2. Third-Party Verification for Closed Vent Systems

**Comment:** Several commenters express opposition to a third-party verification system for the design of closed vent systems. Some of the commenters explain that they design their closed vent system using in-house staff. Many of the details regarding actual flow volumes and gas composition are unknown at the initial design stage, so it would not be possible to certify the designs effectiveness prior to construction. Also, storage vessels are designed to have some level of losses, so it would also not be possible to certify that the closed vent system routes all emissions to the control device.

Several of the commenters also express concern that the verification process discussed in the preamble to the proposed rule would create a complex bureaucratic scheme with no measurable benefits. Many of the commenters believe such a verification process would add a significant labor and cost burden that the EPA has not quantified. The EPAs contention that third-party verification may improve compliance is presented without any analysis or support and does not justify the costs of such a program.

Concerning the impartiality requirements outlined by the EPA, some of the commenters believe that it would be impossible to find someone who is qualified to do verification that could pass those requirements due to the interrelationship between the production and support companies over decades of working with one another. Some commenters contend that the EPA overestimates the availability of qualified third-party consultants, assuming that an impartial one could be found, that understands the industry well enough to competently review designs for closed vent systems.

Some of the commenters remind the EPA of the conclusions the Agency reached after proposing a similar third-party verification system for the Greenhouse Gas Reporting Program, in which the EPA expressed concerns about establishing third-party verification protocols, developing a system to accredit third-party verifiers, and developing a system to ensure impartiality.

**Response:** The EPA continues to believe that independent third party verification can furnish more, and sometimes better, data about regulatory compliance. With better data about compliance, regulatory agencies, including the EPA, would have more information to determine what types of regulations are effective and how to spend their resources. A critical element to independent third party verification is to ensure third-party verifiers are truly independent from their clients and perform competently. We continue to believe that this model best limits the risk of bias or capture due to the third-party verifier identifying or aligning his interests too closely with those of the client. However, in other rulemakings, we have explored and implemented an alternative to the independent third party verification, where engineering design is the element we wish to ensure is examined and implemented without bias. This is the qualified professional engineer model. In the Resource Conservation and Recovery Act (RCRA) Burden Reduction Initiative (Burden Reduction Rule) (71 FR 16826, April 4, 2006) and the Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities rule (67 FR 47042, July 17, 2002), the Agency came to similar conclusions. First, that professional engineers, whether independent or employees of a facility, being professionals, will uphold the integrity of their profession and only certify documents that meet the prescribed regulatory requirements and that the integrity of both the professional engineer and the professional oversight of boards licensing professional engineers are sufficient to prevent any abuses. And second, that in-house professional engineers may be the persons most familiar with the design
and operation of the facility and that a restriction on in-house professional certifications might place an undue and unnecessary financial burden on owners or operators of facilities by forcing them to hire an outside engineer. Also in the Burden Reduction Rule the Agency concluded that a professional engineer is able to give fair and technical review because of the oversight programs established by the state licensing boards that will subject the professional engineer to penalties, including the loss of license and potential fines if certifications are provided when the facts do not warrant it. A qualified professional engineer maintains the most important components of any certification requirement: (1) That the engineer be qualified to perform the task based on training and experience; and (2) that she or he be a professional engineer licensed to practice engineering under the title Professional Engineer which requires following a code of ethics with the potential of losing his/her license for negligence (see 71 FR 16868, April 4, 2006). The personal liability of the professional engineer provides strong support for both the requirement that certifications must be performed by licensed professional engineers. The Agency is convinced that an employee of a facility, who is a qualified professional engineer and who has been licensed by a state licensing board, would be no more likely to be biased than a qualified professional engineer who is not an employee of the owner or operator. The EPA has concluded that the programs established by state licensing boards provide sufficient guarantees that a professional engineer, regardless of whether he/she is independent of the facility, will give a fair technical review. As an additional protection, the Agency has re-evaluated the design criteria for closed vent systems to ensure that the requirements are sufficiently objective and technically precise, while providing site specific flexibility, that a qualified professional engineer will be able to certify that they have been met.

It is important to reiterate that state licensing boards can investigate complaints of negligence or incompetence on the part of professional engineers and may impose fines and other disciplinary actions, such as cease-and-desist orders or license revocation. (See 71 FR 16868.) In light of the third party oversight provided by the state licensing boards in combination with the numerous recordkeeping and recording requirements established in this rule, the Agency is confident that abuses of the certification requirements will be minimal and that human health and the environment will be protected.

In other rulemakings, which have allowed for a qualified professional engineer in lieu of an independent reviewer, the Agency has required that the professional engineer be licensed in the state in which the facility is located. (See Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule (Coal Ash Rule) (80 FR 21302, April 17, 2015)). The Agency has made this decision, in that rule, for a number of reasons, but primarily because state licensing boards can provide the necessary oversight on the actions of the professional engineer and investigate complaints of negligence or incompetence as well as impose fines and other disciplinary actions such as cease-and-desist orders or license revocation. The Agency concluded that oversight may not be as rigorous if the professional engineer is operating under a license issued from another state. While we believe this is the appropriate outcome for the Coal Ash Rule, in part due to the regional and geological conditions specific to the landfill design, we do not believe that we need to provide this restriction for the closed vent system design under this rulemaking. Closed vent system design elements are not predicated on regional characteristics but instead follow generally and widely understood engineering analysis such as volumetric flow, back pressure and pressure drops. We do believe that the professional engineer should be licensed in a minimum of one of the states in which the certifying official does business.
Whether to specify independent third-party reporting, some other type of third-party or self-reporting, or a Professional Engineer is a case-specific decision that will vary depending on the nature of the rule, the characteristics of the sector(s) and regulated entities, and the applicable regulatory requirements. Based on all relevant factors for this rule, the EPA has determined that a qualified Professional Engineer approach is appropriate and that it is unnecessary to require the individual making certifications under this rule to be independent third parties. Thus the final rule does not prohibit an employee of the facility from making the certification, provided they are a professional engineer that is licensed by a state licensing board.