August 23, 2018

VIA ELECTRONIC FILING

Mr. James Belke and Ms. Kathy Franklin
U.S. Environmental Protection Agency
Office of Land and Emergency Management (5104A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 83 Fed. Reg. 24,850 (May 30, 2018); Docket No. EPA-HQ-OEM-2015-0725; FRL-9975-20-OLEM

Dear Mr. Belke and Ms. Franklin:

The U.S. Chamber of Commerce, American Forest & Paper Association, American Iron and Steel Institute, and National Association of Manufacturers ("the Associations") offer these comments in support of the U.S. Environmental Protection Agency's ("EPA" or "Agency") proposal to reconsider certain provisions of the Risk Management Program Amendments rule ("RMP Amendments Rule") under the Clean Air Act ("RMP Reconsideration Rule").[1]

Each of the Associations has many members with operations subject to the Clean Air Act ("CAA") and the Risk Management Program.[2] As such, the Associations have a strong interest in EPA's proposal to rescind or modify certain provisions of the RMP Amendments Rule.[3] The safety and security of facilities, employees, and communities are paramount to the Associations and their members. The Associations' members engage in risk management planning, invest in security, and work to foster a continued partnership with federal, state, and local officials, which is fundamental to ensuring facility safety now and in the future.

Certain aspects of the original RMP program align with industry efforts to achieve these goals. However, certain requirements in the RMP Amendments Rule undermine safety, create significant security risks, and do nothing to further prevent criminal acts that threaten facilities.

The RMP Amendments Rule includes provisions that are unnecessary and fail to properly improve the RMP program, including those related to incident investigation, third-party audits, safer technology and alternatives analysis ("STAA"), root cause analysis, and local coordination and exercise. The proposed RMP Reconsideration Rule is a sensible course of action given the number of deficiencies.

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[1] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 83 Fed. Reg. 24,850 (May 30, 2018).

[2] 42 U.S.C. § 7401, *et seq.*

[3] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4,594 (Jan. 13, 2017).

I. Background

The CAA directs EPA to develop reasonable regulations and applicable guidance to help prevent and detect accidental releases of regulated substances, and for the response by the owners and operators of the sources of releases.[4] Congress also directed EPA to consult with the Secretaries of Transportation and Labor when developing those regulations to account for the "differences in size, operations, processes, class and categories of sources and the voluntary actions of such sources to prevent such releases and respond to such releases." Additionally, Congress instructed EPA to coordinate any comparable requirements with the Occupational Safety and Health Administration ("OSHA"), which developed its own set of Process Safety Management ("PSM") regulations.[5]

EPA initially established the RMP regulations in 1996.[6] Over the course of the next two decades, EPA issued a number of rules that successfully improved the program.[7] However, on August 1, 2013, President Obama issued Executive Order 13650, "Improving Chemical Facility Safety and Security," in response to chemical facility incidents, most notably one the West, Texas explosion.[8] EO 13650 directed EPA, OSHA, and the Department of Homeland Security ("DHS") to establish the "Chemical Facility Safety and Security Working Group" ("Working Group") to consider changes that could prevent future chemical facility incidents.[9]

EO 13650 instructed the Working Group to identify "improvements to existing risk management practices through agency programs, private sector initiatives, government guidance, outreach, standards, and regulations."[10] It also instructed EPA to "review the chemical hazards covered by the RMP…and determine if the RMP…can and should be expanded to address additional regulated substances and types of hazards" and then "develop a plan, including a timeline and resource requirements, to expand, implement and enforce the RMP…in a manner that addresses the additional regulated substances and types of hazards."[11]

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[4] 42 U.S.C. § 7412(r)(7)(B).

[5] *Id.* at § 7412(r)(7)(D).

[6] Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section 112(r)(7), 61 Fed. Reg. 31,668 (June 20, 1996).

[7] *See supra* note 3.

[8] Exec. Order No. 13,650, Improving Chemical Facility Safety and Security, 78 Fed. Reg. 48,029 (Aug. 7, 2013).

[9] *Id.*

[10] *Id.* at 48,031.

