

August 23, 2018

U.S. Environmental Protection Agency
Attention: Docket ID No. EPA-HQ-OEM-2015-0725
Mr. James Belke and Ms. Kathy Franklin
Office of Land and Emergency Management
1200 Pennsylvania Avenue, NW (Mail Code 5104A)
Washington, DC 20460
Via Electronic Submission: <http://regulations.gov>

The National Association of Chemical Distributors (NACD) is pleased to submit the following comments in response to the U.S. Environmental Protection Agency's (EPA) Proposed Rule, **Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Docket ID No. EPA-HQ-OEM-2015-0725, 83 Fed. Reg. 24,850 (May 30, 2018)**.

About NACD

NACD is an international association of nearly 450 chemical distributors and their supply-chain partners. NACD members represent more than 85 percent of the chemical distribution capacity in the nation and generate 93 percent of the industry's gross revenue. NACD members, operating in all 50 states through more than 2,800 facilities, are responsible for nearly 130,000 direct and indirect jobs in the United States. NACD members are predominantly small regional businesses, many of which are family owned and multi-generational. The typical chemical distributor has 26 employees and operates under an extremely low margin.

NACD members meet the highest standards in safety and performance through mandatory participation in NACD Responsible Distribution®, the association's third-party-verified environmental, health, safety, and security program. Through Responsible Distribution, NACD members demonstrate their commitment to continuous improvement in every phase of chemical storage, handling, transportation, and disposal operations.

Owners and operators of NACD member companies have a personal stake in the safety and security of their employees, companies, and communities. They demonstrate this through their commitment to Responsible Distribution, relationships with employees, involvement in local communities, including participation in Local Emergency Planning Committees (LEPCs), and careful compliance with numerous environmental, safety, and security regulations at the federal, state, and local levels.

NACD shares EPA's goals of preventing chemical accidents and improving preparedness and supports the approach the agency has outlined in the May 30, 2018, proposed rule.

NACD Supports EPA's Proposals to Rescind the Accident Prevention and Most of the Information Sharing Provisions in the January 13, 2017, Risk Management Program Amendments Final Rule

The original 1996 RMP regulations are comprehensive, robust, and proven effective in preventing chemical accidents. Based on EPA's own data, the number of accidents at RMP facilities has substantially decreased since the original 1996 rules took effect. In the May 30, 2018, proposed rule, EPA itself states, "The agency acknowledges that the continual decrease in accidental releases under the existing RMP rule is evidence that the existing rule is working and that additional costs may not justify the additional [2017 RMP Final Rule] requirements."¹

NACD agrees with EPA's assessment in the May 30, 2018, proposed rule that the potential benefits of the new requirements in the 2017 rule may not justify the costs. EPA states in the proposed rule, "EPA is now placing greater weight on the uncertainty of the accident reduction benefits than we had when we promulgated the RMP Amendments, especially in contrast to the extensive record on the costs of the rule."²

EPA developed the 2017 Risk Management Program (RMP) Amendments Final Rule in response to President Obama's Executive Order 13650, *Improving Facility Safety and Security*, issued in the wake of the West, Texas fertilizer facility explosion. The rule imposes many onerous new requirements on RMP-regulated facilities that would not have prevented the West catastrophe had they been in place at the time of the incident. NACD was active in the RMP rulemaking process, participating in a Small Business Regulatory Fairness Enforcement Act panel, speaking at an EPA public hearing, meeting with the Office of Management and Budget, and filing written comments to EPA. Despite this input from NACD and many other organizations representing regulated industries, EPA included several unnecessary and burdensome elements in the final rule while providing no evidence these measures would reduce the frequency of accidents.

It was not a lack of regulation but rather a lack of awareness, effort, and coordination that contributed to the West tragedy. NACD strongly believes the top priority of EPA should not be expansion of regulations such as RMP for those already in compliance, but rather a dedicated effort to make sure all chemical facilities are aware of and have a full understanding of their safety and security regulatory obligations. Adding new complex requirements such as those included in the 2017 RMP final rule is not the solution and would only create more regulatory confusion. A more effective approach to expanding regulatory requirements for EPA would be a commitment to outreach, compliance assistance, and enforcement of the original robust regulations. Increased use of Tier II reports, expanded training of fire inspectors, and better interagency coordination would also make a positive impact and would be a better use of resources.

