AGRICULTURAL
RETAILERS
ASSOCIATION

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October 31, 2022

Mr. Barry Breen
Acting Assistant Administrator
Office of Land and Emergency Management
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Mr. Carlton Waterhouse
Deputy Assistant Administrator
Office of Land and Emergency Management
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
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RE: EPA's Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention; Docket ID # EPA-HQ-OLEM-2022-0174

Dear Mr. Breen and Mr. Waterhouse:

The Agricultural Retailers Association (ARA) are submitting comments on the proposed rule on Accidental Release Prevention Requirements: Risk Management Programs (RMP) Under the Clean Air Act (CAA), Section 112(r)(7) published in the Federal Register on Wednesday, August 31, 2022 (87 FR 53556). In the rule, EPA states the purpose of this action is to improve chemical process safety; assist in planning, preparedness, and responding to RMP-reportable accidents; and improve public awareness of chemical hazards at regulated sources.

Statement of Interest

ARA is a 501(c)(6) non-profit trade association that represents the interests of agricultural retailers and distributors across the United States on legislative and regulatory issues. As the political voice for agricultural retailers and distributors, ARA advocates on critical issues, educates legislators and collaborates with regulatory officials on critical issues affecting the industry. Ag retailers supply farmers and ranchers with products and services. These products include seed, nutrients, crop protection products, feed, equipment, and technology.

Retailers also provide consultative services such as crop scouting, soil testing, field mapping, custom planting and application and development of nutrient management and conservation plans. Certified Crop Advisers (CCAs) and Pest Control Advisers (PCAs) are often retained on the retailer's staff to provide professional guidance and crop input recommendations to farmers and consumers.

Agricultural retailers range in size from small, family-held businesses to large companies and farmer-owned cooperatives with many outlet stores. Large and small retail facilities are scattered throughout all fifty states and provide critical goods and services, as well as jobs and economic opportunities in rural and suburban communities.

Comments

Agricultural retailers play an important role feeding the world and provide farmers with essential crop input products like seed, fertilizer, pesticides, and other essential products and services. Our members are a cooperating partner in the regulated community and understand the importance of chemical safety and security.

ARA appreciates the opportunity to provide suggestions and solutions to prevent future incidents from taking place like the April 17, 2013 tragedy at the fertilizer facility in West, Texas, which the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) indicated was an intentional, criminal act by an individual using an incendiary device.[1] According to the ATF, "After more than 400 interviews, a systematic fire-scene examination, the review of witness photos, videos and observations, as well as extensive scientific testing at the ATF Fire Research Lab in Beltsville, Maryland, the fire has been ruled "incendiary," or intentionally set. All viable accidental and natural fire scenarios were hypothesized, tested, and eliminated."[2]

Our employees live and work in communities small and large across the country, and protecting our workers, first responders and their neighbors is a top priority. ARA members communicate and engage with employees, local first responders, and the community to enhance Environmental Health Safety and Security (EHS&S) matters. Our member companies routinely report EHS&S metrics to their respective executive board annually and often quarterly towards safety and prevention. Typically, ARA member companies train their employees monthly on core EHS matters such as: hazard communication, hazardous energy, confined spaces, air, water, waste, and driving.

FERTILIZER: AN ESSENTIAL NUTRIENT FOR U.S. PRODUCTION AGRICULTURE

ARA members store and handle a wide range of fertilizer products, including but not limited to anhydrous ammonia (NH^3), fertilizer grade ammonium nitrate (FGAN), potash, urea, and many more essential nutrient products. When fertilizer is applied on farms and ranches, it is usually in a liquid or solid form. Two primary fertilizer products used by industry and that were stored at the West Fertilizer facility was anhydrous ammonia and ammonium nitrate (AN).

NH3 is an efficient and widely used product that "serves as the foundation of the nitrogen (N) fertilizer industry"[3]. It can be directly applied to the soil as a plant nutrient or used in the creation

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[1] https://www.atf.gov/news/pr/atf-announces-50000-reward-west-texas-fatality-fire
[2] Id.
[3] International Plant Nutrition Institute: Nutrient Source Specifics – Ammonia; Ref # 10070

of other nitrogen fertilizer products. According to the International Plant Nutrition Institute (IPNI), NH3 has the highest N content of any commercial fertilizer, making it a popular source of N despite the potential hazard it poses and the safety practices that are required for its use.[4]

FGAN was the first solid N fertilizer produced on a large scale.[5] While its use has declined in recent years, now comprising approximately 2 percent of the U.S. marketplace, it is still an important fertilizer of choice for many specialty crop producers and ranch operations. According to IPNI, FGAN provides half of the N in the form of nitrate and half in the ammonium form, less susceptible to volatilization losses than urea-based fertilizers when left on the soil surface.[6]

ARA opposes adding new RMP elements as mandatory requirements for covered facilities. These additional requirements will simply increase operating costs, paperwork burdens, and compliance costs rather than making it more likely to prevent an accidental release. The current RMP regulations are working well.

