

P.O. Box 1326
Bloomington, IL 61702-1326
Telephone: (309) 827-2774
Fax: (309) 827-2779

**Testimony of the Illinois Fertilizer & Chemical Association before the U.S. Senate
Environment & Public Works Committee
June 28, 2006**

Dear Mr. Chairman and Members of the Committee:

My name is Jean Payne. I am here today on behalf of the Illinois Fertilizer & Chemical Association (IFCA). IFCA represents and assists the retail agrichemical dealers, who in turn provide agricultural inputs and application services to the farmers of Illinois. We have over 1000 members, 700 of which are ag retail locations in Illinois. Agriculture is the largest industry in our state.

Illinois is a state where regulations governing the storage, handling and application of agrichemicals are extensive, more so than in many other states. IFCA supports the majority of these regulations, in fact our Association drafted and secured passage of many of these laws to improve the stewardship of the crop input industry. Our regulatory agencies in Illinois actively enforce these regulations and we work closely with them and with our members to ensure that our industry complies with over 70 different federal and state environmental, health, safety and transportation regulations that affect agrichemical dealers.

Our interaction with USEPA Region 5 over the years has been fairly cooperative, even though we do not work with them on a daily basis. That's because the majority of the federal environmental regulations are handed to the state agencies to enforce, and we do work daily with state agencies in a very open and fair manner. But I am here to share with you a troubling situation that our industry now finds itself in with Region 5 USEPA. Our members are suddenly on the receiving end of an enforcement policy that is not justified in opinion, was not applied uniformly, was not well communicated and does not treat industry in a fair or equitable manner.

The RMP Regulation and Illinois Ammonia Facilities

In 1998, USEPA promulgated the Clean Air Act Risk Management Plan regulations that affect agricultural retailers who store anhydrous ammonia as nitrogen fertilizer. The rule requires our facilities to document the management and safety of their ammonia systems and to calculate the worst case scenario for the surrounding community if a catastrophic release occurs. To give you an idea of the scope of the agricultural ammonia industry, Illinois fertilizer dealers take delivery of, store and apply an average of 500,000 tons of this nitrogen fertilizer each year. Since 1999, when the RMP regulation went into effect, we have safely handled and applied over 4.2 million tons of anhydrous ammonia with not a single catastrophic release attributed to non-compliance with the RMP regulations. Many Illinois corn and wheat growers prefer this form of nitrogen because it can be directly injected into the root zone and it is the most economical form of nitrogen. Our industry is very proud of our safety record.

Prior to the compliance date for this regulation, IFCA hosted training sessions throughout the state to help our members prepare their RMP. We utilized materials provided by The Fertilizer Institute and Asmark, Inc., a regulatory compliance company who specializes in ag retail regulations. Back in 1998 when this regulation was promulgated, the only guidance from USEPA was provided mostly on their website. It was somewhat helpful but keep in mind that eight years ago, the majority of our ag retailers did not have access to the Internet due to their rural location. The only training classes on the RMP regulation sponsored by Region 5 were classes to help people determine IF the regulation affected them. At the time

Region 5 offered these sessions, the RMP submit computer program was not yet available and so many of our members did not attend but relied instead on more specific guidance from TFI, Asmark and IFCA. Our industry already knew that this would affect our ammonia facilities and so this EPA session would have done little to help us prepare to comply with this very complex regulation. In our opinion, there was no specific, hands-on USEPA outreach or training program enacted by Region 5 for our industry and our state EPA was not commissioned by Region 5 to act as the state enforcement agency for this rule either. We really were on our own.

In January 1999, IFCA conducted a RMP training session at our IFCA convention, which was attended by several hundred ag retail managers. Since then, we have conducted additional courses, almost yearly as part of our annual ammonia safety training, to review the requirements of this rule and assist our members with compliance. Again, we had little guidance to go from, only the federal regulation itself which is not easy to interpret and apply in a practical manner. In addition to attending IFCA training classes, many of our members utilized the compliance services of the Asmark Institute to fulfill the requirements of the RMP.

