July 13, 2021

U.S. Environmental Protection Agency
Office of Land and Emergency Management (OLEM)
1200 Pennsylvania Ave. NW
Washington, DC 20460
Docket ID No. EPA-HQ-OLEM-2021-0312
Submitted via *http://www.regulations.gov*

Re: Docket ID No. EPA-HQ-OLEM-2021-0312, " Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act," 86 FR 28828, May 28, 2021.

The Honorable Administrator Regan,

The U.S. Environmental Protection Agency (EPA) is soliciting comments from stakeholders pertaining to the review of EPA Risk Management Program (RMP)[1] regulation revisions completed since 2017, and to address new priorities as directed under Executive Order 13990: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.[2]

Kansas Agribusiness Retailers Association (KARA) submits this comment on behalf of its member companies. KARA is a voluntary trade association whose membership includes over 700 agribusiness firms that are primarily retail facilities supplying fertilizers, crop protection chemicals, and seed to Kansas farmers. KARA serves as a representative voice for the agribusiness industry to its members, the public, and government, and is committed to business viability for the plant nutrient and crop protection industry.

Over 25 percent of all RMP regulated facilities store (mostly agricultural) anhydrous ammonia – a regulated chemical under the rule that is stored and handled as a fertilizer product by agricultural manufacturers, wholesalers, and retailers. KARA members engage in the handling, storage, transportation, and application of fertilizers in Kansas. Some members manufacture and distribute regulated chemical substances such as anhydrous ammonia and aqua ammonia. Others maintain these fertilizer products at their facilities for retail sale to end users (farmers) or directly service retail facilities. Additionally, KARA members provide safety and risk management services for manufacturers, wholesalers and retailers of agricultural chemicals and fertilizers.

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[1] *40 CFR Part 68, Chemical Accident Prevention Provisions*

[2] *www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis*

KARA members remain fully committed to chemical safety and security within our industry. Anhydrous ammonia and aqua ammonia fertilizers are subject to EPA's RMP requirements when present at a facility above designated threshold quantities. As such, proposed revisions to the RMP rules significantly interest our members.

President Obama's August 1, 2013, Executive Order 13650, *Improving Chemical Facility Safety and Security,* tasked EPA and other agencies to modernize policies, regulations, and standards to enhance safety and security in chemical facilities.[3] The Order instructed the agencies to seek "opportunities to lessen the reporting burden on regulated facilities," "minimize the duplicative collection of information" from such facilities, and develop a "unified Federal approach for identifying and responding to risks in chemical facilities."[4]

On January 13, 2017, EPA published a final rule amending 40 CFR part 68, the Chemical Accident Prevention Provisions, also known as the "Risk Management Program" (82 FR 4594, "2017 Amendments").[5] The 2017 Amendments contained various new provisions applicable to RMP-regulated facilities that addressed prevention programs, emergency coordination with local responders, and information availability to the public.

EPA then received multiple petitions for reconsideration of the 2017 Amendments. On December 19, 2019, EPA promulgated a final RMP Reconsideration rule (84 FR 69834) that repealed several of the 2017 Amendments.

On January 20, 2021, President Biden issued E.O. 13990 directing federal agencies to review existing regulations and take action to address certain priorities, including bolstering resilience to the impacts of climate change and prioritizing environmental justice. As a result, EPA is developing a regulatory proposal to, once again, revise the RMP regulations.

EPA indicates that its RMP rule is intended to minimize public impacts of accidental releases through prevention and response. According to the EPA, "from 2007-2016, at least 90% of RMP facilities had no reported accidents and nearly half of accidents occurred at less than 2% of facilities reporting multiple releases."[6]

As the current rule has proven suitable to meet the agency's stated goals, our comment would encourage EPA to retain the current RMP rule, and to not adopt proposals that were previously rejected, such as requiring:

a. additional analysis of safer technology and alternatives for hazard analysis
b. third-party audits
c. incident investigation "root cause" analysis
d. additional emergency preparedness requirements, and
e. increased public availability of chemical hazard information.

The 2019 Final RMP Reconsideration Rule retained various new requirements with rolling compliance dates. Once such requirement requires the regulated company to hold a public

[3] <u>See</u> *https://www.whitehouse.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security.*
[4] *Id.*
[5] *Pursuant to Section 112(r)(7) of the Clean Air Act, 42 U.S.C. 7401, et seq.*
[6] <u>See</u> *www.epa.gov/sites/production/files/2019-11/documents/final_risk_management_program_reconsideration_final_rule_fact_sheet.pdf*

meeting within 90 days after a qualifying event. Another provision required new emergency coordination obligations. In addition, changes were made to tabletop and field exercise requirements to allow greater flexibility in working with local emergency responders.

