CEEC

Corporate Environmental Enforcement Council, Inc.

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Submitted by Email and Through the
Federal eRulemaking Portal

Mr. James Belke
U.S. Environmental Protection Agency
Office of Land and Emergency Management
1200 Pennsylvania Avenue, NW (Mailcode 5104A)
Washington DC 20460

Re: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule

Dear Mr. Belke:

The Corporate Environmental Enforcement Council, Inc. ("CEEC") welcomes this opportunity to comment on EPA's proposed revisions to the Risk Management Program regulations, "*Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule*," 81 Fed. Reg. 13638 (March 14, 2016)("Proposed RMP Revisions"). CEEC is particularly interested in ensuring that any final revisions promulgated by EPA are written in clear and objective terms that promote compliance by regulated facilities and reduce the risk of subjective or otherwise misdirected enforcement.

Founded in 1995, CEEC is the only cross-industry business coalition that brings together the diverse perspectives of legal, technical and governmental affairs professionals on environmental health and safety issues in the context of enforcement policy and practice. For many years, CEEC and its 28 member companies have maintained an active and constructive dialogue with EPA on its enforcement policies. CEEC believes very strongly that if those policies are successful, they will lead to higher compliance rates, a cleaner and safer environment, and, in turn, less need for enforcement.

1. Third-Party Compliance Audits.

Compliance audits are required under the existing RMP rules but regulated facilities are allowed to do self-audits. EPA is now proposing to require independent third-party audits in certain circumstances, including after an accident or a finding of significant non-compliance by an implementing agency for stationary sources with RMP Program 2 or 3 processes. *See* proposed 40 CFR §§ 68.58(f), 68.59, 68.79(f) and 68.80.

CEEC respectfully submits that both the rationale and the triggers for requiring third-party audits are misplaced. Even worse, we believe that the requirement will lead to inferior results due to unnecessary and counter-productive auditor competency requirements. We are also concerned that EPA's proposed audit reporting and implementation requirements will stymie the kinds of internal checks-and-balances that are necessary for effective corporate environmental compliance assurance programs.

a. CEEC disagrees with EPA's rational for requiring third-party audits

EPA advances several reasons for requiring third-party audits, including: (1) self-auditing may be insufficient to prevent accidents, (2) poor compliance audits are a contributing factor in the severity of past chemical accidents, and (3) self-auditing is more likely to yield lenient or biased audit results. *See* 81 Fed. Reg. at 13654-13658.

CEEC respectfully disagrees with EPA's rationale. Self-auditing is a core component of an effective compliance program and, as EPA has long recognized, "reflects due diligence in preventing, detecting and correcting violations." *See "EPA Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*," 65 Fed. Reg. 19618 (April 11, 2000) ("EPA Audit Policy"). The EPA Audit Policy makes no meaningful distinction between self-audits and third-party audits. Indeed, for over 20 years, EPA has promoted – and indeed incentivized – self-audits to detect and correct violations across all environmental regulatory programs. We know of no basis to deviate from that long-standing approach for the Proposed RMP Revisions.

If EPA is concerned about poor-quality self-audits or bad actors, EPA has ample authority to pursue third-party audits in particular enforcement proceedings, as it has done from time to time in the past. *See* 81 Fed. Reg. at 13655 (citing examples where EPA has required third-party audits in enforcement settlement agreements). The occasional need for enforcement should not serve as the basis for across-the-board rule revisions. Otherwise, EPA will be penalizing the overwhelming number of good actors who have dutifully complied with the compliance audit requirements of the existing RMP rule.

b. Proposed triggers for requiring third-party audits is misplaced

Among the triggers for a third-party audit in the Proposed RMP Revisions is an accidental release from a covered process at a regulated facility that resulted in deaths, injuries, or significant property damage onsite, or known offsite deaths, injuries, evacuations, sheltering in place, property damage, or environmental damage. CEEC believes that EPA's focus on third-party auditing in this scenario is misplaced. After an accidental release of this nature, EPA should focus first and foremost on the regulatory requirements for incident investigation and response, since these are the activities that are most likely to mitigate both the severity of the incident and the potential for recurrence. Auditing certainly has its place in a facility's RMP program and may be a valuable lens through which to evaluate compliance before, during and/or after an accidental release. But auditing is secondary to incident investigation and response, and EPA's proposed trigger for third-party auditing in this particular context appears to be a *non sequitur*.

