire quench system in the event that the device failure results in ignition of the dielectric fluid. These beds provide a significant restriction to movement of any oil that may be released, further reducing the probability that a release would reach navigable waters.

As a result of these features, electrical equipment has an exceptional spill history. At EPA's request, USWAG recently submitted data showing that in the past decade, the industry's rate of reportable discharge to navigable waters or adjoining shorelines is 0.21% of the industry's total universe of electrical equipment. EPA's 1995 SPCC survey showed that the number of discharges from oil storage facilities exceeds by orders of magnitude the extremely low number of comparable discharges from electrical equipment. However, these features cannot be considered in determining whether a facility poses a risk to navigable waters or adjoining shore lines because they are "manmade features" and one of the more perverse features of the SPCC rules prohibit reliance on risk reducing manmade features. See 40 C.F.R. § 112.1(d)(1)(i). In short, "command and control" regulation prevails over the alternative of burden reduction incentives that reward proactive risk reduction measures.

Another factor that produces a disproportionate regulatory burden in circumstances of low to *de minimis* risk stems from the regulatory trigger in the rules. According to § 112.1(b), the rules apply to a facility "which due to its location, could reasonably be expected to discharge oil *in quantities that may be harmful*, as described in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines" (emphasis added). This language suggests that some discharges may be harmful while others may not be, and only the risk of causing *harmful* discharges triggers the SPCC requirements. However, the cross-reference to part 110 establishes as the standard of harm for purpose of triggering the regulatory requirements any discharge that "cause[s] a film or sheen upon or discoloration of the surface of the water or adjoining shorelines," a standard that is met by even a single drop of oil in water. In effect, EPA has stripped the words "in quantities that may be harmful" of any meaning. EPA trivialized the oil pollution prevention program by imposing significant compliance costs to avoid *de minimis* or theoretical risks, such as those posed by the potential discharge of small quantities of oil.

3. High Compliance Costs. As we explained above, most utilities did not construe the original 1973 SPCC rules as covering oil-filled electrical equipment. Therefore, if the 2002 amendments remain unchanged, this vast universe of facilities will be compelled to achieve compliance by preparing plans that satisfy Part 112 of the rules (or modify existing generic spill prevention plans to satisfy those requirements) and to implement the capital investments required by the rules. Given the industry's estimate that some tens of thousands of facilities will need to develop and implement plans, failure to revise the amended SPCC rules will require utilities to divert significant resources from other tasks to ensure compliance by the deadline specified in the amendments. To compel utilities to shift limited funds from the needed focus on reliability to address a perceived rather than realistic environmental threat seems ill-advised during this period of national energy uncertainty. Indeed, the burdens of this requirement do not fall on electric utilities alone. Many manufacturing industries own and operate transformers and other oil-filled electrical equipment at industrial locations, and they are equally subject to this regulation.

Several USWAG member companies have not had the luxury of waiting for the SPCC amendments to become effective to begin the compliance process – a number of EPA regions have insisted that the prior rules cover electrical equipment and our members in those regions have been pressured to respond. The experience of these utilities provides some preliminary indications of the cost the industry faces if these amendments remain in their present form. The cost of site examination and plan preparation among four utilities from both the eastern and western parts of the country ranged from about \$1300 to \$5000 per substation site.

The largest cost element facing utilities is compliance with § 112.7(c) of the rules. That section requires regulated facilities to “[p]rovide appropriate containment and/or diversionary structures or equipment to prevent a discharge” of oil. The rule provides examples of such structures or equipment, including dikes, berms, retaining walls, curbing, gutters or other drainage systems, barriers, spill diversion ponds or retention ponds, or sorbent materials. The rule allows an exception to this requirement and substitution of an oil spill contingency plan if the installation of such structures or equipment is “not practicable” (§ 112.7(d)). However, until its recent settlement of litigation challenging portions of the SPCC amendments brought by the petroleum industry, EPA precluded consideration of costs or economic impacts in any determination whether compliance with the containment or diversionary structures requirement is impracticable. While we expect many electrical substations will be able to demonstrate impracticability, many others will not be in a position to do so and, in any event, such a demonstration must be made on a site-specific basis and incorporated into

the individual SPCC plan. It is one thing to install secondary containment as part of the original design of a new substation; it is quite another to do so at an existing facility where it will be necessary to disrupt operations and shut down equipment to build the required containment at significant cost. One utility that has sought cost estimates for implementing containment at 300 substations determined the cost would be roughly \$12 million or \$40,000 per substation.

