AMERICAN PETROLEUM INSTITUTE, Plaintiff, v. MICHAEL O. LEAVITT and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	No. 1:02CV02247 PLF
MARATHON OIL COMPANY, Plaintiff, v. MICHAEL O. LEAVITT and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	No. 1:02CV02254 PLF

SETTLEMENT AGREEMENT

WHEREAS, plaintiff American Petroleum Institute ("API") and plaintiff Marathon Oil Company ("Marathon") (collectively, "Plaintiffs") filed the following actions in the United States District Court for the District of Columbia: American Petroleum Institute v. Michael O. Leavitt and United States Environmental Protection Agency, Civil Action No. 02-02247, and Marathon Oil Company v. United States Environmental Protection Agency, Civil Action No. 02-02254, which actions were consolidated by order of the Court[1];

[1] These cases were also consolidated with Petroleum Marketers Association of America, et al. v. Michael O. Leavitt and United States Environmental Protection Agency, Civil Action No. 02-02249. A separate settlement agreement has been reached as to all claims in that matter.

WHEREAS, those actions challenge the promulgation by the United States Environmental Protection Agency ("EPA") of a final rule under section 311 of the Clean Water Act, 33 U.S.C. § 1321, entitled "Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities," and published in the Federal Register at 67 Fed. Reg. 47042 (July 17, 2002) (the "SPCC Rule" or "Rule");

WHEREAS, EPA intends to take certain actions as set forth more fully below;

WHEREAS, EPA and the Plaintiffs (collectively, "the Parties") wish to implement this Settlement Agreement ("Agreement") to avoid protracted and costly litigation and to preserve judicial resources;

WHEREAS, the Parties were unable to reach agreement as to issues involving the definition of "navigable waters" in the Rule, set forth in Claims I and II of each complaint;

NOW THEREFORE, the Parties, intending to be bound by this Agreement, hereby stipulate and agree as follows:

1. Within five days of the date they execute this Agreement, the Parties shall file a joint motion in Case No. 02-02247 (and consolidated cases) in the United States District Court for the District of Columbia that notifies the Court that the Parties have reached an Agreement that may resolve these cases, and that requests that all activity as to Claims III - V of Case No. 02-02247 and Claims III - VII of Case No. 02-02254 be suspended pending implementation of this Agreement.

2. Attachments A - D of this Agreement represent EPA's positions on the matters addressed. EPA intends to publish, as expeditiously as reasonably practicable, notices in the

Federal Register containing the language set forth in Attachments A - D, and no language contradicting the language set forth in Attachments A - D.

3. After EPA takes the actions identified in ¶ 2, then the Parties shall promptly file either (1) a joint motion for dismissal with prejudice of the above-referenced claims in accordance with Rule 41(a)(2) of the Federal Rules of Civil Procedure or (2) if intervening parties agree, a stipulation of dismissal with prejudice of the above-referenced claims in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.

4. EPA intends to take the actions identified in ¶ 2 as expeditiously as reasonably practicable. If EPA fails to take such actions as expeditiously as reasonably practicable, then Plaintiffs' sole remedy under this Agreement regarding the claims subject to this Settlement shall be the right to request that the Court lift the stay of proceedings and establish a schedule for further proceedings as to those claims. If such a motion is filed and litigation of those claims is reinstated by the Court, no provision of this Agreement shall be deemed to waive or prejudice any party's position.

5. Nothing in the terms of this Agreement shall be construed to limit or modify the discretion accorded EPA by the CWA or by general principles of administrative law, including EPA's discretion to alter, amend or revise any regulations, guidance, or interpretations EPA may issue in accordance with this Agreement or to promulgate or issue superseding regulations, guidance, or interpretations, nor shall the terms of this Agreement be construed to limit any rights Plaintiffs may have to challenge any such actions by EPA. No provision of this

Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

6. The Parties agree that each party will bear its own costs, fees, and expenses.

7. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

8. The effective date of this Agreement shall be the date by which all Parties have executed this Agreement.

American Petroleum Institute

By: _____
THOMAS SAYRE LLEWELLYN
Law Office of
Thomas Sayre Llewellyn
5125 MacArthur Blvd., NW
Suite 32A
Washington, DC 20016

DATED: March 29, 2004

Marathon Oil Company

By: _____
PETER D. ROBERTSON
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037

DATED: March 29, 2004

THOMAS L. SANSONETTI
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

By: _____
LOIS GODFREY WYE
Environmental Defense Section
P.O. Box 23986
Washington, DC 20026-3986

DATED: 3-29-04

ATTACHMENT A

Federal Register notice to include the following:

Plaintiffs challenged certain statements made in the preamble to the July 2002 SPCC amendments (and the response-to-comment document) concerning the "loading/unloading rack" requirements under 40 CFR §112.7(h). That provision addresses specific SPCC requirements for tank car and tank truck loading and unloading racks, including requirements for secondary containment. The preamble language at issue, which appears at 67 FR 47110 (July 17, 2002), stated the following:

"*This section is applicable to any non-transportation-related or terminal facility where oil is loaded or unloaded from or to a tank car or tank truck.* It applies to containers which are aboveground (including partially buried tanks, bunkered tanks, or vaulted tanks) or completely buried (except those exempted by this rule), and to all facilities, large or small. All of these facilities have a risk of discharge from transfers." [emphasis added.]

The Agency did not intend with the emphasized language to interpret the term "loading/unloading rack." Instead, the Agency was responding generally to a variety of comments each asking that their specific situation not be subject to the 40 CFR §112.7(h) requirements. The reasoning of these commenters did not focus specifically on the contours of what might be considered a loading/unloading rack, but instead focused on a variety of other factors relevant to their facilities. See, e.g., 67 FR 47110 (July 17, 2002) ("Another commenter asked that we clarify that only facilities routinely used for loading or unloading of tanker trucks from or into aboveground bulk storage tanks are subject to this provision."). Thus, the emphasized language above was meant to be a rejection of pleas for exclusions of specific facilities, not an interpretation of the term "loading/unloading rack."

In the response-to-comments document for the rule, EPA stated that "[w]e intend §112.7(h) to apply to all facilities, including production facilities." As discussed more fully below, we interpret §112.7(h) only to apply to loading and unloading "racks." Under this interpretation, if a facility does not have a loading or unloading "rack," §112.7(h) does not apply. Thus, in stating that section 112.7(h) applies to "all facilities, including production facilities," the Agency only meant that the provision applies *if* a "facility" happens to have a loading or unloading rack present. The Agency did not mean to imply that any particular category of facilities, such as production facilities, are likely to have loading or unloading racks present.

Plaintiffs also challenged a change in the language of §112.7(h) (formerly codified as §112.7(c)(4)). Specifically, EPA substituted the phrase "loading/unloading area drainage" for the phrase "rack area drainage" in paragraph §112.7(h)(1). The Agency does not interpret this change as expanding the requirements of that section beyond activities associated with tank car

and tank truck loading/unloading racks. After all, the title of §112.7(h) remains "facility tank car and tank truck loading/unloading *rack*." In addition, the record for the rulemaking reflects that the Agency specifically rejected the idea of enlarging the scope of that section to apply beyond "racks." (See response-to-comment document, p. 212, rejecting a comment on the proposed rule suggesting that we change the title of §112.7(h) from "loading/unloading rack" to "loading/unloading area" because the Agency had not proposed such a change.)

Like other editorial changes to the rule, many of which were not accompanied by specific explanations, the Agency believes the change simply serves to make the rule easier to understand. See, 67 FR 47051 (describing the Agency's use of a "plain language" approach in the rule). In this case, the change in language made the terminology used in the sentence uniform (a basic principle of plain language approaches to rule writing). Previously, the rule stated that a facility must compensate for lack of specified drainage systems at the "*rack area*" with "a quick drainage system for tank car or tank truck *loading and unloading areas*." Obviously, the scope of these two emphasized terms was always meant to be identical, and the challenged language change only makes that clearer.