[11] *Id.*

This directive led to a series of regulatory actions. On July 31, 2014, EPA published a "Request for Information" in the *Federal Register*.[12] EPA then published a "Notice of Proposed Rulemaking" ("NPRM") on March 14, 2016, and convened a Small Business Advocacy Review ("SBAR") panel and held a public hearing to provide stakeholders with the opportunity to present data, views, or arguments regarding the NPRM.[13] The Associations joined a number of other organizations in submitting comments to EPA regarding the NPRM.[14] The comments noted that the proposed RMP Amendments Rule:

1. Overlaps and is inconsistent with other Federal regulatory programs;
2. Should not include the proposed alternatives analysis requirements;
3. Includes public disclosure requirements that may create security risks;
4. Should not require third-party auditing or the submittal of draft reports that add cost without benefit;
5. Includes an inappropriate cost-benefit analysis; and
6. Fails to comply with the Small Business Regulatory Enforcement Fairness Act (SBREFA).

EPA then finalized the RMP Amendments Rule, which includes a number of unnecessary or unwarranted provisions. The Associations again joined a number of other industry associations ("RMP Coalition") in petitioning EPA to reconsider the RMP Amendments Rule.[15] EPA received two other similar petitions.

The RMP Coalition's petition expanded upon a number of deficiencies detailed in the May 2016 multi-association comments on the NPRM, as well as issues relating to the West, Texas incident. The petition noted that EPA:

1. Included new local emergency planning committee ("LEPC") requirements that pose significant security risks;
2. Introduced a new third-party audit trigger;
3. Omitted information on its cost-benefit findings in violation of the CAA and *Michigan v. EPA*;
4. Made a stealth change to the scope of compliance audits;
5. Included new legal rationales for third-party audits and STAA;

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[12] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7), 79 Fed. Reg. 44,603 (July 31, 2014).

[13] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 81 Fed. Reg. 13,637 (Mar. 14, 2016).

[14] *See* U.S. Chamber of Commerce, *et al.*, Comments on Proposed Rule: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act (May 13, 2016), *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0827.

[15] *See* RMP Coalition, Pet. for Recon. and Req. for Agency Stay Pending Recon. and Jud. Rev. of Final Rule entitled *Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act* (Feb. 28, 2017).

6. Added numerous supporting documents after the close of the comment period and still failed to support its position on core issues; and
7. Failed to address changed circumstances regarding the West, Texas incident.

EPA proceeded to reconsider the RMP Amendments Rule on March 16, 2017, and stayed its effective date until June 19, 2017.[16] On April 3, 2017, EPA again proposed to delay the effective date of the rule until February 19, 2019, in order to give the Agency the opportunity for reconsideration of the rule.[17] EPA finalized the delay proposal on June 9, 2017.[18]

Unfortunately, on August 17, 2018, the U.S. Court of Appeals for the D.C. Circuit overturned EPA's decision to delay the effective date until 2019.[19] In its opinion, the Court stated that EPA's actions were "arbitrary and capricious," claiming that EPA lacked reasoning for the delay.[20] The Court also stated that the delay violated a Clean Air Act limit on delays of rules for reconsideration to three months, and that EPA's actions would enable noncompliance.[21]

The Associations supported EPA's delay of the RMP Amendments Rule as it reconsiders certain provisions and supports EPA's proposed RMP Reconsideration Rule. EPA and OSHA designed performance-based respective regulations, and the proposed RMP Reconsideration Rule allows the RMP program to revert to a process that was largely successful. EPA estimates that over the past 10 years, incidents under the original RMP and PSM performance-based regulations have decreased over 50 percent.[22]

The Associations support EPA's decision to rescind provisions related to STAA as part of the Process Hazard Analysis ("PHA"), the RMP auditing process, and prescriptive definitions and methodologies for incident investigations. The proposal also provides for appropriate solutions related to emergency response, information disclosure, and public community engagement, among

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[16] Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 13,968 (Mar. 16, 2017) (Further delaying the effective date until June 19, 2017).

[17] Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 16,146 (Apr. 3, 2017) (Proposing to further delay the effective date until February 19, 2019).

[18] Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 27,133 (June 14, 2017).

[19] *Air Alliance Houston, et al., v. EPA and Andrew Wheeler*, No. 17-1155 (D.C. Cir. Aug. 17, 2018).

[20] *Id.* at 5.

[21] *Id.* at 28 ("The Delay Rule does not have the purpose or effect of 'assur[ing] compliance' with Section 7412(r)(7); it is calculated to enable noncompliance.").

