

March 5, 2009

Office of Solid Waste and Emergency Response  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OPA- 2007-0584-0186

To Whom It May Concern:

The Agriculture Coalition on the Spill Prevention, Control and Countermeasure (SPCC) rule [‘The Coalition’], which includes organizations representing farmers, ranchers, farmer cooperatives, livestock operations and related agribusinesses, submits the following comments in response to the U.S. Environmental Protection Agency’s [‘EPA’ or ‘Agency’] delay of the effective date of the December 5, 2008, final rule amending the SPCC regulations [EPA-HQ-OPA-2007-0584; FRL-8746-3].

The SPCC Rule was originally promulgated on December 11, 1973. In 1991, a proposed rule was initiated but floundered for over 11 years. In a move that caught many off guard, the Agency published a final rule on July 17, 2002, amending the SPCC regulations. This new rule became effective on August 16, 2002, and applied to any facility – including farms – with an aggregate of 1,320 gallons of oil on their property in aboveground tanks of 55 gallons or greater, where the spill might eventually reach navigable waters. That rulemaking showed a lack of understanding of production agriculture, and as a result, required multiple compliance deadline extensions that spanned over five years.

On December 26, 2006, EPA issued another set of SPCC rule amendments and delayed the compliance dates for farms subject to SPCC until a new rule would establish SPCC requirements specifically for agriculture. Just days shy of the 35<sup>th</sup> anniversary of the original SPCC rule, EPA issued its most recent final rule, amending the SPCC regulations with specific requirements tailored to agriculture and oil production facilities.

Throughout the history and evolution of the SPCC rule, the coalition has strived to maintain a constructive dialogue 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, need, and identified risk; and that final regulations be clear and allow time for education and implementation. We take this opportunity to highlight the improved options for agriculture that were contained in the December 5, 2008, final rule. However, we also wish to remind the Agency of areas of concern that still exist.

**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 spread over many miles which may be contiguous or noncontiguous.

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.

The Agency's definition of "facility" clarifies that this definition alone governs SPCC applicability and that contiguous or noncontiguous building properties, parcels, leases, structures, installations, pipes, or pipelines may be considered as separate facilities. This allows 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 retaining this definition as it will allow for the variations in operational structures that are common in farming.

**A Tiered Approach for Qualified Facilities.** We continue to support a tiered approach to the threshold trigger for qualified facilities. However, the use of a Professional Engineer (PE) should be incorporated only when a facility has an aggregate aboveground oil storage capacity above 20,000 gallons. This is similar to the approach recommended by the Small Business Administration (SBA). A tiered approach fits the nature of farming operations which are spread out, remote, and family owned.

**Threshold Triggers.** The 10,000-gallon aggregate trigger causes great concern for the agricultural industry. EPA has yet to produce the data needed to determine a meaningful trigger for all sectors of agriculture.

In the December 5, 2008, final rule, the Agency established a two-tiered approach for farms that meet the "Qualified Facilities" definition.

Tier I qualified facilities are those that:

1. Have 10,000 gallons or less total aggregate aboveground oil storage capacity;
2. Have not during any 12-month period, 3 years prior to the Plan certification date, had:
  - o A single discharge of oil to navigable waters or adjoining shorelines exceeding 1,000 gallons AND
  - o Two discharges of oil to navigable waters or adjoining shorelines each exceeding 42 gallons;
3. Have no individual aboveground oil containers greater than 5,000 gallons.

Tier I qualified facilities are eligible to use the EPA-created SPCC Plan template and self-certify in lieu of a full PE-certified plan.

Tier II qualified facilities are those that:

1. Have 10,000 gallons or less total aggregate aboveground oil storage capacity;

2. Have not during any 12-month period, 3 yrs prior to the Plan certification date had:
  - o A single discharge of oil to navigable waters or adjoining shorelines exceeding 1,000 gallons AND
  - o Two discharges of oil to navigable waters or adjoining shorelines each exceeding 42 gallons;
3. Have individual aboveground oil containers greater than 5,000 gallons;
4. Have an owner or operator eligible for Tier I qualified facility status, but decide not to take the option or choose to develop a hybrid SPCC Plan.

