



October 9, 2008

Ms. Susan Bodine, Assistant Administrator
Office of Solid Waste and Emergency Response
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W. (5101T)
Washington, DC 20460

RE: Spill Prevention, Control, and Countermeasure (SPCC) Rule; Definition of Oil Clarification and Enforcement Discretion

Dear Ms. Bodine:

We would like to thank EPA for attending the May 30, 2008, Small Business Administration (SBA) Environmental Roundtable meeting. We appreciate EPA's willingness to discuss the definition of "oil" under the Spill Prevention, Control, and Countermeasure (SPCC) regulations. However, we remain very concerned that the current definition is so broad that it covers products posing little or no risk to navigable waters. What's more, vague and ambiguous regulatory terms deny the regulated community fair notice of what is required and force companies to make overly conservative assumptions, thereby driving up compliance costs.

We oppose EPA's application of the SPCC program to the storage of products that do not pose a reasonable expectation of risk to U.S. waters. In doing so, the agency is burdening the regulated community with unjustified compliance costs (e.g., forcing site operators to unnecessarily build secondary containment around tanks) while yielding little or no environmental protection. Additionally, given the current economic downturn, unnecessary environmental compliance places an extreme hardship on many small businesses. While the undersigned organizations have additional concerns with the SPCC regulations that previously have been brought to EPA's attention, the scope of this letter is limited to the issues discussed during the SBA Environmental Roundtable meeting.

Definition of Oil - Vague and Ambiguous

As mentioned at the meeting, industry needs clarification of the term "oil" as it pertains to the SPCC regulations. Unfortunately, personnel at EPA headquarters and the various EPA regional offices do not appear to have a uniform view of what constitutes an oil under the rule, nor do they have a consistent process to determine whether a material is, or is not, oil and therefore subject to the SPCC regulations. Compounding the problem, EPA's definition is different than the one used by the Coast Guard.

Without a consistent definition and determination process, it is very difficult for industry to comply with the SPCC regulations. Some facilities might mistakenly assume something is not "oil" per one agency's definition, only later to be inspected and found to be in non-compliance per another agency's definition. Varying definitions include a "sheen" rule (anything that leaves a sheen on



water is an oil), consideration of the characteristics of a material, or reference to the "US Coast Guard list." Adding to the confusion is the fact that Clean Water Act (CWA) hazardous substances that are not oils or mixed with oils are not subject to the SPCC requirements. Further, other definitions do not consider products that are soluble in water or that can't be cleaned up via traditional oil equipment. Many facilities are being forced to make overly conservative assumptions, driving up SPCC compliance costs, especially for small businesses. These overly conservative assumptions are undermining EPA's credibility and the credibility of professional engineers and individuals who are attempting to advise the potentially regulated community about compliance. Further, given that facilities must prepare or amend, and then implement, their SPCC Plans by July 1, 2009, many industries and facilities are struggling to meet the deadline but are being constrained since they cannot ascertain whether the products stored or utilized at their facilities are oils. We urge EPA to take immediate action with regard to the definition of "oil" and determination criteria, and announce a policy of enforcement discretion until a new regulatory definition and determination criteria can be developed.

Below we discuss two particularly acute examples of current definitional uncertainty and possible solutions.

Mixtures

The regulation of mixtures under the SPCC rule is at best unclear. An example of a problematic mixture is dairy products which may contain small amounts of animal-derived fats. Recently, EPA Region 5 officials proclaimed that if a mixture contained any amount of fat or oil whatsoever, the mixture must be viewed as being oil under the SPCC rule. While one can see a benefit to the clarity and certainty that such a "one molecule" viewpoint conveys, sadly it opens a proverbial "Pandora's box" by including a never-ending list of substances that do not warrant coverage under the rule. As was pointed out at the May 30 meeting, even fat-free milk contains a small amount of fat and therefore by extension, any container, vat or vessel in excess of 55 gallons would be subject to the rule. Additionally, agricultural crop protection practices regularly use light-viscosity oils for pest management and these oils, even when diluted in water, could make the entire spray system come under the SPCC rule. This could cause significant confusion and a new burden on America's farmers for no increase in environmental protection.

Substances that are Solid at Ambient Temperatures

Another problem is that EPA maintains that the physical state of a product at room temperature is irrelevant and that the rule applies equally to solids as well as liquids. Examples of products that become solids at ambient temperatures include paraffin wax, asphalt cement, hot-mix asphalt, certain resins, and various animal fats. It is indisputable that these products would not flow very far from a heated storage container if a spill were to occur.

