American Coatings ASSOCIATION℠

October 31, 2022

Deanne Grant
U.S. Environmental Protection Agency
Office of Emergency Management
1200 Pennsylvania Ave NW
Washington DC 20460
Docket ID No. EPA-HQ-OLEM-2022-0174

RE: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention

Dear Ms. Grant:

The American Coatings Association (ACA) submits the following comments to the U.S. Environmental Protection Agency (EPA) regarding its proposed amendments to its Risk Management Program (RMP) regulations which are in response to the Executive Order (EO) 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" and public listening sessions held in 2021.[1] The proposed amendments include several changes that will have an impact on ACA's member companies.

ACA is a voluntary, nonprofit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory, and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services. ACA appreciates the opportunity to comment on the proposal and looks forward to working with U.S. EPA throughout the rulemaking process.

While EO 13990 did not specifically direct the EPA to amend the RMP regulations, EPA solicited for input on the adequacy of the 2017 amendments rule.[2] Many of the changes in the 2017 amendments rule had been rescinded as part of the 2019 reconsideration rule, which reflects the current RMP regulations. Many of EPA's proposed amendments to the RMP rule aim to improve upon prevention program elements of particular types of facilities, promote information availability, and emergency

[1] Proposed Rule, "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention," 87 Fed. Reg. 53556 (August 31, 2022).
[2] Executive Order 13990, "Executive Order on Protection Public Health and Environment and Restoring Science to Tackle the Climate Crisis," Jan. 20, 2021; https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/

response measures. ACA shares EPA's goal of ensuring people both inside and outside of chemical facilities are safe and prevent any catastrophic chemical accidents. However, some of EPA's proposed changes (as currently drafted) will not serve to improve the safety within a chemical facility, but rather create significant burdens on a facility that would result in higher costs to the facility with no corresponding improvement in safety.

ACA encourages EPA to carefully consider the following concerns and suggestions and refrain from imposing significant and costly new requirements that would inadequately protect human health and the environment. ACA remains hopeful that as EPA continues to collaborate with interested stakeholders, EPA can put forth regulations and policies that are tailored in a way that addresses significant risks to human health and the environment while minimizing any adverse economic impacts on chemical facilities.

Root Cause Analysis and Defining "Near Miss"

In response to EPA's solicitation for input on a universal definition of "near miss" and EPA's request for input on the proposed language put forth by the New Jersey Department of Environmental Protection (NJDEP), ACA offers an alternative definition for "near miss" from the draft language offered by NJDEP.

The New Jersey Department of Environmental Protection (NJDEP) recommended the following draft language to define "near miss" that would require an investigation of all accidental releases and near misses. NJDEP's proposed definition of "near miss" is as follows:

> "An unplanned, unforeseen, or unintended incident, situation, condition, or set of circumstances which does not directly or indirectly result in a regulated substance release. Examples of a near miss include, but are not limited to, process upsets such as excursions of process parameters beyond pre-established critical control limitations; activation of layers of protection such as relief valves, interlocks, rupture discs, blowdown systems, halon systems, vapor release alarms, and fixed vapor spray systems; and activation of emergency shutdowns. A near miss also includes an incident at a nearby process or equipment outside of a regulated process if the incident had the potential to cause an unplanned, unforeseen, or unintended incident, situation, condition, or set of circumstances at the regulated process."[3]

ACA does not support NJDEP's proposed definition for "near miss." The NJDEP proposed language to define near miss describes circumstances that do not directly or indirectly result in a regulated substance release. This language leads to an overly encompassing definition that would inappropriately capture minor incidences that would burden a facility to investigate even minor incidences. This all-encompassing definition put forth by NJDEP would be too burdensome for industry to apply because every circumstance would either *directly or indirectly* affect the release of a

[3] Proposed Rule, "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention," 87 Fed. Reg. 53584 (August 31, 2022).

regulated substance. If EPA were to apply a universal definition, ACA encourages the agency to avoid adopting a definition that is overly encompassing such as that put forth by NJDEP.

As an alternative to the proposed language recommended by NJDEP, ACA recommends that a "near miss" be defined as "an unplanned event or condition that has the potential to cause a slight change of events that could result in injury, environmental damage, or an interruption to normal operation." This definition provides a broad enough scope to allow facilities to determine parameters to properly classify a possible incident as a near miss without unintentionally including minor incidences. A potential injury or possible environmental damage would be serious enough for a facility to conduct an incident investigation. Furthermore, a facility could define the boundaries of a normal operation and the "or" modifier would allow facilities to decide whether the near miss would be reportable as a possible injury, environmental damage, or an interruption to normal operations.

