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Re: Comments on EPA’s Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention (EPA–HQ–OLEM–2022–0174)

Dear Ms. Grant:

The American Fuel & Petrochemical Manufacturers (“AFPM”) respectfully submit these comments on the U.S. Environmental Protection Agency’s (“EPA” or “Agency”) proposed amendments to the Risk Management Program (“RMP”) under the Clean Air Act (the “Proposal”).¹ AFPM is a trade association whose members include more than 400 companies that encompass virtually all U.S. refining and petrochemical manufacturing capacity. AFPM has a significant interest in the Proposal because most of its members operate refineries or petrochemical plants subject to the RMP. Should you have questions or would like to discuss this matter, please contact me by phone at (202) 552-8476 or by email at lswett@afpm.org.

Sincerely,
Lara Swett

VP, Technical and Safety Programs
AFPM

¹ EPA’s Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention, 87 Fed. Reg. 53,556 (Aug. 31, 2022).

**Comments of the American Fuel & Petrochemical Manufacturers on the U.S.
Environmental Protection Agency's Accidental Release Prevention Requirements: Risk
Management Programs Under the Clean Air Act; Safer Communities
by Chemical Accident Prevention**

Proposed Rule

Docket No. EPA-HQ-OLEM-2022-0174

87 Fed. Reg. 53,556 (Aug. 31, 2022)

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I. INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”) respectfully submits these comments on the U.S. Environmental Protection Agency’s (“EPA’s”) proposed revisions to the Risk Management Program (“RMP”) regulations.² AFPM is a trade association that represents most of the U.S. refiners and petrochemical manufacturers. Our members work in environments with hazardous materials subject to EPA’s RMP and the Occupational Safety and Health Administration (“OSHA”) Process Safety Management (“PSM”) regulations, and their historical safety performance confirms they are our Nation’s foremost experts in this area. Accordingly, AFPM has a significant interest in the Proposal.

II. EXECUTIVE SUMMARY

AFPM shares EPA’s goal of enhancing safety at refineries and petrochemical facilities. AFPM and our members devote substantial time and resources to ensuring safe, reliable, and environmentally sound operations through numerous safety programs, training, and public outreach. Over the last 25 years, our members have continually reduced the incidence of occupational and process safety accidents. This has resulted in fewer injuries and impact to the environment at refineries and petrochemical plants by, striving toward the goal of zero incidents.

EPA acknowledges that since the promulgation of the original RMP rule in 1996, the accident rate for covered facilities has declined, as have the damages from those accidents. The Proposal fails to provide evidence of problems with the RMP program that would be remedied by the proposed revisions. A review of EPA’s own data from 2004 to 2020 used for its Proposal also shows zero offsite fatalities and only one incident that resulted in offsite property damage. Outlier incidents do not provide a basis for EPA to promulgate new regulations for the masses. Indeed, the Proposed Rule is completely unsubstantiated by the data EPA presented. EPA should promptly withdraw this Proposal, which cannot survive judicial scrutiny.

If EPA were to rush forward with finalizing the amendments as proposed, it would sow confusion, impose undue burdens, divert resources, including those that could go to addressing higher risk areas at a facility, and saddle the regulated community with paperwork exercises rather than improve protections for the environment or the general public. EPA’s overly prescriptive provisions would undermine RMP’s performance-based approach – a reversal that turns its back on proven methodologies without data showing that those methodologies are inadequate.

The Proposal renders the primary workplace safety regulator, OSHA, little more than a bystander on process safety issues. In the Clean Air Act (“CAA”) Amendments of 1990, Congress reserved health and safety issues in the workplace for OSHA and limited EPA’s authority to prevent and mitigate the public health and environmental impacts of accidental releases.”³ Congress directed OSHA to take the lead on process safety, and that EPA align the RMP with

² “Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Preventions,” 87 Fed. Reg. 53,556 (Aug. 31, 2022) [hereinafter, “Proposal”].

³ CAA Section 112(r)(7)(G).

OSHA's directives. In implementing these directives, OSHA issued the first PSM standards in 1992 and EPA adopted the PSM program elements in its first RMP regulations in 1996.⁴

The Proposal would turn this long-standing framework on its head, without authorization. In fact, EPA has aggressively staked out positions in the Proposal on core workplace safety issues that exceed its statutory authority. Congress assigned these issues to OSHA. Furthermore, no longer would PSM compliance satisfy RMP requirements: EPA proposes extensive changes to the scope of RMP compliance auditing and PHA, which would result in companies developing separate work practices to meet the RMP and PSM compliance obligations, rather than a coordinated, single effort as Congress intended.

In addition to sidelining OSHA, the Proposal would impose a series of unlawful, arbitrary, and costly obligations on RMP facilities, without demonstrating concrete safety improvements or benefits. EPA would require third-party compliance audits either after an RMP accidental release or when an implementing agency requires one due to non-compliance with the Prevention Program requirements of Subparts C or D of 40 CFR Part 68. The lead EPA official for the Proposal, James Belke, wrote in a 2001 paper that "EPA would likely face long odds . . . legally if it attempted to make third-party audits mandatory" for the RMP.⁵ We agree. Mandatory third-party audits unlawfully subdelegate EPA's enforcement powers to private third parties and circumvent Congressional limits on EPA's enforcement budget.

EPA proposes a suite of additional requirements for PHAs that exceed EPA's authority and would fundamentally change the nature of the PHA with no added safety benefit. One of the most concerning proposed PHA changes is the gap assessment on codes and standards. The gap assessment against current RAGAGEP is a solution in search of a problem—EPA fails to provide any examples of an RMP incident that would have been prevented had the RAGAGEP portion of the Proposal been in place. EPA also fails to consider any costs of this requirement and completely excludes the requirement from its Regulatory Impact Analysis ("RIA") of the Proposed Rule.

Another very concerning proposed change to the PHA is the requirement that refineries and chemical facilities conduct Safer Technology and Alternatives Analyses ("STAA"), including consideration of Inherently Safer Technology ("IST"), similar to provisions in the 2017 Amendments. This requirement finds no evidentiary support in the Proposed Rule. In the 2019 rule, EPA rejected a STAA requirement after examining data from California and New Jersey and finding that it failed to deliver any meaningful safety benefit.⁶ Yet, EPA offers no contradictory data demonstrating otherwise. Thus, this aspect of the Proposal lacks a reasoned basis and would be unlawful to finalize. Further, the STAA provisions as proposed would not lead to greater protection of the community or the environment and are not cost effective. That is particularly

⁴ 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, 31,672 (June 20, 1996) [hereinafter, "1996 RMP Rule"] (Facilities regulated under Program 3—the most stringent program level under the RMP—have been able to satisfy RMP requirements by implementing PSM).

⁵ James C. Belke, *The Case for Voluntary Third Party Risk Management Program Audits*, Prepared for presentation at the 5th Bi-Annual Process Safety Plant Safety Symposium (Apr. 22-26, 2001).

⁶ *See* 1996 RMP Rule at 31,699-700; *see also* 84 Fed. Reg. 69,834, 69,879 (Dec. 19, 2019) [hereinafter, "2019 RMP Reconsideration Rule"].

evident in the proposed STAA requirements at those refineries that employ hydrofluoric acid (“HF”), a proven technology that the industry has a long track record of safe use.

The information disclosure obligations of the Proposal fail to provide meaningful new information for the public and local responders. To be sure, the Proposal’s required disclosure of the types and quantities of regulated substances manufactured and stored on site is useful, but that information must already be disclosed under the Emergency Planning and Community Right-to-Know Act (“EPCRA”). For example, EPCRA provides the needed mechanisms for local emergency planning committees (“LEPCs”) to receive the necessary and appropriate information, or request information, to fulfill their emergency planning responsibilities. In addition to redundant reporting, the Proposal would require RMP facilities to disclose a host of site-specific documents on rejected PHA and third-party audit recommendations and the justification for rejection to LEPCs and anyone residing within 6-miles of a facility in the language requested within 45 days of receiving the request. This information provides nothing of practical utility to local responders and the community. EPA believes this would enable the public to ensure facilities have conducted the appropriate evaluations, but the public lacks the knowledge and expertise to judge the engineering and facility decisions that would be included in these recommendations and justifications. None of these recommendations provide anything useful for fighting a fire, evacuating a community, or undertaking other actions in response to an emergency.

While providing negligible utility, government and industry security professionals have expressed concerns that the release of such documents may expose security vulnerabilities and other potential site risks. The Proposal, for example, would require facilities to identify first responders involved in facility exercises, leaving them vulnerable to targeting by terrorist groups. During the inter-agency review of the Proposal, other federal agencies opposed EPA’s proposed information disclosure obligations due to security concerns, but EPA ignored those concerns.⁷ Given the concerns raised by other federal agencies involved in the intelligence community, it would be imprudent and arbitrary for EPA to mandate disclosure of such sensitive information.

Not only does the Proposal fail to improve public safety and potentially compromise security, but it would be costly as well. The CAA requires that EPA propose RMP regulations that are “reasonable” in light of costs before moving forward. EPA failed to propose such a cost finding, and therefore any final rule would be premature and legally deficient. While EPA prepared an RIA, the limited analysis in the RIA fails to fulfill EPA’s statutory duty to make a finding that the regulation is reasonable and appropriate in light of costs. In any event, EPA admits that the Proposal’s costs are likely greater than the benefits.

In light of these concerns, as more fully explained below, AFPM respectfully requests that EPA withdraw the Proposal until OSHA updates the PSM standard. This would allow OSHA to exercise its primary role as the workplace regulator, as Congress intended. Synchronizing with OSHA’s rulemaking process for PSM would best position EPA to issue a harmonious, consistent set of regulations—an important factor in ensuring process safety—and address additional risks from offsite consequences of an accident involving a process safety unit.

⁷ Docket #EPA-HQ-OLEM-2022-0174-0094 at 1, 176, 179 [hereinafter, “OMB Redline”].

III. ANY FINAL RULE SHOULD MAINTAIN THE EFFECTIVE PERFORMANCE-BASED FRAMEWORK OF THE RMP PROGRAM

Each refinery and petrochemical manufacturing facility has unique processes, configurations, and risks. This is true for many RMP covered industries which is why the RMP and PSM were designed to be performance-based. The site is responsible for identifying the greatest risks and lowering that risk the best way possible for their specific site. As demonstrated by the data, this approach is effective at reducing risks and mitigating hazards of accidental releases to acceptable levels and has spurred continuous improvements. EPA acknowledges the performance-based nature of RMP and the significant safety improvements under the current regulations.⁸ However, the Proposed Rule abandons this effective approach by proposing prescriptive requirements and advancing a false premise regarding hazard mitigation and risk management. Accordingly, we strongly encourage EPA retain the performance-based nature of the RMP, fully recognize the efficacy of the existing rules instead of layering on costly new regulatory requirements, and appropriately address hazards and risks consistent with its statutory authority.

A. The Performance-Based Nature of RMP Should be Preserved

The RMP and PSM regulations provide a comprehensive, performance-based framework where EPA and OSHA set baseline compliance expectations and provide facilities the flexibility to apply appropriate layers of protections to ensure continuous improvement of the process safety and risk management at each site. Importantly, performance-based regulations help overcome the deficiencies of a prescriptive, command and control approach to addressing so many unique facilities with differing hazards and risks. By enabling facilities to direct their attention and resources to manage hazards that carry the potential for higher risk, this framework also encourages innovation and efficiencies that support continuous improvement. The U.S. refining and petrochemical industries have excelled using this approach, as EPA's own data shows the continuous decline of RMP reportable events with offsite consequences. For these reasons, we strongly encourage EPA retain performance-based RMP regulations.

Performance-based standards recognize the unique configurations and physical considerations that facilities must factor into planning activities. For instance, varying population density as well as geographic, infrastructure, and environmental factors all have a bearing on facility plans. Performance standards provide important flexibility for each site to design incident prevention, risk mitigation, and emergency response strategies tailored to their unique and local circumstances. Due to the different characteristics and challenges of covered facilities, process safety is best served when facilities prioritize the specific areas identified in their individual risk-based analyses. Indeed, the incident prevention and risk mitigation strategy that is best for one facility might completely miss the nuances required for another facility. As such, the performance-based approach is essential because it correctly focuses on the results—incident prevention and mitigation—rather than the means of getting there, which minimizes unintended consequences and encourages innovation and efficiency.

⁸ Proposal at 53,566 (“the RMP rule has been effective in preventing and mitigating chemical accidents in the United States and protecting human health and the environment from chemical hazards.”),

EPA and OSHA have reinforced the performance-based approach underlying the RMP and PSM regulations. As OSHA acknowledged in a recent notice on PSM, “[u]nlike some of OSHA’s standards, which prescribe precisely what employers must do to comply, the PSM standard is ‘performance-based,’ and outlines 14 management system elements for controlling highly hazardous chemicals. Under the standard, employers have flexibility to tailor their PSM programs to the unique conditions at their facilities.”⁹ EPA similarly recognized the performance-based nature of RMP in the Proposed Rule.¹⁰ Yet, the Proposed Rule departs from this longstanding framework by using a command-and-control approach to propose prescriptive requirements across facilities with little to no consideration for existing safety performance under the current structure.

B. The RMP Data Show the Existing Rule Is Effective

EPA relies on RMP data from 2004 through 2020 in the Proposed Rule. As depicted in Figure 1 below, RMP incidents during this period of time are rare.

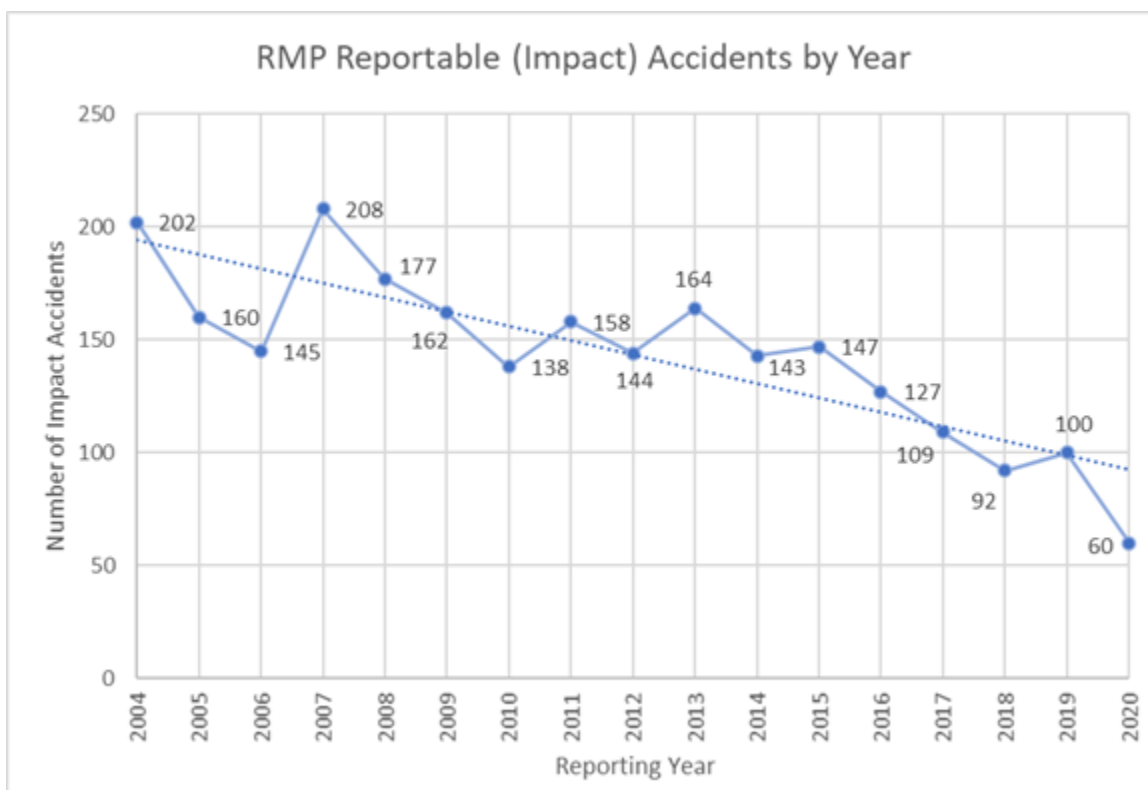


Figure 1. Annual number of EPA RMP-reportable accidents from 2004 through 2020.¹¹

When incidents do occur, they have been concentrated among just a few facilities. EPA reported that between 2016 and 2020, RMP-reportable accidents occurred at only 3% of all RMP covered facilities—i.e., 97% of facilities had zero reportable incidents the last 5-years.¹² This is a

⁹ 87 Fed. Reg. 57,520; 57,521 (Sept. 20, 2022).

¹⁰ Proposal at 53569, 53,595-96.

¹¹ EPA-HQ-OLEM-2022-0174-0065, All_accidents_2004_2020.

¹² EPA-HQ-OLEM-2022-0174 at 80.

significant improvement compared to the 8% of facilities that had accidents in a 10-year period from 2004-2013 noted in the 2019 rule.¹³ The declining number of facilities with incidents demonstrates the current rules are working.

The refining (NAICS 324) and chemical (NAICS 325) facilities have contributed to this decline, particularly during the most recent 5-year reporting period. Specifically, as illustrated in Figure 2 below, NAICS 324 incidents have declined 37% (from 18.4 to 11.6 incidents per year) and NAICS 325 incidents have declined 39% (from 65.2 to 29.6 incidents per year).

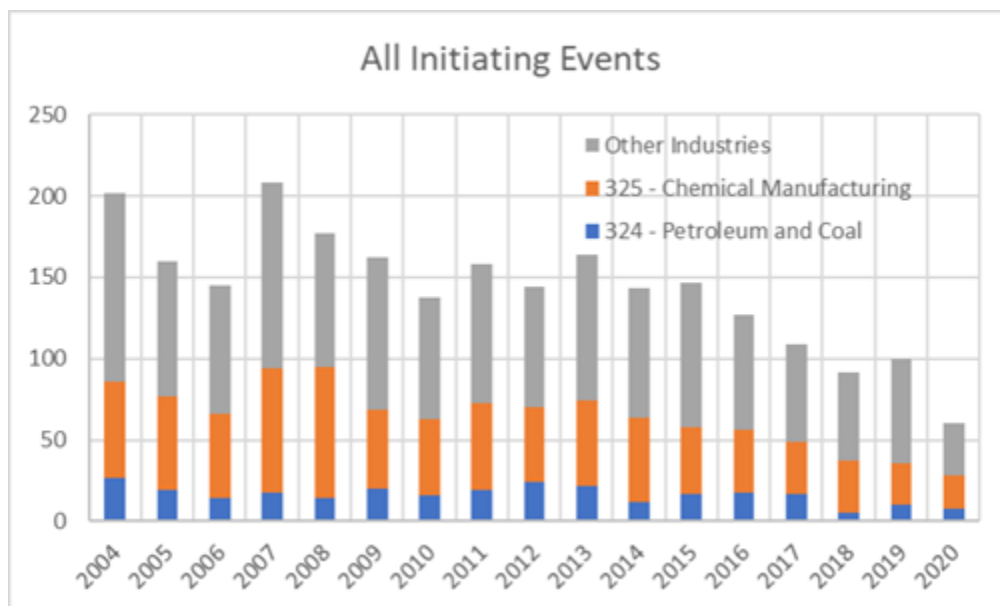


Figure 2. Annual number of RMP-reportable incidents by NAICS 324 and 325¹⁴

EPA also reported that only 0.5% of *all* facilities had multiple accidents in the preceding 5-years, which represents an improvement over the 2% of facilities reporting multiple accidents in the 10-year period noted in the 2019 rule.¹⁵ This data shows that the number of facilities reporting multiple accidents has significantly declined. Therefore, instead of wholesale or sector-wide regulatory revisions, EPA should consider taking a more robust inspection and compliance assistance approach to ensure the existing regulations are properly implemented at these outlier facilities.

As a practical matter, EPA’s Proposal to overhaul the RMP regulations is not going to help facilities continue the downward trend of incidents. Bad regulations will simply redirect resources away from addressing the highest risk areas at an individual site to addressing proposed, unproven prescriptive requirements that will not actually improve safety or reduce risk. For instance, regarding EPA’s proposed requirements to address natural hazards in the PHA, very few incidents

¹³ 2019 Reconsideration Rule at 69,848 (“The RMP accident data show that over a 10-year period [2004-2013], at least 90% of the RMP facilities have had no reported accidents, 6% had only one accident, and about 2% had two or more accidents. Nearly half of the total reportable accidents were from less than 2% of the RMP facilities, which reported multiple releases.”).

¹⁴ EPA-HQ-OLEM-2022-0174-0065, All_accidents_2004_2020.

¹⁵ *Id.*

are triggered by natural hazards, so it does not make sense for facilities to divert resources which address circumstances that might trigger high risk incidents to address natural hazards. The EPA RMP data demonstrate that, from 2004 through 2020, there were 38 RMP-reportable accidents with a natural cause as the initiating event and an additional 46 RMP-reportable accidents where unusual weather conditions were a contributing factor.¹⁶ Combined, these accidents account for just 3% of all accidents reported during that period. The facility knows best as to the hazards associated with the highest risk items, which the performance-based nature of the RMP has long recognized.

Further, EPA's Proposal to impose several new PHA requirements would rob the PHA process of its effectiveness. The Proposal would add five new PHA topics to address,¹⁷ on top of the seven topics that must be covered already under the existing regulations.¹⁸ The proposed new requirements are complex and involve a diverse range of new disciplines, including those required by an evaluation of proximate facilities.

EPA has failed to consider the cumulative effect of imposing so many new requirements simultaneously. PHA teams are required to be knowledgeable in the covered process, an area of expertise that does not necessarily lend itself to analyzing hazards explicitly caused by climate change and the risk profile of nearby, non-RMP facilities. The breadth of new analysis required may result in a sacrifice of the necessary depth and focus on covered processes necessary to conduct an effective PHA. We urge EPA to reconsider its proposed approach to overhauling the PHA and to ensure such decisions are fully informed by a clear understanding and appreciation for PHA teams and functions.

C. EPA Should Reassess Its Approach to Managing Hazards and Risks

EPA should reassess its approach to hazards and risks in the Proposal. Notwithstanding the success of the performance-based nature of RMP and safety improvements accomplished under the existing rules, EPA turns its back on the actual data and attempts to justify the Proposal on an expansive characterization of potential hazards and the false premise that the mere existence of risk warrants wholesale regulation. Such changes have the potential to upend decades of hazard mitigation and risk management practices and reverse the safety improvements facilities have accomplished under the existing framework.

RMP is not a zero-risk program, it is a risk *management* program. The statute directed EPA to prevent and mitigate accidental releases of regulated substances.¹⁹ EPA's RMP regulations have fulfilled this charge through a harmonized prevention program that focuses on controlling hazards (i.e., the potential result of an accidental release) and reducing risk (i.e., the likelihood of an accidental release) to an acceptable level.

¹⁶ EPA-HQ-OLEM-2022-0174, pg. 43.

¹⁷ The five new topics are: (1) the gap analysis for RAGAGEP, (2) natural hazards, (3) loss of power, (4) expanded stationary source siting analysis, and (5) Safer Technology Alternatives Analysis, a topic discussed below.

¹⁸ Under existing regulations, the PHA must address: (1) Hazards of the process; (2) Prior incidents; (3) Engineering and administrative controls applicable to the hazards; (4) Failure of engineering and administrative controls; (5) Stationary source siting; (6) Human factors; and (7) Safety and health effects of a failure of controls.

¹⁹ CAA Section 112(r)(7)(B)(i).

And yet, EPA introduces an approach in the Proposed Rule that would amount to an open-ended list of speculative, remote hazards to be analyzed without demonstrating any means of controlling the hazard or preventing a release. EPA also points to instances where there may be some potential risk of a release or offsite consequence as a basis for proposed requirements, but fails to quantify the risk or discuss the efficacy of the proposed requirement at reducing that risk. Such changes have the potential to upend decades of hazard mitigation and risk management practices and reverse the safety improvements facilities have accomplished under the existing framework. As the saying goes, when everything is a priority, nothing is a priority, which would be the outcome if EPA requires so many additions to the PHA. Such changes will actually dilute the effectiveness of the PHA. Accordingly, EPA should reevaluate its characterization of hazards and risks in the Proposed Rule and reassess its approach to ensure it fulfills the statutory charge. Further, EPA should ensure it does not promulgate vague standards that cannot reasonably be understood and implemented by PHA teams.

D. EPA Should Focus on Compliance Assistance and Enforcement

New regulations for the masses are not justified based on limited examples of a few outliers. EPA applied this logic in the 2019 rule, which has proven to be effective based on the continued decline in reportable incidents since the rule was issued. However, in the Proposed Rule EPA suggests the length of time for enforcement actions as a reason for regulatory revisions. This description in the Proposed Rule is misguided as the Agency does not make clear *who* was responsible for the long length of time for enforcement. Based on feedback from our members, we understand more times than not, such delay is EPA's responsibility, and the Agency often requests extensions beyond the 5-year statute of limitations. It is in EPA's control to decrease the time and the delay it takes for enforcement action. Thus, this is evidence EPA's process needs to improve, it is not grounds to promulgate entirely new regulations.

