



P.O. Box 7553, Arlington, VA 22207

May 13, 2016

USEPA

Submitted via <http://www.regulations.gov>

Docket ID Number EPA-HQ-OEM-2015-0725

FRL-9940-94-OLEM; RIN 2050-AG82

CKRC Comments on the March 14, 2016, Proposed Rule: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act

Dear Sir/Madam:

The Cement Kiln Recycling Coalition (CKRC) is a national trade association representing cement manufacturers that use hazardous waste and other secondary materials as alternative fuels and raw materials in cement kilns. Our membership also includes companies that collect, process, and manage secondary materials and companies that provide services to the industry. CKRC appreciates this opportunity to comment on EPA's Proposed Rule: *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*, (Docket ID: EPA-HQ-OEM-2015-0725) (81 FR 13638, March 14, 2016).

The following provides comments on selected sections of the Proposed Rule:

1.0 Revisions to Incident Investigation Requirements (40 CFR 68.60 and 68.81)

EPA is proposing to require all facilities with Program 2 and 3 processes to conduct a root cause analysis as part of an incident investigation of a catastrophic release or an incident that could have reasonably resulted in a catastrophic release (i.e., a near-miss).¹ These requirements are to be codified at 40 CFR Parts 68.60 and 68.81. EPA is also proposing to require that incident investigations be performed even if the process involving the regulated substance is destroyed or decommissioned following, or as the result of, the incident. Finally, EPA is requiring that an incident investigation be performed prior to any de-registration of a process or stationary source that is no longer subject to the RMP Rule and that the accident be reported to EPA under the requirements of §68.42.

CKRC generally supports the requirement to conduct a root cause analysis as part of an incident investigation of a catastrophic release or an incident that could have reasonably resulted in a catastrophic release. However, we do not believe that the requirement to perform the incident

¹ 81 FR 13640

investigation “including when the affected process is decommissioned or destroyed following, or as a result of, an incident” is warranted. We also do not believe that the requirement to submit the accident information under §68.42 for such instances is necessary to enhance the RMP program structure or to provide information to the former regulated facility which it can rely on to improve its safety performance.

The performance of an incident investigation on a process that will no longer operate, and the revision of the RMP registration on file with EPA to include the accident, only to immediately withdraw the RMP registration will result in the preparation of paperwork at an undue cost, with little or no benefit to the public or the regulated community.

2.0 Revisions to the Compliance Audit Provisions (40 CFR Parts 68.58, 68.59, 68.79, and 68.80)

2.1 Third Party Compliance Audits:

As detailed in the preamble to the proposed rule, EPA asserts that “in some cases, self-auditing may be insufficient to prevent accidents, determine compliance with the RMP rule’s prevention program requirements, and ensure safe operation.”² Therefore, EPA is proposing to require regulated facilities with Program 2 and 3 processes to contract with an independent third-party to perform a compliance audit under the following circumstances:

- After the facility has a release meeting the criteria in Section 68.42(a) from a covered process, or
- When an implementing agency requires such third party audit as a result of non-compliance with Subparts C or D of Part 68.

EPA is also proposing at §§68.59(b)(1)(i) through (iv) and §§68.80(b)(1)(i) through (iv), certain “qualifications” for “third party auditors.” Specifically, these Sections propose that third party auditors be:

- Knowledgeable with the requirements of part 68;
- Experienced with the facility type and processes being audited and the applicable recognized and generally accepted good engineering practices (RAGAGEP);
- Trained or certified in proper auditing techniques; and
- Be a licensed Professional Engineer (PE), or include a licensed PE on the audit team.

CKRC does not believe that third party audits should be required under the revised RMP regulations. While we believe that there may be circumstances where smaller owner/operators may not have the expertise to perform such compliance audits, larger companies, with more substantial environmental resources and experienced environmental/safety personnel may, in fact, employ personnel that are the most qualified to perform such compliance audits.

² 81 FR 13654

As detailed above, EPA has proposed specific “qualifications” for third party auditors. CKRC does not object to these “qualifications” for personnel involved in performing compliance audits that are triggered by accidents meeting the criteria in Section 68.42(a) or when required by the implementing agency as a result of significant non-compliance.

However, we do believe that internal company personnel who meet these criteria are equally qualified to perform these audits. Site personnel frequently represent personnel that are most familiar with the subject RMP process and its applicability under the RMP regulations. Therefore, CKRC requests that the requirement that compliance audits triggered by the criteria detailed above be performed by “third parties” be removed from the final rule.

In addition, the preamble to the proposed rule indicates that EPA is concerned about facilities with poor compliance histories. CKRC does not believe that the occurrence of a regulated accident is necessarily an indicator of a poor compliance program. Therefore, in the event that EPA believes that third party audits are beneficial, we request that third party audits be required only under the criteria of §§68.58(f)(2) and 68.79(f)(2) (i.e., at the request of the implementing agency due to significant non-compliance), and not simply by the occurrence of an accidental release meeting the criteria in Section 68.42(a).

