

Background:

The TBPG was contacted by Steven Fleming, P.G. regarding the EPA's proposal. Mr. Fleming noted that in Part X (Next Generation Compliance and Rule Effectiveness), Section B (Fugitive Emissions Verification) of the proposal, the EPA noted that under the current set of proposed rule changes, it was anticipating a structure in which the facilities are responsible for determining and documenting that their auditors are competent and independent pursuant to specified criteria. Mr. Fleming also noted that the EPA was seeking comment as to whether the approach is appropriate for this type of auditing or whether an alternative approach, such as requiring auditors to have accreditation from a recognized auditing body or EPA, or other potentially relevant and applicable consensus standards and protocols. Mr. Fleming also noted that EPA stated that "competence of the auditor can include safeguards such as licensing as a Professional Engineer (PE)..."

Mr. Fleming requested that TBPG consider making comment to the EPA to the effect that licensure as a Professional Geoscientist (PG) would provide safeguards equal to licensure as a Professional Engineer, for this purpose.

TBPG Officers, Vice-Chairman David Prescott, P.G. and Secretary-Treasurer Becky Johnson, P.G. consulted with Mr. Fleming, studied the issue, and presented a draft comment to EPA to the full TBPG Appointed Board on October 16, 2015. The full TBPG Appointed Board voted to instruct staff to submit the Board's comment to EPA.

Below, I have pasted an excerpt from the EPA's proposal, with certain parts of the excerpt highlighted. The excerpt is from Part X, section B of the proposal.

B. Fugitives Emissions Verification

As discussed in sections VII.G and VIII.G, the EPA is proposing the use of OGI as a low cost way to find leaks. While we believe we are proposing a robust method to ensure that OGI surveys are done correctly, we have ample experience from our enhanced leak detection and repair (LDAR) efforts under our Air Toxics Enforcement Initiative, that even when methods are in place, routine monitoring for fugitives may not be as effective in practice as in design. Similar to the audits included as part of consent decrees under the Initiative (*See U.S. et. Al. v. BP Products North America Inc.*), we are soliciting comment on an audit program of the collection of fugitive emissions components at well sites and compressor stations.

For this rule, we are anticipating a structure in which the facilities themselves are responsible for determining and documenting that their auditors are competent and independent pursuant to specified criteria. The Agency seeks comment as to whether this approach is appropriate for the type of auditing we describe below, or whether an alternative approach, such as requiring auditors to have accreditation from a recognized auditing body or EPA, or other potentially relevant and applicable consensus standards and protocols (*e.g.*, American National Standards Institute (ANSI), ASTM International (ASTM), European Committee for Standardization (CEM), International Organization for Standardization (ISO), and National Institute of Standards and Technology (NIST) standards), would be preferable.

In order to ensure the competence and independence of the auditor, certain criteria should be met. Competence of the auditor can include safeguards such as licensing as a Professional Engineer (PE), knowledge with the requirements of rule and the operation of monitoring equipment (*e.g.*, optical gas imaging), experience with the facility type and processes

being audited and the applicable recognized and generally accepted good engineering practices, and training or certification in auditing techniques. Independence of the auditor can be ensured by provisions and safeguards in the contracts and relationships between the owner and operator of the affected facility with auditors. These can include: The auditor and its personnel must not have conducted past research, development, design, construction services, or consulting for the owner or operator within the last 3 years; the auditor and its personnel must not provide other business or consulting services to the owner or operator, including advice or assistance to implement the findings or recommendations in the Audit report, for a period of at least 3 years following the Auditor's submittal of the final Audit report; and all auditor personnel who conduct or otherwise participate in the audit must sign and date a conflict of interest statement attesting the personnel have met and followed the auditors' policies and procedures for competence, impartiality, judgment, and operational integrity when auditing under this section; and must receive no financial benefit from the outcome of the Audit, apart from payment for the auditing services themselves. In addition, owners or operators cannot provide future employment to any of the auditor's personnel who conducted or otherwise participated in the Audit for a period of at least 3 years following the Auditor's submittal of its final Audit report and must be empowered to direct their auditors to produce copies of any of the audit-related reports and records specified in those sections. Both the owners and operators and their auditors should sign supporting certifications statements. To further minimize audit bias, an audit structure might require that audit report drafts and final audit reports be submitted to EPA at the same time, or before, they are provided to the owners and operators. Furthermore, the audits conducted by the auditors under this rule should not be claimed as a confidential attorney work products even if the auditors are themselves, or managed by or report to, attorneys.

There may be other options, in addition to the approaches above, that may increase owner or operator flexibility, but these options also present risks of introducing bias into the program, resulting in less robust and effective audit reports. EPA invites comment on the structure above as well as alternative auditor/auditing approaches with less rigorous independence criteria. For example, EPA could, in the final rule, allow for audits to be performed by auditors with some potential conflicts of interest (*e.g.*, employees of parent company, affiliates, vendors/contractors that participated in developing source master plan(s) and/or site-specific plan(s), etc.) and/or allow a person at the facility itself who is a registered PE or who has the requisite training in conducting optical gas imaging monitoring to conduct the audit. If such approaches are adopted in the final rule, the Agency could seek to place appropriate restrictions on auditors and auditing with less than full independence from their client facilities in an effort to increase confidence that the auditors will act accurately when performing their activities under the rule. Such provisions could include ones addressed to ensuring that auditor personnel who assess a facility's compliance with the fugitives monitoring requirements do not receive any financial benefit from the outcome of their auditing decisions, apart from their basic salaries or remuneration for having conducted the audits.

Additional examples of the types of restrictions that could be placed on such self-auditing to potentially improve auditor impartiality and auditing outcomes appear in the U.S. and CARB v. Hyundai Motor Company, et al. Consent Decree (CD). Until the CDs corrective measures are fully implemented, the defendants must audit their fleets to ensure that vehicles sold to the public conform to the vehicles' certification. The CD provides that the audit team will be in the United States, will be independent from the group that performed the original certification work, and must perform their audits without access to or knowledge of the defendants' original certification test data which the CD-required audits are intended to backcheck. EPA seeks comment as to whether similar restrictions could be effective for any potential enhanced self-auditing conducted under the rule.