

**Utility Solid Waste Activities Group**

c/o Edison Electric Institute  
701 Pennsylvania Avenue, NW  
Washington, DC 20004-2696  
202-508-5645  
www.uswag.org

U S W A G

November 19, 2004

HAND DELIVERY

EPA Docket Center  
U.S. Environmental Protection Agency  
EPA West, Suite B-102  
1301 Constitution Ave., NW  
Washington, DC 20460

Re: Comments on EPA's Notices of Data Availability on Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities, Docket ID No. OPA-2004-0007

Dear Sir or Madam:

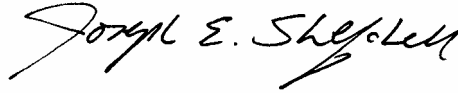
The Utility Solid Waste Activities Group (“USWAG”)<sup>1</sup> submits these comments on EPA’s Notice of Data Availability (“NODA”) regarding possible alternative regulatory requirements for facilities under the Clean Water Act that handle oil below a certain threshold amount (“certain facilities”). 69 Fed. Reg. 56182 (Sept. 20, 2004). At the same time, EPA published a companion NODA in a separate docket dealing with alternative regulatory programs for oil-filled electrical and operating equipment. 69 Fed. Reg. 56184 (Sept. 20, 2004). We are submitting a single set of comments in response to both NODAs and will file them in each docket.

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<sup>1</sup> 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.

If you have any questions or comments about these comments, please contact USWAG's Executive Director, Jim Roewer (202-508-5645) (jim.roewer@uswag.org) or our counsel, Bill Weissman (202-861-3878) (william.weissman@piperrudnick.com).

Very truly yours,

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

Enclosure

cc: Mr. Craig Matthiessen  
Acting Oil Program Director (5203G)

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Re: Comments on EPA's Notices of Data Availability on Oil Pollution  
Prevention and Response; Non-Transportation-Related Onshore and  
Offshore Facilities, Docket ID No. OPA-2004-0008

Dear Sir or Madam:

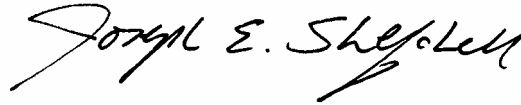
The Utility Solid Waste Activities Group ("USWAG")<sup>1</sup> submits these comments on EPA's Notice of Data Availability ("NODA") regarding possible alternative regulatory requirements for facilities with oil-filled electrical and operating or process equipment. 69 Fed. Reg. 56184 (Sept. 20, 2004). At the same time, EPA published a companion NODA in a separate docket dealing with alternative regulatory programs for facilities that handle oil below a certain threshold amount. 69 Fed. Reg. 56182 (Sept. 20, 2004). We are submitting a single set of comments in response to both NODAs and will file them in each docket.

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If you have any questions or comments about these comments, please contact USWAG's Executive Director, Jim Roewer (202-508-5645) (jim.roewer@uswag.org) or our counsel, Bill Weissman (202-861-3878) (william.weissman@piperrudnick.com).

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Joseph E. Shefcik  
Chairman, USWAG Policy Committee

Enclosure

cc: Mr. Craig Matthiessen  
Acting Oil Program Director (5203G)

**Comments of  
The Utility Solid Waste Activities Group,  
The Edison Electric Institute,  
The American Public Power Association,  
The National Rural Electric Cooperative Association,  
and The American Gas Association on  
EPA's Notices of Data Availability on Oil Pollution  
Prevention and Response; Non-Transportation-Related  
Onshore and Offshore Facilities  
69 Fed. Reg. 56182 (Sept. 20, 2004)  
69 Fed. Reg. 56184 (Sept. 20, 2004)**