Tier II qualified facilities can prepare a self-certified plan in lieu of a PE-certified plan.

Farms with more than 10,000 gallons aggregate aboveground oil storage capacity, or those whose owners or operators are eligible for qualified facility status but decide not to take the option, must prepare a PE-certified Plan.

While we support the self-certification option the Agency has provided, many farm operations would exceed the proposed 10,000-gallon threshold, even with this new flexibility provided for farms and farming operations. For example, many farms receive bulk fuel, and 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.

Row crop farms, ranches, livestock operations, farmer cooperatives and other agribusinesses such as co-ops and retailers pose low risks for spills and are often seasonal in nature. In irrigated agriculture, for example, 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. It is not economical for growers 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.

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, the most recent of which 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.

**Tank Size and Usage.** The volatility in fuel prices makes it financially necessary for growers to seek tanks of a size that can accept bulk orders from their local supplier. 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 cost. By limiting choices among growers EPA will increase costs on a segment of the U.S. economy that has the least power to pass costs along to their customers.

There is no evidence of which we are aware that 10,000-gallon tanks on farm operations present heightened concerns for spills. As the Agency 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.

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 it 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.

**Integrity Testing.** The final rule allows an owner or operator to consult and rely on industry standards to determine the appropriate qualification for personnel performing tests and inspections as well as the type and frequency of integrity testing required for a particular container size and configuration. We support this approach.

While the Agency stated in the rule that Animal Fats and Vegetable Oils (AFVOs) "could still spill, flow, and, depending on the location of the facility, could potentially reach navigable waters or adjoining shorelines," and therefore, should still be regulated under the SPCC rule. However, the rule does provide an owner or operator with the flexibility to determine the scope of integrity testing that is appropriate for containers that store AFVOs, based on compliance with certain Food and Drug Administration (FDA) regulations and other criteria.

**Self-Certification Proposal/Professional Engineer.** While the Coalition, in general, supports the notion of self-certification, in order to make this option viable and meaningful to our industry, the Agency 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. The overwhelming majority of farms do not have extra staff on hand to designate as environmental managers nor can they afford to hire such personnel. They will not have a budget to pay for PE's for each of their tanks. 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."

It is critical to note that the situation now existing in rural America has existed 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 negligible 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 to which contract experts default. 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.

Additionally, the Agency noted in the rule that "under the existing SPCC requirements, the Regional Administrator (RA), after reviewing a facility's Plan, has the authority to require an owner or operator of a facility to amend the SPCC Plan if the RA finds that an amendment is necessary to prevent and contain discharges from the facility. This provision also applies to Tier I qualified facility. That is, an RA could, if warranted, require a Tier I qualified facility to prepare a full (i.e., not using the template) SPCC plan with PE certification."

We urge the Agency to make clear its intent in guidance provided to inspectors to ensure the fewest contrary incidences (i.e., disagreements) during implementation. Also, the Agency must 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.

**Mobile Refueler Exemption.** We believe the definition of mobile refueler should be improved based on the Agency's proposed amendments in the October 2007 rulemaking (72 FR 58378,

October 15, 2007), which proposed to replace “solely” with “primarily”. This more adequately reflects the needs within the industry.

Also, as in past communications, the Coalition fully supports the Agency’s exemption of fuel nurse tanks and fuel transport equipment and remote tanks (considered mobile refuelers) and single-family residential property at the site.

Nurse tanks are considered mobile refuelers and, like other types of mobile refuelers, are exempt from the sized secondary containment requirements. Likewise, the rule rightfully exempts non-transportation-related tank trucks from sized secondary containment requirements.

All areas with the potential for a discharge are subject to the general secondary containment provisions, but in the 2008 final rule EPA clarified the method, design, and capacity of secondary containment and allowed both active and passive measures of secondary containment, including additional examples of prevention systems. We support the Agency’s consideration of manmade structures in determining how to comply.

