

December 14, 2007

Mr. Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OPA-2007-0584

Dear Administrator Johnson,

The Agriculture Coalition on the Spill Prevention, Control and Countermeasure (SPCC) [‘The Coalition’], which includes organizations representing farmers, ranchers, farmer cooperatives, livestock operations and related agribusinesses, submits the following comments on the U.S. Environmental Protection Agency’s [‘EPA’ or ‘Agency’] proposed amendments to the SPCC rule.

For many years, this coalition has been working with EPA to ensure that any agency action regulating oil spill prevention and response take into account the uniqueness of the agricultural industry, be based on sound science and need, and that final regulations be clear and able to be implemented. While the coalition still has concerns with the proposed rule, the new proposed amendments do contain improved options for agriculture.

1. Definition of “Farm/Farming Operation” as a “facility. The Coalition appreciates the Agency’s recognition of the fundamental nature of farming operations -- that farming operations are not necessarily one fixed location but can be a collection of fields which may be contiguous *or* noncontiguous.

The Agency’s most recent proposal modifies the definition of “facility” to clarify that the definition of facility alone governs SPCC applicability and that contiguous or non-contiguous building properties, parcels, leases, structures, installations, pipes, or pipelines may be considered separate facilities. The proposed revisions will allow an owner or operator the flexibility to determine facility boundaries based on many factors, including ownership or operation of the buildings, structures, containers, and equipment on the site, the activities being conducted, property boundaries and other relevant considerations unique to the agricultural industry. The Coalition is supportive of this proposed revision as it will allow for the variations in operational structures that are common in farming. However, we urge the Agency to make clear its intent, within this proposal, for future reference in the guidance provided to inspectors to ensure the fewest contrary incidences (i.e., disagreements) during implementation. Also, we urge the Agency to make clear to the agricultural industry and inspectors the process and timeline for which any disagreements resulting from this proposed flexibility will be addressed. Since at any given time, a producer may be planting, harvesting or engaged in some other time sensitive activity during the year, we urge that a timeframe no shorter than 120 days be provided for a producer to address any possible compliance disagreements identified by an EPA inspector.

2. Tankage Threshold Triggers. The 10,000-gallon aggregate trigger causes great concern for the agricultural industry.

Many farm operations would exceed the proposed 10,000-gallon threshold, even with the new proposed flexibility on the definition of farms/farming operations. The fact is, many farms that receive bulk fuel will have one 10,000-gallon tank for gasoline and one 10,000-gallon diesel fuel tank. Therefore, the Coalition urges the EPA to adopt a 20,000-gallon threshold as reasonable and critical for farm operations. EPA still lacks the data needed to determine a meaningful trigger for all sectors of agriculture. Row crop farms, ranches, livestock operations, farmer cooperatives and other agribusinesses such as co-ops, retailers and other agribusinesses pose similar low risks for spills and are often seasonal in nature.

We understand that the 10,000-gallon aggregate trigger was established in the SPCC rules to remain consistent with those in other regulations related to oil discharges, like the National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP). The NCP was developed in 1968 as a response to a massive oil spill from the oil tanker *Torrey Canyon* off the coast of England. Revisions to the NCP, of which the most recent was finalized in 1994, were again in response to a massive spill, this time the *Exxon Valdez*. Given its unique characteristics and lack of any significant spill history, the agriculture industry cannot be compared to the spills of huge oil tankers nor should it be regulated as such. It should be recognized that the SPCC rules are meant to address the most likely discharge from a facility that can reach navigable waters, rather than the maximum potential discharge. Before any rule is applied to farms/farming operations, EPA must evaluate the threat (if any) the industry presents and establish rules applicable to the industry, including appropriate triggers. The National Oil and Hazardous Substances Pollution Contingency Plan has little or no relevance to agriculture, because agricultural tanks are less than 42,000 gallons.

EPA establishes that a facility, including agricultural facilities, with an aggregated above ground storage capacity of 10,000 gallons or less and that passes certain spill criteria may be eligible for the qualified facility options, which includes a self-certification plan in lieu of a Professional Engineer (PE) certified plan and allow the use of a SPCC Plan Template. The Template needs to be revised and this is being addressed by an industry group working with the Small Business Administration (SBA). EPA then asks if a higher threshold, or a change in criteria, is warranted for farms. The coalition feels that a 20,000-gallon threshold for agriculture is warranted.

