

August 18, 2010

U.S. Environmental Protection Agency
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Washington, DC 20460

RE: Docket ID No. EPA-HQ-OPA-2009-0880

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’] proposed amendments to the Spill Prevention, Control, and Countermeasure (SPCC) rule, establishing compliance dates by which farms must prepare or amend SPCC plans and implement those plans.

Background

The SPCC rule was originally promulgated on December 11, 1973. In 1991, a proposed rule was initiated but floundered for more than 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 35th anniversary of the original SPCC rule, EPA issued the December 5, 2008, final rule, which aptly amended the SPCC regulations with specific requirements tailored to agriculture and oil production facilities. The 2008 rule was followed up with a minor technical corrections rulemaking in November 2009. Also in 2009, EPA issued a new compliance deadline for farms – November 10, 2010. The compliance deadline only applied to those agricultural operations that currently have an SPCC plan or new facilities that came into operation after the rule was effective. Specifically, if a farm was in existence prior to August 16, 2002, the compliance extension was not applicable as these farms were supposed to be in compliance with the SPCC rule and have a plan in place. Such farms could, however, amend their plans by the compliance deadline.

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 appreciate the Agency's acknowledgement in this rulemaking that many farmers and ranchers are understandably confused by the complexity of the SPCC rule and varying compliance deadlines that have been proposed over the years.

Proposed Compliance Extension

While the Coalition continues to believe there are some substantive, practical issues with underlying SPCC requirements that still need to be addressed, as discussed below, once those matters are worked out, the Coalition is fully supportive of an extension during which farmers and ranchers may be allowed to familiarize themselves with the requirements of the SPCC rule so that they can take the necessary steps to comply with the regulation. The Coalition is also fully supportive of rule amendments that would exempt farms' on-farm milk storage from these provisions under certain circumstances, and we support the provision of more time for those operations to come into compliance as appropriate.

For this reason, we appreciate the agency proposing an extension of the deadline to November 10, 2011 – although as we discuss below we believe more time is needed for this purpose. We also applaud the measures in the proposed rule that would delay the compliance date for on-farm milk storage until one year after EPA finalizes a subsequent, separate rule for these facilities. By extending the compliance deadline under certain circumstances by one year to November 10, 2011, the Agency will help to ensure that some of America's farms and ranches have at least a portion of the time they need to fully understand the SPCC regulations dealing with on-farm oil storage and then to take the appropriate steps to comply with the applicable requirements.

But we fear that this particular proposed rule's language concerning the deadline extension will lead to considerable confusion for those farms that have both milk and petroleum storage facilities. There is more than one way to interpret this language as it relates to such operations.

According to the proposed amendments to the SPCC rule, a farm that was in operation on or before August 16, 2002, must have an SPCC plan in place with necessary amendments fully implemented November 10, 2011. However, if a farm in operation on or before August 16, 2002, has both petroleum and bulk milk storage, the language is ambiguous. For example, would their original plan just pertain to their petroleum storage or would it also cover bulk milk storage? In updating their original plan, would the farm have to update their plan as it pertains to petroleum storage to be in compliance with SPCC requirements by November 10, 2011, or would their deadline be predicated on the Agency finalizing the bulk milk storage exemption that will come into effect later?

Likewise, if a facility came into operation after August 16, 2002, but before November 10, 2011, it would be required to prepare and fully implement an SPCC plan on or before November 10, 2011. But if such a facility has both petroleum and bulk milk storage, which deadline applies? Instead of simply finalizing the milk container exemption and setting a reasonable compliance

deadline for **all** farms, EPA has bifurcated the compliance process for agriculture—those with milk containers and those without; those in existence prior to August 16, 2002 and those in existence after. When EPA issues a final compliance deadline, we strongly encourage the Agency to clarify the treatment of farms and seek a simplified compliance deadline that not only provides ample time for outreach and education for all producers but is also appropriate for all farms.

One last point highlights why it is essential that these deadline provisions be made clearer and unambiguous. EPA's Office of Enforcement and Compliance has underway a rigorous and aggressive enforcement initiative involving concentrated animal feeding operations (CAFOs) under the 2008 CAFO rule of the Clean Water Act (CWA). As part of those compliance inspections, some CAFOs have been asked to show proof of compliance with other EPA regulations, including SPCC. In the case of the SPCC provisions, this aggressive and disruptive approach is simply bad policy and unfair. There has been no effective outreach to farmers by the Agency regarding the application of SPCC. And adding to this is the fact that the Agency's own legitimate and good faith efforts over the last eight years to clarify through rulemaking how the SPCC applies to agriculture has proceeded in fits and starts. That enormous confusion has been created in the farming community as a result should surprise no one – and any effort by the Agency to include SPCC requirements in its enforcement initiative is misplaced and should stop until all of these SPCC issues are worked out and clarified. If EPA is planning to conduct enforcement inspections using a “multi-media” or “multi-element” approach (where it is looking at compliance with all applicable EPA regulations), then it must fairly and clearly establish the rules that must be complied with, and when, and then do a better job of working with groups such as ours in disseminating this information to the regulated community.