**Pesticide Application Equipment.** We support the Agency’s exemption of all pesticide application equipment and related mixing containers, regardless of ownership or where used, on farms. Ownership of equipment is not an environmental issue, but rather the use of the equipment is the SPCC issue. We agree with the Agency that facilities housing this equipment and servicing the needs of the farming community should be covered in these SPCC regulatory modifications.

Exempting pesticide application equipment such as ground boom sprayer applicators, airblast sprayers, and specialty applicators that are used to apply measured quantities of pesticides to crops and/or soils, and related mix containers used to mix pesticides with water and, as needed, adjuvant oils, just prior to loading into application equipment, 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.

**Definition of “Oil”.** 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 have had extensive discussions with the Agency regarding this definition as it 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 support the Agency’s efforts to exempt milk containers and associated piping and appurtenances from the SPCC requirements as proposed in a separate rulemaking. We urge the Agency to finalize this exemption to the SPCC rule for all milk and milk product containers, associated piping, and appurtenances as soon as possible.

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.

The regulation of mixtures under the SPCC rule is at best unclear. EPA regional guidance has been inconsistent and variable. In the final rule, EPA states that it “does not agree that the Agency should exempt pesticide mixtures with low concentrations of oil from SPCC regulation. Pesticide mix formulations, such as those that contain crop oil or adjuvant oil, are potentially subject to the SPCC rule because they are considered oil mixtures. The statutory definition of oil includes oil of any kind and in any form, and does not exclude oil mixtures.” 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.

**Plan Development and Implementation.** In discussions with both EPA and the U.S. Department of Agriculture (USDA), the Coalition was informed that following the issuance of a final rule, information was to be disseminated to the regulated community on compliance. No real data exists, however, on how long it truly takes an industry to fully understand and come into compliance with new requirements. Unofficial estimates from EPA and USDA for penetration of an industry sector with new regulatory requirements range from three months to one year for just a full understanding of new requirements, let alone reaching compliance. It should be noted, however, that many regulations issued by USDA arise out of highly anticipated and much debated legislation, such as the Farm Bill. Since USDA estimates that penetration can take up to a year, EPA should recognize that penetration and compliance may take even longer for a rule that has attracted little attention within the agricultural community and where the historic risk has been, and continues to be, exceedingly low.

While the EPA rulemaking of December 5, 2008 modified EPA regulations that have been in existence for more than 35 years and have a high compliance rate in the currently regulated sector, much of the agricultural sector has yet to even hear of the SPCC rules. Many other farmers or ranchers are understandably confused by its complexity and its constantly changing compliance deadlines. In a separate rulemaking that has since been pulled for regulatory review, EPA had proposed two separate compliance dates for farms. Farms meeting the qualified facility definition would have a deadline of November 20, 2010. However, farms over the 10,000 gallon aggregate above ground storage capacity threshold must be in compliance by November 20, 2009, which is less than a year away. We fail to understand how the dual compliance deadline serves agriculture and the environment or clarifies the confusion that has existed around the SPCC rule and its application to farms. We urge the convergence of compliance deadlines, and recommend that they are five years from the date of final publication.

There are stark, fundamental differences between the community that has lived under this regulation for decades and the agricultural community. Most farmers do not have the staff on hand to designate as environmental managers, nor does the cost structure in the sector provide farmers the luxury of hiring such personnel. A 2009 compliance deadline provides less than adequate time for producers to develop SPCC plans, secure budgets (including budgeting for a professional engineer), and make necessary capital expenditures to comply with the final rule. Farms operate on loans and most 2009 budgets have already been established and funds dedicated to other crucial elements of the operation. A 2009 SPCC compliance deadline leaves producers with both technical and budget

problems, and we encourage EPA to consider these factors as it reissues new compliance deadlines. Moreover, we stress that such a request in no way compromises the environment. The risk of such spills from agriculture is extremely low and there is little to no evidence that providing greater flexibility will harm the environment.

