



Conn Maciel Carey Public Hearing Testimony regarding EPA's Risk Management Plan Rulemaking

Tuesday, March 29, 2016

Good afternoon, my name is Eric J. Conn, one of the founding partners of Conn Maciel Carey and Chair of the law firm's national Workplace Safety Practice. I am speaking today on behalf of several of our clients in the Petroleum Refining and Petrochemical Manufacturing space. Our clients operate facilities that house numerous RMP and PSM covered processes.

Although we have serious concerns about many elements of the proposal, I am here to today to testify only about the three-year Compliance Audit element of the Rule. Specifically, EPA included language to amend compliance audit requirements to require a facility to audit all process units, for all RMP program elements, every three years. Since the birth of RMP, and PSM before that, regulated facilities with multiple covered processes were allowed – indeed encouraged by OSHA, EPA and consensus standard-making organizations – to use representative unit sampling to perform a compliance audit; one audit to comply with both regulations.

While my clients are pleased to see EPA acknowledge that this is a new requirement that should be promulgated through the rulemaking process, we are concerned that such a significant change that will undoubtedly result in a significant increase in the cost of compliance was slipped into the Rule without reviewing it with small business representatives in the SBREFA process, and with no discussion or justification in the Preamble or the cost/benefit analysis. More importantly, however, we feel strongly that this proposal will diminish the quality of compliance audits at significant cost.

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Almost universally, my clients in refining and chemical manufacturing follow OSHA and EPA guidance, both of which expressly endorse on their websites the industry publication by the Center for Chemical Process Safety that recommends representative unit sampling for effective compliance audits. One of the reasons for this approach is that management systems under PSM and RMP (for example, management of change and emergency response programs) are implemented the same site-wide and do not differ from process to process. Representative sampling provides an accurate assessment of all covered processes *and* allows for a deeper, more thorough look into the compliance systems.

Under EPA's new proposal, a facility with 30 covered processes would now have to audit 12 RMP Program elements in thirty processes, which effectively means a records review, physical review and interviews related to 420 regulatory elements, every three years. Combined with new compliance audit triggers for every RMP incident and near miss, my clients will be in continuous audit mode. My clients also estimate that the cost to perform an RMP audit will increase under this approach from approx. \$150K per audit to more than \$1M for larger facilities, without adding any additional safety value, or worse, a negative value.

Furthermore, having two overlapping but different regulations will increase compliance costs significantly – but more fundamentally, as EPA recognized when it issued the RMP rule, it is more likely to jeopardize facility safety. When there are conflicting requirements, compliance becomes more challenging. OSHA does not agree with this compliance audit approach, historically, and so far as we know, still today. Accordingly, with this new compliance audit proposal, and many other elements of this proposal, the two agencies will no longer be aligned, and compliance with the regulatory requirements of PSM will no longer comply with RMP. It is the responsibility of the federal government to align these two rulemaking processes and the two rules.

My clients are also deeply concerned about EPA's proposed requirement for "independent" third-party compliance audits. We believe this amendment will diminish the quality of RMP Compliance Audits by restricting the pool of eligible auditors and driving away the most knowledgeable auditors. Specifically, my clients have serious concerns that EPA has put such rigid requirements around the independence of auditors that it will automatically disqualify the vast majority of competent, experienced auditors from an already limited auditing pool. Furthermore, the best qualified auditors who are not automatically disqualified, will decline to

audit because the value to a consultant of an audit is approx. \$40K, as compared to hundreds of thousands of dollars for other consulting services.

In conclusion, we encourage EPA to more clearly acknowledge the change in scope of the compliance audit requirements, factor in the cost of this expansion in your cost/benefit analysis, and eliminate the proposal that would diminish the pool of effective auditors.

Thank you.