With help from industry groups like TFI and IFCA along with organizations like the Asmark Institute, our members filed their RMPs and re-filed them again in 2004 as is required by the rule. During the entire time this regulation has been in effect, we have periodically reminded our dealers of their RMP obligations such as the three year compliance audit and the need to update the plans if changes are made at the facility. During all this time, we heard nothing from Region 5 indicating that we were not keeping up with our compliance obligations.

Region 5 & Illinois Dept of Ag RMP Pilot Program

It was four years after the effective date of this regulation when Region 5 first expressed an interest in the RMP program as it relates to agricultural anhydrous ammonia. Region 5 approached the Illinois Department of Agriculture in 2003 with a pilot program in which USEPA would essentially hire the State of Illinois Dept of Ag inspectors to check 500 ammonia facilities for compliance with the RMP rule. Immediately, the IL Dept of Ag contacted me to attend to a meeting with them and Region 5 to discuss this pilot program. Had the Dept of Ag not informed me of this meeting, I would not have known of it as Region 5 did not reach out to IFCA. But this was the first communication our industry had with Region 5 on this program since its enactment in 1999, and so IFCA welcomed their involvement because we often wondered when or how compliance would be assessed given that no state agency had been given oversight of this regulation.

It was important to the Illinois Dept of Ag that IFCA support this pilot program. In the meeting with IDA and Region 5, EPA staff told us that the Dept of Ag inspectors would utilize a RMP compliance checklist during their inspections. We had the opportunity to review the checklist and we submitted comments on the phrasing of several of the questions. Region 5 staff informed us that they would use the checklists to review the facilities' overall compliance with the RMP and if areas of weakness were discovered, it would allow the Agency and industry to target specific training to improve these areas. We took them at their word and with that being the premise of the pilot program, IFCA supported Region 5 utilizing the services of our state Dept of Ag to assess compliance with the RMP. After all, we had a lot invested in the RMP program and we too wanted to know how our members were doing and what areas may need to be improved. We were also comfortable with the Dept of Ag inspectors because they interact frequently and professionally with our dealers and with IFCA.

We informed our members of this inspection program and urged them to work cooperatively with the inspectors. We viewed this program as way to establish a closer relationship with USEPA on RMP compliance issues. Two years went by and the inspections proceeded. Per EPA instructions the inspection reports were not provided to the fertilizer dealers but we had no reason to worry, we thought. There were no ammonia incidents or blatant violations of the RMP that we knew of or were told about.

Signs of Trouble

IFCA RMP Workshop

In January 2005, at the IFCA convention which is attended by over 1800 people in our industry, IFCA with the cooperation of the IL Dept of Ag conducted yet another RMP compliance workshop. Approximately 150 fertilizer dealers attended this training class. The purpose of the workshop was to once again review the RMP requirements and help answer questions about compliance.

A few days after the IFCA convention, Region 5 staff person Silvia Palomo called me. She was upset that IFCA and the Dept of Ag had offered this program at our convention. She said we had no business informing the facilities of the RMP requirements and that I should have sought approval from Region 5 to offer this class. She also told me that only USEPA personnel were qualified to teach RMP compliance and no one else. I was actually being scolded for helping our members comply with a complex regulation...something we had already been doing for seven years with no help from Region 5. I found out later that Ms. Palomo had also called Jim Larkin, head of the fertilizer bureau at the IL Dept of Ag, with the same message. Jim and I were in disbelief. After listening to Ms. Palomo's scolding, I politely told her thanks for calling but in my opinion industry had every right to help our members with compliance since that is one of IFCA's mission statements. Honestly, I think she was upset because she didn't want our members to learn more about the regulation while the inspections were going on. I believe now that enforcement was Region 5's objective all along and not outreach and education as they had indicated to us. This was the first sign of trouble.

Inspections End, Enforcement Begins

In July of 2005, the Dept of Ag told us that they were finished inspecting the facilities. We heard nothing from Region 5. At the request of the Asmark Institute, I worked to set up a meeting with Mr. Mark Horwitz and Silvia Palomo at Region 5 to discuss Asmark's concerns with an Expedited Settlement Agreement (ESA) that an agrichemical facility in Michigan had received from Region 5 for alleged RMP violations. Asmark was very troubled by the ESA because this facility was their client and no one other client in the country who had utilized the Asmark RMP compliance tools had been issued any kind of monetary penalty for non-compliance.

