

May 13, 2016

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

Re: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Proposed Rule, Docket ID No. EPA-HQ-OEM-2015-0725, 81 Fed. Reg. 13,638 (Mar. 14, 2016)

The National Association of Chemical Distributors (NACD) submits the following comments in response to the proposed rule published by the U.S. Environmental Protection Agency (EPA) in the March 14, 2016, *Federal Register* issue regarding **Docket Number EPA-HQ-OEM-2016-0725, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act.**

About NACD

NACD is an international association of nearly 440 chemical distributors and supply-chain partners. NACD's membership comprises businesses representing in total more than 85% of the chemical distribution capacity in the nation and generating 90% of the industry's gross revenue. NACD members, operating in all 50 states through nearly 1,800 facilities, are responsible for more than 155,000 direct and indirect jobs in the United States. NACD members are predominantly small regional businesses, many of which are multi-generational and family owned. 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 (EHS&S) program, which celebrates its 25th anniversary this year. Through Responsible Distribution, NACD members demonstrate their commitment to continuous improvement in every phase of handling, transportation, storage, and disposal of chemical products.

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 the 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, transportation, safety, and security regulations at the federal, state, and local levels.

While NACD shares EPA's goals of preventing chemical accidents and improving preparedness, the association has concerns about several of the proposed changes to the Risk Management Program (RMP) regulations as outlined below.

Prevention Program - Incident Investigation and Accident History Requirements

EPA proposes to expand the definition of catastrophic release from one “that presents imminent and substantial endangerment to public health and the environment” to “impacts that resulted in deaths, injuries, or significant property damage on-site, or known off-site deaths, injuries, evacuations, sheltering in place, property damage, or environmental damage.”

NACD believes this expansion of the definition of catastrophic release is unnecessary and duplicative of requirements under the Occupational Safety and Health Administration’s (OSHA) Process Safety Management (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 proposed 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. This will result in additional uncertainty for regulated facilities, which will hinder rather than enhance safety.

EPA further proposes to require facilities under RMP Program 2 and Program 3 to determine and identify the contributing factors, including immediate and contributory causes, either direct or indirect, and root causes for all incidents that resulted in, or could reasonably have resulted in, a catastrophic release. EPA proposes to define “root cause” as “a fundamental, underlying, system-related reason why an incident occurred that identifies a correctable failure(s) in management systems.”

NACD is concerned this proposal is far too broad. While we support the concept of root cause analyses, these may not be appropriate for every incident and near miss. This 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 term *near miss incident* is difficult to define across the board at a national level. A near miss at one location may not be considered a near miss at another location because of differing operations and processes. Without a clear definition of *near miss*, the determination would be left to each individual inspector, which would result in confusion and inconsistent enforcement, which would be further exacerbated by overlap between EPA and OSHA under the proposed expanded definition of catastrophic release. Without a definition of near miss, facility owners and operators are left in a position of not knowing the basis for EPA enforcement actions if they do not conduct an investigation and root cause analysis on a near miss but the agency deems an analysis should have been conducted. Further, it is inappropriate for EPA to attempt to create a standard that requires compliance based upon an undefined term.

That being said, attempting to write a clear definition of *near miss* would be next to impossible because the concept is so dependent on any individual facility’s processes and mitigation procedures as well as the specific situation at a given facility.

EPA itself stated in the proposed rule preamble, “The intent is not to include every minor incident or leak, but focus on serious incidents that could have resulted in a catastrophic release, *although EPA acknowledges this will require subjective judgment* [emphasis added].”

NACD recommends EPA lessen the impact of this dilemma by maintaining the 1996 definition of catastrophic release and by limiting the root cause analysis requirement to actual incidents rather than both incidents and near misses. Safety is enhanced when subjectivity is minimized and members of the regulated community have clarity on standards and agency expectations.

