

Deadline for Amending SPCC Plans Extended

On April 17, 2003, EPA adopted a final rule that extends by 18 months the deadline for amending facility spill prevention, control and countermeasure (SPCC) plans as required by recent revisions to the SPCC regulations. Under the new schedule, facilities in operation on or before August 16, 2002 must amend their SPCC plans by August 17, 2004; any necessary changes must be implemented by February 18, 2005. The extension adopted is longer than that proposed by EPA in January.

In July 2002, EPA adopted extensive revisions to its SPCC regulations, set forth at 40 CFR Part 112. The regulations made various changes to SPCC plan applicability, including: (1) eliminating the 660-gallon individual aboveground tank threshold; (2) excluding from the 42,000-gallon underground storage tank threshold tanks which are subject to federal underground storage tank regulations or their state equivalent; and (3) excluding from applicability calculations all containers with a capacity of less than 55 gallons. EPA also adopted various changes to the SPCC plan requirements, including: (1) amending the requirements for professional engineer certification; (2) allowing facilities to use formats different from those specified (PE) in the regulations (provided all information is included); (3) allowing facilities to deviate from most of the rule's substantive requirements (except secondary containment) provided certain conditions are met; (4) adding periodic integrity testing of containers and periodic integrity and leak testing of valves and piping; and (5) amending the training requirements. Facilities subject to the new SPCC rules were required to amend their plans to address any required changes by February 16, 2003 and to implement the changes by August 18, 2004.

Shortly after adopting the regulations, EPA received an "overwhelming" number of requests for extensions to the deadline. In response, EPA issued an interim 60-day extension to avoid the need to process individual extension requests and to allow time for the agency to adopt a longer extension. Initially, EPA stated that the extension would be for six months, to August 2003, however the final rule extends the deadline for submitting amended SPCC plans an additional 18 months.

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FEDERAL NEWS

Expanded Headworks Exemption Proposed

EPA has proposed the addition of benzene and 2-ethoxyethanol to the list of solvents whose mixtures are exempted from the definition of hazardous waste. Under RCRA, various spent solvents are classified as hazardous wastes ("F" wastes). Ordinarily, mixing these spent solvents with a solid waste, such as wastewater, renders the entire mixture a hazardous waste. However, EPA adopted exemptions from the RCRA regulations for solvents contained in wastewaters going to treatment and for certain other wastewater streams containing *de minimis* quantities of spent solvents. Under the exemption, if the total concentration of the listed solvents at the headworks does not exceed 25 ppm (1 ppm for certain solvents) and certain other conditions are met, the wastewater mixture is no longer considered a hazardous waste. In 1999, EPA received a request from the American Chemistry Council to add four solvents to the list of wastes covered by the headworks exemption: 1,1,2-trichloroethane, benzene, 2-nitropropane, and 2-ethoxyethanol. This rule adds benzene and 2-ethoxyethanol to the list of exempt solvents, but does not add the other two chemicals. Benzene will be added to the solvents with a total 1 ppm headworks limit and 2-ethoxyethanol will be added to the solvents with a 25 ppm limit. With respect to benzene, the exemption is conditioned on the use of aerated biological treatment units and lined surface impoundments.

In the same rulemaking, EPA proposed to expand the options available to facilities for assessing compliance with the exemption by allowing facilities to directly measure solvent chemical levels at the headworks of the wastewater treatment system. Currently, the

regulations require facilities to use a mass balance approach to calculate whether the 25 ppm and 1 ppm thresholds are met. This approach allows facilities to subtract the amount of solvents known not to go into the wastewater treatment system (e.g., losses to product, still bottoms, etc.) but not losses due to volatilization. In the wake of the adoption of various new air emission standards, EPA is proposing to expand the options available for demonstrating compliance with the exemption by allowing facilities to directly monitor solvent levels at the headworks. Facilities that wish to take advantage of the direct monitoring approach must report the entire concentration of the chemical in question if any of it was used as a solvent in their processes.

