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Re: Proposed Rule, Environmental Protection Agency; "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention"; 87 Fed. Reg. 53,556 (August 31, 2022); Docket ID No. EPA–HQ–OLEM–2022–0174

Dear Mr. Breen and Mr. Waterhouse:

We, the undersigned Associations, submit these comments in response to the U.S. Environmental Protection Agency's ("EPA" or "Agency") Notice of Proposed Rulemaking, "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention" ("Proposed Rule" or "Proposal").[1]

Together, we represent a broad cross-section of companies that strongly value the safety of their employees and neighboring communities. Recognizing the critical importance of safety, our member companies engage in numerous voluntary measures to promote and enhance process safety. Many of those companies have also spent decades aligning their voluntary safety practices with the regulatory performance-based framework of EPA's Risk Management Program ("RMP") and the Occupational Safety and Health Administration's ("OSHA") Process Safety Management ("PSM") regulations. As a result, reportable accidents and major incidents stand at record lows in the United States. Despite this progress, the Proposal would make several major changes to the RMP regulations that are unwarranted and otherwise unlawful, putting at risk these gains and creating substantial legal uncertainty.

We offer several comments and recommendations for the Agency's review and consideration:

- The Proposal fails to provide an adequate rationale for overturning EPA's three-year-old finding that the existing RMP regulations work well to promote safe facilities and communities.

- EPA should pause the Proposed Rule to coordinate with OSHA's review of the PSM standards to promote the harmonization of these safety standards and thus to promote regulatory certainty.

[1] 87 Fed. Reg. 53,556 (Aug. 31, 2022) (the "Proposed Rule" or "Proposal").

- The proposed Process Hazard Analysis (PHA) requirements exceed EPA's statutory authority and are otherwise arbitrary and capricious, including proposed requirements to analyze external events such as natural hazards and the risks posed by proximate facilities.

- EPA's proposal to resurrect both third-party audits and Safer Technology Alternative Analysis (STAA) ignores the legal infirmities and other serious problems that led the Agency to rescind these requirements in 2019.

- The proposed employee participation requirements are unlawful and would pose new safety risks.

- Certain proposed emergency response requirements raise feasibility issues and lack justification.

- The proposed information disclosure requirements raise security risks and impose significant burdens with no added benefit.

- The proposed revisions to key definitions, such as the definition of the term "stationary source," would upend longstanding implementation practices without adequate explanation or justification.

INTRODUCTION

The Associations' members support the existing process safety framework under the RMP regulations. It is performance-based, focusing on continuous improvement and lessons learned. As a result, there have been unprecedented improvements in safety, with 97 percent of RMP-regulated facilities reporting no accidents during the most recent reporting period (i.e., 2016-2020).

That enviable record spurred EPA in 2019[2] to rescind the 2017 amendments to the RMP rule.[3] The 2017 amendments imposed a series of unprecedented requirements on the regulated community that would have undermined process safety and would have imposed undue burdens.

The Proposal attempts to resurrect several features of the 2017 Amendments and to mandate a slate of additional new obligations. The Agency fails to provide an adequate rationale for why these changes would further the statutory objective of managing process safety risk.[4] Instead, the Proposed Rule rests on two overarching flawed rationales.

First, EPA notes that the Proposal grew out of issues unrelated to process safety.[5] EPA's authority to amend the RMP program springs from Section 112(r) of the Clean Air Act, a statutory

[2] 84 Fed. Reg. 69,834 (Dec. 19, 2019) ("2019 Reconsideration Rule" or "2019 Rule").
[3] 82 Fed. Reg. 4,594 (Jan. 13, 2017) ("2017 Amendments").
[4] *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2315-16 (2012) ("an agency . . .should acknowledge that it is in fact changing its position and "show that there are good reasons for the new policy") (quoting *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009)); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983).
[5] 87 Fed. Reg. at 53,563.

provision that applies to process safety. We are concerned that EPA's proposal would exceed the bounds of EPA's statutory authority.[6]

Second, EPA indicates that Congress intended RMP to eliminate all accidents. In EPA's view, the proposed slew of new requirements are needed because "accidents continue to occur."[7] EPA's characterization of RMP as a zero-risk program is at odds with the statute. The purpose of RMP is to reduce the risk of an accident to a manageable level through prevention, detection, and response measures.[8] A handful of incidents largely concentrated at a few facilities provides no reason to overhaul an entire regulatory program that has driven record improvements in safety.

The Associations respectfully recommend that EPA withdraw the Proposal and reevaluate the necessity of moving forward at this time. Should the Agency decide to issue a final rule regarding any of the proposed amendments, we provide comments below on specific provisions of the Proposed Rule, along with actionable suggestions for the Agency to consider. We hope to serve as a resource for EPA on the Proposed Rule and RMP generally, and look forward to continuing to partner with the Agency to protect human health and the environment.

ANALYSIS

1. EPA SHOULD REEVALUATE THE PROPOSAL BECAUSE OF SEVERAL LEGAL AND RECORD DEFICIENCIES

In the Proposed Rule, EPA ignores several critical legal issues and fails to develop a record supporting the changes. The Agency should withdraw the Proposed Rule to consider these issues.

a. EPA Fails to Provide an Adequate Rationale for Departing from its 2019 Finding that the Existing RMP Regulations and Enforcement Work Well to Promote Process Safety

The RMP accident data demonstrate that the current regulations prevent and mitigate accidents. In the 2019 rule, EPA reported a decline of more than 50 percent in annual accidents between 2004 and 2017 and that 90 percent of all RMP facilities had no reportable accidents. In the Proposal, EPA acknowledges that these improvements in safety have continued through 2020, the most recent year for which RMP data are available. Reported RMP accidents declined substantially, with a 70 percent reduction in annual reported accidents between 2004 and 2020.[9] Indeed, accidents occur rarely, with only three percent of RMP facilities reporting an accident during the most recent 5-year reporting period (i.e., 2016-2020). In other words, 97 percent of all RMP facilities had no reportable accidents in the most recent reporting period. That remarkable improvement in process safety results from the existing performance-based framework.

While EPA acknowledges the effectiveness of the current regulations in the Proposed Rule, the Agency suggests that the mere occurrence of *any* accidents provides justification for additional regulation. That suggestion is not an adequate justification for wholesale change to the existing

[6] *West Virginia v. EPA*, 124 S. Ct. 2587 (2022).
[7] 87 Fed. Reg. at 53,566.
[8] 42 U.S.C. § 7412(r)(7)(B)(i).
[9] EPA-HQ-OLEM-2022-0174-0065.

regulations. As EPA explained in the original 1996 RMP rulemaking, RMP is not a zero-risk program. Instead, Congress intended RMP to reduce and manage risks.[10] That interpretation reflects the common-sense notion that industrial activity and life itself carry risk. As Justice Stevens observed in the Supreme Court's plurality opinion in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*[11]:

> [S]afe is not equivalent of risk-free. There are many activities that we engage in every day—such as driving a car or even breathing city air—that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities unsafe.