IV. EPA SHOULD RECOGNIZE THE STRONG SAFETY RECORD AND CONTINUOUS IMPROVEMENTS OF AFPM MEMBERS

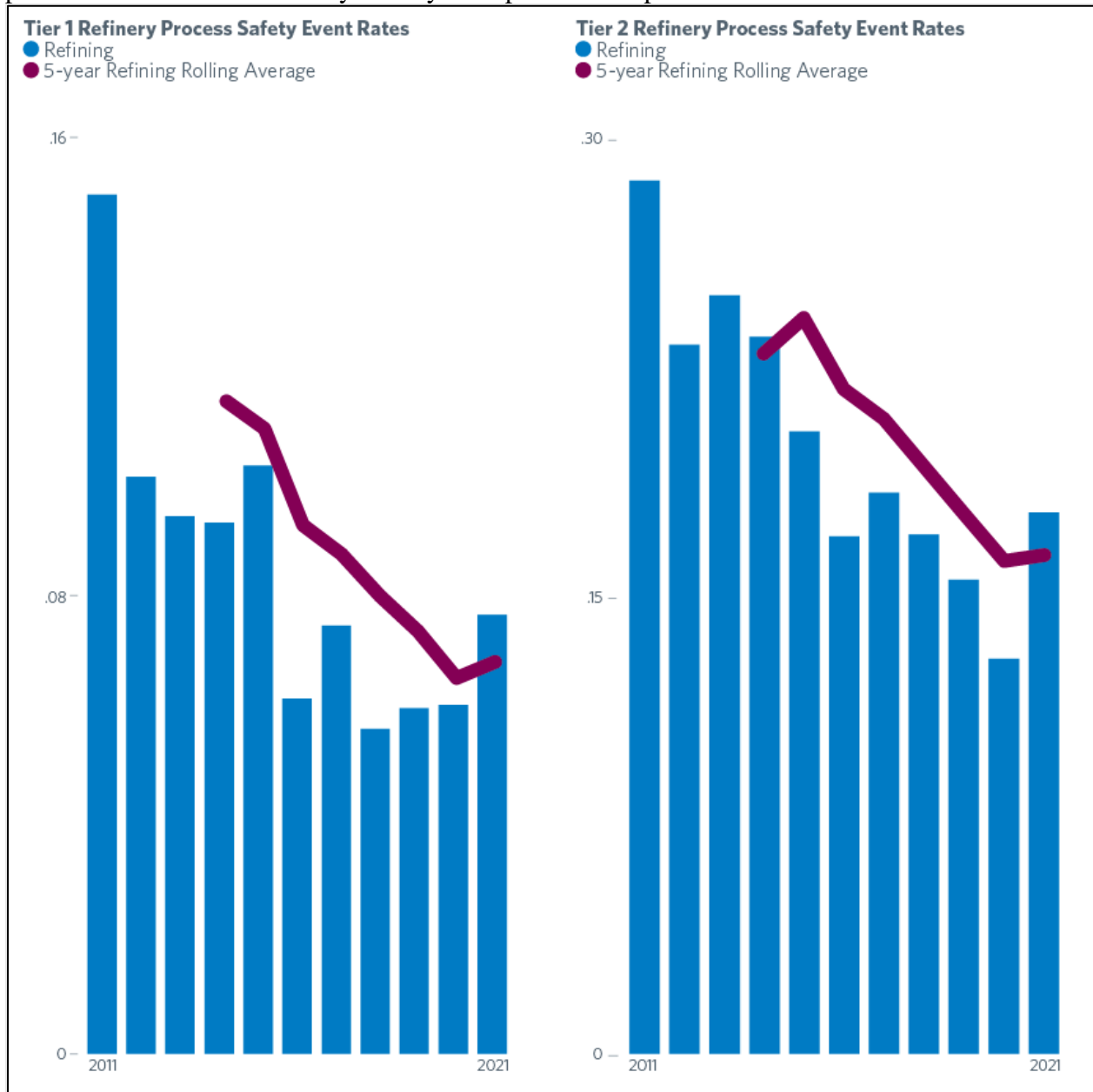
The safety performance of the refining and petrochemical industries shows a decreasing number of process safety and RMP-reportable events. Under the PSM and RMP performance-based framework, the refining and petrochemical industries are also continuously improving. These facilities invest significant resources in their people, equipment, procedures, and management systems to drive continuous improvement in process safety. EPA should recognize this strong safety record and voluntary efforts of AFPM members and reconsider its proposed requirements specific to our industries.

A. Refining and Petrochemical Industries Have A Strong Safety Record

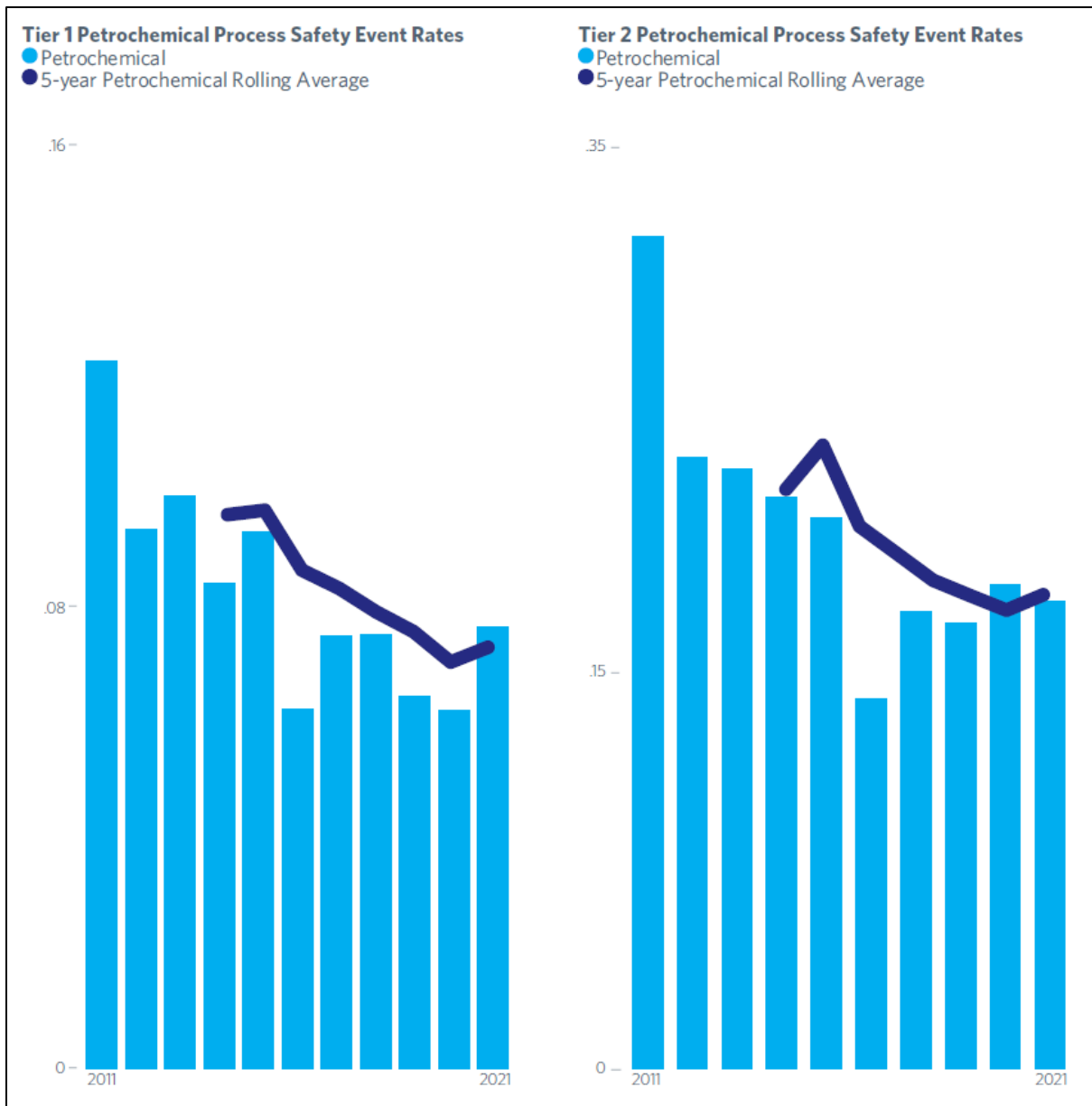
This commitment to safety is evident in the consistent decline in process safety events (PSEs) as well as injury and illness incident rates over time, in which our industries outperformed others.

As illustrated in the following charts, the AFPM collected refinery and petrochemical PSE data reported pursuant to API Recommended Practice 754 shows PSE rates have decreased by 50

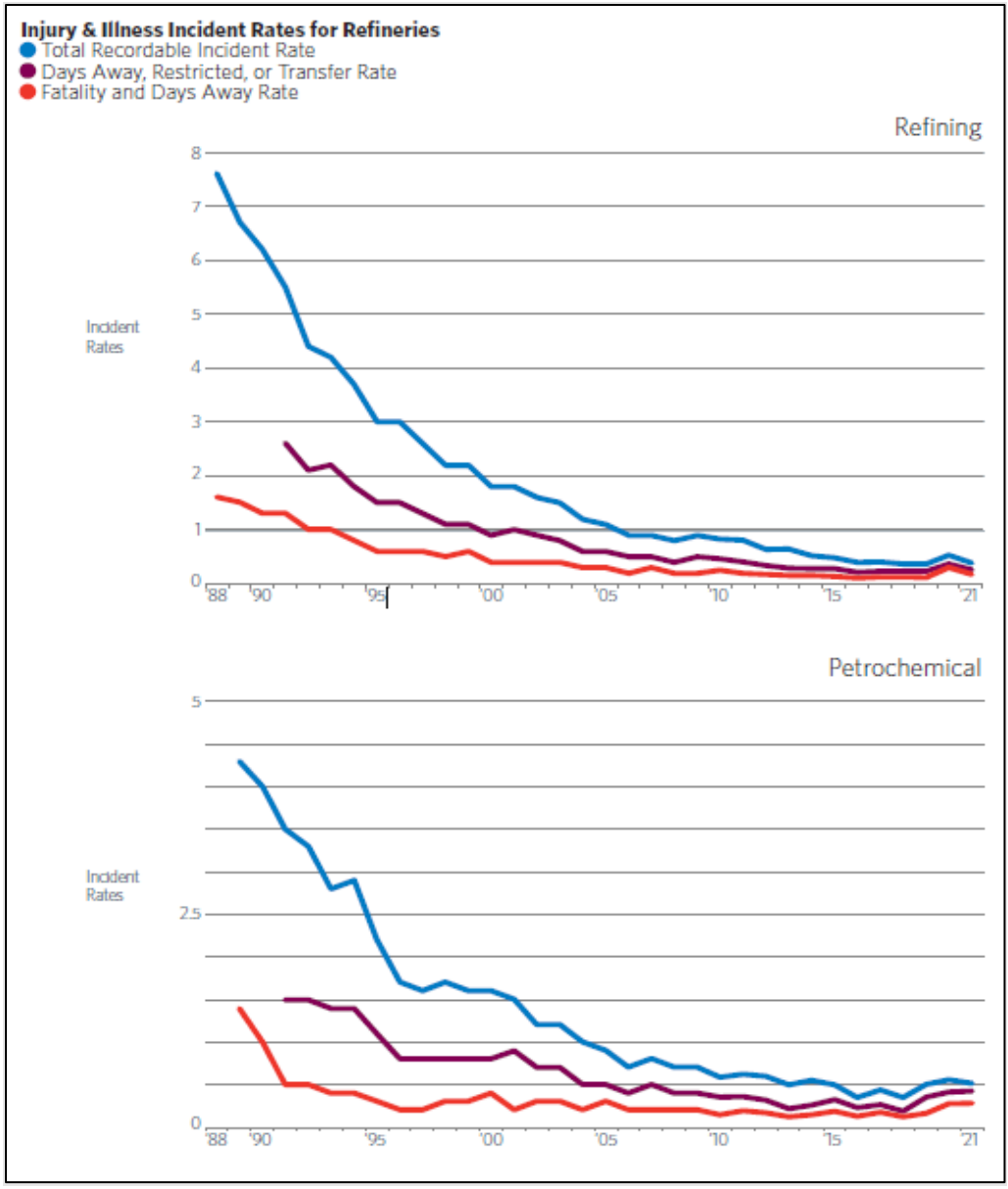
percent at refineries and by nearly 40 percent at petrochemical facilities since 2011.²⁰



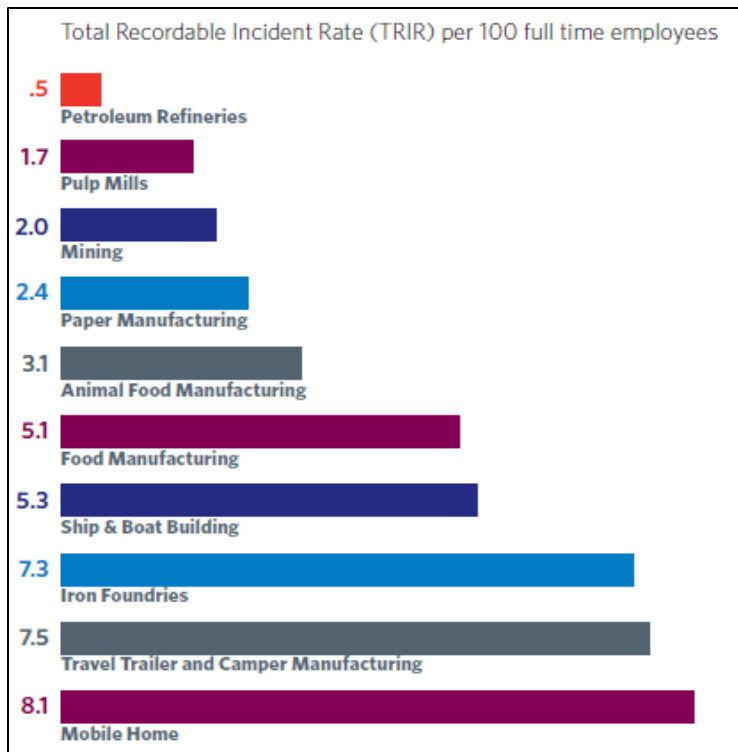
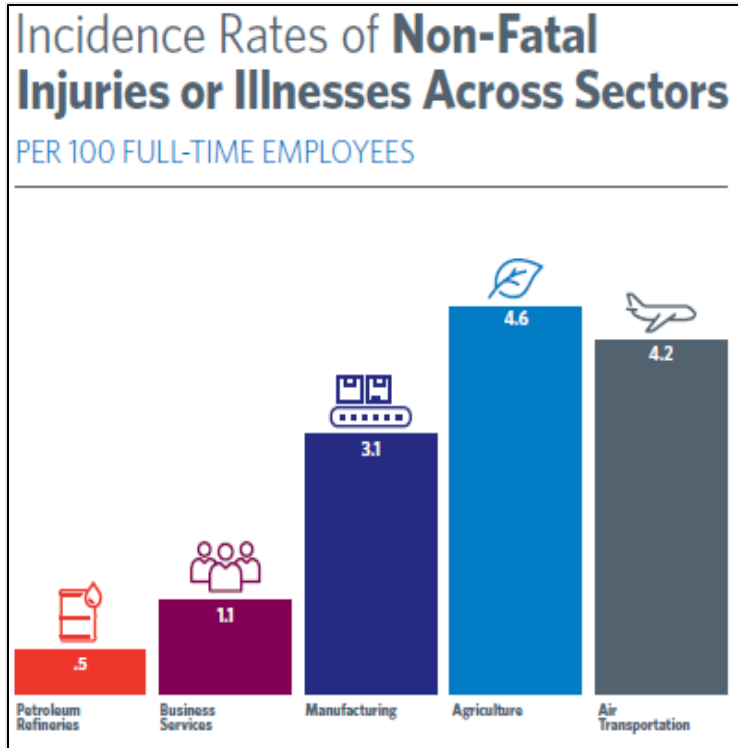
²⁰ It is important to point out that over the past several years there has been a decrease in the PSE rate denominator, total hours worked, with 2021 being the lowest. To continuously learn and improve, AFPM conducted a deep dive analysis on the data and updated our industry process safety strategic plan to refocus our efforts on those items that are causing the most process safety incidents in industry. This is another example of how industry is working together to continually improve process safety. See API RP 754 “Process Safety Performance Indicators for the Refining and Petrochemical Industries,” 3rd edition (Aug. 2021); see also <https://www.api.org/-/media/Files/Oil-and-Natural-Gas/Refining/Process%20Safety/2021-RP-754-PSE-Public-Reporting-2017-2021-Data.pdf?la=en&hash=2EAA97BEDB423929B49B4412F254F2892C6702B0>.



There has also been a 30-year decline in refinery and petrochemical facilities' incident rates of injury and illness, as depicted in the charts below.



According to the U.S. Bureau of Labor Statistics, the refining industry has some of the lowest rates of incidents with non-fatal injuries and illnesses out of 503 manufacturing sectors, including as compared to other major industrial sectors.



Not only has EPA failed to account for this record success of our industries, EPA has inappropriately and without justification focused on our industries in a number of areas which concerns AFPM. EPA proposed a number of prescriptive requirements based on little more than supposition with little to no data to support its Proposal. Particularly troublesome is the Agency's

focus on refineries with hydrofluoric acid (“HF”) alkylation processes. Arbitrarily targeting the refining petrochemical sector defies the data.

B. Data Show Hydrofluoric Acid Alkylation Processes Are Well Managed

Refiners take safe, reliable operations of HF alkylation units very seriously. In addition to following all government regulations for HF, our members have developed extensive industry-specific guidance for managing HF in refinery settings. RMP is a “risk management program” and the data demonstrates that industry is safely managing the risk associated with HF. That was also the conclusion EPA made with its 1993 report to Congress on HF and the only difference between then and now is that performance has improved as well as the detection and mitigation technology.²¹ The improvement are reflected in EPA’s own RMP data.

Since 1992, AFPM members with HF alkylation units have contributed to, continuously improved, and followed API Recommended Practice 751 (“RP 751”). RP 751 is the collaborative product of an industry working group comprising nearly 100 of the top global leaders in HF alkylation science and process safety. The most recent edition of RP 751—its 5th—was released in August 2021 and reflects the newest data, real-world learnings and available safety technologies. It is the most rigorous and exhaustive policy for HF management in existence.

RP 751 provides guidance on incident prevention, detection and containment that is applicable and adaptable for every refinery with an HF unit. It is recognized by OSHA and the U.S. Chemical Safety Board as providing effective guidance for the safe operation of HF alkylation units and management of HF catalyst, for the ultimate purpose of protecting people both on- and off-site.

It is because of our members’ commitment to safe operations, and RP 751 and its requirements for regular audits and oversight that a refinery’s risk from HF alkylation is so well managed. There have never been any life-threatening injuries to people in surrounding communities stemming from HF-related incidents at refineries. Wherever incidents have occurred, multiple layers of mitigation technologies and emergency procedures have kept people safe. Learnings from those and other incidents are shared and considered for future RP 751 editions.

Safety is always the number one job at every refinery, and it extends well beyond our own employees and contractors to include our neighbors outside the fence line. It is because of our safe, reliable operations—achieved by adhering to RP 751 and all government regulatory and performance standards for HF and chemical safety—that refiners and American consumers are able to fully enjoy the benefits of alkylate in cleaner, higher octane fuels.

An analysis of the EPA RMP data, as depicted in Figure 3 below, shows between 2016 and 2020, the refining industry (NAICS 324) accounted for less than one-quarter of the RMP-reportable accidents involving HF. Notably, these incidents include impacts such as evacuations and shelter-in-places, which may be purely precautionary. For EPA to meaningfully determine incidents with significant offsite impacts, precautionary impacts should have been excluded.

²¹ "Hydrogen Fluoride Study: Report to Congress, Section 112(n)(6), Clean Air Act As Amended: Final Report," U.S. Env'tl. Protection Agency, 1993.

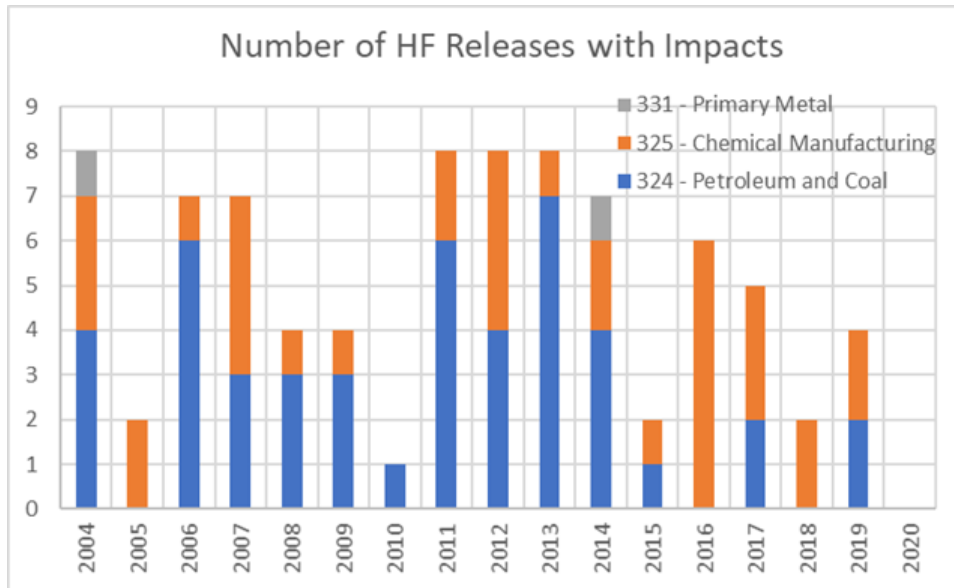


Figure 3. RMP-reportable incidents of NAICS 324 and 325 facilities involving HF

When analyzing those events by pounds of HF released, the refining industry accounted for less than 1% of the mass of HF released, as illustrated in Figure 4 below.²² This proves that onsite mitigations are working.

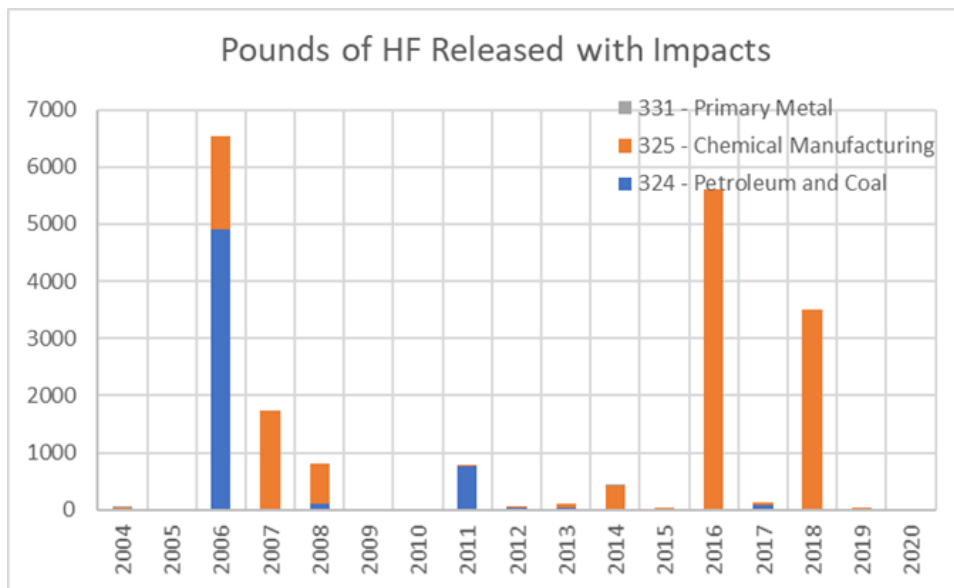


Figure 4. Pounds of HF released by NAICS 324 and 325 RMP-reportable incidents

Over the period between 2016-2020 there were four releases of HF totaling 80 pounds, while over the same time period, there were significantly more releases of two other toxic chemicals that can have severe impacts to the community—i.e., 175 releases of ammonia totaling

²² Note, the EPA RMP data did not include the PES incident.

590,333 pounds and 80 releases of chlorine for 184,852 pounds. As such, EPA’s focus on HF alkylation in the refining industry is misguided as the industry is safely managing the chemical. An analysis of the number of incidents associated with such releases further supports this conclusion as displayed by Figure 5 below which covers the number of RMP-reportable incidents involved with releases of HF, ammonia (NH₃), and chlorine (Cl₂)—across all industries—from 2004 through 2020.

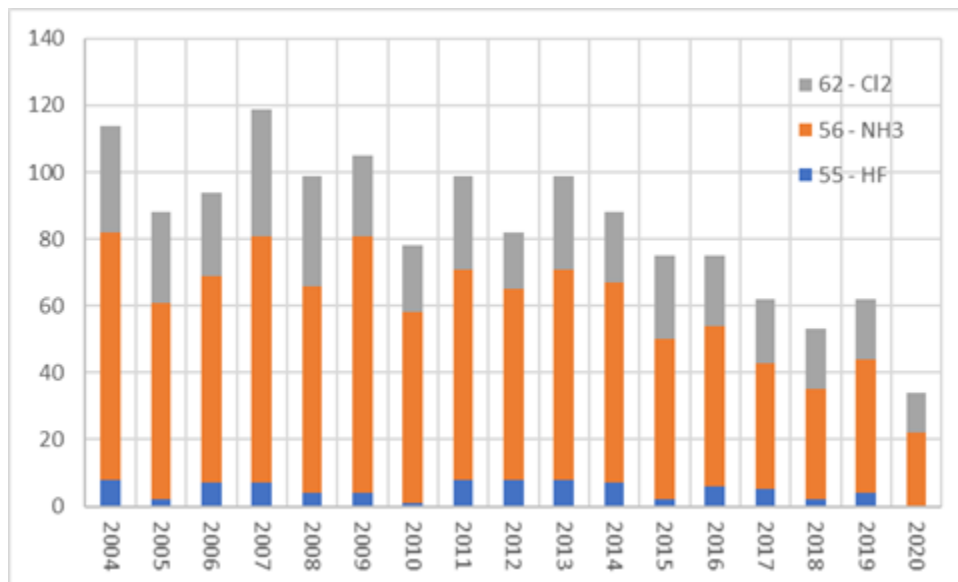


Figure 5. Annual number of RMP-reportable incidents involving HF, Cl₂, and NH₃

C. AFPM Members Lead Continuous Safety Improvements

Our industry’s safety record, clearly shows the existing PSM and RMP, under the performance-based framework, are doing what they were designed to do—reduce and prevent accidental releases at refineries and petrochemical facilities.

AFPM members continuously enhance their safety and reliability by having the flexibility to adopt and implement new standards, learnings, and other risk reduction activities. As part of a constant feedback loop to drive further improvements, sites incorporate new tools and adopt different practices, including new mitigation, detection, and safety system technologies, to provide safer processes as sites learn from their own experiences and audits, and as information is shared by industry peers.