Since publication of the 2008 final rule, EPA has had modest communications with stakeholders and trade organizations. Several EPA regional offices held webcast seminars. This is a great tool for a “train the trainer” program but not a great way to reach farmers. The Agency expects short-term compliance yet there is no evidence of a compliance assistance program or education process in place. The purpose of all EPA rules is environmental protection through compliance, not through generation of confusion.

As new compliance deadlines are proposed, EPA should also provide a clear plan to pass along this information to our nation’s farmers, a sector of the economy that is vast, decentralized, and has limited broadband access. Without a clear plan, we are not convinced that the Agency can adequately prepare guidance and mobilize specific outreach activities in a timely manner that will provide the farming community with the understanding and necessary tools to comply with the final rule.

Given the lack of knowledge, exposure and understanding of the SPCC rule within the agriculture sector and the Agency’s lack of a communication plan, we recommend, at a minimum, all farms (regardless of above ground storage capacity) should have the same compliance deadline. Furthermore, any agricultural deadline must be predicated on EPA conducting a successful and active national compliance assistance program for the agricultural community.

That said, we do not understand why the Agency favored a five-year time frame for the oil production industry to comply with the December 5, 2008 final rule. EPA stated in the final rule that “the agricultural community did not provide information that would lead the Agency to conclude that farms are sufficiently different to warrant further differentiation from other facilities that store oil.” The Coalition would remind EPA of the 2005 USDA study which found that nearly 70 percent of all farms will be potentially affected by the SPCC rule. Yet, the study also concluded that data on oil spill on farms, cooperatives, and other agribusinesses is almost nonexistent. The Agency has failed to provide data or even anecdotal evidence of agricultural spills to justify such a resource-intensive rulemaking and also failed to adequately justify the longer time period for the oil production industry that has a history of spills.

For simplicity, we call on the Agency to establish one compliance deadline for all industry sectors impacted by this final rule to avoid further confusion. Since the Agency sees no differentiation between the agriculture community’s risk under SPCC compared to that of other covered facilities, such as oil production facilities, we see no reason for differentiation in compliance deadlines.

Additionally, states should be given timelines to facilitate implementation and compliance *before* EPA enforcement can take place. This extra time will provide farmers and others the opportunity to work within their organizations and with appropriate government agencies, including USDA, regarding the development of guidelines that could be utilized to meet such requirements.

We also urge EPA to set up a hotline specifically for agricultural 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 clarify requirements.

We encourage the Agency to continue coordinated efforts with USDA to ensure timely publication of information in local newspapers, purchases of radio time, mailing of information, and meetings with leaders in local communities. We also appreciate EPA's coordinated efforts with the USDA Natural Resources Conservation Service (NRCS) and the Cooperative Extension Service on this issue.

Equally important, we urge EPA to develop guidance in response to the court ruling issued by the United States District Court for the District of Columbia (D.D.C.) in *American Petroleum Institute v. Johnson*, 571 F.Supp.2d 165 (D.D.C. 2008). For purposes of the SPCC rule, the court restored the regulatory definition of navigable waters promulgated by EPA in 1973. We believe based on the definition of "waters of the United States," that not all of our facilities would be subject to the SPCC requirements. We think it is imperative to establish guidance so the regulated community can better ascertain which facilities are subject to the rule.

In conclusion, the Coalition appreciates some of the options for agriculture that EPA has included in the final rule. 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 are eager to continue our open dialogue with EPA on this important issue 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.

The Coalition strongly affirms that members of the agricultural sector, who grow this nation's food and rely on well water from their property for their families' needs, 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.

We thank you for this opportunity to comment and would be available to meet with you to discuss these matters further.

Sincerely,

National Council of Farmer Cooperatives  
CHS, Inc  
Agricultural Retailers Association  
South East Dairy Farmers Association  
Western United Dairymen  
USA Rice Federation

American Farm Bureau Federation  
National Cotton Council  
National Milk Producers Federation  
National Association of Wheat Growers  
National Corn Growers Association  
Kansas Cooperative Council