[22] U.S. Environmental Protection Agency, Regulatory Impact Analysis: Reconsideration of the 2017 Amendments to the Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7), at 35 (April 27, 2019) (Proposal RIA).

other related issues. The proposed RMP Reconsideration Rule would also allow EPA to address appropriately small business concerns. Moreover, in light of the U.S. Court of Appeals for the D.C. Circuit's ruling, the Associations encourage EPA to act on these recommendations expeditiously and thoroughly.

II. EPA Has the Authority to Reconsider Provisions of the RMP Amendments Rule

EPA has the authority to repeal or modify past decisions.[23] To do so, EPA must show that there are good reasons for a new policy and that it believes the new policy would be better than the old one.[24] A change in Administration is adequate for EPA to reexamine its RMP regulations.[25] EPA may reconsider the RMP Amendments Rule based upon the existing rulemaking record, so long as there is sufficient material to support its decision.[26]

III. The Proposed RMP Reconsideration Rule

The Associations support the overarching goals of the RMP and believe that the proposed RMP Reconsideration Rule appropriately addresses our concerns and removes unnecessary, overlapping, and overly burdensome requirements without jeopardizing safety or security.

The Associations support EPA's actions related to STAA, third-party and compliance audits, incident investigations, emergency response coordination, public engagement, and training. EPA makes much-needed adjustments related to: the cost-benefit analysis for the RMP Amendments Rule, compliance dates, general terminology, and conflicts between the RMP and PSM frameworks.

These actions will provide further clarity and certainty for both regulators and the regulated community, and allow EPA to revert to a RMP process that showed tremendous promise in the years leading up to the RMP Amendments Rule.

a. PHA and STAA Requirements

The Associations support EPA's decision to repeal requirements related to STAA. The RMP Amendment Rule amended 40 C.F.R. section 68.67(c)(8) to require that manufacturers of paper, petroleum and coal products, and chemicals conduct a STAA as part of their respective PHA.[27] That decision was deeply flawed and unnecessary decision.

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[23] *See Ctr. for Sci. in the Pub. Interest v. Dep't of Treasury*, 797 F.2d 995, 998-99 (D.C. Cir. 1986).

[24] *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1811 (2009).

[25] *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012).

[26] *Ctr. for Sci. in the Pub. Interest*, 797 F.2d at 1000.

[27] 82 Fed. Reg. at 4,629.

When EPA first issued the RMP Rule in 1996, it recognized that a STAA requirement would not improve process safety or materially reduce accidents and their consequences, noting that industry typically recognizes the benefits of inherently safer technologies ("IST") and inherently safer designs ("ISD") and implements them without regulation.[28] Processes already exist under the CAA to reduce the risk of releases of listed substances into the ambient air: regulated businesses conduct a PHA every five years, and Management of Change ("MOC") is a continuous mitigation effort. It is already typical practice for PHA teams to suggest viable alternatives to reduce the risk of releases of listed substances into the ambient air.

EPA failed to justify the inclusion of the open-ended STAA requirement in the RMP Amendments Rule, and the requirement placed a large burden on the regulated community. For example, re-examining the design and operation of all covered processes would require regulated entities to dedicate resources that they may not have or may need to apply elsewhere. Additionally, regulated entities typically conduct STAA during the design phase of a new process, not for an existing process.

Given the open-ended nature of the requirement, STAA may also vary considerably across industries, and those analyses are quite costly. EPA estimates direct costs of about $70 million annually, and notes that indirect costs would increase that number significantly if facilities act on the results of their STAA.[29] Given EPA's misleading cost-benefit analysis, those costs are likely understated, considering the additional costs (such as the hiring of additional personnel) that regulated entities may incur if STAA is required.

The RMP Amendments Rule also required that a PHA address the findings from all incident investigations required under 40 C.F.R. section 68.87, as well as any other potential future scenarios.[30] The Associations support EPA's decision to rescind that addition, as detailed in the RMP Reconsideration Rule. The PHA mandate would be inconsistent with specific paperwork requirements provided for in OSHA's PSM regulations. It would also be duplicative and burdensome because incident investigations already require a significant amount of paperwork.

As such, it is proper that EPA remove those STAA provisions, and the regulations should reflect the practice prior to the RMP Amendments Rule.

