

The Case for Voluntary Third Party Risk Management Program Audits

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“Unpublished”

**Prepared for presentation at the
5th Bi-Annual Process Plant Safety Symposium**

April 22-26, 2001

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Abstract

In the preamble to the Risk Management Program regulations (40 CFR Part 68), EPA endorses the concept of offering sources the option of using third parties to assist owner/operators in meeting their obligations under the rule. EPA recognizes that any third party proposal must: not weaken the compliance responsibilities of source owner/operators, offer cost savings and benefits to the industry, community, and implementing agencies that significantly exceed the cost of implementing the qualified third party approach, lead to a net increase in process safety, particularly for smaller, less technically sophisticated sources, and promote cost-effective agency prioritization of implementing agency oversight resources.

EPA is considering a voluntary program to offer regulated sources the option of using qualified third parties to audit RMP compliance. The decision to participate in the program or not would be completely at the discretion of the regulated source. To encourage participation in the program, EPA would offer regulatory incentives to participating facilities. In certain cases, a financial incentive may also exist through the use of insurance companies acting as third party auditors. EPA believes that this program will benefit participating facilities, surrounding communities, auditors, and RMP implementing agencies, and eventually lead to stronger and more uniform RMP compliance nationwide, with minimal costs. This paper will explain the proposed program, including the results of a pilot experiment, regulatory changes needed to support a national program, expected benefits of the program to industry, communities, auditors and implementing agencies, and the basic steps of program implementation.

Introduction

In 1990, Congress amended the Clean Air Act to create two new federal regulatory programs aimed at preventing releases of hazardous chemicals [1]. These two programs are now well known as the OSHA Process Safety Management (PSM) standard, and the EPA Risk Management Program. The OSHA PSM standard, enacted in 1992, required facilities containing large quantities of highly hazardous chemicals to implement accident prevention and emergency response measures to protect workers. The EPA RMP regulation, enacted in 1996, borrowed the same accident prevention concepts and language from PSM, but went beyond PSM by requiring facilities to perform a hazard assessment (consisting of an Offsite Consequence Analysis and Five-Year Accident history) and to submit a summary report, called the Risk Management Plan (RMP), to EPA [2,3].

The OSHA PSM standard and EPA RMP rule are unlike many previous OSHA and EPA regulations in that they contain few easily verifiable requirements. In contrast to the traditional “command and control” style of regulation, these rules have many aspects of a “performance-based” approach. That is, they do not specify how much of a particular chemical a facility is allowed to store, or what sort of process design a facility must use, or what type of safety equipment a facility must have. Neither do they specify what level of risk to workers or the public is too high.

Instead, these regulations embody a philosophy toward industrial safety and loss prevention that can be loosely described as “use best safety practices.” The regulations require implementation of certain management systems and safety practices, and in some cases particular features of those systems, that are aimed at minimizing industrial risks and preventing accidents from occurring. Examples of such best safety practices include systematic analysis and control of process hazards, development and adherence to written operating procedures for conducting hazardous evolutions, design and operation of equipment and systems within specified safety limits, equipment maintenance, systematic review of planned equipment or system changes for safety implications, thorough safety reviews prior to process start-ups, and use of properly trained and qualified staff to operate equipment and systems.

Challenges for Enforcement

While such safety practices have been used quite successfully in many high-risk occupations and endeavors, they present some new problems for the government in carrying out its regulatory enforcement responsibilities. For many of the safety program elements required under the PSM and RMP regulations, there is no universally accepted standard against which an auditor or inspector may objectively measure a facility’s performance. This is not necessarily a bad thing, nor did it happen by accident. Rather, it reflects the government’s recognition that the wide variety of process technologies used at hazardous chemical facilities, and constant innovations in industrial safety practice, require a flexible regulatory structure instead of a “one-size fits all” approach.