Farming is a unique industry in many ways. Unlike other industries agriculture varies greatly in what it produces and how it does so. The 'facilities' vary greatly in size, shape, location, integrity, geography, production methods, production equipment, costs, profits, managerial structure, ownership, leasing structure, etc. It is the one industry where a weather event, for as little as one day or night, can ruin an entire year's work and profits. Most farms do not have extra staff on hand to designate as environmental managers nor can they afford to hire one. They will not have a budget to pay for secondary containment and PE's for each of their tanks. EPA's efforts to define agriculture in relation to the heavy industries that the agency is more comfortable with will only cause problems for agriculture and eventually the environment. We believe that the agency needs to address farm self-certification with different criteria and a higher capacity threshold.

In further consideration of the 10,000-gallon threshold, however, the agency offers small oil production facilities a self-certification plan with similar criteria but not limited to a storage

capacity threshold “because they would likely have greater than 10,000 gallons in aggregate aboveground oil storage capacity.” The Coalition does not understand how a facility that produces oil on a constant basis can be granted such leeway while farms are not. We also do not understand how EPA can apply a 10,000-gallon threshold to agriculture while ignoring it in another industry. In irrigated agriculture, many tanks that run the irrigation systems stay empty a large part of the year. They are only used at times when irrigation is needed and then they are often used extensively requiring constant re-supply. Once the season is past the tanks stand empty until time to refill them for the next season. At the prices of fuel, growers cannot afford to keep seasonal tanks full year round. Not only does this tie up money that is needed elsewhere, it prevents the grower from using the market to order fuel at times of lower prices, and it increases the likelihood of theft of the fuel.

3. Tank Size. As fuel prices continue to stay high or increase, it is financially necessary for some growers to seek tanks of a size that can accept bulk orders from their local supplier. For example, many operations will have one 10,000-gallon tank for gasoline and one 10,000-gallon tank for diesel fuel. The agency’s action on a 10,000-gallon aggregate threshold limits the ability of these growers to move to bulk orders and save money because the loss of a self-certification plan would require the hiring of PE’s at substantial costs. By limiting choices among growers EPA will increase costs on a segment of the U.S. economy that has the least power to pass the costs along to their customers.

In addition, given the tank-sized realities of today, the coalition urges the EPA to increase the Tier I individual tank threshold requirement from 5,000 to 10,000 gallons. There is no evidence of which we are aware that 10,000-gallon tanks on farm operations present heightened concerns for spills. As the EPA is well aware, evidence of farm spill problems is extremely small, if it exists at all.

Farms buy used tanks for application in the future if expansion is warranted. These empty tanks, along with seasonal-use tanks that stand empty part of the year, may make the facility have an aggregated capacity over 10,000 gallons. Why are they counted for a low capacity threshold on farms when the same capacity or greater is ignored at oil production facilities?

The current SPCC rule exempts from applicability and from capacity threshold determinations any oil storage container that is permanently closed. It appears that for a container to be considered permanently closed, all liquid and sludge must be removed from the container and connecting lines, all connecting lines and piping must be disconnected from the container and blanked off, all valves (except ventilation valves) must be closed and locked, and conspicuous signs must be posted to the container stating that is a permanently closed container and noting the date of closure. Permanently closed containers are not required to be removed from a facility and may be brought back into use as needed for variations in production rates and economic conditions. We believe that EPA's position on permanently sealed containers needs to be modified so tanks can be removed from service and then placed back in service with minimal operational effort thus giving farmers and agribusiness more storage flexibility.

4. A Tiered Approach For Qualified Facilities. We continue to support a three-tiered approach to the tank threshold trigger for qualified facilities and that the use of a PE only be incorporated in the case of tank capacity above 20,000 gallons. Again, this is similar to the SB

A's recommended approach. A three-tiered-approach fits the nature of farming operations which are spread out, remote, and family owned.

5. Self-Certification Proposal/Professional Engineer. Under EPA's proposed self-certification approach, facility owners/operators of qualified facilities choosing to self-certify their SPCC plans may not deviate from any requirement of the SPCC rule under Sec. 122.7(a)(2) (with two exceptions) and may not make impracticability determinations in their SPCC plans as described under Sec. 122.7(d). The two exceptions are that facility owners/operators of qualified facilities choosing to self-certify their SPCC plans would have flexibility with respect to the security requirements and container integrity testing.