Third Party Compliance Audits

ACA continues to oppose EPA's proposed amendments to require third party compliance audits as outlined in the proposed rule. EPA's reasoning for requiring independent third party compliance audits fails to address how implementing a third party compliance audit approach not only burdens industry to guarantee the qualifications of auditors but also inaccurately presumes third party compliance audits would be more rigorous, thorough, and timely than an internal audit with a greater likelihood of accident prevention.

First, EPA has not demonstrated that requiring a third party compliance would sufficiently prevent accidental chemical releases. EPA estimated that between 2016 and 2020, if the regulations had required a third party compliance after two accidental releases within a five year period, then approximately 70 facilities would have been affected;[4] Similarly, EPA estimated that the proposed amendments, which would have required facilities with regulated NAICS 324 and 325 process that had one RMP-reportable accident and is located within one mile of another facility with a regulated NACIS 324 and 325 process to conduct a third party compliance audit, would have affected about 66 incidences that occurred between 2016 and 2020 .[5] However, EPA cites this statistic without directly stating how many facilities this affected.[6] Furthermore, EPA states that 97% of RMP facilities had no RMP-reportable accidents from 2016 to 2020.[7] EPA's data implies that the types of accidents may be concentrated on specific facilities.

[4] Proposed Rule, "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention," 87 Fed. Reg. 53586 (August 31, 2022).
[5] The North American Industry Classification System (NAICS) classifies business establishments for the purposes of collecting and analyzing economic data related to the U.S economy. NAICS codes are typically self-assigned and based on a company's primary business activity. NAICS 324 refers to the category of businesses that are identified to conduct Petroleum and Coal Products Manufacturing; NAICS 325 refers to businesses within the category of Chemical Manufacturing.
[6] Proposed Rule, "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention," 87 Fed. Reg. 53586 (August 31, 2022).
[7] *Id*.

Although the proposed regulations appear to target specific facilities to require third party compliance audits, EPA makes a misplaced presumption that requiring a third party compliance audit over other more feasible measures, such as internal audits or ensuring rigorous audits, would prevent future accidents. Although a third party audit may identify corrective actions, EPA fails to state why requiring a third party to conduct the audit provides significant benefits over other types of audits- such as internally conducted ones. It is the quality and thoroughness of the audit, along with the auditor's expertise that results in an effective audit rather than solely relying on the audit being performed by a third party.

Second, although the proposed amendments require the third party auditor to be "knowledgeable" and "experienced," compelling facilities to make the determination of whether an auditor is knowledgeable and experienced may lead to inconsistencies in audits and an imbalance in the market for truly qualified auditors. Having each facility determine whether a third party auditor would meet the "knowledgeable" and "experienced" requirements may cause inconsistencies in which auditors were selected to perform audits. Additionally, requiring all facilities to seek out third parties instead of using their facility's own experienced employees could potentially alter the existing market resulting in a select few auditors being truly qualified. This could artificially spike the demand and prices for third party audits.

Third, mandating facilities to use third parties to perform compliance audits significantly increases the costs for industry. Not only would the facility now need to have their own personnel review the qualifications of the third party auditor to meet the "knowledgeable" and "experienced" requirements, but the facility would be required to pay additional fees to acquire these services. Since performing an audit of this nature requires highly specialized experience, the rates could be potentially costly for facilities and disadvantage small businesses.

Lastly, ACA has concerns about requiring facilities that conducted third party compliance audits to share with the findings information and reasons to not implement any recommendations with local responders. It is crucial that a company be allowed to review its own audit reports and maintain its reasons on whether to implement changes based on an audit. By sharing this highly technical and business sensitive matter with outsiders, such as the local responders that may lack expertise in the particular chemical process, dangerously skews how a response event could unfold. A local responder could potentially misidentify and mischaracterize the response when an accidental release occurs by inaccurately assuming that the information from the audit finding served as the cause of the accident when that may not be the cause at all. During a response event, information may be difficult to gather accurately, but immediately jumping to an inaccurate conclusion could also exacerbate the dangerous circumstances.

Emergency Response

ACA does not support EPA's amendments to 40 CFR 68.90(b) that would require notification procedures be made available by the facility upon request to those within close proximity which EPA has defined to be within six miles to an RMP facility. The proposed amendments would be overly burdensome while providing minimal safety benefits. ACA suggests limiting the distribution of

notification procedures to those individuals and facilities located within a facility's offsite consequence analysis (OCA).

Although notification procedures are critical for an effective emergency response, only those individuals within an affected region should be notified in order to reduce the burden on a facility. Limiting disclosure also helps minimize any potential security risk to the facility. EPA states that the agency believes that the distance of six miles would be reasonable to cover 90% of all toxic worst-case distances; however, EPA goes on to further state that almost all flammable worse-case distances are less than a mile.[8] Requiring a coatings facility to disseminate notification procedures to all individuals within six miles would place an unnecessary burden on industry, especially since those located within a mile would likely be most at risk in the event of a flammable incident and not necessarily the those located past a one mile range.

