

January 29, 2003

EPA Docket Center
U.S. Environmental Protection Agency
Headquarters (EPA, HQ), Mail Code 5305T
1200 Pennsylvania Ave., NW.
Washington, DC 20460

Attention: Docket ID No. OPA-2002-001.

Subject: Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities, 68 Federal Register 1352 (January 9, 2003) - Proposed Rule, (Docket ID No. OPA-2002-001).

These comments are filed on behalf of the Independent Petroleum Association of America (IPAA), the Domestic Petroleum Council (DPC), the International Association of Drilling Contractors (IADC), the International Association of Geophysical Contractors (IAGC), the National Ocean Industries Association (NOIA), the National Stripper Well Association (NSWA), the Natural Gas Supply Association (NGSA), the Petroleum Equipment Suppliers Association (PESA), the US Oil & Gas Association (USOGA), and the following organizations:

California Independent Petroleum Association
Colorado Oil & Gas Association
East Texas Producers & Royalty Owners Association
Eastern Kansas Oil & Gas Association
Florida Independent Petroleum Association
Illinois Oil & Gas Association
Independent Oil & Gas Association of New York
Independent Oil & Gas Association of Pennsylvania
Independent Oil & Gas Association of West Virginia
Independent Oil Producers Association Tri-State
Independent Petroleum Association of Mountain States
Independent Petroleum Association of New Mexico
Indiana Oil & Gas Association
Kansas Independent Oil & Gas Association
Kentucky Oil & Gas Association
Louisiana Independent Oil & Gas Association
Michigan Oil & Gas Association
Mississippi Independent Producers & Royalty Association
Montana Oil & Gas Association
National Association of Royalty Owners
Nebraska Independent Oil & Gas Association
New Mexico Oil & Gas Association
New York State Oil Producers Association
Ohio Oil & Gas Association
Oklahoma Independent Petroleum Association

Panhandle Producers & Royalty Owners Association
Pennsylvania Oil & Gas Association
Permian Basin Petroleum Association
Petroleum Association of Wyoming
Tennessee Oil & Gas Association
Texas Alliance of Energy Producers
Texas Independent Producers and Royalty Owners
Wyoming Independent Producers Association

Collectively, these groups represent the thousands of independent oil and natural gas explorers and producers that will be the most significantly affected by the proposed actions in these regulatory actions. Independent producers drill about 85 percent of domestic oil and natural gas wells, produce over 40 percent of domestic oil, and approximately 65 percent of domestic natural gas.

We appreciate the opportunity to comment on the Environmental Protection Agency (EPA) proposal to extend, by one year, the dates for a facility to amend its Spill Prevention, Control, and Countermeasure (SPCC) Plan, and implement the amended Plan (or, in the case of facilities becoming operational after August 16, 2002, prepare and implement a Plan that complies with the newly amended requirements). We strongly support EPA's proposal to extend these compliance dates. We agree with EPA's assessment that it would be required to manage an overwhelming number of extension requests. Additionally, we believe that these requests would result from fundamental issues in the current regulations that need to be addressed during the extension period.

One of the first issues that causes concern and confusion is the question of what triggers the need to create an SPCC Plan. This decision must be based on whether an operation is a "facility" under the regulation and whether it could result in a release that would reach "navigable waters". Both elements must be met and both pose significant questions to the producer who must interpret them.

For example, some sources have indicated that the Environmental Protection Agency (EPA) estimates that there are approximately 144,000 oil and natural gas upstream operations that would require SPCC Plans. However, there are approximately 870,000 producing oil and natural gas wells in the United States. Most producers believe that the SPCC regulation definition of a facility would capture most of these producing wells. Moreover, about 635,000 of these producing wells are stripper wells that are highly vulnerable to the impact of excessive regulatory costs. Many of these wells could be shutdown if meeting the new SPCC Plan requirements is too costly.

A similar fundamental issue relates to the interpretation of navigable waters. Making a judgment regarding whether an operation - particularly one in a remote area - poses a threat to navigable waters has been consistently confounding. Over the past two decades different interpretations of the scope of the term have been complicated by different assessments by various EPA Regional offices. Further confusing the issue in this rule is the Supreme Court decision limiting the definition of the term in the *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers* ("SWANCC") case, 531 U.S. 159 (2001). The Administration has released

new guidance regarding the implications of this decision on all federal regulations and it has published an Advanced Notice of Proposed Rulemaking (68 Federal Register 1991, January 15, 2003). The new guidance states the following:

- Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands).
- In light of SWANCC, field staff should not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the "Migratory Bird Rule".
- In light of SWANCC, field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over isolated non-navigable intrastate waters based on other types of interstate commerce links listed in current regulatory definitions of "waters of the U.S."

However, this guidance has not yet been systematically applied and additional regulatory action seeks comments designed to produce specific regulations on the definition of wetlands. The outcome of these actions significantly affects the ability of producers to determine whether an SPCC Plan is required for their operation. Additionally, it is essential that all EPA Regional offices consistently apply these ultimate standards. Without some common understanding of the law, producers will be compelled make judgments regarding the need for SPCC Plans that may be incorrect. They would either risk enforcement actions or incur unnecessary costs. Neither choice is appropriate.