As an example, paraffin wax is both chemically and physically much different than other petroleum or oil products regulated under 40 CFR 112. It is a highly crystalline structured chemical made up of a mixture of hydrocarbon molecules, and when fully refined, the oil content is reduced to less than 1 percent. Paraffin wax meets the Food and Drug Administration's Generally Recognized as Safe (GRAS) criteria and is used as a food additive and in packaging materials for direct contact

with foods. The wax is solid at temperatures less than 120 degrees F (49 degrees C), and is heated to a liquid state for application. If spilled, the wax quickly solidifies and does not have a direct toxic or physically harmful effect on fish, wildlife, or their food supply. Further, it is deemed safe for contact with human food and poses no contamination threat to water bodies. There is simply no reason to regulate paraffin wax under the SPCC rules.

Again, paraffin wax is just one of numerous examples of substances that become solids in ambient temperatures that should be exempted from the SPCC rule because these do not pose a reasonable expectation of risk to U.S. waters.

Proposed Interim Approach

The combination of EPA's unclear treatment of mixtures and its inclusion of solids extends the potential application of the SPCC rule to the vast majority of food products and to many other non-food products that exist in the United States. Although EPA regional guidance is inconsistent and variable, most reasonable people at EPA and elsewhere seem to agree that products that do not act like oils in terms of solubility, toxicity, buoyancy or other physical properties, especially mixtures containing small amounts of fat or oil, should not be considered oils, or subject to the rule.

We are hopeful that EPA will finalize its October 15, 2007, proposal to exempt hot-mix asphalt from the SPCC rule applicability as proposed. We are further hopeful that EPA will extend that exemption to other products like paraffin wax, asphalt cement, certain resins, and various animal fats. This extension could be based on the unique "self-containing" characteristics of all these materials and the low risk of a spill reaching navigable waters. In the event of a spill or leak, these materials would quickly harden at outside air temperatures and would not flow beyond the immediate vicinity of the tank or holding silo. A simultaneous rain event would only accelerate the solidification process. There is also no threat of these materials contaminating ground water.

We are aware that EPA has expressed some interest in formulating a logical approach by which a substance of concern would be evaluated on the basis of a variety of chemical, physical, or other properties for a determination of whether the substance should be regulated as an oil under the SPCC rule. We are also aware that EPA is cognizant of the problem of mixtures under the SPCC rule, but that the Agency has determined that it must first tackle the question of "what is oil" before it can figure out how to treat mixtures that contain oil. We recognize and applaud EPA's logical approach, but are very concerned that the looming 2009 compliance deadlines, if the issue is not addressed, will create enormous problems for industry as well as EPA.

To provide EPA with the much-needed time to effectuate a solution without harming the rule, the environment or industry, we suggest that EPA issue enforcement guidance to its regional offices until the definition of oil is resolved instructing them to exercise enforcement discretion which stays or exempts from the SPCC requirements:

- 1) mixtures that contain 33 percent or less oil (or fat);
- 2) mixtures that contain CWA hazardous substances if the product is soluble in water and traditional oil cleanup equipment cannot be used,
- 3) substances that are solid at ambient temperatures, and
- 4) substances not listed on the U.S. Coast Guard "List of Petroleum and Non-Petroleum Oils."

We would very much like to work with EPA to develop uniform guidance criteria for mixtures and substances that are solids at ambient temperatures. Once approved, EPA should post the criteria on its website for use by industry, facilities owners and professional engineers.

On behalf of all the associations listed below that are signing onto this letter, we thank you for your consideration of our request and we look forward to your prompt response.

Sincerely,



David F. Darling, P.E.,
Director, Environmental Affairs
National Paint & Coatings Association

Agricultural Retailers Association
American Farm Bureau Federation
American Feed Industry Association
American Forest & Paper Association
American Meat Institute
American Trucking Associations
Associated General Contractors of America
Association of American Railroads
Corn Refiners Association
Flavor and Extract Manufacturers Association
Institute of Shortening and Edible Oils
International Dairy Foods Association
National Asphalt Pavement Association
National Automobile Dealers Association
National Cotton Council of America
National Council of Farmer Cooperatives
National Grain and Feed Association
National Institute of Oilseed Products
National Oilseed Processors Association
National Paint & Coatings Association
National Renderers Association
South East Dairy Farmers Association
Specialty Graphic Imaging Association
Synthetic Organic Chemical Manufacturers Association
The National Cotton Ginners Association
Western United Dairymen