AGRICULTURAL
RETAILERS
ASSOCIATION

1156 15TH Street, NW · Suite 500 · Washington, DC 20005
T 202.457.0825 · F 202.457.0864 · www.aradc.org

May 13, 2016

Mr. James Belke
U.S. Environmental Protection Agency
Office of Emergency Management
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

RE: EPA's Proposed Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act, Section 112(r)(7); EPA-HQ-OEM-2015-0725

Dear Mr. Belke,

On behalf of the Agricultural Retailers Association (ARA) I am 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 81 Federal Register 13638. In the rule, EPA states the purpose of this action is to improve safety at facilities that use and distribute hazardous chemicals in response to Section 6(a)(i) of Executive Order (EO) 13650, "Improving Chemical Facility Safety and Security" issued on August 1, 2013.

Statement of Interest

Farm supply dealers are scattered throughout all 50 states and range in size from local family-held businesses and farmer cooperatives to larger companies with hundreds of retail outlets across the USA. Retailers play an important role feeding the world and provide farmers with essential crop input products like seed, fertilizer, crop protection products and equipment. We are a cooperating partner in the regulated community and understand the importance of chemical safety and security.

We appreciate 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) this week indicated was an intentional, criminal act by an individual using an incendiary device.[1] 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.

[1] https://www.atf.gov/news/pr/atf-announces-50000-reward-west-texas-fatality-fire

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.

Comments

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 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 (NH3) and ammonium nitrate (AN).

NH3 is an efficient and widely used product that "serves as the foundation of the nitrogen (N) fertilizer industry"[2]. It can be directly applied to the soil as a plant nutrient or used in the creation 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.[3]

FGAN was the first solid N fertilizer produced on a large scale.[4] 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.[5]

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[6]. ARA and TFI has already made the FGAN Guidelines available to our members who handle the product and to OSHA, which has made these Guidelines available through its website.

---

[2] International Plant Nutrition Institute: Nutrient Source Specifics – Ammonia; Ref # 10070

[3] Id

[4] International Plant Nutrition Institute: Nutrient Source Specifics – Ammonium Nitrate; Ref # 22 # 11083

[5] Id

[6] 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.

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.

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, approximately 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 will use this checklist to audit the level of compliance at each participating facility.

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.

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 an accident or findings of significant non-compliance by an implementing agency. EPA's definition of "independent third-party" is "a private auditor, inspector or other type of verifier external to the facility"...excludes the regulated entity or any firm that has had a "supply-chain relationship" or contractors, consultants, or purchasers of the facility's good or services. ARA has serious concerns about the overly restrictive nature of this proposal as it will make it very difficult for a facility to find a qualified auditor with any relevant industry experience.

While we certainly understand the need for auditor independence, 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. It is our understanding there have been recommendations submitted to require a professional engineering license as part of these requirements. ARA opposes any professional engineer (PE) requirements as they add an unnecessary costs 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. We are also extremely concerned with basically a blanket restriction on consultants from performing audits due to previous or potential future work. This will only reduce the overall number of capable individuals able to perform the audit and will have unintended consequences of reducing the quality of the audit.

ARA is very concerned with the proposed 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 these EPA proposed regulatory changes. It appears the agency is 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. As currently drafted, the EPA's RMP would appear to eliminate most auditors that have completed the ResponsibleAg auditor training program from being eligible.

ARA supports the comments submitted by the Auditing Roundtable and the Board of Environmental, Health & Safety Auditor Certifications (BEAC).

Safety Technology Analysis and Alternative Approaches

EPA is considering proposing an amendment to the RMP regulations to Program 3 processes in three NAICS codes (petroleum and coal products manufacturing 324; chemical manufacturing 325; and paper manufacturing 322) 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[7].

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

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

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."*[8]

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. These industry consensus standards are similar to ones that have been adopted by OSHA.[9] 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

---

[8] 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*

[9] 29 CFR 1910.111

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.

Emergency Response Preparedness Requirements

Under the proposed rule, all Program 2 or 3 processes would be required to coordinate with local response agencies annually to determine response needs and ensure that response resources and capabilities are in place to respond to an accidental release of a regulated substance. The owner or operator would be required to document coordination activities. In addition, the proposal allows Local Emergency Planning Committees (LEPCs) or local emergency response officials to request in writing that the RMP-facility owner or operator comply with the emergency response program requirements of § 68.95 that requires the owner or operator of the facility to develop an emergency response program that includes an emergency response plan, procedures for use, inspection and maintenance of response equipment, training for responding employees, and procedures to review and update the program.

ARA members support efforts to more closely coordinate with their local LEPCs and local emergency responders related to education and training activities to ensure they are well prepared in case of an accidental release. However, we question whether EPA has the regulatory authority to require a facility or their employees to become a HazMat first responder. Under existing regulations, the facility is already required to coordinate their Emergency Action Plan with the local emergency first responders. EPA should be focusing on providing additional resources and training towards LEPCs in smaller, more rural communities that have limited staff and resources.

