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December 1, 2011

U.S. Department of Homeland Security
National Protection and Programs Directorate
Infrastructure Security Compliance Division (NPPD/ISCD)
245 Murray Lane SW, Mail Stop 0610
Arlington, VA 20598-0601

RE: Comments on the Notice of Proposed Rulemaking to Establish an “Ammonium Nitrate Security Program” (Docket No. 2008-0076)

Dear Sir or Madam:

On behalf of the more than two million farmers and ranchers who belong to at least one farmer cooperative, the National Council of Farmer Cooperatives (NCFC) submits the following comments in response to the Notice of Proposed Rulemaking (NPRM) by the U.S. Department of Homeland Security (DHS), entitled the “Ammonium Nitrate Security Program.” 76 Fed. Reg. 46,908-57.

Since 1929, NCFC has been the voice of America's farmer cooperatives. Our members are regional and national farmer cooperatives, which are in turn composed of over 2,500 local farmer cooperatives across the country. NCFC members also include 26 state and regional councils of cooperatives. NCFC is unique in Washington as the only national organization devoted solely to promoting, protecting and advancing the interests of farmer cooperatives and their owner-members.

NCFC values farmer ownership and control in the production and distribution chain; the economic viability of farmers and the businesses they own; stewardship of natural resources; and vibrant rural communities. We have an extremely diverse membership. Our members span the country, supply nearly any agricultural input imaginable (including AN fertilizer), provide credit and related financial services, and process and market a wide range of commodities and value added products. Earnings from these activities are returned to their farmer members on a patronage basis, helping to improve their income from the marketplace.

America's farmer cooperatives also generate benefits that strengthen our national economy. They provide jobs for nearly 250,000 Americans with a combined payroll over \$8 billion. Many of these jobs are in rural areas where employment opportunities are often limited.

Before addressing the various aspects of the NPRM, we feel it is important to explain the nature and structure of farmer cooperatives. This basic knowledge of farmer cooperatives could have been provided as part of a consultation process to assist DHS with development of the NPRM but we were not afforded such opportunity. Nonetheless, we appreciate the opportunity now through the public comment process

to provide context to DHS as to how the terms used and subsequent requirements contained in this rulemaking could dramatically impact farmer cooperatives and their producer owners.

The Structure of Farmer Cooperatives

Farmer cooperatives are an essential part of the agricultural economy because, acting independently, individual farmers are too small and too numerous to deal effectively with larger agribusinesses in the supply, processing, and marketing sectors of agriculture. Like today, these problems were prevalent in the late 19th and early 20th centuries, when American farmers first joined forces to form cooperative associations.

Cooperatives can be categorized in a number of ways, including by geographic, governance, functions, financial and other arrangements. Given the subject matter of this rulemaking, it is not necessary to describe the structure of financial cooperatives but the other four types are described below.

Geography

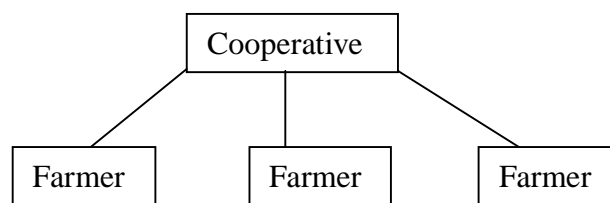
The territory served by a farmer cooperative can range from local to super local, regional, interregional or national, and even international

- Local cooperatives operate in a relatively small geographic area, typically within a radius of 10 to 30 miles.
- Super local cooperatives operate over two or more counties, with several branch facilities.
- Regional cooperatives typically serve a number of counties, an entire state or a number of states.
- Interregional or national cooperatives are organized, owned, and controlled by regional cooperatives, usually to provide specific services.
- International cooperatives operate on an international basis, with headquarters in the United States.

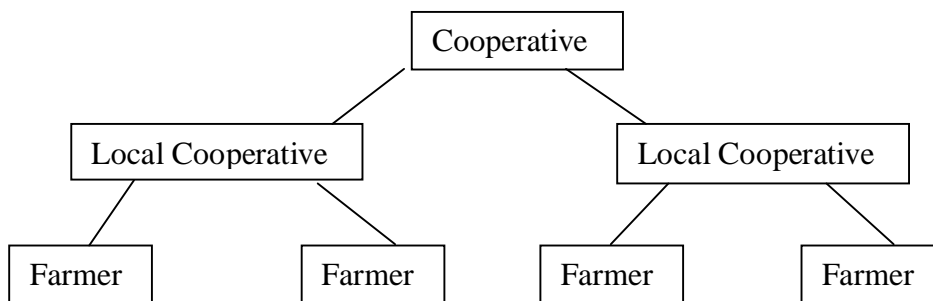
Governance

Based on governance or membership structure, cooperatives can be classified as centralized, federated or mixed. The figures below depict these different cooperative structures, with lines of ownership.

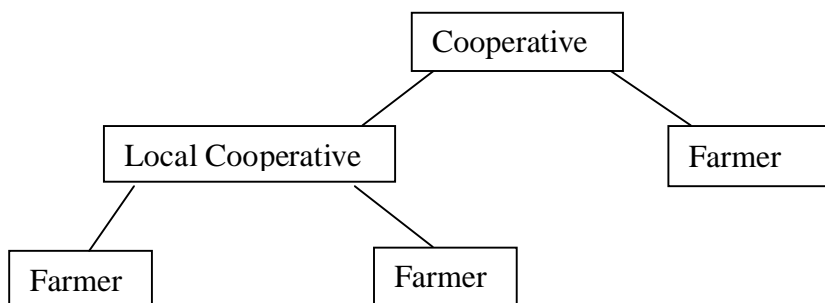
- A local cooperative is ***centralized*** with individual farmer-members as owners. A centralized regional cooperative might serve members in a large geographical area, such as a state or all or parts of several states. A centralized regional cooperative has one central office, one board of farmer directors and a manager who supervises the entire operation, which may be conducted through many branch offices.



- A **federated** cooperative is a cooperative of cooperatives. The members of a federated cooperative are local cooperatives operated by managers hired by and responsible to local boards of farmer directors. Each local association in a federated cooperative is a separate business entity that owns a membership share entitling it to voting rights in the decisions of the regional. The federated cooperative has its own hired management and staff, and a board of farmer directors elected by and representing the local associations.



- A **mixed** cooperative is a combination of the two, having individual farmers and local cooperatives as members.



Functions

Cooperatives may perform one or more functions for their member owners, including: marketing products, purchasing supplies, and providing services. Within the context of this rulemaking, the functions performed by supply and service cooperatives are most relevant.

For more than one hundred years, farmers have joined forces forming cooperatives to purchase and sell farm production supplies such as feed, fuel, fertilizer and seed. In 2010, for example, farm supply cooperatives had fertilizer sales of \$11.1 billion according to the U.S. Department of Agriculture (USDA).

To reduce production costs for their farmer members through quantity purchasing, manufacturing and distributing dependable supplies of quality products, farmer cooperatives employ warehouses to handle farm chemicals and fertilizers, animal health products, fencing, building supplies, automotive accessories, and other products. These warehouse facilities are often leased by the cooperative. In other cases,

cooperatives affiliate with other cooperatives, often through regional and interregional cooperatives, in an effort to reduce farmer costs and strengthen the purchasing power through ownership of large-scale facilities such as phosphate, potash, and nitrogen manufacturing plants, petroleum refineries, feed mills and so on.

Distribution of farm supplies to farmer members at the local level often requires added services. Agricultural service cooperatives provide services related to the production and marketing of farm commodities (e.g. recommending and applying fertilizer, lime or pesticides) as well as more general services (e.g. providing credit or other business functions).

Other Structural Arrangements

Cooperatives also may have wholly- or partially-owned subsidiaries; have controlling interest in a holding company; or enter into joint ventures or partnerships with other cooperatives or private enterprises.

Comments on the NPRM

Nitrogen fertilizer is a key input required for the bountiful yields achieved by U. S. farmers. In particular, AN is used as fertilizer on specialty crops and pastureland grown in warmer climates. Ammonium nitrate can be lawfully used as a component of explosives in many industries. Unfortunately, AN is also used as a component of illegal explosives, including in the 1995 bombing of the Murrah Federal Building in Oklahoma City as well as several overseas terrorist attacks on U.S. targets.

Farmer cooperatives take very seriously their role in ensuring the safety and security of our homeland, including the secure handling of AN. NCFC worked with Congress and industry partners during the development and passage of Fiscal Year 2008 Homeland Security Appropriations Act (P.L. 110-161), which included Section 536 “Secure Handling of Ammonium Nitrate” establishing a new Subtitle J of the Homeland Security Act of 2002 (6 U.S.C. 488) to “regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility....to prevent the misappropriation or use of AN in an act of terrorism.” The agriculture sector was specifically identified in Subtitle J because AN is a critical source of nitrogen in fertilizers due to agronomic, environmental and economic traits that other nitrogen fertilizers do not possess. The Act also tasked DHS “to ensure that the access of agricultural producers to [AN] is not unduly burdened.”