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[28] 61 Fed. Reg. at 31,674.

[29] U.S. Environmental Protection Agency, *Regulatory Impact Analysis – Reconsideration of the 2017 Amendments to the Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7)* 55-56 (Apr. 27, 2018), *available at* https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OEM-2015-0725-0907&contentType=pdf ("Proposed RIA").

[30] 82 Fed. Reg. at 4,602.

b. Auditing Process

It is prudent for EPA to revise added provisions related to compliance and third-party audits. EPA required compliance audits at "each covered process unit" as well as third-party audits after every reportable incident at certain covered facilities *and* where an agency may decide that conditions *could* lead to a potential accidental release.[31] Those additional requirements conflict with longstanding agency practice, and provide no additional benefits to process safety management.

i. Compliance Audits

EPA should remove certain compliance audit provisions. The RMP Amendments Rule adjusted the RMP Program regulations to require that EPA audit "each covered process unit." This change in requirement is arbitrary and capricious and conflicts with longstanding EPA practice.

When the RMP Amendments Rule was first proposed, it failed to notify stakeholders of such a change, so commenters could not sufficiently weigh in on the matter. EPA's decision to include that change in the final rule proves that it is not a logical outgrowth of the proposal. EPA provided that the change was a clarification of existing practice as the only supporting information.[32]

Existing practice, however, demonstrates otherwise. EPA and OSHA have long conducted compliance audits relying on a representative sample of covered process units. This practice comports with Center for Chemical Process Safety ("CCPS") guidelines that recommend such an approach via two separate methodologies for selecting sample units.[33]

Using a representative sample of covered process units in compliance audits is reliable, cost-effective, and produces a robust set of data. Covered process facilities do not have to search aimlessly for redundant results and strain resources when shutting down an unnecessary number of facilities for auditing purposes. The previous compliance audit process is more than sufficient to address process safety management, so the Associations welcome the removal of "each covered process unit" from the regulations. The Associations recommend codifying the representative sampling approach to ensure further regulatory certainty for the regulated community.

ii. Third-Party Audits

EPA should also remove certain provisions related to third-party audits. The RMP Amendments Rule added a requirement for third-party audits after *every* reportable incident at a

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[31] *Id.* at 4,609, 4,614.

[32] *Id.* at 4,611.

[33] EPA, General Guidance on Risk Management Programs for Chemical Accident Prevention, § 7.9, at 7-13, *available at* https://www.epa.gov/sites/production/files/2013-11/documents/chap07-final.pdf; OSHA, Process Safety Management Guidelines for Compliance: OSHA 3133, at 27 (1994), *available at* https://www.osha.gov/Publications/osha3133.pdf.

Program 2 or Program 3 facility *and* where an agency may decide that certain conditions *could* lead to an accidental release. The Associations addressed the third-party audit requirements previously and note that the CAA fails to grant EPA the authority to impose such requirements. Those mandates are also an unwarranted departure from past practice.

A future proposal to mandate third-party audits based on separate regulatory criteria is unnecessary. The existing performance-based RMP Program has resulted in a substantial decrease in accidents while at the same time improving safety at covered process facilities. The addition of a blanket requirement for third-party audits would not reflect the fact that circumstances surrounding accidents are case-specific.

Third-party auditors likely lack the experience necessary to audit sufficiently a covered process facility. In-house auditors with "on the ground" experience provide covered process facilities with the experience necessary to accurately address site-specific issues and determine a path forward.

EPA fails to rationalize appropriately the need for expensive third-party audits under the existing RMP program. It does not make sense to conduct audits prior to the completion of incident investigation action items. The Associations support EPA's decision to remove the third-party audit requirements, considering that such requirements would provide no additional benefits to the risk management process.

c. Incident Investigation

The Associations support EPA's decision to remove provisions related to incident investigations. The RMP Amendments Rule added the following provisions to the existing RMP program: requiring that Program 2 and 3 facilities include "near misses" as a trigger for incident investigations; defining "root cause" and requiring a "root cause" methodology to be carried out during an incident investigation; and relating to what information should be included in such an investigation. Those additions are vague, duplicative, and unnecessary, and conflict with requirements in OSHA's PSM regulations.