ATTACHMENT B

Federal Register notice to include the following:

Plaintiffs challenged statements made in the preamble to the SPCC amendments concerning the meaning of "impracticability" under 40 CFR §112.7(d). As you know, that section provides that where secondary containment is "not practicable," a facility may use a contingency plan instead. The preamble language at issue, which appears at 67 FR 47104 (July 17, 2002), stated the following:

"We believe that it may be appropriate for an owner or operator to consider costs or economic impacts in determining whether he can meet a specific requirement that falls within the general deviation provision of §112.7(a)(2). We believe so because under this section, the owner or operator will still have to utilize good engineering practices and come up with an alternative that provides "equivalent environmental protection." However, we believe that the secondary containment requirement in §112.7(d) is an important component in preventing discharges as described in §112.1(b) and is environmentally preferable to a contingency plan prepared under 40 CFR part 109. *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. Instead, the owner or operator may only provide a contingency Plan in his SPCC Plan and otherwise comply with §112.7(d). Therefore, the purpose of a determination of impracticability is to examine whether space or other geographic limitations of the facility would accommodate secondary containment; or, if local zoning ordinances or fire prevention standards or safety considerations would not allow secondary containment; or, if installing secondary containment would defeat the overall goal of the regulation to prevent discharges as described in §112.1(b).*" [emphasis added].

The Agency did not intend with the language emphasized above to opine broadly on the role of costs in determinations of impracticability. Instead, the Agency intended to make the narrower point that secondary containment may not be considered impracticable solely because a contingency plan is cheaper. (This was the concern that was presented by the commenter to whom the Agency was responding.) As discussed above, this conclusion is different than that reached with respect to purely economic considerations in determining whether to meet other rule requirements subject to deviation under §112.7(a)(2). Under that section, as stated above, facilities may choose environmentally equivalent approaches (selected in accordance with good engineering practices) for any reason, including because they are cheaper.

In addition, with respect to the emphasized language enumerating considerations for determinations of impracticability, the Agency did not intend to foreclose the consideration of other pertinent factors. In fact, in the response-to-comment document for the SPCC amendments rulemaking, the Agency stated that ". . . for certain facilities, secondary containment may not be

practicable because of geographic limitations, local zoning ordinances, fire prevention standards, or other good engineering practice reasons." For more examples of situations that may rise to the level of impracticability, see, e.g. 67 FR 47102 (July 17, 2002) and 67 FR 47078 (July 17, 2002) (pertaining to flow and gathering lines).

ATTACHMENT C

Federal Register Notice, to include the following –

The Agency has been asked whether produced water tanks at dry gas facilities are eligible for the SPCC rule's wastewater treatment exemption at 40 CFR §112.7(d)(6). A dry gas production facility is a facility that produces natural gas from a well (or wells) from which it does not also produce condensate or crude oil that can be drawn off the tanks, containers or other production equipment at the facility.

The SPCC rule's wastewater treatment exemption excludes from 40 CFR Part 112 "any facility or part thereof used exclusively for wastewater treatment and not used to satisfy any requirement of this part." However, for the purposes of the exemption, the "production, recovery, or recycling of oil is not wastewater treatment." In interpreting this provision, the preamble to the final rule states that the Agency does "not consider wastewater treatment facilities or parts thereof at an oil production, oil recovery, or oil recycling facility to be wastewater treatment for purposes of this paragraph."

It is our view that a dry gas production facility (as described above) would not be excluded from the wastewater treatment exemption based on the view that it constitutes an "oil production, oil recovery, or oil recycling facility." As discussed in the preamble to the July 2002 rulemaking, "the goal of an oil production, oil recovery, or oil recycling facility is to maximize the production or recovery of oil. . .." 67 FR 47068. A dry gas facility does not meet this description.