To achieve both the goal of preventing misappropriation or misuse of AN while ensuring the agriculture community maintains access to this critical farm input, several adjustments are needed before a final rule implementing this new security program is promulgated. Without refinement and further clarification, members of the regulated community will be unable to discern the obligations, prohibitions, and protections created under this new rulemaking.

Additionally, NCFC encourages DHS to re-evaluate the NPRM with respect to the existing federal laws designed to secure AN during domestic storage and transportation to ensure that this rulemaking is consistent but not duplicative. For example, DHS claims it made “an attempt to harmonize” the AN security program with existing laws. However, the thresholds for exemptions under the NPRM (i.e. 30 percent AN or less by weight; or 25 pounds or less of an otherwise-regulated AN product) bear no resemblance to the thresholds in other regulatory programs that currently control the flow of AN in the

marketplace. Having multiple standards based on varying thresholds will only result in confusion. DHS must align this program with existing laws and regulations regarding AN.

Several members of NCFC are also members of The Fertilizer Institute (TFI) and we endorse the comments TFI provided to DHS in response to this rulemaking. In particular, TFI's analysis of the rulemaking with respect to potential costs incurred by the agriculture sector strongly suggests that DHS should refine the Program. Additionally, TFI provides compelling arguments on the need to clarify what substances will be defined as a "mixture" or "blend" under the new security program.

Lack of a Consultation Process

During previous regulatory actions, DHS sought consultation on matters impacting the agriculture community. As DHS developed the Chemical Facility Anti-Terrorism Standards (CFATS), for example, NCFC and many other agriculture groups were engaged in a productive dialogue to find common ground on the need for, and design of, regulations governing chemical security. In fact, NCFC participated in a two-day conference held by DHS May 14-15, 2008, to discuss the unique nature of agriculture in the context of CFATS development and implementation. During this dialogue, NCFC highlighted support for public and private efforts to preserve agriculture's use of the fertilizers, pesticides, disinfectants, fuels and other inputs relied on to provide a safe, affordable and stable domestic supply of food, fiber and energy.

It is unfortunate that such dialogue has been non-existent in recent years, especially leading up to the release of this NPRM. As noted above, farmer cooperatives sold more than \$11 billion of fertilizer in 2010, making them a stakeholder in this discussion. Despite statements to Congress in 2010 that it hosted "conversations with industry" and held "listening sessions with numerous industry associations," to date, NCFC has not been directly contacted by DHS to participate in consultation separate from ordinary public comment process. We can find no record of what transpired at these sessions reportedly held in 2009 and 2010, who participated, or even a press release announcing the sessions to stakeholders. Some of NCFC members participated in "listening sessions" held this fall after the NPRM was published, but the stated goal of those sessions was to provide an overview of the NRPM and inform the public how comments can be submitted. This does not constitute consultation.

Consultation involves a specific process that utilizes bilateral discussions with stakeholders identified by the authorizing statute. Subtitle J Homeland Security Act specifically provides that DHS "shall consult...appropriate private sector entities, to ensure that the access of agriculture producers to AN is not unduly burdened." This duty includes both a procedural component – conducting consultation beyond the general public notice-and-comment process – and a substantive component – ensuring no "undue burden" is imposed on agricultural AN transactions. Many of the adjustments needed in the proposed rule (e.g. defining "ownership" or clarification of "mixtures" and "blends") could have been dispensed with during a proper consultation process.

To rectify the lack of consultation, NCFC strongly recommends that DHS formally announce and initiate consultation with appropriate private sector entities to refine the proposed rule. As a start, NCFC participates in an ad hoc coalition of national and regional agricultural associations to engage on chemical security issues. The Agriculture Chemical Security Working Group would be an appropriate venue for DHS to initiate outreach with the agriculture community. NCFC stands ready to help facilitate such a dialogue to avoid future pitfalls with this or other regulatory actions impacting the agriculture community.

Facility and Seller Registration

Like other businesses in our economy, farmer cooperatives range in size from organizations with only a few member-owners to massive and complex organizations with thousands of member-owners. The NPRM would require owners and operators of AN facilities (including facilities that provide AN application services) to register with DHS.

As noted above, farmer cooperatives are owned by their farmer-members. Requiring facility “owners” to register could result in hundreds or even thousands of farmers required to register simply because they are member-owners of a farm supply cooperative. To avoid this paperwork nightmare, we encourage DHS to include a statement regarding the unique nature of farmer cooperatives, and clarifying that, under this rule, they are treated like other corporations or entities. DHS should make clear that the individual farmer-owners of the cooperative are not subject to the same registration requirements and legal liabilities as the cooperative.

