

May 1, 2009

U.S. Environmental Protection Agency
EPA Docket
1200 Pennsylvania Avenue, NW
Mail Code: 2822T
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OPA- 2007-0584. Oil Pollution Prevention; Non-Transportation Related Onshore Facilities; Spill Prevention, Control, and Countermeasure Rule Requirements – Final Amendments

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].

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 are appreciative of many of the regulatory reforms adopted by EPA in 2006 and 2008 to clarify and streamline the SPCC rule as it applies to farms. In particular, we appreciate the Agency’s inclusion of a definition of a farm as provided in past comments by the U.S. Department of Agriculture [‘USDA’] and many agriculture stakeholders. 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. We encourage the Agency to utilize the expertise at USDA to ensure that any definition of a farm used in this rulemaking is consistent with USDA data and recommendations. As a reference, we direct the Agency’s attention to a recently issued publication released by the Economic Research Service within USDA entitled "Exploring Alternative Farm Definitions" [<http://www.ers.usda.gov/Publications/EIB49/> Economic Information Bulletin No. (EIB-49) 40 pp, March 2009].

Additionally, we appreciate the exemption of mobile refuelers, nurse tanks, pesticide sprayers and mix containers as well as home heating oil tanks. We also support the exemption of loading racks as they are not part of a normal farming operation. We support the Agency’s approach with respect to integrity testing. For additional information regarding the coalition’s specific

recommendations and positions on the aforementioned improvements to the SPCC rule, we encourage the Agency to review our detailed comments submitted on March 5, 2009, in response to EPA's initial delay of the effective date of the December 5, 2008, final rule [EPA-HQ-OPA-2007-0584-0186].

We also support the Agency's proposed rule to exempt certain milk containers and associated piping and appurtenances from the SPCC Rule [EPA-HQ-OPA-2008-0821]. EPA should finalize this rulemaking as soon as possible. Similarly, we direct the Agency to our March 5, 2009, comments with respect to refining the definition of "oil" and how that definition may apply to "mixtures."

That said, we are very concerned that past improvements will be lost as a result of this most recent and vague *Federal Register* notice, which stated "Consistent with the January 21, 2009, OMB memorandum "Implementation of Memorandum Concerning Regulatory Review," the EPA Administrator has chosen this rule for additional assessment of policy and legal issues..." It appears that the Agency intends further evaluation of certain undefined aspects of the rule but provides no assurance that future public comment periods would be made available if the rule is altered. Any such action is counter to our efforts to remove confusion in farm country on how and when to comply.

The Coalition appreciates the opportunity to reiterate our concerns with the SPCC rule as it relates to farms. Our comments are based on the rulemakings to date and we remind EPA that the original SPCC regulation, which became effective in 1974, was never intended to apply to farms and ranches. It wasn't until EPA issued its amended regulations in 2002 that anyone in agriculture became aware of such requirements. Since that time, the SPCC rule has undergone many alterations and multiple compliance deadline extensions. While the EPA rulemaking of December 5, 2008, aptly 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.

We offer the following recommendations to improve the rulemaking so that it reflects the very low level of risk borne out by our history of lack of spills to navigable waters.

Overview

We remind the Agency that 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.

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.

Furthermore, 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. Yet, EPA stated in the 2008 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 requests that EPA consult with USDA and review the 2005 USDA study which found that nearly 70 percent of all farms will be potentially affected by the SPCC rule despite the fact that data on oil spill on farms, cooperatives, and other agribusinesses is almost nonexistent. If necessary, this study should be updated to provide EPA with the most accurate data possible.

Before any rule is applied to farms/farming operations, EPA in consultation with USDA must evaluate the threat (if any) the industry presents and establish rules applicable to the industry. We have repeatedly called for this evaluation and have been thus far ignored.

Self-Certification Proposal

Upon review of the public comments submitted to EPA, we became aware of an alternative option for farms that we believe was not studied or considered by EPA. We call the Agency’s attention to comments submitted by the Missouri Farm Bureau, which recommended that all of agriculture be given the option of self-certification. EPA reviewed and dismissed exempting farms as one alternative and instead established a tiered structure with some facilities being eligible for self-certification and others requiring the use of a Professional Engineer (PE) to provide certification. Based on the April 1, 2009, notice, it appears that the Agency dismissed without study or never considered the alternative to allow self-certification for all farms.

We believe Missouri Farm Bureau’s alternative approach deserves a full study along with a cost-benefit analysis. Such a request is in line with the White House’s statements on transparency and sound science as well as OMB’s regulatory review process and Executive Order 12866 which says in part that the government should “assess all costs and benefits of available regulatory alternatives.”

For a number of reasons, self-certification could prove to be the most sensible way to apply SPCC rules to all farms – if in fact EPA insists that farming operations must be regulated, a view that we do not share. For example, row crop farms, ranches, livestock operations, farmer cooperatives and other agribusinesses such as 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 it’s 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. Furthermore, requiring a PE for seasonal use tanks is a tremendous waste of financial resources.