**submitted to  
The United States  
Environmental Protection Agency  
Docket ID Nos.  
OPA-2004-0007  
OPA-2004-0008**

**November 19, 2004**

**Of Counsel**

**Piper Rudnick LLP  
1200 19<sup>th</sup> Street, N.W.  
Washington, D.C. 20036-2412**

**Comments of the Utility Solid Waste Activities Group, the  
Edison Electric Institute, the American Public Power Association,  
the National Rural Electric Cooperative Association, and  
the American Gas Association on EPA’s Notices of Data Availability  
on Oil Pollution Prevention and Response; Non-Transportation-  
Related Onshore and Offshore Facilities  
69 Fed. Reg. 56182 (Sept. 20, 2004)  
69 Fed. Reg. 56184 (Sept. 20, 2004)**

The Utility Solid Waste Activities Group (“USWAG”)<sup>1</sup> submits these comments on EPA’s Notices of Data Availability regarding possible alternative regulatory requirements for particular classes of facilities arguably subject to current or previously promulgated but not yet effective Spill Prevention Control and Countermeasure (“SPCC”) regulations. The first NODA solicits public comment on streamlined alternative regulatory requirements for “certain facilities.” 69 Fed. Reg. 56182 (Sept. 20, 2004). The second NODA invites public comment on alternative regulatory approaches for facilities with oil-filled electrical and process equipment. 69 Fed. Reg. 56184 (Sept. 20, 2004). Accompanying the notices are documents submitted to EPA by various stakeholders (including USWAG) or by other government agencies describing the proposed alternatives to the current SPCC rules. We address the second NODA first.

As EPA has come to recognize, the current SPCC regulatory framework has proved to be unworkable as applied to the types of facilities covered by the two NODAs

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<sup>1</sup> 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.

and a fresh and innovative approach for these facilities is long overdue. It has also become evident that there is a high degree of uncertainty and confusion among many professional engineers (“PEs”) in determining what constitutes an acceptable SPCC plan for facilities containing oil-filled electrical and operating equipment. We commend EPA and the Oil Program Center staff for recognizing the need for tailored approaches for preventing discharges to surface waters from these classes of facilities. USWAG urges EPA to expedite the rulemaking process for developing the regulatory amendments needed to implement these innovative alternatives.

**I. Oil-Filled Electrical Equipment (Docket ID No. OPA-2004-0008)**

USWAG welcomes EPA’s decision to invite public comment on our three-tier regulatory alternative for oil-filled electrical equipment.<sup>2</sup> See Data on Facilities with Oil-

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<sup>2</sup> The NODA also resurrects suggestions presented many years ago by USWAG and some of our members for addressing the electrical equipment issue. For example, Document No. 8 contains a 1997 USWAG proposal to substitute “electrical equipment response plans” or “area response plans” for site-specific SPCC plans, a recommendation also supported by individual USWAG members. See Document No. 12. Similarly, USWAG submitted proposals for raising the regulatory threshold for electrical equipment in its comments on the 1991 proposed SPCC amendments. Document No. 27. Neither of these proposals, however, was approved in the final 2002 SPCC amendments. See 67 Fed. Reg. 47042, 47054-55, 47074 (July 17, 2002). Therefore, when the Agency’s staff invited USWAG to submit a new proposal on electrical equipment in the form of a draft regulatory amendment, we saw no point in resubmitting a proposal that the Agency in effect had already rejected. Instead, we took a fresh look at the issue and submitted the three-tier proposal that we urge EPA to propose in a formal rulemaking. See Document No. 9.

It seems odd that the NODA includes a 1973 letter from Dairyland Power Cooperative, a USWAG member, urging EPA to exclude from SPCC regulation small (less than 50 gallons) reservoirs for lubricating oil. Document No. 6. It may have taken EPA 29 years to see the wisdom in Dairyland’s 1973 proposal, but it is no longer necessary to give the proposal further consideration because all containers below 55 gallons were excluded from SPCC regulation by the 2002 amendments. See 40 C.F.R. § 112.1(d)(5); 67 Fed. Reg. at 47066-67, 47068.