E. Proposed Solution – At EPA’s invitation, USWAG submitted a proposal for reforming the regulation of oil-filled electrical equipment. We proposed to establish a separate section at the end of Subpart B of Part 112 specifically for such equipment. We then recommended that EPA tailor the SPCC requirements to the unique characteristics of electrical equipment.

One of the features of the SPCC rules that would result in over-regulation of electrical equipment is the requirement to base the regulatory status of a facility on the *aggregate* oil storage capacity of the entire site. This requirement is an understandable component of a storage tank regulatory program because large tanks systems are often interconnected by piping from which a release of the contents of multiple tanks is a plausible risk. That does not occur in the case of electrical equipment. Multiple pieces of equipment are generally not hydraulically interconnected, and failure of one piece of equipment is extremely unlikely to cause the failure of any other piece of equipment at the same substation. We therefore recommended that the regulatory threshold be based on the oil storage capacity of each piece of equipment.

The second recommendation we presented to EPA was to divide the equipment into three tiers subject to three different sets of regulatory requirements. Equipment below 1320 gallons would be below the size threshold. This would exclude from SPCC planning requirements the universe of extremely small equipment, such as circuit breakers, capacitors, voltage regulators, switches, and small transformers, such as distribution transformers located at the utility customer’s premises. Experience has shown that this equipment poses virtually no risk of discharge to surface waters, and in the rare case where a discharge occurs, the response action is typically swift and complete. Nevertheless, were a discharge to occur, the Agency’s enforcement authority under the Clean Water Act § 311(b)(3) and Part 110 of EPA’s rules remains in place.

For equipment that ranges from 1320 gallons to 20,000 gallons, we recommended that EPA establish a tier for what would be defined as a “qualified facility.” What qualifies a facility for the second tier is the combination of lower oil storage capacity, the ability to respond quickly to any loss of oil, a history of not having had any discharges, and the absence of any Agency directive to override the regulation and to

prepare an SPCC Plan for that facility. A “qualified facility” would have the option of preparing an oil spill contingency plan consistent with Part 109 of EPA’s rules in lieu of preparing an SPCC Plan and would also be required to prepare a written commitment of manpower, equipment, and materials required to respond to any discharge of oil to surface waters. The general provisions for inspection, testing, recordkeeping, and training would apply to “qualified facilities.”

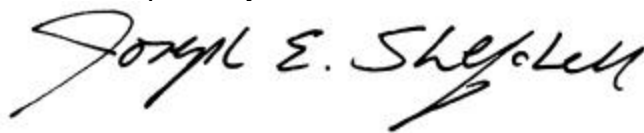
The third tier would apply to all equipment that is ineligible (greater than 20,000 gallons oil storage capacity) or has lost its status as a “qualified facility”, (in general, due to a reportable discharge) Such a facility would be fully regulated under the SPCC rules except for modification of the current prohibition for considering manmade features that provide containment at the facility to determine whether the facility is subject to regulation.

In sum, USWAG has proposed a risk-based regulatory approach in which the most stringent requirements would generally apply to large equipment or to equipment where experience has shown that it is not low risk by having had a reportable discharge within the previous 10 years. Many of the smaller members of our industry – especially the rural electric cooperatives and the publicly-owned utilities – would likely see most of their equipment universe qualify for significantly reduced regulation.

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We appreciate the opportunity to provide OMB with these recommended revisions to EPA’s regulations. If you have questions, please contact USWAG counsel, Douglas Green, at Piper Rudnick LLP (202/861-3847).

Respectfully submitted,



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