To ARA's knowledge most agricultural retailers are aware of the EPA's RMP requirements and submit an updated risk management plan every 5 years as required by law. It should be noted that West Fertilizer had submitted their RMP as required, including information related to the anhydrous ammonia stored on site. The anhydrous ammonia tanks stored at West Fertilizer remained intact following the explosion. It does not appear that West Fertilizer is listed on EPA's RMP Accidents 2004-2020 (Appendix A) Technical Background document included in this notice of proposed rulemaking.[7] ARA believes the RMP accident data included by EPA is inaccurate and the industry has increased compliance and safety of RMP regulated facilities over that time frame. For example, EPA data from the RMP Accidents 2004-2020 document on line 35 it lists Geneseo Fertilizer (Accident ID # 5260) located in Geneseo, Illinois as having an RMP accident in 2004 with 10 public responder deaths. There is no reported incident from 2004 related to Geneseo Fertilizer that we could find searching the U.S. Coast Guard National Response Center database[8], which includes information on emergency response calls from 1990 until the present. ARA is not aware of such a major accident and tragedy taking place in the state of Illinois in 2004 that would include the death of that many public responders. The only incident with several emergency responder deaths connected to an agricultural retail facility regulated under RMP is the West Fertilizer tragedy, which was caused by an intentional criminal act of arson as previously mentioned. West Fertilizer is not listed in the EPA's RMP accident data. ARA is aware of OSHA citing the facility for numerous health and safety regulatory violations such as unsafe handling and storing of chemicals, inadequate relief valves, lack of an emergency response plan and failure to pressure test replacement hoses on chemical tanks. However, we are not aware of EPA issuing any citations against West Fertilizer for any failure to comply with existing RMP regulations.

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[4] Id
[5] International Plant Nutrition Institute: Nutrient Source Specifics – Ammonium Nitrate: Ref # 22 # 11083
[6] Id
[7] https://www.regulations.gov/document/EPA-HQ-OLEM-2022-0174-0065
[8] https://nrc.uscg.mil/

The goal of an RMP is to prevent chemical accidents at locations storing more than threshold amounts of regulated hazardous chemicals. Facilities subject to the rule must revise and resubmit RMPs to the EPA every 5 years. The plans should:

- Detail the impact of potential chemical accidents at the facility.
- Outline specific accident prevention measures in place.
- Define precise actions to be taken in the event of a chemical accident.

The plans must sufficiently provide:

- An assessment of potential impacts of an accidental chemical release;
- A 5-year history of accidents at the facility;
- A detailed assessment of "worst-case and alternative accidental releases";
- Prevention protocols, such as employee training, safety monitoring equipment, equipment maintenance schedules, and specific safety precautions; *and*
- A response plan in the event of an accident, such as healthcare protocols; employee accident-response training; and notification procedures for alerting first responders, regulatory agencies, and the public.

If EPA is particularly concerned with issues directly related to the operation and maintenance of critical equipment, like failing to perform safety inspections or ensure its mechanical integrity and implementing stringent enforcement to prevent accident hazardous substance releases it stands to reason the agency would have cited West Fertilizer for RMP compliance violations of existing requirements. Either EPA has erroneously left out the data that included in the proposed revisions or the agency potentially failed to properly enforce existing RMP regulations. Neither option provides public confidence in the underlying data and assumptions being made by EPA in the development of these major RMP regulatory changes that will incur significant costs on all impacted industries.

ResponsibleAg Program

ResponsibleAg Inc. (www.responsibleag.org/) is a non-profit organization founded in 2014 to promote the public welfare by assisting agribusinesses as they seek to comply with federal environmental, health, safety and security rules regarding the safe handling and storage of fertilizer products. The organization provides participating businesses a federal regulatory compliance audit relating to the safe storage and handling of fertilizers, recommendations for corrective action where needed and a robust suite of resources to assist in this regard.

The fertilizer industry is building upon its corporate social responsibility by promoting safe storage and handling practices. Our goal: Improving safety and security associated with storage and handling of fertilizer products, supporting compliance with federal regulations, demonstrating accountability and transparency, and providing for the safety of employees, customers and communities-while continuing to serve the vital need of the agricultural community for crop nutrients.

Any business that stores or handles fertilizer products is eligible to participate in the ResponsibleAg Certification Program. The focus of the program for the first three years will be on companies that store and handle ammonium nitrate fertilizer and/or anhydrous ammonia fertilizer. Approximately 9,000 facilities are estimated to be eligible to participate in ResponsibleAg in the U.S. Of these, over 3,000 handle ammonium nitrate fertilizers and/or anhydrous ammonia fertilizer. These 3,000 facilities are the initial focus for the ResponsibleAg audit program.

ResponsibleAg has compiled a checklist of federal regulatory requirements applicable to the storage and handling of fertilizer products. The checklist, developed by a technical committee comprised of industry regulatory professionals, contains more than 320 questions. Auditors credentialed under the ResponsibleAg Certification Program[9] will use this checklist to audit the level of compliance at each participating facility. The program has a Top 25 list[10] of common issues for Ag retail facilities, which does not include any of the RMP related concerns raised by EPA in their proposed rule.

The scope of the audit is determined by the participating facility. All participants are required to have a base audit for the storage and handling of fertilizer products. A participating facility can choose to add supplemental areas. For example, if a facility also handles agricultural chemicals, it can add a supplement to the base audit that would cover the storage and handling of these products as well.