The Court went on to affirm the Fifth Circuit's decision remanding certain OSHA workplace exposure standards, in part because several members of the Court concluded that the agency had failed to show that potential exposure levels "threaten[] the workers with a significant risk of harm."[12] Similarly, no significant risk arises from the existing RMP regulations, where reportable accidents have plummeted 70 percent since 2004, and 97 percent of facilities have no reportable accidents since 2016.[13]

The 2019 Rule found that concentrating enforcement efforts on the relatively small number of facilities with compliance problems would best promote process safety. The Proposed Rule, however, discounts the effectiveness of enforcement by asserting that enforcement actions only address past violations of individual companies. But EPA enforcement actions generally deter *other companies* from violating the rules by seeking civil penalties and other relief that generally deters noncompliance.[14] As EPA has explained, "this general deterrence motivates other persons or facilities subject to the same or similar laws or requirements to also identify and meet their legal obligations."[15]

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[10] *See, e.g.*, 31,668, 31,670 (1996) ("EPA recognizes that regulatory requirements, by themselves, will not guarantee safety."); 58 Fed. Reg. 5,190, 54,193 (1993) ("The purpose of todays proposed rule is to require industry to develop such an integrated holistic approach to managing the risks posed by the presence and use of regulated substances.").

[11] 448 U.S. 607, 642 (1980) (plurality opinion of Stevens, J., joined by Burger, C.J., Stewart, J., and Powell, J.).

[12] *Id.*; *see also id.* at 614-15, 653 (Stevens, J., joined by Burger, C.J., and Stewart, J.); *id.* at 663 (Burger, C.J., concurring); *id.* at 667 (Powell, J., concurring in part and concurring in the judgment). Justice Rehnquist, who did not join the plurality opinion and provided the fifth vote for the judgment of affirmance, would have decided the case on nondelegation grounds. Nonetheless, he observed in his separate opinion that he was not persuaded that the Occupational Safety and Health Act required OSHA to "eliminate marginal or insignificant risks of material harm right down to an industry's breaking point." *Id.* at 683 (Rehnquist, J., concurring in the judgment).

[13] *Cf. Irving v. United States*, 162 F.3d 154, 168 (1st Cir. 1998) ("The OSH Act's [Occupational Safety and Health Act's] purpose is to provide for a satisfactory standard of safety, not to guarantee absolute safety.") (citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646, (1980); *Donovan v. General Motors Corp.,* 764 F.2d 32, 35–36 (1st Cir.1985) (same); *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 118 (D.C.Cir.1987)); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1215 (5th Cir. 1991) ("Congress did not enact TSCA as a zero-risk statute").

[14] *See, e.g.*, EPA, Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68 (June 2012).

[15] EPA, Monitoring, Enforcement, & Environmental Compliance: Understanding Specific & General Deterrence Comparative Analysis of Monitoring and Enforcement Impact Measures, at 7 (June 2009), available at https://archive.epa.gov/compliance/resources/reports/compliance/research/web/pdf/meec-whitepaper-task6.pdf.

The proposed rule also criticizes enforcement as taking far too long, focusing on a single example of a highly complex case that took six years to resolve.[16] However, the rest of the enforcement data shows that EPA regularly resolves enforcement actions in an expeditious manner, often in less than a year.[17] Considered as a whole, the enforcement data show timely and effective resolutions. Selectively choosing contrary examples is arbitrary, and inconsistent with actual EPA practice.[18]

b. The Proposed Rule Fails to Consider Costs and Other Necessary Information

The Proposed Rule suffers from several legal deficiencies that require it to be withdrawn.

Section 112(r)(7) of the CAA requires that the RMP regulations be "reasonable" in providing for prevention, detection, and response to accidental releases to "the greatest extent practicable."[19] Similar provisions of the CAA were the subject of the Supreme Court's ruling in *Michigan v. EPA* regarding the Mercury and Air Toxics Standards ("MATS").[20] EPA promulgated the MATS rule pursuant to Section 112(n)(1) of the CAA, which requires EPA to determine whether such regulation is "appropriate and necessary."[21] In *Michigan*, the Court held that EPA had unreasonably deemed costs irrelevant when interpreting this provision and deciding whether it was "appropriate" to regulate hazardous air pollutants from power plants.[22] The Court considered "appropriate" a "broad and all-encompassing term" that required "consideration of all relevant factors."[23] Indeed, the Agency cannot consider "all relevant factors" if it "entirely fai[ls] to consider an important aspect of the problem"—namely, cost.[24] The Court reasoned that "[n]o regulation is "appropriate" if it does significantly more harm than good."[25] The statute required EPA to weigh "the advantages *and* the disadvantages of" MATS to ensure it would not "do[] significantly more harm than good."[26]

As in *Michigan*, EPA violated the CAA by failing to consider the costs of the proposed revisions of the RMP regulations. The text of CAA Section 112(r)(7) closely tracks the "necessary and appropriate" language that compelled EPA to consider costs under Section 112(n)(1) of the

[16] Proposed Rule, 87 Fed. Reg. at 53,565 (discussing multi-site refinery RMP settlement that took more than 6 years to resolve).
[17] EPA, National Compliance Initiative: Reducing Risks of Accidental Releases at Industrial and Chemical Facilities, *available at* https://www.epa.gov/enforcement/national-compliance-initiative-reducing-risks-accidental-releases-industrial-and
[18] *See, e.g.*, *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008).
[19] 42 U.S.C. § 7412(r)(7)(B)(i) ("*reasonable* regulations and *appropriate* guidance to provide, to the greatest extent *practicable*, for the prevention and detection of accidental releases of regulated substances and for response to such releases by the owners or operators of the sources of such releases") (emphasis added).
[20] *Michigan v. EPA,* 135 S. Ct. at 2699.
[21] 42 U.S.C. § 7412(n)(1).
[22] 135 S. Ct. 2699, 2707 (2015).
[23] *Michigan v. EPA,* 135 S. Ct. at 2707.
[24] *Id.*
[25] *Id.; see also id.* ("One would not say that it is even rational, never mind "appropriate", to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.").
[26] *Id.* (emphasis in original).

Act in *Michigan*.[27] Thus, to promulgate "reasonable" RMP regulations that are "practicable," EPA must adequately assess the costs of the Proposed Rule and determine whether they are disproportionate to the benefits that the Proposed Rule would confer.

Here, EPA failed to evaluate the costs *at all* of many of the proposed provisions, including the proposed natural hazards and proposed gap analysis requirements for PHAs.[28] Several proposed regulatory changes were not addressed in the preamble at all, including the proposed requirement to audit each covered process as part of the triennial compliance audit. Thus, the Proposal should be withdrawn until EPA conducts an appropriate consideration of costs weighed against benefits, consistent with the requirements of Section 112(r) and with *Michigan*.

For those provisions of the Proposal for which EPA did consider costs, EPA's analysis is inadequate and arbitrary. In lieu of a traditional cost-benefit analysis, EPA's Regulatory Impact Analysis ("RIA") is premised on a "breakeven analysis" in which EPA provides an estimate of the general decline in accidents and associated damages needed to breakeven (i.e., offset) with the estimated burdens of the Proposed Rule.[29] Based on the breakeven analysis, approximately 15 accidents would need to be avoided each year to offset the anticipated impacts of the Proposed Rule.[30] Yet the record is devoid of any explanation of how EPA calculated this estimate of 15 accidents avoided. EPA acknowledged that it "has no data or empirical estimates of the precise impact of each rule provision on the probability and magnitude of an accident, or on improved efficiency due to better information."[31]

EPA's failure to appropriately consider costs and benefits is all the more unreasonable because the Agency has conducted a cost-benefit analysis in past RMP rulemakings. In the RIA in support of its 1996 RMP rule, EPA stated that "[b]ecause the rule is unlikely to result in a 100 percent reduction in accidental releases, the analysis used an estimate of a 50 percent reduction, based on a small survey conducted by industry of the impact of implementing the OSHA PSM standard."[32] For any processes already subject to OSHA's PSM standard, EPA assumed that its 1996 RMP rule would be half as effective at preventing additional accidents.[33] Nothing in the

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[27] Section 112(r)(7) requires *"reasonable* regulations and *appropriate* guidance to provide, to the greatest extent *practicable,* for the prevention and detection of accidental releases of regulated substances and for response to such releases by the owners or operators of the sources of such releases." 42 U.S.C. § 7412(r)(7)(B)(i) (emphasis added).

