

Utility Solid Waste Activities Group

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U S W A G

July 7, 2004

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 ID No. OPA-2004-0003, 69 Fed. Reg. 34014 (June 17, 2004)

Dear Sir or Madam:

The Utility Solid Waste Activities Group ("USWAG")¹ submits these comments in support of EPA's proposal (69 Fed. Reg. 34014) (June 17, 2004) to extend the dates for a facility to amend and implement its Spill Prevention, Control, and Countermeasure ("SPCC") plan to comply with the July 17, 2002, SPCC amendments. 67 Fed. Reg. 47042.

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

¹ USWAG was formed in 1978, and is an informal consortium of approximately 80 energy industry 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"). EEI is the principal national association of investor-owned electric power and light companies. NRECA is the national association of rural electric cooperatives. APPA is the national association of publicly owned electric utilities. AGA is the principal national association of natural gas utilities. Together, 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.

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 purporting 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).

As EPA noted in the pending proposal, settlement of all but one of the litigation issues has been achieved and additional time will be necessary for the regulated community to understand and implement the changes contemplated by the settlement. 69 Fed. Reg. at 34015. In addition, numerous other issues requiring clarification through interpretive guidance or regulatory amendment have been under discussion with Agency staff. See Spill Prevention, Control and Countermeasure Stakeholder Meeting, March 31, 2004, Summary Document, reproduced at EPA web site at <http://www.epa.gov/oilspill/pdfs/SPCCStakeholderMeetingSummary.pdf>. Sufficient time will be necessary for EPA to complete its work on those issues and thereafter for the regulated community to implement the resolution of those issues. It makes no sense for the regulated community to expend resources to achieve compliance with regulatory provisions that the Agency has recognized require revision or clarification. For these reasons, EPA's proposed extension is entirely appropriate.

What the pending proposal does not address, but the Agency cannot avoid addressing, is its expectation of the regulated community on issues that EPA has concluded require rulemaking to resolve. Both EPA and the regulated community recognize that such rulemaking will not be completed in a year, and some of the issues to be addressed in rulemaking may not stem solely from the 2002 SPCC amendments. Plainly, the proposed extension applies only to new or heightened requirements imposed by the 2002 SPCC amendments. See 69 Fed. Reg. at 34014. Therefore, the proposed one-year extension does not fully address the concerns of the regulated community.

An issue of great importance to USWAG member companies as well as to many industrial companies outside our industry is the extent to which oil-filled electrical and operating equipment must comply with SPCC requirements that the Agency has publicly acknowledged will undergo material change in a future rulemaking. 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. To be sure, this interpretation provides only a 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 Agency 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. It 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, EPA 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.

We understand 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). 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.

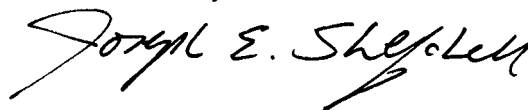
The advantage of the first option is that it provides an immediate short-term solution for oil-filled equipment without precluding the other two options on a more long-term basis. The advantage of the SBA proposal for interim relief is that it makes no distinction between SPCC requirements in the original 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, we ask 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.

We appreciate 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 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,

A handwritten signature in black ink that reads "Joseph E. Shefchek". The signature is written in a cursive style with a large, sweeping initial "J".

Joseph E. Shefchek
Chairman, USWAG Policy Committee

cc: Mr. Craig Matthiessen
Acting Oil Program Director (5203G)
Mr. Hugo Fleischman (5203G)
Mr. Mark Howard (5203G)