NACD Comments on Specific Elements of the Proposed Rule

Incident Investigation and Root Cause Analysis for Catastrophic Releases and Near-Misses

The 2017 final rule requires all facilities with RMP Program 2 or 3 processes to conduct a root cause analysis as part of an incident investigation of a catastrophic release or an incident that

¹ *Federal Register*, Vol. 83, No. 104, May 30, 2018, page 24871

² *Ibid.*

could have reasonably resulted in a catastrophic release (i.e., a near-miss). In addition to including near-misses, the rule also expands the definition of catastrophic release to include on-site impacts already covered by the Occupational Safety and Health Administration's (OSHA) Process Safety Management (PSM) standard.

NACD strongly supports EPA's proposal to rescind the new incident investigation and root cause analysis requirements and expanded definition of catastrophic release. While NACD supports the concept of root cause analyses, these may not be appropriate for every incident and near-miss. This obligation would be particularly burdensome for the owners and operators of small businesses, such as the typical NACD member, who would need to hire experts to conduct the root cause analysis or to be trained on the methodologies. It is not feasible or practical to conduct a true root cause analysis on every near-miss. In addition, the root cause analysis and near-miss concepts in the 2017 rule are too broad and allow for far too much subjectivity in enforcement.

The expansion of the definition of catastrophic release in the 2017 final rule is unnecessary and duplicative of requirements under the OSHA PSM standard. The overall scope of the RMP is off-site consequence, including public impact and environmental harm and prevention measures to address these areas. EPA's new definition of catastrophic release deliberately expands the scope into OSHA's PSM responsibilities of worker impact and prevention of incidents within a facility's fence line. The expanded definition will lead to differences of opinion between the two federal agencies, which will cause confusion in regulatory interpretations and guidance as well as inspections.

The rescission of these provisions will result in more certainty for RMP-regulated facilities, including NACD members. Safety is enhanced when subjectivity is minimized and members of the regulated community have clarity on standards and agency expectations.

Third-Party Audits

The 2017 final rule requires RMP Program 2 and 3 facilities to contract with an independent third party, or assemble an audit team led by an independent third party, to perform a compliance audit after the facility has an RMP-reportable accident, when the government believes conditions at the facility could lead to a release, or when a previous third-party audit failed to meet the specified competency or independence criteria. The rule includes stringent requirements for third-party auditor competency and independence and establishes responsibilities for audit reports and findings.

NACD strongly supports EPA's proposal to rescind the new third-party audit requirement. This mandate is unnecessary and seems based on the assumption internal auditors may be biased or lenient. There is no guarantee a third-party auditor will be more effective than an internal auditor in discovering issues needing attention. To be effective, an auditor must be both knowledgeable about a facility's operations and available to conduct the audit, which will be extremely difficult under the 2017 rule's stringent competency and independence criteria. An additional concern is that in order to be able to continue to work with companies on a wide variety of facility and process safety issues, regulatory and otherwise, some auditing firms may choose not to conduct these particular RMP audits, which will further limit availability.

NACD strongly supports EPA's current proposal to drop the third-party audit requirement entirely and continue to provide facility operators the ability to select the audit method most

suited to their individual operations, whether internal or using third-party firms. In cases where EPA believes a third-party audit is warranted, the agency already has the ability to require a facility to conduct a third-party audit as a corrective action under an enforcement settlement.

Safer Technology and Alternatives Analysis

The 2017 rule requires RMP Program 3 facilities in NAICS codes 322, 324, and 325 to conduct Safer Technology and Alternatives Analyses (STAAs) as part of their process hazard analyses (PHAs). These STAAs would include analyses of potential safer technologies and alternatives and a determination of feasibility of implementation of any inherently safer technologies (ISTs).

Although a limited number of NACD member facilities are in NAICS code 325, and most are in NAICS Code 4246 and would not be subject to the STAA requirements, NACD strongly supports EPA's proposal to rescind these new STAA requirements. NACD opposes the concept of regulatory IST consideration and implementation mandates. Because each facility is unique, IST consideration and implementation should not be mandated by the government. Such a statutory requirement would result in enforcement subjectivity and would raise severe liability issues for facilities.

PHAs, which themselves are highly labor and resource intensive, are sufficiently rigorous in identifying hazards for facilities to address. It is not practical to require a facility to conduct an IST analysis as part of a PHA. A PHA is conducted on a defined process with defined chemicals. It cannot be done on a process that does not exist. To consider a substitute, a facility operator would need to design the new process before being able to conduct the analysis. This would be an expensive and time-consuming endeavor. For most facilities, an IST analysis would likely produce limited options that would not justify the cost and effort of the exercise itself.

In its 1996 RMP rulemaking, EPA came to the same conclusion about an IST analysis mandate. In the *Federal Register* notice of the final RMP rule, the agency stated, "EPA does not believe that a requirement that sources conduct searches or analyses of alternative processing technologies for new or existing processes will produce additional benefits beyond those accruing to the rule already."³ NACD agrees with EPA that the application of good PHA techniques often reveals opportunities for continuous improvement of existing processes and operations without a separate analysis of alternatives and that IST analysis will not produce additional benefits beyond those accruing to the rule already.