In verifying that a particular gas facility is not an "oil production, oil recovery, or oil recycling facility," the Agency plans to consider, as appropriate, evidence at the facility pertaining to the presence or absence of condensate or crude oil that can be drawn off the tanks, containers or other production equipment at the facility, as well as pertinent facility test data and reports (e.g., flow tests, daily gauge reports, royalty reports or other production reports required by state or federal regulatory bodies).

ATTACHMENT D

In the July 2002 SPCC amendments, the Agency promulgated definitions of "facility" and "production facility." These definitions, which appear in 40 CFR §112.2, apply "for the purposes of" Part 112. The Agency has been asked which of these definitions governs the term "facility" as it is used in 40 CFR §112.20(f)(1) when applied to oil production facilities.

40 CFR §112.20(f)(1) sets criteria for determining whether a "*facility* could, because of its location, reasonably be expected to cause substantial harm to the environment ..." (emphasis added). It is the Agency's view that, because, among other things, that section consistently uses the term "facility," not "production facility," it is the definition of "facility" in 40 CFR §112.2 that governs the meaning of "facility" as it is used in 40 CFR §112.20(f)(1), regardless of the specific type of facility at issue.

PETROLEUM MARKETERS ASSOCIATION OF AMERICA, et al., Plaintiff, v. MICHAEL O. LEAVITT and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	No. 1:02CV02249 PLF

SETTLEMENT AGREEMENT

WHEREAS, plaintiff Petroleum Marketers Association of America, et al. ("PMAA") filed the following action in the United States District Court for the District of Columbia: Petroleum Marketers Association of America, et al. v. Michael O. Leavitt and United States Environmental Protection Agency, Civil Action No. 02-02249[1/];

WHEREAS, those actions challenge the promulgation by the United States Environmental Protection Agency ("EPA") of a final rule under section 311 of the Clean Water Act, 33 U.S.C. § 1321, entitled "Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities," and published in the Federal Register at 67 Fed. Reg. 47042 (July 17, 2002) (the "SPCC Rule" or "Rule");

WHEREAS, EPA intends to take certain actions as set forth more fully below;

[1/]This case was consolidated by order of the Court with American Petroleum Institute v. Michael O. Leavitt and United States Environmental Protection Agency, Civil Action No. 02-02247, and Marathon Oil Company v. United States Environmental Protection Agency, Civil Action No. 02-02254. Those actions are the subject of a separate partial settlement agreement.

WHEREAS, EPA and the Plaintiff (collectively, "the Parties") wish to implement this Settlement Agreement ("Agreement") to avoid protracted and costly litigation and to preserve judicial resources;

NOW THEREFORE, the Parties, intending to be bound by this Agreement, hereby stipulate and agree as follows:

1. Within five days of the date that the Parties execute this Agreement, the Parties shall file a joint motion in Case No. 02-02249 in the United States District Court for the District of Columbia that notifies the Court that the Parties have reached a final, written Agreement that may resolve this case, and that requests that the stay in this case be continued and all activity be suspended pending implementation of this Agreement.

2. Attachments A and B represent EPA's position on the matters addressed. EPA intends (a) to issue as soon as reasonably practicable a letter from the Assistant Administrator for the Office of Solid Waste and Emergency Response to PMAA of substantially the same substance as set forth in Attachment A of this Agreement; (b) to publish in the Federal Register a notice of the availability of that letter; and (c) to publish as soon as reasonably practicable a notice in the Federal Register containing the language set forth in Attachment B.

3. After EPA takes the actions identified in ¶ 2, then the Parties shall promptly file either (a) a joint motion for dismissal with prejudice of Case No. 02-02249 in accordance with Rule 41(a)(2) of the Federal Rules of Civil Procedure or (b) if intervening and other parties agree, a stipulation of dismissal with prejudice in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.

4. EPA intends to take the actions identified in ¶ 2 as soon as reasonably practicable. If EPA fails to take such actions as soon as reasonably practicable, then Plaintiff's sole remedy under this Agreement regarding the Rule under review in these cases shall be the right to request that the Court lift the stay of proceedings and establish a schedule for further proceedings as to those claims. If such a motion is filed and litigation of those claims is reinstated by the Court, no provision of this Agreement shall be deemed to waive or prejudice any party's position.