In addition, all of our members participate in voluntary activities through AFPM and other organizations to ensure that they continuously improve their safety performance and learn how best to ensure the safety of their employees, contractors, and nearby communities. In addition to regulatory measures from OSHA and other agencies, our members focus on voluntary measures to manage risks and improve safety, including:

- Sponsoring educational organizations to advance new technologies and studies;

- Participating in industry-led programs designed to continually improve safety performance;
- Developing improved industry safety standards; and
- Participating in technical forums to learn from others.

The refining and petrochemical industries invest in various initiatives designed to forge a strong process safety culture and drive safety improvements. One such initiative is the Annual Occupational & Process Safety Conference, where industry representatives share lessons learned from incidents and near misses, discuss recent safety challenges, and discover the latest innovations in safety technology and services. AFPM's newest conference, The Summit, is a multi-discipline collaborative effort to bring process safety learnings among others to the broader operations, maintenance, and process technology community. In addition, AFPM hosts over 50 meetings annually for a variety of safety committees to encourage peer-to-peer networking and exchanging ideas to enhance occupational and process safety. More than 1500 personnel from over 50 operating companies participate in the national conference, workshops and regional meetings each year.

AFPM manages regional meetings for process safety, occupational safety, and are in the process of starting mechanical integrity networks as well. These networks have been extremely valuable in building relationships and knowledge sharing among site level practitioners. AFPM also maintains an online educational resource dedicated to industry safety that collects key government agency reports on past incidents, presentations from safety conferences, safety alerts, statistical reports, and other analytical resources that help members continuously improve their process safety management systems and performance. Most recently, AFPM has developed a committee on immersive learning that develops data driven resources for our members. In the two short years this committee has existed, they have developed virtual reality training, micro-learning videos and animations. The goal is to bring the right information to the right people at the right time to help improve process safety awareness. These programs have been so successful that other industries have reached out to AFPM to speak to their members on how a trade association can help facilitate tangible safety improvements for their members. Collectively, these examples exemplify the commitment AFPM members have towards safe operations not only at their companies but across the entire refining and petrochemical industries.

Prescriptive regulations, such as those in the Proposed Rule, may not keep up with newer techniques, information, and technologies in a timely manner, stifling innovation and limiting the risk reduction value of new technologies. An overly prescriptive program would function more as a costly paperwork burden than a catalyst for process safety innovation and better safety outcomes. Facilities would be forced to spend resources on satisfying prescriptive requirements that may be irrelevant or inappropriate to a particular facility or incident, instead of dedicating resources to reduce the highest risks at their facilities.

V. EPA SHOULD RECOGNIZE OSHA'S LEAD ROLE IN THE PSM/RMP FRAMEWORK

When approaching any potential revision to the RMP, EPA should recognize OSHA's lead role in the PSM and RMP framework. OSHA and EPA were provided the PSM and RMP authorities to assist manufacturers and distributors of highly hazardous chemical substances to reduce the risk of a catastrophic release in response to several incidents of catastrophic releases of highly hazardous chemicals. Congress gave each agency authority based on their missions and expertise. OSHA was authorized to address health and safety in the workplace, which OSHA fulfilled by issuing the PSM standard in 1992.²³ In contrast, the CAA Amendments of 1990 directed EPA to prevent and mitigate public health and environmental impacts that might arise from accidental releases, which EPA addressed by promulgating the initial RMP rule in 1996. EPA recognized this division of authority as its first RMP rulemaking explained that "OSHA's focus is on workplace impacts while EPA's focus is on *offsite consequences*, reflecting the different statutory mandates of the two programs."²⁴

To promote the consistency that is vital to process safety, Congress imposed two obligations that require EPA 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."²⁵ 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.²⁶

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] . . ."²⁷ Yet Section 112(r) contains no parallel provision requiring OSHA to consult with EPA before amending the PSM regulations. That textual difference demonstrates 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 elements when the Agency issued the first RMP regulations in 1996.²⁸ Indeed, the first EPA RMP rule "used OSHA's language verbatim" for Program 3 facilities' prevention program requirements.²⁹ Thus, facilities regulated under Program 3—the most stringent program level under the RMP—have been able to satisfy RMP requirements by implementing PSM, typically resulting in one harmonized accident prevention program to protect workers, the

²³ CAA Section 112(r)(7)(G); *see also* 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." (emphasis added)).

²⁴ 58 Fed. Reg. 54,190, 54,192 (Oct. 20, 1993); AFPM 2016 Comments at 48.

²⁵ CAA Section 112(r)(7)(G).

²⁶ 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.

²⁷ CAA Section 112(r)(7)(D).

²⁸ 57 Fed. Reg. 6,356 (Feb. 24, 1992); 1996 RMP Rule at 31,668.

²⁹ 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.

general public, and the environment.³⁰ Thanks to the 2019 RMP Rule, this harmony has been maintained and RMP data collection, analyses, information sharing, emergency response and training requirements have improved.

The Proposed Rule would upend this longstanding, effective framework by layering 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.

As such, EPA should recognize OSHA's PSM standards and EPA's 2019 RMP rule as the existing baseline generating continuous improvements from periodic PHAs, inspections, and audits. EPA should respect historical jurisdictional boundaries and approach RMP from the perspective that the OSHA regulations are effective and should not layer onto those regulations additional requirements unless presented with compelling data that the requirements are necessary to mitigate an unacceptable off-site risk from the release of extremely hazardous substances, recognizing the baseline risk mitigation established under the OSHA PSM program and industry performance data.

Because of the historic PSM baseline for RMP, EPA should recognize OSHA's lead role and pause this rulemaking process. As EPA stated in its 2019 rulemaking, it is prudent to understand OSHA's approach to any future PSM amendments before considering changes to the RMP that affect onsite issues.³¹ It is the wrong time for EPA to advance the Proposal, particularly as OSHA has an open review of the PSM standards underway that should supersede any EPA Proposal to overhaul the regulations. The analytical baseline for a proposed regulation should always include any existing regulation and anticipated changes in safety spurred by industry advancements and government regulations affecting the regulated industry.³² Thus, EPA must consider the impact of any future PSM changes on the baseline risk posed to public health and the environment from accidental releases before revising the RMP regulations.

On August 30, 2022 – the day before EPA's Proposed Rule published in the Federal Register – OSHA published a notice of an informal stakeholder meeting regarding its PSM standard and opened a docket inviting public comments on potential changes to the standard.³³ OSHA subsequently postponed the stakeholder meeting and extended the deadline for submitting public comments in response to requests for the public to have additional time to consider and prepare for meaningful input on PSM revisions.³⁴ Unlike OSHA's reasonable approach, EPA

³⁰ AFPM 2018 Comments at 47; AFPM 2016 Comments at 50; 83 Fed. Reg. at 24,863 (citing 61 Fed. Reg. 31,672).

³¹ 83 Fed. Reg. at 24,863-64.

³² Circular A-4 requires RIAs include a baseline against which to measure the costs and benefits of a Proposed Rule. The baseline presents the world as it is today (i.e., if the Proposed Rule were not adopted) now and into the future. The baseline must account for the expected changes, including regulatory changes, that will bring about change in the regulated industry without the Proposed Rule. Office of Management and Budget, Circular A-4 Regulatory Analysis (Sept. 17, 2003).

³³ 87 Fed. Reg. 53,020 (Aug. 30, 2022).

³⁴ 87 Fed. Reg. 57,520 (Sept. 20, 2022).

declined requests to extend the public comment period for the Proposed Rule, leaving an insufficient period of time to conduct a robust review of the data and assessment of the impacts of the novel provisions in the Proposal.

In another departure with OSHA, EPA’s pre-Proposal public engagement was not meaningful. EPA’s 2021 RMP listening sessions were open-ended, offering stakeholder input on the RMP regulations generally with high-level mention of administration interest in addressing climate change and environmental justice.³⁵ EPA provided no indication of areas of the RMP the agency was reconsidering or notice of potential changes related to climate change and environmental justice. In contrast, OSHA’s stakeholder meeting notice identified specific changes to the scope of PSM and particular provisions of the current PSM requirements under consideration.³⁶

VI. THE ADMINISTRATIVE RECORD LACKS DATA AND ANALYSIS TO SUPPORT KEY ELEMENTS FROM EPA’S PROPOSAL

Any decision to move beyond the proven, well-functioning existing PSM/RMP baseline must be data-driven and evidence-based. Because of the “complex scientific issues involved in EPA rulemaking” Congress established more rigorous requirements under the CAA for making information available for public scrutiny.³⁷ Specifically, the CAA mandates that “[a]ll data, information, and documents ... on which the Proposed Rule relies shall be included in the docket on the date of publication of the Proposed Rule.”³⁸ However, the Proposed Rule includes numerous data and information gaps that the EPA requested commenters provide for use in the final rule. Given these shortcomings, before EPA can proceed with a final rule, the Agency will be required to issue a supplemental notice for public comment.³⁹ The absence of basic information renders the Proposed Rule, as currently written, defective because it fails to provide commenters fair notice of an agency’s proposed regulation.⁴⁰

Examples of data and information gaps in the record for the Proposed Rule include, but are not limited to, the following:

- The EPA failed to provide a list and its associated NAICS codes for the 12,855 unique facilities reporting between 2016 and 2020
- Some accidents are duplicated in the list of “unique” accidents provided by the EPA⁴¹

³⁵ See <https://www.regulations.gov/document/EPA-HQ-OLEM-2021-0312-0001>.

³⁶ 87 Fed. Reg. 53,020 (Aug. 30, 2022).

³⁷ E.g., *Small Ref. Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 518 (D.C. Cir. 1983).

³⁸ CAA § 307(d)(3) (emphasis added); see *Kennecott Corp. v. EPA*, 684 F.2d 1007, 1018 (D.C. Cir.) (CAA §307(d)(3) requires EPA to place in the docket “the factual data on which the proposed regulations are based”).

³⁹ “[T]he public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings.” *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977).

⁴⁰ *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 176 (2007).

⁴¹ EPA-HQ-OLEM-2022-0174-0065, All_accidents_2004_2020.

- Some facilities in “facility-dense” areas are duplicated in the list of NAICS 324/325 facilities located within 1-mile of another NAICS 324/325 facility⁴²
- A single outlier event on November 27, 2019, has skewed the data such that the EPA identified a trend of “considerably larger offsite impacts,” including “over 153 million dollars in offsite property damage” for facilities in “facility-dense” areas. This one incident accounts for *all* of the property damage, but EPA has not acknowledged this. A single event does not indicate a trend.⁴³
- The EPA failed to present any data to support their claim that “densely co-located” facilities have an increased potential for a release at a second facility. In addition, they did not justify its claim that the alleged increased potential is applicable to facilities with one, two, or more adjacent facilities to warrant a “densely co-located” designation.⁴⁴

In addition, throughout the Proposed Rule EPA makes broad claims regarding anticipated bad behavior by industry and general platitudes as reasons to propose certain provisions. Such statements cannot justify the Proposal and, absent supporting information for such claims, should be removed from any future rulemaking. For these reasons, EPA’s Proposal falls short of being evidence-based and fails to provide a sound record to support revisions of the RMP regulations at this time.

VII. EPA’S FAILURE TO CONDUCT A PROPER COST-BENEFIT ANALYSIS INVALIDATES THE PROPOSAL

EPA must also assess the costs and benefits of the proposed revisions, including a detailed analysis of how such measures would actually mitigate the risks of offsite consequences of an accidental release.⁴⁵ However, EPA did not fulfill this requirement in the Proposed Rule. EPA’s failure to conduct a proper cost-benefit analysis invalidates the Proposal.

A. EPA’s Failure to Conduct a Cost-Benefit Analysis Violates the Clean Air Act

Clean Air Act Section 112(r)(7)(B)(i) requires EPA to consider costs when promulgating RMP amendments. Specifically, that section of the CAA requires EPA promulgate “*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.”⁴⁶ The U.S. Supreme Court interpreted a similar provision of the CAA to require EPA to consider costs in *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). There, the Court held that EPA arbitrarily declined to consider costs when deciding whether the Mercury Air Toxics (“MATs”) regulation was “appropriate” for the

⁴² EPA-HQ-OLEM-2022-0174-0065, Facilities_324_325_1_mile

⁴³ EPA-HQ-OLEM-2022-0174-0066, Excerpt 8.

⁴⁴ EPA-HQ-OLEM-2022-0174, pg. 79.

⁴⁵ *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

⁴⁶ 42 U.S.C. § 7412(r)(7)(B)(i) (emphasis added).

electric utility industry under Section 112(n) of the Act.⁴⁷ As the Court stated, “[n]o regulation is ‘appropriate’ if it does significantly more harm than good.”⁴⁸ Further, the Court explained:

Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions. It also reflects the reality that too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.⁴⁹

Because EPA failed to weigh “the advantages and disadvantages of” MATs to ensure that it would not “do significantly more harm than good,” the Court held that EPA’s determination that it was “appropriate” to regulate was arbitrary.⁵⁰

Michigan squarely applies here because the statutory language authorizing RMP requires regulations to be “reasonable.”⁵¹ EPA is fully aware of this requirement, particularly with respect to the RMP regulations as the Agency’s failure to conduct a proper cost-benefit analysis consistent with *Michigan* was part of AFPM’s request for reconsideration of the 2017 Amendments.⁵² Nevertheless, EPA has repeated the same error with the Proposed Rule and makes no mention of the *Michigan* ruling. This shortcoming is a fatal flaw of the Proposed Rule that must be addressed before EPA proceeds with finalization.

B. EPA’s Break-Even Analysis is Not a Substitute for a Proper Benefit-Cost Analysis

Agencies provide a regulatory impact analysis for significant regulations that consist of a robust benefit-cost analysis to ensure new regulations provide a net benefit to society. Yet, the RIA for the Proposed Rule does not include a benefit-cost analysis. This is a fatal flaw for EPA’s Proposal.

EPA acknowledges its failure to conduct a benefit-cost analysis, asserting it “cannot sufficiently quantify or monetize the benefits” of the Proposed Rule.⁵³ Instead, EPA presents a “break-even analysis” as justification for the Proposed Rule. EPA’s “Guidelines for Preparing Economic Analyses” indicates a break-even analysis can be appropriate to “support benefits valuation when robust value estimates and/or risk estimates are lacking.”⁵⁴ However, the Guidelines caution that because break-even analyses “do not estimate the net benefits of a policy

⁴⁷ 135 S. Ct. 2699, 2707 (2015).

⁴⁸ *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.”).

⁴⁹ *Id.* at 2707-08.

⁵⁰ *Id.*

⁵¹ 42 U.S.C. § 7412(r)(7)(B)(i).

⁵² RMP Coalition Petition for Reconsideration and Request for Agency Stay Pending Reconsideration and Judicial Review of Final Rule entitled Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act (EPA-HQ-OEM-2015-0725-0759) (Feb. 28, 2017) (the “Petition”).

⁵³ RIA, p. 10.

⁵⁴ U.S. Environmental Protection Agency, “Guidelines for Preparing Economic Analyses,” Updated March 2016, p. 7-50 (“Guidelines”).

or regulation, they fall short of [benefit-cost analysis] in their ability to identify an economically efficient policy.”⁵⁵ For this reason, break-even analyses are typically a “sensitivity analysis” to and not a replacement of a benefit-cost analysis.⁵⁶

The Guidelines also note that a break-even value should be “assessed for credibility and plausibility.” However, EPA’s break-even value described in the RIA is neither credible nor plausible. The break-even value is not credible for several reasons, including but not limited to the fact the value: i) includes mathematical errors; ii) ignores provisions in the Proposed Rule and the associated costs of these provisions; iii) relies upon unrealistic or out of date cost estimates for some provisions in the Proposed Rule; and iv) fails to adequately account for the highly variable nature of incident damages. In addition, the break-even value is not plausible because EPA has not demonstrated how the Proposal, which EPA characterizes in many instances as “clarifying” existing requirements or not “requiring” a particular change at a facility—i.e., maintain the status quo—would result in 15 fewer incidents, annually, as EPA claims. Thus, EPA’s break-even analysis is not a substitute for a proper cost-benefit analysis and does not meet the Agency’s requirement to consider the full costs and benefits of the Proposal.

C. EPA’s Break-Even Analysis is Mathematically and Fundamentally Flawed

EPA’s break-even analysis is also mathematically and fundamentally flawed. A break-even analysis compares the costs of the Proposed Rule to the damages associated with incidents. According to the RIA, the Proposed Rule will “break-even” so long as its provisions collectively prevent 15 incidents (the “break-even value”). Mathematically, the calculated break-even value can be too low if the estimated damages associated with incidents are too high and/or the estimated costs of the Proposed Rule’s provisions are too low. As described below, both are true.

The RIA calculates potential damages as the sum of estimated onsite damages and estimated offsite damages. Onsite damages include damages associated with fatalities, injuries, and property damage. Offsite damages include damages associated with fatalities, hospitalizations, medical treatment, evacuations, sheltering in place, and property damage. Both the offsite and onsite damages are based on per year averages calculated using data from 2016 through 2020. The largest two contributors to the RIA’s damage estimate are onsite property damages and offsite property damages. Onsite property damages are estimated to cost, on average, \$4.16 million per accident per year. Offsite property damages are estimated to cost, on average, \$0.39 million per accident per year. Combined, these two categories account for 93% of the damages modeled in the RIA.

It is common to use averages in economic analysis but there are limitations. Averages are sensitive to extreme observations by construction. To illustrate, assume there are 10 incidents. If all 10 incidents each had onsite property damages of \$1 million, the average would be \$1 million. However, if nine incidents had onsite property damages of \$1 million and the ninth had property damages of \$10 million, the average across all incidents would be \$1.9 million. As demonstrated in this illustrative example, the average is skewed by the extreme observation and is not indicative

⁵⁵ Guidelines, p. 7-50.

⁵⁶ Guidelines, N 42 on p. 7-50.

of most incidents. For this reason, economists will consider alternatives to the average whenever extreme observations are present.

One alternative used by economists is to remove extreme observations from the calculation of the average (i.e., include nine, \$1 million incidents and remove the single \$10 million incident). Another approach is to use the median.⁵⁷ A median is the value that separates the lower half of the data from the upper half of the data. A median considers all data (i.e., the \$10 million incident is still relevant to the calculation). The median in the illustrative example is \$1 million which is more indicative of most incidents than is the average.

The RIA acknowledges that extreme values are present and “influence” their offsite property damages estimates.⁵⁸ Extreme values are also present in their onsite property damages estimates.⁵⁹ Given that onsite and offsite property damages comprise 93% of damages, the “influence” of these extreme observations is material to the break-even analysis. If median values for all categories of damages were used instead of averages, the Proposed Rule would need to prevent well over 100 incidents for it to break-even. Given that only 100 incidents occur each year, this break-even value is impossible. In other words, the Proposed Rule will *never* break-even.

EPA also employs other questionable methods in the break-even analysis.

- First, EPA cites data that suggests Sheltering in Place lasts “a few hours.” They also note Evacuations are typically completed in 5 hours. Nevertheless, EPA assumes that Sheltering in Place takes 4 hours and Evacuations take 8 hours. By inflating the number of hours necessary for the (rare) instances in which Evacuations or Sheltering in Place occurs, EPA inflates that component of the “damages.” While this is a small impact on the overall damages, EPA’s arbitrary assumptions lead to a lower break-even value than the data actually support.
- Second, to quantify the cost of Sheltering in Place and Evacuations, EPA uses a mean hourly rate across all workers of \$27.35. This hourly rate is sourced from a BLS data estimate. The BLS estimate is a national statistic that includes geographies not proximate to a regulated facility and may include careers that do not exist near a regulated facility. In addition to national statistics, BLS publishes Occupational Employment and Wage Estimates for Metropolitan and Nonmetropolitan Areas. This information could have been used to calculate a wage rate more applicable to the affected areas than what is currently used.
- Third, EPA used existing information from previous rulemakings in 2017 and reconsideration of Proposed Rules in 2019 as the basis for their monetized accident costs. Rather than collect more recent information, EPA relied upon data from

⁵⁷ In their second round of comments, the Office of Management and Budget (“OMB”) requested that median damages per incident be included in Exhibit ES-2. It is not unreasonable to infer that OMB’s request was driven by concern over EPA’s questionable use of averages in their analysis. (See, “2nd round comments from OMB,” available at https://downloads.regulations.gov/EPA-HQ-OLEM-2022-0174-0085/attachment_1.pdf, p. 9.)

⁵⁸ See notes associated with RIA, Exhibit 3-13.

⁵⁹ The onsite value of property damage per incident is \$8.38 million whereas all other years range from \$0.48 million to \$5.5 million. See RIA, Exhibit 3-9.

2004-2016 and adjusted them from 2015 dollars to 2020 dollars. This approach does not yield reliable estimates of current values and is methodologically inconsistent with the rest of EPA’s analysis. After all, for other categories of costs, EPA relied upon 2016-2020 information and did not merely adjust historical costs for inflation. To be consistent, EPA should have collected and used monetized accident costs from 2016-2020.

- Fourth, Exhibit 3-10 reports the annual average value of property damages is \$191.5 million. This value was not calculated correctly as it includes the Annual Average (\$32 million) in the calculation. When correcting the mathematical error, the Value of Property Damages falls from \$191.5 million to \$159.7 million.
- Fifth, the RIA asserts the Proposed Rule will have benefits.⁶⁰ However, there is no basis for EPA to make this assertion. For example, EPA assumes the STAA provision only requires regulated facilities to conduct a study, but that does not mean the STAA will identify practicable improvements. Office of Management and Budget (OMB) raised a similar point when it asked EPA “[s]ince the majority of the avoided damages are private, not to the surrounding communities, would EPA explain why these facilities would not mitigate these risks adequately even without EPA regulation?”⁶¹ The RIA does not answer OMB’s question.
- Sixth, EPA speculates that its estimate of STAA costs “may be a conservative estimate as recent advancements in technology target HF conversion and may be lowering conversion costs.”⁶² To the extent EPA is referring to technologies by Elessant Cleaner Technologies, AFPM notes the option is not yet proven on commercial scale and thus cannot be a reasonable basis to claim conservatism. Moreover, there is no basis to claim conversion costs at all as the Proposed Rule does not require conversion in the STAA provisions.
- Seventh, EPA admits that its cost estimate for the practicability study is “highly simplistic” and is not an accurate reflection of costs borne by facilities.⁶³ EPA acts arbitrarily and capriciously when it knowingly uses inaccurate data to justify expensive regulatory requirements.

Collectively, these modeling choices and errors yield an unreliable and fundamentally flawed break-even calculation.

VIII. EPA’S PROPOSED AMENDMENTS TO THE PHA PROCESS ARE UNLAWFUL AND UNDERMINE PROCESS SAFETY

The proposed amendments stray far from the well-settled understanding of a process hazard analysis. For decades, PHAs have played a key role in reducing the frequency and severity

⁶⁰ RIA, Exhibit 6-3.

⁶¹ “2nd round comments from OMB,” available at https://downloads.regulations.gov/EPA-HQ-OLEM-2022-0174-0085/attachment_1.pdf, p. 24.)

⁶² RIA, p. 37.

⁶³ RIA, p. 87.

of incidents through an iterative, performance-based process that worked in lockstep with OSHA’s PSM PHA elements. In contrast, the Proposal imposes several prescriptive obligations that conflict with existing regulations and undermine process safety. The proposed PHA amendments should be withdrawn.

A. The Proposed Gap Analysis for RAGAGEP Arbitrarily Ignores Benefits, Costs and Existing Regulations

CAA 112(r)(7)(B)(i) requires EPA to develop “reasonable regulations” that account for “voluntary actions of such sources to prevent such releases and respond to such releases.” In recognition of this statutory language, facilities are provided the flexibility necessary to apply recognized and generally accepted good engineering practices (“RAGAGEP”) to promote safety at a particular facility. Under the Proposed Rule, EPA would break from this longstanding application of RAGAGEP by imposing unreasonable, prescriptive requirements in the PHA.

The Proposal requires the PHA to address “[a]ny gaps in safety between the codes, standards, or practices to which the process was designed and constructed and the most current version of applicable codes, standards, or practices.”⁶⁴ EPA intends this Proposal to “clarify that PHAs must include an analysis of the most recently promulgated RAGAGEP in order to identify any gaps between practices related to the facility’s design, maintenance, and operation and the most current version of RAGAGEP.”⁶⁵

Nowhere in the preamble – or the rest of the administrative record – does EPA analyze the safety benefit of conducting a gap analysis of RAGAGEP. Unlike other provisions in the Proposal, EPA offers no analysis on whether gaps in RAGAGEP resulted in RMP reportable accidents, catastrophic releases, or other events. Nor does EPA offer anecdotal evidence of incidents and enforcement actions linked to gaps due to outdated RAGAGEP.

These omissions likely reflect that the existing RMP regulations already address EPA’s concern about gaps in RAGAGEP. Specifically, the relevant regulation on process safety information, 40 CFR § 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.*”⁶⁶ EPA adopted this regulation verbatim from OSHA’s PSM regulation,⁶⁷ and OSHA has made clear that its regulations require the verification of safe equipment, not a continual review of RAGAGEP.⁶⁸ Inexplicably, the Proposal fails to acknowledge § 68.65(d)(3) and its regulatory history. Nor does the Proposal explain how the gap

⁶⁴ Proposed Rule, 40 CFR 68.67 (c)(10).

⁶⁵ 87 Fed. Reg. at 53,605.

⁶⁶ *E.g.*, 40 CFR § 68.65(d)(3) (emphasis added).

⁶⁷ 61 Fed. Reg. 31,688, 31,711 (1996) (“Section 68.65, process safety information, is adopted directly from OSHA.”).

