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February 19, 2016

Jim Belke
Risk Management Program Coordinator
Environmental Protection Agency
1200 Pennsylvania Ave, NW
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Sent via email

Dear Mr. Belke,

We appreciated the opportunity to meet with you and your colleagues on December 16, 2015 to discuss our concerns relating to enforcement of the Environmental Protection Agency's (EPA's) Risk Management Program (RMP) Compliance Audit requirements.

As discussed during the meeting, there is a disconnect between recent EPA enforcement activity and longstanding EPA and Occupational Safety and Health Administration (OSHA) guidance regarding the compliance audit requirements of their respective rules. In general, our members have followed OSHA and EPA guidance,¹ which expressly references and endorse the Center for Chemical Process Safety (CCPS) publication that recommends using a representative unit sampling to conduct effective compliance audits.² AFPM members are concerned that EPA's reinterpretation of the RMP Compliance Audit program would require a facility to audit all process units for all program elements, which is not consistent with industry best practices and might actually *decrease* the effectiveness of compliance audits across the industry. Such an interpretation would serve only to increase personnel and monetary resources exponentially.

CCPS recommends two alternative methodologies for selecting units for process safety compliance audits:

In medium-to-large facilities with PSM programs, there are generally multiple processes or units covered by that program. If there are 20-25 complex processing units included within the scope of the PSM program (as would be typical of an oil refinery) and there are 15-25 elements in the program, the amount of potential

¹ OSHA Appendix D §1910.119 – Sources for Further Information (non-Mandatory) and CPL 03-00-010, Petroleum Refinery Process Safety Management National Emphasis Program; General RMP Guidance – Chapter 7 Prevention Program (Program 3) Section 7.9 Compliance Audits - <http://www.epa.gov/sites/production/files/2013-11/documents/chap-07-final.pdf>

² International Organization of Standardization (ISO) also has several published standards on auditing and sampling procedures that are used by our members as well.



auditing is almost always beyond the available time and resources. Therefore, to reduce the audit to a manageable scope, the choices are the following:

- *Audit some elements of the PSM program in all covered process and units; or*
- *Audit all elements of the PSM program in some of the process and units.³*

In many instance, the latter choice is selected...

One of the reasons for this approach is that management systems under PSM and RMP (e.g., management of change and emergency response programs) are typically implemented site-wide and do not differ from process to process. Representative sampling provides an accurate depiction of the entire population (i.e., all the covered processes) and allows a deeper, more thorough look into the compliance system. It is also important to note that while a facility might use representative sampling to choose a subset of covered processes to audit, the audit findings are applied facility-wide, not just at those covered processes that were sampled. Once a finding is substantiated through the auditing process, it would be an ineffective use of time and resources to continue looking at the same issue in other process areas.

Based on the discussions during our meeting with EPA, and other enforcement discussions between various EPA Regions and some of our members, it appears that EPA's current expectation is that a stationary source will audit each RMP prevention program element in every covered process, every three years. Therefore, if a facility has 30 covered processes, it would have to audit all 12 RMP Program 3 prevention program elements (and 14 for PSM) in each process, which effectively means a records review, physical review, and interviews related to 420 regulatory elements every three years. Contrary to that interpretation, industry guidance recommends selecting 2-4 units,⁴ and OSHA recommends selecting a "sample size sufficient to give a degree of confidence that the audit reflects the employer's level of compliance," before auditing all program elements for those selected representative units. During an in-person meeting with AFPM and its members on October 23, 2015, OSHA's PSM enforcement staff confirmed that this recommendation remains OSHA's official interpretation of PSM.

AFPM members are concerned that while EPA has repeatedly affirmed its compliance audit related requirements for RMP are identical to OSHA's PSM audit requirements,⁵ recent

³ *Guidelines for Auditing Process Safety Management Systems*, Center for Chemical Process Safety of the American Institute of Chemical Engineers, p. 83-84, (2d ed. 2011).

⁴ *Id.* at p. 85.