Prevention Program - Third-Party Compliance Audits

EPA proposes to require all RMP Program 2 and 3 facilities to conduct an independent third-party audit following an accident or inspector findings of significant noncompliance. The third party must not be associated with the regulated facility or parent company. In addition, the auditor must meet stringent criteria, including being a licensed Professional Engineer (PE).

NACD questions whether the third-party auditor requirement is necessary. This condition 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 order 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 EPA’s proposed stringent criteria.

EPA proposes that third-party auditors be knowledgeable with the RMP accident prevention requirements, be experienced with the facility type and processes being audited, be trained or certified in proper auditing techniques, and be a licensed PE or include a licensed PE on the audit team. EPA’s proposal that auditors must be licensed PEs is unprecedented and will severely limit the number of individuals who are eligible to perform audits as well as exponentially increase the costs. It will be difficult for companies to find auditors who are experienced with RMP, their particular facility type (such as a chemical distribution operation), and proper auditing techniques while also being a PE. Having a PE license does not make an individual qualified to perform RMP audits, nor does it provide the credentials or ethics needed to conduct these RMP audits. In many cases, a chemist, chemical engineer, or Certified Hazardous Materials Manager® could be better qualified.

EPA’s proposed independence and impartiality requirements for auditors exacerbate the problem created by the PE requirement. It is of utmost importance for an auditor to have a thorough knowledge of a facility’s processes, and this expertise helps to enhance safety. By prohibiting third-parties who have done prior work at particular facilities on RMP, OSHA PSM, or other programs, EPA is forcing regulated facilities to hire firms that are not inherently familiar with all processes and systems at the facilities and as such will require substantial retraining. It is difficult now to find well-qualified third-party auditors. The costs of training new auditors on the unique aspects of all regulated facilities would be substantial, which would further limit the availability of these auditors and drive up costs for regulated facilities.

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, there is a strong possibility some auditing firms may choose not to conduct these particular RMP audits, which will further limit availability.

EPA is also proposing that RMP owners and operators be fully responsible for determining and documenting the competency, independence, and impartiality of the third-party auditors. This is unnecessary and introduces yet another opportunity for the agency to take enforcement actions against facility owners and operators, not for actions that had a negative impact on safety, but for paperwork violations. The proposed independence criteria, which limit a company's ability to evaluate thoroughly an auditor's expertise first-hand, further complicate the situation. An auditor may have a glowing resume on paper, but that does not mean they are truly well-qualified. It is overkill for EPA to establish such unrealistic criteria for auditors and further place full responsibility on facility owners and operators to find, vet, and document the qualifications of these auditors.

Regarding third-party audit reports, EPA seeks comment on whether the agency should require draft audit reports to be submitted to the implementing agency at the same time, or before, such reports are provided to facility owners and operators and whether such a requirement would be further effective in minimizing potential third-party compliance audit bias.

This is a misguided proposal. Facility owners and operators should have the opportunity to review audits in advance of them being submitted. Errors are common, and the draft stage is where these errors should be resolved. In addition, if a facility contracts with a third-party auditor, that agreement is between the facility and the auditor. No outside agency or entity should be privy to draft data. Under no circumstances should any document other than a final report be required.

EPA also proposes that the audit report and related records cannot be claimed as attorney-client communications or as attorney work products even if the auditors are themselves, or are managed by or report to, attorneys.

NACD is strongly opposed to this proposal. NACD members will not, under any circumstances, waive any rights they may have in the future to attorney-client privilege. Further, EPA does not have the authority to ask companies to do so. Any legal entity, whether an individual or a business, is and must continue to be afforded due process under our system of law. This proposal treads on constitutional rights. NACD urges EPA to remove it.

NACD recommends EPA drop the third-party audit proposal in its entirety 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. In addition, EPA is the overall responsible federal agency for RMP. If the agency has a concern at a site based on an incident or inspection, EPA should have the leadership role in auditing the site as the RMP charged with RMP implementation responsibilities.

Prevention Program - Safer Technology and Alternatives Analysis

EPA proposes to require 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).