⁶⁸ OSHA Standard Interpretation (1910.119), RAGAGEP in Process Safety Management Enforcement (May 11, 2016), available at <https://www.osha.gov/laws-regs/standardinterpretations/2016-05-11> (last accessed Sept. 23, 2022) (emphasis in original); *See also, e.g., BP Products North America, Inc.*, OSHRC 10-0637, 27 OSHC 1391, at p. 15 (Sept. 27, 2018) (the duty to ensure RAGAGEP compliance must ... not be continual.”).

analysis would work in tandem with that regulation, which the Proposal fails to repeal or revise. Ignoring existing regulations is the essence of arbitrary government action.⁶⁹

EPA also omits the costs of gap analysis of RAGAGEP from the Proposal. The preamble offers not one word on the issue. Perhaps more surprising, the rest of the docket, including the RIA, is silent on the costs of the gap analysis. *Michigan v. EPA* requires agencies to consider costs as part of reasonable rulemaking, as discussed earlier.⁷⁰ EPA's failure to do so here renders the gap analysis arbitrary, and it should be withdrawn.⁷¹

The failure to consider costs in the RIA deprives the public of a fair opportunity to participate in the rulemaking process. The purpose of an RIA is to describe and quantify the potential social benefits and social costs of a Proposed Rule. RIAs allow stakeholders to assess the merits of Proposed Rule overall and compared to alternatives. To serve that purpose, an RIA must include all provisions in a Proposed Rule. Regulatory bodies – including the EPA – cannot pick and choose which provisions from a Proposed Rule to include in an RIA. Doing so leads to an underestimate of costs and would render any economic analysis of a Proposed Rule invalid, misleading, and uninformative to public policy. Stakeholders are not able to assess the full costs and benefits of the Proposal because the gap analysis is not included in the RIA.

As previously stated, EPA failed to conduct a proper benefit-cost analysis and instead relied upon a break-even analysis. Given this modeling choice, EPA did not need to quantify the social benefits of the gap analysis, only its social costs. This greatly simplified EPA's task in performing an analysis of the gap provision for the RIA. Despite this simplification, EPA still failed to account for the social costs of the gap analysis provision. The consequence of this omission is the break-even analysis does not include the full costs of the Proposed Rule and thus, yields an artificially low break-even value of 15 incidents. AFPM believes the gap analysis provision of the Proposal is a time and resource intensive exercise which is merely a paperwork exercise that will not improve safety or result in fewer incidents. As such, the break-even value would be substantially higher than what is presented in the RIA.

B. The Proposed PHA Requirement to Analyze Natural Hazards is Unlawful, Inconsistent, and Unreasonable

EPA's Proposal to add "external events such as natural hazards, including those caused by climate change or other triggering events that could lead to an accidental release" to the PHA at §68.67 exceeds the scope of authority for PHAs, conflicts with OSHA's PSM standards, and lacks a sound justification.⁷² Facilities already consider the effects of natural hazards, including those

⁶⁹ 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).

⁷⁰ 135 S. Ct. 2699 (2015).

⁷¹ The proposed gap analysis would be costly, requiring a facility to perform an extensive literature search so that facility standards address any and all published industry standards that may be applicable. This significantly departs from the existing regulation and would be extremely resource-intensive and burdensome. Each facility is unique and must have flexibility to apply the RAGAGEP appropriate for its unique circumstances. The time and resources that would need to be devoted to searching literature and updating facility standards under the Proposed Rule are better spent ensuring safe operation "on the ground" at the facility.

⁷² Proposal at 53,612.

that may be related to climate change, just like any other hazard. However, the Proposal would require evaluating undefined “external events” and seemingly require PHA teams to determine such hazards were “caused by climate change.” Such an evaluation by PHA teams is not only unreasonable, but would be overly burdensome given the expansive scope of events covered by EPA’s proposed text. PHAs specifically deal with the consequence (e.g., lost power as a result of flooding) – not the source of the consequence – when evaluating hazards of the process in a PHA. As such, EPA’s proposed revisions to the PHA for natural hazards is misplaced.

Natural hazards are also addressed as part of an evaluation of prior incidents in PHAs and in the context of other RMP requirements such as emergency response plans. As such, this aspect of the Proposal simply increases the costs by imposing a redundant requirement that yields no additional benefit. While EPA acknowledges this in the preamble and suggests the Proposal was simply “enhancing” existing practices, the regulatory text proposed (e.g., addressing undefined “external events” including those explicitly “caused by climate change”) erroneously places additional, ambiguous, and overly burdensome requirements in the PHA without conducting a full cost-benefit analysis or demonstrating the requirements, if implemented, would achieve EPA’s stated purpose.

1. Extending PHAs to Require Analysis of Natural Hazards Exceeds EPA’s Authority and Interjects Inconsistency and Confusion into the PHA Process

As noted above, EPA’s current PHA requirements are extensive and follow OSHA’s PSM standards. The proposed expansion of the PHA to specifically address undefined “external events” including natural hazards explicitly “caused by climate change” would dramatically alter the scope of PHAs and inappropriately wade into an area where OSHA has taken the lead. Notwithstanding EPA’s claim that the Proposal aligns with OSHA’s intent, the proposed regulatory text adds a new element of the PHA (i.e., “external events” and “natural hazards, including those caused by climate change”) that is not included in PSM and goes well beyond the established purpose of the PHA in addressing hazards “of” the process.

Importantly, the Proposal goes beyond the tradition scope of PHAs as PHAs cover hazards “of” or “in” the process, not hazards “to” the process.⁷³ EPA’s Proposal would have the PHA cover external (i.e., offsite) events, which EPA does not define in the Proposal, which may result in a hazard *to* the onsite process. Such events are not hazards *of* the process that PHAs were designed to evaluate.

As a practical matter, external events involve process hazards that have not yet occurred, and it is unreasonable for EPA to expect PHA teams to predict all potential off-site hazards to a process and it would be overly burdensome to conduct. PHA teams are not equipped to predict *future* natural hazards caused by climate change. Indeed, there is no utility in PHA teams conducting such an analysis. PHAs are only 5-year documents while the resources EPA mentions in the Proposed Rule, such as the Intergovernmental Panel on Climate Change (“IPCC”), model climate impacts out to 2050 and beyond, and would be inappropriate to use to forecast potential hazards posed at a site over a 5-year period.⁷⁴ The events EPA proposes would constitute a natural

⁷³ 40 CFR 68.87(a) (the PHA “shall identify, evaluate, and control the hazards involved in the process.”)

⁷⁴ Proposal at 53,568.

hazard (e.g., hurricanes, tornadoes, earthquakes, etc.) are the type of events likely to result in global impacts on the site. Such global impacts on a site are evaluated as part of “Facility Preparedness Plans or Business Continuity Plans”⁷⁵ – not the PHA – and are developed by a team with a different set of expertise than that of the PHA team.

There are also local and state building codes, site standards for wind, snow and seismic load and other predictable events as well as separate requirements imposed by insurers, if they cover business interruption. These plans have broader implications beyond process safety to environmental, food rations for ride out teams, go-no-go requirements based on wind speed, clean-up after a storm, etc. However, EPA failed to account for the other ways in which facilities address natural hazards such as facility response planning. This exclusion signals EPA’s possible lack of understanding of facility planning or purpose of the PHA that EPA must consider in explaining the basis for the Proposal, subject to public comment, before proceeding to finalize this requirement.

2. Natural Hazards Are Not Driving Incident Rates

In the preamble, EPA recognizes “many facilities with RMP processes are generally managing natural hazards well”⁷⁶ under the existing PSM regulations. Yet, EPA goes on to say, “however, some RMP accidents are still being reported as linked to natural hazards.”⁷⁷ Closer analysis of the RMP data demonstrates that natural hazards are not material to incident rates. EPA identifies 38 RMP-reportable accidents from 2004-2020 with a natural cause as the *initiating* event, but this accounts for only 1.5% of all reportable accidents during that time, and only 8 of these incidents occurred in the more recent 2016-2020 period. EPA identifies 46 RMP-reportable accidents from 2004-2020 where unusual weather conditions were listed as a *contributing* factor, but these represent only 2% of all reportable accidents during that time, and only 12 of these events occurred during the 2016-2020 period. Such a small universe of accidents does justify EPA imposing the far-reaching proposed changes to evaluate undefined “external events” in PHAs.

Moreover, if EPA were to consider the increase in extreme weather events against the number of RMP-reportable incidents, the Agency would see how effective the current regulations, local and state building codes and site standards and facility plans are at protecting facilities from accidental releases. The 8 accidents where a natural cause was reported as the initiating event during 2016-2020 reflects about 1-2 accidents *a year* while there are more than 1-2 “naturally occurring events” *each day*. According to the U.S. Government Accountability Office (“GAO”), EPA has looked for RMP incidents in the aftermath of major natural disasters such as hurricanes Harvey, Katrina and Rita and found only two accidental releases at facilities, neither of which were RMP-related.⁷⁸

In the preamble to the Proposed Rule EPA highlights only one incident in the discussion of natural hazards, which did not involve an RMP-covered process and does not justify a change

⁷⁵ 29 CFR 1910.38 (requiring facilities plan for predictable events).

⁷⁶ Proposal at 53,567.

⁷⁷ *Id.*

⁷⁸ Chemical Accident Prevention: EPA Should Ensure Regulated Facilities Consider Risks from Climate Change, U.S. Government Accountability Office, February 2022, p. 12.

in the RMP regulations.⁷⁹ EPA failed to appropriately consider such voluntary measures and the effectiveness of existing regulations and guidance on emergency planning. Given the frequency of natural events compared to the incredibly low number of associated accidents, facilities have clearly been effective at preventing and mitigating natural hazards. There is no reasoned basis for changing the existing PHA requirements.

3. The Natural Hazards Analysis is Vague

The proposed regulatory text regarding natural hazards is ambiguous and requires significant clarification that warrants a supplemental notice, subject to public comment. In the preamble, EPA asserts it “is not proposing additional regulatory requirements from what already exists in the RMP regulations, rather EPA is proposing adding regulatory text to emphasize that natural hazards . . . are among the hazards that must be addressed in hazard reviews and PHAs.”⁸⁰ But the proposed regulation aims more broadly, requiring a PHA of “*external events* such as natural hazards, including those caused by climate change *or other trigger events* that could lead to an accidental release.”⁸¹

The reference to external events should be removed. It is an undefined and vague term. Consistent with the due process clause, CAA Section 307(d) requires notice of proposed regulations and an opportunity to comment. That is impossible when the public must guess at EPA’s interpretation of the term “external events.”

The proposed requirement that the PHA include natural hazards “caused by climate change or other triggering events” is equally ambiguous. In the first instance, this provision is legally vulnerable as it appears to transform a longtime process safety program into one addressing climate change without explicit authorization from Congress.⁸² The language is also overly broad and appears to include events that go well beyond the proposed definition of natural hazards.⁸³ Further, this text creates an entirely new type of requirement for the PHA to not just identify the hazard, as defined in §68.3, but specifically those natural hazards “caused by climate change” per §68.67. This suggests facilities are required to separately identify natural hazards caused by climate change, yet EPA has provided no rationale in the preamble for such action. EPA must provide clarity on this regulatory text and the precise requirements on covered facilities. Further, there is no basis in RMP to identify a cause of an external hazard. The purpose of the PHA is to consider hazards to the process itself (e.g., losing power, overpressure, etc.), not the external events contributing to those hazards and certainly not the causes of such external events.

⁷⁹ Proposal at 53,568.

⁸⁰ *Id.*

⁸¹ Proposal at 53,612 (Proposed 40 CFR 68.67(c)(8)) (emphasis added).

⁸² *See West Virginia v. EPA*, 142 S.Ct. 2587 (2022) (Supreme Court vacated an EPA rule to address climate change under a different section of the CAA because the Agency failed to “point to clear congressional authorization for the authority it claims” when addressing a matter of such economic and political significance as climate change.).

⁸³ Proposal at 53,609 (“Natural hazard means naturally occurring events that have the potential for negative impact including meteorological or geologic hazards. Meteorological hazards include those that naturally occur due to the weather cycle or climatic cycles, and include flooding, temperature extremes, snow/ice storms, wildfire, tornado, tropical cyclones, hurricanes, storm surge, wind, lightning, hailstorms, drought, etc. Geologic hazards are those occurring due to the movement of the earth and the internal earth forces, and include seismic events, earthquakes, landslides, tsunamis, volcanic eruptions, and dam rupture.”).

While EPA refers to catastrophic accidents generally, the regulatory text requires analyzing external and triggering events that could lead to “any” accidental release. As a matter of administrative law, EPA fails to explain why such an analysis is necessary for “any” release, nor does the Agency address the more onerous approach as compared to the longstanding PHA requirement to analyze previous incidents that had a likely potential for catastrophic consequences.⁸⁴ Though EPA requests comments on more prescriptive and stringent requirements for natural hazards analysis, the Agency fails to consider alternatives such as analysis limited to potential catastrophic consequences.

Last, EPA ignored the impact such ambiguous terms would have on requirements outside the PHA. When evaluating the proposed regulatory text with other proposed changes, such as the requirement for a third-party audit, the broadly defined “climate change and other triggering events” could open the door to an inspector finding something that was not considered as the list of what may be considered a result of climate change or a “triggering” event, which results could be endless. Further, the infinite list of external events and associated recommendations from the PHA a facility must consider would also likely trigger an equally long list of rejected recommendations and justifications to be included in RMPs that could dilute the value of the content in RMPs reported to EPA. EPA must consider these possible impacts from the proposed language and provide much-needed clarity and explanation, along with an opportunity for the public to comment.

4. The Proposal Establishes an Infeasible Deadline for Natural Hazards Analysis

The Proposal establishes an infeasible compliance deadline for natural hazards analysis that seemingly ignores the 5-year schedule for PHA updates under §68.67(f) and would divert resources to comply with this provision without any consideration to the potential adverse impacts such as diluted PHAs. Specifically, per the proposed §68.10(a)(4), facilities will be expected to comply with the proposed §68.67(c)(8) requirement that PHAs address external events on the date the final rule is effective. As rules are typically effective on the date the final rule publishes in the Federal Register, this proposed deadline sets up an impossibility for facilities to comply with the requirements of the rule on day one. At minimum, the compliance date should be after a full 5-year cycle to comply with any new PHA requirements.

5. EPA Failed to Analyze the Costs and Benefits of the Natural Hazard Analysis

EPA ignores the costs and benefits of natural hazards analysis. It claims this proposed “requirement will ensure the threats of natural hazards are properly evaluated and managed to prevent or mitigate accidental releases,” but the record is bereft of any evidence of how the Proposal would actually prevent or mitigate accidental releases, let alone in a way that could be quantified and compared to any costs.⁸⁵

⁸⁴ Compare proposed 68.67(8) “that could lead to an accidental release” with (2) “the identification of any previous incident which had a likely potential for catastrophic consequences.”

⁸⁵ Proposal at 53,567.

EPA similarly failed to consider any costs associated with the proposed text. While EPA claims this is already required and it expects facilities to utilize existing resources, the Agency also states some facilities are not properly doing this, which could justify enhanced education and enforcement by EPA not a wholesale regulatory revision. Based on the ambiguous text in the Proposal, this requirement could significantly burden PHA teams. For these reasons a cost-benefit analysis of the provisions must be completed and subject to public comment before the Agency can proceed.

C. The Proposed PHA Analysis For Power Loss Exceeds EPA’s Authority and is Unnecessary

The Proposal would impose a specific requirement to evaluate standby or emergency power systems. While facilities presently consider power loss as a hazard in PHAs, the Proposal creates new obligations that are unlawful and arbitrary.

1. The Proposed Power Loss PHA Requirement Conflicts with the PSM Program

EPA’s Proposal to explicitly require evaluation of standby and emergency power systems diverges with OSHA’s PSM requirements in the PHA. While OSHA has guidance on power loss,⁸⁶ OSHA declined in the 1992 PSM rule to require an express regulation to mandate the consideration of power loss in PHAs because utilities are not covered processes. EPA’s Proposal would inappropriately create an inconsistency between the two regulatory programs, injecting ambiguity and uncertainty into the PHA process.

2. Power Loss Plays a *De Minimis* Role in Causing Incidents

Power loss accounts for less than 1% of all RMP reportable accidents that occurred from 2004 to 2020.⁸⁷ The RMP data over the 16-year period identified only 20 accidents linked to power loss.⁸⁸ None of these resulted in injuries to the public, offsite deaths, or offsite property damage. Of these 20 accidents, only 7 were from the 2016-2020 period, and none have been since 2018.⁸⁹ The negligible role played by power loss in incidents reflects the fact that facilities have existing systems to safely shutdown amid power loss.

Perhaps recognizing that the RMP data fails to show a power loss problem, EPA arbitrarily cherry picked the data in two respects. First, EPA considered National Response Center (“NRC”) data reporting releases under EPCRA/CERCLA, in addition to RMP data, to demonstrate that power loss may be a significant issue.⁹⁰ In contrast, the remainder of the Proposal only relies on the RMP reportable accident data. No explanation appears in the record to explain this discrepancy, but the effect of considering the NRC data is to inflate the number of events tied to power loss, even though “most of these incidents did not involve RMP chemicals, processes, or accidental

⁸⁶ See <https://www.osha.gov/laws-regs/standardinterpretations/2008-01-31>.

⁸⁷ EPA-HQ-OLEM-2022-0174, pg. 52

⁸⁸ Proposal at 53,569.

⁸⁹ EPA-HQ-OLEM-2022-0174-0065.

⁹⁰ Proposal at 53,569.

releases.”⁹¹ Second, EPA used RMP data back to 2004 to justify addressing power loss, but insisted on using a 2016-2020 range for the same data in justifying other aspects of the Proposal.⁹² No explanation appears in the record to explain this arbitrary difference in methodology, but it again has the effect of increasing the number of incidents tied to power loss.

3. Existing RMP Regulations Address Power Loss at a Site

The Proposal ignores that if the site identifies the possibility of power loss, it would be addressed in the PHA process already. Power loss is a possible consequence when facilities evaluate the effects of a failure of engineering and administrative controls such as detection methodologies that provide early warnings of a release in PHAs. Power loss may be considered as a lesson learned from reviewing previous incidents at other facilities in a PHA.⁹³ Program 3 facility RMPs also consider the potential effect of power loss on process control systems.⁹⁴

4. EPA Should Clarify Ambiguities About Power Loss Analysis

The Proposal’s analysis of the power loss issue is ambiguous and should be clarified in a supplemental notice of Proposed Rulemaking. For instance, EPA states that it is not requiring standby/emergency power for “the entirety of an RMP process,” but only for “air pollution and monitoring equipment associated with prevention and detection of accidental releases.” Another part of the preamble discusses the need for standby/emergency power to ensure continuous monitoring “during and following” an incident. Indeed, nothing in the regulatory text suggests the analysis of standby/emergency power is limited to a specific period of time. EPA should issue a supplemental Proposal that clarifies the proposed requirements and rationale to ensure a meaningful opportunity to comment. The preamble to the Proposed Rule suggests the otherwise voluntary monitoring will become mandatory. However, based on the proposed regulatory text, it is ambiguous whether EPA intended to repeal the acceptable detection methods for releases currently codified at 40 CFR §68.67(3).⁹⁵ If EPA intended to require back up power for monitoring each system during power outages—that would not only exceed EPA’s authority under RMP but would impose a significant cost not considered by the Agency.

EPA should also clarify the type of equipment the Proposal is meant to address. There are many examples of air monitoring systems used to detect accidental releases and it is not clear which equipment EPA is referring to concerning its stated expectation for standby/ emergency

⁹¹ *Id.*

⁹² Proposal at 53,570.

⁹³ 40 CFR 68.87 (2), (3), (4), and (7).

⁹⁴ 40 CFR 68.175(e)(4).

⁹⁵ 40 CFR 68.67 (3) (“(Acceptable detection methods might include process monitoring and control instrumentation with alarms, and detection hardware such as hydrocarbon sensors.)”). The current regulatory text at 40 CFR 68.67(c)(3) states the PHA shall address “[e]ngineering and administrative controls applicable to the hazards and their interrelationships such as appropriate application of detection methodologies to provide early warning of releases. (Acceptable detection methods might include process monitoring and control instrumentation with alarms, and detection hardware such as hydrocarbon sensors.)” The Proposed regulatory text for 68.67(3) states, “[e]ngineering and administrative controls applicable to the hazards and their interrelationships such as appropriate application of detection methodologies to provide early warning of releases and standby or emergency power systems.” Because the proposed regulatory text does not include the acceptable detection methods in parentheses under the current regulation, it is unclear whether EPA is rescinded the language or inadvertently withheld it from the regulatory text in the Proposal.

power. For instance, refiners, petrochemical facilities, resin producers and other RMP affected industries are required to monitor for Pressure Relief Device (“PRD”) releases to the atmosphere for PRDs in hazardous air pollutant service (e.g., benzene). As another example, vinyl chloride producers and PVC resin producers are required to have ambient monitoring systems within their units to detect accidental releases of vinyl chloride monomer. Indeed, EPA and states require many other monitoring systems such as: gas chromatographs, mass spectrometers, calorimeters, Continuous Emission Monitoring Systems (“CEMS”) for NO_x, SO₂, etc., as well as fence line and community monitoring systems. Most of these monitoring systems are for the purpose of routine process control or compliance with emissions limits under various provisions of the CAA. They are not intended or designed for the detection of RMP accidental releases, and most would be ineffective for that service. Yet, EPA’s Proposal would bring all CAA-required monitoring under the umbrella of RMP, and require under RMP back up power for systems that are unrelated to RMP.

5. The Proposal Underestimates the Costs of Power Loss Analysis

EPA ignores its obligation to fully consider costs of the proposed requirements and fails to consider feasibility issues for facilities that may trip Safety Instrumented Systems (“SIS”) before back-up power can come online. SIS and other fail-safe systems provide a way to address the hazard of losing power without requiring back-up power. While the agency at least provides an estimate of \$0.4 million undiscounted costs of emergency backup generators for perimeter monitors, this is an underestimate as there is no discussion of costs associated with fuel, batteries, or installation. EPA should have also considered feasibility issues with all RMP facilities trying to get fuel or batteries at the same time. In addition, EPA failed to consider unintended consequences of cogeneration on standby or provide any discussion of environmental or safety impacts associated with additional power demands.

D. The Proposed Stationary Source Siting Requirements are Infeasible and Unlawful

The existing RMP regulations require consideration of “stationary source siting” as part of the PHA.⁹⁶ The Proposal expands upon this text by requiring such siting include “the placement of processes, equipment and buildings within the facility, hazards posed by proximate facilities, and potential accidental release consequences to nearby public and environmental receptors.”⁹⁷

1. PHA Requirements for Proximate Facilities Are Undefined and Infeasible

Under the current rules, source siting involves addressing the hazards *of* the onsite equipment in the PHA. The Proposal breaks from that traditional approach because EPA would require evaluation of all the potential hazards, including offsite hazards from “proximate facilities,” *to* the onsite equipment.

But the Proposal provides little to no guidance on what EPA proposes to designate as proximate facilities. Other provisions of the Proposed Rule designate specific numeric distances for other requirements such as a 6-mile radius for the information sharing. In contrast, EPA is

⁹⁶ 40 CFR 68.67(c)(5).

⁹⁷ Proposal at 53,612.

silent on what distance makes a facility proximate. Use of the term “proximate” instead of “adjacent” as applied in other sections of the Clean Air Act, raises additional ambiguity.⁹⁸ In addition to the vagueness of proximate, the Proposal fails to specify what type of facilities are to be considered. The regulatory text is silent on that issue. The preamble could be read to suggest that a proximate facility include both RMP-covered and non-RMP facilities, but ultimately provides no definition of proximate facilities for the public to consider and comment upon.

Even if a PHA team could discern the meaning of proximate facilities, the PHA analysis would be infeasible. The team tasked with conducting a PHA at a site would likely have no idea about the steps that proximate facilities take to comply with RMP and otherwise address hazards. The Proposal fails to address several practical questions that make this kind of kind of hazard assessment an impossible task, including:

- What authority would allow a PHA team to compel a proximate facility to provide information?
- How would the PHA team address the potential sharing of proprietary information and/or trade secrets?
- How would information sharing be conducted while protecting against antitrust concerns and other issues?

None of the answers to these questions can be found in the preamble, which is silent on how proximate facilities would be addressed in the PHA.

2. PHA Requirements for Equipment Within Facilities Should be Narrowly Construed to Avoid Intruding Upon Local Zoning Decisions

The proposed PHA requirements on the “the placement of processes, equipment and buildings within the facility” should be narrowly interpreted to preserve local zoning authority. Local land use controls are an area of traditional state authority, and, as such, require a clear statement from Congress to preempt.⁹⁹ Indeed, the Supreme Court has recognized, “zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities.”¹⁰⁰ There is no authority in CAA Section 112(r)(7), much less a clear statement, that would authorize the EPA to create some type of boundary between covered facilities and proximate facilities. Indeed, the preamble to the Proposal notes that commenters raised this concern in an earlier phase of this rulemaking, but tellingly the agency provided no response to such comments.¹⁰¹

⁹⁸ See, e.g., *Summit Petroleum v. EPA*, 690 F.3d 733 (2012) (analyzing adjacency under Title V of the Clean Air Act).

⁹⁹ *Gregory v. Ashcroft*, 501 U.S. 52 (1991); *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

¹⁰⁰ *Warth v. Seldin*, 422 U.S. 490 n.18 (1975); see also *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments.”).

¹⁰¹ Proposal at 53,573.

3. Nothing in RAGAGEP and Applicable Guidance Mandates Relocating Existing Equipment at Facilities

PHA currently requires evaluation of stationary source siting and most companies perform siting studies using industry guidance such as the API RP 752 and 753 or the CCPS Guidelines that evaluate onsite receptors – not offsite. However, none of these recommended practices and guidance documents require facilities to move existing equipment. The PHA may account for potential consequences associated with offsite receptors qualitatively. However, the impact of one unit to another at an adjacent facility is outside the scope of the PHA, which is focused on hazards of the process to prevent and mitigate consequences of accidental releases. Any impacts an RMP facility might have on adjacent facilities are already factored into the required worst case scenario offsite consequences analysis and is part of facility’s emergency response plan.¹⁰² Yet, EPA does not address the adequacy of these requirements or reconcile these requirements with the Proposal, nor does the Agency state how the proposed requirements would actually prevent and mitigate the consequences of an accidental release.

4. The Record Fails to Support Imposing New Stationary Source Siting Requirements

EPA’s justification for the proposed siting requirements is a handful of inapposite incidents. Several incidents date back well before the PSM and RMP rules were promulgated and actually served as the basis for PSM in the first place.¹⁰³ These examples offer inadequate support for the current Proposal. The list of seven also included the 2013 West, Texas explosion caused by arson that had nothing to do with the RMP regulations. Only one of the seven examples occurred since the 2019 rule took effect and it was an incident outside the United States where similar zoning ordinances either do not exist or differ significantly and another example did not include a release.¹⁰⁴ Thus, the data does not support the Proposal.