The other trigger for a third-party audit in the Proposed RMP Revisions is the decision of an implementing agency to require one based on a regulated facility's non-compliance with the RMP program. As described above, CEEC understands and accepts that third-party audits can be an appropriate component of an enforcement settlement agreement, particularly where the enforcement proceeding is based, at least in part, on a defendant's required but deficient self-auditing in the past. Importantly, however, those proceedings include due process safeguards that protect defendants from the unilateral and precipitous imposition of third-party auditing requirements. The Proposed RMP Revisions contain no similar safeguards. Instead, they are written to allow an implementing agency to immediately require a third-party audit, regardless of whether the regulated facility has received proper notice of its alleged non-compliance or an opportunity to contest those allegations. This improperly short-cuts the enforcement process and raises serious due process concerns.

c. EPA's auditor competency requirements run contrary to the Agency's stated goals.

Drawing from its unsupported concerns about leniency and/or bias in self-audits, EPA proposes a number of unprecedented new "competency" requirements for third-party auditors. Some of these requirements are perfectly sensible, like requiring auditors to be knowledgeable with relevant regulatory requirements, experienced with the source and process(es) being audited, trained or certified in proper auditing techniques, and impartial when performing their audit activities. But other requirements do more harm than good.

Under the "competency requirements," EPA proposes to require a licensed Professional Engineer ("PE") on the audit team. But there is nothing about a licensed PE that makes him/her uniquely qualified or valuable for RMP auditing purposes. Indeed, depending on the specific source and process(es) being audited, a licensed PE may be no more qualified or valuable than a chemist, chemical engineer, certified hazardous materials professional or any of a number of

other professional qualifications, many of which are licensed, certified and/or bound by standards of professional ethics equivalent to those of licensed PEs.

Under the "independence and impartiality requirements," EPA proposes to exclude auditors that have worked at or for the facility in the past 3 years, or that will work at or for the facility within 3 years after the audit is completed. These requirements effectively prohibit the use of "first party" or "second party" auditors due to their past, present or future connection to the facility, notwithstanding the fact that this connection may make the auditor uniquely qualified to conduct the most rigorous and effective audit (*e.g.*, based on knowledge and familiarity with the particular facility, its practices, operations and procedures). The requirements will also be very difficult to monitor and enforce, given how often auditors move from one consulting company to another, or those companies merge or otherwise change hands. Rather than allowing facilities to select the most knowledgeable auditors, EPA is essentially forcing facilities to select auditors that know the least about their source and process(es). In this respect, EPA's interest in "independence and impartiality" actually undermines EPA's goals for more rigorous and effective audits and corrective/preventive actions (especially where companies work with their auditors to evaluate implementation alternatives and help implement corrective actions).

d. <u>EPA's audit reporting and implementation requirements conflict with effective compliance assurance programs</u>.

EPA proposes to require third-party auditors to submit their audit reports to the implementing agency at the same time, or before, they provide their report to the facility. The facility then has up to 90 days (but not longer) to prepare and submit a findings response report to the agency that includes corrective actions and a schedule for their implementation. None of the reports associated with the audit may be treated as privileged attorney-client communications or attorney work product, even if that is precisely what they are (*i.e.*, conducted by or through attorneys for the purposes of providing legal advice or preparing for litigation). And all of the reports related to corrective actions and schedules must be immediately provided, in full, to the audit committee of the company's board of directors, or other comparable committee. These requirements run contrary to the following, well-established auditing practices.

First, even the best auditors occasionally make mistakes in their audits and written findings based, for example, on misunderstandings of law, case decisions interpreting the law, application of the law to the particular facts and circumstances at any given facility, or even a simple scrivener's error documenting what they saw. For this reason, it is essential that facilities have an opportunity for an arms-length back-and-forth with the audit team (whether internal or external) <u>before</u> an audit report is finalized or shared externally.

Second, in many cases, as part of that back-and-forth, attorneys are involved to provide advice on the law and how it applies to the facts. Without the involvement of attorneys, critical issues of legal interpretation can be missed altogether, leading to audit outcomes that are wrong, misdirected, or both. Overriding legal privileges by regulation is bad policy. It also conflicts with EPA's long-standing willingness <u>not</u> to erode such privileges in the auditing context.

Third, the best audits rarely treat the underlying findings in a vacuum wholly removed from implementation. For this reason, it is common for audit teams to present findings and recommended corrective actions together, so that plans for corrective and preventive actions can be vetted and deployed simultaneously with the review and vetting of the underlying findings.

