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Docket ID No. EPA-HQ-OLEM-2022-0174

EPA Docket Center
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Comments on Proposed Rule: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention (87 Fed. Reg. 53,556 (Aug. 31, 2022))
Docket ID No. EPA-HQ-OLEM-2022-0174

To whom it may concern:

The Utility Solid Waste Activities Group (“USWAG”)¹ submits these comments on EPA’s Proposed Rule: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention (the “Proposal”). *See* 87 Fed. Reg. 53,556 (Aug. 31, 2022). As an industry organization with members who are subject to this rulemaking, USWAG appreciates the opportunity to comment on this proposal.

While USWAG supports the important environmental objectives underlying the current proposal and appreciates EPA’s efforts to make meaningful revisions to the RMP to prevent accidental releases, we have some concerns with the current proposal. Some of these are similar to the concerns we expressed to the Agency in our comments on EPA’s 2016 proposal to revise the RMP (81 Fed. Reg. 13,638 (Mar. 14, 2016)), which was finalized in January 2017 (82 Fed. Reg. 4,594 (Jan. 13, 2017)) (“2017 Rule”) and largely rescinded by EPA in December 2019 (84 Fed. Reg. 69,834 (Dec. 19, 2019)) (“Reconsideration Rule”). Our comments, as detailed below, relate primarily to the following six provisions of the current proposal.

¹ USWAG is an association of over one hundred and thirty utilities, utility operating companies, energy companies, and trade associations representing electric companies, utilities, and cooperatives. USWAG members own and operate facilities that are subject to the requirements of the Risk Management Program (“RMP”). USWAG and its members, therefore, have a direct stake in EPA’s proposed revisions to the RMP.

1. Public information-sharing

USWAG has concerns with the proposed reinstatement of certain elements of the 2017 Rule’s public information-sharing provisions. *See* 87 Fed. Reg. at 53,599, 53,601, 53,616.² While we acknowledge that, compared to the 2017 Rule, the Proposal limits information availability to members of the public residing within a six-mile radius of a regulated facility, we are concerned that making information available regarding hazardous substances on site, accident history, and emergency response compliance poses security risks.

Utility facilities pose unique security concerns that go beyond the risks associated with their chemical processes and are considered critical infrastructure for electrical and gas supply. Making the above information available, even within a relatively limited geographic area, will likely not improve regulatory compliance or provide additional information to local communities on the risks associated with regulated facilities. Instead, we are concerned that making this information available in a consolidated manner increases security risks at facilities and draws attention to facilities as potential targets of criminal or terrorist activity. Of note, EPA itself acknowledged this risk in the Reconsideration Rule,³ and simply reducing the universe of members of the public who can anonymously request this information does not realistically reduce this risk. We request that this provision be dropped from the final rule or, at minimum, be removed as applied to the entities in NAICS codes 2211 and 221210 responsible for generating, transmitting, and distributing power and natural gas to the public.⁴

2. Third-party compliance audits

USWAG members also have concerns with EPA’s proposal to reinstate the obligation to conduct third-party compliance audits for accidental releases and/or if requested by an implementing agency. *Id.* at 53,610-11, 53,612-14.⁵ We oppose the need to formally delineate, through a series of regulatory criteria, the degree of independence between third-party auditors and audited RMP facilities. While we recognize that EPA has modified the “independence” criteria in the Proposal compared to the 2017 Rule (*see id.* Fed. Reg. at 53,586-87), we nonetheless question

² Proposed to be codified at 40 C.F.R. § 68.210(d)-(f).

³ 84 Fed. Reg. at 69,887 (“EPA agrees that anonymous access to sensitive chemical facility hazard information could increase the risk of criminal acts and terrorism against regulated facilities”); *id.* (“EPA believes that the consolidation of the required chemical hazard and facility information may present a more comprehensive picture of the vulnerabilities of a facility than would be apparent from any individual element and requiring it to be made more easily available to the public from a single source (*i.e.*, the facility itself) could increase the risk of a terrorist attack on some facilities.”).

⁴ Further, the Proposal is redundant to the extent that it would require the disclosure of certain information already available to the public under the Emergency Planning and Community Right-to-Know Act (EPCRA) reporting requirements, the 40 C.F.R. § 68.42 accident history reporting requirements, and the 40 C.F.R. Subpart G reporting requirements.

⁵ Proposed to be codified at 40 C.F.R. §§ 68.59, 68.79, 68.80.

the need for the proposed regulatory criteria, which could unnecessarily limit (both in terms of numbers and in meeting the proposed timeframes for conducting third-party audits) qualified third-party auditors when auditor independence is already assured by credentialing bodies (e.g., state professional engineer licensing boards) and the professional nature of this work. If, however, EPA retains this set of limiting conditions, the Agency should provide a regulatory process (e.g., a petitioning process) if there are inadequate numbers of competent, independent, and impartial third-party auditors to conduct a required audit within the Proposal’s prescribed timeframes.

We also maintain that the Agency should specify with more particularity the conditions under which third-party audits can be required for regulated facilities. The Proposal currently calls for third-party audits (1) after two accidental releases within a five-year period; (2) after one accident for facilities with Program 3-regulated NAICS code 324 and 325 processes located within one mile of another facility with a NAICS code 324 or 325 process; or (3) when “[a]n implementing agency requires a third-party audit *due to conditions at the stationary source that could lead to an accidental release of a regulated substance . . .*” *Id.* at 53,610, 53,612 (emphasis added). For the third criterion for requiring a third-party audit, EPA should specify or define the threshold level of severity above which non-compliance would pose a predetermined degree of risk of accidental release that would trigger the requirement for a third-party audit. While the Proposal allows for an appeal process in these circumstances, delineating with more particularity the circumstances that would enable an implementing agency to direct a third-party audit would likely avoid unnecessary appeals of such directives. Strictly administrative and/or paperwork violations should not be used to trigger this onerous requirement.