NACD strongly opposes the concept of regulatory IST consideration and implementation mandates. In addition to being highly labor and resource intensive, PHAs are sufficiently rigorous in identifying hazards for facilities to address. For most facilities, an IST analysis would likely produce limited options that would not justify the cost and effort of the exercise itself.

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.

Adding an IST consideration requirement would not only be costly and unnecessary, but would also raise severe liability issues for facilities. If this analysis is in the PHA, the facility would need to describe why it chose not to implement a particular IST. *Feasibility* is unique to every situation. In any court case arising from an incident, plaintiffs could easily accuse the facility owner/operator of failing to implement ISTs they as the plaintiffs perceive to be feasible but the facility owner/operator determined were not feasible.

To protect against this liability exposure, some facility owners may feel compelled to implement considered ISTs, which raises other concerns. Chemical companies maintain specific inventories of products in order to respond to the needs of their customers. If facilities are pressured to take measures to protect themselves from liability exposure such as reducing inventories of certain products, this would prevent these companies from effectively addressing their customers' needs. It could also lead to increased transportation activities, which would increase the likelihood of loading, unloading, or in-transit incidents.

EPA's proposed feasibility definition exacerbates these problems by failing to include consideration of costs and benefits and by failing to take the entire supply chain into account. For example, downstream users may not even be able to receive an alternative product.

In the 1996 RMP rulemaking, EPA came to some of these same conclusions 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."¹ 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 also notes EPA has not provided sufficient evidence to explain why the agency is reconsidering the 1996 determination that IST analysis was unlikely to produce additional benefits.

NACD urges EPA to withdraw the Safer Technology Alternatives Analysis mandate from the proposed rule.

Emergency Response Preparedness - Response Program Coordination with Local Responders
EPA proposes to require facilities to coordinate annually with the LEPCs/emergency responders and to ensure response capabilities exist. EPA further proposes to require these

¹ *Federal Register*, Vol. 61, No. 120, July 20, 1996, page 31699

facilities to document coordination and allow LEPCs/responders to request that the facility prepare an emergency response program.

NACD agrees facilities can and should discuss response capabilities with LEPCs/emergency responders. In areas where an active LEPC does not exist, it is important for facilities to be allowed to seek alternative means for response, including contractors and mutual aid agreements. Many NACD member companies contract directly with competent for-profit emergency response contractors in their local communities because of the lack of resources in the public sector.

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 local response organizations have severe budget and other resource constraints, which prevents them from being receptive or responsive to coordination attempts from facilities.

NACD asks EPA to recognize “good faith” efforts, including documentation of attempts to coordinate with local officials as acceptable for compliance. There is EPA precedent for this. The hazardous waste generator emergency preparedness regulations², implemented in 1980, state that an owner or operator must attempt to make arrangements with local responders and must document any inability to complete these arrangements. The responder resource challenges in 1980 continue today, and it is more important than ever for EPA to recognize good faith efforts.

Emergency Response Preparedness - Facility Exercises

In addition to strengthening the local coordination requirement, EPA proposes to require Program 2 and Program 3 facilities to perform annually an exercise of their emergency notification system to include contacting the federal, tribal, state, and local public emergency response authorities and other external responders that would respond to accidental releases at the source.

EPA further proposes to require the owner or operator to conduct an emergency response field exercise involving the simulated accidental release of a regulated substance at least once every five years and within one year of any accidental release. In addition, EPA proposes to require the owner or operator to conduct annually an emergency tabletop exercise involving the simulated accidental release of a regulated substance, except during years when field exercises are conducted. Both of these exercises have substantial lists of proposed elements.

NACD supports the concept of emergency response exercises. 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. Our concern again about regulatory mandates in this area is that many local emergency response providers have limited resources and are not always available to devote the manpower and resources to exercises with facilities. Every community is different; and while this may be achievable in some areas,

² 40CFR §265.37 Arrangements with local authorities

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.