EPA's proposal to remove the inclusion of "near misses" as a trigger for incident investigations is warranted.[34] Under the original RMP Program, incident investigations were required for "catastrophic releases" and incidents that "could have reasonably resulted in a catastrophic release." The addition of "near misses" is vague, as it went undefined and fails to provide stakeholders with clarity as to what actually constitutes a "near miss." That addition could potentially provide EPA an unnecessary extension of jurisdiction and conflict with OSHA's PSM regulations, as Congress only intended that EPA regulate accidents pertaining to releases into the ambient air, while giving OSHA the authority to regulate accidents pertaining to on-site accidents.

EPA also proposes removing the definition of "root cause" from the RMP regulations as well as the prescriptive requirement that covered facilities use "root cause" methodology when

[34] 83 Fed. Reg. at 24,852.

conducting incident investigations.[35] This, too, is warranted. In the RMP Amendments Rule, EPA defined "root cause" to mean "a fundamental, underlying, system-related reason why an incident occurred."[36] This definition makes the presumption that *every* incident has an underlying system-related cause, which may, in fact, not exist. It would be an unnecessary use of facility resources to search for information that may not be there, while ignoring information that may relate to the prevention of future accidents. Rather, as in past practice, facilities should use whatever methodology they deem appropriate and effective, as the preexisting RMP regime clearly proved effective and showed a decline in incidents at covered process facilities.

Lastly, the Associations support EPA's proposal to remove requirements pertaining to the inclusion of certain information in incident investigations. The RMP Amendments Rule added such requirements for Program 2 and Program 3 facilities. It required Program 2 facilities to include the time and location of an incident, a chronology of all relevant facts, consequences, emergency actions taken, and incident investigation recommendations. Program 3 facilities also had to include a schedule for addressing recommendations from incident investigations. Covered Program 2 process facilities tended to include such information under the preexisting RMP program. Such a prescriptive measure would be unnecessary.

Incident investigations are already effective for identifying factors that contribute to an accident and for implementing any increased safety measures. The PSM requirements also contain no such a requirement, so it is appropriate to remove them from the RMP program to mirror those regulations.

EPA's proposed actions regarding "near misses," "root cause" methodology, and information inclusion are the best course of action to ensure regulatory certainty and transparency for covered process facilities.

d. Emergency Response Exercises

The Associations generally support EPA's actions regarding emergency response exercises, and believe the following changes would provide more regulatory certainty and transparency for all affected stakeholders.

The proposed RMP Reconsideration Rule retains certain related provisions, but also proposes requiring facilities coordinate with local officials to conduct field exercises; changes elements of those exercises from requirements to recommendations; removes the minimum frequency requirement for field exercises; and proposes to allow facility owners and operators to determine whether to include an evaluation report due 90 days after each exercise.[37]

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[35] *Id.*

[36] 82 Fed. Reg. at 4,602.

[37] 83 Fed. Reg. at 24,853.

This is a step in the right direction, but EPA could further improve emergency response exercise provisions. For example, a 90-day period for evaluation reports may not be appropriate. In many instances, exercises include certain elements that take longer than 90 days to document.

Additionally, regulated entities conduct field exercises in a variety of different fashions, and they vary from community to community. A prescriptive requirement to include certain elements may be a burden on some regulated entities that may lack the resources to include them. Removing such a requirement would provide regulated entities with additional flexibility in administering exercises.

EPA should also remove the mandate to provide data of "the names and organizations of each participant." This may be a burden to many covered process facilities, especially small businesses, as some exercises contain hundreds of participants. The inclusion of this information may raise security concerns, and no real benefit stems from noting each individual participant.

e. Information Disclosure

EPA should further clarify information availability and disclosure provisions to address potential security risks. The RMP Amendments Rule included a broad and drastic expansion of information disclosure requirements, requiring that chemical facilities disclose "any other information that local emergency planning and response organizations identify as relevant to local emergency planning" upon request by a LEPC. Stakeholders were unable to comment on this requirement when originally proposed, and the provisions in the final rule were a dynamic shift away from the proposal's list of specific materials that facilities would have to disclose to LEPCs upon request.[38]

EPA is now proposing to take a step back from those broad requirements in an effort to protect sensitive information and improve security concerns. The Associations support this effort, but encourage EPA to improve those provisions in a number of ways. For example, EPA should clarify who can receive sensitive information following an incident. The proposed RMP Reconsideration Rule fails to identify who receives such a disclosure.