It was while we were discussing our concerns with the Michigan ESA that Region 5 staff changed the subject and informed me and Allen Summers of Asmark that in their opinion, over 90% of the 500 Illinois ammonia facilities inspected were also in violation of the RMP rules, would be formally cited for violations of the federal Clean Air Act, would be fined a minimum of \$500 per facility and be required to attend a EPA training course. It was inferred to me that the Agency was treating the Illinois facilities kindly because they can fine the facilities substantially more or issue ESA's as was done in the Michigan case.

I have never been more shocked in my professional life. We have had no ammonia releases in Illinois attributed to non-compliance with RMP regulations. Our ammonia facilities have an enviable safety record considering the hundreds of thousands of tons of ammonia fertilizer that is stored and applied yearly in Illinois. After six years of getting no help whatsoever from USEPA on compliance with this rule, we thought we would be working with USEPA to identify areas of uncertainty in RMP compliance and work to improve them; we were stunned to learn that the Agency intended to go straight to enforcement and that our fertilizer dealers would all be on record of being in violation of the federal Clean Air Act.

While a \$500 penalty may not seem like much to some, it is substantial to many fertilizer dealers who in many cases are family-owned small businesses. To get a letter from USEPA that states you are in violation of federal law with penalties up to \$32,500 per day if you do not comply with the Agency's directives is frightening to our members, especially when they all felt that their RMP inspections had actually gone quite well. I immediately sent a letter to Mark Horwitz, to the Acting Director of Region 5

and to USEPA headquarters outlining our concerns with this enforcement approach and asking them not to proceed down this track. This was on July 26, 2005.

Receiving no immediate reply to my letter, for the remainder of the summer of 2005 I continued to urge USEPA to sit down with our industry to review the alleged violations so that we could understand what our members had done so wrong prior to the violation letters going out. I probably called them or emailed them on almost a weekly basis requesting this meeting. Finally, in September 2005 Mark Horwitz called me to tell me that they had decided not to issue the \$500 per facility penalties, but that they would require our members to attend a mandatory training class as well as enter into a Consent Agreement Final Order (CAFO). I thanked him for dropping the monetary penalties but again requested a meeting to discuss the alleged violations and the CAFO process. Finally, on November 30, 2005 Region 5 staff agreed to meet with IFCA and several other industry representatives who represent the vast majority of ammonia facilities in Illinois. This is now four months after the July meeting in which we learned of the enforcement initiative.

At the November 30, 2005 meeting, Region 5 personnel did review the alleged violations with us. While we did not agree with the majority of their reasoning for the violations which were by far mostly paperwork discrepancies, we still felt it was a very worthwhile meeting. At the meeting Region 5 agreed to offer one of their mandatory training classes at the IFCA convention in January 2006. They also agreed to let our industry submit sample RMP compliance forms that they could use as training tools and they expressed an interest in allowing us to review their training program to offer constructive suggestions on how it might be presented so that most fertilizer dealers would understand the content. Region 5 told us that the letters to our members would be phrased in a non-threatening manner and would cite "deficiencies" instead of the word "violation." We were told that the letters were in the mailroom already, and would be going out in a few days. I immediately prepared our members to receive these letters and assured them that IFCA would be working closely with them to help them respond to the "deficiencies." In early December 2005, IFCA printed and mailed out 1,500 IFCA convention programs to our members and in the program we listed the USEPA RMP Training Session to be held on January 23, 2006 during the convention. Our members began registering to attend this training session.