For reasons described below, we believe an additional four years is needed to provide the Agency time to address the layers of confusion surrounding this rule, and to provide the regulated agricultural community sufficient time to understand their obligations.

Definition of “Oil” Unresolved

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.”

Furthermore, 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.”

It is the Coalition's belief that the Agency's 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. 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.

Milk Container Exemption

Without a clear definition of oils in product mixtures, many liquid mixes in food production also may needlessly fall under the SPCC rule – as is the case with 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.

As such, we strongly support the Agency’s proposed rule to exempt certain milk containers and associated piping and appurtenances (bulk milk storage) from the SPCC rule [EPA-HQ-OPA-2008-0821]. EPA’s proposed rule would amend the SPCC rule to exempt milk containers and associated piping and appurtenances from the SPCC requirements provided they are constructed according to the currently applicable 3-A Sanitary Standards and are subject to the current applicable Grade "A" Pasteurized Milk Ordinance (PMO) or State dairy regulatory equivalent to the current applicable PMO. EPA should finalize this rulemaking as soon as possible.

In the proposed amendments, however, EPA states that the “compliance date would be delayed one year from the effective date of a final rule specifically addressing SPCC requirements for these milk containers, associated piping and appurtenances, or *as specified by a rule that otherwise establishes a new compliance date for these facilities*” [emphasis added]. It appears that this statement may imply that the Agency intends further evaluation of certain aspects of the proposed rule to exempt milk containers. The Agency has had roughly almost eighteen months to review public comments and finalize the milk container rule. We view the rule as straightforward, applying common sense. Any action counter to the proposed rule for milk containers would only add to the confusion on how and when to comply.

Plan Development and Implementation

The Coalition also appreciates the Agency’s recognition of the fundamental nature of farming operations. Unlike other industries, agriculture varies greatly in what it produces and how it does so. 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 extended compliance deadline may provide some farmers and others the opportunity to work within their organizations and with appropriate government agencies, including U.S. Department of Agriculture (USDA), regarding the development of guidelines that could be utilized to meet the requirements of the SPCC rule.

We remain concerned, however, that even the extended compliance deadline will be difficult for many agricultural producers to meet. The Coalition has been actively engaged on the SPCC issue throughout the course of EPA’s efforts to revise and modify the rule’s requirements. While EPA has made an effort to listen to the concerns of the agricultural community and has recognized the unique circumstances of on-farm oil use and storage, it is our judgment that far

more work needs to be done by the Agency in its outreach to individual farmers and ranchers. EPA cannot expect that the Agency can simply set a compliance deadline and have producers, who are busy running businesses and providing for their families, understand and implement these changes.

While recent EPA rulemakings modified 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. There are stark, fundamental differences between the community that has lived under this regulation for decades and the agricultural community. It is rare within the farming community for farmers to have staff on hand to designate as environmental managers. The cost structure in the sector simply does not provide farmers the luxury of hiring such personnel.

Furthermore, we would remind EPA of the 2005 USDA study which found that data on oil spill on farms, cooperatives, and other agribusinesses is almost nonexistent. The Agency has failed to provide data or anecdotal evidence of agricultural spills to justify such a resource-intensive rulemaking. If necessary, this study should be updated to provide EPA with the most accurate data possible. EPA in consultation with USDA must evaluate the threat (if any) the industry presents and establishes rules applicable to the industry. We have repeatedly called for this evaluation and have been thus far ignored.

With industry-applicable rules in mind, we must hold that, until evidence of agriculture-related spills can be produced, several facets of the final SPCC rule stand merely as baseless generalizations. Unless this has already been remedied, the coalition can find no reason why small oil production facilities that produce oil on a constant basis should be offered a self-certification option with no storage capacity threshold, while agriculture, an industry consisting largely of family businesses with few resources to spare, should be forced to implement specific spill control regulations with the costly assistance of a professional engineer at any level above 10,000 gallons. To limit the size of fuel storage an agricultural producer may hold to 10,000 aggregate gallons, with the cost of a professional engineer as a deterrent, could be the death knell for many small or mid-sized operations already on the margin. By limiting tank size with a 10,000 gallon Tier I ceiling, the Agency no longer allows producers to store fuel from a time of low prices for later use in the season at a potential cost in the thousands of dollars. These economic considerations, as well as the fact that many producers with existing facilities above the threshold are ill-prepared to afford the consultation of a professional engineer or a downsize in storage size, and provide ample reason to re-examine agriculture's immediate inclusion in these regulations.