The advantages of this regulatory approach notwithstanding, auditing a facility’s compliance with the PSM standard or RMP regulation is difficult (perhaps some would see this as another advantage!) This does not mean that “anything goes,” or that government inspectors are incapable of evaluating

a facility's process safety program. Properly trained government inspectors can tell the difference between a good operating procedure and a bad one, and between a sound process hazards analysis and a faulty one. OSHA runs a training course specifically geared toward preparing its compliance officers for PSM enforcement, and EPA is taking steps to provide similar training to its inspectors to prepare them for RMP audits. But even with the appropriate training and experience, rigorous evaluation of RMP or PSM compliance can be a difficult and time consuming task. And even for the most experienced auditors, the regulations leave undeniable gray areas wherein reasonable people may disagree about whether a program is acceptable [5].

Another difficulty facing the government is simply that of coping with limited inspection resources. OSHA is perhaps more fortunate than EPA in this regard, since the PSM standard does not place any specific auditing burden on OSHA, only on PSM-regulated facilities (i.e., to conduct self audits) [2]. The RMP rule, on the other hand, also requires EPA or its designated implementing agencies to periodically audit RMPs [3]. Currently, there are approximately 15,000 RMP facilities, but relatively few government inspectors with the training and experience necessary to perform comprehensive RMP audits, and those that are capable of doing so will often have the responsibility to enforce other regulations in addition to the RMP rule [4,5,6].

The RMP Third Party Auditor Concept

Considering the difficulty inherent in risk management program audits, and the small number of government inspectors available to do them, it is unlikely that EPA will ever be able to regularly perform comprehensive RMP audits on more than a small fraction of the total number of regulated facilities. Recognizing these realities, EPA is considering the feasibility of a voluntary program where qualified third parties¹ would perform comprehensive RMP audits at facilities that volunteer to undergo such an audit.

As currently conceived, this program would operate in the following manner. First, EPA would establish certification standards and audit protocols for third party auditors, and regulatory incentives to encourage facilities to use third party auditors. Next, third party auditors would complete certification, and EPA would make the identities of qualified third party auditors available to RMP-regulated facilities. A facility interested in obtaining a third party audit would then independently contact a qualified third party auditor, arrange for the audit, and pay the auditor's fee, if any. The third party auditor would conduct the audit in accordance with EPA's protocol, and present an audit report to the facility (*not* to EPA or its delegated implementing agency). Based on the results of the audit, facility managers would decide whether or not to submit the report to EPA. If facility managers decided that they did not desire to submit the report to EPA, the process would end, and EPA would have no knowledge that the facility arranged for a third party audit, or the contents of the audit report. However, if a facility decided to voluntarily submit the report to EPA, it would qualify for certain regulatory benefits, such as a partial exemption from future EPA RMP inspections, reduced penalties for violations discovered during the audit, and others (the proposed regulatory incentives are explained in more detail later).

¹ In this context, a third party is someone not employed by either an RMP implementing agency or an RMP-regulated facility.

History of Third Party Audits and Inspections

Third parties have been widely used in the past to monitor regulatory compliance and verify contractual or legal obligations. Recent examples include using third parties to audit or inspect steam boilers and pressure vessels, commercial and residential building construction, pipeline construction projects, underground storage tanks, corrosion coatings, automobiles, food and drinking water safety, manufacturing processes, and financial accounting. Third parties are also used to perform ISO 9000 and 14000 certification inspections. Indeed, EPA briefly considered using ISO 14001 certification inspections as surrogates for RMP inspections² [7]. Another relevant example is OSHA's ongoing safety and health consultation program, where employers may volunteer to have a non-OSHA consultant conduct a hazard inspection at the employer's workplace. If the employer corrects any deficiencies noted by consultants and demonstrates commitment to the implementation of an effective safety and health program, he may receive a temporary exemption from certain OSHA enforcement activities, such as programmed OSHA inspections [8,13].

These examples demonstrate that third party inspectors are generally used where there is a need for credible and unbiased verification of the completion of some important obligation, condition, or requirement. Usually, third parties are used in situations requiring skilled inspectors with specialized knowledge or credentials, and often where government resources of this type are limited [9]. All of these same factors are present in the EPA Risk Management Program.