⁵ According to EPA: A source owner or operator responsible for a process in compliance with the OSHA PSM standard should already be in compliance with the Program 3 prevention program requirements of 40 CFR Part 68, Subpart D (61 FR 31687; June 20 1996). EPA agrees with commenters that bringing the PSM standard and the Risk Management Program rule even closer together will prevent duplicative and conflicting requirements. Because Agency has revised the final rule to match the PSM standard as the commenters describe, the EPA has addressed these comments. (Response to comment regarding Risk Management Plan Rule: Summary and Response to Comments, Part 5 of 12; p. 15-1; EPA-HQ-OAR-2004-0365-0007).



enforcement activity suggests otherwise. Several of our members have been notified or have already received EPA Notices of Violation that state:

[Company X] failed to certify that it had evaluated compliance with the provisions of 40 CFR Part 68 at least every three years to verify that the procedures and practices it developed are adequate and being followed, as required by 40 CFR 68.79(a). Specifically, the company's RMP Compliance Audits in (past 2 audit dates) did not evaluate all RMP covered processes. Company's Procedure number xxx-xxx, PSM Compliance Audit, Rev 1, date: Section x.x Scope, states that the audit will only cover a representative sample of the covered processes.

OSHA's National Emphasis Program for both petroleum refineries and chemical facilities found only 4% of all citations issued were related to compliance audits (1910.119(o)). Nearly all of those citations related to the failure to conduct an audit, failure to address audit findings, audits not completed timely, or the number of pressure vessels audited was not an adequate representative sample. No citations were issued for audits that did not include all covered processes and our members are unaware of any OSHA or EPA Notice of Violation requiring all process units to be audited for all program elements until recently.

OSHA states in its Petroleum Refinery Process Safety Management National Emphasis Instruction dated August 10, 2009, "Due to the performance nature of PSM, how the employer audits its hot work permits/procedures, or any procedure, is a matter of ensuring performance (i.e., procedures are developed, adequate and are being implemented), rather than a matter of OSHA specifying how to conduct compliance audits."⁶ Since both EPA and OSHA have the same compliance audit requirements, AFPM members do not understand why they are now receiving NOV's from EPA stemming from audit methodologies that are consistent with agency guidance and have not changed over the past 20 years. OSHA's auditing guidance points to CCPS auditing practices as the preferred approach. EPA's RMP website references OSHA's guidance for Program 3 compliance,⁷ because according to EPA, the two regulatory requirements are intended to be identical. EPA's new enforcement methodology changes the scope of the auditing requirement in a manner that no longer aligns with OSHA's enforcement of the compliance audit regulations.

It is common practice for AFPM members to perform a PSM compliance audit to meet the requirements of both OSHA PSM and EPA RMP. This practice was affirmed by the EPA in the preamble to the final RMP rule: "The Program 3 prevention program includes the requirements of the OSHA PSM standard, 29 CFR 1910.119 (c) through (m) and (o), with minor wording

⁶ Directive Number: CPL-03-00-010, p. A 59.

⁷ <http://www.epa.gov/sites/production/files/2013-11/documents/chap-07-final.pdf>, p. 13



changes to address statutory differences. This makes it clear that one accident prevention program to protect the general public, and the environment will satisfy OSHA and EPA.”⁸

During our discussion with you last month, we learned that EPA’s new interpretation was published in the preamble to a Notice of Proposed Rulemaking (NPRM) for RMP on October 20, 1993.⁹ However, EPA did not take that position in the June 20, 1996 final rule, or its preamble.¹⁰

The preamble to the RMP NPRM references an owner/operator’s duty to conduct a “complete” safety audit. Per industry guidance, selecting a representative sample of process units is the best practice, and is considered a “complete audit” for all intents and purposes. In addition, the preamble to the NPRM states: “The proposed rule would require only that over each three year period, all covered processes are audited.” This reference does not state that all processes need to be audited against all program elements in a three year period, just that the covered processes need to be audited. Therefore, EPA’s interpretation to audit all covered processes for all process elements was never expressed; not even in the preamble to the NPRM. **It is necessary to note once again that § 68.58 and § 68.79¹¹ of the final RMP rule contains no statements to the effect that an owner or operator is required to audit all covered processes for all program elements every three years.**