We base this concern on the reaction we have seen from individual producers to educational efforts the undersigned organizations have undertaken over the last several months, since EPA issued its final rule and compliance deadline. During that period, many of us have held meetings or attended other sessions to explain to producers their obligations under the regulation. Even though we are all cognizant of the low risks posed by agricultural facilities and the lack of data that show any history of agricultural spills, individual producers have responded by asking what exactly they will be required to do. Unfortunately, it is extremely difficult to respond to these questions in a clear way. For instance:

- There is no clear, consistent guidance on how a facility is determined for purposes of aggregating storage. Thus, while EPA has taken positive steps to note that farms are often operated as separate parcels, farmers are concerned that they will be held accountable for reasonable, good-faith judgments in segregating operations when there is no clear enunciation by EPA that such a judgment will be accepted. Such concerns can easily become a reality in an enforcement setting on unrelated matters, as in the case of the CAFO rule above. For example, a farm in good faith could make an SPCC parcel decision for their operation, but without clear Agency guidance can find themselves subsequently subject to charges of failing to comply with these SPCC measures by the enforcement entities in the Agency who have adopted their own interpretation of the application of the SPCC in support of their enforcement purposes. These purposes can be distinctly different than what may have been intended by the SPCC program office.
- The constant change of compliance dates is confusing. Many of us have pointed out to producers that the change of compliance date only applies to operations that have come into business since August, 16, 2002. Yet they are confused by the seemingly constant shifting of requirements, dates of compliance, applicability, etc. We believe it is imperative for the agency to allow a period during which the “dust can settle.” This will ensure that the provisions of the regulation are clear, producers obligations are clear, there is clear guidance to producers on what they can do, and the resources are readily available to them to meet their obligations.
- Ongoing policy debates involving other, related areas of the CWA authorities have further confused growers. For instance, it is clear that the SPCC provisions are not applicable to oil storage facilities in circumstances where an oil spill would never reach a water of the US. While the Agency and the Army Corps of Engineers has issued guidance as to the determination of what are and are not jurisdictional waters, it is still a highly subjective and situation-based approach that is open for considerable divergence of views at the field level. Two federal officials trained in these criteria could separately come to different conclusions as to whether the same waterway was jurisdictional. Certainly, differences in interpretation must be expected between federal officials and the regulated community with no training in these jurisdictional matters. Similarly, both EPA and the Army Corps of Engineers are engaged in deliberations on the application of the Corps policy articulated in the 1993 regulation on Section 404 that prior converted cropland (PCC) retain their non-jurisdictional status even if the PCC is no longer in agricultural use . The outcome of those deliberations, and how those wetlands are treated, may well have an impact on how a farmer responds to potential spills to waters of the US.

The Agency expects short-term compliance yet there is no evidence of a compliance assistance program or education process in place nor does there appear to be the necessary budget in place to do the level of outreach that is needed to ensure agriculture understands what is required and when.

With a new compliance deadline proposed, EPA must 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 and the budget to back it up, 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.

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.

In conclusion, the Coalition remains unconvinced that farms' and ranches' use and management of oils on their operations represents a serious risk to water quality, given the quantities of oil involved and their general lack of proximity to waters of the US. Still, without question, the members of the agricultural sector, who grow the nation's food and rely on surface and well water to meet their families' and agricultural operations' 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. As such, they can and do take very seriously their responsibility, consistent with the intent and spirit of the SPCC provisions, to properly manage the oil resources used on their operations.

We believe that a four year delay in the effective date of these provisions could be used to very good ends and ultimately result in more complete and effective compliance by producers. The Agency has a history of establishing similar periods of time before rules become effective, most recently in the case of the Agency's rulemaking to limit Greenhouse Gas (GHG) emissions from stationary sources, where the Agency has proposed to defer the application of these provisions for several years to a host of GHG sources.

We are confident that if the agency can provide the agricultural community at least four years of additional time, it would mean that the Agency could:

- Use the opportunity to clarify guidance to everyone involved as to what the specific obligations are for farmers and ranchers;
- Update and simplify the template now on its website so that it is far more user friendly than the current version;
- Provide states with timelines to facilitate implementation and compliance before EPA enforcement begins;
- Ensure that there will be adequate resources available (through professional engineering associations and businesses) to provide farmers the assistance they need in a timely fashion; and
- Work with our organizations in providing additional information and assistance which we can then use to continue educating our members.

It is our hope that we can continue to work with EPA to ensure that farming operations are able to meet new SPCC requirements in a timely and cost effective manner. We thank you for this opportunity to comment and would be available to meet with you to discuss these matters further.

Sincerely,

American Farm Bureau Federation
American Soybean Association
American Malting Barley Association
California Dairies, Inc.
CHS, Inc.
Kansas Livestock Association
National Association of Wheat Growers
National Barley Growers Association
National Cattlemen's Beef Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Farmers Union
National Milk Producers Federation
National Pork Producers Council
National Sorghum Producers
National Sunflower Association
South East Dairy Farmers Association
The Fertilizer Institute
United Egg Producers
US Canola Association
USA Dry Pea & Lentil Council
USA Rice Federation
Western United Dairywomen