While the coalition, in general, supports the notion of self-certification, in order to make this option viable and meaningful to our industry, the EPA must work with the industry to allow for more flexibility in this option. Knowing that farming operations and other agricultural entities vary in size, layout, topography, etc... EPA must consider changing its position to allow entities to self-certify while incorporating the use of some alternative environmentally equivalent measures and applying impracticability determinations for qualified facilities. Without this flexibility, self-certification may be impractical for our industry. Also, we disagree with comments made by some in the professional engineering field regarding self-certification. In testimony before the Senate Committee on the Environment and Public Works (12/2005), Dr. James Corbett of the University of Delaware stated "exempting PE certification from SPCC plans on the basis of cost (or regulatory burden) may increase the risk of spills from self-certifying facilities where managers without engineering training and/or technicians do not possess a standard professional knowledge base, ascribe to a professional code that places public protection highest, or share individual legal liability for their judgments."

We find it unusual that this situation has existed in rural America for decades, yet the catastrophic events predicted by certain experts have not occurred. Were the case as dire as indicated, significant spills would regularly occur. However, the evidence in this regard is so small it borders on nonexistent.

In fact, it seems reasonable to believe that because these facilities are utilized every day by people who bear immediate and direct liability, both from an operational as well as a legal perspective, their facilities may be better engineered, more practical and less prone to failure than the one-size-fits-all methodology that contract experts default to.

Furthermore, the coalition strongly contends that members of the agricultural sector who grow this nation's food, raise their children on the land, and rely on well water from their property are highly motivated to ensure that their environmental practices are sound. These producers strive daily to ensure a safe environment for their children and the communities in which they live.

6. Mobile Refueler Exemption. We feel the definition of motive power mobile refueler has been improved in the Agency's latest proposed amendments. Replacing "solely" with "primarily" more adequately reflects the needs within the industry.

Also, as in past communications, the Coalition fully supports the EPA's proposal to exempt fuel nurse tanks and fuel transport to equipment and remote tanks (considered mobile refuelers) and

heating oil storage containers located at a farm facility's main site, but which is used for the single-family residential property at the site.

7. Pesticide Application Equipment. The Agency is proposing to exempt all pesticide application equipment and related mixing containers used on farms. This equipment would include ground boom sprayer applicators, airblast sprayers, and specialty aerial applicators that are used to apply measured quantities of pesticides to crops and/or soils.

The coalition supports this proposal and feels this action is consistent with EPA's action on the mobile refueler exemption. As you know, the agricultural producer is serviced by thousands of custom applicators that apply farm chemicals when and where needed. According to the U.S. Department of Agriculture's Economic Research Service (USDA-ERS), in 2003, custom applicators accounted for 70 percent of all acres treated with insecticide in the cotton industry alone. EPA's latest proposal should ensure that facilities housing this equipment and servicing the needs of the farming community would be covered in these SPCC regulatory modifications. Ownership of equipment is not an environmental issue, use of the equipment is the SPCC issue, therefore farm used application equipment needs to be exempt from the SPCC rule.

It is the coalition's belief that the Agency proposal to exempt spray rigs from the SPCC rules which contain liquid product that have oils in a concentration as little as 1 percent or less in the finished mix does not go far enough. Without a clear definition of oils in product mixtures, many liquid mixes in food production may needlessly fall under the SPCC rule. Many agricultural products such as milk have oil content due to fat levels ranging from less than 0.5 percent to approximately 4.5 percent and could fall into the SPCC rule guidelines. In mixtures where the properties of oil are no longer actively present due to their minimal concentration, we believe that the EPA should define such mixtures as exempt from SPCC regulation.

8. Plan Development and Implementation. In discussions with both EPA and USDA, the coalition has learned that when new rules are promulgated, information is disseminated, but no real data exists on how long it truly takes an industry to fully understand and come into compliance with new requirements.

EPA publishes final rules in the *Federal Register*, emails stakeholders and often communicates in some form with trade organizations. The USDA publishes information in local newspapers, purchases radio time, participates in mailings and often has meetings with leaders in local communities.