Even before the RMP regulation was finalized, EPA recognized that third parties could provide many potential advantages in assisting facilities with compliance with Clean Air Act section 112(r) [7,9,10]. During the RMP rulemaking process, EPA sought public comments regarding the use of third parties. While some commentary supported the concept without reservation, most expressed concern over the potentially greater compliance costs of the regulation if sources were required to use third parties [3].

In the final Risk Management Program regulation, EPA took no action regarding the participation of third parties. However, in the preamble to the rule, EPA did endorse the concept of using third parties to assist in rule compliance and oversight, provided that any third party proposal not weaken the compliance responsibilities of facility owner/operators, offer cost savings and benefits to the industry, community, and implementing agencies that significantly exceed the cost of implementing the approach, lead to a net increase in process safety, particularly for smaller, less technically sophisticated facilities, and promote cost-effective agency prioritization of oversight resources [3]. But this language did not impose any specific criteria or requirements to regulate the activities of facilities, implementing agencies, or third parties themselves with respect to third party assistance. It simply left the door open for further investigation and possible later action by EPA.

² Many aspects of the RMP and PSM regulations are common to voluntary Environmental Management System (EMS) standards such as ISO 14001. For example, The RMP rule's emphases on management system implementation, systematic hazard analysis, training, self-auditing, and emergency planning are consistent with the principles of the ISO 14001 standard.

RMP Third Party Audit Pilot Project

These further investigations took the form of a series of roundtable meetings to delve into specific implications of third party auditors, and a pilot experiment to test the actual application of third party auditors at RMP-regulated facilities. Participants in this research included EPA, the Wharton School of the University of Pennsylvania, Delaware's Department of Natural Resources and Environmental Control, and a number of private companies, trade and professional associations, other government agencies, and consultants.

The pilot experiment was conducted in two phases during 1999 and 2000. This study involved using third party auditors to evaluate compliance with the EPA Risk Management Program at 21 chemical facilities in Delaware and Pennsylvania. During the experiment, EPA desired to test the concept of third party inspectors for RMP compliance audits in two different regulatory environments. Phase I of the pilot was conducted in Delaware, where a state-level accident prevention law similar to section 112(r) had already existed for some time. Phase II of the pilot was conducted in Pennsylvania, which did not have any state-level accident prevention law resembling section 112(r).

EPA hoped to answer a number of questions during this experiment, including the following:

- Could third parties be identified that had the capability to conduct comprehensive risk management program audits?
- Would third party auditors perform RMP audits that were at least as rigorous as audits conducted by government inspectors?
- What background and experience would best prepare a third party to conduct RMP audits?
- What additional specific training would be necessary to prepare prospective third party auditors?
- How would facilities react to the presence of auditors? Would facilities see value in the audit?
- How much time would an audit take?
- Would facilities in states without previous accident prevention laws in place be less compliant with the RMP rule, and therefore more difficult for a third party to audit?

The results of the pilot experiment are explained in detail elsewhere [Ref 5, 6]. In summary, the experiment conclusively demonstrated that third parties could successfully conduct compliance audits at RMP facilities with adequate rigor, that the previously existing state regulatory environment appeared to have little effect on the ability of third parties to conduct adequate audits, and that facilities reacted favorably to the presence of third party auditors and found third party audits to have value. The experiment and roundtable meetings also provided important insights into other critical issues associated with implementing third party audits, such as the necessary training and experience for third party auditors, the costs associated with an audit, the incentives that would be necessary to encourage facilities to volunteer for an audit, and the potential role of insurance companies in third party audits.