Participating facilities will receive an audit by a credentialed ResponsibleAg auditor once every three years. Up to seventeen areas of a facility are assessed by the auditor. (Examples of these areas are dry fertilizer, liquid fertilizer, anhydrous ammonia, shop, office, and grounds, etc.) The auditor will enter their findings into the secure portal on the ResponsibleAg website within 24 hours of completing the audit. After it is entered, the facility will receive (if applicable), a corrective action plan listing any issues that were discovered by the auditor.

Compliance education is a key component of ResponsibleAg' s mission. If the auditor identifies compliance issues, the facility will receive a corrective action plan listing those issues, information on how to correct them and a recommended time frame for corrections. Certification may not be obtained until all outstanding issues are addressed.

Additional Industry Compliance Assistance Tools

To improve the safety and security of AN, TFI and ARA modernized FGAN Guidelines that are specifically tailored to fertilizer grade AN retailers. The FGAN Guidelines present a condensed overview of the rules, best practices, and procedures that all fertilizer retail facilities should know if they sell AN fertilizer products[11]. The FGAN Guidelines are available to our members who handle

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[9] https://www.responsibleag.org/CredentialingApplication/

[10] https://www.responsibleag.org/

[11] The FGAN Guidelines offer guidance for facility-level planning activities, security and access controls, internal inspections, and other topics (e.g., important electrical, vehicular, and structural safety issues) that are implicated by routinely handling AN products in a retail setting.

the product and to OSHA[12], which has made these Guidelines available through its website. ARA encourages EPA and OSHA to promote the ResponsibleAg program by providing access through the agency's compliance assistance websites.

The industry also has available the Asmark Institute's myRMP program[13], which is designed to help confirm the correct program level for your facility. EPA provides a link to the myRMP program on their website discussing "Guidance for Facilities on Risk Management Programs (RMP)[14]"

Third-Party Audit Compliance Audits

The EPA is proposing to increase the RMP's compliance audit provisions to require independent third-party compliance audits after 2 accidental releases within a 5-year period. While we certainly understand the potential need for third party audits, ARA believes this can be accomplished whether a team is comprised of internal or external auditors. Internal auditors can provide a better understanding of the facility and process and will likely improve the quality and substance of the audit. ARA opposes any professional engineer (PE) requirements be considered by EPA as they add an unnecessary cost and these individuals do not automatically understand auditing techniques and may not qualify to perform an effective audit. The PE licensing process is state regulated with various, non-standardized requirements and is not specific to Process Safety.

The overall circumstances under which a company conducts an RMP audit at one of their facility's should be left up to the company as it is a performance-based standard. ARA is concerned with the potential requirements that the auditor shall submit the report to the agency at the same time or BEFORE it is provided to the owner or operators. We are also concerned the audit report and related records shall not be privileged as attorney-client communications or attorney work products, even if written for or review by legal staff. This seems contrary to the basic due process and legal rights that should be afforded the owner or operators of the facility. ARA opposes the agency trying to mandate a company hire a third-party to conduct an audit to basically act as an extension of EPA enforcement officials. The legality of this proposal is very questionable.

Audit reports, either in draft or final form, contain confidential business information that must be properly secured. Requiring the publishing of incomplete or un-vetted audit reports will only create unnecessary confusion and the potential for litigation and controversy. At the heart of the ResponsibleAg initiative is the goal of providing accurate and credible audits consistently across the entire group of carefully trained ResponsibleAg credentialed auditors. Each auditor must successfully complete this course initially, as well as annual refresher training to maintain proficiency and certification. If EPA decides to move forward with a Third-Party Audit requirement, we urge the agency to recognize the ResponsibleAg program and any auditors that have completed the RA auditor training program hired by an RMP facility as being eligible and in compliance with this potentially new regulatory requirement.

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[12] https://www.osha.gov/fertilizer-industry
[13] https://www.asmark.org/myRMP/
[14] https://www.epa.gov/rmp/guidance-facilities-risk-management-programs-rmp

Safety Technology Analysis and Alternative Approaches

EPA is considering proposing an amendment to the RMP regulations to Program 3 processes in NAICS codes (petroleum and coal products manufacturing 324; chemical manufacturing 325) that requires:

- An analysis and documentation of safe technologies and alternatives
- Integration of the safer technologies and alternatives analysis into the Process Hazard Analysis (PHA)
- Implementation of safer technologies and alternatives were feasible; EPA would not make any determination regarding the specific analysis, technology, design, or process selection by chemical facility owners or operators.

ARA would like to point out that the North American Industrial Classification System (NAICS) was developed for use in the collection, tabulation, presentation, and analysis of statistical data that show the economic status of the United States. This classification system was never intended to determine whether a business is subject to or exempt from federal regulations[15].