In regard to qualitative support, EPA’s reasoning is flawed and inconsistent. EPA asserts “accidents continue to happen” as a reason for requiring siting evaluation to “ensure protection of human health and the environment.”¹⁰⁵ However, Congress designed the program to prevent and mitigate the impacts of accidental releases, it did not require or assume no accidents. EPA also claims the Proposal is needed to address the increased likelihood of “knock-on” secondary releases by a nearby process. While the preamble suggests such releases are common, it includes no concrete examples.¹⁰⁶ Instead, EPA references two source siting enforcement actions against facilities that had no reported incidents.¹⁰⁷ These anecdotal references are insufficient basis for EPA to change nearly 30 years of source siting requirements rooted in the PSM regulations.

¹⁰² 40 C.F.R. §68.25, §68.95

¹⁰³ Proposal at 53,751 (e.g., 1984, Bhopal, India; 1984, Juan Ixhuatepec, Mexico; 1994, Port Neal, Iowa, U.S.).

¹⁰⁴ *Id.* at 53,572 (i.e., 2020, Visakhapatnam, Andhra Pradesh, India).

¹⁰⁵ *Id.*

¹⁰⁶ EPA references a 2016 case of an RMP accident that was also listed in a 2018 OSHA enforcement action. A subsequent enforcement action under PSM is not evidence of a “knock-on” release or recurring accident as EPA suggests.

¹⁰⁷ *Id.* at 53,573.

E. The Proposed Recordkeeping and Reporting Obligations are Unnecessary and Counter-Productive

Facilities are currently required to have a system to address and resolve the PHA team's recommendations, which the facility must document and retain.¹⁰⁸ Under the Proposal, EPA would impose a new requirement for facilities to report rejected PHA recommendations and the justification for the rejection in its RMP submissions. While EPA has failed to articulate any risk reduction or reasoned basis for reporting such rejected recommendations in RMPs, the Agency also failed to consider the risks of possibly diluting recommendations in the PHA or costs of additional burdens on PHA teams.

Specifically, EPA proposes Program 3 RMPs include justifications for recommendations declined regarding:

- Natural hazard evaluations;
- Power loss evaluations;
- Siting hazard evaluations; and
- Safety gaps between codes, standards, or practices to which the process was designed and constructed and the most current version of applicable codes, standards, or practices.¹⁰⁹

This is an unnecessary paperwork burden. As noted, there are existing regulatory requirements and internal processes to respond to PHA recommendations. The corresponding hazards, controls, and changes pursuant to PHA recommendations are currently required to be included in RMPs. There is no reasonable explanation for requiring the reporting of rejected recommendations, including a justification. Indeed, there is no requirement to provide a justification for any other PHA-related element of the RMP. It is inexplicable for EPA to specifically call out rejected PHA recommendations that are associated with only the new PHA requirements under the Proposal. EPA provides no reason why recommendations associated with natural hazards, power loss, or siting hazard evaluations are any different than the other PHA requirements. Indeed, stationary source siting and human factors are currently required under the PHA and not specified for inclusion in RMPs, and EPA has failed to explain why the Proposed Rule's approach is reasonable to justify departing from current regulatory requirements.

Aside from the lack of rationale, EPA failed to conduct any analysis of the impacts of this proposed requirement, including the costs of compliance. EPA does not consider the labor costs and time that would be devoted to preparing a written justification for rejected recommendations, time—resources that could be better spent on implementing accepted recommendations. For EPA to focus on what was rejected may also have the conflicting incentive for PHA teams to hold back recommendations and ideas to avoid the scrutiny and exposure from reporting to EPA, and ultimately, the public through the expansive proposed information disclosure requirements.

¹⁰⁸ 40 CFR 68.67(e), (g).

¹⁰⁹ Proposal at 53,615 (Proposed 68.175(e)(8)-(9)).

Overall, the Proposal fails to recognize the role and expertise of the PHA teams and how these requirements would overly burden PHA teams.

F. The Updated PHA Deadline Should Be Clarified

Most of the major new provisions of the Proposal would become due 3 years after the effective date of the final rule, including STAA and third-party audits.¹¹⁰ However, EPA would apparently require facilities to comply with the proposed revisions in their PHAs upon the effective date of the rule,¹¹¹ which could theoretically be set as early as 30 days after publication in the *Federal Register*.¹¹² That deadline is infeasible because it would take years to address the host of expansive new PHA requirements that require analysis of a wide range of issues, from metrological analysis of natural hazards to the potential risks posed by proximate facilities. Accordingly, EPA should clarify that the deadline for any new requirements is when the PHA becomes due as part of its 5-year cycle, or 3 years after the effective date of the final rule, whichever comes later.

IX. EPA'S PROPOSED REINSTATEMENT OF STAA WOULD IMPOSE BURDENSOME REQUIREMENTS THAT FAIL TO ADVANCE PROCESS SAFETY

EPA proposes to require a STAA in PHAs for (1) refiners (i.e., NAICS 324) and chemical plants (i.e., NAICS 325) that are located within 1-mile of another chemical plant or refinery, and (2) any refineries with HF alkylation processes.¹¹³

The proposed STAA would require documenting in the PHA process the consideration of safer alternatives, including the practicability and feasibility of implementing inherently safer technologies and alternatives. Although EPA acknowledged that facilities may elect not to implement STAA because of cost, the agency proposed an evaluation of practicability be first based on technological, environmental, legal, and social factors, with economic considerations evaluated last. In the alternative, EPA requested comment on requiring the implementation of STAA.¹¹⁴

The data show no process safety benefit, while the costs and burdens of going through the exercise are high. It was for those reasons that EPA rescinded STAA in the 2019 rule. Nothing has changed except the party controlling the White House and additional years of data that still demonstrate no value from STAA outside of the design phase. EPA should withdraw the STAA requirement.

A. STAA Delivers No Meaningful Safety Benefit

EPA has previously acknowledged there would be no risk reduction or safety improvements from mandating STAA. The original 1996 RMP rulemaking recognized mandating STAA would not incrementally improve process safety.¹¹⁵ EPA then noted, as holds true today,

¹¹⁰ Proposal at 53,609-10 (Proposed 40 CFR §68.10)

¹¹¹ *Id.*

¹¹² *See* 5 U.S.C. § 553(d).

¹¹³ Proposal 53,612.

¹¹⁴ *Id.* at 53,575-80.

¹¹⁵ 1996 RMP Rule at 31,699.

that where IST/ISD exists for in-use process units, industry may adopt it voluntarily. In the 2019 rule, EPA evaluated RMP data compared to states with STAA-like programs such as New Jersey and Contra Costa County, California. After a careful evaluation of the incident data, EPA found that facilities in those states had higher accident rates than the national rates and thus, STAA would not be an effective risk-reduction measure on a national scale.¹¹⁶

In the Proposal, EPA admits that its 2019 analysis of STAA in New Jersey and other jurisdictions remains valid.¹¹⁷ Instead, “EPA contends that it is more appropriate to emphasize in this rulemaking factors like the expert views of CSB and other researchers, case studies, and EPA’s technical judgment rather than the analysis comparing accident rates under the New Jersey TCPA to national rates”¹¹⁸

That vague conclusion is arbitrary. Repeatedly in the Proposal, the agency emphasizes the importance of assessing real-world data on reportable accidents and incidents, but in evaluating STAA rejects that data when it leads to an unwanted conclusion. The Proposal also fails to articulate what “expert views” and “case studies” would warrant overruling real-world incident data and seemingly ignores the expert views of the engineers and scientists working every day to safely manage facilities. The overall impression left by EPA’s analysis is that it is relying on a results-oriented approach, rather than a reliable process safety methodology.

B. Mandatory Imposition of STAA Would Run Afoul of the Statute and Reasoned Decision-Making

While the Proposal requires certain facilities to conduct a STAA, EPA states that IST is not required and effectively characterizes the STAA provisions as an information collection and documentation of decision-making on safer technologies.¹¹⁹

Nonetheless, EPA requests comments on requiring the implementation of STAA. In response, AFPM respectfully submits that mandatory STAA implementation should be rejected for two reasons.

First, the statutory provision of the CAA that EPA relies upon, Section 112(r)(7)(B), fails to provide authority to impose IST or other design requirements as part of STAA. Unlike other provisions of the CAA,¹²⁰ Section 112(r)(7)(B), which required EPA to promulgate the RMP

¹¹⁶ Proposal at 53,578. The lack of any indicators showing a process safety improvement in New Jersey and other “STAA jurisdictions” may result from the fact that conducting STAA for existing facilities or operational processes rarely leads to actionable outcomes. Further, passive, active, or procedural controls identified in existing PHAs and other RMP and PSM elements such as Management of Change and incident investigations are adequate and effective.

¹¹⁷ *Id.* at 53,579.

¹¹⁸ *Id.*

¹¹⁹ The agency, nonetheless, claims that implementing IST in chemical and refining sectors may prevent serious accidental releases in the future. EPA cannot have it both ways: it cannot suggest the purpose of the STAA provisions are to achieve a certain risk reduction and simultaneously suggest the STAA provisions are nothing more than a paperwork exercise.

¹²⁰ *See, e.g.*, CAA Section 112(r)(7)(A), 42 U.S.C. § 7412(r)(7)(A) (general duty clause); CAA Section 213(c) (non-road engine standards), 42 U.S.C. § 7547 (non-road engine standards).

program, makes no mention of granting EPA authority over covered process design. Had Congress intended to grant EPA authority over facility design in RMP, it would have said so.¹²¹

In accordance with our view of the statute, Congress has repeatedly rebuffed amendments to the CAA that would allow EPA to mandate IST. The first such attempt came about in 1999, through the Chemical Security Act of 1999, which proposed amendments to CAA § 112(r) that would have required chemical facilities to prepare vulnerability assessments, implement on-site security improvements, and adopt IST “to the maximum extent practicable.”¹²² These efforts intensified after the events of September 11. In October 2001, former Senator Jon Corzine (D-NJ) introduced new chemical security legislation that would have required EPA to set chemical security standards and mandated the use of “practicable” IST at the most hazardous facilities.¹²³ The bill never came up for vote on the floor and subsequent versions of this legislation were also unsuccessful.¹²⁴

Congress has also barred DHS from enacting IST. In 2006, Congress inserted a single-page amendment into a Senate appropriations bill that gave DHS broad authority to set temporary security standards for the “chemical facilities that, in the discretion of the Secretary, present high levels of security risk.”¹²⁵ The regulations under this mandate are referred to as the Chemical Facility Anti-Terrorism Standards (“CFATS”). The legislation authorizing the CFATS, however, specified that DHS “may not disapprove a site security plan. . . based on the presence or absence of a particular security measure.”¹²⁶ DHS has correctly interpreted this provision to prohibit DHS from mandating the use of IST.¹²⁷

Congress has spoken directly and repeatedly to EPA and DHS on STAA, particularly IST, denying them that authority. This broader legislative context makes clear that Congress never intended for EPA to go its own way and regulate IST without specific authorization. Against this backdrop, EPA should withdraw the STAA provision unless and until Congress affirmatively grants it authority to mandate STAA.¹²⁸

Second, EPA lacks the cost information about implementing STAA that would allow it to engage in reasoned decision-making. The cost of implementing IST and other measures may vary significantly across the range of sites and the options selected. Nothing in the record indicates that EPA has surveyed relevant ISTs and their costs. In the preamble, EPA acknowledges that “EPA

¹²¹ *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).

¹²² Chemical Security Act of 1999, S. 1470, 106th Cong. § 3(b) (1999).

¹²³ Chemical Security Act of 2001, S. 1602, 107th Cong. § 3(7) (2001).

¹²⁴ *See, e.g.*, Chemical Facilities Security Act of 2003, S. 994, 108th Cong. (2003).

¹²⁵ Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 550(a) (2006).

¹²⁶ *Id.*

¹²⁷ 72 Fed. Reg. 17,688, 17,718 (Apr. 9, 2007) (“[The chemical security rider] prohibits the Department from disapproving a site security plan ‘based on the presence or absence of a particular security measure,’ including inherently safer technologies.”). In 2014, Congress amended CFATS, but did not authorize IST. *See* Pub. L. 113-254. Thus, DHS’ prohibition on IST remains.

¹²⁸ *See, e.g.*, *FDA v. Brown & Williams*, 529 U.S. 120 (2000) (superseded by statute) (considering decades of congressional legislation and other statutes in deciding whether Congress had spoken directly to the issue of FDA’s authority).

has little information on the potential costs of large STAA projects.”¹²⁹ Without this cost information, EPA is unable to engage in the reasoned decision making required by *Michigan v. EPA*, particularly the consideration of costs of proposed measures.¹³⁰

C. EPA’s Requirement to Conduct STAA for Refineries and Chemical Plants Within a 1-Mile Radius Is Based on Flawed and Incomplete Data

To support STAA for refineries and chemical plants within a 1-mile radius, EPA points to the raw number of accidents that have occurred at such facilities. However, it appears that EPA included duplicate facilities in its analysis since many of the chemical plant (NAICS 324) and refinery (NAICS 325) facilities reported in “facility-dense” areas have the exact same latitude and longitude. This error by the EPA exaggerates the number of facilities in “facility-dense” areas. Their analysis also includes duplicate facilities that have slightly different latitudes and longitudes from each other, and does not consider whether proximate facilities are located in rural or urban population centers. EPA must reassess its analysis by ensuring only unique facilities are counted.

First, the Agency inappropriately applies a sector-wide flawed assumption on NAICS 324 and 325 facilities without normalizing the data. EPA asserts, that facilities with NAICS 324 and 325 codes experience more frequent accidental releases than the rates for all regulated facilities combined. In explaining why, the Agency did not normalize accident rate data using criteria other than a per facility basis, EPA claimed that the number of processes at large facilities were “arbitrary” and did not make adjustments for facilities that included many processes, as compared to facilities with just a single process. However, when normalized on a per process basis, the accident rates for NAICS 324 and 325 facilities are more aligned with the rate for all regulated facilities (2-3%). EPA’s failure to present this normalized data is arbitrary.

EPA should also reconsider the proper definition of “facility-dense” areas. For example, approximately 40% of the facilities the EPA identified as being located within a “facility-dense” area have only one other NAICS 324/325 facility located within 1-mile, with a second facility located, on average, approximately 40-miles away. Indeed, EPA postulates “increasing the likelihood of a secondary ‘knock-on’ release by compromising nearby processes,” but does not reference EPA RMP data or other data to justify such statements.¹³¹

While EPA states 1-mile as the median distance of facilities with NAICS 324 and 325 processes that have had accidents from 2016 to 2020, and the nearest adjacent NAICS 324/325 facility, this is irrelevant without comparing reportable incident data of the adjacent NAICS 324/325 facilities. EPA claims that communities in areas with NAICS 324 and 325 facilities “face overlapping vulnerability zones and a heightened risk of being impacted by an accidental release” without providing sufficient data to support this claim compared to other NAICS facilities. EPA has not provided any data demonstrating that any of the 563 facilities the Agency claims to be in “facility dense” areas are located near public (or residential) communities.

Analysis of EPA’s data demonstrates that if one large event (i.e., the November 2019 TPC Port Neches incident) is excluded from the analysis as an outlier, *none* of the 64 other incidents

¹²⁹ Proposal at 53,580.

¹³⁰ 576 U.S. 743 (2015).

¹³¹ EPA-HQ-OLEM-2022-0174, pg. 57.

between 2016 and 2020, which involved 324/325 facilities in “facility dense” areas, caused any offsite property damage. This selection also fails to account for concentrations of these facilities that exist in proximity to one another as compared to, on the other hand, the number of facilities that exist more than 1-mile from other such facilities but have similar accidents.

D. The Proposal Sets an Unreasonable Compliance Schedule for STAA

Under the proposed §60.10(g), a facility must comply with the STAA provisions within 3 years of the final rule’s effective date. But the Proposal also requires that PHAs, which include STAAs, be updated every 5-years. AFPM respectfully suggests that, if EPA finalizes STAA, it maintains the 3-year deadline for completing the STAA, but remove the requirement to prepare a new STAA every 5-years. Imposing potentially overlapping 3-year and 5-year deadlines might result in unduly burdensome and repetitive STAA analyses that would add no value.

E. EPA’s Cost Assessment of STAA is Flawed

The RIA purports to compare the costs of the Proposed Rule to two regulatory alternatives.¹³² The high-cost regulatory alternative includes higher cost versions of the STAA and third-party audit provisions. The low-cost regulatory alternative keeps the STAA costs unchanged relative to the Proposed Rule but considers lower cost alternatives for root cause analysis, third-party audits, and employee participation. No lower cost option for the STAA is considered for the low-cost option even though it is the largest cost provision within the Proposed Rule. Indeed, the STAA represents 70% of the total costs EPA estimates apply to the Proposed Rule.¹³³ Given this burden on the industry, EPA should have considered a less expensive version of the STAA provision when preparing its lower cost alternatives analysis. This is especially true given unproven and unquantified benefits of the STAA provision.

X. EPA’S PROPOSED STAA REQUIREMENTS FOR HF FACILITIES ARE ARBITRARY AND BASED ON FLAWED ASSUMPTIONS

In addition to the legal, technical, and policy concerns associated with the proposed STAA provisions noted above, EPA’s proposed targeted application of STAA to NAICS 324 facilities with hydrofluoric acid (HF) alkylation processes is arbitrary, based on flawed assumptions and missing analyses that require EPA’s reconsideration. Once a facility is up and running, most alternative technologies are no longer feasible to implement, particularly where refinery fuel alkylation is concerned. In nearly all cases, new technology cannot be slotted in without completely reconstructing individual units and potentially reconfiguring entire facilities, which would come with major costs and the potential to severely impact U.S. fuel supplies. Furthermore, on-going PHA studies, other risk assessments, and 3-year HF alkylation unit audits have identified improvement opportunities—based on current technologies and industry knowledge—that have led to safer HF alkylation processes. Therefore, the highest value option is to allow resources to continue to utilize the PHA process and standards to reduce risk versus distracting these resources by performing STAAs that inherently will not reduce risk.

¹³² RIA, Section 7.

¹³³ RIA, Exhibit ES-1.

A. EPA’s blanket requirement of STAA for all refineries with HF-alkylation is unlawful and arbitrary

As noted above, EPA has no legal authority to mandate STAA on *existing* processes. In addition, EPA’s proposed STAA requirements on *all* HF alkylation processes at petroleum refineries (i.e., NAICS 324) is arbitrary and unlawful. EPA overstated the risk and discussion of potential benefits by ignoring the HF mitigation measures currently deployed at these facilities. Data shows incidents of HF releases at refineries have gone down after API 751 was first issued as well as after the 2007 and 2013 updates. At the same time, HF releases from other industries has been flat over the years.

Of the 46 RMP-reportable incidents involving the release of HF at NAICS 324 facilities included in the EPA data from 2004-2020, over 60% resulted in the release of 1 pound of HF or less. Between 2016 and 2020, there have been only 4 incidents involving HF and none resulted in injuries to the public, offsite deaths, offsite property damage, shelter-in-place, or evacuations.¹³⁴ This is attributable, in part, to the evolving recommended practices for HF alkylation units, in API 751. For example, the 3rd edition of API 751, published in 2007, required that early detection and rapid mitigation of a release should be considered in the refiner’s process hazards management program.¹³⁵ After the publication of the 4th edition in 2013, which required that mitigation systems capable of continuous HF release detection, remotely activated/controlled water mitigation, and an event management system shall be provided,¹³⁶ the number of HF incidents decreased by a third of the previous rate, from 4.0 accidents per year in 2008 – 2013 to 1.3 accidents/year in 2014 - 2020. The latest edition of API 751, published in 2021, added additional safeguards to protect against the accidental release of HF by requiring refiners to develop a special emphasis inspection program to inspect all carbon steel components for five HF corrosion zones.¹³⁷ Yet, EPA provides no comparison of refinery facilities to other facilities utilizing HF. The lack of comprehensive data also undermines the public’s opportunity to meaningfully comment on the Proposal.

B. EPA imposes unjustified and underestimated costs on HF alkylation facilities

In nearly all cases, replacement technologies cannot be slotted in without completely reconstructing individual process units and potentially reconfiguring entire facilities. Alkylation technology cannot be changed in a vacuum. Disrupting this one process would have impacts across a facility, potentially resulting in a range of other costly problems such as more expensive gasoline; gasoline and other fuel shortages; higher dependence of fuel imports; potential refinery shutdowns; and job losses.

¹³⁴ The EPA RMP data does not include the June 2019 event at Philadelphia Energy Solutions.

¹³⁵ API 751 – 3rd Edition (2007) – Safe Operation of Hydrofluoric Acid Alkylation Units, Section 6.4 Active Mitigation Systems.

¹³⁶ API 751 – 4th Edition (2013) – Safe Operation of Hydrofluoric Acid Alkylation Units, Section 6.2 Mitigation Systems.

¹³⁷ API 751 – 5th Edition (2021) – Safe Operation of Hydrofluoric Acid Alkylation Units, Section 6.4.2.3.3 Special Emphasis Piping Inspection Programs and Annex G. The special emphasis inspection program addresses the direct cause of the June 2019 event at Philadelphia Energy Solutions.

C. EPA failed to consider feasibility of HF alternatives and conduct a risk-switching analysis

In proposing STAA for HF refineries, EPA states there are recognized potentially safer alternatives to HF implemented at refineries, such as sulfuric acid alkylation, ionic liquid alkylation, or solid acid catalyst alkylation. However, EPA disregards the feasibility and potential risks associated with implementing these alternatives at existing facilities and does not consider the full costs of switching, which would force shutdowns and involve rebuilding and decommissioning of existing units. Based on these shortcomings, EPA lacks a reasoned basis to impose a STAA on these units.

As long as the world needs gasoline, there will be demand for alkylate. Alkylate is a low-emission gasoline blendstock that is also very high in octane. Gasoline with the highest environmental specifications—such as the California Reformulated Gasoline Blendstock for Oxygenate Blending (“CARBOB”)—requires alkylate. Alkylate is produced in refinery alkylation units and is the product of a chemical reaction started by a catalyst—primarily HF or sulfuric acid. Though other catalyst technologies are in various stages of testing and development, roughly half the alkylate produced in the United States at present is made with HF or modified HF (“MHF”), which has a vapor suppression additive. The other half is made using sulfuric acid.

While EPA refers to alternatives to HF alkylation units, the Agency has not analyzed the risks, unintended consequences, and feasibility of switching these units to the alternatives EPA referenced. For instance, solid acid is not commercially viable and ionic-liquids alkylation is in its infancy, and EPA has not analyzed and explained the hazards of these alternatives in the Proposal. As such, EPA’s Proposal suggests alternatives that may potentially pose a greater risk than HF. It is not only premature, but also a dereliction of EPA’s duty, to suggest alternatives the Agency has not even evaluated for potential hazards. For this reason, EPA must strip these alleged alternatives from the rule record.

The hazards of sulfuric acid are known and despite differences with HF hazards, sulfuric acid is still a hazardous chemical that can result in severe consequences, both on-site and off-site. The aggregate risk between sulfuric and HF alkylation are relatively equal given all of the safety and mitigation measures employed at refineries. Because the risks between the two are equal, there are no benefits attributed to EPA’s proposed requirement to switch. In addition, the costs of such a switch are enormous and may drive refineries to closure – all impacts EPA failed to consider. Thus, a wholesale replacement of U.S. refineries’ HF alkylation capacity with new sulfuric acid alkylation units would involve significant expense as well as practical difficulties and would likely not result in risk reduction to the public or environment, especially when compared to the cost or benefit of alternative courses of action.

Replacing 100% of the existing HF alkylation unit capacity with sulfuric acid capacity across 41 refineries would require a total capital investment cost of \$15 to 45 billion, excluding unforeseen inflationary pressure.¹³⁸ On a facility-basis, cost of investment would be between \$200 to \$850 million, depending on the size of the unit, and excluding recent cost escalation and

¹³⁸ *Critical Considerations and Factors for US Refiners to Address as Part of an HF Alkylation Technology Conversion*, Becht at 4 (Oct. 28, 2022) (“Becht Paper”).

inflationary pressures.¹³⁹ These costs are only direct capital costs and do not factor in the costs associated with unit downtime to demolish the HF units and build sulfuric acid units and the ability to replace alkylate during the transition. EPA failed to consider any of these costs in its Proposal.

Replacing an HF unit with an alternative catalyst unit is not a simple proposition for a fuel refinery. HF is a lower volume catalyst, so HF units tend to be much smaller in size than sulfuric acid alkylation units to produce the same volume of alkylate. The differing unit sizes, required volumes of catalyst and specific needs for catalyst regeneration complicate any possible technology swap. A catalyst overhaul would need to be paired with other modifications throughout a refinery to accommodate the new technology. These are tradeoffs EPA should have considered. For instance, sulfuric acid alkylation uses approximately 200 times more acid than HF alkylation and requires additional storage tanks for both fresh and spent acid.¹⁴⁰ If an HF alkylation unit replacement includes the capability of processing the spent sulfuric acid from a sulfuric acid-alkylation unit, the capital costs would be an estimated \$131 million, which would be in addition to the investment costs of replacing the HF alkylation unit with sulfuric acid (i.e., \$200-\$800 million plus \$131 million).¹⁴¹ This cost is considerable and studies have suggested many refineries would not be able to afford the change and would idle their units or shut down their fluid catalytic cracker and HF alkylation unit which consists of 60% of the refinery gasoline capacity; both scenarios are potential precursors for facility shutdowns.