Advantages and Disadvantages of RMP Third Party Audits

The pilot experiment and roundtable meetings also provided clarity regarding many of the advantages and disadvantages of RMP third party audits. A voluntary RMP third party audit program would present numerous advantages: Namely, third party audits would:

1. *Alleviate EPA's resource problem:* Since there would be no need for government audits at facilities that volunteer for a third party audit (except perhaps in unusual circumstances) EPA would have fewer RMP facilities to cover with its own inspectors.
2. *Focus traditional enforcement actions at facilities more likely to be major violators:* This advantage is a natural consequence of the first. Presumably, many facilities that pose the greatest risks to the nearby public and environment will not volunteer for an audit. These may be facilities that have a history of poor regulatory compliance, or who have suffered serious accidental releases in the past, or who for whatever reason desire to “fly below the radar.” At such facilities, traditional enforcement activities are probably the most suitable way (and perhaps the only way) for the government to ensure regulatory compliance. For these facilities, government inspectors are likely to focus primarily on whether a facility is in compliance with those aspects of the regulation that are unambiguous, such as whether or not particular components of a risk management program exist at all, rather than making subjective judgements about their quality. This is a reasonable enforcement approach for facilities where egregious regulatory violations may exist, since it leads to the most easily defended enforcement actions.
3. *Promote a less confrontational enforcement approach at facilities acting in good faith:* The great majority of RMP facilities are likely to be making good-faith efforts at regulatory compliance. For these facilities, using third party auditors is a more suitable, nuanced, and progressive approach toward monitoring regulatory compliance and improving process safety. Under the terms proposed here, a third party audit would allow a facility to receive an independent, unbiased, and legally reliable verification of their RMP compliance with little or no direct interaction with a regulatory agency. It would also appropriately afford such facilities with greater flexibility to make safety improvements and correct deficiencies while preserving EPA's ability to initiate traditional enforcement actions if a facility does not act in good faith.
4. *Promote an higher overall standard of process safety among regulated facilities:* This advantage is a direct consequence of the fact that the total number of RMP compliance audits performed nationwide will increase. Audits conducted by third parties will be in addition to those conducted by government auditors at other facilities. This should lead to wider and more uniform rule compliance, particularly if EPA establishes qualification or certification standards that all third party auditors must meet, and standard audit protocols.
5. *Promote the growth and use of private sector chemical process safety expertise:* The greatest sources of knowledge, expertise and experience in industrial and chemical process safety and risk management reside in the private sector. The largest RMP-regulated firms often possess in-house expertise in these areas, or can afford to hire consulting firms that specialize in providing such

services to industry. However, consulting services are an unaffordable luxury for many facilities. A nationwide RMP third party audit program would likely create additional demand for such services, particularly at smaller, less technically sophisticated facilities, since regulatory incentives would help justify the cost of an audit. Promoting the use of private sector safety consultants as third party auditors may also encourage the sharing of knowledge among facilities, and eventually lead to innovations in process safety.

6. *Foster goodwill between participating facilities and surrounding communities:* The public will likely feel that facilities having independently audited risk management programs are more likely to be safe than facilities that have not received such an audit, particularly if EPA provides symbols of positive recognition to participating facilities [17].

The principle disadvantages of voluntary third party audits are:

1. *They will cost money:* As already indicated, a comprehensive risk management program audit can be a difficult and time consuming task. Such services, therefore, usually do not come cheaply. One insurance company estimated that they would charge approximately \$125/hour per auditor to perform an RMP third party audit³ [15].

2. *They will limit EPA's ability to conduct traditional enforcement at participating facilities:* EPA will need to relinquish some of its control over the regulatory enforcement process at facilities that use third party auditors. This will mainly result from the necessity for EPA to create attractive regulatory incentives for facilities to volunteer for third party audits.

3. *EPA will need to invest some of its own resources to implement the program:* Administering a third party auditor program will require EPA and delegated implementing agencies to perform some initial and ongoing program administration activities, such as developing training and certification standards, audit protocols, and auditor oversight mechanisms, and maintaining a registration of certified third party auditors.

Unresolved Issues

The success of the pilot experiment and the insights gained from roundtable discussions suggest that the advantages of RMP third party audits far outweigh their disadvantages. Nevertheless, several important issues remain unresolved, including:

- What level of formal certification, if any, is necessary to ensure the competence of third party auditors?
- How should the performance of third parties be monitored? What measures would be used to ensure adequate rigor and quality of third party audits?