Filled and Process Equipment, Document No. 9.<sup>3</sup> Since we have already discussed the details of our proposal with EPA staff on several occasions and responded to all of the Agency's questions, we see no need to repeat the specifics of the proposal here. However, we wish to remind EPA that only a significant departure from the current SPCC regulatory approach will achieve the needed reform of spill prevention regulation of electrical equipment.

First, unlike the current SPCC requirement for aggregating the oil storage capacity of all oil containing units at a facility, we are proposing a unit specific regulatory approach to reflect the fact that failure of one piece of electrical equipment due to loss of oil has no effect on the risk of oil discharge from any other piece of equipment at the facility. Multiple pieces of equipment are generally not hydraulically interconnected. Hence there is no justification for regulating a low risk piece of small equipment at a site in the same manner as might be warranted for regulating a higher risk piece of equipment containing large volumes of oil.<sup>4</sup> We acknowledge that adoption of a unit specific regulatory approach would be a significant departure from the current aggregation approach for calculating facility oil storage capacity under the SPCC rules,

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<sup>3</sup> The heading on the document incorrectly states February 5, 2004, as the date of the document. The correct date is March 14, 2003. Document No. 7 contains an abbreviated description of our recommended alternative.

<sup>4</sup> EPA applied a similar rationale to justify excluding containers below 55 gallons from SPCC regulation. See 67 Fed. Reg. at 47066-67 ("We believe it is not necessary to apply SPCC or FRP rules . . . to containers smaller than 55 gallons storing oil because a discharge from these containers generally poses a smaller risk to the environment. \* \* \* While we realize that small discharges may harm the environment, depending on where and when the discharge occurs, we believe that this measure will allow facilities to concentrate on the prevention and containment of discharges of oil from those sources most likely to present a more significant risk to human health and the environment.").

but without this change, EPA cannot achieve a closer balance between risk and regulatory burdens for the electrical equipment universe.

Second, because equipment failure leads to an interruption of electric power to our customers, the utility industry's overriding economic interest in maintaining continuity of service provides the necessary incentive for rapid response to any loss of oil that could both affect nearby surface waters and result in a power outage. A regulatory program like SPCC, designed primarily for the very different universe of oil storage tanks and containers, simply adds an extra layer of costly requirements when the environmental interests served by the SPCC program and the industry's economic interest in reliability of power transmission lead to the same beneficial result. The way to avoid this unnecessary overlay of costly regulatory burdens is to carve the universe of oil-filled electrical equipment out of the SPCC rules and to address electrical equipment in a separate section in Part 112 tailored to their unique characteristics.

One issue of great importance to USWAG member companies that the Agency needs to address is its expectation of the regulated community with respect to electrical equipment prior to completion of the rulemaking that will establish the new regulatory regime for such equipment. Agency officials have repeatedly advised the industry that EPA does not expect the regulated community to commit significant resources to comply with a regulation 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 existing SPCC program at facilities containing electrical equipment prior to completion of that rulemaking, but it has received no assurances that doing so would avoid enforcement risk.

The most obvious way for EPA to provide those assurances to the regulated community is for the Agency to interpret its 2002 amendment to 40 C.F.R § 112.1(b) as the source of the regulatory obligation for electrical equipment compliance with the SPCC program. Because of pre-2002 conflicting statements and actions regarding the applicability of the original 1973 SPCC rules to electrical equipment, EPA chose to resolve the uncertainty by amending section 112.1(b) to add the term “using” to the list of activities that may trigger SPCC regulation. As new regulatory language, it may only be applied prospectively.<sup>5</sup> See, e.g., *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988). Moreover, since the compliance date for amending SPCC plans to conform to the 2002 amendments has been extended to February 17, 2006 (see 69 Fed. Reg. 48794, 48795 (Aug. 11, 2004)), there would be no cause for enforcement concern, at least until that date.