2.2 *Independence and Impartiality Requirements for Third Part Audits:*

Notwithstanding our position that third party audits are inappropriate, CKRC also has strong objections to the third party audit “Independence and Impartiality Requirements” proposed at 40 CFR Parts 68.58(b)(2) and 68.80(b)(2).

Specifically, these sections require that the auditor/audit team shall:

- “(i) Act impartially when performing all activities under this section;
- (ii) Receive no financial benefit from the outcome of the audit, apart from payment for the auditing services;
- (iii) Not have conducted past research, development, design, construction services, or consulting for the owner or operator within the last 3 years. For purposes of this requirement, consulting does not include performing or participating in third-party audits pursuant to § 68.59 or § 68.80;
- (iv) Not provide other business or consulting services to the owner or operator, including advice or assistance to implement the findings or recommendations in an audit report, for a period of at least 3 years following submission of the final audit report;
- (v) Ensure that all personnel involved in the audit sign and date the conflict of interest statement in § 68.59(c)(1)(v); and
- (vi) Ensure that all personnel involved in the audit do not accept future employment with the owner or operator of the stationary source for a period of at least 3 years following submission of the final audit report. For purposes of this requirement, employment does not include performing or participating in third-party audits pursuant to §§ 68.59 or 68.80.”

EPA appears to be attempting to eliminate potential bias on the part of the third party audit team. CKRC believes that this concern is unfounded, and several of the resulting “independence and impartiality requirements” detailed above are unnecessary to ensure that compliance audits are performed in a professional and unbiased manner. In addition, these “independence and

impartiality requirements” may actually result in less qualified individuals performing the compliance audits for the reasons set forth below.

First, and most importantly, compliance audits under these circumstances are most effectively performed by personnel who are most familiar with the regulated process and the applicable RMP requirements for that process. Many facilities subject to the RMP regulations utilize consulting firms that perform a variety of environmental/safety services for that facility, that industry, and other industries. It is these consultants that are most familiar with the regulated processes and are most capable of performing a thorough and complete audit of the facility’s RMP compliance status.

Secondly, many facilities already utilize third parties to perform compliance audits as required under the existing RMP regulations. We are not aware of any systemic cases of bias or fraudulent audits being performed by third parties so that they may obtain further compensation or work from the regulated community. The proposed regulations already require that the third party be a “licensed Professional Engineer (PE) or include a licensed PE on the audit team.” The purpose of this requirement is to maintain the integrity of the audit process under the ethical and professional standards of the auditor’s PE license. In fact, the first fundamental canon of ethics for a PE is: “Engineers shall hold paramount the safety, health, and welfare of the public.”³ The qualifications detailed in Sections (iii) through (vi) are therefore unwarranted.

Finally, the existing RMP and PSM regulations require extensive qualification and training requirements for new contractors and consultants (see the RMP Program 3 “Contractor” requirements at §68.87 and the OSHA PSM “Contractor” requirements at 29 CFR §1910.119(h)). Additionally, cement companies such as those represented by CKRC are also required to comply with the MSHA contractor training requirements at 30 CFR Part 46. Requiring owner/operators to identify, qualify, and train new consultants in the event a third party audit is required can be burdensome and can incur significant cost to the regulated community.

For these reasons, we do not believe that the third party “Independence and Impartiality” requirements at §§68.58(b)(2)(iii), (iv), (v),(vi) and §§68.80(b)(2)(iii), (iv), (v),(vi) are necessary or warranted and we request that they be removed from the final regulation.

3.0 Revisions to the Requirements for Emergency Response Program Coordination with Local Responders

EPA is proposing to require facilities with Program 2 or 3 processes to coordinate with the local emergency response agencies at least once a year to ensure that resources and capabilities are in place to respond to an accidental release of a regulated substance.

CKRC is in general support of such a requirement. However, it should be noted that RCRA-permitted facilities pose a unique situation because they are already required to coordinate their emergency response activities (i.e., contingency plans) with the local emergency responders. Therefore, we believe that the proposed revisions to the RMP regulations requiring this annual coordination is duplicative for RCRA facilities. CKRC requests that the proposed RMP regulations exempt “RCRA-permitted facilities for whom the regulated RMP process is covered

³ <http://www.nspe.org/resources/ethics/code-ethics#sthash.uX6dbPLe.dpuf>

by the RCRA permit” from the annual coordination requirements of §68.93(a).⁴

4.0 Proposed Emergency Responder Notification Exercises:

EPA is proposing to revise the emergency response preparedness requirements by requiring facilities with Program 2 or 3 processes to conduct annual notification exercises to ensure that their emergency contact information is accurate and complete.