Safety Analysis and Investigations at Regulated Facilities

EPA's 2017 Amendments would have broadened RMP regulatory requirements for investigations and safety analysis by requiring certain facilities to conduct a "root cause" investigation of any incident that (1) resulted in a catastrophic release (including when the affected process is decommissioned or destroyed following, or as the result of, an incident); or (2) could reasonably have resulted in a catastrophic release (a "near miss").

The proposed "near miss" category was subjective in nature and open-ended. Mere "process upsets," or "incidents at nearby processes or equipment outside of a regulated process," might trigger the need for a "root cause" analysis.[7] Because the proposal lacked specificity to define the "near miss" standard, the language might have established constitutional due process concerns as the proposal failed to provide adequate notice to the regulated community.

Additionally, the proposal gave rise to questions about how a facility was to conduct a "root cause" analysis. This is especially important for small retail facilities for which it is not economically feasible to retain a safety and regulatory consultant on staff.

We are concerned that the quality of the safety reviews under the proposed 2017 Amendments could be diluted by routinely applying them to high-frequency, low-consequence incidents. Prescribing similar reviews for far less significant incidents will generate much documentation with very little relevancy to potential catastrophes.

This "near miss" requirement would impose substantial administrative burdens and unnecessary economic costs on regulated facilities. Additionally, without a well-defined threshold for a "near miss", the proposed rule would likely fail to result in clear discernable improvements to safety, accident prevention, or risk management. For this reason, we would urge EPA to not adopt this proposal from the 2017 Amendments.

More broadly, regarding EPA investigations of a catastrophic release or "near miss" event, EPA should avoid encroaching upon those areas where OSHA has primary jurisdiction. EPA should ensure that any investigation thresholds for safety to owners, operators, workers, and communities of chemical facilities are consistent with current OSHA Process Safety Management (PSM) protocols, and any likely changes OSHA is expected to make to PSM.

Safer Technology and Alternatives Analysis

The 2017 Amendments proposed a mandate for regulated facilities to consider "safer technology and alternatives" analysis (STAA) as a part of the process hazard analysis, and to evaluate the

[7] The U.S. Environmental Protection Agency's Proposed Rule Entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act," 81 Fed. Reg. 13,638, at 13,640 (March 14, 2016).

feasibility of inherently safer technology (IST). These changes would not generate tangible RMP outcomes in the agricultural industry beyond what current PHA requirements can accomplish in controlling hazards. EPA rightly rejected this proposal previously, and we would recommend that it not be adopted at this time.

Third-Party Audits

EPA's 2017 Amendments proposed requiring regulated facilities to contract with an "independent third-party" to perform a compliance audit after a reportable release. This proposal would serve to derail current industry-sponsored initiatives for fertilizer storage and handling facilities, and mandate unnecessary compliance audits.

EPA's proposal to limit these audits to a narrowly defined range of safety consultants that can qualify as an "independent third-party" is not realistic and would not support better RMP audits or improve safety performance. The "independent third-party" audit requirement disregards the fact that industry-driven safety and audit programs already exist. In fact, emphasizing "third-party" audits over the auditor's competency would likely degrade rather than improve safety.

As the third-party consultant services would be mandated, industry would essentially be held captive to auditors' pricing demands. Additionally, the administrative and record keeping burden associated with the requirement would increase costs on the agribusiness industry at a time when margins are increasingly thin.

Expertise in the agrichemical field, and how to store, transport, and handle the crop protection materials our member facilities handle may provide a more complete, informed audit than the proposed narrow focus on the relationship between a facility and an auditor. Parties unacquainted with a given process, industry, or business often are the least qualified to provide meaningful safety and engineering input.

In addition, under the proposal, an auditor could not have conducted past research, development, design, construction services, or consulting for the owner or operator within the last 3 years, or provided 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. This three-year look back disqualifier is overly restrictive. The availability of such auditors is very limited, especially in rural states with a small population, like Kansas.

Even if sufficient auditors were to become available, the associated costs of these audits, due to high demand for their time and travel expenses, would be prohibitively high. Additionally, while many inspectors are currently internal employees of regulated facilities, these persons would likely be unauthorized to conduct audits under the proposal. EPA previously rescinded these proposals, and we would encourage that same decision here.