³ This estimate referred to cases where the regulated facility did not already have an insurance policy with the company providing the third party audit. In cases where the regulated facility was already their insurance client, the insurance company indicated that it may absorb all or part of the cost of the audit.

- What role could insurance companies play in providing market incentives for facilities to volunteer for audits?
- How would communities, labor groups, and environmental advocates react to such a program?
- Can sufficient regulatory and other incentives be designed to encourage facilities to volunteer for third party audits? What regulatory changes does EPA need to make to create such incentives?

Auditor Certification

With regard to the first of these issues – auditor certification – the pilot experiment and roundtable meetings have probably provided enough information to allow EPA to develop a certification process that will adequately prepare third parties to conduct credible, rigorous RMP audits. The project team made reasonable judgements in its informal auditor selection and training criteria. It found that auditors with an engineering background, chemical industry experience, knowledge of the PSM standard and RMP regulation, strong interpersonal and auditing skills, and provided with some specialized classroom training, could successfully conduct RMP audits. All that remains in this area is for EPA to take the logical next steps recommended by the pilot project team, which include development of a formal certification process for RMP third party auditors that would require completion of appropriate classroom training, successful completion of a written examination, and issuance of auditor credentials [5,6]. The devil remains in the details, but it is certainly within EPA's ability to implement these recommendations.

Auditor Oversight

The pilot experiment was less instructive regarding auditor oversight. In the pilot, the adequacy of third party audits was verified by re-auditing each pilot facility with government auditors, and comparing the results of the two audits. This approach was necessary to conclusively demonstrate the original premises of the pilot, but EPA obviously cannot take this approach on a national scale, for all the same reasons it is contemplating this initiative in the first place. However, there are less intrusive means available to EPA to monitor third party auditor performance. For example, EPA could elect to re-audit a small sample of third party facilities, while providing assurances to facility owners that the only purpose of such audits would be to monitor third party auditor performance, and that verification audits would not result in any enforcement actions against the facility itself. This periodic sampling approach is used in other third party applications, including the Commonwealth of Massachusetts' Licensed Site Professional (LSP) program, and the OSHA consultation program [11,12,13]. Other alternatives for monitoring auditor performance would be to conduct detailed technical reviews of the reports submitted by third party auditors, without actually visiting the facility where the audit occurred, and to periodically evaluate the performance of qualified auditors via interviews or examinations [8,11].

Role of Insurance Companies

Insurance companies played a prominent role in the pilot experiments conducted in Delaware and Pennsylvania by providing third party auditors on a *pro bono* basis [5,6]. Representatives of insurance companies participating in the pilot experiments and roundtable meetings have indicated that their interests – identifying and underwriting lower-risk insurance markets – are furthered by

implementation of the EPA Risk Management Program [12,15]. Insurance companies typically conduct “loss control” surveys (on-site inspections to determine risk exposures and suitable controls) prior to underwriting large accounts and on a continuing basis to some currently insured clients [14,15]. In the environmental/catastrophic risk segment of the insurance market, these inspections entail many aspects of an ideal risk management program audit [12,15]. Not surprisingly then, during the pilot experiments EPA found that insurance company loss-control specialists were effective at conducting third party risk management program audits [5,6].

If implemented on a nationwide scale, companies whose third party inspection is performed by their insurer will gain an immediate financial incentive for participation in the RMP third party audit program – namely that the insurer would pay part or all of the cost of the audit [15]. But the potential exists for the participation of insurance companies to provide an even larger financial incentive for RMP facilities to volunteer for third party audits.