However, EPA failed to consider scenarios in which the Proposal leads to a refinery shut down. There are many factors contributing to such a decision, including the high capital cost relative to capital employed, limits on the capacity needed, lack of space to install necessary equipment, or an inability to obtain an operating permit, among others. In the event of shutdown, the unit requires decontamination and demolition, among other costly steps such as processing the hazardous waste produced, which would cost an estimated \$30 million.¹⁴²

EPA also failed to consider other impacts associated with refineries shutting down HF alkylation units. Such facilities may become more reliant on imported fuels that come with an entirely other set of costs, risks, uncertainties, and environmental impacts EPA failed to consider. Indeed, if the United States lost half its alkylation capacity because of RMP rules, there would be no immediate way to make up the difference in alkylate production. Sulfuric acid alkylation units are running at high capacity already and cannot double their output to make up for lost alkylate from HF units. United States gasoline production would be severely curtailed and would have to be replaced by imports. Gas prices are of particular interest to the public at this time, yet EPA failed to consider these impacts in developing the Proposal.

Given these complex and interconnected issues associated with implementing EPA's Proposal, and the short shrift the Agency gave to consider any of these potential impacts, we urge the Agency not advance requirements specific to HF alkylation units.

¹³⁹ *Id.* at 5.

¹⁴⁰ *Id.* at 8.

¹⁴¹ *Id.*

¹⁴² *Id.* at 6.

D. EPA ignores the safety performance of HF alkylation units

We encourage EPA to meaningfully consider the performance of HF alkylation units and continuous improvements made over time. EPA's claimed benefits of STAA are flawed as it fails to consider the measures taken at facilities that follow or audit against API 751, including codes, standards, and recommended practices. Indeed, API 751 works. Safety performance over time demonstrates the HF alkylation process can and has been safely operated. Significant progress has been made by refineries in defining site risk, then developing risk management technologies and enhanced operating practices for HF alkylation that would lower the overall site risk contours. The Proposal does not account for these measures. If it had, EPA would have certainly come to a different conclusion.

E. Proposal requires unjustified reporting

As noted above, EPA's proposed requirement for facilities to report on IST/ISD measures implemented, including the technology category, in its RMP, coupled with the public disclosure requirements, is improper and unjustified.¹⁴³ EPA has provided no meaningful account of the benefits associated with this requirement and has failed to state specifically how this requirement would fulfill any statutory requirements of the RMP. Members of the public do not have the expertise on HF alkylation units and potential substitutes or full knowledge of a facility's business operations. As such, it appears more likely such information will be inappropriately used by the general public to compare and pressure facilities to change course on complex engineering decisions. This requirement has no value or basis in the RMP program.

XI. EPA'S PROPOSED EXPANSION OF AUDITS TO "EVERY COVERED PROCESS" LACKS A REASONED BASIS

The current RMP regulations require Program 2 and 3 facilities to conduct compliance audits every 3 years.¹⁴⁴ Owners and operators can currently satisfy this requirement by auditing a representative sample of all covered processes similar to how EPA audits these sites during an inspection. Such an approach reduces the costs and burden associated with compliance audits while at the same time ensuring the safety of regulated facilities. In the Proposal, without any explanation in the preamble, EPA proposes to revise these provisions by adding a requirement to audit "each covered process unit."¹⁴⁵ Thus, a compliance audit based on a representative sample of all covered processes is no longer adequate to satisfy the obligations under the Proposal. EPA has failed to explain why the current sampling approach is no longer appropriate. In fact, EPA does not provide any support in the record for this proposed change

Representative sampling of covered process units for compliance audits promotes process safety in an efficient manner. The management systems under PSM and RMP—such as

¹⁴³ See Proposal at 53615 (proposed 40 CFR § 68.175(e)) (requiring PHA to identify "inherently safer technology or design measures implemented since the last PHA, if any, and the technology category (substitution, minimization, simplification and/or moderation)"). Note that the preamble language appears to extend beyond the proposed regulatory text by having the PHA identify "the results of the STAA analysis," not just IST implemented since the last PHA. *Id.* at 53,575. As EPA omitted proposed regulatory text implementing this broader requirement alluded to in the preamble, AFPM is unable to fully and fairly comment upon it.

¹⁴⁴ 40 CFR 68.58(a), 68.79(a).

¹⁴⁵ 40 CFR 68.79(a).

management of change and emergency response programs—are typically implemented site-wide and do not differ from process to process. Representative audit sampling provides an accurate depiction of the entire population (i.e., all the covered processes) and allows a deeper, more thorough look into the compliance system. It is also important to note that while a facility might use representative sampling to choose a subset of covered processes to audit, the audit findings are applied facility-wide, not just at those covered processes that were sampled. Once a finding is substantiated through the auditing process, it would be an ineffective use of time and resources to continue looking at the same issue in other process areas. This would include mechanical integrity inspections as well. Inspections continue to occur as part of the mechanical integrity program, however, if a deficiency in the program is found in one place, it is fixed across the entire site. An audit is not the same thing as a physical inspection and audit looks at the management program that manages the inspection program.

EPA is well aware of the longstanding issues with such an auditing requirement and failed to address why the current practice of representative sampling is insufficient. EPA and OSHA have recognized for decades that representative sampling is a best practice for ensuring a quality audit at complex program 3 facilities with numerous covered process units. CCPS guidelines also recommend using a representative unit sampling method to conduct compliance audits.¹⁴⁶ Yet, the Proposal breaks from decades of facilities relying on the CCPS guidelines without any explanation.

Indeed, when an agency changes its policies, it must “acknowledge that it is . . . changing its position and ‘show that there are good reasons for the new policy.’”¹⁴⁷ Even if EPA were to ultimately provide some explanation of the change in a final rule, it would be deemed arbitrary and capricious as it would have precluded the public from the opportunity to comment on EPA’s reasoning for the change.¹⁴⁸ Since EPA failed to provide any reason for the change in policy, EPA cannot, as a matter of black letter administrative law, proceed with finalizing this requirement.

As a practical matter, auditing each covered process is an enormous undertaking that would divert resources from other risk reduction activities. EPA has also failed to include in the RIA’s break-even analysis additional compliance audit costs that would be incurred under the Proposed Rule if regulated facilities were required to audit all processes. Yet, EPA has prior cost estimates for such a requirement from AFPM the Agency inexplicably failed to consider. According to Table 3-10 below from AFPM’s 2016 comments, the audit cost per process is \$36,500, and for large or complex regulated facilities, the costs would exceed \$1 million—not accounting for the recent record (and future) increase in inflation.¹⁴⁹

¹⁴⁶ Center for Chemical Process Safety of the American Institute of Chemical Engineers, at 83-84, (2d ed. 2011).

¹⁴⁷ *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.”).

¹⁴⁸ *Id.*

¹⁴⁹ AFPM, “Comments of the American Fuel & Petrochemical Manufacturers on the U.S. Environmental Protection Agency’s Accident Prevention Release Requirements: Risk Management Programs under the Clean Air Act; Proposed Rule Docket No. EPA-HQ—OEM-201500725, 81 Fed. Reg 16,637 (Mar. 14, 2016)”, May 13, 2016, p. 83.

Table 3-10. AFPM Member Cost for Auditing All Process Units

	Cost per process	Number of Processes	Total Cost	Marginal Cost Increase
Single Process Unit	\$36,500	1	\$36,500	N/A
“Simple” Refinery/ Petrochemical Plant	\$36,500	2.5	\$91,250	N/A
“Medium Complex” Refinery/ Petrochemical Plant	\$36,500	14	\$511,000	\$365,206.90
“Complex” Refinery/ Petrochemical Plant	\$36,500	25.8	\$941,700	\$795,906.90
Largest Facility Reported to AFPM	\$36,500	39	\$1,423,500	\$1,277,406.90
EPA Average for NAICS 32411	\$36,500	9.3	\$339,450	\$253,656.90

These costs are substantial and should not have been ignored by EPA in performing its break-even analysis. Moreover, the omission of such costs is inconsistent with how EPA treated other, similar cost categories in the RIA. For example, EPA purports to include the costs of third-party audits in its break-even analysis. While AFPM believes EPA’s cost estimates are substantially below the true costs of third-party audits, that EPA includes them at all is a tacit admission that audit costs are not immaterial and certainly not \$0 as EPA suggests with the change to the existing compliance audits. As another example, EPA estimated the labor costs for facility personnel which are associated with information disclosure requirements under the Proposed Rule. Again, this is a tacit admission by EPA that facility personnel labor costs should be included in its break-even analysis, but by not incorporating the costs of auditing each covered process, the RIA’s analysis is internally inconsistent and inconsistent with the Proposed Rule. As a result, the break-even value described in the RIA is artificially low and entirely unreliable.

XII. THE PROPOSED THIRD-PARTY AUDIT REQUIREMENT IS CONTRARY TO LAW AND UNNECESSARY

In the Proposal, EPA attempts to resurrect the third-party audit requirement that it rescinded 4 years ago. This latest incarnation does not address the inherent problems with the third-party audit mandate because it continues to delegate enforcement authority to private parties. Equally important, third-party auditing fails to advance process safety. The existing RMP rule already requires incident investigations, compliance audits, process hazard analyses, mechanical integrity and inspections program, emergency response planning and a host of other obligations to reduce and mitigate risks. Third-party auditing should be withdrawn from the final rule.

A. EPA Violated Section 307(d) of the Clean Air Act by Failing to Provide a Legal Interpretation Justifying Third-Party Audits

Congress imposed important procedural safeguards on EPA’s regulatory authority in CAA Section 307(d). This statutory provision requires certain categories of significant rulemakings,

including RMP regulations,¹⁵⁰ to provide “a much more detailed notice of Proposed Rulemaking than does the APA [Administrative Procedure Act].”¹⁵¹ Proposals under Section 307(d) must include, among other things, “the major legal interpretations and policy considerations underlying the Proposed Rule.”¹⁵²

Yet the Proposal provides no legal interpretation justifying third-party audits as a lawful tool under CAA Section 112(r). That omission is all the more remarkable because a range of commenters challenged EPA’s authority in the 2016 rulemaking that originally promulgated third-party audits.¹⁵³ Indeed, those comments mentioned that EPA’s career staff publicly doubted the agency’s authority to dictate third-party audits.¹⁵⁴ Because the Proposal lacks any analysis whatsoever of EPA’s authority to impose third-party audits, the agency should withdraw that portion of the Proposal.

B. Mandatory Third-Party Audits Are Unlawful

In a 2001 paper, James Belke, a senior RMP official at EPA, wrote that “EPA would likely face long odds . . . legally if it attempted to make third party audits mandatory” for RMP.¹⁵⁵ AFPM agrees.

1. Nothing on the Face of Section 112(r)(7)(B) Grants EPA the Authority to Subdelegate Its Enforcement Powers to a Private Party

EPA’s Proposal treats an adverse audit finding as conclusive proof of a violation. The Proposal requires an audited entity to prepare an audit response report that includes a “schedule for promptly addressing deficiencies” within 90 days of receiving an adverse finding in a third-party audit.¹⁵⁶ That compliance schedule must in the response report must include a “certification, signed and dated by a senior corporate officer, or an official in an equivalent position . . .” certifying, among other things: “that appropriate responses to the findings have been identified and deficiencies were corrected, or are being corrected . . .”¹⁵⁷ Corporate officers signing these certifications must acknowledge the “significant penalties for making false material statements, representations or certifications, including the possibility of fines and imprisonment for knowing violations.”¹⁵⁸ The Proposal also requires facilities meet the compliance schedule and maintain implementation records.¹⁵⁹ EPA does not itself supervise this audit process directly or have any mandatory duty whatsoever to review the audit records. None of the audit records are required to

¹⁵⁰ Proposal at 53,560 (explaining that Section 307(d) applies to the Proposal).

¹⁵¹ *Union Oil Co. of California v. EPA*, 821 F.2d 678, 682 (D.C. Cir. 1987).

¹⁵² *See* 42 U.S.C. § 7607(d)(3).

¹⁵³ AFPM 2016 Comments at 91-128; AFPM 2018 Comments at 16-20.

¹⁵⁴ *See, e.g.*, AFPM 2016 Comments at 91-144; AFPM 2018 Comments at 16.

¹⁵⁵ James C. Belke, *The Case for Voluntary Third Party Risk Management Program Audits*, Prepared for presentation at the 5th Bi-Annual Process Safety Plant Safety Symposium (Apr. 22-26, 2001) [hereinafter “Belke Paper”].

¹⁵⁶ Proposal at 53,611 (Proposed 40 C.F.R. § 68.59(f)(1)(iii)).

¹⁵⁷ *Id.* (Proposed 40 C.F.R. § 68.59(f)(1)(iv)).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (Proposed 40 C.F.R. § 68.59(f)(2)).

be submitted to the agency before a corporate officer must commit under the threat of imprisonment to correcting “deficiencies” identified by a third-party auditor.¹⁶⁰

By presuming non-compliance that must be remedied from alleged deficiencies found in a third-party audit, EPA has transferred its enforcement authority to these auditors. Courts have struck down such attempts by federal agencies to subdelegate their responsibilities to private entities. “An agency delegates its authority when it shifts to another party ‘almost the entire determination of whether a specific statutory requirement. . . has been satisfied’ or where the agency abdicates its ‘final reviewing authority.’”¹⁶¹ In *U.S. Telecom Association v. FCC*,¹⁶² the D.C. Circuit rejected FCC’s delegation of decision-making authority to state commissions. The Proposed Rule required state commissions to determine certain issues under federal telecommunications law using elaborate procedures crafted by FCC. Aggrieved parties could petition FCC for a declaratory ruling against the state commission, but were not guaranteed a response. The D.C. Circuit found that federal agency officials “may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority [from Congress] to do so.”¹⁶³

Nothing on the face of Section 112(r)(7)(B) grants EPA authority to offload its enforcement obligations onto a private party.¹⁶⁴ In the preamble to the Proposal, EPA discusses at length numerous third-party auditing programs, but omits entirely any discussion of its statutory authority to impose such an obligation under RMP. This is surprising because the Administrative Conference of the United States’ (“ACUS”) report on third-party auditing programs, which EPA cites in the preamble,¹⁶⁵ advises agencies to determine the source of their statutory authority to promulgate such programs.¹⁶⁶ Indeed, all of the mandatory third-party auditing programs discussed in the ACUS report were “created directly by Congress”; the rest were voluntary programs.¹⁶⁷

¹⁶⁰ Instead of reporting audit records to EPA, the Proposal imposes a recordkeeping obligation on companies to maintain audit records. *See* Proposal at 53,614 (proposed 40 CFR 68.80(g)). In addition, the Risk Management Plan update, which is performed on a 5-year cycle, must provide the following: “The date of the most recent compliance audit; the expected date of completion of any changes resulting from the compliance audit; and identification of whether the most recent compliance audit was a third-party audit....” *Id.* at 53,615-616 (proposed 40 CFR 68.175(k)).

¹⁶¹ *Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2d Cir. 2008) (quoting *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 567 (D.C. Cir. 2004) and *Nat’l Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 19 (D.D.C. 1999)) (internal citations omitted).

¹⁶² 359 F.3d 554 (D.C. Cir. 2004).

¹⁶³ *Id.* at 566; *see also id.* at 565.

¹⁶⁴ Before Congress enacted the RMP program as part of the CAA amendments of 1990, at least two appellate courts had struck down an EPA attempt to use contractors for enforcement under the CAA. *United States v. Stauffer Chem. Co.*, 684 F.2d 1174 (6th Cir. 1982); *United States v. Stauffer Chem. Co.*, 647 F.2d 1075 (10th Cir. 1981). In light of those decisions, Congress’s silence on the use of private parties for RMP enforcement should be presumed to signal an intent for EPA to maintain control of enforcement through its own employees.

¹⁶⁵ Proposal at 53,585.

¹⁶⁶ L. McCallister, Administrative Conference of the U.S., Third-Party Programs Final Report, at 5 (Oct. 22, 2012) (“In many cases, Congress provided legislative authority for the third-party program and set forth certain design elements in statute. In other cases, agencies have implemented third-party programs *under existing statutory authority.*”) [hereinafter “ACUS Report”].

¹⁶⁷ ACUS Report, at 58. The report discusses eight programs that use third parties to assess regulatory compliance. However, only half of these are assessing mandatory, rather than voluntary, standards. Of these four mandatory

ACUS subsequently issued a set of formal recommendations on agencies' use of third-parties for regulatory compliance. Those recommendations warn agencies about "delegate[ing] their regulatory authority to" third parties.¹⁶⁸ Rather, ACUS advise that agencies should use third-parties "to perform technical tasks," while agencies rely on "their own enforcement" of standards.¹⁶⁹ Consistent with ACUS recommendations, other federal agencies decline to use third-party programs to determine compliance because it remains the agencies' responsibility to enforce the law.¹⁷⁰

2. Section 114 of the Act Prohibits Third Parties from Exercising RMP Enforcement Authority Because They Are Not "Authorized Representatives" of EPA

In the Proposal, EPA admits that third-party auditors function as a partial substitute for enforcement inspections, stating that the "Agency now recognizes that there are some impracticalities of relying on EPA inspections, particularly in the wake of the COVID-19 pandemic ..."¹⁷¹ But EPA's compliance outsourcing to third parties violates Section 114 of the CAA. It limits access to records and the right of entry in RMP inspections and investigations to "the Administrator or his authorized representatives[.]"¹⁷² Because third-party auditors are not "authorized representatives" of the Administrator, EPA's Proposal is impermissible.

The EPA Office of Inspector General ("OIG") has warned about this issue, writing a report reminding EPA that two federal Courts of Appeal—covering ten States and parts of five EPA Regions—have ruled that the private employees of an EPA contractor are not "authorized representatives" for purposes of RMP inspections under Section 114 of the CAA.¹⁷³ In the view of the Sixth Circuit, "the word 'representatives' as used in section 114(d) [and 114(a)(2)] necessarily envisions EPA *employees*" because "Congress could not have intended to entrust th[e] kind of sensitive. . . communication" in Section 114 inspections to private employees.¹⁷⁴ "[T]he plain meaning of 'representative,' *i.e.*, one standing or acting for another through delegated authority, [thus] controls."¹⁷⁵ And so the legislative history of Section 114 confirmed in equating

standards programs, only two require the use of third-parties: FDA's Import Certification Program and Voluntary Qualified Importer Program, authorized by the Food Safety Modernization Act of 2011; and the Consumer Product Safety Commission's Third Party Testing and Certification program that was authorized by the Consumer Product Safety Improvement Act of 2008.

¹⁶⁸ ACUS, Administrative Conference Recommendation 2012-7, Agency Use of Third-Party Programs to Assess Regulatory Compliance, at 3 (Dec. 6, 2012) [hereinafter "ACUS Recommendations"].

¹⁶⁹ *Id.*

¹⁷⁰ *See, e.g.*, ACUS Report, at 61 (discussing FDA enforcement and compliance).

¹⁷¹ Proposal at 53,585.

¹⁷² 42 U.S.C. § 7414(a)(2).

¹⁷³ *See* Office of Inspector Gen., EPA, Early Warning Report: Use of Contractors to Conduct Clean Air Act Risk Management Program Inspections in Certain States Goes Against Court Decisions (Mar. 28, 2012) (citing *United States v. Stauffer Chem. Co.*, 684 F.2d 1174 (6th Cir. 1982) ["*Stauffer II*"]; *Stauffer Chem. Co. v. EPA*, 647 F.2d 1075 (10th Cir. 1981) ["*Stauffer I*"]), <https://www.epa.gov/sites/production/files/2015-09/documents/20120328-12-p-0376.pdf>.

¹⁷⁴ *Stauffer II*, 684 F.2d at 1184 (emphasis added).

¹⁷⁵ *Id.* at 1185.

“authorized representatives” to “officers or employees” of EPA.¹⁷⁶ The Tenth Circuit, in fact, found the legislative history sufficiently compelling to base its decision on that alone.¹⁷⁷

Those holdings are still good law in both Circuits, and their principles undoubtedly extend to third-party auditors, who are neither officers nor employees of EPA. Those decisions must also receive national effect under EPA’s own Regional Consistency regulations.¹⁷⁸ As the D.C. Circuit held in *National Environmental Development Association v. EPA*, these regulations *unambiguously* preclude disadvantaging private firms in federal circuits with more onerous precedent.¹⁷⁹ That decision vacated the *Summit* Directive, an instruction from EPA Headquarters to all Regional Offices outside the Sixth Circuit to ignore that court’s holding major source status under the CAA.¹⁸⁰ Affected industry outside the Sixth Circuit sued EPA for noncompliance with the Regional Consistency regulations, which commit the agency to “[a]ssure fair and uniform application *by all Regional Offices* of the criteria. . . and policies employed in implementing and enforcing the [A]ct[.]”¹⁸¹ Applying the bedrock principle that an agency cannot ignore its own lawfully enacted regulations, the D.C. Circuit held that a competitive disadvantage for all regulated entities outside the Sixth Circuit simply could not be called “fair and uniform” application of the CAA.¹⁸² Instead, regional differences in regulatory burden were “plainly contrary” to the Regional Consistency rules—a conclusion that rules out any future appeal to *Auer*¹⁸³ or its kin.¹⁸⁴

EPA must provide the same treatment required in the Sixth and Tenth Circuits to regulated entities across the country. That means a refusal to recognize third-party auditors as EPA’s “authorized representatives” who can determine RMP “deficiencies.” The agency should abandon its Proposal to require independent third-party audits.

3. Even if Congress had authorized EPA to delegate authority to private third-party auditors, delegation of such authority would be unconstitutional

The D.C. Circuit recently affirmed in the *Amtrak* litigation that Congress cannot grant regulatory authority to private parties. In the first published opinion arising from this litigation, the D.C. Circuit decided whether the Passenger Rail Investment and Improvement Act of 2008 (“PRIA”) unconstitutionally delegated to Amtrak the authority to enforce standards against other railroads. The D.C. Circuit opened its “discussion with a principle upon which both sides agree: Federal lawmakers cannot delegate regulatory authority to a private entity.”¹⁸⁵ That principle flows from the structure of the Constitution, which respectively vests legislative and executive powers

¹⁷⁶ *Id.* (internal quotation marks omitted).

¹⁷⁷ *Stauffer I*, 647 F.2d at 1078-79.

¹⁷⁸ See 40 C.F.R. §§ 56.3(a), (b) (“It is EPA’s policy to ... [a]ssure fair and uniform application by all Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the act; [and] [p]rovide mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies being employed by Regional Office employees in implementing and enforcing the act. . .”).

¹⁷⁹ See *Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1009-11 (D.C. Cir. 2014).

¹⁸⁰ See *id.* at 1003 (citing *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012)).

¹⁸¹ *Id.* at 1003-04 (emphasis added) (quoting 40 C.F.R. §§ 56.3(a), (b)).

¹⁸² See *id.* at 1005-06, 1009-11.

¹⁸³ See *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

¹⁸⁴ *Id.* at 1010.

¹⁸⁵ *Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, 721 F.3d 666, 670-71 (D.C. Cir. 2013), vacated and remanded sub nom. *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 191 L. Ed. 2d 153 (2015).

in the Congress and President. In contrast, the Constitution commits no such authority – and imposes no checks and balances – to privately exercise regulatory authority.¹⁸⁶ While the D.C. Circuit recognized that private entities may “assist” agencies in carrying out their roles, private parties cannot exercise any regulatory authority “on equal footing” with an agency.¹⁸⁷ With these principles established, the D.C. Circuit held that the PRIA was unconstitutional because it delegated regulatory authority to Amtrak, an entity that the court found to be a private party, not a federal agency.

The U.S. Supreme Court reversed the D.C. Circuit holding that Amtrak was a federal actor, rather than a private entity.¹⁸⁸ In his concurring opinion, Justice Alito echoed the opinion of the D.C. Circuit in *AAR I*, finding no support for private delegations in the Constitution. He explained that “[t]he principle that Congress cannot delegate away its vested powers exists to protect liberty” because the Constitution “prescribes a process for making law, and within that process there are many accountability checkpoints.”¹⁸⁹

On remand, the D.C. Circuit recently issued another opinion invalidating the delegation to Amtrak on Due Process and Appoints Clause grounds.¹⁹⁰ In that opinion, the D.C. Circuit mentioned that its “prior opinion detailed extensively why private entities cannot wield the coercive power of government. . . .”¹⁹¹ Because “the Supreme Court reversed on other grounds, we stand by that analysis.”¹⁹² The D.C. Circuit also quoted favorably Justice Alito’s concurrence, including his conclusion that “[w]hen it comes to private entities [exercising governmental powers],. . . there is not even a fig leaf of constitutional justification.”¹⁹³

The judicial opinions in the *Amtrak* litigation are consistent with the federal government’s longstanding policy against delegating “inherently governmental activities” as defined in OMB Circular A-76.¹⁹⁴ Inherently governmental activities are those that “require the *exercise of substantial discretion* in applying government authority and/or in making decisions for the government.”¹⁹⁵ Typically, that discretion arises in “[d]etermining, protecting, and advancing... [governmental] interests by . . . civil or criminal judicial proceedings... [or s]ignificantly affecting the life, liberty, or property of private persons[.]”¹⁹⁶ OMB has explained that the key test for the public nature of an action is “if it commits the government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by . . . final approval or regular oversight by agency officials.”¹⁹⁷ That is precisely what occurs with the

¹⁸⁶ *Id.* at 671.

¹⁸⁷ *Id.* at 673.

¹⁸⁸ *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1237-38, 191 L. Ed. 2d 153 (2015).

¹⁸⁹ *Id.* at 1237.

¹⁹⁰ *Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, No. 12-5204, 2016 WL 1720357 (D.C. Cir. Apr. 29, 2016).

¹⁹¹ *Id.* at *15.

¹⁹² *Id.*

¹⁹³ *Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, No. 12-5204, 2016 WL 1720357, at *15 (D.C. Cir. Apr. 29, 2016) (quoting *Dep’t of Transp.*, 135 S.Ct. at 1237 (Alito, J., concurring)).

¹⁹⁴ See OMB Circular A-76 Revised, Attachment A (May 29, 2003), https://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction/.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

proposed third-party audits that command private parties to address deficiencies without any agency oversight.