If EPA is unable to arrive at this fairly simple solution for providing the necessary non-enforcement assurances, a second option was presented by the U.S. Small Business Administration Office of Advocacy (“SBA”) request for interim relief from current SPCC requirements pending completion of the soon to be initiated rulemaking. See Letter from Thomas M. Sullivan & Kevin Bromberg, SBA, to Thomas P. Dunne, Acting Assistant Administrator, EPA OSWER, dated June 10, 2004. Although granting interim relief is likely to require time-consuming notice and comment rulemaking, we see

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<sup>5</sup> Of course, prospective application of SPCC requirements would in no way diminish the statutory and regulatory prohibition against discharges of oil as described in section 112.1(b) (see Clean Water Act § 311(b)(3); 40 C.F.R Part 110) and owners or operators of such facilities violating this prohibition would remain liable for cleanup costs and damages from such discharges. See 67 Fed. Reg. at 47067. In addition, the Regional Administrators would retain case-specific authority to require a facility to prepare an SPCC plan to carry out the purposes of the Clean Water Act even if the regulation did not specifically require the facility to prepare such a plan. 40 C.F.R § 112.1(f); see 67 Fed. Reg. at 47071.

no useful guidance to the public on the Agency's enforcement intentions short of one of these two options.

**II. Oil-Filled Operating Equipment (Docket ID No. OPA-2004-0008)**

USWAG endorses the SBA recommendation to exempt "manufacturing process systems/operational equipment" containing oil from SPCC regulation. Document No. 3. However, the wording of the recommendation is somewhat confusing and we propose a more direct way to achieve this result. In the first recommendation, SBA proposes an exemption from the definition of "bulk storage container", but this recommendation was already adopted by EPA in the 2002 amendments. See 67 Fed. Reg. at 47054 ("we have specifically excluded oil-filled electrical, *operating, or manufacturing equipment* from the definition [of 'bulk storage container']") (emphasis added). SBA then proposes to exempt this equipment from oil storage calculations, a somewhat indirect way of achieving a full exemption from Part 112. EPA can achieve the same result by amending section 112.1(d) to state unambiguously that this class of equipment is not subject to SPCC regulation.

In the second recommendation, SBA describes the universe of equipment encompassed within the term "manufacturing process systems/operational equipment" as "tanks and conveyances (including piping and other structures) that are used in the course of changing raw, feedstock, and intermediate materials into finished products." Document No. 3. From the standpoint of manufacturing industries, the definition properly identifies the affected equipment in terms of its role in transforming raw material into a finished product. If electric power is equated with a "finished product", this definition would include utility industry operational equipment (some of which is identical to equipment used in manufacturing industries) within the scope of the

exemption. Any rulemaking proposal should confirm that utility industry operating equipment qualifies for the exemption.

The oil content in this equipment serves an integral function in the operation of the equipment, typically as a lubricant or for cooling or insulation. The equipment cannot perform its intended function if it loses its oil content. The owner/operator of the equipment has every incentive to ensure its integrity because equipment failure means the industrial process will be disrupted.

At the SBA Advocacy Roundtable meeting on October 29, 2004, EPA indicated a lack of information on precisely what is covered by the terms operating equipment or process equipment and suggested that the regulated community provide industry-specific data that would assist the Agency in understanding the types of equipment that would be included in any alternative regulatory scheme. EPA also expressed interest in receiving historic discharge data relating to such equipment.

In the short time since receiving EPA's request for information, we have been able to assemble preliminary data that does not yet allow us to conclude that the information is necessarily representative of the industry as a whole. The information we received indicates that the two most common examples of oil-filled operating equipment in the utility industry are (1) turbine/generator lubrication systems, including such ancillary components as reservoirs and centrifuges, and (2) hydraulic equipment.<sup>6</sup>

Let us first address the data on hydraulic equipment. Much of this equipment is used by utilities at their motor vehicle service centers, and most of it is not unique to the

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<sup>6</sup> To the extent that this oil-filled equipment would be classified as an underground storage tank under RCRA Subtitle I, EPA has excluded the equipment from regulation under the Part 280 rules. 40 C.F.R. § 280.10(b)(3).

utility industry. Some hydraulic equipment is also located at electric generating stations. The preliminary data indicate that nearly 85% of this equipment holds less than 1320 gallons of oil, about 12% falls within 1320 and 10,000 gallons, and about 3% contains more than 10,000 gallons.