We also encourage DHS to define ownership in the context of leased facilities. It is unclear whether a landlord would be required to register as an AN facility and appoint its own facility representative, or if it could rely on its commercial lessee’s registration(s).

With respect to seller registration, we believe DHS has gone beyond congressional intent by imposing registration requirements on all individuals who contact or handle AN within a facility, or transportation providers who are already subject to existing security programs. In fact, the DHS Authorization Act for Fiscal Year 2012 pending before Congress includes a provision to clarify the number of facility personnel required to register under the program in Subtitle J. NCFC supports this legislative effort.

NCFC’s members are concerned that they would have to register large numbers of individuals in their organizations to attempt to comply with the broad, vague definitions currently proffered for the program, including personnel who:

- Market product or “perform” sales but do not physically transfer possession of the product to other persons;
- Process orders and thereby appear “on paper” to transfer possession of AN;
- Load AN into vehicles or trains, thereby transferring physical possession of the product event though they are not involved with the sale transactions;
- Acknowledge transfers (e.g. information technology or accounting staff who track transfers) without actually engaging in such transactions; and
- Transport and apply AN to a purchasers’ property, the latter of which would be specifically exempted under the program.

Prior to transfer, DHS requires an AN facility representative, seller, or other registrant to provide details of the transfer by phone or a web portal “to be developed” by DHS. DHS would then review the details of the transferor and transferee of AN associated with the transaction (whether or not the transaction is a “sale” or simply a transfer of possession among registrants). Those individuals “may not transfer [AN] unless and until” DHS makes a determination regarding that information, and then “authorize[s] the sale or transfer” over the phone or through the yet to be developed web portal. That coupled with the DHS

statement requiring “all commercial and non-commercial transfers of AN will be subject to the verification process (e.g. for movement of AN between locations owned by the exact same cooperative, or from one registrant to another), will result in a breakdown of the normal movement of AN within the fertilizer industry before it reaches the end-user.

At a minimum, NCFC recommends DHS more carefully define the scope of the terms “sale” and “transfer” within the program, and narrow the scope of those required to register (e.g. “AN Sellers” versus “AN Facility Representatives”) so that it is clear who actually must register on behalf of a particular facility and how movement of AN should be recorded. For example, DHS could create a system where a supervisor is registered and can sign-off on load quantity and purchaser authorization but the actual loader operator, accountant, cashier/clerk, etc. would not have to be registered.

The process and requirements for reporting product loss is disjointed and confusing. We encourage DHS to align reporting requirements with Subtitle J, Section 899E, which imposes the onus of reporting on “any person...who has knowledge of the theft or unexplained loss,” rather than on all of his/her colleagues who have no such knowledge. Imputing the same, simultaneous knowledge to all registrants at a particular AN facility is impractical. DHS should also define such terms as “unexplained loss,” and account for the fact that some AN fertilizer products “shrink” by a variable percentage while in transit.

Additionally, DHS should narrow the recordkeeping requirements to cover only information that is directly related to potential misuse of AN by suspect actors. NCFC opposes the requirement of compiling inherently sensitive production, inventory, sales, and other records in an electronic file, and sending this sensitive information to DHS via email.

Purchaser Registration

NCFC strongly agrees that purchasers should not include farmers who merely obtain application services. However, DHS should further clarify when a farmer must undergo the verification process. The NPRM is unclear as to whether or not verification is required each time a farmer purchases or transfers AN. DHS should create an efficient mechanism to allow verifications on a periodic basis for frequent purchasers. In addition, DHS should clarify a process by which a third party or employee of a registered farmer can take possession of the product if authorized to do so. Finally, there is no requirement for AN purchasers to report loss of product. This could be a potential security loop-hole that might negate reasons for doing the security program in first place.

NCFC also is concerned with the turnaround time needed to approve or deny an applicant based on the name-based background check. As the law states, DHS, to the extent possible, is to issue or deny an application within 72 hours of receipt of a completed application and act to resolve appeals within 72 hours. DHS should reduce the waiting time for obtaining an AN registration to 24, if feasible. Due to a number of circumstances, including the unpredictability of the weather, farmers often have a tight window to apply AN. If an AN application is delayed too long, farmers will lose the ability to make production decisions in a timely manner.

In closing, NCFC encourages DHS to allow adequate time for the agriculture community to implement any new AN security program. Furthermore, compliance can be achieved by partnering with the agriculture community to improve outreach efforts. NCFC appreciates the opportunity to comment on

this important program intended to further protect the homeland. We look forward to working with DHS to further homeland security.

Sincerely,

A handwritten signature in black ink, appearing to read "C. F. Conner". The signature is fluid and cursive, with a long horizontal stroke at the end.

Charles F. Conner
President & CEO