Moreover, the Agency has offered 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” and “because, notwithstanding their simple configurations, many of these small oil production facilities cannot meet the 10,000 gallon aggregate aboveground oil storage capacity threshold.” Therefore, we can only assume that oil production is granted separate threshold criteria whether they cannot meet, or they can exceed the arbitrary 10,000 gallon limit.

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 volume-sized capacity threshold to agricultural, seasonal-use tanks while utilizing other criteria such as equipment configuration for oil production tanks in the same rulemakings. We find the disparity in the treatment of farms when compared to oil and gas production facilities to be very troubling.

Another key reason for the Agency to consider self-certification for all farms is the ever-changing status of the owner or operator. In some cases the farms are owned by their operators. In others, farms are rented or leased, and the owners are not involved in the daily operations of the farm. Leasing and rental agreements change periodically, resulting in new operators taking over the day-to-day workings on the farm. Complicating the situation further is tank ownership, especially when dealing with leased or rented property. In such cases, the owner, the renter (operator), or both may own the tanks. We are concerned that a PE certification could be required as operators change. This scenario differs from most industrial facilities where ownership and even leases are long-term. It is unclear if the SPCC plan follows the “facility” because the tanks will often follow the outgoing renter and the new renter will provide his own. Under this scenario, a new plan and more costs for a PE will be needed by both the incoming and outgoing operators.

In providing self-certification under the tiered system and guidance to farmers on how to create secondary containment, the Agency acknowledges that owners or operators are competent to carry out these instructions. In practicality, the owner or operator will likely do the work to write an SPCC plan and create a secondary containment structure only to have a PE come in for his certification. Requiring the use of PE does nothing more than add unnecessary cost.

Furthermore, we strongly 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.

While the Coalition is interested in pursuing the option of self-certification for all farms, in order to make this option viable and meaningful to our industry, the Agency must work with the industry to allow 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.

We also 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.

Threshold Triggers

As noted in past comments, 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.

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. 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.

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.

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

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.

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.

We recommend the Agency issue a compliance deadline that provides adequate time for producers to develop SPCC plans, secure budgets, and make necessary capital expenditures to comply with the final rule once it has been published. Farms operate on loans and funds are often dedicated several years in advance to other crucial elements of the operation. We encourage EPA to consider these factors as it establishes new compliance deadlines. We recommend the Agency provide five years from the date of final publication for compliance for farms.

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 and its subsequent rollback, EPA has had little communication with stakeholders and trade organizations. The Agency cannot expect short-term compliance when it has yet to establish any compliance assistance program or education process. 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 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.

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.

Regulatory Impact Analysis

In the Agency's Regulatory Impact Analysis (RIA), we find that the calculated cost to farms is a gross underestimation. EPA estimated that approximately 152,000 farms will be affected by the rule. EPA does not mention the USDA numbers presented in the 2005 survey they conducted which shows that nearly 70 percent of all farms will be potentially affected by the SPCC rule.

We believe the Agency's assumption 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 assumptions. For example, EPA cites the 1982 U.S. Census of Agriculture as the best source of information of on-farm fuel storage data, and uses this information as a baseline for establishing potential impact. Further complicating matters, EPA cites in a footnote in the 2008 rule (*RIA, Vol 1, Pg 46.; Footnote #28, Section 4.2 – Facility Categories*) a different set of figures based on the 2002 average fuel expense broken down by sales class. EPA's own numbers do not match up and it appears the Agency simply selected the more economically pleasing figures to show a lower impact on farms.

Upon further review, it appears that the EPA's estimated cost savings due to exempting pesticide application equipment is based on a report from one state. Agriculture's diversity is so great that a report from one state cannot simply be extrapolated to determine a nationwide impact. This limited data set calls into question any numbers that the Agency attempted to derive from it.

We also question EPA's assertion on residential heating oil tank exemptions. The 1973 rule exempted 660 gallon tanks for the express purpose of exempting residential heating oil tanks. The current threshold of 1,320 gallons is above the upper gallon size of heating oil tanks as estimated by EPA (1,045 gallons). Therefore, in practicality, no one has applied SPCC rules to their home heating oil tanks. As such, these cost savings are nonexistent.

The Coalition is troubled by the considerable inconsistencies and misrepresentations referenced in the RIA. EPA is mandating a rule for many more farms than the rulemaking suggests, placing costly and burdensome requirements on the agricultural industry with no data to show a risk to justify such costs.

We request the Agency in consultation with USDA and the industry accurately calculate the costs of this rule to the agricultural sector in order to fully appreciate the impact upon the rural economy.

Conclusion

The Coalition appreciates some of the options for agriculture that EPA included in the 2008 final rule. 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
United Egg Producers
National Cattlemen's Beef Association
National Grange
National Association of Wheat Growers
CHS, Inc.
National Corn Growers Association
Agricultural Retailers Association

USA Rice Federation
National Milk Producers Federation
National Cotton Council
National Cotton Ginners' Association
American Farm Bureau Federation
National Grape Cooperative
Welch's