5. Nothing in the terms of this Agreement shall be construed to limit or modify the discretion accorded EPA by the CWA or by general principles of administrative law, including EPA's discretion to alter, amend or revise any regulations, guidance, or interpretations EPA may issue in accordance with this Agreement or to promulgate or issue superseding regulations, guidance, or interpretations, nor shall the terms of this agreement be construed to limit any rights plaintiffs may have to challenge any such actions by EPA. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

6. The Parties agree that each party will bear its own costs, fees, and expenses.

7. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

8. The effective date of this Agreement shall be the date by which all Parties have executed this Agreement.

Petroleum Marketers Association Of America

By: _____

Title: _____

DATED: _____

Pennsylvania Petroleum Marketers & Convenience Store Association

By: _____

Title: _____

DATED: _____

Palmer Oil Company, Inc.

By: _____

Title: _____

DATED: _____

THOMAS L. SANSONETTI
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

By: _____
LOIS GODFREY WYE
Environmental Defense Section
P.O. Box 23986
Washington, DC 20026-3986

DATED: 3-29-04

William Gerald Robertson Enterprises, Inc.

By: _____

Title: _____

DATED: _____

Bjornson Oil Company, Inc.

By: _____

Title: _____

DATED: _____

Louisville Tire Center, Inc.

8. The effective date of this Agreement shall be the date by which all Parties have executed this Agreement.

Petroleum Marketers Association Of America

By: Edward H Gallagher

Title: President

DATED: 3-26-2004

Pennsylvania Petroleum Marketers & Convenience Store Association

By: _____

Title: _____

DATED: _____

Palmer Oil Company, Inc.

By: _____

Title: _____

DATED: _____

THOMAS L. SANSONETTI
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

By: _____
LOIS GODFREY WYE
Environmental Defense Section
P.O. Box 23986
Washington, DC 20026-3986

DATED: _____

William Gerald Robertson Enterprises, Inc.

By: _____

Title: _____

DATED: _____

Bjornson Oil Company, Inc.

By: _____

Title: _____

DATED: _____

Louisville Tire Center, Inc.

By: _____

Title: _____

DATED: _____

Acme Fuel Center

By: _____

Title: _____

DATED: _____

Lanman Oil Co.

By: _____

Title: _____

DATED: _____

ATTACHMENT A

Letter from Assistant Administrator for the Office of Solid Waste and Emergency Response to PMAA as follows:

This letter is in response to your request for the Agency's view regarding whether several approaches under consideration by your members would satisfy 40 CFR §112.7(a)(2)'s "equivalent environmental protection" provision and for clarification of the scope of the requirements in 40 CFR §112.7(h)(entitled "Facility tank car and tank truck loading/unloading rack (excluding offshore facilities)"). We discuss each of your proposals and questions below. Please note that the guidance provided in this letter is based on generalized assumptions and may not be applicable in a particular case based on site-specific circumstances.

"Equivalent Environmental Protection"

Integrity Testing

The newly amended SPCC provisions regarding bulk storage container integrity require, among other things, that each aboveground container be tested for integrity "on a regular schedule." 40 CFR §112.8(c)(6). These regulations further provide that "you must combine visual inspection with another testing technique such as hydrostatic testing, radiographic testing, ultrasonic testing, acoustic emissions testing, or another system of non-destructive shell testing." As you know, however, the regulations also allow deviations from this requirement where "you provide equivalent environmental protection by some other means of spill prevention, control, or countermeasure." 40 CFR §112.7(a)(2). You have asked whether, for shop-built containers, visual inspection plus certain actions to ensure that the containers are not in contact with the soil would likely be considered to provide "equivalent environmental protection" to visual inspection plus another form of testing.