[28] For example, EPA provided no benefits or costs of the proposed natural hazard requirements for the PHA, the proposed expanded compliance audits to each covered process, or the proposed translation requirements under the information disclosure provisions.

[29] Docket #EPA-HQ-OLEM-2022-0174-0093_attachment_2 ("RIA"), p. 59. A break-even analysis is not a substitute for a cost-benefit analysis where, as here, it is possible to conduct such an analysis, as EPA has done in pat RMP rulemakings. EPA, Guidelines for Preparing Economic Analyses, Updated March 2016, p. 7-50. *See also* RIA, p. 10.

[30] RIA, p. 59.

[31] RIA, p. 59.

[32] EPA, Economic Analysis in Support of Final Rule on Risk Management Program Regulations for Chemical Accident Release Prevention, As Required by Section 112(r) of the Clean Air Act, at ES-9 (June 1996).

[33] *Id.* OSHA likewise estimated the impact of its rule on reducing accidents when it promulgated its 1992 PSM regulations. It estimated that its rule would avoid 40 percent of accidents for the first five years and 80 percent of accidents for the next five-year period, presumably anticipating that increased compliance over time would result in decreased accidents. OSHA, Final Regulatory Impact and Regulatory Flexibility Analysis of the Final Standard for Process Safety Management of Highly Hazardous Chemicals, at I-8 (Feb. 1992).

Proposed Rule record explains EPA's failure to use the same or similar methodology here. EPA may not arbitrarily decline to quantify safety benefits when it is feasible to do so.

Finally, the Proposed Rule includes numerous data and information gaps,[34] and requests that commenters provide missing data and information for the Agency's potential use in a final rule.[35] Such open-ended requests for public input and vague proposed requirements limit the opportunity to meaningfully comment on the proposed requirements. Before EPA proceeds to a final rule, the Agency should issue a supplemental notice for public comment that provides the public full and fair access to review and comment on any new regulatory requirements as well as any data or information that EPA intends to rely upon.[36]

c. EPA Should Align Any Review of RMP with OSHA's Review of PSM

EPA should respect OSHA's lead role in process safety and should pause this rulemaking process during OSHA's review of the PSM program.[37] Congress conferred on OSHA the authority to address employees and onsite safety issues and delegated to EPA the responsibility to address off-site consequences of accidental releases.[38] To avoid inconsistency and to promote certainty, Congress imposed two obligations on EPA that require the Agency to give appropriate respect for OSHA's key role and to coordinate regulatory action with OSHA.

First, Section 112(r) of the CAA provides that in exercising its RMP authority, EPA "shall not…be deemed to be exercising statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."[39] Despite this statutory limit, several provisions of the Proposed Rule drift into OSHA's lane, including novel requirements for employee participation in the RMP program.[40]

Second, CAA Section 112(r) provides that EPA "shall consult with the Secretary of Labor…and shall coordinate any requirements under this [accident prevention] paragraph with any requirements established for comparable purposes by [OSHA] . . ."[41] Of note, there is no similar provision requiring OSHA to consult with EPA before taking similar action. That disparity evidences OSHA's lead role in regulation in this area. EPA has traditionally complied with this duty of coordination by having OSHA lead first with PSM rules before issuing RMP regulations. For example, OSHA issued the initial PSM rule in 1992, and EPA mirrored the PSM program

[34] For example, Appendix A failed to provide associated NAICS codes for the unique facilities reporting between 2016 and 2020, and included duplicate accidents reported. *See* EPA-HQ-OLEM-2022-0174-0065, All_accidents_2004_2020.
[35] For example, EPA requests comments on "[n]atural hazard resources such as databases, checklists, or narrative discussions," "any potential safety issues associated with" the proposed requirement for back-up/emergency power for air pollution control or monitoring equipment, "additional benefits provided by the practicability assessment" under the proposed STAA provisions, whether to limit the STAA provisions to 1 mile parameter for NAICS 324 and 325 facilities "or if another distance (e.g., 3 miles) would be appropriate, and the rationale for proposed distance alternatives." Proposed Rule at 53,558.
[36] S*ee* CAA § 307(d)(3); *see also* 5 U.S.C. §553(b)(3).
[37] 87 Fed. Reg. 53,020 (Aug. 30, 2022); 87 Fed. Reg. 57,520 (Sept. 20, 2022).
[38] CAA Section 112(r)(7)(G).
[39] CAA Section 112(r)(7)(G).
[40] *E.g.*, proposed revisions to employee participation requirements at 40 C.F.R. §68.83 and proposed revisions to process hazard analysis to evaluate hazards "to" the covered onsite process at 40 C.F.R. §68.67.
[41] CAA Section 112(r)(7)(D).

elements when the Agency issued its first RMP regulations in 1996.[42] Indeed, the first EPA RMP rule "used OSHA's language verbatim" for Program 3 facilities' prevention program requirements.[43] These requirements have remained the same for more than 25 years.

The Proposed Rule would upend this longstanding, effective framework by layering on new requirements that either conflict with or get ahead of changes to PSM. Comments on this Proposal are due on October 31, 2022, but OSHA thus far has only held a public hearing to allow potential options to be considered. There is no pending PSM proposal from OSHA that is available for public comment, much less a final rule. Rushing to revise RMP ahead of OSHA's review would create more confusion, burdens, and potential safety risks for covered facilities, LEPCs, and communities.

The timing of EPA's Proposal also raises significant concerns under the Paperwork Reduction Act (PRA).[44] That statute aims to avoid unnecessary and duplicative collection of information from regulated entities. By jumping ahead of OSHA, EPA may be subjecting the regulated community to two rounds of burdensome information collection. Moreover, the PRA regulations require agencies to ensure the "practical utility" of any collected information and disclosure of information to third parties or the public.[45] EPA neglected making any finding on the practical utility of the numerous categories of information that must be collected and publicly reported, including documents concerning third-party audits and PHAs. EPA should explain the actual usefulness of the proposed information to be collected and disclosed pursuant to the Proposal, not just the theoretical or potential usefulness.

2. THE NEW PROCESS HAZARD ANALYSIS PROVISIONS EXCEED EPA'S AUTHORITY AND ARE OTHERWISE ARBITRARY

The Proposed Rule introduces a suite of proposed changes to the Process Hazard Analysis ("PHA") process that are unlawful, inappropriately break from the PSM program, and risk undermining process safety.

a. The Proposed Requirement to Consider External Events, Including Natural Hazards, is Misplaced and Unjustified

The proposed requirement that PHAs address "external events," including "natural hazards," is overbroad and lacks proper justification.[46] Facilities already consider natural hazards

[42] 57 Fed. Reg. 6,356 (Feb. 24, 1992) ("The CAAA requires in section 304 that the Secretary of Labor . . . promulgate, pursuant to the Occupational Safety and Health Act of 1970, a chemical process safety standard to prevent accidental releases of chemicals which could pose a threat to employees."); 61 Fed. Reg. 31,668 (June 20, 1996) ("1996 RMP Rule").

[43] 1996 RMP Rule at 31,672. Facilities regulated under Program 3—the most stringent program level under the RMP—have been able to satisfy RMP requirements by implementing PSM.

[44] *See* 5 C.F.R. § 1320.5(d)(1)(i-iii) requires an agency take "every reasonable step" to ensure the collection "is the least burdensome necessary," "is not duplicative," and "has practical utility."