While insurance companies desire to identify and underwrite those companies with the lowest risk profile, and therefore may be presumed to take a company’s risk-reduction measures into account when setting policy premiums, there is not always any direct, immediate correlation between a company’s risk exposure and its insurance policy premium. This is partly a consequence of legal underwriting constraints, and partly due to the fact that insurance companies make money not only by underwriting profitable risk, but also by profitably investing policy premiums before they are paid out in claims. In many cases, investment income may dominate an insurance company’s operating ratio – the total of underwriting profit or loss combined with investment profit or loss [14]. Indeed, in so-called “soft markets,” insurance companies may compete intensively among themselves for policies that otherwise would be judged, on an underwriting basis alone, as too risky [16]. Nevertheless, the insurer may accept the consequent underwriting losses as a necessary evil in order to retain market share, and will get away with this practice profitably if its investment income offsets its underwriting losses.

But at the other end of the insurance market cycle – the “hard market” – client companies who benefited, via low insurance rates, from competition amongst insurers, may find it impossible to renew their policies at such favorable rates, or indeed to get insurance at all [16]. Under such conditions, companies with strong risk management programs, independently verified through a third party audit, will be favorably positioned in the insurance market. So, while it is unlikely that any insurance company will be able to make a formal commitment to reduce a prospective client’s policy premium by some amount if they agree to participate in a third party audit, there is little question, over the long term, that a company’s risk profile will eventually affect their insurance rates and insurability. EPA must continue to work with the insurance industry to find a way to turn this fact into a more concrete incentive for facilities to volunteer for third party audits.

Reactions of Community Members, Labor Groups, and Environmental Advocates

The reactions of community members, labor groups, and environmental advocates may be important factors in a facility’s decision to employ a third party auditor. Experience suggests that labor groups and environmentalists will usually advocate stronger traditional government regulatory enforcement, so to the extent that third party audits are perceived as diminishing government’s enforcement

authority, these groups may oppose them. However, this is not always true, particularly in the case of labor groups. Often, companies with the greatest commitment to safety and environmental excellence also have strong labor-management relations. Indeed, an important component of the PSM standard and Risk Management Program is employee participation in development and implementation of safety management systems [2,3]. Labor representatives at companies who have adopted employee participation as a core safety philosophy may view third party audits as an opportunity to validate or improve their current risk management activities.

The perception of members of surrounding communities may be of even greater importance to facility owners. But how a facility's environmental performance is perceived by members of its surrounding community is difficult to generalize about. Many factors can affect a company's status in its community, including the condition of the local economy, the company's past environmental performance, its public relations efforts, its national reputation, and others. Nevertheless, the pilot project team made a limited effort to determine how community members would perceive third party audits by conducting interviews and an informal survey among community members surrounding one facility. Most people reacted favorably to the concept [17]. EPA could enhance this perception by providing visible symbols of public recognition to companies who volunteer for third party audits. This is a typical feature of other voluntary programs, such as ISO 14001 and OSHA's Voluntary Protection Program.

Notwithstanding the fact that third party audits will necessarily reduce government's presence at participating facilities, any perception that third party audits will diminish the effectiveness of government enforcement is probably incorrect. The opposite is more likely; third party audits should enhance the overall effectiveness of government enforcement actions. It is important to emphasize that EPA does not intend third party auditors to *replace* government auditors. If EPA implements third party audits, government auditors will likely perform just as many RMP audits as they would have without a third party program, just at a different set of facilities. And, since it is unlikely that "bad actors" – companies not committed to regulatory compliance or with a history of poor environmental performance – will volunteer to undergo any audit, third party or otherwise, by default they will be more likely to be targeted for a government audit if a third party program exists than they would without a third party audit program. In any case, EPA can design regulatory incentives that preserve EPA's ability to take timely traditional enforcement actions if particularly egregious situations are identified during a third party audit.

Regulatory Incentives

Perhaps the single greatest unresolved challenge to implementing a successful RMP third party inspection program is to design adequate incentives for facilities to participate. Some have suggested that one way for EPA to easily solve this dilemma is simply to make third party audits mandatory. This is a fairly typical approach. For example, in the Commonwealth of Massachusetts LSP program, hazardous waste site owners are required to hire a third party "Licensed Site Professional" to manage the site cleanup [18, 19].