LEPC members are not subject to any sort of vetting process. They, too, may pose a potential security risk. EPA should identify who at an LEPC can receive sensitive information, and could narrow the disclosure requirement in 40 C.F.R. section 68.93 to "responding organization." That is the only entity that may *need* such sensitive information and reduces the likelihood that information bad actors can access information.

EPA must further protect confidential business information ("CBI"). The RMP Reconsideration Rule, as proposed, only addresses the disclosure of CBI to EPA and fails to consider such a disclosure to non-government entities, such as LEPCs. EPA should revise its CBI and classified information disclosure provisions to more clearly articulate how covered process

[38] 82 Fed. Reg. at 4,653.

facilities may address these concerns.

f. Public Meetings

The Associations support engaging with local affected communities and providing relevant information following incidents. Regulated entities engage with local communities in several ways. Incident circumstances vary from one covered process facility to the next, and the proposed RMP Reconsideration Rule's language should reflect that.

The RMP Amendments Rule's added provisions would require covered process facilities to hold public meetings with affected communities following an incident. The proposed RMP Reconsideration Rule retains that requirement, and the Associations respectfully disagree with that decision.[39]

The original RMP Rule, published in 1996, does not address or mandate public engagement, and related provisions have changed minimally since. EPA states currently that each facility's RMP should address an "…emergency response program that spells out emergency health care, employee training measures and procedures for informing the public and response agencies (e.g. the fire department) should an accident occur."[40] EPA should retain this approach, as it provides flexibility for informing the public.

Moreover, any requirement of public meetings would encroach on the Emergency Planning and Community Right-to-Know Act ("EPCRA") process, which provides that LEPCs develop an emergency response plan, review the plan at least annually, and provide information about chemicals in the community to citizens.[41] Through this process, as well as the PSM process, facilities already make a significant amount of information available to local communities. For example, covered process facilities regularly meet with Community Advisory Panels, distribute online or print news, and use automated electronic communication, such as text messaging services.

However, the Associations would support EPA's clarification regarding the substance of public meetings, should the Agency choose to retain such a requirement. The proposed RMP Reconsideration Rule would clarify that public engagement should be limited to the information elements of five-year accident history reports in 40 C.F.R. section 68.42, regarding the incident at issue *only*.

EPA should continue operating under the *status quo*, which has been in place since 1996, rather than mandate public meetings. Local LEPCs and facilities have worked closely and productively together in the past on public engagement issues. Should the Agency choose to

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[39] 83 Fed. Reg. at 24,853.

[40] *See* U.S. Environmental Protection Agency, Risk Management Plan (RMP) Rule Overview, *available at* https://www.epa.gov/rmp/risk-management-plan-rmp-rule-overview.

[41] *See* 42 U.S.C. §§ 11001-03.

disregard our recommendation on this matter, however, the public meetings requirement should be limited to incidents that have major offsite consequences for public health and the environment, such as one that affects human health to the extent that one's injury requires days away from work. This is consistent with EPA's jurisdiction under the CAA. Public meetings in response to incidents with minor offsite consequences would generate little interest from affected communities and be an unnecessary cost to covered process facilities if they are required.

EPA must afford regulated entities the opportunity to tie the timing of a public meeting to an incident investigation, and EPA should not require regulated entities to hold such a meeting until they complete the relevant incident investigation. It is beneficial to all parties involved that available relevant information be gathered in anticipation of its disclosure to affected communities, and a 90-day window ignores the realities of a complicated process. Tying public meetings to incident investigations would provide all stakeholders with certainty and transparency without sacrificing facility resources that could otherwise be more useful elsewhere.

g. Training

Workers operating covered process facilities should receive adequate training. The proposed RMP Reconsideration Rule would remove changes made by the RMP Amendments Rule adding unnecessary training. Specifically, the RMP Amendments Rule changed training requirements under the RMP Program that apply to supervisors responsible for process operations and employees operating a process.[42]

EPA now proposes to delete those provisions under 40 C.F.R. sections 68.54 and 68.71.[43] Engineers and others who may direct operators should not be *required* to receive operation training, but rather have the option if deemed necessary. Such requirements could increase the costs of training, conflict with relevant provisions in OSHA's PSM regulations, and fail to provide any real increase to risk management processes. Only relevant operators should be subject to required operations training, and EPA should finalize those changes included in the proposal.

h. Conflicting Regulatory Framework

The proposed RMP Reconsideration Rule would provide for better coordination among federal agencies regarding the safety and security of chemical facilities. EPA is proposing to remove provisions that overlap with OSHA's jurisdiction over onsite and workplace issues and harmonize the RMP program with OSHA's PSM regulations, including, as previously noted, the requirement for compliance audits for each covered process, third-party auditing requirements, and STAA requirements.

EPA, OSHA, DHS, the Mine Safety and Health Administration ("MSHA") and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE") administer regulatory programs that

[42] 82 Fed. Reg. at 4,675.

[43] 83 Fed. Reg. at 24,852.

promote the safety and security of stationary sources: OSHA's PSM program; DHS's Chemical Facility Anti-Terrorism Standards ("CFATS") program; and related explosives storage and manufacturing regulations.

Most notably, EPA's RMP Amendments Rule undermines OSHA's PSM program. Congress created two separate programs, administered by EPA and OSHA, to address the risks of accidental releases when it amended the CAA in 1990. Congress gave EPA the authority to address accidental releases into the ambient air that could affect the environment and public health, while it gave OSHA the authority over accidental releases that pose threats to workers located on-site at the stationary source.[44]

Congress intended that EPA and OSHA coordinate the RMP and PSM programs amongst themselves in order to maximize consistency and ease implementation of regulatory requirements. After President Obama signed EO 13650 into law, both EPA and OSHA were required to engage in a rulemaking to develop further security and safety measures at chemical facilities. While EPA has taken action, OSHA has not yet completed a rulemaking. It is imperative that EPA and OSHA conduct rulemakings in a coordinated fashion.

With that said, it is important that EPA recognize the limits set forth by Congress, and the RMP Amendments Rule neglected to do so. The Associations support EPA's action and believe that the proposed RMP Reconsideration Rule provides the opportunity for EPA and OSHA to harmonize their respective authorities.

i. Cost-Benefit Analysis

The Associations generally support the repeal of provisions related to the RMP Amendments Rule that incur costs that far exceed the projected benefits. As previously discussed, EPA is proposing to rescind those amendments related to third-party audits, "root cause" analysis, and STAA. Both Congress and the Supreme Court support EPA's determination to repeal the provisions.

Section 112(r)(7) of the CAA requires EPA to consider costs when promulgating regulations under the RMP program.[45] Accordingly, these regulations must be *reasonable* and guidance must be *appropriate* in order 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."[46]

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[44] 42 U.S.C. § 7412(r)(7)(G) ("[I]n exercising any authority under this subsection, [EPA] shall not . . . be deemed to be exercising statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.").

[45] *Id.* at § 7412(r)(7)(B)(i) (emphasis added).

[46] *Id.* (emphasis added).

Similarly, in *Michigan v. EPA*, the Supreme Court held that the CAA imposes a duty on EPA to propose cost findings for public comment unless Congress expressly prohibits consideration of costs.[47] This case centers on emissions regulations under the Mercury and Air Toxics Standards ("MATS") rule, which is based on CAA language that closely mirrors the "necessary and appropriate language" that serves as part of the underlying statutory authority for the RMP program. In that instance, EPA failed to weigh "the advantages and disadvantages of" MATS to ensure that it would not "do[] significantly more harm than good" and deemed EPA's actions as arbitrary and capricious.[48] Additionally, the Court noted, "[n]o regulation is 'appropriate' if it does significantly more harm than good."[49]

The proposed RMP Reconsideration Rule appropriately addresses Congressional intent and *Michigan v. EPA*, but it understates the costs and overstates the benefits of the RMP Amendments Rule. EPA did not take into account implementation and security costs and relied on the RMP Amendments Rule's flawed benefits assessment to justify its current actions. Further explanation and clarity regarding adjusted costs and benefits are warranted.

j. Compliance Dates

EPA has appropriately extended the compliance dates for those programmatic changes included in the proposed RMP Reconsideration Rule.[50] The new compliance dates would provide regulated entities sufficient time to familiarize themselves with the new provisions. The changes also would allow regulated entities to avoid unnecessarily expending resources on provisions that may ultimately change.

Moreover, the Associations agree with EPA's proposal to retain the requirement for owners or operators to have exercise programs and schedules in place within four years of the effective date of the final rule.[51] Owners and operators should establish their exercise schedule in conjunction with local officials rather than with the EPA. This will improve response coordination and ease regulated entities into the new provisions.

k. Terminology

The Associations support EPA's decision to remove certain definitions related to the RMP program. Specifically, the proposed RMP Amendments Rule seeks to remove the definitions of "active measures," "inherently safer design or technology," "passive measures," "practicability," and

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[47] *Michigan v. EPA*, 135 S. Ct. 2699 (2015)

[48] *Id.* at 2707.

[49] *Id.*

[50] 83 Fed. Reg. at 24,861-62.

[51] *Id.* at 24,875.

"procedural measures."[52] Likewise, it would remove the definitions of "root cause" and "third-party audit," which mirrors EPA's decision to remove the STAA and third-party audit provisions.[53] The Associations also agree with EPA's decision to use "Safety Data Sheets" instead of the outdated term "Material Safety Data Sheets" in Sections 68.48 and 68.65.[54]

l. Small Business Concerns

The proposed RMP Reconsideration Rule would provide EPA with a means of properly addressing small business concerns, as the Agency did not properly consider the impact that the RMP Amendments Rule would have on small businesses when it was initially proposed. The Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Act of 1996 ("SBREFA"), requires that EPA convene an SBAR panel when a proposed action would have a significant impact on a substantial number of small businesses.[55] The purpose of this requirement is to give representatives of such small businesses an opportunity to review and comment on EPA's proposed action *before* its official publication so that EPA can make necessary changes in response to the SBAR panel's concerns.

As previously noted, EPA convened a SBAR panel on November 4, 2015, with the deadline for submitting written comments to the SBAR panel on December 9, 2015.[56] The SBAR panel generated a report on the proposed rule and submitted it to EPA on February 19, 2016.[57]

EPA, however, displayed an utter disregard for the concerns that the SBAR panel expressed in its report. For instance, EPA submitted the proposed RMP Amendments Rule to the Office of Management and Budget ("OMB") two months prior to when the SBAR panel completed its report. Additionally, EPA issued a pre-publication copy of the proposed rule on February 24, 2016, only five days after receiving the SBAR panel report.

Given the timing, it is clear that EPA disregarded the SBAR panel's attempt to inform its decision-making process. EPA's actions violated the RFA, and the proposed RMP Reconsideration Rule would provide the Agency with an opportunity to remedy its unlawful activities.

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[52] *Id.* at 24,852-53.

[53] *Id.* at 24,853.

[54] *Id.* at 24,852.

[55] Regulatory Flexibility Act of 1980, 5 U.S.C. § 609 *et seq.* (1980) (as amended by the Small Business Regulatory Enforcement Act of 1996, P.L. 104-121 (1996)).

[56] *See* U.S. Environmental Protection Agency, SBAR Panel: Modernizing the Risk Management Plan (RMP) Rule, *available at* https://www.epa.gov/reg-flex/sbar-panel-modernizing-risk-management-plan-rmp-rule.

[57] *Id.*

IV. Conclusion

The Associations appreciate EPA's consideration of these comments and urge the Agency to provide stakeholders with regulatory certainty and the proper means to truly meet the goals of the risk management program.

Sincerely,

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President & CEO
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Paul Noe
Vice President, Public Policy
American Forest & Paper Association

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Vice President, Environment
American Iron and Steel Institute

Ross Eisenberg
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National Association of Manufacturers

Appendix A

The **U.S. Chamber of Commerce** is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system.

The **American Forest & Paper Association (AF&PA)** serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - Better Practices, Better Planet 2020. The forest products industry accounts for approximately four percent of the total U.S. manufacturing GDP, manufactures about $200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 45 states.

The **American Iron and Steel Institute (AISI)** serves as the voice of the North American steel industry and represents 21 member companies, including integrated and electric furnace steelmakers, accounting for the majority of U.S. steelmaking capacity with facilities located in 41 states, Canada, and Mexico, and approximately 120 associate members who are suppliers to or customers of the steel industry.

The **National Association of Manufacturers (NAM)** is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.