ARA urges EPA to not require a safer alternatives options analysis either as a new prevention program element, as part of the existing PHA / Hazard Review element, or as a separate new requirement under CAA section 112(r). The EPA reviewed this issue and correctly rejected the idea to impose an inherently safer technology analysis when the RMP regulations were first issued on June 20, 1996. The same arguments were made by anti-chemical groups at that time. The fundamental issues / problems of potentially imposing an IST federal mandate that EPA considered then remain the same today. In the RMP Final Rule issued in 1996, it states the following:

> "*EPA has decided not to mandate inherently safer technology analyses. EPA does not believe that a requirement that sources conduct searches or analyses of alternative processing technologies for new or existing processes will produce additional benefits beyond those accruing to the rule already. As many commenters, including those that support such analysis, pointed out, an assessment of inherently safer design alternatives has the most benefit in the development of new processes. Industry generally examines new process alternatives to avoid the addition of more costly administrative or engineering controls to mitigate a design that may be more hazardous in nature. EPA believes these processes can be safely operated through management and control of the hazards without spending resources searching for unavailable or unaffordable new process technologies.*"[16]

ARA agrees with EPA's rationale for rejecting an IST mandate then and should reject instituting an IST mandate in the future. ARA members and other sectors of the agricultural industry regularly review and update existing industry consensus standards such as ANSI K61.1 which covers anhydrous ammonia storage facilities and nurse tank loading stations.

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[15] http://www.census.gov/eos/www/naics/faqs/faqs.html#q17

[16] EPA Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section 112(r)(7); FRL-5516-5; RIN 2050-AD26; *Federal Register, Vol. 61, No. 120, June 20, 1996, pages 31699-31700*

These industry consensus standards are like ones that have been adopted by OSHA.[17] When EPA inspectors go to RMP facilities to conduct a compliance audit, the EPA is already writing citations against the facility under the agency's "General Duty" clause if it fails to follow industry consensus standards such as the ANSI standards referenced earlier.

ARA opposes any EPA mandate that would require facilities substitute products for "safety alternative chemicals." Ammonia is a basic building block for the manufacture of nitrogen fertilizer products. There are no safer alternatives to replace this product so even being required to conduct an IST analysis makes no sense.

Anti-chemical groups contend that the option could be used to replace, or in the environmental context supplement, existing PSM and RMP safety requirements with a system that requires employers to present to regulators a structured argument, supported by a body of evidence, that provides a compelling, comprehensible, and valid case that a system is safe for a given application in a given operating environment. However, ARA and other impacted industry segments believe regulations should be straight forward and easy to understand. The current federal regulatory scheme is already complex. Changing the regulatory structure utilizing a "safety case" model will create additional confusion and do little to improve safety. The U.S. Chemical Safety Board also declined to make this recommendation to the state of California, in response to the Chevron explosion. The "safety case" would be a major departure from the current regulatory model, and we believe requires legislative action to implement.

EPA is also proposing that all facilities with petroleum and coal products processes (in NAICS 324) using hydrofluoric acid (HF) in an alkylation unit (approximately 45 facilities) consider safer alternatives to HF alkylation, regardless of proximity to another NAICS 324- or 325-regulated facility. The EPA's estimated costs to make changes at refining and petrochemical sites could be near $1 billion per site. ARA believes the proposal will have a significant impact on all industries, including small businesses, due to significant impacts on U.S. gasoline production and stress on U.S. fuel supplies. The United States is already experiencing historic highs in gas and diesel costs and record inflation. If this EPA RMP proposal is allowed to be finalized the severe economic impact on the U.S. economy would be catastrophic, causing an even worse energy and food crisis impacting all Americans and the globe. EPA has provided little to no data to back up the need for these massive regulatory changes against industries already working to make operations safer under existing RMP regulations. The most effective way for EPA to improve safety is to focus their efforts on existing enforcement efforts and increased compliance assistance.[18]

ARA urges the EPA to establish a Small Business Advocacy Review (SBAR) panel before moving forward with this proposal as we believe the agency substantially understated the economic impact on small businesses. The SBAR is designed to provide an opportunity for regulated small entities the ability to provide advice and recommendations on regulatory alternatives to minimize the burden

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[17] 29 CFR 1910.111

[18] https://advocacy.sba.gov/resources/reference-library/sbrefa/

on small entities. Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 to provide new avenues for small businesses to participate in the federal regulatory process. EPA, OSHA, and the Consumer Financial Protection Bureau (CFPB) are required to convene SBAR panels prior to proposing rules that would have a significant economic impact on a substantial number of small entities.[19] EPA has failed to take this required action regarding this proposed rule that will have a significant economic impact on small entities.

Emergency Response Preparedness Requirements

Under the proposed rule, all Program 2 or 3 processes would be required to comply with several new requirements that inappropriate, unnecessarily increase operating costs on RMP facilities, and threatens facility security with the potential release of confidential, sensitive information. ARA members support efforts to coordinate more closely with their local LEPCs and to education and training activities to ensure they are well prepared in case of an accidental release. Under existing regulations, the facility is already required to coordinate their Emergency Action Plan with the local emergency first responders. Under the Emergency Planning and Community Right-to-Know Act (EPRCA)[20] facilities are required to submit Tier 1 and /or Tier 2 report under Sections 311 and 312 regarding a hazardous chemical inventory to the State Emergency Response Commissions (SERCs), Local Emergency Planning Committees (LEPCs), and local fire departments. If the EPA believes the current EPCRA reporting system is inadequate, then the agency should properly focus on improving the Tier 1 and Tier 2 reporting systems. EPA should also be focusing on providing additional resources and training towards LEPCs and volunteer first responders in smaller, more rural communities that have limited staff and resources.