EPA is also proposing various other changes to the headworks exemption, including: (1) the addition of scrubber waters derived from the combustion of spent solvents and sent to the facility wastewater treatment plant to the list of wastewaters covered by the headworks exemption; (2) the extension of the exemption for *de minimis* releases to wastewater of commercial chemical products (P and U-listed wastes) at manufacturing facilities to non-manufacturing facilities; and (3) the exemption of releases of *de minimis* quantities of F and K-listed wastes, provided certain conditions are met.

States are not required to adopt the revisions, assuming they are approved by EPA. However, EPA is "strongly encouraging" states to amend their programs to include the new exemptions once they become final. EPA is accepting comments on the proposal until June 9, 2003.

Consent Decree Setting MACT Schedule Proposed

On March 27, 2003, EPA published a proposed partial Consent Decree arising out of litigation to compel EPA to adopt the remaining Maximum Achievable Control Technology (MACT) standards and avoid implementation of case-by-case MACT standards under the so-called CAA § 112(j) "MACT Hammer" rule. The decree would require EPA to promulgate standards for any 12 of the remaining listed source categories by

August 29, 2003 and for the remaining four categories by February 27, 2004. The list of source categories requiring MACT standards includes industrial, institutional and commercial boilers and process heaters, miscellaneous metal parts and products, miscellaneous organic chemical manufacturing, plastic parts and products surface coating, reciprocating internal combustion engines, and site remediation, among others.

Under the CAA, states are required to develop case-by-case MACT standards where EPA fails to meet the schedule for MACT development under the Act. On April 5, 2002, EPA adopted regulations that required affected sources to submit complete case-by-case MACT applications by May 15, 2004; that rule was challenged by environmental groups who felt the deadline was too long. In response, EPA proposed a schedule in December 2002 that called for establishing a category-specific schedule for submission of case-by-case MACT standards. The consent decree reflects the agreement between EPA and the petitioners concerning an appropriate schedule for developing the remaining MACT standards and for developing other standards required by the

Act.

Although the focus of the consent decree is on major source MACT standards, it also sets deadlines for adopting standards for various other sources, including: (1) industrial, institutional and commercial boilers that burn hazardous waste (June 15, 2005); (2) new source performance standards (NSPS) and emission guidelines for large municipal waste combustion units (April 28, 2006); (3) standards for certain area sources under CAA §§ 112(c)(3), 112(c)(6), 112(d) and 112(k) (various deadlines); and (4) NSPS and emission guidelines for categories of solid waste incineration units not covered by other, more specific standards (November 30, 2005).

EPA Proposes to Revise New York SIP to Include New Air Regulations

EPA has proposed approval of a revision to New York's State Implementation Plan (SIP) for ozone to include various new and amended regulations adopted by New York State to reduce emissions of volatile organic compounds, an ozone precursor. These regulations to be included are Solvent Metal Cleaning (6 NYCRR Part 226), Consumer Products (6 NYCRR Part 235), and Portable fuel container spillage control (6 NYCRR Part 239). In the proposal, EPA stated that the

standards adopted by EPA met the requirements of the CAA with the exception of the variance provisions of Part 235 and 239. According to EPA, these provisions do not clearly require EPA approval of alternative test methods, variances, innovative products and alternative compliance plans. The proposed approval of these regulations as part of the SIP is contingent on the submittal of specific application of these alternative compliance strategies as SIP revisions.

New DOT Regulations Affect Hazardous Materials Shippers

In a final rule effective March 25, 2003, the Department of Transportation (DOT) is requiring shippers of hazardous materials to provide security awareness training for their employees. The rule, designed to enhance the security of hazardous materials in transportation, also requires shippers of certain hazardous materials to prepare a security plan and provide training to their employees on the plan. Current employees must be trained at the first scheduled recurrent training date, but no later than March 24, 2006. New employees must receive security awareness training within 90 days of employment. DOT has available a security awareness program that can be downloaded or ordered at no charge in limited quantities from their website at http://hazmat.dot.gov/hmt_security.htm.