Moving beyond these pivotal issues, a number of other significant issues with the new regulations must be either clarified or addressed. Following are brief reviews of these issues.

First, past interpretations of the SPCC Plan requirements clearly allowed the operator to consider costs in determining the practicability or impracticability of meeting particular requirements of the planning process. In the new regulation, EPA states, "Thus, we do not believe it is appropriate to allow an owner or operator to consider costs or economic impacts in any determination as to whether he can satisfy the secondary containment requirement." The consequence of this approach could be enormous when applied to the marginal wells in this country. To put this in perspective, a marginal oil well is defined as one producing 15 barrels per day or less (a stripper oil well produces 10 barrels per day or less). Individually, marginal oil wells average around 2.2 barrels per day, but collectively they produce about 20 percent of domestic oil and are about 80 percent of the number of wells. If oil sells at \$25.00 per barrel, the average marginal well will gross about \$20,000 annually with operating costs of about \$17,400. The costs of SPCC Plans are estimated to range from lows of around \$5,000 to as high as \$20,000 with most of this cost associated with secondary containment requirements. Clearly, these costs put the economic viability of marginal wells in jeopardy.

Second, one of the principal issues affecting these costs is a requirement in the new regulations for secondary containment at loading operations. There have been extensive and productive discussions regarding alternative approaches to managing the spill risk during loading

operations. Any resolution of this issue will likely require additional rulemaking. In any event, resolution prior to the deadline dates in the regulation is not possible.

Third, a similar issue exists regarding secondary containment related to flowlines. Here again, the issue is unresolved and will likely require a revision or an exemption to the rule.

Fourth, in the new rule EPA has concluded that produced water operations are not exempted as wastewater treatment. This decision would subject hundreds of thousands of produced water tanks and vessels to secondary containment requirements when they contain only incidental amounts of oil. This issue needs further examination during the delay period; it clearly presents a potentially significant cost.

Fifth, as EPA states in its support for the deadline delay, there is a significant issue regarding the availability of licensed professional engineers to certify new SPCC Plans. However, the issue may be far more problematic. It has become clear that in many states few licensed professional engineers are involved in SPCC Plan work. Moreover, the new regulation may drive many of those out of the business because they are concerned that they cannot certify the Plans based on the current uncertainty over their interpretation of the regulation. Anecdotally, information from two states accentuates this problem. In Kansas, there are estimates that the new regulations could apply to 35,000 facilities, but there are only three professional engineers currently doing SPCC Plan certification. In Ohio, the situation is similar - about 40,000 wells and 4 professional engineers.

Assuming that these engineers were certifying SPCC Plans on a one per day rate, it would take about three years to complete these two states. These limitations raise profound questions about the ability of the nation's oil and natural gas producers to meet current February and August 2003 deadlines in the regulations - deadlines that become even more unrealistic given the number of outstanding issues that still need resolution.

Sixth, there are other issues that undoubtedly will raise similar questions; these need to be identified and addressed.

These issues are significant in the context of EPA's concerns about the number of extension requests it would receive. As we understand the EPA process, if a producer can interpret the regulation, develop a Plan, and obtain a professional engineer's certification, he does not need specific action by EPA. However, if a producer wants to do an alternative approach - such as many of the approaches discussed with EPA officials regarding the issues described above - the producer would have to get the concurrence of the EPA Regional Administrator. This means that in many, if not most, cases to take any approach that might be more cost effective, regional EPA staff must be available to process the request. This would appear to place EPA in a position of having to address many of the questions we discussed on an ad hoc basis. Moreover, it would be a significant and probably insurmountable burden on the EPA regional staff.

We believe that there are three broad challenges that must be met. First, there is a compelling need to continue the process of developing an approach that is clearly understood by all domestic oil and natural gas producers - particularly marginal well producers. Second, the process must yield a Plan that can be certified by licensed professional engineers. Third, the Plan must be

affordable so that both the environmental objective of SPCC regulation can be met and domestic production is not inappropriately impaired.

We do not believe that these challenges can be met under the current compliance deadlines. Consequently, we support EPA's proposal to extend the existing compliance dates and we urge EPA to begin the process of proposing such new regulations as are necessary to address the changes that are needed to revise the SPCC Plan requirements. We are prepared to work with EPA to develop an approach to formulating SPCC Plans to meet the environmental risks of domestic oil and natural gas production.

Ideally, it is our view that such an approach should be focused on addressing those circumstances that have presented problems in the past. Such an approach would assure that the limited funds available - particularly for marginal well producers - are spent on areas where past experience has demonstrated a compelling call for action.

During this extension period, it is important to emphasize that the environment is not at increased risk. First, the SPCC Plan requirements in existence prior to the new regulations remain in place. Second, the responsibility to report and respond to spills is unaffected.

If there are questions regarding these comments or if additional information is required, please contact [Lee Fuller](#) at IPAA, 202-857-4722.