Fourth, while appreciating the value of close cooperation and engagement between regulated facilities and their implementing agencies, audit reports are not commonly part of the back-and-forth; nor should they be. They are not written for the agencies. Instead, they are written for the regulated facilities in order to help them prevent, detect and deter violations. Often, facilities choose to discuss and share information on violations and corrective actions with relevant agencies, but EPA's proposal would turn this choice into a mandate, with overly-prescriptive requirements for what, how and when to report.

Finally, while one of the hallmarks of an effective compliance program is to have a governing body (*e.g.*, board of directors) that is knowledgeable about the content and operation of the compliance program and exercises reasonable oversight with respect to the implementation and effectiveness of the compliance program, such knowledge and oversight do not require (and indeed may be undermined by) the review of full-blown audit-related reports. Many high functioning and effective corporate compliance programs typically require high level reporting of compliance issues to the board (*e.g.*, using summaries rather than full-blown reports). This enables the board to quickly hone in on specific compliance issues without being distracted or burdened by the minutiae that audit-related reports typically contain. Summaries of RMP audits, along with summaries of the suite of other audits that most companies conduct (*e.g.*, in other compliance areas), enable governing boards to focus on trends and any patterns of weakness that need to be addressed. This higher level review is both more efficient and effective for governance purposes. Whether the board of a particular company is inclined to dig into a full-blown report, as opposed to a high level summary, is a question of corporate culture – neither option is necessarily better or worse than the other, so EPA should not dictate one to the exclusion of the other.

2. Agency Coordination Under Executive Order 13650.

The Proposed RMP Revisions were prompted by Executive Order 13650, "Improving Chemical Facility Safety and Security." Other federal agencies, including OSHA and DHS, are also undertaking or planning to undertake rulemakings as a result of the Executive Order. Due to inherent and inextricable linkages between many of these rulemakings, it is essential that the agencies coordinate their actions, including the timing of their proposals and public comment periods. EPA has essentially "jumped the gun" by issuing its proposal before giving other agencies a chance to confirm and coordinate their plans.

By way of example, EPA now proposes to require compliance audits for each covered process every three years. *See* proposed 40 CFR § 68.58. This means that if a facility has 15 covered processes, it must audit every process for every RMP element every three years, even if many of the RMP elements apply facility-wide and do not vary process by process (*e.g.*,

management of change procedures). EPA's proposal marks a dramatic change from long-standing EPA and OSHA practice allowing facilities with more than one covered process to use "representative unit sampling" to better focus the audit and allow for a "deeper dive" into compliance. By deviating from a shared practice of the two agencies, EPA presents regulated facilities with the challenge of overlapping but different audit requirements, increasing the regulatory burden (not to mention the risk of conflicting compliance obligations) without any demonstrated improvement to chemical facility safety, and exacerbating the risk of confusion and non-compliance. At a minimum, EPA and OSHA need to remain aligned on core aspects of the RMP/PSM program.

EPA has also decided not to address ammonium nitrate in the Proposed RMP Revisions, even though OSHA is currently considering whether ammonium nitrate should be added to the list of chemicals subject to the PSM standard, and DHS is currently considering potential modifications to its CFATS regulation that may affect the screening levels for ammonium nitrate. The lack of coordination by EPA on this issue is particularly striking since the ammonium nitrate explosion at the West Fertilizer facility in West, Texas was a key impetus for Executive Order 13650.

In addition, EPA has proposed to revise its definition of "catastrophic release" in a manner that intrudes on the authority that Congress delegated to OSHA through the Clean Air Act amendments of 1990. Rather than limit its definition to releases *from* a regulated facility, EPA's proposal now captures impacts (including injuries) *within* the regulated facility, essentially usurping OSHA's jurisdiction and authority.

In some cases, the decisions of the other federal agencies will have a direct impact on RMP compliance, even if EPA takes no action whatsoever. For example, in June 2015, OSHA issued a revised interpretation of its PSM retail exemption. As a consequence, some chemical distributors are no longer exempt from PSM and, in turn, are now subject to RMP Program 3 requirements (whereas before, most were covered under RMP Program 2). This example highlights the importance of the agencies acting in a coordinated manner, so that "all of the cards are on the table" for regulated stakeholders to consider in commenting on rulemakings and, perhaps even more importantly, planning for compliance.

As another example, EPA is proposing to use and define the term "feasible" in the context of Inherently Safer Technology. But EPA acknowledges that OSHA is unwilling and/or unable to adopt the same definition under the PSM standard. *See* 81 Fed. Reg. at 13667 col. 3. Given the substantial overlap between PSM and RMP, it is essential that the agencies use and abide by the same core definitions.