Hamson Ag Receives First Letter

When no letters had yet been received by our members by the end of the second week in December, I called Region 5 to inquire about the status. My phone calls were not returned. On December 19, 2005 I received a call from Ronnie Hamson at Hamson Ag in Dahlgren, Illinois. Dahlgren is a small community in deep Southern Illinois. Ronnie is the definition of a small business as he runs the fertilizer plant with his wife and a handful of employees. He had shut down the facility the week prior to Christmas so that they could use the company shop to help some members of their community frame up the walls for an addition to their church. When he picked up his mail that day, he was shocked. In it was a letter from USEPA and it was not non-threatening. Instead, it stated that he had "violated" provisions of the RMP, would be required to enter into a Consent Agreement and had to respond within 10 days as to which training class he would attend. If he did not reply to the Agency within 10 days (that would be by December 26, 2005) he would be subject to \$32,500 per day penalties and possible criminal penalties or imprisonment. Ronnie said to me "*Jean, what have I done wrong? I thought my Dept of Ag inspection went fine. I have never received a letter from USEPA in all my years at this plant. Am I going to jail?*" He was sick at heart and I was sick for him. Again, this was less than 10 days before Christmas.

Ronnie's inspection was performed on December 7, 2004 so it was over a year before he received any indication that he was not in full compliance with the RMP, and yet he had only 10 days during the Christmas holidays to respond or face monetary penalties that would put him out of business. If this is not bad enough, the RMP class that EPA committed to teach at the IFCA convention was NOT listed on the letter. Ronnie asked me why the IFCA class was not an option on the letter, because I had told our members, based on EPA's verbal commitment on November 30, that it would be. I had no answer for Ronnie but told him I could contact Region 5 immediately. His was not the only phone call we received

at IFCA. Our phones began to ring in earnest and the concerns expressed by the dealers were as serious as Ronnie's and worse. I wondered how things could have gone so wrong after the positive meeting we had with Region 5 on November 30. In sending out these letters, they did not uphold any of the commitments they made to us at that meeting nor did they extend IFCA the courtesy of informing us ahead of time that they would not be good to their word.

For nearly all of our dealers, this was the first violation letter they had ever received from USEPA and they are not used to the legal language and stern wording in the letters. They were stunned, upset, angry and confused. From the tone of the letter you would think our entire industry was on the brink of catastrophic and on-going ammonia releases. I was very worried that some of our members wouldn't pick up their mail until after Christmas and would miss the 10 day turn-around and be fined or worse. If nothing else, where was the common sense on behalf of the Agency?

Immediately, that day on December 19, 2005 I called Mark Horwitz at Region 5 to talk to him about these letters, why they were being sent right before Christmas, to express concern about their enforcement tone and ask why they did not list the IFCA training class as one of the choices. I got his voice mail stating he would be out of the office until January. I then reached out to Tom Skinner, the Administrator of Region 5, by email literally begging him to have his staff stop sending the letters until after Christmas and until after we could address the missing IFCA training class. Thankfully, he had the Deputy Director call me back the next day and we got a temporary reprieve. After a few more phone calls with Region 5 staff the IFCA training class was added to the list of classes and USEPA had to re-send the letters after Christmas with the IFCA class offered as an option for training.

Keep in mind that our members would also have to enter into Consent Agreements within 90 days, something which troubled me greatly. I felt, as did others in our industry, that we had legal grounds to challenge the CAFO requirement if nothing else. Region 5 informed me that CAFOs were "the least onerous tool in their enforcement toolbox" and that was the best they could do. But I still felt it was not justified. However, with our small budget IFCA does not have the resources to hire an attorney to take on the federal government. Our members also do not have these resources. IFCA is a three-person Association and the majority of our members are small businesses. As such, it is difficult if not impossible to defend our industry against the government in a court of law without bankrupting ourselves. Therefore, we rely on our good name and our solid reputation to try to work things out and that is exactly what I did, working often with Tom Skinner and Deputy Director Bharat Mathur to try to come to some kind of reasonable resolution to this issue. I have great respect for these two gentlemen and in my conversations with them, I always felt that they did understand our concerns. Unfortunately, so much damage had been done by the time they intervened that the perception of USEPA by our members was that of a renegade Agency out to shut down their businesses. In one short year, we went from a cooperative industry/Agency effort to a complete meltdown of trust and unfortunately a lack of belief by our members in the USEPA's ability to ever treat them fairly. It will be hard to undue the damage and you can sense the on-going frustration of our members in the statements they have submitted for the committee record.