We also recommend that EPA amend the proposed provisions requiring that these reports be provided to the regulated facility’s board of directors. *Id.* at 53,611, 53,614. We suggest that these reports should more properly be delivered to the responsible official of the regulated facility. Third-party audit findings regarding adherence to the RMP are typically relevant to and most meaningful for the operational functions of regulated facilities.

3. RAGAGEP

USWAG believes that power sector facilities (*i.e.*, NAICS codes 2211 and 221210) should not be required, as a regulatory condition, to meet current recognized and generally accepted good engineering practices (“RAGAGEP”) with respect to process hazard analyses (“PHAs”). EPA is proposing requiring PHAs to include analysis of any gaps between a facility’s current practices and the latest industry RAGAGEP, and requiring facilities to justify not adopting PHA recommendations with respect to RAGAGEP. *See id.* at 53,605, 53,610, 53,612.⁶ While this may be appropriate for other industrial sectors, the power sector is too diverse to be subject to across-the-board RAGAGEP. To be clear, we believe that regulated utility facilities should adhere to applicable RAGAGEP whenever applicable and practical, but the lack of readily available, sector-wide RAGAGEP makes this an unnecessary and impractical regulatory obligation to place on the power sector.

⁶ Proposed to be codified at 40 C.F.R. §§ 68.48(b), 68.65(d)(2).

4. Changes to emergency response requirements

USWAG believes that the proposal to require field exercises every ten years is unnecessary. The current proposal would require this unless local emergency officials determined it were impractical. *Id.* at 53,599, 53,615.⁷ The frequency of field exercises should be determined based on the needs and availability of local emergency officials. As EPA acknowledged in the Reconsideration Rule, a minimum frequency requirement for field exercises is “impracticable because the burden it would impose on many local emergency response organizations with multiple RMP-covered facilities would discourage the participation of such organizations in the exercises; in other words, it would not be workable and effective.” 84 Fed. Reg. at 69,849.

USWAG is also concerned with EPA’s proposal to require non-responding facilities to assure that a community notification system is in place to warn of a release or threatened release. 87 Fed. Reg. at 53,596-97, 53,615.⁸ Currently, facilities are required to have procedures in place for informing local responders of an accidental release. The proposed additional requirement unfairly makes facilities responsible for the activities of third parties. While regulated facilities will certainly continue to coordinate with local emergency responders in notifying the public of and responding to a release, regulated facilities should not be subject to a regulatory condition that involves attempting to control whether and how third-party local emergency responders notify the public of and respond to releases. USWAG urges EPA to remove this proposed provision.

5. Changes to the definition of “stationary source”

USWAG agrees with the position of the American Gas Association (“AGA”) supporting EPA’s proposal to continue excluding from the definition of “stationary source” at 40 C.F.R. § 68.3 facilities and equipment used in “transportation and storage incident to transportation” subject to the pipeline safety regulations under 49 C.F.R. parts 192, 193, or 195, or a state natural gas or hazardous liquid program for which the state has a Department of Transportation (“DOT”) certification. We believe that DOT’s Pipeline and Hazardous Safety Administration (PHMSA) regulations under 49 C.F.R. parts 192, 193 and 195 provide robust oversight and regulatory requirements for accident prevention and appreciate that EPA is not intending to change the long-standing scope of the transportation exclusion. Like AGA, however, we take issue with EPA’s proposal to change the definition of “storage incident to transportation” to state that “A transportation container is in storage incident to transportation as long as it is attached to the motive power that delivered it to the site (*e.g.*, a truck or locomotive)” 87 Fed. Reg. at 53,609. EPA should clarify that storage facilities and storage containers connected to *all* pipeline systems or other transportation facilities subject to regulation under 49 C.F.R. parts 192, 193 or 195—not just vehicles—are transportation or storage incident to transportation rather than stationary sources within the meaning of 40 C.F.R. § 68.3.

⁷ Proposed to be codified at 40 C.F.R. § 68.96(b)(1)(i).

⁸ Proposed to be codified at 40 C.F.R. § 68.95(a)(1)(i).

6. Potential definition of “near miss”

EPA solicits comment on a potential definition of “near miss” in the context of incident investigation. 87 Fed. Reg. at 53,584. The New Jersey Department of Environmental Protection’s (“NJDEP”) recommended definition, on which EPA specifically seeks comment, provides examples of “near miss” that include “activation of layers of protection such as relief valves, interlocks, rupture discs, blowdown systems, halon systems, vapor release alarms, and fixed vapor spray systems.” USWAG urges EPA not to adopt this broad definition because it would potentially encompass system devices that are engineered to prevent issues before they occur; in other words, systems operating safely may be classified as “near misses” when no near miss has in fact occurred. For example, anhydrous ammonia systems are equipped with relief valve systems engineered and installed to prevent issues before they occur and rely on sensitive vapor release alarms that alert to potential employee exposure from sources as small as pin hole leaks. Under NJDEP’s recommended definition, these near-daily events (particularly during the summer, when warm temperatures increase ammonia’s expansion potential) would cause near-daily “near misses” requiring investigation. To avoid this unnecessary and extremely burdensome outcome, EPA should ensure that any revised definition of “near miss” exclude from incident investigation requirements normal operation of devices—such as relief valves and vapor release alarms—that operate as intended during the ordinary course of facility operations.

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We appreciate the opportunity to submit these comments on this proposed rule. If we can be of further assistance, please contact me or USWAG counsel Doug Green at dhgreen@venable.com or 202-344-4483.

Sincerely,



Daniel Chartier
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