4. The Third-Party Auditing Program Unlawfully Circumvents Congressional Appropriations Limits on EPA's Enforcement Budget

For years, EPA has made clear that it believes Congress fails to appropriate a sufficient budget to oversee and enforce RMP. From 1999 to 2001, EPA conducted a pilot study with the Wharton School of the University of Pennsylvania on the efficacy of voluntary third-party RMP audits. As part of this EPA-Wharton Pilot Study, third-party audits were conducted on 21 facilities in Delaware and Pennsylvania, resulting in a report from Delaware on third-party audits in that state, a report from EPA Region 3 on third-party audits conducted in Pennsylvania, and the previously quoted paper from Mr. Belke.¹⁹⁸ Both reports note that EPA approached Wharton about studying third-party audits because “government resources” for RMP are “limited.”¹⁹⁹ Mr. Belke is even more direct in his paper, listing the first advantage of third-party auditing as “[a]lleviat[ing] EPA’s resource problem” because EPA would have “fewer RMP facilities to cover with its own inspectors.”²⁰⁰ Consistent with the EPA-Wharton Pilot Study, we understand that EPA is insisting on third-party auditing because it lacks sufficient appropriated resources to implement and oversee the RMP, particularly the much expanded RMP Program that the Proposal envisions.²⁰¹

Federal law prohibits EPA augmenting its enforcement budget by mandating that third parties oversee the RMP Program. The Taxing and Spending Clause of the U.S. Constitution vests Congress with the power of the purse.²⁰² Consistent with Congress’ exclusive authority over spending, the Anti-Deficiency Act prohibits government entities “authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation”²⁰³ As the GAO explained: “As a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority.” The purpose of this rule “is to prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity.”²⁰⁴ EPA’s Proposal to use third-party audit reports as conclusive

¹⁹⁸ See R. Barrish, R. Antoff, & J. Brabson, Dep’t of Natural Resources & Env. Control, Third Party Audit Pilot Project in the State of Delaware, Final Report (June 6, 2000) [hereinafter “Delaware Report”]; EPA Region 3, Third-Party Pilot Project in the Commonwealth of Pennsylvania, Final Report (Feb. 2001) [hereinafter “Region 3 Report”]; Belke Paper. For purposes of these comments, we refer to these documents collectively as the “EPA-Wharton Pilot Study.”

¹⁹⁹ See Delaware Report, at 1; Region 3 Report, at 8. See also Delaware Report, at 2 (“Due to the large number of facilities that were subject to the EPA Risk Management Program regulation and the relatively small amount of resources available to oversee implementation of regulation, EPA was interested in determining the viability of using third party audits for verifying compliance with the rule as an alternative to traditional methods of regulatory oversight.”).

²⁰⁰ Belke Paper, at 7.

²⁰¹ ACUS repeatedly cites lack of resources as motivating factor for agencies to consider third-party programs. See, e.g., ACUS Recommendations, at 2; ACUS Report, at 1.

²⁰² U.S. Const., Art. I, Sec. 8, Cl. 1.

²⁰³ 31 U.S.C. § 1341(a)(1).

²⁰⁴ GAO, Principles of Federal Appropriations Law, Third Edition, Volume II, at pages 6-162 through 6-163 (Feb. 2006); see also *In re Community Work Experience Program*, B-211079, 1987 WL 101336, *2 (Comp. Gen. Jan. 2, 1987) (agency would be improperly augmenting its appropriations by relying on uncompensated personnel to perform tasks that would normally be performed by agency staff).

evidence of “deficiencies” unlawfully bypasses Congress’s budgeting authority by having facilities—and ultimately, consumers—pay for the enforcement mechanism themselves.

C. The Proposed Third-Party Auditing Requirements are Arbitrary and Unnecessary

RMP program elements work together to compliment different areas of risk reduction. After an incident, for example, an investigation is conducted and recommendations are made to improve the management system at a site. The compliance audit, in turn, pressure tests that management system in order to prevent and mitigate future accidents. The outcome of this performance-based system has been a steady decline in the rate of accidents and damages from those accidents.²⁰⁵

Without demonstrating that the RMP program suffers from systemic problems, EPA proposes to require third-party compliance audits, which would substantially burden industry and limit employment options for consultants and former employees. EPA has not shown that the current system is deficient to support its mandatory third-party assessments. On the contrary, EPA has repeatedly touted the effectiveness of self-audits in its longstanding audit policy. These flaws render the Proposal arbitrary and capricious. It should be withdrawn. AFPM supports the existing system of performing triannual compliance audits.

1. EPA Provided No Analysis of Data to Show a Systemic Failure in First- or Second-Party Auditing for the RMP Program

In proposing third-party compliance audits, EPA relied on the rationale in the 2016 RMP rulemaking that “self-auditing may be insufficient to prevent accidents, determine compliance with the RMP rule’s prevention program requirements, and ensure safe operation.”²⁰⁶ But the administrative record from the 2016 RMP rule contains no statistical analysis to determine whether systemic problems actually exist in how RMP audits are currently performed or reported.

The lack of analysis in the record is surprising because OSHA looked at that very issue. In 2012, OSHA analyzed compliance issues as part of its refinery and chemical plant National Emphasis Program. OSHA’s analysis demonstrates that auditing reforms are unnecessary. OSHA found that only 4% of its refinery violations involved compliance audit deficiencies, while chemical plants similarly had only a 4.5% rate of compliance audit deficiencies.²⁰⁷ A more than 95% success rate hardly mandates abandoning the current approach. OSHA’s analysis is corroborated by Mr. Belke’s paper on third-party audits, which notes that “[t]he great majority of RMP facilities are likely making good-faith efforts at regulatory compliance.”²⁰⁸

²⁰⁵ See, e.g., Proposal at 53,565-66.

²⁰⁶ Proposal at 53,585.

²⁰⁷ Jordan Barab, Deputy Assistant Secretary, OSHA, OSHA’s Refinery & Chemical National Emphasis Program, at 3, 9 (July 20, 2012), available at [http://www.csb.gov/UserFiles/file/Barab%20\(OSHA\)%20PowerPoint.pdf](http://www.csb.gov/UserFiles/file/Barab%20(OSHA)%20PowerPoint.pdf).

²⁰⁸ Belke Paper, at 7. Rather than reviewing the data comprehensively, EPA’s 2016 rule cherry-picked four Chemical Safety Board (“CSB”) reports on past incidents, claiming that they demonstrate a need for third-party audits. None of these reports found poor compliance audits to be the fundamental root cause accidents. Instead, the CSB attributed incidents to the failure to take corrective action and other issues. These reports fail to support EPA’s Proposal.

In the 2016 rulemaking, EPA also referenced a few enforcement settlements to support its third-party auditing Proposal, but none indicate a systemic problem in RMP self-audits.²⁰⁹ EPA cites the *United States v. Tyson Foods* consent decree, but none of the alleged violations were for a deficient compliance audit.²¹⁰ EPA also relies on the *Mann Distribution LLC* administrative order, but this was a general duty case, *not* an RMP matter. The *United States v. Hyundai et al.* consent decree also was *not* an RMP matter; it involved alleged violations of Title II of the Clean Air Act. The lack of significant enforcement matters based on deficient compliance audits suggests that RMP self-auditing functions properly.

2. EPA's Broadside Against First- and Second-Party Audits Ignores the Agency's Own Audit Policy

In the 2016 rulemaking, EPA attacked at length first- and second-party self-audits²¹¹ citing everything from financial regulation to smog checks at garages.²¹² EPA completely ignores its own Audit Policy, which has recognized the efficacy of voluntary, first- or second-party, self-audits for over two decades.²¹³ The Audit Policy reflects EPA's "continuing commitment to encouraging voluntary self-policing while preserving fair and effective enforcement." *Id.* And this preference for compliance self-auditing extended to "settlement of claims for civil penalties for *any* violations under *all* of the Federal environmental statutes" administered by EPA.²¹⁴ So long as a regulated entity met all or nearly all of nine conditions,²¹⁵ it could rely on the Audit Policy for significant reductions in civil or criminal penalties.²¹⁶

Thousands of companies did just that. As the 2000 Audit Policy explained, "[u]se of the Audit Policy has been widespread" since 1995.²¹⁷ Within only a few years after the 1995 version took effect, regulated entities had self-disclosed "actual or potential violations at more than 2700 facilities[,]" with the annual number of disclosures rising each year.²¹⁸

²⁰⁹ To be clear, consent decrees and consent orders themselves do not confer any general authority on EPA. Any authority exercised by EPA pursuant to these agreements derives from the contractual consent of the defendants who agreed to EPA's assertion of authority. *See, e.g., Pigford v. Veneman*, 292 F.3d 918, 923 (D.C. Cir. 2002) (explaining the contractual nature of consent decrees).

²¹⁰ *See United States v. Tyson Foods, Inc. et al.*, No. 1:13-cv-56, at 2 (E.D. Mo. Lodged April 4, 2013) [hereinafter "*Tyson Foods CD*"].

²¹¹ First-party audits are self-audits; second-party audits are those performed by a contractor, consultant or other party under contract to perform the audit.

²¹² EPA cited a field experiment on industrial plant audits in India; emissions testing of cars in New York; and financial auditing as analyzed by the Public Company Accounting Oversight Board.

²¹³ *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).

²¹⁴ 65 Fed. Reg. at 19,626 (emphasis added).

²¹⁵ Those conditions are: (1) the systematic discovery of a violation through an audit or compliance management system, (2) voluntary discovery of the violation, (3) prompt disclosure, (4) discovery and disclosure independent of a third-party, (5) correction and remediation, (6) actions to prevent recurrence of the violation, (7) a first-time violation, (8) no serious actual harm to the environment or imminent and substantial danger to the public health or environment, and (9) cooperation with the government. *See* 65 Fed. Reg. at 19,620-23.

²¹⁶ *See* 65 Fed. Reg. at 19,620.

²¹⁷ 65 Fed. Reg. at 19,619.

²¹⁸ *Id.*

EPA went to exceptional lengths to study and document the positive effects of its self-auditing regime. The agency conducted an internal survey of staff experienced in handling self-audit disclosures, a survey of regulated entities, a series of meetings with stakeholders, public conferences, a notice-and-comment process for revisions, and a data analysis on the Policy's usage.²¹⁹ The incentives for disclosure had prompted more frequent and more thorough self-monitoring by industry.²²⁰ That, in turn, had led both to reduced risks to the environment and public health and to a greater awareness at EPA of particularly high risks in certain industries.²²¹

In the absence of an agency study showing bias in self-audits that would be cured by transitioning to third-party audits, EPA's decision is arbitrary. EPA generally alleged bias in self-audits in the 2017 Amendments, but did not have specific examples of RMP triannual compliance bias. EPA made the same error here. Further, EPA's embrace of third-party auditing would break with more than two decades of agency practice under the Audit Policy. It imposes additional and unnecessary costs that are unsupported by agency analysis or industry experience. The mere possibility of *some* non-compliance cannot justify tossing aside two decades of "fair and effective enforcement."²²²

D. The Proposed Third-Party Audits are Overbroad and Unreasonable

EPA proposes to require third-party audits if one of three triggers occurs: (1) two accidental releases within 5-years that trigger accident reporting ("2-Accident Trigger"); (2) one accidental release within 5-years that triggers accident reporting under 40 CFR 68.42(a) if the accident occurred at a chemical plant (NAICS 324) or petroleum refinery (NAICS 325) within a 1-mile radius of another chemical plant or refinery ("1-Mile Trigger"); or (3) the implementing agency requires a third-party audit because "conditions" at a site "could lead to an accidental release" or the prior third-party audit did not meet the competency or independence criteria for auditors ("Agency Trigger").²²³

As noted, AFPM opposes any form of mandatory third-party audit imposed by EPA. To the extent that the agency proceeds, we offer the following comments on the applicability triggers for third-party audits and other proposed conditions of third-party audits.

1. The 2-Accident Trigger and 1-Mile Trigger Should be More Narrowly Tailored

The 2-Accident Trigger and 1-Mile Trigger are overbroad in the context of triggering a third-party audit. Both are tied to having a reportable accident under the 5-year accident history rule.²²⁴ But that rule might require reporting as an "injury" a sprained ankle or any minor medial

²¹⁹ See *id.*; see also Evaluation of "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" Policy Statement, Proposed Revisions and Request for Public Comment, 64 Fed. Reg. 26,745, 26,747-48 (May 19, 1999). These evaluations revealed an unqualified success, or, in EPA's own words, "very positive results." 65 Fed. Reg. at 19,619.

²²⁰ See 65 Fed. Reg. at 19,619; 64 Fed. Reg. at 26,747-51.

²²¹ See 64 Fed. Reg. at 26,748-49, 26,752.

²²² 65 Fed. Reg. at 19,619.

²²³ 65 Fed. Reg. at 53,612 (proposed 40 CFR 68.78(f) and 40 CFR 68.80(a)).

²²⁴ See 40 CFR 68.42(a).

issue attended to by a physician, at least according to EPA’s guidance.²²⁵ Similarly, EPA considers reportable accidents to include any event leading to *any* level of off-site property damage and “significant” on-site property damage, an undefined term.²²⁶ As EPA has noted, “in some accidents, minor injuries treated with first aid have been reported.”²²⁷

EPA’s view is consistent with the experience of AFPM members who have seen RMP reports filed for minor accidental releases, including those listed below.

- *Knee Injury*: A worker injured his knee in his effort to get away from a propylene leak that occurred when loosening a bonnet on a valve for a line that had been isolated, but not fully depressurized. This event meets the definition of an RMP accidental release under 40 CFR § 68.42 and had to be listed in the 5-year accident history of that regulation. As such, this knee injury would trigger a third-party audit under the Proposal, even though the event was not catastrophic and had no potential to be catastrophic.
- *Precautionary Treatment*: A worker in the alkylation unit thought he smelled HF and later felt something on his neck like a bee sting. The refinery flushed his skin, applied a medical salve to his neck, and transported him to the hospital. Because the worker thought he smelled HF, a nebulizer treatment was applied en route to the hospital. The worker remained overnight for observation and returned to work for his next shift. EPA determined that this incident met the definition of an RMP accidental release under 40 CFR § 68.2 and required it to be listed in the 5-year accident history of that regulation. This precautionary treatment of a potential HF exposure – which was far from a catastrophic release – would trigger a third-party audit under the Proposal, even though there was no evidence that the worker was actually exposed, and this was far from a catastrophic release.
- *Property Damage Only*: A plant experienced a fire caused by a piping failure due to vibration fatigue. This abnormal vibration was noticed by an operator during normal rounds. The failure occurred while he was in the control room troubleshooting potential causes. The incident caused no injuries. Operations quickly isolated the system, automatic systems activated to suppress the fire, and local emergency response resources were activated to secure personnel and put out the fire. The incident had to be reported because the unit was significantly damaged. However, the health and safety risk for personnel was low: the operator response was effective and the emergency response functioned as expected. These types of issues are not necessarily indicative of systemic problems or a lack of preparedness. Yet it would trigger a third-party compliance audit and a field exercise under the

²²⁵ EPA, General RMP Guidance – Chapter 3: Five-Year Accident History, at 3-5 (2009) (explaining that injuries might result from “indirect consequences” of an incident and are reportable when “medical treatment ... other than first aid” is obtained), available at <https://www.epa.gov/rmp/general-rmp-guidance-chapter-3-five-year-accident-history>.

²²⁶ *See id.* at 3-5 to 3-6.

²²⁷ 2016 Proposal, RIA, at 91.

Proposal, neither of which is a necessary or appropriate response. An incident investigation in this case suffices to address the issue.

Due to these reporting realities, EPA could be overwhelmed with submissions and unable to discern the most substantial concerns that deserve the attention of the agency's limited enforcement resources.

As an alternative, AFPM proposes that EPA narrow the third-party audit trigger from reportable accidents to catastrophic releases.²²⁸ The existing RMP regulations define "catastrophic releases" as a "major uncontrolled emission, fire, or explosion, involving one or more regulated substances that presents imminent and substantial endangerment to public health and the environment."²²⁹ Such catastrophic releases already trigger incident investigations under the existing RMP rules, which identify any management systems or other high-level controls in need of revision.²³⁰ Applying the same catastrophic release trigger for third-party audits would allow the assessment of the effectiveness of the changes made in response to the incident investigation. To accomplish that objective, the third-party audit should be conducted after the completion of the incident investigation during the 3-year audit cycle.²³¹

Adopting a more targeted trigger for third-party auditing would be consistent with CSB's release reporting rule. In that recent rule, CSB required reporting of accidental releases that result in fatalities, hospitalizations, and property damage at or outside the site of at least \$1 million.²³² CSB reasoned that these triggers for release reporting "will likely capture accidental releases of significance" and avoid scrutiny of accidents where "there is very little likelihood of serious scrutiny or follow up investigation"²³³ Applying a more focused third-party audit trigger would similarly allow companies and EPA to focus on significant incidents that may warrant scrutiny.

2. There are Several Flaws in EPA's Analysis Supporting the 1-Mile Trigger for Third-Party Audits

EPA proposes to apply the same 1-mile trigger for NAICS 324 and 325 facilities as its proposed STAA requirements. As explained earlier, EPA's analysis of 324/325 facilities located within 1-mile is flawed. EPA fails to provide record support for the NAICS 324/325-specific requirements or any explanation of the nexus between the proposed third-party audit requirements and these facilities. The Agency Trigger for Third-Party Audits is Vague and Overbroad

The Agency should remove the provision allowing the implementing agency to require a third-party audit because "conditions" at a site "could lead to an accidental release"²³⁴ That

²²⁸ All of AFPM's suggested revisions to the third-party audit obligation - and all other proposed requirements of the Proposal - are made subject, and without waiving, any of AFPM's objections to the rulemaking.

²²⁹ 40 CFR 68.3 (definition of "catastrophic release").

²³⁰ 40 CFR 68.81(a).

²³¹ As explained elsewhere in these comments, third-party audits should be conducted only as part of the 3-year compliance audit cycle.

²³² 40 CFR 1604.2 (definitions of "serious injury" and "substantial property damage"); *id.* 1604.3 (release reporting triggers including "serious injury" and "substantial property damage").

²³³ 40 CFR 10,074, 10,086 (Feb. 21, 2020).

²³⁴ 65 Fed. Reg. at 53,610 (proposed 40 CFR 68.58(f) and 40 CFR 68.59(a)).

vague catch-all leaves regulated sources to the whims and imagination of the implementing agency. It covers any conditions that *could* lead to a release, no matter how remote the chance of the condition resulting in an accidental release. The unprecedented breadth of discretion raises serious Due Process concerns because regulated parties are left guessing at their compliance obligations to avoid an Agency Trigger for a third-party audit.

3. EPA Should Clarify that Third-Party Audits Only Should be Performed as Part of the Regular 3-Year Cycle for Compliance Audits

The proposed deadlines for these audits are ambiguous and risk audit overload, making conditions potentially less safe at RMP regulated sites. One provision of the Proposal states that if one or more of three triggers occurs, then the third-party audit would be completed on the regular 3-year schedule for the compliance audit.²³⁵ But another part of the Proposal sets different deadlines for each of the three triggers. The 2-Accident Trigger would require completing the third-party audit within 12 months of the second reportable accident, while the 1-Mile Trigger would be required within 12 months of the first reportable accident. And the Agency Trigger would require completing the third-party audit within 12-months of a final agency determination compelling an audit.²³⁶

These three dueling audit triggers should be removed in the final rule. Instead, third-party audits should simply be part of the existing 3-year cycle for compliance audits. Facilities need clarity and certainty to perform quality audits, which the current 3-year cycle provides. Meaningful audits cannot be done quickly. It can take upwards of a year to locate auditors, contract for the auditors' services, staff the audit with appropriate support, perform the audit, and then document any findings.

Moreover, having more than one audit trigger creates the risk of having to perform several audits within the same 3-year cycle. Auditing repeatedly and quickly over a few years may lead to poor assessments, detract from resources needed to perform incident investigations and other tasks, and creates the risk of having teams that lack the requisite expertise and skills to perform the audit. Rushing through the process would simply lead to a "check-the-box" exercise.

Within the 3-year audit cycle, there should be an additional opportunity to extend the deadline for third-party audits when merited. As an example, third-party audits should only take place after facilities have implemented the recommendations identified during their post-incident investigations required under 40 CFR §68.60 and §68.81. It would make little sense to audit until the recommendations from the incident investigation are applied and in practice to audit against the changes. Likewise, the ability to complete a third-party audit within 12-months may be infeasible because an incident may spawn several concurrent federal investigations (e.g. CSB, EPA) and state agency reviews under their own process safety rules. Accordingly, there should be a mechanism for owners or operators to obtain an extension of third-party audit deadlines.

²³⁵ Proposal at 53,612 (Proposed 40 CFR 68.79(a), (f))

²³⁶ *Id.* at 53,613 (Proposed 40 CFR 68.79(h)).

4. The Independence Criteria for Third-Party Auditors Should be Clarified

EPA proposes independence criteria for third-party auditors, principally a 2-year ban on accepting direct employment with an owner or operator after conducting an audit.²³⁷ On its face, this temporary prohibition would only apply to the audit personnel who conducted the third-party audit. With this understanding in mind, AFPM might be able to support this 2-year cooling off period on direct employment of third-party audit personnel, provided that EPA clarifies direct employment in the final rule. Specifically, EPA should clarify that the 2-year cooling off period does not preclude consulting services unrelated to the audit. As an example, a site should that uses a PSM auditor should not be precluded from using the same company for 2-years on FCC consulting or design work for a change to the process. Otherwise, the 2-year cooling off period would sweep too broadly and severely shrink the pool of qualified auditor.

EPA also proposes to remove two of the independence criteria from the 2017 Rule. Those criteria would have (1) disqualified auditors who had done work for an owner/operator within the last 2 years *before* an audit and (2) disqualified auditors from providing other business or consulting services 2 years *after* an audit.²³⁸

AFPM supports removing these two onerous and unnecessary independence criteria. These criteria would have resulted in an insufficient pool of qualified auditors, harmed the quality of audits, and significantly driven up costs. These concerns are further explained in AFPM's comments on the 2017 Rule.²³⁹

Finally, EPA seeks “comment on whether the selected auditor should be mutually approved by the owner or operator and employees and their representatives, and if direct participation from employees and their representative should be required when the third party conducts the audit.”²⁴⁰ First, this is unnecessary because employees are already included in third-party audits. By necessity, employees must participate in third-party audits in order to provide the auditor information about a site, support the audit while it is being conducted, and assist in performing corrective action. Second, unions already possess the ability to collectively bargain for their rights under labor law. Having EPA dictate a union role in an RMP audit would raise serious legal questions about the agency's authority to alter labor relationships under the National Labor Relations Act. The questions that could arise include:

- What would occur if management and the employees and their union cannot “mutually approve” a third-party auditor?
- Would EPA resolve the dispute over auditor selection?
- What legal standard would be applied in that dispute?
- How long would that take to resolve and how would that affect the audit schedule?

²³⁷ *Id.* at 53,586-87; *id.* at 53,613 (Proposed 40 CFR 68.80(c)(2)(iv)).

²³⁸ *Id.* at 53,586.

²³⁹ AFPM 2016 Comments, at 101.

²⁴⁰ Proposal at 53,587.

- Would a formal right of “direct participation” by employees and their unions allow them to dispute an adverse audit finding that might affect a union member?
- How would that dispute be resolved and who would resolve it?

It seems doubtful at best that EPA has the authority under the Clean Air Act to resolve these labor questions, which should be left to other regulators.

5. Mandatory Board Reporting of Third-Party Audits is Unwarranted, Arbitrary, and Unlawful

The Proposed Rule would require the owner or operator of each audited site to “immediately provide” a copy of any third-party audit to owner/operator’s audit committee of the board of directors “or other comparable committee or individual if applicable.”²⁴¹

This mandatory board reporting requirement is procedurally and substantively flawed. Nowhere in the preamble does EPA discuss this board reporting provision. EPA provides no legal interpretation explaining EPA’s view of its authority to impose board reporting. Nor does the agency offer a factual justification for it.²⁴² These omissions are all the more remarkable because the agency has never previously imposed a mandatory board reporting rule in the history of the Clean Air Act. EPA’s novel attempt to regulate corporate governance using the Act would raise major questions about the agency’s authority and would require a clear authorization from Congress.²⁴³ No such authorization exists. Other federal statutes, most prominently, the Sarbanes-Oxley Act,²⁴⁴ regulate corporate governance. The Clean Air Act, in contrast, contains no authorization to intrude into corporate governance, much less clear authorization.

The proposed mandatory board reporting is also unlawful because it would purport to change long-settled principles of corporate governance. Specifically, the Proposal would conflate the role of the board and management. Taking corrective action on the third-party audit report would be the responsibility of management, which carries out the day-to-day operation of the company. Boards, in contrast, play oversight and advisory roles on management’s decisions.²⁴⁵ The Proposal ignores these bedrock corporate norms by requiring third-party audit reporting “immediately” to the Audit Committee before management has an opportunity to act on the audit findings. Because Congress gave no indication in the Clean Air Act of displacing “the entire corpus of state corporation law,”²⁴⁶ the proposed board reporting should be withdrawn.

²⁴¹ Proposal at 53,614 (Proposed 40 CFR 60.80(f)(3)).

²⁴² The Proposal contains no discussion of any incidents or non-compliance that resulted from management failing to keep boards appropriately informed of RMP compliance, a necessary predicate for amending the rule.

²⁴³ *West Virginia v. EPA*, 124 S. Ct. 2587 (2022).

²⁴⁴ See P.L. 107-204, Sarbanes-Oxley Act of 2002.

²⁴⁵ National Association of Corporate Directors, *The Role of the Board vs. the Role of Management* FAQ, <https://www.nacdonline.org/insights/publications.cfm?ItemNumber=35784>.

²⁴⁶ See *United States v. Bestfoods*, 524 U.S. 51, 63 (1998) (internal quotation marks and citation omitted).

6. The Proposed Audit Response Conflicts with Due Process and Common Sense Because It Treats the Third-Party Audit as Conclusive Evidence of a Violation

Within 90 days of receiving a third-party audit report, the audited entity would be required under the Proposal to prepare an Audit Findings Response Report (“Audit Response” or “Response”) and retain copies for required recordkeeping purposes. The Response would include a certification under penalty of perjury from a “corporate officer” that “appropriate responses” were taken and “deficiencies corrected.” The Proposal also requires providing the audit committee of the board of directors with a copy of the Audit Response and submission to the regulator of a schedule for correcting deficiencies.²⁴⁷

The Audit Response requirement needs to provide a mechanism for the audited companies to dispute any purported findings. As proposed, the Audit Response presumes that there are actual “deficiencies” that must be corrected, on a compliance schedule to be provided to the regulator. To be sure, companies may agree with the audit findings and gladly work to resolve those issues. But alleged deficiencies may instead result from a misunderstanding of the facility’s processes, an overly expansive view of the regulations or other issues. Concerns about audit errors are heightened when, as here, third-party auditors are used. They are necessarily less familiar with a facility’s processes than its own employees. In fact, the rule requires them to be.