Like electrical equipment, the turbine/generator lube systems at utility industry sites contain mostly low volumes of oil. The preliminary data representing over 3000 pieces of equipment indicate that nearly 72% of these turbines contain less than 1320 gallons of oil, roughly 25% range from 1320 to 10,000 gallons, and about 3% contain more than 10,000 gallons. Although the data indicate that most of these turbines are located inside buildings, a significant number are outdoors and hence we cannot state with confidence that indoor siting is decidedly the prevailing practice. Most of the turbine systems have low oil level alarm systems that would signal the loss of oil at the utility's control room, and any release of oil would be collected in a containment system designed for the location. Thus, for example, most of the indoor turbines would be designed to collect any release of oil in the floor drain and routed to the building sump system or an oil/water separator. These turbines are located at facilities that are typically manned round the clock and usually are subject to daily inspection. Thus, an uncontrolled release from this equipment would be rapidly detected and responded to immediately. Many (but not all) utilities reported no discharges to navigable waters from these turbines in the past 20 years.

The wind turbine generators are located outdoors, but the volume of oil – between 40 and 150 gallons of hydraulic and gear oil – is significantly less than the turbines at fossil plants. This oil is used for hydraulic and lubricating purposes and is generally situated within equipment casings and towers and thus removed and insulated

from the proximity of navigable waters. In the rare case of a leak, the oil would be unlikely to reach navigable waters because it would be contained within the casings, tower, or on the gravel pad surrounding the wind tower. This equipment is routinely inspected and maintained because of its integral role in the functioning of the electrical generating equipment, and, like transformers, is essentially self-monitored because a loss of oil would lead to equipment failure and interruption of electric power generation. The equipment at wind farms is typically provided with remotely monitored low oil level and low oil pressure alarms and cutoff switches, ensuring a rapid response in the event of any leaks of oil. Wind generators are typically located over a wide area at a wind farm site and they are usually located to avoid wetlands and other water features. In fact, it is generally optimum to locate wind generators at the highest local elevation, and this would generally place them at the furthest distance from water sources. Like electrical equipment, the failure of one piece of operating equipment has no effect on any other piece of equipment. Therefore, aggregation of facility oil storage capacity is not justified, and if EPA is unable to fully exempt this equipment from SPCC regulation, an essential feature of any alternative regulatory approach should adopt the unit specific approach that we have proposed for electrical equipment.

We are advised that EPA has had a dialogue with the American Gas Association, a USWAG member, about the regulatory status of certain natural gas operating equipment. Although those discussions and correspondence dealt primarily with the issue of whether this equipment is transportation-related (and hence subject to the jurisdiction of the Department of Transportation) or non-transportation-related (and therefore subject to EPA's jurisdiction), EPA should recognize that a determination that

EPA has jurisdiction over some or all of this equipment may qualify them for the regulatory relief that EPA may provide to operational equipment generally.

In sum, regulatory relief for oil-filled operating equipment, as proposed by SBA, is justified because in most cases the volume of oil is relatively low, the equipment is self-monitoring, and the owner/operator is typically in a position to respond rapidly to any release of oil. At a minimum, modification of the SPCC requirements based on volume of oil storage capacity, as we have proposed for electrical equipment, may be an alternative option.

**III. Facilities that Handle Below a Certain Threshold of Oil (“Certain Facilities”) (Docket ID No. OPA 2004-0007).**

USWAG commends EPA for inviting public comment on proposed regulatory alternatives for facilities that handle below a certain threshold of oil. The documents accompanying this NODA reveal an intent to provide regulatory relief to small businesses that are subject to SPCC regulation. But this proposal will benefit more than small businesses; any regulated entity with a facility whose oil storage capacity is below 10,000 gallons will benefit. Such a meaningful reform of the program will go a long way toward bringing the costs and benefits of the program more closely in sync.