CKRC agrees that it is important to maintain accurate and complete contact information for purposes of notifying emergency responders in the event of an emergency. However, we do not believe that the “notification exercises” proposed at §68.96(a) and as described in the proposed rule preamble are warranted.

Specifically, the preamble to the proposed rule provides an expectation that an actual “test” notification be made and describes these notification exercises as follows:

“The purpose of these notifications is to ensure facility personnel understand how to initiate the notification system and to test the emergency contact information to ensure it is up-to-date. As part of the notification exercise, the individual making the notifications should clearly indicate that the call is part of an exercise to test the notification system. The owner or operator would be required to document these notification exercises and maintain a written record of each exercise conducted for a period of five years. The owner or operator would also be required to provide copies of the report to local response officials, and to make the report available to the public in accordance with §§ 68.205 and 68.210.”

Again, while CKRC agrees that confirming contact information is current and accurate is appropriate, we believe that requiring the performance of an actual “notification exercise” would represent an unnecessary burden on the regulated community as well as the responding organizations. Local responding agencies are typically required to maintain a response program that details the procedures for coordinating emergency response. Calling these agencies (in many cases, calling 911) as part of a “test” notification would be waste of resources associated with these agencies.

Finally, as discussed above, RCRA-permitted facilities are already required to coordinate their emergency response activities (i.e., contingency plans) with the local emergency responders. This includes the requirement to maintain current coordination agreements with local responding agencies. Therefore, we believe that the proposed requirement to perform emergency notification exercises is duplicative for these RCRA facilities. In the event that EPA maintains these notification exercise requirements in the rule, CKRC requests that the proposed RMP regulations exempt “RCRA-permitted facilities for whom the regulated RMP process is covered by the RCRA permit” from the annual notification exercise requirements of §68.96(a).

⁴ “Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.” E.O. 12866, 58 FR 51735, Oct. 4, 1993.

5.0 Proposed Field and Table-top Emergency Response Drills:

EPA is proposing to require that all facilities subject to the emergency response program requirements of Subpart E of the rule conduct a full field exercise at least once every five years and one tabletop exercise annually in other years.

CKRC is in general support of such a requirement. However, it should be noted that RCRA-permitted facilities already perform such field exercises under the contingency plan requirements of 40 CFR Part 264. Therefore, we believe that the proposed revisions to the RMP regulations requiring these field and tabletop drills impose duplicative requirements for these RCRA facilities. CKRC requests that the proposed RMP regulations exempt "RCRA-permitted facilities for whom the regulated RMP process is covered by the RCRA permit" from the five-year field exercises and annual table-top exercises.

6.0 Proposed Information Availability Requirements:

6.1 LEPC Information:

EPA is proposing to require that certain RMP and chemical hazard information be made available to the LEPC upon request. This information is detailed at proposed §68.205. While CKRC does not object to providing the majority of the chemical hazard information detailed at §68.205(b) to the LEPC, we do have significant concerns with the distribution of information associated with the facility's compliance audits and incident investigation reports. Specifically, compliance audit and incident investigation reports may contain detailed process information that may be used by unauthorized persons in nefarious ways. For instance, information identified in the root cause portion of an incident investigation could expose potential "soft-spots" of the regulated process or "target areas" for outside forces to exploit.

In response to concerns of vandalism, sabotage, and even terrorist attacks at RMP-regulated sites, EPA previously removed several public information requirements associated with the original RMP regulations published in 1999. For these same reasons, CKRC requests that either the compliance audits and incident investigation reports be removed from §68.205(b), or this section of the regulation be revised to allow the local LEPC to review these documents at the regulated facility, without taking the documents off-site.

6.2 Public Information:

EPA is proposing to require that certain RMP and chemical hazard information be made available to the public in a readily available manner. EPA has proposed the use of company web-sites or information repositories such as a local library or maintaining the information at the facility for public review.

We also note that under EPCRA, facilities may be required to submit Tier II forms. The Tier II form is intended to provide State and local officials and the public with specific information on hazardous chemicals present at facilities.

CKRC does not generally object to making this information available to the public. However, we believe that the RMP requirements should utilize existing data submission requirements and repositories to avoid duplicative efforts wherever possible. Therefore, we believe that this information can be easily made part of the EPA's ECHO database. The use of the existing ECHO database would provide the public with a "one-stop" web interface and provide consistency in the presentation of the information to the public and surrounding community.

CKRC appreciates the opportunity to provide input on EPA's Proposed Rule. Should you have questions or need additional information, please feel free to contact me.

Respectfully,



Michelle G. Lusk
Executive Director, CKRC
703-624-4513