However, this approach is not likely to be available to EPA. As indicated previously, the greatest concern reflected in public comments to EPA on the issue was the greater costs that would be

incurred by sources if EPA required the use of third parties. For this and other reasons, EPA would likely face long odds politically and legally if it attempted to make third party audits mandatory. So the whole question of incentives results from EPA's desire to make the use of third parties completely voluntary. Making the use of third parties voluntary partly addresses this cost concern, since a facility would incur no additional expense if they choose not to participate in the program. But since EPA also desires to address its own resource problem, incentives must be developed that will encourage a significant number of facilities to volunteer for third party audits.

Another possible solution to this problem would be for EPA itself to pay for third party auditors. And indeed, EPA received a number of comments to this effect when it sought public comment on the use of third parties [3]. OSHA's success in adopting this approach in its safety and health consultation program indicates that a strong case can be made for EPA to at least partially fund third party audits⁴ [13].

However, EPA is unlikely to receive additional funding to pay for RMP third party audits, at least in the near future. Consequently, if EPA expects a significant number of facilities to volunteer for third party audits, it must develop other incentives and benefits for facilities that will exceed the financial cost to the facility of paying for a third party auditor. Fortunately, other incentives are available to EPA, and they are mostly regulatory in nature. Possible regulatory incentives for participating facilities could include the following:

1. *Allow third party audits to satisfy the RMP requirement for a triennial self compliance audit.* In addition to the RMP rule's requirement for implementing agencies to audit sources' RMPs, the rule contains a separate requirement for sources to audit their own compliance with the accident prevention program elements of the regulation [3]. Allowing sources to use a third party audit to satisfy this regulatory requirement would partially offset the cost to the source of compensating an independent auditor, since the source would not have to perform a self audit in addition to the third party audit.

2. *Assign lower future audit priority or provide outright exemptions from government RMP audits for facilities that volunteer for third party audits.* This incentive would be similar to that provided by OSHA under its safety and health consultation program, where OSHA provides up to a two year exemption from programmed OSHA inspections following a consultation visit. The RMP rule currently requires implementing agencies to select stationary sources for RMP audits based on seven criteria, including accident history of the stationary source, accident history or other stationary sources in the same industry, quantity of regulated substances present at the stationary source, location of the stationary source and its proximity to the public and environmental receptors, presence of specific regulated substances, hazards identified in the RMP, and a plan providing for neutral, random oversight. EPA already exempts facilities with a Star or Merit ranking under OSHA's Voluntary Protection Program from audits based on the accident history of the source's

⁴ In the OSHA program, OSHA provides grant money to states to develop safety and health consulting services. Facilities request an audit, and the grant money pays for most of the cost of the audit. OSHA has indicated that under this scheme, approximately 27,000 facilities volunteer for consultation visits annually [13].

industry or neutral/random oversight plans [3]. EPA could, at the very least, provide an equivalent exemption to facilities undergoing third party audits. EPA could even go farther than this, and provide exemptions from audits based on other stated criteria (although it is unlikely that EPA would provide an absolute exemption from all RMP audits), or provide a longer exemption period, such as 5 years.

3. *Provide greater flexibility to correct deficiencies identified during third party audits without penalty.* Section 68.220 of the RMP rule currently specifies a process for resolution of implementing agency audit findings that is very favorable to facilities, in that it gives a facility multiple opportunities to respond to an agency’s findings and significant time (generally more than 120 days) to correct deficiencies before a facility is deemed to be in violation of the rule [3]. However, the rule does not *require* implementing agencies to use this audit resolution procedure, and in practice, it appears to be seldom used. Implementing agencies appear to prefer more direct enforcement of RMP violations. EPA could create a significant regulatory incentive by requiring implementing agencies to use the audit procedure already specified in the RMP rule for facilities that opt for third party audits, except in the case of violations that pose an immediate life-threatening hazard to workers or the surrounding public.