Electric utilities are not ordinarily thought of as small businesses, but Document No. 25 provides EPA with data showing that there exists a small business segment within the utility industry, and these entities, represented in USWAG primarily through the National Rural Electric Cooperative Association and the American Public Power

Association,<sup>7</sup> will benefit greatly from the proposed alternative regulatory program for facilities below 10,000 gallon oil storage capacity. As noted in Document No. 25, a large number of rural electric cooperatives have 20 or fewer employees, and at least 30 cooperatives operate with 10 or fewer employees. Similarly, more than 1500 public power systems have 20 or fewer employees. See Document No. 11.

At the public briefing last March on EPA's plans for reforming the SPCC program, one of EPA's senior officials acknowledged widespread noncompliance with the SPCC rules dating back to the original promulgation in 1973. From USWAG's efforts at providing training workshops for utility industry personnel following the 2002 SPCC amendments, it became obvious to us that there is widespread confusion and misunderstanding about the scope and requirements of this program. When there is such widespread misunderstanding about a regulatory program, it is incumbent on the Agency to closely examine the reasons for public disregard of a 30 year old regulation. Most of the regulated community – especially but not exclusively the smaller entities – understood the SPCC program as targeted at oil storage. The fact that EPA never undertook a cost-benefit analysis that covered the full scope of the program in its most expansive construction added to the public misunderstanding. The interpretive disconnect between EPA Headquarters and some of the regions, particularly prior to promulgation of the 2002 amendments, added to the public confusion.

In contrast to EPA's reluctance prior to 2002 to reexamine its past regulatory decisions in light of the experience gained in administering the SPCC program, the clear

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<sup>7</sup> APPA's members are all government owned, but many of the governments are in small municipalities with limited resources. A few investor-owned utilities also qualify as small businesses.

signal by the senior leadership of the Office of Solid Waste and Emergency Response and the Oil Program Center in these NODAs to consider fresh ideas and new approaches for oil spill regulatory policy and to resist the temptation of stubbornly adhering to failed policies is very encouraging.

The proposal for alternative regulation of facilities below 10,000 gallons is an example of a promising idea that will enhance public compliance with oil spill prevention regulation with little or no degradation of the environment. In particular, the cost of PE certification of plans – particularly at small facilities – can no longer be justified. Among the various documents published with the NODA, the estimated cost of PE certification per facility ranges from \$2000 to \$5000. See Documents No. 1, p 8; No. 17 & No. 23. Whether the actual cost falls at the high end or the low end of these estimates, this is a significant expense for an owner or operator to incur, particularly when SPCC plans must be developed and certified for multiple facilities within a relatively short time period for compliance.

The three-tier alternative recommended by SBA (see Document Nos. 2 & 3) and others (see Document Nos. 4-6) is a sound approach, especially for the small business community, which in only a small percentage of cases employs PEs. See Document Nos. 11, 13, 16 & 25. We encourage EPA to move forward with this reform of SPCC regulations applicable to facilities below a threshold of oil of 10,000 gallons.

### **CONCLUSION**

USWAG appreciates the effort EPA has made in the past two years to reexamine the SPCC program and to engage in a dialogue with the regulated community to bring the costs and benefits of this program more closely together. Despite the Agency's commitment to address the many concerns with the program raised by industries

subject to its requirements, progress has been inordinately slow and the regulated community remains in a state of uncertainty as to EPA's expectations during this interim period. We appreciate your considering our comments and look forward to working with the Agency's staff in assembling a record to support the fundamental changes in the SPCC program that USWAG members believe are necessary.

If you have any questions, please contact our Executive Director, Jim Roewer (202-508-5645) ([jim.roewer@uswag.org](mailto:jim.roewer@uswag.org)) or our counsel, Bill Weissman (202-861-3878) ([william.weissman@piperrudnick.com](mailto:william.weissman@piperrudnick.com)).