ARA concurs with the concerns raised by the U.S. Conference of Mayors, the National Association of Counties (NACO) and the National League of Cities (NLC) with the costs and impacts of a more prescriptive RMP regulations that will fall disproportionately on smaller facilities, smaller rural communities, which only compounds their challenges of complying with new federal mandates. These facilities and communities already face managing a wide range of federal regulations and compliance issues. It is puzzling that EPA failed to involve key stakeholders such as the states and local governments in the development of this proposal. As the U.S. Conference of Mayors, NACO and NLC point out this proposal and effort by the agency to rush to a final regulation runs counter to EPA's internal "Guidance on Executive Order 13132: Federalism" issued in November 2008, which specifies that states and local governments must be consulted on rules if they impose substantial compliance costs, preempt state or local laws and / or have "substantial direct effects on state and local governments." Similar concerns have been raised by state departments of public safety that handle emergency management programs.

The proposal will also have a significant impact on agricultural retailers, where many have indicated due to these new burdensome costs which in many cases could be over

$100,000 per facility in paper work costs and equipment upgrades, will get out of handling anhydrous ammonia all together or close many facilities and consolidate into fewer distribution locations using larger storage tanks and more transportation carriers to move product farther distances.

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 agrees with the comments submitted by the State Attorney Generals from Louisiana and Texas. They raise great points on how 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. As they also point out, 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.

The States of Louisiana and Texas also correctly highlight "Executive Order 13563 Improving Regulation and Regulatory Review" issued by President Obama in 2011, which 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 take into account 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 established by the Administration.

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

When Congress passed the Clean Air Act Amendments of 1990,[10] 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.[11] The RMP contains three elements: a hazard assessment, a prevention program, and an emergency response program.[12] 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."[13] 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."[14] 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.[15] 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."[16]

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."[17] An "accidental release" is 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."[18]

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

[10] Clean Air Act Amendments of 1990, Title III "Air Toxics" (P.L. 101-549); 40 CFR Part 68
[11] 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.
[12] EPA Office of Solid Waste and Emergency Response – Risk Management Program (RMP) Audit Program; EPA 550-F-00-010; August 2000.
[13] EPA Risk Management Programs under Clean Air Act Section 112(r): Guidance for Implementing Agencies; P. 1; February 1998.
[14] H.R. REP. 101-490(I); P. 171
[15] Id.
[16] Id, P. 172.
[17] Clean Air Act Amendments of 1990, Title III "Air Toxics" (P.L. 101-549); 40 CFR Part 68
[18] Id

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."[19] 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.[20] 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."[21] 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."[22] 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.*"[23] Waxman outlined the establishment of the RMP program and what the EPA Administrator must consider when determining whether to list a particular compound.[24] At the time the Clean Air Act Amendment of 1990 were developed by Congress and enacted into law Waxman 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[25], issued in April 1999, focuses all of 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.

---

[19] EPA Risk Management Programs under Clean Air Act Section 112(r): Guidance for Implementing Agencies; Chapter 1 Overview: Background, P. 2; February 1998.

[20] EPA Office of Solid Waste and Emergency Response – The General Duty Clause; EPA 550-F-09-002; March 2009

[21] 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.

[22] Id.

[23] Id, D. Title III: Control of Hazardous Air Pollutants, 6. Accidental Releases of Hazardous Air Pollutants.

[24] Id.

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

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."[26] 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."[27]

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 if 1910.109(i) to FGAN, but OSHA must consider many factors before enforcing this statute.

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,

[26] 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"

[27] Id.

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 4,000 bulk agricultural chemical facilities that have reported under the RMP Program Level 2 process of storing large quantities of anhydrous ammonia. However, there a large number of 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."[28] 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 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."[29] 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

[28] Minnesota Department of Agriculture website on Nurse Tank Anatomy
[29] 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*

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 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.

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 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 a number of complex topics ranging from expanding the list of covered substances, adding a number of new program requirements, mandating an inherently safer technology (IST) analysis, and numerous other proposals to further expand the program. For all of 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)[30] requires that the advice provided by these committees be objective and accessible to the public.[31] The EPA has an existing Clean Air Act Advisory Committee (CAAAC)[32] 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 a number of Subcommittees and Work Groups. One of the inactive groups listed is the "Accident Prevention Subcommittee"[33], 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 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

[30] P.L. 92-463

[31] Congressional Research Service: Federal Advisory Committees: An Overview, April 16, 2009.

[32] http://www.epa.gov/air/caaac/index.html

[33] http://www.epa.gov/air/caaac/accident_prev.html

> system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government."[34]

Utilizing a federal advisory committee to review and discuss the issues raised in the EPA's Small Business Advocacy Review Panel process on potential revisions to the RMP regulations is consistent with President Obama's Open Government Directive. If the EPA decides to move forward with arbitrary deadlines in an effort to finalize pre-determined decisions to expand regulations for the RMP program whether they are necessary or not would be inconsistent with the Administration's stated goal 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. We support the issues and concerns raised in the March 6, 2016 comments submitted by House Energy & Commerce Committee Chairman Fred Upton, House Small Business Committee Chairman Steve Chabot, and House Energy & Commerce Subcommittee Chairman for Energy & Power Ed Whitfield. They raise legitimate concerns over the process of this regulatory proposal from EPA and the appearance by the agency of some pre-determined positions even before comments have been completed and fully reviewed. For example, while EPA convened a Small Business Advocacy Review (SBAR) Panel to obtain advice and recommendations from Small Entity Representatives (SER) potentially subject to the rule's requirements, EPA sent the proposed rule to the White House Office of Management & Budget (OMB) two months before the panel's final report was completed. According to the House Congressional letter, the proposed rule was signed only 5 days after receiving those reports. ARA had several members participate on the SBAR panel and it appears most if not all of the panel recommendations were ignored.

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

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

[34] http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment