

Why are we so confused about certification of compliance with RMP?

What, if anything, does Part 70 have
to do with it?

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Disclaimer

This presentation does not purport to provide legal counsel but instead presents uncertainty associated with applying Part 70 requirements to RMP elements . . . Especially those developed by OSHA.

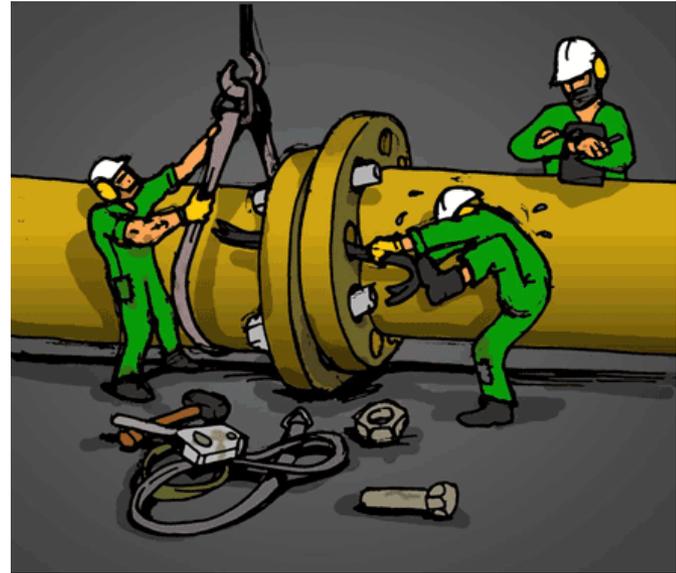
Facilities should not alter their current practice of annual certification, but instead are urged to work together to obtain useful clarification from EPA as to the requirements.

Introduction

Part 68 & Part 70

- Prevention Program elements were developed by OSHA and adopted by EPA.
- Terms and concepts are different
 - Process ↔ Emissions Unit
- Term with different meanings
 - Deviation & Work practice
- No guidance exists that correlates the term

Part 68 and Part 70 reference each other,
but did EPA properly flange them up?



Permit Contents

40 CFR 68.215(a)

- (a)(1) – list Part 68 as an “applicable requirement”
- (a)(2) – provide a compliance schedule or a certification statement

RMP Certification

40 CFR 68.215(a)(2)

- (a) The 40 CFR part 70 or part 71 permit for the stationary source shall contain:
2. Conditions that require the source owner or operator to submit:
 - i. A compliance schedule for meeting the requirements of this part by the date provided in §68.10(a) **or**;
 - ii. As part of the compliance certification submitted under 40 CFR 70.6(c)(5), a certification statement that the source is in compliance with all requirements of this part, including the registration and submission of the RMP.

RMP Certification

40 CFR 68.215(a)(2)

- Regulation requires that owner or operator must submit either:
 - (i) a compliance schedule, **or**
 - (ii) a certification statement
- Structurally, the owner must only submit one or the other. Accordingly, based on this text and structure, **an owner that submitted a compliance schedule need not ever submit a certification statement.**

Reinforcing mutually exclusive choices

Compliance Schedule or compliance statement

The permit must identify part 68 as an applicable requirement and establish conditions that require the owner or operator of the source to submit either a compliance schedule for meeting the requirements of part 68 by the date specified in § 68.10(a) or, as part of the compliance certification submitted under 40 CFR 70.6(c)(5), a certification statement that, to the best of the owner or operator's knowledge, the source is in compliance with all requirements of this part, including the registration and submission of the RMP.

61 Fed. Reg. 31668, 31674 (June 20, 1996)

RMP Certification

40 CFR 68.215(a)(2)

- But what is the significance of the preamble to §68.215(a)(2)(ii)?
 - (ii) As part of the compliance certification submitted under 40 CFR 70.6(c)(5),*
- Compliance certification occurs on an annual basis. 40 CFR 70.6(c)(9)(iii).
- Annual compliance statement?
 - Add text: “each” or “annual” for clarity?
 - Annual certification struck from final rule (more to follow)
- Ongoing obligation? – no support

RMP Certification

40 CFR 68.215(a)(2)

- But what is the significance of the preamble to §68.215(a)(2)(ii)?
 - (ii) *As part of the compliance certification submitted under 40 CFR 70.6(c)(5),*
- Compliance schedule - **one-time event**
- Compliance statement – **one time event?**
- Compliance statements under Part 70 are one-time events

Certification Statement vs Compliance Plan

Part 70 is consistent

- **§70.5 Permit application** – “statement” appears 13 times:
 - Application form – requirements that Part 70 source seeking a permit is in compliance or a narrative description of how the source will achieve compliance.
- **§70.6 Permit content** (including annual compliance certifications) – **no** reference to “statements”

Certification statements are discrete events - not annual

Compliance certifications [§70.6(c)(5)] are not “statements”

Further evidence in rule that statement is onetime event

Permitting authority shall . . .

40 CFR 68.215(e)(2)

Verify that the source owner or operator has submitted a source certification or in its absence has submitted a compliance schedule consistent with paragraph (a)(2) of this section;

RMP Certification

40 CFR 68.215(a)(2)

- Certification statements are single, point-in-time statements.
- Had EPA intended that an owner provide a compliance schedule **and** a compliance statement (annual or not), the regulation should have been written different (substitute “or” with “and”).
 - EPA proposed and removed an annual certification requirement (discussed later)
- Given the (i) or (ii) structure of the regulation, and given that compliance with (i) eliminates the need for (ii) - any compliance statement ever, it is inconceivable (and structurally and textually unsupported) that EPA intended that (ii) or “RMP certification” to be annual and required by all owners. Annual certification could have be avoided forever by providing a compliance schedule.

RMP Certification

40 CFR 68.215(a)(2)

The only direct reference to a (Part 70) compliance certification found in Part 68 refers to a one-time event.

RMP Certification

40 CFR 68.215(a)(1)

(a) The 40 CFR part 70 or part 71 permit for the stationary source shall contain:

1. A statement listing this part as an applicable requirement;
- RMP does not define “applicable requirement” – must look to Part 70.
 - RMP rule “does not alter the definition of “applicable requirement” . . . 61 Fed. Reg. at 31689.

Applicable Requirement

Part 70 definition

Applicable requirement means all of the following as they apply to emissions units in a part 70 source (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates):

- (1) –(3) Any standard or other requirement under title I or § 111
- (4) Any standard or other requirement under section 112 of the Act, including **any requirement concerning accident prevention under section 112(r)(7)** of the Act;
- (5) – (13) Any standard under other sections

Applicable Requirement Part 70 Definition

requirement under this Act.” EPA further states in part 70.2 that “Applicable Requirement means * * *

(4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act; * * *”

Consequently, EPA must require that air permitting authorities implementing Title V permit programs be able to assure compliance with section 112(r). In the SNPRM, EPA

Applicable Requirement

Part 70 definition

But,

“ * *” = as they apply to **emissions units** in a part 70 source*

Is this important? Does removal of this phrase change the meaning of Applicable Requirement?

Let's substitute some “environmental lingo” with some common words and review the structure of the definition!

Structure of Definition

- **Food materials** means all of the following as they apply to **human digestible substances** in an **organic** source:
 - (4) Any **material from a plant**, including any **roots**;

Structure of Definition

Introduction - “food material” must be digestible

Whereas a list of materials that could be food is provided, for an individual item from the list to be food, it must be digestible.

Correct?

Structure of Definition

Consider

- Carrots (which are roots), are food materials, whereas an oak tree root is not.
- Not all roots are food materials.

Consider again

- Any requirement, *as it applies to an emissions unit*, concerning accident prevention under section 112(r)(7) of the Act is an applicable requirement

Structure of Definition

Conclusions

1. RMP requirements, as they apply to emission units, are Part 70 Applicable Requirements
2. To be a Part 70 requirement, RMP requirements must apply to an emissions unit

Questions

- Do all RMP requirements apply to emissions units? Are all roots digestible?

Applicable Requirement

- Part 68 rule (1996) – No change to Part 70 definition
- Part 68 requirements - as they apply to emissions units

Conclusion: only RMP requirements, as it applies to an emission unit, are Part 70 Applicable requirements

RMP Proposed Rule (1995)

(Annual certification removed from final)

Each part 70 permit shall contain conditions requiring the following provisions, for any activity and/or emission unit subject to this part:

(3) The source shall annually certify compliance with, and implementation of, risk management program requirements described in this part and as described by the submitted RMP or revised plan.

Proposed 40 CFR 68.58(a)(3)

RMP Final Rule (1996)

Emissions Unit

- Proposed rule – certify compliance with **any activity** subject to Part 68 – very broad language!
- Final rule - Part 70 Permits shall contain a statement that Part 68 is an applicable requirement
 - Part 70 - Applicable requirements means all of the following **as they relate to emissions units** . . .
- The term “emissions unit”
 - does not appear in the final rule (anywhere);
 - Was hidden by inserting ellipses (* * *); and
 - Is also an integral part of the term deviation

Deviation

40 CFR 71.6(a)(3)(C)

For purposes of paragraph (a)(3)(iii)(B) of this section, deviation means any situation in which *an emissions unit* fails to meet a permit term or condition. . . . Included in the meaning of deviation are any of the following:

(1) –(2) – Very specific to emissions

(3) A situation in which observations or data collected demonstrates noncompliance with *an emission limitation or standard* or *any work practice* or operating condition required by the permit;

(4) Specific to Part 64

Is the failure to inspect a PPU a deviation?

Delek vs. OSHA - The PPU is part of a process, and the failure to inspect it is a violation of RMP.

Is it a deviation?

Process ↔ Emission Unit

Process means any activity involving a regulated substance including any use, storage, manufacturing, handling, or on-site movement of such substances, or combination of these activities. For the purposes of this definition, any group of vessels that are interconnected, or separate vessels that are located such that a regulated substance could be involved in a potential release, shall be considered a single process.

Emissions unit means any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act. This term is not meant to alter or affect the definition of the term “unit” for purposes of title IV of the Act.

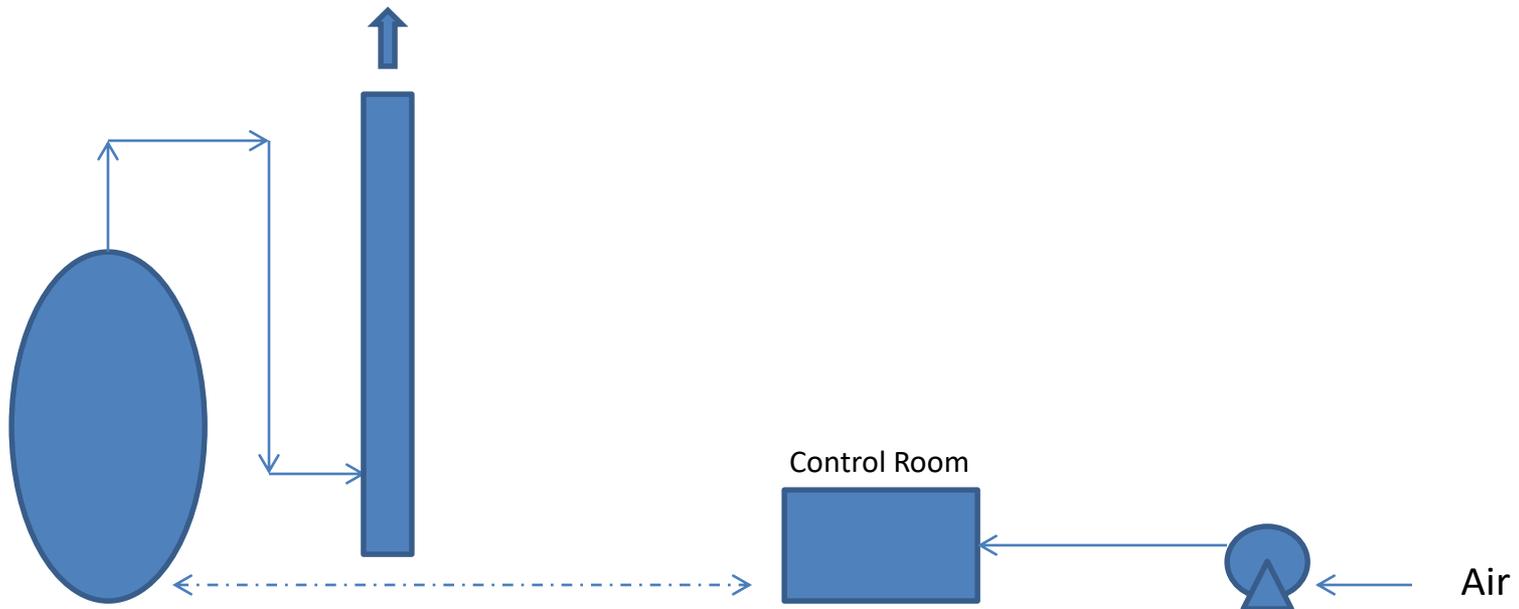
DOES A PPU (essentially an air mover) emit regulated pollutants?

Process versus emissions Unit

All is part of a process.

All part of an emissions unit?

Emissions unit means any part or activity of a stationary source
that emits (a pollutant) – Textually narrower



Process means any activity involving a regulated substance including – Textually Broad

Emission Unit

Although an emissions unit may consist of a single piece of equipment, here the appropriateness of applying controls over multiple units justifies viewing the affected facility as defined by NSPS HHH, to be the emissions unit.

Judith Katz, EPA Region III Director (2000)

Emission Unit

- Single piece of equipment?
 - PPU? Does it emit pollutants?
- EPA - At times appropriate for an affected facility
 - FCC affected facility
 - Pre 1973 – None
 - 1973-2007 – Regenerator
 - 2007+ - FCCU
 - If defined as affected facility, does it change?
- Emission Unit \neq Process
- Why no guidance?

Deviation

40 CFR 71.6(a)(3)(C)(3)

A situation in which observations or data collected demonstrates noncompliance with **an emission limitation or standard** or **any work practice** or operating condition required by the permit;

A requirement to inspect a PPU is not an emission limitation or standard. **Is it a work practice?**

Deviations

Work Practice

- With the exception of “safe work practices,” no regulations, preamble, or guidance refers to any RMP requirements to be “work practices.”
- What is a work practice?

Deviations

Work Practice

- Safe work practices are procedures to assure that activities such as the following are conducted in a safe manner:
 - Lockout / tagout
 - Confined space entry
 - Equipment opening
 - Control of entry into stationary source
- Safe work practices need not be in writing. See, *Albemare Corp. v. Herman*, 221 F.3d 782, 785-86 (5th Cir 2000). Accordingly, operating procedures, which must be in writing are not safe work practices.

Deviations

Work Practice

- CAA §112(h) – allows EPA to promulgate “work practices” where numerical limits would be infeasible
 - e.g., asbestos abatement work practices used to keep asbestos emissions to the minimum
 - Clearly relates to the concept of emission unit (i.e. activity that emits)
 - Work practices that are authorized under §112(h) are clearly identified as such when promulgated

Deviations

Work Practice

- CAA §112(r)(7)(A) – Provides authority EPA to promulgate rules to prevent release including:
 - Monitoring – vessel thickness? - §68.73
 - Training – Training - §68.71
 - Design – RAGAGEP - §68.65
 - Operational requirements – procedures - §68.69(a)-(c)
 - Work practices – safe work practices - §68.69(d)
- No direct relationship to emissions
- No discussion in preamble or guidance justifying or parsing out

Deviation

40 CFR 71.6(a)(3)(C)

For purposes of paragraph (a)(3)(iii)(B) of this section, deviation means any situation in which *an emissions unit* fails to meet a permit term or condition. . . . Included in the meaning of deviation are any of the following:

(1) – (2) – Very specific to *emissions*

(3) A situation in which observations or data collected demonstrates noncompliance with *an emission limitation or standard* or any *work practice or operating condition* required by the permit;

(4) Specific to Part 64



The definition of Applicable Requirements, Deviations, and (effectively) Work Practices all relate to emissions / emission units

If EPA intended annual certifications, why did they

- not keep the proposed language,
- the ignore the term emissions units, and
- not discuss work practices?



Incorporation of RMP elements into Part 70 Permits

- Except for §68.215(a), RMP elements “should not become permit conditions.” 61 Fed. Reg. at 31690.
- States “have the authority to choose to incorporate detailed part 68 requirements into Title V permits, although EPA would discourage such a practice.” Summary and Response to Comments, p. 139 of Section 28.
- It would be inconsistent to argue that EPA intended annual certification of detailed requirements it recommended should not be included in a permit.

Conclusions - Facts

- EPA proposed and subsequently removed an annual certification requirement
- Emission Units
 - Applicable requirement – EPA glossed over relationship to emission units
 - A deviation (including work practices) of a Title V permit also relates to emissions units
- EPA discouraged states from putting specific RMP requirements into Title V permits
- EPA has failed to issue guidance since RMP issued

Conclusions

¿Unanswered Questions?

- Is an “emissions unit” and a “process” the same thing?
 - If so, why does one have a broad definition and the other a narrow one?
- What is an RMP “work practice?”
 - Recall Part 70 deviations relate to emission unit terms and conditions.
- Where did we get the idea that annual Part 70 compliance certifications included any activity required by Part 68?
 - EPA has never said so in writing (except a withdrawn proposed requirement).



Thank You!

Questions? Comments.

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