Information Availability Requirements

ARA recommends the EPA withdraw its proposed information sharing provisions included in this proposal. We believe the sharing of detailed facility and chemical information with the public as proposed conflicts with information security protocols under the U.S. Department of Homeland Security's (DHS) Chemical Facility Anti-Terrorism Standards (CFATS) regulations. Any non-security sensitive information such as the off-site consequences analysis data should only remain accessible to the public through Federal reading rooms.

ARA believes the release of some sensitive facility information such as audit reports, exercise schedules and summaries, and emergency response details does nothing to prevent accidents or reduce potential harm, but likely increase the vulnerability of multiple facilities to attacks by terrorists or other criminals. The problems that may currently exist are the result of a lack of coordination between federal agencies and a failure of the federal government to communicate with the local communities and first responders or properly targeting limiting financial resources to LEPCs to help with joint education and training programs with local RMP facilities.

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[19] Id
[20] https://www.epa.gov/epcra

"Executive Order 13563 Improving Regulation and Regulatory Review" issued by former President Obama in 2011, states the following:

> Section 1. General Principles of Regulation. (a) Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must consider benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

This EPA proposal does not meet this goal include in EO 13563.

EPA Does Not Have Statutory Authority to Include FGAN Under the RMP Regulations

When Congress passed the Clean Air Act Amendments of 1990,[21] Section 112r required EPA to publish regulations and guidance for chemical accident prevention at facilities using substances that posed the greatest risk of harm from accidental releases.[22] The RMP contains three elements: a hazard assessment, a prevention program, and an emergency response program.[23] The RMP program was created by Congress following the 1984 tragedy that occurred in Bhopal, India to "address the dangers of hazardous chemicals released to the air."[24] The RMP program was created following the establishment of the EPCRA because federal law existing at the time contained "few provisions regulating the prevention, detection, or response to accidental releases."[25] In the case of Section 112, the GAO, in a February 23, 1990 opinion to the House Energy & Commerce Committee stated that EPA did not have the authority to "regulate the accidental release of chemical air pollutants.[26] The RMP program was created under Title III in order for EPA to "establish reasonable and appropriate regulations to prevent and detect accidental releases to the maximum extent practicable."[27]

Under the "Accident Prevention" Section of Title III "Air Toxics" included in the Clean Air Act of 1990 (P.L. 101-549), it discusses the purpose and general duty of this law by stating "it shall be the objective of the regulations and programs authorized under this section to prevent the sudden, accidental release and to minimize the consequences of any such release of any substance listed pursuant to section (c) or any other extremely hazardous substance."[28] An "accidental release" is

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[21] Clean Air Act Amendments of 1990, Title III "Air Toxics" (P.L. 101-549); 40 CFR Part 68
[22] EPA Office of Solid Waste and Emergency Response - Clean Air Act Section 112(r): Accidental Release Prevention / Risk Management Plan Rule; EPA 550-R-09-002; March 2009.
[23] EPA Office of Solid Waste and Emergency Response – Risk Management Program (RMP) Audit Program; EPA 550-F-00-010; August 2000.
[24] EPA Risk Management Programs under Clean Air Act Section 112(r): Guidance for Implementing Agencies; P. 1; February 1998.
[25] H.R. REP. 101-490(I); P. 171
[26] Id.
[27] Id, P. 172.
[28] Clean Air Act Amendments of 1990, Title III "Air Toxics" (P.L. 101-549); 40 CFR Part 68

defined as meaning "the *direct or indirect introduction of an extremely hazardous substance into the air* under circumstances which are not routine and which are not authorized pursuant to any permit or emission limitation or standard under any other provision of this Act or any other Federal law. Such term shall not include a release from a vent or relief value, or a release that results from a disturbance in a process (commonly referred to as a `process upset') that is planned and designed to prevent catastrophic events."[29]

Some members of Congress and the Chemical Safety Board (CSB) have recommended to EPA that FGAN be added to the EPA RMP list. However, it is very clear from the intent of Congress in 1990, the plain meaning of the statutory language, and subsequent guidance and regulations issued by the EPA, that the RMP program was never created or designed to address products such as FGAN. The RMP program was created to specifically address the accidental releases of hazardous chemicals in liquid or gas form into the air that could cause harm to the public or the environment. The EPA guidance issued for implementing agencies of the RMP program in February 1998 stated that "the regulations (40 CFR Part 68) require covered facilities to develop and implement a risk management program that includes analyses of offsite consequences of accidental chemical releases to the air, a five-year accident history, a prevention program, and an emergency response program."[30] Under the Clean Air Act Section 112(r)(1), the General Duty Clause also specifically references facilities subject to 40 CFR Part 68 as responsible for the following: knowing the hazards posed by the chemicals and assessing the impacts of releases, designing and maintaining a safe facility to prevent *accidental releases*, and minimizing the consequences of *accidental releases* that do occur.[31] As mentioned previously, the statutory definition of "accidental releases" under this program relates to a "*direct or indirect introduction of an extremely hazardous substance into the air*".