The Alleged Violations

If all this were not bad enough, the violations cited by USEPA and listed in the letters were based on the Agency's interpretation of the state Dept of Ag reports. The majority of the violations were procedural or paperwork discrepancies at best; at worst, and in many cases, the violations did not match up with the findings of the Dept of Ag inspection report. Copies of the inspection reports were not provided to our members, only a letter listing their violations. Our members who utilized the compliance services of Asmark were cited as well, even though other USEPA regions have reviewed the Asmark RMP model and found it fully meets the requirements of the RMP rule. But in Illinois, Region 5 found it deficient. Where is the consistency in that? I honestly don't believe any of our facilities could have met the expectations of the staff in Region 5; the violations cited were vague and in many cases completely incorrect. I also feel that the Illinois Dept of Ag was not kept informed of how their reports were

interpreted or utilized. The good name and reputation of Illinois Dept of Agriculture and its inspectors have also been tarnished by the way Region 5 managed this pilot program. But what happened was not the fault of the Department of Agriculture nor does our industry blame them for the unfortunate role they played in what was supposed to be a cooperative program.

Being found out of compliance with a federal regulation is one thing, but being singled out for enforcement is quite another. Region 5 did not contract with the Department of Ag in any other state to conduct inspections. Ammonia facilities in the other Region 5 states of Wisconsin, Minnesota, Indiana, Michigan and Ohio were not, and have not, been subject to whole-sale inspection or enforcement in this manner by Region 5. In Ohio, the state EPA administers the RMP compliance programs, and in Ohio similar types of RMP deficiencies were treated like this: The manager got a simple and unthreatening letter asking him to work to improve a certain part of the RMP; the Ohio EPA would then follow-up to check his progress. This is a fair, respectable and cooperative approach that works well.

But because the Illinois dealers and IFCA cooperated with USEPA and supported this pilot RMP inspection program in Illinois, we were threatened with monetary penalties, received violation notices, and our dealers would be required to submit to a Consent Agreement Final Order and be on record as being in violation of the Clean Air Act. This is how our facilities who filed their RMPs were treated, while the Agency, in my opinion, made no real effort to locate and inspect facilities in Illinois that DID NOT file an RMP...they only ordered inspections for facilities that did their best to comply with this regulation because they know who they were, thus making them easy to inspect and easy to target for enforcement.

Congress Intervenes

Word of what was going on in Illinois made its way through our industry. Many of my counterparts and fertilizer dealers in other states observed what was happening in Illinois with a sense of shock as well as a sense of relief that it wasn't them. I felt at the time I had done all I could do as a representative of the industry to work with USEPA on a reasonable approach for compliance. We had, after all, talked them out of the \$500 per facility penalties, but certainly many issues remained including the CAFOs.

In late December 2005, I became aware that Senator James Inhofe had made an inquiry into the issue of Region 5 enforcement of the RMP and the impact on the Illinois fertilizer dealers. I believe it was due to the intervention of Senator Inhofe and his staff that Region 5 reconsidered the CAFO provision and withdrew this regulatory enforcement requirement. Instead, they provided our ammonia facility managers with a "Certificate of Compliance" that requires them to certify, under threat of perjury, that to the best of their reasonable knowledge and belief, they are in compliance with all provisions of the RMP. While this Certificate is a less threatening enforcement requirement than a CAFO, many of our members still have concerns with signing the Certificates of Compliance because they still do not fully understand the violations they were cited for nor do they completely understand what Region 5 expects them to do to fully satisfy the requirements of the RMP. Again, it goes back to lack of education, outreach and communication with industry.

I have to share with you, after months of feeling run over by the USEPA it was very uplifting to know that there was someone in Washington D.C. who did care about the agricultural industry and the small business person. I have no doubt that without Chairman Inhofe's inquiry into our situation, the Illinois fertilizer dealers would have been forced into the CAFO process and had a permanent blot on their otherwise clean compliance records for handling anhydrous ammonia.

Is the End in Sight?