It is our view that for well-designed shop-built containers with a shell capacity of 30,000 gallons or under, combining appropriate visual inspection with the measures described below would generally provide environmental protection equivalent to that provided by visual inspection plus another form of testing. Specifically, the Agency generally believes that visual inspection plus elevation of a shop-built container in a manner that decreases corrosion potential (as compared to a container in contact with soil)[1] and makes all sides of the container, including the bottom, visible during inspection (e.g., where the containers are mounted on structural supports, saddles, or some forms of grillage) would be considered "equivalent." In a similar

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[1] Additionally, we recommend that special attention be paid to the characteristics of the material used for the support structure to ensure that they do not actually accelerate corrosion.

vein, we'd also generally believe an approach that combines visual inspection with placement of a barrier between the container and the ground, designed and operated in a way that ensures that any leaks are immediately detected, to be considered "equivalent." For example, we believe it would generally provide equivalent environmental protection to place a shop-built container on an adequately designed, maintained, and inspected synthetic liner.[2] We believe these approaches would generally provide equivalent environmental protection when used for shop-built containers (which generally have a lower failure potential than field-erected containers), because these approaches generally reduce corrosion potential and ensure detection of any container failure before it becomes significant.

In determining the appropriate SPCC plan requirements for visual inspection of containers managed as described above, we suggest that the professional engineer (PE) begin by consulting appropriate industry standards, such as those listed in Steel Tank Institute Standard SP001 and American Petroleum Institute Standard 653.[3] Similarly, in assessing whether a shop-built container is well designed, the PE may wish to consult industry standards such as Underwriters Laboratory 142 or American Petroleum Institute Standard 650, Appendix J. Where a facility is considering the use of the above approaches for containers that are currently resting on the ground, or have otherwise been managed in a way that presents risks for corrosion or are showing signs of corrosion, we recommend the facility first evaluate the condition of the container in accordance with good engineering practices, including seeking expert advice, where appropriate.

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[2]Note, however, that a facility may not rely solely on measures that are required by other sections of the rule (e.g., secondary containment) to provide "equivalent environmental protection." Otherwise, the deviation provision would allow for approaches that provide a lesser degree of protection overall.

[3]Note that the Agency intends in the near future to develop guidance on appropriate visual inspection of shop-built containers. In that guidance, we intend to address issues such as inspection frequency, scope (e.g., internal and /or external), training and/or qualifications of persons conducting the inspections, and other measures that may be appropriate at a given site (e.g., measures to detect the presence of water in a container). We expect to use the referenced industry standards in developing such guidance.

It is also important to note, however, that depending on site circumstances, the appropriate requirements for visual inspection may exceed those normally conducted in accordance with recognized industry standards.

Security

The SPCC regulations state that you must "fully fence each facility handling, processing, or storing oil, and lock and/or guard entrance gates when the facility is not in production or is unattended." 40 CFR §112.7(g)(1). You have asked whether two specific sets of circumstances would likely be determined to provide "equivalent environmental protection" to this requirement. The first is where the area of the facility directly involved in the handling, processing and storage of oil is adequately fenced. The second is where the facility is equipped with a "pump house" or "pump shack," which contains, among other appropriate things, a master disconnect switch from which all power to pumps and containers is cut off when the facility is unattended.

With respect to your first scenario, it is our view that, as a general matter, adequately fencing all discrete areas directly involved in the handling, processing and storage of oil would provide equivalent environmental protection to fencing the entire footprint of the facility, since it is potential for harm to this equipment that poses the risk addressed by the fencing requirement.

With respect to the second scenario, the approach you suggest would appear to generally provide environmental protection equivalent to fencing for risks associated with the potential for unauthorized access to pumping equipment. In other words, cutting off power in the manner you suggest would likely provide the added layer of protection offered by a fence should the other security measures offered by the rule, in this case 40 CFR §112.7(g)(3)'s requirements for securing pumps, fail. However, because cutting off power as suggested does not address risks to containers, piping and appurtenances not associated with the pumps at the facility, it does not appear to provide protection equivalent to fencing as it relates to risks to such equipment.

