December 9, 2015

Ms. Laura Free
Regulatory Management Division
Acting Small Business Advocacy Review Chair
Office of Policy
U.S. Environmental Protection Agency

via e-mail: Free.Laura@epa.gov

Dear Ms. Free:

The National Association of Chemical Distributors (NACD) and Allied Universal Corporation (Allied) submit the following comments on the U.S. Environmental Protection Agency (EPA) Risk Management Modernization Rule to the Small Business Advocacy Review Chair. NACD and Allied appreciate the opportunity to participate in the Small Business Advocacy Review (SBAR) Panel process.

About NACD

The National Association of Chemical Distributors 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. 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.

Chemical distributors play a unique and integral role in the supply chain. Manufacturers increasingly rely on chemical distributors to market and sell their products in a variety of packaging sizes to an exceptionally varied customer base. Every seven seconds, an NACD member company moves chemical products to and from their facility. This constant movement of those products results in chemicals being frequently added to and removed from inventory. Unlike the regular changes in inventory, NACD members' safety processes remain the same.

NACD Members' Commitment to Safety

A member-voted condition of membership in NACD is a signed commitment to NACD Responsible Distribution®. Under this robust program, each member must follow 13 Codes of Management Practice in order to protect the environment, promote health and safety of

employees and community members, enhance product stewardship, and ensure the security of its facilities and products. Under each Code, member companies have an active program designed to improve safety continuously and reduce incidents. Each member must develop, implement, and undergo periodic third-party verification of policies and procedures in each of the 13 areas, which include Risk Management, Handling & Storage, Emergency Response & Public Preparedness, Community Outreach, and Product Stewardship.

Owners and managers 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.

About Allied Universal Corporation

Allied Universal Corporation was established in 1954 as a start-up business and has since grown to take its place as the largest bleach and chlorine repackager in the United States. Allied boasts six domestic plants and two foreign facilities enabling the company to service 21 states and 24 Caribbean, South American, and Central American countries. With over 300 specially trained employees and a dedicated fleet of tractors, trailers, and tankers, Allied is committed to providing high quality products and exceptional customer service to the water treatment industry. As a leader in the industry, Allied is an active member of the National Association of Chemical Distributors and The Chlorine Institute, including CHLOREP (the Chlorine Institute's emergency response mutual aid network). Through its participation in the NACD Responsible Distribution® program, Allied strives for excellence in product stewardship, environmental protection, and customer safety and security training.

NACD and Allied are pleased to submit the following comments on the Risk Management Program (RMP) proposals EPA has presented to the SBAR small entity representatives.

Third-Party Compliance Audits

EPA proposes to require all RMP Program 2 and 3 facilities to conduct an independent third-party audit in lieu of a compliance audit following an RMP reportable accident. 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 and Allied question whether the third-party auditor requirement is necessary. This condition seems based on the assumption that internal auditors may be biased or lenient, which is not necessarily the case. There is no guarantee that 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's proposal that auditors must be licensed PEs is unprecedented and will severely limit the number of individuals who are eligible to perform audits. Being a PE does not make an individual qualified to perform an RMP audit, nor does it provide the credentials or ethics needed to perform RMP audits. In many cases, a chemist, chemical engineer, or Certified Hazardous Materials Manager® could be better qualified.

This problem created by the PE requirement is exacerbated by EPA's proposed independence and impartiality requirements for auditors. For example, under EPA's current proposal, a chemical facility in California would be precluded from using an auditor from a national firm if a different auditor from that firm had done work for another one of that company's facilities in Massachusetts within the last three years. Facilities will be placed in the cumbersome position of needing to vet auditing companies carefully to make sure that no one from these firms has any relationship to their companies.

Allied has a specific, real world example. A recently retired state inspector working for a private firm after his 25-year career with the state not only would be eliminated from performing RMP audits, but so would his entire firm. This individual as well as his firm would have strong knowledge of RMP requirements and chemical facility operations. However, Allied would not be able to hire him because he is not a PE, nor would the company be able to hire anyone from his firm due to the previous working relationship. Allied also uses a third-party engineering firm to lead process hazard analysis once every five years. Again, Allied would not be able to hire this small business to perform RMP audits despite their extensive knowledge of Allied's operations and the RMP requirements due to its on-going process analysis relationship and its employees being engineers and chemists, but not PEs.

If EPA elects to pursue the third-party auditor requirement, the agency must provide more flexibility on the criteria for these independent auditors. Without more flexibility on the qualifications and independence criteria, it will be extremely difficult for facilities to find eligible auditors, and they will be exceedingly expensive because of supply and demand.

In addition, NACD and Allied urge EPA to approve third-party auditors. Under such a program, the agency would grant approvals based upon technical and other qualifications. This would provide a list of acceptable auditors for industry to use. There is precedent for this in other federal agencies. For example, the U.S. Department of Transportation approves U.N. Third-Party Certification Agencies or Independent Inspection Agencies.

NACD and Allied recommend that EPA drop the third-party audit proposal 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. The broader requirement EPA is now proposing is not necessary.

<u>Incident Investigation & Root Case Analysis</u>
EPA proposes to require facilities to complete a root cause investigation within 12 months of all RMP reportable incidents and near miss incidents.

NACD and Allied are concerned that 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 small businesses, which would need to be trained in analysis or hire experts to conduct the analyses.