EPA should also acknowledge industry-driven programs, and OSHA-required programs, to ensure that duplicative inspection cycles are not imposed on industry. This is consistent with EO 13650 which requires agencies to "lessen the reporting burden," "minimize the duplicative

collection of information," and develop a "unified Federal approach" to the regulation of chemical facilities.[8]

Emergency Response and Preparedness

The 2017 Amendments required certain regulated facilities to coordinate annually with local emergency response agencies to ensure that resources and capabilities are in place to respond to an accidental release of a regulated substance. The facilities were also required to conduct notification exercises annually to ensure that their emergency contact information is accurate. Many facilities that provide this now receive little to no support or input from Local Emergency Planning Committees (LEPC's) and local emergency response.

Other changes, such as field and table-top exercises seem unreasonable and inappropriately task regulated facilities with professional emergency responder responsibilities. Such proposals would cause a non-responding facility to become a responding facility, which moves against the goal of increasing safety and risk management.

Our members participate in safety training in rural regions of our state, and many of our members' employees are involved in local emergency services. They share in training exercises with other local emergency responders. Coordinating and working with local emergency personnel is a continuing activity throughout much of Kansas.

Coordination with first responders should ultimately be driven locally by state and local authorities. Training goals and scheduling should account for the make-up of the community, emergency response assets, locally available training, and community risk factors.

Facility and Chemical Hazard Notification

EPA's 2017 Amendments would have required various changes to the public availability of chemical hazard information by requiring all RMP regulated facilities to make certain information accessible to the public. These requirements would have jeopardized security programs designed to safeguard such information and were counter-productive to emergency responders.

While much of this information is available at the publicly available website *www.rtknet.org*, the public posting of certain other information would be in violation of Chemical Facility Anti-Terrorism Standards (CFATS) regulations. EPA previously rescinded this proposal due to security concerns, and we would encourage that same decision here.

In addition, the notification requirements proposed in 2017 would have placed confidential business information (CBI) at risk. The type of disclosures and methods for posting/disseminating, whether CBI or facility/chemical information, create security

[8] See *https://www.whitehouse.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security*.

vulnerabilities. Additionally, the record keeping requirements for emergency preparedness previously proposed (requirement to document the "nature of coordination activities") were overly burdensome compared to the intended benefit. As such, we would encourage EPA to not adopt those proposals at this time.

OSHA Process Safety Management (PSM)

The RMP requires EPA to coordinate with 'requirements established for comparable purposes' by OSHA."[9] As OSHA is the principle regulatory agency for workplace safety, and the main purpose of the EO was to enhance safety at chemical facilities, OSHA is clearly the lead agency on implementing any regulatory changes necessitated by the EO (in contrast of the purpose of the RMP - to assess and manage risk from "releases" or "emissions" of regulated chemicals.)

Aspects of EPA's proposal appear to encroach upon the purpose of OSHA's Process Safety Management (PSM) regulations (such as the proposed RMP requirement to evaluate "safer technologies and alternatives." EPA should ensure that it continues to avoid conflicts between PSM and any proposed changes to the RMP rule.

Economic Impacts

The costs associated with implementation and compliance with the 2017 Amendments would cause economic harm to our industry. In 2019, the cost of third-party audits would be close to $1,000 for a small facility, and possibly double that amount for a larger, more complex facility.

As over 25 percent of Risk Management Program regulated facilities are for agricultural anhydrous ammonia – our industry will be faced with over 25 percent of the increased compliance costs from the proposal. It seems unlikely that this incredible cost increase on one industry is justified by a corresponding increase in process safety and risk management.

For an agricultural retail facility that sells 500 tons of NH3 fertilizer annually, and grosses $50/ton margin, over 50% of all the facility's gross sales would go toward RMP compliance. Add in other costs of doing business, and most facilities would not remain profitable. The industry would, in fact, face closure in many instances and consolidation in the balance.

The net effect of adoption of the 2017 Amendments would be decreased access to nitrogen fertilizer for farmers, or farmers hauling anhydrous ammonia fertilizer nurse tanks over many more miles of public roads – a perverse effect of a regulation intended to increase chemical process safety and risk management.

Several of the issues noted above will significantly increase direct compliance costs (additional time on record keeping, maintenance, and reporting) and indirect costs on our members. We

[9] 81 Fed. Reg. at 13,697.

additionally note that the Small Business Advocacy Review Panel (SBAR) previously raised concerns that EPA had not adequately considered several aspects of the proposal, and that failing to do so would have placed significant unanticipated costs on regulated entities.

Thank you for considering these comments. The 2019 Final RMP Reconsideration Rule has a strong safety record and is working well in the agricultural industry. It is suitable to meet the agency's goal of minimizing public impacts of accidental releases through prevention and response.

KARA looks forward to working with EPA and our industry partners. For the reasons set forth above, we would strongly support retention of the 2019 Final RMP Reconsideration Rule and would discourage adoption of the proposed 2017 Amendments that were previously set aside.

Respectfully,

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