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# Storing Crude Oil: Do Rail Tank Cars Become EPA-Regulated Storage Vessels?

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As discussed in our [prior alert](#) and [reported on by the New York Times](#), U.S. oil producers are scrambling to find storage to wait-out the COVID-19-driven supply glut and depressed market prices. Converting non-conventional facilities to use as storage can trigger significant regulatory obligations and potential enforcement risks. The U.S. Department of Transportation (“DOT”), through its Pipeline and Hazardous Materials Safety Administration (“PHMSA”) and Federal Railroad Administration (“FRA”), regulates crude oil as a hazardous material during transportation and temporary storage.

For companies considering oil storage in rail cars, regulatory burdens do not stop when transportation ends and the rail cars come to rest. In particular, the U.S. Environmental Protection Agency (“EPA”) Spill Prevention, Countermeasures and Control (“SPCC”) program rules require “facility” owners and operators to develop and implement an SPCC plan addressing various aspects of oil handling and spill prevention, including secondary containment to protect against the discharge of oil into jurisdictional waters of the United States. The SPCC program requires containment volume equal to the greater of the largest single vessel or 10% of the total storage capacity of all vessels at the facility. SPCC plans are required for facilities with at least 1320 gallons of oil storage capacity where oil can reasonably be expected to discharge into jurisdictional U.S. Waters if a spill were to occur.

SPCC rules apply to a very broad range of oils and facilities, including rail tank cars in certain circumstances. These requirements do not apply to tank cars engaged in transportation activities, which are regulated by the DOT instead of EPA. DOT jurisdiction extends to tank cars passing through facilities or those that are stopped “temporarily” during transportation activities. EPA jurisdiction applies, however, when tank cars are serving as non-transportation-related oil storage or if the tank car is utilized exclusively within a non-transportation-related facility. In cases where a tank car is serving as a storage vessel for oil, a single tank car can be considered an SPCC-regulated facility.

SPCC obligations can be enforced against all owners and operators of a facility. In these types of storage agreements, many parties are potentially involved to include, the owners of the track, the oil, and the tank cars. This, of course, calls into question which entity (or entities) is liable for satisfying SPCC requirements, and careful analysis of the parties’ agreements must be considered. Liability/responsibility for SPCC requirements should be a key term during the negotiation of leases for land, tracks and railcars, as well as operating agreements.

Other important factors to consider with respect to SPCC requirements include:

- How to develop spill prevention and response methods that consider the need for (eventual) car mobility as well as adequate capacity to contain a spill;
- Whether the cars can be located in areas that prevent discharges to U.S. jurisdictional waters; and
- Whether an argument could be made that the facility falls within the EPA’s impracticability exception to containment requirements.

Please [contact](#) Clark Hill’s EENR Practice Leaders or Clark Hill’s transportation team for information on SPCC requirements and other regulatory considerations for oil tank car storage.