Conclusion

Please note that determinations of "equivalent environmental protection" must be implemented and documented in accordance with 40 CFR §112.7(a)(2). In addition, please be aware that the conclusions drawn in this letter are only for the purposes of meeting the "environmental equivalence" standard in the SPCC regulation. PE's might nevertheless decide to recommend non-destructive shell testing and fencing of the entire footprint of the facility for reasons other than compliance with the SPCC rule (e.g., to protect an owner's investment in equipment or to meet other local, state or federal requirements).

Finally, this letter is meant to provide guidance on the "equivalent environmental protection" standard. It does not, however, substitute for EPA's statutes or regulations, nor does it itself constitute a regulation. Thus, it cannot impose legally-binding requirements on EPA, States, or the regulated community, and its recommendations may not be appropriate at an individual site based on site-specific circumstances.

40 CFR §112.7(h)

In addition to the above, you have asked the Agency whether having a rack within a facility's boundaries subjects all loading/unloading areas at the facility to 40 CFR §112.7(h)'s tank car and tank truck loading/unloading "rack" requirements. As we have discussed, the Agency does not interpret §112.7(h) to apply beyond activities and/or equipment associated with tank car and tank truck loading/unloading racks. Therefore, loading and unloading activities that take place beyond the rack area would not be subject to the requirements of 40 CFR §112.7(h) (but, of course, would be subject, where applicable, to the general containment requirements of 40 CFR §112.7(c)).

If you have any questions, please contact David Evans of my staff at (703) 603-8885.

[Signature of Assistant Administrator for the Office of Solid Waste and Emergency Response]

ATTACHMENT B

Federal Register notice to include the following:

Plaintiffs challenged statements made in the preamble to the SPCC amendments concerning the meaning of "impracticability" under 40 CFR §112.7(d). As you know, that section provides that where secondary containment is "not practicable," a facility may use a contingency plan instead. The preamble language at issue, which appears at 67 FR 47104 (July 17, 2002), stated the following:

"We believe that it may be appropriate for an owner or operator to consider costs or economic impacts in determining whether he can meet a specific requirement that falls within the general deviation provision of §112.7(a)(2). We believe so because under this section, the owner or operator will still have to utilize good engineering practices and come up with an alternative that provides "equivalent environmental protection." However, we believe that the secondary containment requirement in §112.7(d) is an important component in preventing discharges as described in §112.1(b) and is environmentally preferable to a contingency plan prepared under 40 CFR part 109. *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. Instead, the owner or operator may only provide a contingency Plan in his SPCC Plan and otherwise comply with §112.7(d). Therefore, the purpose of a determination of impracticability is to examine whether space or other geographic limitations of the facility would accommodate secondary containment; or, if local zoning ordinances or fire prevention standards or safety considerations would not allow secondary containment; or, if installing secondary containment would defeat the overall goal of the regulation to prevent discharges as described in §112.1(b).*" [emphasis added].

The Agency did not intend with the language emphasized above to opine broadly on the role of costs in determinations of impracticability. Instead, the Agency intended to make the narrower point that secondary containment may not be considered impracticable solely because a contingency plan is cheaper. (This was the concern that was presented by the commenter to whom the Agency was responding.) As discussed above, this conclusion is different than that reached with respect to purely economic considerations in determining whether to meet other rule requirements subject to deviation under §112.7(a)(2). Under that section, as stated above, facilities may choose environmentally equivalent approaches (selected in accordance with good engineering practices) for any reason, including because they are cheaper.

In addition, with respect to the emphasized language enumerating considerations for determinations of impracticability, the Agency did not intend to foreclose the consideration of other pertinent factors. In fact, in the response-to-comment document for the SPCC amendments rulemaking, the Agency stated that ". . . for certain facilities, secondary containment may not be

practicable because of geographic limitations, local zoning ordinances, fire prevention standards, or other good engineering practice reasons." For more examples of situations that may rise to the level of impracticability, see, e.g. 67 FR 47102 (July 17, 2002) and 67 FR 47078 (July 17, 2002) (pertaining to flow and gathering lines).