[45] 5 C.F.R. Part 1320.3(l). The PRA regulations define "practical utility" as "the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects (or a person's ability to receive and process that which is disclosed, in the case of a third-party or public disclosure) in a useful and timely fashion…" *Id.*

[46] Proposed 40 C.F.R. §68.67(c)(8) ("External events such as natural hazards, including those caused by climate change or other triggering events that could lead to an accidental release").

in their prevention and emergency response plans. Substantially extending those requirements into an open-ended duty to consider every conceivable external event raises several significant concerns.

The Proposal fails to provide a reasonable basis for requiring the consideration of natural hazards, let alone "external events," in PHAs. EPA's accident data from the 2016-2020 period reveal that only eight reports of accidents listed a natural cause as the initiating event and that only 12 reports identified unusual weather conditions as a contributing factor. Taken together, those 20 reports are *de minimis,* representing a mere 4.1 percent of the 488 total accidents reported during the same period. Even EPA admits that facilities are managing natural hazards "well."[47] The requirements would impose significant costs on PHA teams and none of those costs were analyzed as part of the Proposal. As an example, the associated reporting requirement for rejected recommendations would create unnecessary paperwork burdens that EPA has not fully analyzed or determined would result in safety benefits. EPA's failure to consider benefits and costs violates the agency's duty to promulgate "reasonable" regulations under Section 112(r) of the Act and *Michigan*.

The proposed obligation to consider external events is also vague, depriving the public of an adequate opportunity to comment and raising substantial due process concerns, as it is not feasible to predictably comply with a duty with no discernible bounds. Although EPA proposes a definition for natural hazards, the Agency does not define external events. PHAs historically cover hazards "of" the process, not "to" the process from the wider world. Indeed, requiring the consideration of every conceivable external event that might impact the process goes well beyond the expertise of a typical PHA team familiar with the covered processes and principles of process safety. Nor does the PSM rule shed any light on this EPA proposed requirement, as OSHA has yet to propose any parallel requirement. EPA has not adequately explained how a regulated party could comply with the proposed requirement.

Section 112(r)(7) of the CAA requires that regulated parties prevent, detect, and respond to releases of hazardous substances at RMP regulated facilities. Mandating a nebulous duty to assess and prevent against risks from external events ignores the boundaries that Congress set on EPA's authority. [48]

b. The Proposed Requirements for Loss of Power are Unlawful and Unreasonable

Facilities already consider power loss as a potential hazard in PHAs under the existing RMP regulations. However, the Proposal would venture much further, explicitly requiring back-up and emergency power systems for emissions monitoring equipment. That proposed extension of the RMP program is unlawful. Section 112(r) of the CAA provides EPA authority to prevent and mitigate accidental releases, not to oversee the monitoring of emissions generally in the

[47] 87 Fed. Reg. at 53,567..

[48] This is correct not merely as a matter of interpreting Section 112(r)(7). It is also consistent with *West Virginia v. EPA*, which invalidated an EPA rule promulgated under another section of the CAA. 142 S. Ct. 2587, 2610, 2623 (2022). The more aggressive the claim of authority by EPA here, the more likely that the claim will be held to trigger the major questions doctrine.

absence of a release. The Proposal would also break with PSM and would upend the longstanding harmonization between RMP and PSM by mandating backup power for monitoring equipment.

EPA lacks a reasoned basis for changing the existing requirements. Power loss plays a *de minimis* role in reportable RMP accidents. During the 2016-2020 period, only 7 out of 488 total reported accidents were linked to power loss and none of them reported offsite property damage or injuries. That represents less than two percent of reported accidents. EPA acknowledges these results but, advances the proposed requirement to ensure back-up and emergency power based on the generalized concern that a facility may improperly "use" power loss as a justification for shutting off monitoring equipment, without providing any evidence to back up the claim.[49]

EPA also neglected to conduct a proper cost-benefit analysis of the proposed backup power requirement. Although the RIA includes some estimates of costs for perimeter monitors, this is an underestimate of the full costs of back-up power, particularly for emissions monitoring equipment. EPA also failed to articulate the safety benefits of the requirement. Indeed, the proposed regulatory text is vague and would likely not yield any operational improvement, particularly without stating any durational requirement for backup power. EPA should address this ambiguity, providing clarification and a full analysis of the costs and benefits of the provision, subject to public comment, before proceeding with a final rule.

c. The Proposed Expansion of Stationary Source Siting is Overly Broad and Exceeds EPA Authority

As part of the PHA, the Proposal would require facilities to consider "hazards posed by proximate facilities" in stationary source siting decisions.[50] This proposed requirement is vague and lacks justification. [51]

Under the current RMP regulations, facilities address source siting in PHAs by considering hazards *of* onsite equipment, yet the proposal would unjustifiably expand the scope of PHAs to require facilities to consider hazards *to* onsite equipment.[52] Further, EPA does not define "proximate facilities" nor does the Agency explain the rationale for this language compared with other proposed provisions that specify distances.[53] Absent clarification, including whether "proximate facilities" includes non-RMP facilities and how covered facilities would collect necessary information from such facilities, the public lacks any meaningful ability to comment on this aspect of the Proposal.

The Proposal also fails to provide an adequate rationale for imposing heightened siting obligations. As part of the 2017 RMP Amendments, EPA previously considered and rejected heightened siting. Nor did the 2019 RMP rule impose any siting requirements. The preamble to this Proposal discusses several accidents as being linked to siting, but most of those accidents were considered under the 2017 and 2019 rulemakings, and the Agency offers no new accident data to justify its change in position now. Indeed, the only post-2019 rule accident that EPA cites in the

[49] 87 Fed. Reg. at 53,571.
[50] *Id.* at 53,612.
[51] *Id.* at 53,573.
[52] 87 Fed. Reg. at 53,612.
[53] *See e.g.*, 1-mile radius for STAA provisions.

preamble occurred in 2020 in India. Incidents in foreign countries subject to different legal systems provide no grounds to regulate U.S.-based facilities.

EPA postulates that an expanded source siting evaluation is needed to effectively create a boundary between a facility and "proximate facilities."[54] Creating federal siting boundaries falls outside EPA's authority to address accidental releases. Zoning is a peculiarly local government function. As such, it requires a clear statement from Congress for a federal agency to override.[55] Nowhere in Section 112(r) did Congress confer such zoning authority on EPA.

d. The Proposed "Gap Analysis" Lacks Justification and Would Unnecessarily Duplicate PSM Requirements

The Proposal would require facilities to conduct a gap analysis of facility equipment against "the most current version of applicable codes, standards, or practices" every five years as part of the PHA process.[56] EPA asserts that this requirement would ensure that facility equipment complies with the latest recognized and generally accepted good engineering practices ("RAGAGEP").

But EPA arbitrarily ignores that the existing RMP regulations already address gaps in RAGAGEP. The process safety information requirement, 40 C.F.R. § 68.65(d)(3), provides: "For existing equipment designed and constructed in accordance with codes, standards, or practices *that are no longer in general use*, the owner or operator shall determine and document that the equipment is designed, maintained, inspected, tested, and operating in a safe manner."[57] EPA adopted this regulation verbatim from OSHA's PSM regulations,[58] and OSHA has made clear that its regulations require the certification of safe equipment, not a continual review of RAGAGEP.[59] It is arbitrary that the Proposal never acknowledges § 68.65(d)(3), much less addresses this regulatory history.[60]

EPA omitted any analysis of the benefits and costs of performing a gap analysis of RAGAGEP every 5-years as part of the PHA process. Nowhere in the preamble – or the rest of the administrative record – does EPA analyze the safety benefit of conducting a gap analysis of RAGAGEP. Nothing in the record links reportable accidents or other events to these gaps.