Shippers of the following hazardous materials must, by September 25, 2003, prepare a written

security plan that addresses the security risks inherent in the shipping of those materials:

- A highway route-controlled quantity of a Class 7 (radioactive) material;
- More than 25 kg (55 pounds) of a Division 1.1, 1.2, or 1.3 (explosive);
- More than one L (1.06 qt) per package of a material poisonous by inhalation;
- A shipment of a quantity of hazardous materials in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases or more than 13.24 cubic meters (468 cubic feet) for solids;
- A shipment in other than a bulk packaging of 2,268 kg (5,000 pounds) gross weight or more of one class of hazardous materials for which placarding of a vehicle, rail car, or freight

container is required for that class;

- A select agent or toxin regulated by the Centers for Disease Control and Prevention under 42 CFR part 73; or
- A quantity of hazardous material that requires placarding.

The security plan must include an assessment of possible transportation security risks for hazardous materials shipments and appropriate measure to address those risks. At a minimum, the plan must include the following:

- **Personnel security.** Measures to confirm information provided by job applicants hired for positions that involve access to and handling of the hazardous materials covered by the security plan. Such confirmation system must be consistent with applicable Federal and State laws and requirements concerning employment practices and individual privacy.
- **Unauthorized access.** Measures to address the

assessed risk that unauthorized persons may gain access to the hazardous materials covered by the security plan or transport conveyances being prepared for transportation of the hazardous materials covered by the security plan.

- **En route security.** Measures to address the assessed security risks of shipments of hazardous materials covered by the security plan en route from origin to destination, including shipments stored incidental to movement.

By December 22, 2003, each hazmat employee of a shipper required to prepare a security plan must be trained concerning that plan and its implementation.

Shippers of hazardous wastes may become subject to this rule as many hazardous wastes are hazardous materials that require placarding. For a copy of the rule, use the QUIK-REPLY Form.

STATE NEWS

Decision Invalidates Special Assessments on Hazardous Remediation Wastes

In a recent decision, an Administrative Law Judge at the New York State Department of Taxation and Finance (DTF) invalidated a decision by DTF levying special assessments on hazardous remediation wastes generated from remediation project undertaken without DEC oversight. This action rejected a DTF/DEC policy that exempted only remediation wastes generated at sites on the State Registry of Inactive Hazardous Waste Sites or subject to a consent order. While the decision only affects the parties in the action, it may represent an opportunity for other companies that have paid special assessments under similar circumstances to perhaps seek a refund, and may discourage special assessments in similar circumstances in the future.

Under Section 27-0923 of the New York Environmental Conservation Law (ECL), hazardous waste generators must pay special assessments based on the quantity of hazardous waste they generate. The amount of the assessment depends on the disposal method used,

with the highest assessment levied on wastes that are disposed of at an on or off-site landfill. The statute exempts from the special assessment “the retrieval or creation of hazardous waste which must be disposed of due to remediation of an inactive hazardous waste disposal site in New York state as defined in section 27-1301.” Although the statute does not expressly distinguish among types of remediation wastes, the DTF and DEC traditionally have exempted only wastes from sites that are on the State Superfund list or that are cleaned up under a consent order. Wastes generated under voluntary cleanup agreements or wastes generated by companies undertaking remedial activities on their own initiative (without DEC oversight) were not covered by the exemption.

In *re General Motors Corp. (GMC)* and *In re American Axle Manufacturing, Inc. (AAM)*, the petitioners filed petitions challenging the DTF’s decision to levy special assessments for wastes generated during the cleanup of two sites, one of

which had been sold by GMC to AAM. GMC undertook the work on its own initiative, purportedly because it needed to clean up the site quickly to expedite expansion of an existing factory. The DTF levied special assessments of \$265,000 on the remediation wastes generated during the cleanup. GMC and AAM challenged the assessments, stating that they were contrary to the plain language of the statute. The ALJ agreed, concluding that nowhere in the ECL or the implementing regulations "is there any language

that restricts the availability of the hazardous waste special assessment exclusion to persons engaged in the remediation of inactive hazardous waste disposal sites that are either on the Registry or are the subject of a DEC consent order." The ALJ went on to note that the decision was contrary to the purpose of the ECL § 27-0923 exclusion, which was intended to encourage site remediation. Consistent with that conclusion, the ALJ granted GMC's and AAM's petitions and cancelled their notices of deficiency.