According to U.S. Representative Henry Waxman (D-CA), Ranking Member of the House Committee on Energy & Commerce, the Clean Air Act Amendments of 1990 represented a "culmination of a decade of debate and controversy" and "no legislation received more scrutiny during its consideration."[32] Congressman Waxman wrote that this "historic legislation establishes an aggressive regime of new control requirements to address four crucially important *air pollution* problems: urban smog, *hazardous air pollution*, acid rain, and depletion of the stratospheric ozone layer."[33] He went on to write about the creation of the EPA RMP program in a section of his law review article entitled "Accidental Releases of Hazardous Air Pollutants", discussing how "releases of toxic substances into the *air* can be divided into two groups: routine releases and *unanticipated accidental releases.*"[34] Waxman outlined the establishment of the RMP program and what the EPA Administrator must consider when determining whether to list a particular compound.[35] At the time the Clean Air Act Amendment of 1990 were developed by Congress and enacted into law Waxman

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[29] Id
[30] EPA Risk Management Programs under Clean Air Act Section 112(r): Guidance for Implementing Agencies; Chapter 1 Overview; Background, P. 2; February 1998.
[31] EPA Office of Solid Waste and Emergency Response – The General Duty Clause; EPA 550-F-09-002; March 2009
[32] 21 Envt. L. 1721; The Clean Air Act Amendments of 1990: A Symposium Overview and Critique; An Overview of the Clean Air Act Amendments of 1990 by The Honorable Henry Waxman, 1991.
[33] Id.
[34] Id, D. Title III: Control of Hazardous Air Pollutants, 6. Accidental Releases of Hazardous Air Pollutants.
[35] Id.

served as Chairman of the House Energy and Commerce Committee's Subcommittee on Health and the Environment, which has jurisdiction over the federal Clean Air Act. Congressman Waxman was a central architect of the Clean Air Act.

The EPA's Risk Management Program Guidance for Offsite Consequence Analysis[36], issued in April 1999, focuses all their modeling on toxic gases, toxic liquids, and flammable substances in gas or liquid form. None of the modeling relates to hazardous materials stored in a solid form. As part of the planning for the Worst-Case Scenario, EPA requires each regulated facility to calculate the distance to the endpoint and provide for offsite consequence analysis. Air dispersion modeling is the basis of determining the Worst-Case endpoint.

On June 27, 2013, over two months following the West Fertilizer tragedy, Barry Breen, Principal Deputy Assistant Administrator for the EPA's Office of Solid Waste & Emergency Response testified before the U.S. Senate Committee on Environment and Public Works. In Breen's written testimony, he states that "the goal of the EPA's Risk Management Program is to prevent accidental releases of substances to the air that can cause serious harm to the public and the environment from short-term exposures, and to mitigate the severity of releases that do occur."[37] In that same written testimony, Breen mentions the several statutory factors considered the agency used to develop the RMP list, "including the severity of any acute adverse health effects associated with accidental releases of the substance, the likelihood of accidental releases of the substance, and the potential magnitude of human exposure to accidental releases of the substance. An accidental release is an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source."[38]

Given that the EPA RMP program was designed to address accidental releases of extremely hazardous materials into the air such as anhydrous ammonia, not to address storage related issues for product like FGAN, ARA opposes adding FGAN to the EPA RMP list. ARA believes the best, most prudent path forward for the safe and secure storage and handling of FGAN is for OSHA to work collaboratively with industry on education, compliance assistance, and industry outreach efforts, provide agency support for the TFI-ARA FGAN Storage and Handling Guidelines issued in February 2014, and promote the ResponsibleAg® initiative.

ARA believes there should be a concentrated focus on FGAN storage and handling regulations, rather than regulating a solid substance under an air statute such as the RMP regulations. Thus, ARA supports the principles of 1910.109(i)[39] to FGAN.

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[36] EPA Office of Solid Waste and Emergency Response – Risk Management Program Guidance for Offsite Consequence Analysis; EPA 550-B-99-009

[37] Written Testimony of EPA Office of Solid Waste and Emergency Response Principal Deputy Assistant Administrator Barry Breen, June 27, 2013, before the U.S. Senate Committee on Environment & Public Works full committee hearing **entitled, "Oversight of Federal Risk Management and Emergency Planning Programs to Prevent and Address Chemical Threats, Including the Events Leading Up to the Explosions in West, TX and Geismar, LA"**

[38] Id.

[39] https://www.responsibleag.org/compliance-assistance-library/Ammonium_Nitrate-20160120.pdf

Criteria for Facilities That Should Be Covered by the RMP Regulations

In determining whether a facility should be subject to the requirements of the RMP regulations, the EPA needs to focus on the following:

- Product (i.e.: Anhydrous Ammonia)
- Threshold Quantities (i.e.: amount stored on the facility)
- Process (i.e., manufacturer vs. ag retail facility vs. farm)
- Location (near populated areas)

Product: In 1996, the EPA established a list of regulated chemicals that pose a large risk of accidental release and are extremely hazardous to people and the environment. EPA's RMP regulations requires all agricultural chemical facilities that handle, process, or store a quantity of 10,000 pounds or more of anhydrous ammonia to register with the agency and submit a Risk Management Plan.