A member company of NACD provided an excellent example of the challenge. The company conducts annual drills. At the company's five facilities subject to the RMP regulations, the local responders are always invited. These responders are able to attend only about once every five years; and when they do, only a few come to observe and then tour the facility. This is the case for both major metropolitan and rural areas. The company continues to invite both fire and police personnel to tour their facilities as another option due to lack of response on the drills. Industry cannot compel the local authorities to be involved in the process, so the regulatory burden should not be placed on industry.

Therefore, for the above reasons, NACD commends EPA for requiring facilities to invite local response organizations to participate and for stating that actual participation in exercises by local responders is not required for a facility to comply with the exercise provisions.

An additional concern is that, depending on the facility's size, requiring a field exercise simply is not practical in some cases. If a site only has one or two people and if the local responders elect NOT to participate, there is no way to conduct the field exercise.

Regarding the tabletop exercises, while these are worthwhile, NACD believes the requirement to conduct these annually will place an undue burden on the regulated community. The scope of the exercises and after-action reporting are extensive; therefore, NACD recommends EPA provide additional flexibility to facilities in conducting these types of exercises in order to recognize the resource constraints of both facilities and local communities.

The main focus in this area should be coordination. This may include periodic exercises, such as full scale drills, tabletop exercises, or other methods to help ensure local response officials and organizations are familiar with facility operations and can ensure their preparedness. Flexibility is key.

Information Availability Requirements

EPA proposes to increase substantially the amount of information all RMP-regulated facilities are required to share with LEPCs, emergency responders, and the general public. NACD has concerns about the scope and security risks of this proposal.

First, EPA would require owners and operators of RMP-regulated facilities to develop summaries of specific chemical hazard information for all of their regulated processes and provide this information, upon request, to their LEPCs or local emergency response officials. While NACD agrees LEPCs and local responders need information in order to be prepared for an incident, the volume of information required under the proposal is excessive. It is unclear why the LEPCs would need the level of detail proposed. An LEPC is always free to follow up with a facility to request additional information.

NACD recommends EPA take a more narrowed approach in which a one-page summary of each significant chemical hazard with basic information and recommended firefighting and emergency response measures be provided upon request. The value of even this is questionable. Localities do not have the systems to receive, absorb and utilize the data companies are trying to send to them now. Multiple NACD members have reported that Tier II

reports, which companies are already required to file under the law, have been returned to them by the post office because the reports either could not be delivered to or were refused by the local entities.

EPA further proposes to require owners and operators of RMP-regulated facilities to distribute certain chemical hazard information for all regulated processes to the public in an easily accessible manner. NACD believes adequate information, including RMP executive summaries, is already available to the public. An additional requirement to repackage this information and widely distribute it is unnecessary and raises security concerns. Providing information upon request is a preferred approach as the requester would be able to demonstrate a need to know, for example, as a nearby resident. Conversely, making certain information easily accessible to anyone with a click of a mouse could have the result of giving potential terrorists a roadmap for causing harm.

EPA also proposes to require regulated facilities that have any incident meeting the five-year accident history criteria in the RMP regulations to hold a public meeting within 30 days after the event. While requiring public meetings only after an accident is preferable to requiring that these meetings be held periodically, NACD questions the benefit and practicality of a public meeting requirement.

The proposed deadline to hold a public meeting within 30 days after a reportable accident is unrealistic. So shortly following an accident, a facility may still be investigating the incident and taking recovery measures, leaving limited time and resources to plan and carry out a public meeting. As an alternative to requiring a full public meeting, EPA could require the facility to schedule a meeting with the LEPC/emergency responder 60-90 days following the incident or at the next scheduled LEPC event.

Conclusion

NACD appreciates the opportunity to provide these comments. On behalf of our membership, we urge EPA to move forward on only those proposals that are cost effective and would provide a tangible benefit. For example, the STAA proposal should be dropped as it is neither cost-effective nor would it produce a commensurate benefit, as EPA itself recognized in 1996. In addition, NACD urges EPA to withdraw the third-party audit requirement and scale back the information sharing proposals to avoid security concerns.

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

Sincerely,



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