4. *Reduce or eliminate enforcement penalties for non life-threatening RMP violations discovered during third party audits.* EPA currently has a policy providing for reduced or eliminated enforcement penalties for facilities that voluntarily disclose environmental violations identified during self audits [20]. If a facility meets all specified audit policy criteria, and has not derived any economic gain from the violation, EPA may waive all monetary penalties that otherwise would have been assessed. In order for facilities to obtain relief under this policy, they must meet the following nine criteria:

- Systematic Discovery Through and Environmental Audit or Compliance Management System
- Voluntary Discovery
- Prompt Disclosure (generally within 21 days)
- Discovery and Disclosure Independent of Government or Third Party Plaintiff
- Correction and Remediation (generally within 60 days of discovery)
- Prevent Recurrence
- No Repeat Violations
- Other Violations Excluded (i.e., policy does not apply to violations that result in serious actual harm to the environment or which may have presented an imminent and substantial endangerment to public health or the environment.)
- Cooperation with EPA

The EPA Audit Policy was intended to encourage “self policing”, and does not specifically mention third party audits. However, there is no compelling reason why third party audits should not be afforded at least the same considerations afforded to self audits under this policy. Indeed, third party audits could reasonably be afforded even greater considerations than self audits, since third party audits carry a mantle of independence, and hence reliability, that self audits do not.

With this in mind, the proposed audit policy incentive would appear as even more attractive to facilities considering third party audits if it was initiated *after* the completion of the audit resolution process specified in section 68.220 of the RMP rule (assuming this process was made mandatory for resolution of third party audit findings as specified above in 3.). Indeed, since under section 68.220, a facility is not deemed to be in violation of the rule until the conclusion of the specified audit resolution process, and only then if EPA and the source disagree on the resolution of a particular audit finding, many facilities would likely never need to invoke their protections under the EPA audit policy. But it would not hurt for EPA to provide such additional reassurance to regulated sources, while retaining its ability to enforce against egregious rule violations in a timely manner.

Conclusion

Taken together, these regulatory incentives, along with the other advantages presented here, would likely encourage a significant number of facilities to volunteer for RMP third party audits. However, the regulatory incentives that would serve as a centerpiece of this program do not currently exist – EPA must modify the RMP regulation in order to create most or all of them. In attempting to do so, EPA must come to grips with fundamental policy differences inside the Agency.

These differences are clearly articulated in a recent report by The National Academy of Public Administration, entitled “Environment.Gov: Transforming Environmental Protection for the 21st Century” [21]. This report, written by a panel of preeminent environmental protection experts, including former EPA Administrator William Ruckelshaus, recommends advice, strategies, and insights to guide future EPA actions. In the report, the panel states:

“EPA has been both a force for innovation and a counter-force: a financier and promoter of numerous pilot projects and an enforcer preventing those pilots from getting off the ground. That internal contradiction should come as no surprise: EPA has never been a monolith. Rather, it is a collection of regions, programs, offices, and individuals loosely bound by shared goals, leaving ample room for entrepreneurs in one corner of the organization to promote ideas that good soldiers in the other parts of the organization feel compelled to frustrate.”

The panel also recommends:

“The administrator should make it clear to the agency, states, regulated entities, and the general public that he or she is willing to take risks to develop better systems. EPA should end its practice of permitting only those experiments that pose no possibility of increasing some pollution or decreasing some measure of enforceability.”

Implementing RMP third party audits nationally will require EPA to accept the risk of decreased enforceability at participating facilities. But the success of the pilot experiments in Delaware and Pennsylvania, along with experiences from previous programs that have successfully used third

parties demonstrate that third party audits would be a viable option for improving compliance with the RMP regulation and enhancing the safety of hazardous chemical facilities. EPA can and should modify the RMP regulations to promote the use of third party auditors, and take any additional steps necessary to implement a nationwide voluntary RMP third party audit program.

Disclaimer: Except as otherwise noted, all views expressed in this paper are those of the author, and do not necessarily represent official positions or policies of the U.S. Environmental Protection Agency.

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