Expanding this to near misses beyond those for catastrophic releases would create an enormous burden for all businesses, with the most substantial impact on small businesses. It is not feasible 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. Without a clear definition of *near miss*, the determination would be left to each individual inspector, which would result in confusion, a lack of certainty, and uneven enforcement.

Safer Alternatives Analysis

EPA proposes to require Program 3 facilities in NAICS codes 322, 324, and 325 to analyze potential safer technologies and alternatives and the feasibility of implementation of any inherently safer technologies (IST) considered as part of their process hazard analyses (PHAs). NACD and Allied strongly oppose the concept of regulatory inherently safer technology 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 a court case arising from an incident, plaintiffs could easily accuse the facility of failing to implement ISTs they perceive to be feasible but the facility determined was not.

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 and Allied agree 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.

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

Local Coordination

EPA proposes to require all Program 2 and 3 facilities to coordinate annually with the LEPCs/emergency responders and ensure response capabilities exist. EPA further proposes to require these facilities to document coordination and allow LEPCs/responders to request that the facility prepare an emergency response program.

NACD and Allied agree that 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.

Emergency Response Exercises

In addition to strengthening the local coordination requirement, EPA proposes to require all Program 2 and 3 facilities to test their emergency response program through notification, tabletop, and/or field exercises and to document these activities.

NACD and Allied support 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. However, we believe EPA's proposal is too prescriptive. Our concern 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, 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.

Allied itself is a good example. 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, it is only by a few to observe and then tour the facility. This is the case for both major metropolitan and rural areas. Allied 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. NACD is concerned about the prospect of members being placed in the position of being in violation of the regulations because the local response authorities simply do not have adequate time and resources to devote to these activities in some communities.

In addition, 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.

Overall, we commend EPA's concept for emergency response exercises. However, the proposal is too prescriptive with requiring field exercise with tabletops in between. As an alternative, EPA could state that exercises such as field drills, tabletops, notifications, etc. should be

conducted annually; and these exercises should be coordinated, as applicable, with local responders and LEPCs, depending on responder/LEPC availability. Flexibility to recognize different situations and responder/LEPC resource constraints is key.

Information Sharing

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 and Allied have concerns about the scope and security risks of this proposal.

LEPCs do not want incident investigation reports, company drill reports, audit data, IST reports, etc. They do not have the resources, labor support, or expertise to handle that volume of information, much less to evaluate the data. This would be data overload for LEPCs with no benefit. LEPCs already have access to facilities' Emergency Planning and Community Right-to-Know Act (EPCRA) Tier II reports and are always welcome to contact any facility for additional information.

In addition, when a facility has a reportable quantity (RQ) event, it is already required by law to send a follow-up incident report to the State Emergency Response Commission (SERC) and LEPC under EPCRA. Therefore, data for RQ incidents flows to the SERCs and LEPCs; and they are able to come back to facilities with additional questions if they have them.

There is also a security concern with sharing this type of information with those who do not have a need to know, particularly now when hacking of sensitive information takes place multiple times each day. In addition, Chemical Facility Anti-Terrorism Standards (CFATS)-regulated sites may be prohibited from supplying this data, which in some cases would be considered counterterrorism-vulnerability information under the CFATS regulations.

EPA's proposal to require facilities to host public meetings is not feasible. When the RMP regulations first took effect in the 1990s, regulated facilities were required to hold public meetings. For many companies, no one attended, so this was a waste of time, money, and effort. In addition, many smaller facilities simply do not have the resources, including meeting rooms, to host the public. They would need to use a local school, hall, hotel, or other venue at added expense and time to locate and coordinate a venue.

For example, Allied hosted eight public meetings, and only one of these was attended by members of the public other than LEPC members. This case was a meeting hosted after an accident that involved an RQ release and offsite shelter in place. On the other hand, no one attended at least half of the meetings. For facilities where the rollout was affiliated with an active LEPC, public responders and LEPC members did attend. Despite advertising and working with the LEPCs, these roll-outs were simply not well received or utilized by the public.

Another NACD member hosted 10 meetings, and only two of these attracted individuals who were not employees of the company. Only one of the company's facilities was large enough to host these meetings, based on the number of attendees who could have attended. The rest had to be held in fire halls, hotels, or other rented spaces, which turned out to be a waste of time and resources with the lack of public attendance.

Another NACD member held several outreach meetings at several sites, and no one attended any of them. The company also manned a booth at a popular local mall, where the county

coordinated an effort to allow companies to set up informational booths. Only two people stopped by the booth; and they were seeking employment, not facility data. This same company serves on a LEPC with another RMP-regulated company that makes popular desert/snack food. Despite promoting that the company would give away free snacks/deserts at their public meeting, only a few individuals attended.

In addition, the proposed deadline to hold a public meeting within 30 days after a reportable accident is unrealistic. 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 or Office of Emergency Management event.

Conclusion

In closing, NACD and Allied appreciate the opportunity to submit comments on these issues through the Small Business Advocacy Review Panel process. On behalf of small chemical facilities, we urge EPA to move forward on only those proposals that are cost effective and would provide a tangible benefit. For example, the IST 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, EPA must provide more flexibility on the third-party audit requirement and scale back the information sharing proposal to focus on LEPCs.

We look forward to providing additional input throughout the rulemaking process.

Thank you for your consideration.

Sincerely,

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