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[54] 87 Fed. Reg. at 53573.

[55] *See, e.g., Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (in absence of "a clear statement from Congress," reading Clean Water Act provision to avoid "a significant impingement of the States' traditional and primary power over land and water use"); *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544 (1994).

[56] Proposed Rule, 40 C.F.R. § 68.67 (c)(10).

[57] *E.g.,* 40 C.F.R. § 68.65(d)(3) (emphasis added).

[58] 61 Fed. Reg. 31,688, 31,711 (1996).

[59] OSHA Standard Interpretation (1910.119), RAGAGEP in Process Safety Management Enforcement (May 11, 2016); BP *Products North America, Inc.*, OSHRC 10-0637, 27 OSHC 1391, at p. 15 (Sept. 27, 2018).

[60] *See*, *e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983) (holding that agency must explain why it is departing from past agency precedent and provide a reasoned basis for doing so).

The costs of gap analysis of RAGAGEP are also missing from the record. *Michigan* requires agencies to consider costs as part of reasonable rulemaking under Section 112(r), as discussed above.

e. Proposed Reporting Requirements for Certain Rejected PHA Recommendations Are Unduly Burdensome and Confer No Significant Safety Benefit

Much of the proposed PHA changes require new reporting obligations that are unnecessary and have not been fully analyzed. Specifically, EPA proposes that a facility be required to report to EPA any rejected recommendations from its evaluation of natural hazards, power loss, and the gap analysis. Such reports would be required to be publicly available.

EPA provided no reasonable explanation for such requirement, nor did it consider the cost, including resources that may be diverted because of this paperwork exercise, or benefits of the requirement in the RIA. EPA should conduct this analysis and provide an explanation for public comment before proceeding to finalize this requirement.

3. THE PROPOSED REVIVAL OF REQUIREMENTS FROM THE 2017 RULE IS UNLAWFUL AND UNREASONABLE

The Proposal revives several requirements of the 2017 Amendments that EPA rescinded as part of the 2019 Rule, including third-party audits and STAA. The legal and record deficiencies of these revised requirements are not cured in the Proposal. They should be withdrawn.

a. The Proposed Expansion of Compliance Audits to Each Covered Process Is Procedurally Infirm, Fails to Consider Costs, and Ignores the Successful Application of Representative Sampling

EPA proposes regulatory text that would expand the existing requirements for facilities to conduct compliance audits every three years to explicitly require such audits include "each covered process unit." EPA offers no explanation at all of this significant proposed change in the preamble, which violates the basic notice and comment requirements of the Administrative Procedure Act and the Clean Air Act.[61] EPA similarly fails to assess the costs and benefits of this expansion as required under *Michigan*. The proposal fails to account for the success and practical application of representative sampling, which results in findings and observations that inform improvements to similar processes. Requiring an audit of each covered process would be overly burdensome and divert critical resources that could go towards actual safety improvements. Thus, EPA must provide reasoned justification – subject to public notice and comment – before it could proceed to finalizing this provision.

[61] *See* 42 U.S.C. § 9607(d)(3); 5 U.S.C. § 553(b); *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2315-16 (2012) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983) (While the agency is entitled to change its view . . . it is obligated to explain its reasons for doing so.").

b. The Proposed Revival of Third-Party Compliance Audits is Unlawful and Arbitrary

EPA's proposed revival of third-party compliance audits is unlawful, overly burdensome, and lacks a sufficient basis to conclude that it would result in safety improvements. In the first instance, the proposed third-party audit requirements would effectively subdelegate enforcement powers to a private party. However, agencies "may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority [from Congress] to do so."[62] Since there is no authority under the CAA for EPA to confer its enforcement obligations on a third party, EPA should not proceed to finalize the provision.

The Proposal also lacks data that would indicate first- or second- party audits are inadequate. In fact, EPA's own Audit Policy finds first- and second-party audits effective.[63] Similar to the proposed changes to regular compliance audits, EPA proposes that third-party audits would involve each covered process without consideration of the full costs or the effectiveness of representative sampling. EPA must provide sufficient explanation if it intends to depart from its existing agency precedents.[64]

The requirement that the auditor must be "knowledgeable and experienced" would also place an added and undue burden on industry to verify this information. This requirement is also vague and absent clarification could be construed inconsistently, thus potentially leading to poor quality and vast inconsistencies in audits, which counters the purpose of this requirement. EPA should clarify such criteria for auditors and consider whether this is the "least burdensome" option to achieve the Agency's intended goal.

Finally, the proposed triggers for third-party audits are narrower than in the 2017 Amendments, but nonetheless lack a reasoned basis. As proposed, third-party audits would apply to facilities (1) reporting two or more accidental releases in the last five years, or (2) facilities with covered processes in NAICS 324 (refineries) or 325 (chemical plants) covered process reporting one accidental release in the last five years when located within one mile of another facility with NAICS 324 or 325 covered processes. These two applicability criteria for third-party audits are not justified. The RMP accident data for NAICS 324 and 325 facilities between 2016 and 2020 shows just one accident resulted in offsite property accident, the 2019 Port Neches, Texas TPC Group incident. That lone accident represents a tiny fraction of the 488 reported accidents during this time. Such an outlier incident fails to provide adequate basis for the lower threshold for NAICS 324 and 325 facilities, nor does it support the one-mile parameter.

c. The "Near Miss" Definitions Presented Are Overly Broad and Would Provide No Meaningful Safety Benefit

While EPA states it is not proposing a definition of "near miss" as part of the Proposed Rule, the Agency nonetheless requests comments on a "universal" definition of "near miss" as

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[62] *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004).
[63] *See generally* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000) (updating the 1995 Audit Policy).
[64] *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (agency's failure to follow its own guidance documents is arbitrary and capricious).

well as requests comment on alternative definitions that "would address difficulties in identifying the variety of incidents that may occur at RMP facilities that could be near misses that should be investigated."[65] EPA also solicits input on its definition in the 2017 Amendments and the New Jersey Department of Environmental Protection's ("NJDEP") proposed definition of "near miss."[66] The three near miss definitions that EPA contemplates are overly broad and would be unduly burdensome for RMP facilities to comply with, and EPA has not explained how these definitions would provide a meaningful safety benefit. EPA should not proceed with proposing any of these definitions.

For instance, consider the examples provided by NJDEP with its proposed definition. The NJDEP proposal expressly encompasses even those actions or processes that function *as designed*, because it includes the activation of a variety of protective devices as examples of near misses.[67] The proper operating of process safety equipment does not necessarily indicate a near miss. These devices are engineered and installed to ensure safe operation and to prevent releases, demonstrating forethought that a facility has exercised to prevent issues before they occur.

In the event EPA proceeds with proposing a near miss definition, EPA should avoid promulgating a broad definition that attempts to be universally applicable. Such a definition would be vague and unusable in many applications. EPA should not proceed with these provisions and instead, should consult affected industry stakeholders regarding the definition. Such consultation would allow more careful consideration of the impacts of a particular definition for the range of impacted industries, and would help to avoid the promulgation of an unclear and unusable "one size fits all" definition. Developing a tailored definition (or sets of definitions) would create more certainty among RMP facilities, which would reduce response costs of implementation and having to correspond with EPA for clarifications.

d. The Proposed Reinstatement of STAA for Certain Industries is Arbitrary and Unduly Burdensome

EPA proposes to revive a requirement from the 2017 Amendments for certain facilities to conduct Safer Technology and Alternatives Analyses ("STAA") as part of the PHA in what would be the most costly aspect of the Proposed Rule. STAA is a design tool which has no place in the PHA and exceeds EPA's authority. There is nothing in the CAA Section 112(r) provisions that confers EPA authority to use RMP to dictate facility design; had Congress intended to grant such authority, it would have expressly done so.[68]

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[65] 87 Fed. Reg. at 53,584. EPA now seeks comments on the Center for Chemical Process Safety (CCPS) definition: "an incident in which an adverse consequence could potentially have resulted if circumstances (weather conditions, process safeguard response, adherence to procedure, etc.) had been slightly different."

[66] EPA proposed in 2017 to define a near miss as an incident that "reasonably could have resulted in a catastrophic release." *Id*. EPA also seeks comments on a definition proposed by the New Jersey Department of Environmental Protection (NJDEP): "an unplanned, unforeseen, or unintended incident, situation, condition, or set of circumstances which does not directly or indirectly result in a regulated substance release." *Id*.

[67] *Id*. This includes "activation of layers of protection such as relief valves, interlocks, rupture discs, blowdown systems, halon systems, vapor release alarms, and fixed vapor spray systems …."

[68] *E.g., Bluewater Network v. E.P.A.*, 370 F.3d 1, 18 (D.C. Cir. 2004); *Consumer Fed'n of Am. v. U.S. Dep't. of Health & Human Servs*., 83 F.3d 1497, 1503 n.6 (D.C. Cir. 1996).

The Proposed Rule also lacks evidentiary support to reverse EPA's prior finding that STAA would not result in any meaningful safety benefit. EPA acknowledges that states that have imposed STAA-like requirements such as New Jersey and California, have had no reduction in incident rates.[69] While EPA claims that the STAA would prevent most of the accidents in its break-even analysis to justify the rule, there can be no benefits attributed to STAA, as EPA states that the rule would not require a facility to implement inherently safer technologies following a STAA. EPA cannot have it both ways and say that the rule does not require STAA while justifying the rule based on STAA. Nevertheless, EPA is still required to consider the full costs of the proposal, in which it underestimates the cost of STAA. EPA admits that it "has little information on the potential costs of large STAA projects."[70] Absent such information, EPA failed to meet its obligation under *Michigan v. EPA* to adequately consider costs.[71]

Further, EPA's proposed imposition of STAA on select facilities is arbitrary and sets an improper precedent for future action that the Agency failed to address. While the Agency has narrowed the scope of the requirement from the 2017 Amendments, the targeted industries and 1-mile radius perimeter selected are based on limited data in the record. The Proposed Rule suggests that EPA failed to look holistically at the RMP data and fails to demonstrate a clear nexus between facilities within a certain radius. As evidence of this failing, after excluding an outlier event from 2019, none of the incidents involving the targeted industries in the last five-year reporting period resulted in offsite property damage. In view of the above, EPA should abandon the proposed STAA provision.

4. THE PROPOSED EMPLOYEE PARTICIPATION REQUIREMENTS ARE ILLEGAL AND WOULD POSE NEW SAFETY RISKS

OSHA has exclusive authority to address worker safety issues, which EPA has acknowledged.[72] EPA's proposed employee participation requirements impinge on this area reserved solely for OSHA and thus are not lawful.

The whistleblower provisions of the CAA and the Occupational Safety and Health Act (OSH Act) already protect employees, making EPA's proposed whistleblower requirements unnecessary, redundant, and potentially confusing. EPA even acknowledges in its Proposal that OSHA enforces these whistleblower requirements under both the CAA and OSH Act.[73] Yet, EPA proposes new requirements to establish its own anonymous reporting framework for the workplace, which exceed the statutory authority provided to EPA.

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[69] 87 Fed. Reg. at 53,578.
[70] 87 Fed. Reg. at 53,580.
[71] 576 U.S. 743 (2015).
[72] 58 Fed. Reg. 54,190, 54,192 (Oct. 20, 1993) (proposed OSHA standard "is intended to protect workers," whereas "EPA's mandate under section 112(r) of the CAA is to protect public health and the environment"; accordingly, "for some elements of the two programs, OSHA's focus is on workplace impacts while EPA's focus is on offsite consequences, reflecting the different statutory mandates of the two programs"); 61 Fed. Reg. 31,668, 31,672 (Jun. 20, 1996) (noting changes designed to ensure that "OSHA retains its oversight of actions designed to protect workers while EPA retains its oversight of actions to protect public health and the environment"); *id.* at 31,687 ("OSHA's responsibility is to protect workers").
[73] 87 Fed. Reg. at 53,593 ("OSHA enforces whistleblower protections provided under the CAA, the Occupational Safety and Health Act, and other Federal laws.")

For the same reasons, EPA has no authority to investigate and prosecute workplace disciplinary disputes between an employee and employer. OSHA already administers a complaint resolution process under its statutory authorities. Also, disciplinary disputes often implicate collective bargaining, which is governed by the National Labor Relations Act (NLRA). EPA has no experience with these types of disputes, and with good reason, as such disputes fall outside its statutory authority.

Regarding the proposed stop work authority, existing authority allows employees to stop a job or task they believe is unsafe.[74] Many businesses have strongly established procedures (and mutually reinforcing workplace cultural norms) requiring employees not to begin work unless conditions are safe, which EPA acknowledges in the Proposal."[75] EPA nonetheless departs from this reality by proposing an unjustifiably broad, overarching stop work authority that would not add any safety benefit.

EPA's proposed "Recommendation Decisions" for employees and their representatives exceed EPA's authority and are unjustified.[76] These Recommended Decisions for PHAs, compliance audits, and incident investigations risk handing over decision making authority to employees and their representatives on matters of health and safety, flipping the employee and management roles in a manner that could create additional risks. EPA relies on a single example that it believes shows that management may be impeded from receiving process safety feedback.[77] EPA acknowledges in describing the example that the *existing process* operated as intended, allowing the facility to oversee and promote process safety. Regardless, this alleged singular failure by management does not justify EPA's current proposed approach of making individual employees into the managers of others' health and safety. Further, burdening an employee with this type of decision-making authority presents additional legal issues in terms of employee responsibility and accountability, such as in the event an incident occurs, is investigated, and results in disciplinary action or legal liability.

The proposed requirements conflict with collective bargaining requirements under the NLRA.[78] Granting a management function to non-management employees and their representatives can be accomplished only through collective bargaining under the NLRA—not via an EPA rulemaking under the CAA. The requirements also violate the balance of collective bargaining under the NLRA because they would grant non-management employees, by law, management functions that can only be bargained away.[79] In particular, "safety on the job" is a condition of employment and "is a mandatory subject of collective bargaining."[80]

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[74] *See* 87 Fed. Reg. 53590, and citations therein (discussing industry comments on employees' authority to stop work and the inherent role of this authority in the oil and gas industry).
[75] 87 Fed. Reg. 53591 ("many facilities with RMP processes already have the appropriate measures to identify, reduce, and mitigate the threat of an accidental release before it happens").
[76] Proposed 40 C.F.R. § 68.83(c).
[77] Proposed Rule, 87 Fed. Reg. at 53,589.
[78] 29 U.S.C. § 158(d).
[79] *See* 29 U.S.C. §§ 152(3), (11) & 158(d) (providing duty to bargain in good faith related to terms and conditions of employment, and excluding supervisors from definition of "employee").
[80] *Pierce v. Commonwealth Edison Co.*, 112 F.3d 893, 896 (7th Cir. 1997).

5. CERTAIN PROPOSED EMERGENCY RESPONSE REQUIREMENTS LACK JUSTIFICATION

EPA includes several proposed requirements that all share a common element, making facilities responsible for community notification systems.[81] Each of these provisions lacks justification, because it is inappropriate for EPA to impose a responsibility on RMP facilities regarding notification systems owned and operated by third parties. In addition, the requirement to seek federal and state approval regarding the frequency of local drill activities is further unjustified and misguided.

a. The Proposed Emergency Notification System Requirements are Inappropriate

Current regulations set requirements for emergency response coordination with local emergency planning and response organizations.[82] EPA is proposing to set a requirement that makes RMP facilities responsible for the systems that these organizations use to notify the public. This is inappropriate, as RMP facilities have no ownership or operational control over those systems.

The Proposal contains multiple references to how facilities are expected to "ensure" aspects of third-party systems, such as that a facility must ensure that a community system is "in place" or "available."[83] EPA states that it "can expect facilities to ensure that a community notification system is available" based on the existence of the Federal Emergency Management Agency ("FEMA") Integrated Public Alert & Warning System ("IPAWS"), which may be used to make notifications.[84]

Notwithstanding that this system may be generally available, however, EPA never explains—much less, justifies—how it expects an RMP facility to ensure, legally or in practice, that a community's notification system is available. The example cited by EPA to justify the proposed requirements, the example of Apache Nitrogen Products, does nothing more than to describe an incident where the facility *did not employ* the required notification measures.[85] RMP facilities should not be responsible for how community emergency response notification systems function. It is inappropriate for EPA to require facilities to ensure the functioning of notification

[81] These revisions include the following requirements for non-responding facilities: ensuring a community notification system is in place (40 C.F.R. §68.90(b)), ensuring an emergency response program is in place (§68.95(A)(1)(i)); ensuring a prompt notification is provided to the public (§68.90(b)(3) and 68.95(c)); and ensuring required content is included in community response plans ((§68.90(b)(1)).
[82] *See* 40 C.F.R. §68.90.
[83] 87 Fed. Reg. 53595.
[84] *Id.* at 53596–53597.
[85] *Id.* at 53595.

systems when the facilities are not the owners or operators of the systems, especially given that EPA fails to provide any method for accomplishing the requirement.[86]

b. The Proposed Provisions Regarding Community Emergency Response Programs Lack Sufficient Explanation

EPA also proposes to make facilities responsible for certain components of community emergency response programs related to the response plans implemented under those programs.[87] Current regulations require that both responding and non-responding facilities coordinate with local authorities in relation to community emergency response plans, which by law must include several components.[88] EPA's proposed changes to these requirements are inappropriate.

In the Proposal, EPA seeks to include the emergency response plan components expressly within the text of the regulations, but EPA does not cite any authority for making RMP facilities responsible for the content of community response plans. For example, under 42 U.S.C. §11003, which EPA cites, local authorities are responsible to develop community response plans, and RMP facilities will provide information to inform those plans. This framework is already captured in the existing requirements. Once again, EPA does not explain how a facility could possibly *ensure* the contents of a response program that the facility does not have the authority to develop. It is inappropriate for EPA to attempt to place responsibility for the community plan or its contents on the RMP facility.

c. There is No Basis for Requiring Federal and State Approval of Field Exercise Deviations

EPA proposes to require state and federal approval to deviate from the proposed 10-year requirement for emergency response exercises.[89] This provision would significantly change the current RMP regulations that require facilities to coordinate emergency response field and tabletop exercises with local emergency planning committees ("LEPCs") on a mutually agreeable frequency. The Proposed Rule imposes a 10-year minimum frequency for emergency field exercises.[90] Under this proposed provision, facilities may deviate from this frequency only if LEPCs indicate that it is unreasonable and if federal and state officials approve of such deviation.[91] Throughout the preamble, this requirement for federal and state approval remains unexplained. It is reasonable for LEPCs to make determinations regarding the frequency of the exercises that, by regulation, they are involved in. Federal and state officials are not involved in these exercises; and EPA does not explain why it would be reasonable for them to possess a veto power over the decisions made by local officials. EPA should make clear that federal and state approvals are not needed in addition to the determinations by local officials.

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[86] EPA's discussion of the proposed requirement also fails to analyze how the purported benefits of this proposal weigh alongside the anticipated costs. *See* 87 Fed. Reg 53561 (providing a total cost estimate of $38 million (undiscounted)).
[87] *See* 87 Fed. Reg. 53597-53598.
[88] 40 C.F.R. §68.90(b)(1), §68.95(c).
[89] 87 Fed. at 53,598-99.
[90] 87 Fed. Reg. at 53,598.
[91] 40 C.F.R. §68.96 (b) ("When planning emergency response field and tabletop exercises, the owner or operator shall coordinate with local public emergency response officials and invite them to participate in the exercise.").

6. THE PROPOSED INFORMATION DISCLOSURE PROVISIONS RAISE SIGNIFICANT SECURITY RISKS AND IMPOSE SIGNIFICANT BURDENS WITH NO ADDED BENEFIT

The proposed information disclosure provisions require disclosure of a host of information, including sensitive design documents such as STAA, third-party audit findings, and drill exercise reports. All of this information raises substantial national security concerns, particularly when the Proposal covers several segments of the energy sector that provide critical infrastructure to society.

The record does not show that EPA meaningfully consulted with the U.S. Department of Homeland Security ("DHS") and other federal and state law enforcement agencies concerning these proposed provisions. As an example, DHS raised security concerns with the proposed information disclosure provisions that appear to be unaddressed, as noted in the interagency redline of the draft Proposal. Similarly, in the 2016 rulemaking, these federal and state law enforcement agencies were in some instances relegated to filing public comments. It is inappropriate to impose such disclosure requirements unless (1) EPA considers a robust analysis of potential security risks by DHS and other relevant federal and state agencies and (2) more generally, EPA appropriately coordinates with these agencies and receives and considers their input as part of the rule development process.

EPA provides no justification for departing from the 2019 Rule's reasoned conclusion that heightened RMP disclosures pose security risks. EPA similarly fails to address the security risks raised by other federal agencies, including agencies in the intelligence community, during the prior rulemaking and during the interagency review of the Proposed Rule.[92] The agency should clarify, for example, that Post Office Box addresses near RMP facilities are not required to be notified with site hazard information, as an entity or persons, with criminal intent, could gain access to that information by simply opening a Post Office Box.

More broadly, EPA should respect the authority and expertise of federal agencies in the intelligence community that have raised security concerns with the Proposed Rule and similar disclosure requirements under the 2017 Amendments. Security risks are an increased hazard under the Proposed Rule and should be seriously considered given recent cybersecurity attacks on industrial facilities and current national security threats.

Weighed against the potential risks, the benefits of the proposed disclosure requirements appear to be outweighed by the potential national security risks. Facilities already provide publicly available information on chemicals manufactured and stored onsite under the Emergency Planning and Community-Right-to-Know Act ("EPCRA") and RMP-related information through EPA. Yet, EPA proposes to layer an additional, overly burdensome requirement for facilities to individually respond to requests for information from a resident within 6 miles of the facility, with no demonstrated safety benefit.

[92] Docket #EPA-HQ-OLEM-2022-0174-0094 at 1, 176, 179.

EPA's authority to require facilities to disclose such information to the public is limited, which the Proposal fails to adequately address.[93] The proposal also lacks a reasoned basis for changing the existing reporting requirements and for imposing an arbitrary 6-mile radius for requesters. Before EPA proceeds, the Agency must reconcile its proposal with its limited authority and provide a reasoned basis for the change, subject to public comment. Clarification is also required for validating a requester's residence.

The proposed translation requirements go beyond EPA authority and would arbitrarily subject facilities to a standard that no other EPA regulation requires. E.O. 13166 requires agencies to provide meaningful access to Limited English Proficiency individuals, but no laws or regulations mandate EPA translation. Indeed, the proposed requirements would subject RMP facilities to a higher standard than EPA's own guidance requires of the Agency itself.[94] Lastly, EPA failed to assess the costs of the proposed translation provision as required under *Michigan*. EPA offered no explanation for excluding this requirement from the RIA even though costs of such a requirement are feasible to estimate.[95] This requirement would certainly impose costs, and the number of languages and requests received could be very large due to the diverse nature of the nation's communities and number of spoken languages. It would also have the potential to divert time and limited resources away from critical management and execution of the current RMP program. EPA did not properly consider such impacts against the practical utility of the information as required under the Paperwork Reduction Act.[96]

7. THE PROPOSED REVISIONS TO KEY DEFINITIONS WOULD MAKE CHANGES TO LONGSTANDING IMPLEMENTATION PRACTICES WITHOUT AN ADEQUATE JUSTIFICATION

The Proposed Rule would revise key definitions in the RMP regulations. These proposed revisions are unnecessary and unhelpful. They would result in burdensome changes to longstanding EPA and industry practice regarding successful implementation of RMP. EPA has not provided any persuasive justification for doing so.

We support the current "retail facility" exclusion and note that the Proposed Rule's revision to the retail facility exclusion lacks sufficient justification. EPA proposes to amend the current definition of "retail facility" and add the requirement that "more than one-half of the *annual* income *(in the previous calendar year)* is obtained from direct sales."[97] According to EPA, the definition of retail facility currently lacks a definite time frame in which to calculate the percentage of sales, creating uncertainty of whether a facility qualifies as a "retail facility." However, EPA

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[93] *See, e.g.*, the Critical Infrastructure Information Act, Chemical Facilities Anti-Terrorism Standards Act of 2007, and Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014.

[94] *See* EPA, Limited English Proficiency Order (2017), https://www.epa.gov/sites/default/files/2017-03/documents/epa_order_1000.32_compliance_with_executive_order_13166_02.10.2017.pdf; *see also* Executive Order 13166, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/eolep.pdf.

[95] Compare with the Department of Health and Human Services' cost estimates for language assistance service and related items, including the discussion of Paperwork Reduction Act requirements. 87 Fed. Reg. 47,824, 47,900-09 (Oct. 3, 2022). We take no position in these comments on whether the HHS estimates are adequate, but we cite them here merely to illustrate that such estimates are doable and should be performed here.

[96] 5 C.F.R. § 1320.5(d)(1)(i-iii) requires an agency take "every reasonable step" to ensure the collection "is the least burdensome necessary," "is not duplicative," and "has practical utility."

[97] 87 Fed. at 53,605.

offers no supporting information for broad claims of "uncertainty" that warrant a change. EPA also states that the one year of sales activity "captures the seasonality of propane sales at propane distribution facilities."[98] Yet EPA does not expand upon the justification, nor does the Agency discuss the seasonality of propane sales elsewhere in the Proposed Rule. This generalized statement regarding propane sales is an insufficient basis for the change, considering that the retail facility definition applies to more than just propane distribution facilities.

Furthermore, EPA's current definition of "retail facility" excludes from RMP the flammable substances listed in the tables to 40 C.F.R. § 68.130 when they are used as a fuel or held for sale as a fuel at a retail facility.[99] A retail facility is defined as a stationary source at which more than one-half of the income is obtained from direct sales to end users or at which more than one-half of the fuel sold, by volume, is sold through a cylinder exchange program.[100] The PSM "retail facility" definition, which has been in place since 1992, provides that "an employer is a retail facility if more than fifty (50) percent of its income is derived from the direct sale of the covered process to end users." The "retail facility" definition for RMP and PSM have been in place for many years and are well understood by the industry. The meaning and understanding of calculating annual business revenue usually is the money it receives during the course of a year. This could mean a fiscal year (e.g. October 1-September 30) or the calendar year (i.e. January 1-December 31). For the reasons stated above, we recommend that EPA maintain the current definition. However, if EPA moves forward to adjust the time frame component of the retail facility definition, then we recommend providing facilities the option of selecting either fiscal year or calendar year when determining annual income from direct sales to end users.

The proposed revisions to the longstanding stationary source definition expands the scope of covered facilities without a justifiable safety improvement or sufficient explanation. Specifically, EPA would add transportation containers stored for 48 hours or more to the threshold determination for stationary sources.[101] This revision would largely affect railyards and other transportation facilities that have long been exempted from the threshold stationary source determination. EPA provides no meaningful explanation for the change except that the Agency viewed the change as providing "clarity" concerning which containers used for onsite storage must be incorporated into the facility RMP. The U.S. Department of Transportation ("DOT") already has requirements for forwarding RMP listed materials shipped by rail and regulates the safe transportation of railcars. The 48-hour rule proposed by EPA ignores these specific DOT requirements and creates confusion for transporters. EPA should coordinate with DOT and note that transportation containers covered under active shipping papers are not subject to EPA regulation until the container is delivered to the final consignee.[102] Additionally, the DOT rule

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[98] *Id.*
[99] 40 C.F.R. § 68.126.
[100] 40 C.F.R. § 68.3; see also https://www.epa.gov/rmp/what-definition-retail-facility.
[101] 87 Fed. Reg. 53,604-53,605; *see* 40 C.F.R. §68.3 (definition of "stationary source").
[102] 49 C.F.R. § 171.1 states that requirements in the hazardous materials regulations apply to the transportation of a hazardous material in commerce and to each person who transports a hazardous material in commerce. Transportation begins when a carrier takes physical possession of the hazardous material for the purpose of transporting it and continues until the hazardous material is delivered to the destination indicated on a shipping document, package marking, or other medium, or in the case of a railcar, until the car is delivered to a private track or siding. This would also be consistent with the proper scope of EPCRA, as documented in Section 327 of the 99th Congress 2nd Session Report 99-962, which states that transportation containers covered under active shipping papers are not subject to regulation under that statute until the container is delivered to the final consignee.

cited as the basis for the 48-hour timeframe does not apply to railcars once they are on private tracks and also includes exclusions (e.g., for weekends and holidays), which EPA fails to consider.[103] The Proposed Rule also creates ambiguity between the regulatory text and the preamble, which requires clarification and an opportunity for additional public input before EPA could finalize the change.

CONCLUSION

We appreciate the opportunity to comment on the Proposed Rule. Given the shortcomings raised in these comments, we strongly encourage EPA to halt this rulemaking process to allow OSHA's review of the PSM standard to advance ahead of any major revisions to the RMP. This approach would align with the RMP/PSM statutory authorities, preserve the performance-based framework for RMP/PSM, and encourage the continuous improvement by RMP facilities. In the meantime, EPA should provide compliance assistance under its current regulations and should consider enforcement measures to address the very rare instances of RMP accidents. Such an approach would best prevent and mitigate the impacts of accidental releases on human health and the environment.

Sincerely,

Agricultural Retailers Association
American Chemistry Council
American Coatings Association
American Coke and Coal Chemicals Institute
American Forest and Paper Association
American Iron and Steel Institute
American Short Line and Regional Railroad Association
Corn Refiners Association
Council of Industrial Boiler Owners
The Fertilizer Institute
International Liquid Terminals Association
National Association of Chemical Distributors
National Association of Manufacturers
National Lime Association
National Mining Association
National Oilseed Processors Association
Plastics Industry Association
Portland Cement Association
Society of Chemical Manufacturers and Affiliates
U.S. Chamber of Commerce

[103] 87 Fed. Reg. 53,606.