Finally, while EPA suggested during our meeting that a majority of facilities are auditing all covered processes for all elements, it included the following question in its 2014 Request for Information that seems to indicate this assertion may not be accurate:

⁸ 61 Fed Reg. 31672 (1996)

⁹ 58 Fed. Reg. 54198 (1993) **The proposed regulations would require facilities to conduct a complete safety audit once every three years to ensure that the process safety management elements are in place, updated, and being implemented properly.** Although compliance with the proposed elements will provide an indication of safe operations, other considerations are important as well. For example, it is not enough to develop and train employee on the standard operating procedures the facility must check to see that procedures are being followed. Therefore, a safety audit is more than a review of regulatory compliance; it is a check, by management, that the facility is being operated safely. Facilities would be required to document their audits in a report that includes findings and recommendations. Management’s response to the findings would also be documented. EPA chose the three-year interval to be consistent with the OSHA requirement for safety audits. **EPA notes that for large facilities and those with a number of covered processes, the audit would not need to be performed at one time. The facility may choose to audit different processes on different schedules. The proposed rule would require only that over each three-year period, all covered process are audited.**

¹⁰ 61 Fed. Reg. 31668-31732 (1996)

¹¹ 61 Fed Reg 31722 and 31724 1996 § 68.58 and § 68.79 – (a) The owner or operator shall certify that they have evaluated compliance with the provisions of this section at least every three years to verify that the procedures and practices developed under the standard are adequate and being followed. (b) The compliance audit shall be conducted by at least one person knowledgeable in the process. (c) A report of the findings of the audit shall be developed. (d) the owner or operator shall promptly determine and document an appropriate response to each of the findings of the compliance audit, and document the deficiencies have been corrected. (e) The owner or operator shall retain the two (2) most recent compliance audits.



During compliance inspections at multiple-process sources, EPA inspectors have noted that some owners or operators have audited only a subset of covered processes at the source. Should EPA clarify § 68.58 and § 68.79 to explicitly indicate that all covered processes must receive a full compliance audit at least every three years?¹²

There is also a significant cost difference between an audit completed with representative sampling and one completed by auditing all covered processes for all program. The expense for a large refinery to audit four covered processes using a third party is approximately \$150K-\$170K.¹³ This cost will increase by at least an additional \$30K-\$50K per covered process added to the audit. Therefore, a facility with 30 covered processes will now pay between \$1-2M for a compliance audit and increase the amount of time the site is being audited from about 10 days to over 100 days in a three year period. **This cost estimate was never presented and surely not contemplated by EPA or OSHA in the costs analyses done for these regulations, and therefore, could not be what these regulations now require.**

EPA indicated it would discuss Compliance Audit enforcement with OSHA PSM Enforcement staff as its next step. AFPM and its members agree that interagency coordination on this issue is important and request to be included in that meeting to support alignment between the two agencies and promotion of audit best practices.

We also encourage EPA to include the audit scope issue in the current rulemaking process for RMP. EPA should allow for proper notice and comment if they intend to deviate from OSHA's guidance and two decades of practice, in addition to increasing the cost of compliance with the RMP Compliance Audit program element ten-fold. EPA's position would decrease the quality of compliance audits by not allowing as thorough of a review for each process unit while

¹² 79 Fed. Reg. 44619

¹³ Actual numbers supplied to AFPM:

	# of Covered Processes	# of covered process audited	# of 3rd Party Auditors	Length of Audit (days)	Cost of 3rd Party Auditors
Refinery 1	24	4	5	10	\$ 160,000
Refinery 2	30	4	5	10	\$ 170,000
Chemical Plant	2	2	3.6 (one auditor on site only 3 days)	5	\$ 73,000
Small Site 1	1	1	2	4	\$ 47,000
Small Site 2	1	1	2	3	\$ 54,000



utilizing a significant amount of additional monetary and personnel resources that could be better used actually reducing risk and increasing safety. Such a change requires thorough consideration through proper notice and comment.

Sincerely,
Lara Swett

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AFPM

cc:

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