NACD commends EPA for proposing to rescind the STAA mandates in the 2017 rule.

Information Availability

The 2017 rule requires RMP-regulated facilities to provide certain information to the public, upon request, including names of regulated substances, safety data sheets, accident history, emergency response program information, lists of scheduled exercises, and LEPC contact information. The rule further requires facilities to provide ongoing notification of availability of this information on their company websites, social media platforms, or other publicly

³ *Federal Register*, Vol. 61, No. 120, July 20, 1996, page 31699

accessible means. The rule also requires all facilities to hold a public meeting for the local community within 90 days of an RMP-reportable accident.

NACD supports EPA's proposal to rescind most of the 2017 rule's public information availability provisions, particularly regarding specific chemical hazard information. Limiting the amount of information shared and methods of sharing as EPA is now proposing would still allow those who truly need the information to obtain it while also addressing security concerns. NACD members will continue to work with their local responders and LEPCs to ensure they have the information they need to be prepared for an incident.

EPA proposes to retain the requirement for facilities to hold a public meeting within 90 days of a reportable incident. NACD questions the benefit and practicality of a public meeting requirement. Public meetings such as this divert attention from important incident investigation activities and have a history of sparse attendance. As an alternative to a public meeting, EPA could require the facility to schedule a meeting with the LEPC/emergency responder community within 90 days of the incident or to place it on the agenda for the next scheduled LEPC event.

Emergency Response Coordination

The 2017 rule requires facilities to coordinate response needs at least annually with local emergency planning and response organizations and to document these activities. The rule also requires facilities to provide emergency response plans, emergency action plans, updated emergency contact information, and any other information relevant to their local emergency planning and response organizations. Facilities are also required to request to meet with the LEPC (or equivalent) and/or local fire department as appropriate to review and discuss these materials.

EPA is proposing to retain most of the emergency response coordination provisions. The most significant change is to replace other "relevant" information with "other information necessary for developing and implementing the local emergency response plan" and to incorporate appropriate information protection provisions.

NACD members support emergency response coordination and understand the importance of these activities. In fact, under Responsible Distribution, NACD members are required to coordinate with local emergency responders by making them aware of the potential hazards of the chemicals they have on-site, conducting plant tours, and coordinating emergency response plans.

NACD supports EPA's proposed clarifications. Flexibility and recognition of good faith efforts are key. NACD continues to have concerns about situations in which facilities attempt to coordinate with local response organizations but are unable to engage these groups despite concentrated attempts. Many LEPCs are comprised of volunteers with limited hazardous materials expertise. Other public local response organizations have severe budget and resource constraints, which prevents them from being receptive or responsive to coordination attempts from facilities. The most important issues for NACD members are information protection and a recognition of good faith efforts by a facility to coordinate with local officials. EPA recognizes both items in the proposed rule.

Emergency Response Exercises

The 2017 rule requires RMP Program 2 and 3 facilities to perform annual exercises to test their emergency response notification mechanisms. The rule also requires responding facilities to conduct tabletop exercises involving simulated releases every three years and field exercises every ten years. The rule also includes prescriptive recordkeeping requirements for these activities.

EPA proposes to retain the annual emergency notification exercises. The agency proposes to eliminate the minimum frequency for field exercises and the prescriptive elements to be included in exercise reports.

NACD supports and understands the importance of maintaining the annual emergency notification requirements. NACD also supports EPA's effort to provide more flexibility on the emergency response exercises.

NACD strongly supports the concept of emergency response exercises. Again, flexibility rather than strict regulatory mandates is key as many local emergency response providers have limited resources and are not always available to devote the manpower and resources to conduct exercises with facilities. Every community is different; and while this may be achievable in some areas, others simply do not have the resources. Public response organizations have numerous demands, and this is only increasing today with the need for additional exercises such as active-shooter and bomb drills in their communities, particularly schools.

Conclusion

NACD appreciates the opportunity to provide these comments, and we commend EPA for proposing to rescind the elements of the 2017 final rule that are burdensome and of questionable benefit. For example, the STAA mandate is not cost-effective and would not produce a commensurate benefit, as EPA itself recognized in 1996.

Enhancing emergency response coordination as EPA is proposing along with outreach, compliance assistance, and enforcement of the RMP regulations are the most effective and cost-effective ways to improve safety and prevent future chemical accidents.

If you have questions or require additional information, please do not hesitate to contact me.

Sincerely,



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