DEC Finalizes Guidance on Quantifying Hazardous Waste Shipments

DEC recently finalized a new program policy document entitled *Counting of Container and Packaging Weights*, which was circulated for comment last Fall. The document establishes a uniform policy to exclude the weight of containers and packaging when determining the quantity of hazardous waste generated. Previously, there was some confusion concerning whether to exclude container weight when hazardous waste is measured in weight rather than volume. Under the new policy, the weight of containers is excluded when determining the quantity of hazardous waste generated for all purposes: annual reporting and

hazardous waste reduction planning, calculation of special assessments and generator fees, and determination of generator-size categories. However, for shipments of waste in containers, generators must clearly note on the relevant documents whether the weight of the container and packaging is, or is not, including in the weight. DEC received no comments on the draft guidance during the public comment period and, according to DEC, the policy issued contains no substantive changes from the draft version.

For a copy of the new policy, use the QUIK-REPLY Form.

SPDES Priority Rankings Issued

DEC recently made available for comment its revised Environmental Benefit Permit strategy (EBPS) rankings issued under the State Pollutant Discharge Elimination System (SPDES) program. The EBPS rankings priorities SPDES permits for full technical review based on various criteria outlined in DEC guidance. Considerations include whether a permit modification is necessary to address recent regulatory developments, specific

water quality concerns, existence of a consent order or permit noncompliance issue, possible anti-degradation concerns, need for toxicity testing, or existence of substantial public concern. The review under the EBPS rankings occurs independent of routine SPDES permit renewals. The ranking for this year can be found in the April 23, 2003 issue of the *Environmental Notice Bulletin*, available on DEC's website.

CALENDAR OF EVENTS

June 6: Capital District Environmental Breakfast Club Monthly Meeting. Holiday Inn Turf on Wolf Road, Albany. 7:30 am. \$12 pre-registered, \$14 walk-ins, includes full breakfast buffet.

Topic: Trends in Environmental Enforcement. Kevin M. Young, Esq. Young, Sommer...LLC. For reservations call 518/438-9907 ext. 240 or email: bpopolizio@youngsommer.com

June 11: Mohawk Valley Environmental Information Exchange Monthly Meeting. Radisson Hotel, Utica; 7:30 am. Topic: OSHA Update, Diane Braydon, OSHA Regional Director. For reservations or more information call 315-793-8050.

June 12: Hudson River Tributaries: The State of our Knowledge. Research and monitoring of physical, chemical and biological parameters and how human activities affect tributary function and the opportunities to restore those functions - Institute of Ecosystem Studies at Millbrook and the Hudson River Environmental Society. Preregistration by June 7. HRES members: \$50; Non-members: \$70; Students: \$15 * Check HRES web site: <http://www.hres.org> for form, or contact: stephenwilson1@compuserve.com.

QUIK-REPLY FORM

For more information on the topics in this issue, fax or mail this form to: Vicki Schlierer, Regulatory Affairs Paralegal, Young, Sommer...LLC, Five Palisades Drive, Albany, NY 12205. Fax: (518) 438-9914.

Name: _____

Title: _____

Company: _____

Address: _____

City, ST, Zip: _____

Phone: (____) ____ - _____ Fax: (____) ____ - _____

Please send the following:

DOT Hazmat Security Rule

DEC Hazardous Waste Counting Policy

Reservations for the Capital District Environmental Breakfast Club, Holiday Inn Turf, Wolf Road, Colonie, NY **June 6, 2003**

_____ Registration (includes full breakfast buffet) \$12.00

_____ Binder update \$ 3.00

Please make your reservation no later than **June 3, 2003**. Fax your reservation to 518/438-9914; call Betsy Popolizio at 518/438-9907 ext. 240; or email bpopolizio@youngsommer.com. Cancellations will be accepted until January 31, 2001. No refunds or credits given after that time. To help us plan, please make a reservation. **The registration fee will be \$14.00 for walk-ins.**