According to the EPA, there are approximately 3,300 bulk agricultural chemical facilities that have reported under the RMP Program Level 2 process of storing large quantities of anhydrous ammonia. However, there many other business operations storing as much or more anhydrous ammonia at their facilities currently not subject to the RMP regulations. Under the current regulations when ammonia is used as an agricultural nutrient, when held by farmers, is exempt from ALL provisions of the RMP regulations. When this new EPA regulation was put in place, most farm operations did not store large quantities of anhydrous ammonia. The common practice for farm operations was to purchase anhydrous ammonia from the local agricultural retailer. The farmer typically used nurse tanks "to transport the anhydrous ammonia as a liquid under pressure from the dealer to the field."[40] Nurse tanks are most often either 1,000 or 1,500 gallons in size weighing between 7,500 to 10,000 pounds. Today, there are many large farming operations storing as much or more anhydrous ammonia than an independent agricultural retail dealer. The risk of an accidental release from anhydrous ammonia is as great or greater from these non-regulated facilities.

ARA believes the EPA should focus on the types of products being stored at a facility that pose a risk of "accidental release to the air and mitigate the consequences of such releases by focusing prevention measures on chemicals that pose the greatest risk to the public and the environment" rather than focusing on the type of ownership of the facility. An individual or community potentially exposed to a product such as anhydrous ammonia due to an accidental release care more about the potential risks to the surrounding area and steps being taken to prevent an accident rather than who owns the facility.

Threshold Quantities (TQ): Under the EPA RMP regulations, the requirements under this program apply to "all stationary sources with processes that contain more than a threshold quantity

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[40] Minnesota Department of Agriculture website on Nurse Tank Anatomy

of a regulated substance." The TQ for anhydrous ammonia under the RMP regulations is 10,000 pounds. In addition, within the final List Rule issued on June 20, 1996, the EPA defined stationary source to include "transportation containers that are no longer under active shipping orders and transportation containers that are connected to equipment at the stationary source for the purposes of temporary storage, loading or unloading."[41] EPA's definition of stationary source would include transportation containers only when they are no longer in transportation in commerce. ARA agrees with the EPA's TQ for anhydrous ammonia and their historical definition of stationary source.

Process: Within the RMP regulations, there are three different program levels – Program 1, Program 2, and Program 3. Program 1 processes are those which would not affect the public in the case of a "worst-case release" and with no accidents with specific offsite consequences within the past five years. These types of facilities have limited hazard assessment requirements and minimal prevention and emergency response requirements. Program 2 processes are likely to be relatively simple by imposing streamlined prevention program requirements, as well as additional hazard assessment, management, and emergency response requirements. Facilities likely to have one or more Program 2 processes include agricultural retailers. Program 3 processes impose OSHA's Process Safety Management (PSM) standards are the prevention program as well as additional hazard assessment, management, and emergency response requirements. Program 3 level requirements like the OSHA PSM standards are typically required for manufacturing facilities that usually involve complex chemical processes.

ARA believes the current criteria being used by EPA to determine the Program level for certain processes and facilities should remain the same. The RMP regulations should view the processes taking place at a manufacturing facility utilizing complex chemical processes to develop a product significantly different compared to more basic processes that take place at an agricultural retail facility or farm. If EPA required agricultural retail facilities to comply with Program 3 level requirements it would significantly increase their operating / regulatory compliance costs with no real additional safety benefits. The storage and handling processes for anhydrous ammonia are relatively simple compared to complex processes involving multiple chemicals at a manufacturing facility. ARA strongly urges EPA maintain the Program 2 requirements for agricultural retail facilities as it usually involves the storage and handling of a single product – anhydrous ammonia.

If significant additional regulatory requirements are placed on agricultural retailers, many would seriously consider consolidating facilities, or getting out of the anhydrous ammonia business altogether. This would mean reduced availability of a critical fertilizer product, an increase in the price of food, and ultimately it would hurt American agriculture's ability to produce an abundant and affordable food supply. In certain crops, anhydrous ammonia is the preferred fertilizer source because it contains 82 percent nitrogen and is most economical. Because fewer facilities would carry this product, farmers will be required to either 1) travel longer distances to obtain their supply or 2) forced to purchase significantly larger quantities of alternative sources of nitrogen, or 3) purchase

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[41] EPA Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section 112(r)(7); FRL-5516-5; RIN 2050-AD26; *Federal Register, Vol. 61, No. 120, June 20, 1996, page 31668*

and build their own on-farm anhydrous ammonia storage tanks that are not subject to any of the RMP regulations.

Location: Another key criteria EPA should focus on relates to the location of the facility. Facilities located closer to more populated areas storing an RMP regulated product above the TQ are likely to pose a greater risk of causing death, injury, or serious adverse effect on human health or the environment in the event of an accidental release. Facilities located in more rural areas with lower populations are likely to pose a lower risk.