Congress specifically envisioned and directed coordination between EPA, OSHA and other federal agencies. *See, e.g.*, 42 U.S.C. 7412(r)(7)(D) ("In carrying out the authority of this paragraph, the Administrator shall consult with the Secretary of Labor and the Secretary of Transportation and shall coordinate any requirements under this paragraph with any requirements established for comparable purposes by the Occupational Safety and Health Administration or the Department of Transportation."). CEEC asks that EPA suspend any

further action on the Proposed RMP Revisions until it has coordinated its proposal with OSHA and DHS and conformed/curtailed its revisions commensurate with the requirements established for comparable purposes by those agencies.

3. Coordination with Local Emergency Response Agencies.

The Proposed RMP Revisions call for enhanced coordination with local emergency planning and response organizations, but EPA fails to adequately address situations where those local bodies are not equipped to engage or coordinate, or are otherwise non-responsive.

For example, an all-volunteer local fire department may not have the staffing or resources to engage in joint drills or response exercises. Rather than mandating coordination across the board, EPA should consider an "upon request" or "as needed" approach that focuses on what the relevant local emergency planning and response organizations really want and need for emergency preparedness purposes.

As written, EPA's proposal would put the entire burden of coordination on the regulated facility, and the facility would bear the brunt and risk of enforcement even in situations where the facility attempted in good faith to coordinate with a non-responsive local emergency response agency. The facility's only alternative would be to develop and implement its own emergency response program, but doing so may be wholly unnecessary. Worse, it may force multiple facilities in the same jurisdiction to develop their own programs, wasting resources and creating risks of conflicting response plans that could be averted through sensible, "as needed" local coordination.

4. Public Access to Information.

Under the Proposed RMP Revisions, regulated facilities are required to provide extensive information to the public in an easily accessible manner (such as a public website), including chemical hazard information for all regulated processes, safety data sheets for all regulated substances, accident history information (including operational and process changes made in response to releases), emergency response information, and summaries of response exercises. *See* proposed 40 CFR § 68.210. CEEC recognizes that there is both conceptual and practical value in keeping the public informed about chemical facility safety and security *if and when* such information aids in preventing accidents or reducing potential harm, but the benefits of transparency must be carefully balanced against the serious risks of exploitation by terrorists, as well as disgruntled and/or former employees.

What EPA now proposes to be easily accessible to the public is, in effect, a roadmap for terrorists and other bad actors on vulnerabilities and opportunities to do harm. EPA proposes limited protections for "classified information" and "confidential business information," but these protections are inadequate to address the risks of exploitation and misuse. They also fail to address the challenges that local emergency response agencies will face attempting to safeguard classified and confidential information that they are required to receive under the Proposed RMP Revisions, and the risks to regulated facilities if those agencies are unwilling or unable to take

the necessary steps to protect classified and confidential information. Finally, EPA has failed to explain why the information already required to be reported publicly under the Emergency Planning and Community Right To Know Act is inadequate to inform the public, especially since that is the law Congress specifically envisioned for that purpose.

5. Near Misses.

EPA proposes new incident investigation requirements for both catastrophic releases and "near-misses." *See* proposed 40 CFR § 68.60(a)(2). In the preamble to the proposal, EPA acknowledges that it has contributed to confusion over the meaning of the term "near miss" in the past, and also acknowledges that is difficult to prescribe the various types of incidents that may occur in RMP-regulated sectors that should be considered "near misses" for investigation purposes. *See* 81 Fed. Reg. at 13651-13652. Instead of proposing a new regulatory definition of "near miss," EPA says that it will rely on facility owners or operators to decide which incidents to investigate, based on the seriousness of the incident, the process(es) involved, and the specific conditions and circumstances involved, recognizing that this will require subjective judgment.

CEEC supports EPA's decision to defer to facility owners and operators but believes that EPA needs to go a step further in articulating an objective "safe harbor" provision for facilities to follow. Such a provision should provide as follows: if a facility owner/operator develops procedures for determining near misses using a deliberative process that weighs different near miss factors, and if the facility owner/operator in fact implements those procedures, then it will be deemed compliant with the rule for purposes of deciding whether and when to conduct incident investigations.

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We thank you for the opportunity to participate in this process and look forward to continuing the dialogue with the Agency on these important issues.

Sincerely,

John Flatley
Executive Director