In March 2006 IFCA requested that Region 5 extend the compliance date for our members to complete and return their Certificate of Compliance. We made this request because otherwise, the requirement falls right in line with the spring planting and post-emerge spraying season which is the busiest six months for

our industry. Given the fact that this RMP pilot program has been going on now for 3+ years, extending the compliance date to December 31, 2006 was reasonable in our opinion. Region 5 instead extended it to July 1, 2006 which has still caused stress for our members in that the spray season is still going strong.

Summary

Over time, with substantial effort on our part and by making direct and constant appeals for nearly a year to Region 5 staff and management and with the intervention of Katherine English, we were able to avoid monetary penalties and consent agreements. All the while, our Association, The Fertilizer Institute and the Asmark Institute have worked diligently to further improve RMP compliance tools for our industry. No doubt many ammonia dealers in the country will benefit from this unfortunate situation in Illinois and will also utilize our improved compliance tools, but the fact remains that Illinois fertilizer facility managers are still dealing with the vague instructions given by Region 5 personnel and are spending days revising their RMPs to try to address violations that in most cases never existed in the first place.

Our Illinois dealers will always be on record in Region 5 as not meeting the standards of the RMP...when in fact Illinois dealers are in fact among the most responsive in the country to the mandates of this and other regulations. At times I blame myself for being so open to this pilot program; had IFCA opposed this process our Dept of Ag would likely have refused to participate and our ammonia facility managers would be going safely about their business as are others in the country instead of worrying about \$32,500 per day possibilities. Situations like this certainly erode trust in the regulatory process. That is perhaps the MOST unfortunate outcome of this event.

The greatest flaw in USEPA's enforcement program, I believe, is that it is not uniform, and in many cases the Agency personnel are not familiar with the industry they are trying to regulate. The RMP is not the only example, there are other examples I can provide including USEPA filing criminal charges against an Illinois pesticide applicator for a spray drift incident. This is the first time that we know of that USEPA has filed criminal charges against an ag retailer and its employees for a pesticide application event. The federal judge in the Southern Illinois District recently dismissed this case in its entirety but only after our member spent a quarter of a million dollars defending their employees from criminal prosecution in a case that should never have been filed by USEPA in the first place. For nearly a year, two hard-working certified pesticide applicators at Wabash Valley Service Company spent sleepless nights worried about going to federal prison and wondering how they would support their families. While all of this was going on with the RMP, it was doubly disconcerting to learn of the Wabash Valley case. It has not been a good year in Illinois with regard to industry and USEPA enforcement initiatives in our state.

Some agency staff seem to be trained only to respond with enforcement and penalties while industry is begging for outreach, for cooperation, and for clear guidance. It is not clear to me USEPA headquarters is fully aware of what is going on until industry is forced to go to the top to try to secure fair treatment. Going to the top is not something we like to do. We prefer to work with staff and the Regions because they are the ones we have the most communication with on many issues. I will say that when we managed to get the attention of the Region 5 Administrator and Deputy Administrator, they were responsive and easy to talk to. I have great respect for Tom Skinner and Bharat Mathur as I have known and worked with both of them for many years, back to the days when they were at the Illinois EPA. But at the point when they got involved, so many poor decisions had already been made and executed by their staff that it was difficult even for them to stop the train of miscommunication and enforcement because the damage had already been done.

When people outright ignore or violate a regulation or cause injury or harm, enforcement is justified and we support its swift application. In our case, we did our best to comply with a complex regulation, we welcomed USEPA's pilot inspection program and the Illinois fertilizer dealers got severely penalized for our efforts.

We want the industry to be responsive to government, but we want government to be responsive as well. Among all levels of federal government it seems that USEPA Regions are notoriously independent and can initiate enforcement for alleged violations that other Regions do not consider violations at all. Industry asks only for the government to communicate with us in a sensible manner, and to give us the benefit of the doubt, particularly when our safety record warrants that respect. We do know what we are doing despite the complexity of the regulations issued by the Agency.

Thank you for this opportunity today.

Sincerely,

The Illinois Fertilizer & Chemical Association

A handwritten signature in black ink that reads "Jean Payne". The signature is written in a cursive style with a large, looping initial "J" and a distinct "P".

Jean Payne
President