Proposed Revision to Definition of "Retail Facility"

EPA proposes to amend the current definition of "retail facility" and add the requirement that "more than one-half of the *annual* income *(in the previous calendar year)* is obtained from direct sales."[42] According to EPA, the definition of retail facility currently lacks a definite time frame in which to calculate the percentage of sales, creating uncertainty of whether a facility qualifies as a "retail facility." According to EPA's definition of a "retail facility" it states the following:

- A flammable substance listed in 40 CFR §68.10 is excluded from the Risk Management Program regulations when it is used as a fuel or held for sale as a fuel at a retail facility (§68.126). What is the definition of a retail facility for the purposes of this exclusion?

- A retail facility is defined as a stationary source at more than one-half of the income is obtained from direct sales to end users or at which more than one-half of the fuel sold, by volume, is sold through a cylinder exchange program (§68.3).[43]

The PSM "retail facility" definition, which has been in place since 1992, provides that "an employer is a retail facility if more than fifty (50) percent of its income is derived from the direct sale of the covered process to end users." The "retail facility" definition for RMP and PSM has been in place for a long time and is well understood by the industry. The meaning and understanding of calculating annual business revenue usually is the money it receives during the course of a year. This could mean a fiscal year (e.g., October 1-September 30) or the calendar year (i.e., January 1-December 31). If EPA moves forward to adjust the definition, we recommend providing businesses and / or facilities with the option of selecting either fiscal year or calendar year when determining annual income from direct sales to end users.

EPA Should Utilize Federal Advisory Committee Structure to Fully Review Potential Revisions to the Risk Management Program Regulations and Related Programs and Make Any Necessary Technical Recommendations

ARA and several other national trade associations in 2014 submitted a letter to EPA requesting the agency utilize an existing federal advisory committee to provide the Office of Emergency

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[42] Proposal at 53605.
[43] https://www.epa.gov/rmp/what-definition-retail-facility

Management with industry stakeholder advice and counsel on scientific and technical aspects of the Clean Air Act (CAA) Section 112(r): Accidental Release Prevention/Risk Management Program (RMP) Regulations. The FACA committee or new subcommittee would be established to fully examine the RMP regulations and report back any specific recommended changes, if needed, to EPA officials.

In the EPA RMP proposal, the agency requests input on several complex topics ranging from expanding the list of covered substances, adding several new program requirements, mandating an inherently safer technology (IST) analysis, and numerous other proposals to further expand the program. For all these topics, EPA is seeking detailed financial data regarding costs and economic impacts on industry. We believe the current timeframe is woefully inadequate to fully address these major questions/issues that could lead to fundamental changes in the RMP regulations.

Federal advisory committees have been utilized by EPA and other federal agencies to generate expert advice and recommendations. The Federal Advisory Committee Act (FACA)[44] requires that the advice provided by these committees be objective and accessible to the public.[45] The EPA has an existing Clean Air Act Advisory Committee (CAAAC)[46] that was established "to advise the U.S. EPA on issues related to implementing the Clean Air Act Amendments of 1990." The EPA CAAAC has several Subcommittees and Work Groups. One of the inactive groups listed is the "Accident Prevention Subcommittee"[47], which was created to provide industry stakeholder advice and counsel on scientific and technical aspects of the Clean Air Act Section 112(r). We recommend re-activating this subcommittee and task it to fully vet the numerous issues raised in the RMP proposal in a forum open to public viewing. If EPA proceeds forward through this type of consensus building process it will help, ensure fair and balanced points of views will be represented by industry and other key stakeholders and prevent inappropriate influence from any special interests. In addition, a more deliberative review of the RMP regulations will also ensure transparent and open debate takes place on whether any major or minor revisions to this federal program are necessary. In a memorandum issued by former President Barack Obama to all heads of Executive Departments and Agencies entitled "Transparency and Open Government" he states the following:

> "My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government."[48]

Utilizing a federal advisory committee to review and discuss the issues raised in an EPA's Small Business Advocacy Review Panel process on potential revisions to the RMP regulations is consistent with former President Obama's Open Government Directive. If the EPA decides to move forward

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[44] P.L. 92-463
[45] Congressional Research Service: Federal Advisory Committees: An Overview, April 16, 2009.
[46] http://www.epa.gov/air/caaac/index.html
[47] http://www.epa.gov/air/caaac/accident_prev.html
[48] https://obamawhitehouse.archives.gov/the-press-office/transparency-and-open-government

with arbitrary deadlines to finalize pre-determined decisions to expand regulations for the RMP program whether they are necessary or not would be inconsistent with goals of a transparent, participatory, and collaborative government.

Conclusion

The EPA should evaluate the RMP regulations from a "manufacturer to end user" perspective and address each safety and security issue if they intend to prove to the public their efforts are comprehensive. ARA is raising legitimate concerns over the process of this regulatory proposal from EPA and the likelihood of exceeding its regulatory authority regarding many of the new requirements being placed on RMP facilities. We support the comments included in the coalition letter that ARA is a co-signor along with the US Chamber of Commerce and several other industry associations. ARA also supports the comments submitted by the U.S. Small Business Administration's Office of Advocacy.

Thank you for your review and consideration of our comments. If you have any questions or want further information, please do not hesitate to contact me at 202-595-1699 or richard@aradc.org.

Sincerely,

Richard D. Gupton
Senior Vice President, Public Policy & Counsel