Additionally, EPA states that for toxic incidences (presumably not incidences included in the flammable estimates) about 67% of these incidences are under three miles in range.[9] EPA's proposed amendments to require notification procedures to those within six miles would be overly burdensome to facilities and fails to require facilities to ensure those closest to the facility would first be properly notified. ACA understands that notification is critical, but the facility should ensure that those facilities closest to the hazard are properly notified. Since the type of accident greatly determines how much of the surrounding community would be affect, ACA would like to offer an alternative suggestion to ensure that the notification procedures would be tailored to the hazards posed as well as the unique physical circumstances specific to each facility and its location.

ACA recommends an alternative that would require a facility to notify the public located within a facility's OCA. This alternative method provides facilities with a focused public group with which to ensure that those individuals be informed of notification procedures. This would not limit a facility from notifying individuals outside the OCA, but rather provides a baseline that a facility would be required to provide notification procedures.

Having a facility rely on its OCA to determine notification distances inherently takes into account the type of risk that is posed to the public, whether it is flammable or toxic in nature. Although EPA cannot compel a facility to release OCA information, the facility would not have to release the OCA information, but rather use the information within the OCA to then target its notification procedures.

Information Availability

ACA does not support EPA's proposed amendments to 40 CFR 68.210 that allows those in the public that reside within six miles of a facility to request specific chemical hazard information. The proposed amendments will be burdensome on facilities and provide minimal safety benefits. ACA has concerns regarding the proposed amendments and suggests an alternative that would be more feasible.

[8] Proposed Rule, "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention," 87 Fed. Reg. 53601 (August 31, 2022);
[9] *Id*.

The proposed amendments that allow those in the public that reside within six miles of a facility to request specific chemical hazard information would be impractical and overly burdensome on facilities while providing minimal safety benefits. EPA does not specify how to determine if someone resides within that six mile range and whether there is a durational requirement that allows for someone to claim residency within the range. Furthermore, EPA does not elucidate if any tangible evidence (like identification) would be necessary to validate someone's claim of residency within this six mile distance. This becomes an impractical way to inform the public and would be overly burdensome for a facility to verify and respond to every request for chemical hazard information from an individual claiming to reside within this distance.

Although EPA claims that the six mile distance requirement limits the potential security risk, the proposed amendments regarding information availability creates an insecure and unbalanced system of sharing information. EPA states that these amendments are intended to encourage communities and individuals to be better prepared for an emergency, however simply having the information of the chemical hazards within a facility does not automatically serve as an impetus to being prepared for an emergency. Understanding the hazards is certainly necessary, however, to be properly prepared for an emergency, and EPA should work with the local responders to ensure proper training and equipment in order for the responders to respond accordingly without endangering themselves or others within the community. Furthermore, EPA could work with communities through the local emergency planning committees (LEPC) to help educate the general public on nearby chemical hazards.

Additionally, EPA fails to address what may occur when an imbalance in the release of information occurs. EPA cited that the 2019 reconsideration rule mentioned that community members may request information from their local emergency planning committee, yet 10% of the active facilities did not provide information on who to contact for the local emergency planning committee.[10] This statistic from EPA would imply that 90% of the active facilities reported the necessary contact information as required within the regulations, however, EPA did not mention what the disposition was to the 10% of facilities that failed to include the name of the LEPC. It is fair to reason that if these proposed amendments were to be enacted, then there may be a similar percentage of facilities that would not appropriately respond to the public inquiries, yet EPA does not address what penalties or corrective action would occur to ensure facilities properly disseminate the required information.

ACA suggests that EPA consider alternatives that incorporate information that facilities are already required to report under the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986, as well as information from a facility's OCA. Under EPCRA, facilities are required to report hazardous and toxic substances that meet the reporting thresholds housed at the facility at any given point during a reporting year.[11] Additionally, providing more information to those residing in a

[10] Proposed Rule, "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention," 87 Fed. Reg. 53600 (August 31, 2022).
[11] Reporting thresholds under the EPCRA vary by state and can be found at https://www.epa.gov/epcra/state-tier-ii-reporting-requirements-and-procedures.

facility's OCA would help target necessary resources (such as equipment and training) for both local responders and community residents in the event of an emergency. Although EPA cannot—by existing rules—compel facilities to disclose OCA information, EPA could find alternative means to have the EPA coordinate with both a facility and the LEPC to ensure that any affected community within a facility's OCA be provided chemical hazard information.

Conclusion

If you have questions regarding ACA's comments or would like to discuss any of these comments in further detail, please do not hesitate to contact us.

Sincerely,

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