Unofficial estimations from EPA and USDA, for penetration of an industry sector with new regulatory requirements, range from three months to one year for a full understanding of new requirements, depending on the complexity of the rule. Therefore, once EPA publishes a final rule, we believe at a minimum, an additional two years would be necessary for compliance. The purpose of all EPA rules is environmental protection through compliance, not through a generation of confusion. The EPA regulations now being modified have been in existence for nearly 35 years and have a high compliance rate in the currently regulated sector but much of the agriculture sector has yet to even hear of the SPCC rules; and there is no clear plan to pass along this information to an industry segment which is vast, decentralized and has limited broadband Internet access.

Even determining which farms have to comply with all or part of the final rule, and how, will take time. Given the reality of this, farmers should be given at least two more years in which to comply. States should be given timelines to facilitate implementation and compliance *before* EPA enforcement can take place. This additional time will provide farmers and others the opportunity to work within their organizations and with appropriate government agencies, including USDA, regarding the possible development of a model plan or set of guidelines that could be utilized to meet such requirements.

We also urge EPA to set up a hotline for producers seeking information and clarity on the rule and how it applies to their operation. In anecdotal USDA examples, hotlines were operational for approximately two years in conjunction with other educational programs to ensure maximum compliance. The hotline allowed producers to inquire about deadlines, report issues and problems, and clarified requirements.

Also, we urge the creation of a website dedicated specifically to SPCC requirements, offering information on rules, clearly stating deadlines, providing templates and making clear the formal review, appeal and mitigation process. Again, we urge the Agency to consider no less than 120 days for the suggested review, appeal and mitigation process.

Lastly, the agricultural community stands ready to work with the Agency to facilitate this educational process in our industry sector.

9. Dairy. Under EPA's current regulations, oil is defined as "oil of any kind or in any form, including, but not limited to: fats, oils, or greases of animal, fish, or marine mammal origin; vegetable oils, including oils from seeds, nuts, fruits, or kernels; and, other oils and greases, including petroleum, fuel oil, sludge, synthetic oils, mineral oils, oil refuse, or oil mixed with wastes other than dredged spoil." We understand that this definition also captures milk and milk storage, as milk has a fat content ranging from less than 0.5 percent to approximately 4.5 percent, depending upon whether it is in a processing plant or on the farm. We urge the EPA to exempt milk storage from the rule as the dairy industry is regulated under a model ordinance that is maintained through a cooperative agreement between the states, the U.S. Food and Drug Administration and the industry to address the interstate shipment of milk. This ordinance, referred to as the Grade "A" Pasteurized Milk Ordinance, contains several references to milk storage which we feel not only addresses the need to maintain a safe and wholesome product, but which also ensures the integrity of storage containers to prevent leaks and spills.

10. EPA's Regulatory Impact Analysis Has Serious Flaws. In the Agency's Regulatory Impact Analysis (RIA), we find that the calculated cost to farms is a gross underestimation. EPA estimates that approximately 152,000 farms will be affected by the rule; the Coalition believes that this number is extremely underestimated. Nowhere in the proposal does EPA use the 2005 survey conducted by USDA which shows that nearly 70 percent of all farms will be potentially affected.

We believe the Agency's assumptions on costs and savings are based on complex calculations that do not take into account the diversity of the industry and incorporate outdated and incorrect information. We urge the Agency to work with USDA and the industry to accurately calculate

costs of this rule to the agricultural sector in order to fully appreciate the impact upon the rural economy.

11. Conclusion. The Coalition appreciates some of the options for agriculture that EPA has included in this proposal. However, we still do not believe that EPA fully understands or appreciates the unique nature of the agricultural industry, our history of lack of spills to navigable waters and our reaction to spills. We strongly urge EPA to reconsider the threshold triggers for regulation and increase it to 20,000 gallons.

The Coalition will continue to work with EPA on efforts to obtain a rule that is more practical and relevant to our industry. We can then work with EPA to encourage compliance for all our affected members; and to inform, educate, and train as appropriate.

We would welcome an opportunity to discuss this further at your convenience.

Sincerely,

National Council of Farmer Cooperatives
CHS, Inc
National Barley Growers Association
South East Dairy Farmers Association
Agricultural Retailers Association
National Association of Wheat Growers
National Cattlemen's Beef Association
National Grange
United Egg Producers

USA Rice Federation
National Sorghum Producers
National Corn Growers Association
Western United Dairymen
American Soybean Association
National Cotton Council
American Farm Bureau Federation
National Pork Producers Council