The EPA-Wharton Pilot Study confirms the need for companies to have the opportunity to challenge alleged deficiencies because the study makes clear that reasonable people may disagree over whether an audit finding is, in fact, a deficiency. Both the Delaware and Region 3 Reports that were issued as part of the pilot study observed that “disagreement[s] over the degree of a potential deficiency [are] common, as this is a performance-based regulation that has limited specifications.”²⁴⁸ As a result, RMP is “open to interpretation and acceptable compliance can vary depending on the observer.”²⁴⁹

In his paper on the pilot study, Mr. Belke echoed those conclusions, writing that “[f]or many of the safety program elements required under the PSM and RMP regulations, *there is no universally accepted standard against which an auditor or inspector may objectively measure a facility’s performance.*”²⁵⁰ “[E]ven for the most experienced auditors, the regulations leave *undeniable grey areas wherein reasonable people may disagree* over whether a program is acceptable.”²⁵¹ The lack of an objective standard “reflects the government’s recognition that the wide variety of process technologies used at hazardous chemical facilities, and constant innovations industry safety practice, require a flexible regulatory structure instead of a ‘one-size fits all’ approach.”²⁵²

The lack of an objective standard for RMP third-party audits would risk arbitrary and unreliable audits. The ACUS Report warned that the “regulatory standards used in a third-party

²⁴⁷ Proposal at 53,613-14.

²⁴⁸ Delaware Report, at 10; Region 3 Report, at 8.

²⁴⁹ *Id.*

²⁵⁰ Belke Paper, at 3 (emphasis added).

²⁵¹ *Id.* at 4 (emphasis added).

²⁵² *Id.* at 3.

program should facilitate the objective assessment of conformity. When possible, standards should be quantitative and the qualities of interest should be measurable.”²⁵³ Without objective standards, “the risk of unreliability and inconsistency in the determinations of third-parties becomes higher.”²⁵⁴

Thus, third-party audits create the possibility that the audited facility and the auditor may disagree over what constitutes a deficiency, even without factual errors. Fairness requires that the audit response allow the audited entity an opportunity to discuss and ultimately dispute an adverse audit finding. Indeed, EPA consent decrees provide an opportunity to contest deficiencies found in third-party RMP audits.²⁵⁵ The regulated community should receive at least as much due process as a company signing a consent decree after an enforcement action. Providing this opportunity does not prejudice EPA. To the extent that an audited entity and EPA disagree over audit findings, then EPA has at its disposal all of its enforcement powers under the CAA to resolve those disputes, including initiating an investigation, issuing a notice of violation, and, if necessary, filing an enforcement action in U.S. District Court.²⁵⁶

Refusing to afford companies the opportunity to dispute audit findings raises fundamental Due Process concerns. At its core, Due Process requires that implementing agencies afford facilities “an opportunity for a hearing before [they are] deprived of any significant property interest.”²⁵⁷ EPA’s Proposed Rule denies the opportunity to be heard. The Proposal does away with this fundamental obligation of process by presumptively concluding that an audit finding triggers a schedule for correcting violations and other legal consequences.

E. The 90-Day Deadline for Audit Responses Should Have a Provision for Extensions

Companies may well not know how to resolve many of the deficiencies raised in an audit report within 90 days. Resolving certain issues may require significant engineering efforts or the coordination of many departments in a complex facility. For longer-term solutions, 90 days may be insufficient to provide an adequate plan. EPA should either extend the deadline for the Audit Response or permit facilities to obtain extensions as needed to adequately address the concerns raised by the third-party auditor.

F. To The Extent that EPA Insists on a Certification of Accuracy in the Audit Response, the Certification Should Be Significantly Revised

The Proposal would require the operator’s Audit Response to “include a certification signed and dated by a senior corporate officer, or official in an equivalent position of the owner or

²⁵³ ACUS Report, at 57.

²⁵⁴ *Id.*

²⁵⁵ *See, e.g., Tyson Foods CD*, App. A, §§ 6.1-6.3.

²⁵⁶ *See, e.g., 42 U.S.C. §§ 7413, 7414.*

²⁵⁷ *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *see also, e.g., Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (“This Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest.”); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (finding a due process violation from termination of welfare without “timely and adequate notice detailing the reasons for proposed termination and an effective opportunity to defend” against it).

operator of the stationary source. . .”²⁵⁸ This certification would attest to the truth, accuracy, and completeness of the information contained in the Audit Response based on the executive’s “personal knowledge and experience, or inquiry of personnel involved in evaluating the report findings and determining appropriate responses to the findings. . .”²⁵⁹ The certification would conclude with the statement that the certifying officer is “aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.”²⁶⁰

Imposing another certification obligation is unnecessary and burdensome and not supported in the rulemaking record. Section 1001 of the federal criminal code already makes it a felony to “knowingly and willfully” lie to federal agencies.²⁶¹ Section 113(c)(2) of the CAA likewise criminalizes knowing and willful false statements to EPA.²⁶² These laws work: EPA has put forth no evidence of owners or operators lying about RMP compliance. Mandating a certification requirement to address a phantom problem only increases the burden and cost without any corresponding benefit.

The certification requirement also risks infringing on the senior corporate official’s Fifth Amendment privilege against self-incrimination.²⁶³ The privilege protects against compulsory disclosures to the government when those disclosures have “the direct and unmistakable consequence of incriminating” the disclosing party.²⁶⁴ EPA’s proposed certification requirement may well compel precisely those sorts of disclosures. The certification necessarily admits the existence of “deficiencies.” These forced confessions of a senior corporate officer—a potential target of any criminal probe—are compounded by the officer’s complete inability to contest the truth of the audit report in the certification. But worse still, those “deficiencies” may relate to “accidental releases. . . that resulted in deaths [or] injuries[.]”²⁶⁵ Given the possibility of criminal sanctions against corporate officers for violations of hazardous pollutant regulations,²⁶⁶ EPA’s forced statement from a senior corporate officer “would surely prove a significant link in a chain of evidence tending to establish his guilt”—thus raising serious constitutional concerns.

Similarly, the certification requirement raises First Amendment concerns. This type of compelled speech must serve a sufficient government interest to avoid running afoul of the right to free speech. Certain limited government interests merit either restraining or compelling commercial speech in the interest of the consumer or general public.²⁶⁷ However this compelled speech by the senior corporate official is not “purely factual and uncontroversial information.”²⁶⁸ It requires the senior corporate official to certify “that appropriate responses to the findings have

²⁵⁸ 87 Fed. Reg. at 53,613-14.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ 18 U.S.C. § 1001.

²⁶² 42 U.S.C. § 7413(c)(2).

²⁶³ The lack of a meaningful opportunity for the facility to review the audit findings, and the limited time for the audit response, increase the possibility of factual errors in the underlying audit report and the response. Those facts provide additional legal jeopardy for anyone signing a certification for the audit response.

²⁶⁴ *Marchetti v. United States*, 390 U.S. 39 (1968); accord *Grosso v. United States*, 390 U.S. 62 (1968).

²⁶⁵ 81 Fed. Reg. at 13,658.

²⁶⁶ *See, e.g.*, 42 U.S.C. § 7413(c).

²⁶⁷ *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

²⁶⁸ *Am. Meat Institute v. U.S. Dep’t of Agriculture*, 760 F.3d 18, 21 (D.C. Cir. 2014).

been identified and deficiencies were corrected, or are being corrected.”²⁶⁹ This certification implicitly acknowledges that there were deficiencies, which is hardly a matter of cold fact. EPA has acknowledged that “disagreement over the degree of a potential deficiency is common ... and acceptable compliance can vary depending on the observer.”²⁷⁰ Yet with no opportunity to dispute the findings, EPA requires a senior corporate official to affirm the opinions of the third-party auditor and indicate how the facility is resolving them.

To compel speech in this manner, EPA must demonstrate three things: (1) that its asserted interest is substantial, (2) that the regulation directly and materially advances that interest, and (3) that the regulation is narrowly tailored to that interest.²⁷¹ In this case, the certification fails to advance in a narrowly tailored way any substantial government interest. As described above, entities are already under an obligation to not make false statements to the government. The matters in the certification are made plain from the language of the response itself. The fact that a third-party prepared the audit report, and that the facility must respond with corrections without contesting its findings, render this certification different from every other certification related to regulatory compliance.

To the extent that EPA insists upon requiring a certification in the Audit Response by a certifying official, the agency needs to clarify who it intends to count as a “senior corporate officer, or official in an equivalent position.” That is a vague, undefined term. It does not appear in prior RMP rulemakings or guidance. Nor does the preamble to the Proposal explain what EPA means by “senior corporate officer” or “equivalent position.”

Instead of sowing additional confusion with a new term, AFPM recommends that EPA incorporate the “responsible official” definition from the CAA’s Title V operating permit program for major stationary sources. Under the Title V regulations, a “responsible official” must sign compliance certifications for major stationary sources.²⁷² Responsible officials are not limited to corporate leadership, such as Presidents and Vice-Presidents, who may be completely unfamiliar with the day-to-day operation of a facility. Rather, corporate officials may appoint a “duly authorized representative,” such as a plant manager, to sign compliance certifications.²⁷³ AFPM recommends that EPA adopt the “responsible official” concept from the Title V regulations to the extent that the agency goes forward with a certification obligation.

²⁶⁹ 81 Fed. Reg. at 13,705.

²⁷⁰ Region 3 Report, at 8; see also Delaware Report, at 10-11; Belke Paper, at 3-4.

²⁷¹ *Id.* at 250 (citing *Sorrel v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011)).

²⁷² See 40 C.F.R. § 70.2. In relevant part, the Title V regulations define “responsible official” as follows:

- (1) For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

- (i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding \$25 million (in second quarter 1980 dollars); or
- (ii) The delegation of authority to such representatives is approved in advance by the permitting authority;

- (2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively. ...

40 C.F.R. § 70.2.

²⁷³ *Id.*

Similarly, any certification obligation for the Audit Response should incorporate the “reasonable inquiry” concept from Title V compliance certifications. The reasonable inquiry regulation states that “[a]ny . . . [Title V] compliance certification . . . shall contain certification by a responsible official of truth, accuracy, and completeness. . . based on information and belief formed after reasonable inquiry[.]”²⁷⁴

The reasonable inquiry requirement has a long history under Title V of the CAA. The 1990 amendments to the CAA dictated an undefined method of compliance certification by a Title V applicant.²⁷⁵ But in its first regulations under those amendments, EPA recognized that the sheer volume of information in a permit application “from certain large complex sources (e.g., chemical plants)” posed problems for the compliance certification and other requirements.²⁷⁶ EPA therefore proposed a certification standard modeled after Rule 11 of the Federal Rules of Civil Procedure: The certifying official “must make a reasonable (under the circumstances) inquiry before attesting to the truth, accuracy, and completeness of the information and statements.”²⁷⁷ As the agency has consistently explained, the Rule 11 standard has never mandated “absolute knowledge[.]”²⁷⁸ Rather, the reasonableness of an inquiry depends on a variety of factors, including the time available to the certifier and his reliance on others for information.²⁷⁹ The flexibility in that standard made perfect sense for the Title V permit program. A single individual cannot be expected to gain first-hand knowledge of all facts potentially relevant to such an extraordinarily complicated issue. EPA adopted the reasonable inquiry standard without significant change, and it has functioned effectively for decades.²⁸⁰

EPA should adopt the same standard for certifications in Audit Responses. Most importantly, those “certain large complex sources”—chemical plants, refineries, power plants, etc.—are no smaller or simpler today than in the early 1990s.²⁸¹ As with a Title V permit application, a single senior official signing a certification cannot hope to obtain personal knowledge of all the facts potentially relevant to the response to the RMP audit. The volume and dynamic nature of information is too much, especially for someone under time constraints. Particularly for refineries, senior corporate officers may oversee many facilities, in addition to terminals, retail facilities, and more. Given the unique nature of each refinery, it is impracticable for a corporate officer to be intimately familiar with the day-to-day operations and intricacies of each covered process of each facility. A reasonable inquiry standard is necessary to account for this complexity and the need to rely on others at the facility. For these reasons the proposed requirement that senior corporate officers or equivalent signing the certification is unreasonable.

²⁷⁴ 40 C.F.R. § 70.5(d).

²⁷⁵ See Pub. L. No. 101-549, § 503, 104 Stat. 2399 (1990) (codified at 42 U.S.C. § 7661b(b)(2)).

²⁷⁶ Operating Permit Program, 56 Fed. Reg. 21,712, 21,733 (proposed on May 10, 1991).

²⁷⁷ *Id.* at 21,734.

²⁷⁸ Amendments to Compliance Certification Content Requirements for State and Federal Operating Permits Programs, 79 Fed. Reg. 43,661, 43,665 (July 28, 2014). These limitations on the certification are especially appropriate given the lack of a meaningful opportunity to review the audit report and the rushed nature of the audit response.

²⁷⁹ See, e.g., Fed. R. Civ. P. 11 advisory committee’s note to 1983 amendment.

²⁸⁰ See Operating Permit Program, 57 Fed. Reg. 32,250, 32,303 (July 21, 1992).

²⁸¹ Fed. Reg. at 21,733.

XIII. EPA'S NEW PROPOSED EMPLOYEE PARTICIPATION REQUIREMENTS EXCEED EPA'S AUTHORITY AND WOULD PROVIDE NO RISK REDUCTION

There is nothing more important to U.S. refineries and petrochemical facilities than providing a safe workplace. These industries have invested significant resources in their employees, equipment, procedures, and management systems to drive continuous improvement in process safety performance—above and beyond compliance with OSHA's PSM or EPA's RMP regulations. This performance-based approach is effective, as evidenced by the strong safety record in the RMP data for these industries. For this reason, much of the employee participation requirements in the Proposed Rule are unnecessary and could potentially impede the process safety performance these industries have achieved.

PSM and RMP regulations already include employee participation requirements. In the Proposed Rule, EPA adds several new employee participation requirements for owners and operators of RMP covered facilities at 40 CFR §68.83. These requirements include: consultation with employees and their representatives on recommendations and findings of PHAs, compliance audits, and incident investigations; authorities for employees to refuse work and recommend an operator partially or completely shut down a unit and for qualified operators to partially or completely shut down a unit; and a process to for employees and their representatives to anonymously report unaddressed hazards, unreported RMP-reportable accidents, or any other noncompliance. Many of these proposed requirements exceed EPA's authority because the requirements: 1) conflict with collective bargaining requirements under the National Labor Relations Act (NLRA); 2) conflict with the balance of employee responsibilities provided by the NLRA; and 3) interfere with OSHA's regulation of the workplace. As a matter of administrative law, the Proposal did not provide sufficient reasons for the proposed requirement. The requirements also have the potential to create additional hazards from an unplanned shutdown that EPA did not consider in the Proposal.

A. EPA's proposed requirements exceed its statutory authority for the RMP.

EPA's proposed employee participation requirements implicate the NLRA and OSHA's authority and inappropriately wade outside the scope of RMP. As discussed above, when Congress established the RMP program, it reserved the exclusive authority to address onsite worker safety issues to OSHA. In addition, the NLRA sets a "mutual obligation of the employer and the representative of the employees" to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment."²⁸² Indeed, "safety on the job" is a condition of employment and "is a mandatory subject of collective bargaining."²⁸³ EPA's Proposal to set requirements that fall within the scope of the NLRA's mandatory collective bargaining provisions, would therefore conflict with the NLRA.

The proposed requirements also interfere with a fundamental management responsibility as provided by the NLRA because the Proposal would escalate the authority of nonmanagement employees, for example, in the resolution of recommendations related to participation in, or "veto" power over, PHAs, compliance audits, and incident investigations, and allow nonmanagement

²⁸² 29 U.S.C. § 158(d).

²⁸³ *Pierce v. Commonwealth Edison Co.*, 112 F.3d 893, 896 (7th Cir. 1997).

employees to shut down processes. Such requirements also violate the balance of collective bargaining under the NLRA because they grant non-management employees and their representatives by law a management function that, under the NLRA, can only be bargained away.²⁸⁴ Therefore, assigning this type of “veto” power to non-management employees exceeds EPA’s authority.

EPA’s proposed requirement for implementing a process to allow anonymous reporting of unreported accidents and noncompliance further exceeds EPA’s authority. As EPA acknowledges in the Proposal, employee avenues for anonymous reporting already exist through OSHA. Indeed, “OSHA enforces whistleblower protections provided under the CAA, the Occupational Safety and Health Act, and other Federal laws.”²⁸⁵ Yet, EPA’s proposed requirements ignore the CAA statutory prohibition on addressing worker safety, and tread on the ground reserved for OSHA’s supervision, i.e., on-site in the workplace.

B. EPA provides no meaningful justification for the proposed requirements.

The Proposal fails to provide “good reasons” for a change in policy.²⁸⁶ The existing PSM and RMP regulations already include employee participation requirements. These include required written operation procedures, including emergency operations and emergency shutdown, and the assignment of shutdown responsibility to qualified operators to ensure that emergency shutdown is executed in a safe and timely manner. EPA presents no data or sufficient explanation of why the performance-based framework of the existing RMP rule, and facility policies and procedures, are inadequate. Moreover, EPA acknowledges that industry performs better than EPA’s current rule, stating “many facilities with RMP processes already have the appropriate measures to identify, reduce, and mitigate the threat of an accidental release before it happens.”²⁸⁷ In the Proposal, EPA recognizes data that shows RMP incidents are most often followed by improvements in “specific prevention program areas,” not the areas of the employee participation requirements.²⁸⁸ Yet, EPA disregards this data, offering simply that it “believes [the Proposal is] a better approach” than any changes to the specific program prevention areas. This does not meet the legal standard for proposing the change to the existing regulations.

Regarding stop work requirements, the Proposal recognizes “the current RMP rule . . . already addresses many aspects of a stop work authority” by which employees do not start work unless it is verified safe to do so (i.e., in good faith by the operator) Pre Startup Safety Review (PSSR) being one example.²⁸⁹ Indeed, there is a strong industry culture that employees should not start work in the first place if there are safety concerns. EPA similarly lacks a basis for the proposed shut down requirements as emergency shutdown procedures already govern the process for shutting down a unit by qualified operators.²⁹⁰ Moreover, EPA offers no meaningful explanation of the need for requiring employee “veto” power in matters such as incident investigations, PHAs,

²⁸⁴ 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”).

²⁸⁵ Proposal at 53,593.

²⁸⁶ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

²⁸⁷ Proposal at 53,591.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ 40 CFR 68.69(a)(1)(iv)

and compliance audits. EPA also fails to explain how this requirement would be implemented, including how facilities would address instances of no consensus or resolution. Indeed, EPA should clarify that the Proposal is not intended to grant “veto” power to employees or their representatives. The current RMP already provides for consultation with employees on the development of the PHA and on the development of the other elements of process safety management in both the PSM standard and RMP rule. Yet, the Proposal would arbitrarily expand this requirement and mandate a prescriptive checklist for employee participation, i.e., “addressing, correcting, resolving, documenting, and implementing recommendations and findings.”²⁹¹

U.S. refineries and petrochemical facilities support and already allow employees the ability to stop a job or task for safety reasons.²⁹² EPA’s Proposal regarding employee refusal to perform a task also falls short of an appropriate justification because this situation is already addressed through the employee discipline framework, thereby implicating collective bargaining and the OSHA-administered framework for employee discipline. Specifically, if the employer determines that the employee’s refusal to perform work is justified, then there is no need for discipline in the first place. If the employer nonetheless inappropriately disciplines the employee for their refusal to perform work, then the employee may file a whistleblower complaint with OSHA. If the employer is unionized, the resolution of workplace disputes falls within the mandatory collective bargaining provisions of the NLRA and the employee may file a grievance and proceed to arbitration. OSHA—not EPA—regulates anonymous “whistleblower” reporting. Overall, EPA has no authority to investigate and prosecute, much less does it have experience with regulating, disciplinary disputes between an employer and employee.

In addition, EPA fails to justify the requirements for employee representatives included in each of the proposed provisions. EPA expands the shutdown, refusal, and recommendation authorities to “employee representatives” as well as employees.²⁹³ The employee representative may not have the knowledge or understanding of the specific equipment or process unit to properly identify when a situation is unsafe or to provide any benefit in resolving recommendations. The EPA also did not provide cost data for employees and their representatives being consulted on “addressing, correcting, resolving, documenting, and implementing recommendations and findings” of PHAs, audits, and investigations.

C. EPA fails to consider the full costs and potential unintended consequences that may result from the Proposal.

As discussed above, the RMP already accounts for stop work authority. The current requirements establish a framework for an employee to notify management about safety issues and to start work only once it is deemed safe. The implementation of the existing requirements within the context of a strong company culture for safety creates a safe work environment. The Proposed Rule, however, would potentially create an unsafe environment by allowing an employee to shut down work in a manner that might not comply with safe shutdown procedures impacting other connected facility processes. This would create additional hazards to the facility and its employees

²⁹¹ Proposal at 53,614.

²⁹² 29 CFR § 1977.12(b)(2); OSH Act Section 11(c) (e.g., employees have the right to refuse work in light of a hazardous condition that could cause serious bodily injury or death).

²⁹³ 40 CFR 68.83(d).

beyond the hazards for which an individual employee might believe they should stop work related to a single process in a particular instance.

Giving nonmanagement employees the authority to shut down an entire operation is a significant escalation of authority. Such a requirement could pose a greater hazard than keeping the operation running. For example, an individual may not have complete information regarding the current circumstances of the facility, such as knowledge of what is occurring in other operations at the site and how a shutdown could impact those operations. Indeed, each facility trains specific operators on the shutdown process and there are procedures in place to initiate a shut down and it would be unsafe to deviate from the established site practices and procedures. Therefore, the Proposal potentially creates *more* dangerous situations that could lead to catastrophic releases and compromise safety, including to *other employees*.

Also, the proposed requirements could have unintended impacts to the business itself and individual employees themselves. As one example, the proposed stop work requirement would provide nonmanagement employees with legal leverage to misuse that authority, causing unnecessary harm to the business. Separately, it is unclear how EPA would treat nonmanagement employees who are thrust into this type of decision-making role, in the event a decision by the employee leads to adverse consequences such as a catastrophic release. If nonmanagement employees are permitted to shut down an operation, would EPA consider the company liable if the shutdown led to adverse consequences?

XIV. EPA LACKS JUSTIFICATION TO MAKE FACILITIES RESPONSIBLE FOR COMMUNITY NOTIFICATION SYSTEMS.

EPA proposes several revisions related to community notification in the event of accidental releases, all of which make facilities themselves responsible for ensuring community notification. These revisions include: adding a requirement for non-responding facilities to ensure a community notification system is in place; adding an emergency response program requirement to ensure a community notification system is in place; amending accidental release provisions to ensure prompt notification to the public; and, specifying in the RMP rule, the contents of community response plans. EPA lacks justification for requiring facilities to ensure both that third-party authorities make these notifications and that community response plans include specific content. Responsibility for compliance with these requirements must remain with the party in control of those matters.

In proposing the community notification provisions, EPA lacks a meaningful justification for the requirements. The Proposal states that facilities must “ensure that a community notification system is in place to warn the public within the area threatened by a release” and offers few examples of when EPA believes an appropriate notification was not made.²⁹⁴ The preamble provides a primary example dating back to 2014; however, EPA does not demonstrate how the Proposal would have prevented this accident.²⁹⁵ EPA simply states that the Proposed Rule would make facilities responsible for the functioning of third-party notification systems. This fails to consider that it is entirely impractical to make facilities responsible to ensure that community

²⁹⁴ Proposal at 53,595–96.

²⁹⁵ *Id.* at 53,595.

notification systems are working, when the facility does not have operation of, or control over, those systems. In addition, EPA's consideration of a few hand-picked examples of accidents does not analyze how the purported benefits of this Proposal weigh alongside the anticipated costs.²⁹⁶

For the same reasons, EPA also fails to provide sufficient information or direction regarding how the proposed community notification provisions would be implemented. The proposed revisions themselves recite the various requirements that facilities must ensure aspects of notification systems, without adding any further explanation. The Proposal is impractical as described above. And the lack of direction provided in the Proposal regarding how facilities could accomplish the requirements in practice, undermines the opportunity for the public to meaningfully comment on the community notification aspects of the Proposal.

EPA does not offer any authority to make RMP facilities responsible for the notification systems of third parties, or to make them responsible for the content of community response plans. The appropriate role of RMP facilities is, to provide information for local authorities to develop their own community response plans as required by law, in 40 U.S.C. §11003, which EPA cites in the Proposal. EPA states that "EPA can expect facilities to ensure that a community notification system is available because the Federal Emergency Management Agency (FEMA) has established the Integrated Public Alert & Warning System (IPAWS) for community notification."²⁹⁷ But the mere existence of a system operated and maintained by third parties does not provide EPA authority to require RMP facilities to *ensure* aspects of that system, and it does not explain how a facility could possibly ensure this or ensure the contents of a response plan developed by a community.

XV. EPA SHOULD CLARIFY THAT STATE AND FEDERAL APPROVAL IS NOT NECESSARY AS RELATED TO LOCAL RESPONDER FIELD EXERCISES.

The current RMP regulations require emergency response field and tabletop exercises to be coordinated with local officials.²⁹⁸ Regarding the frequency of such exercises, EPA proposes to require emergency response field exercises to be conducted with local responders "once every 10 years unless local responders indicate that frequency is impractical."²⁹⁹ While the current requirement for facilities to consult with LEPCs on the frequency of field exercises is working well and provides a collaborative framework for facilities and LEPCs, we have no objection to the proposed 10 year schedule given the flexibility for LEPCs to modify the frequency. However, we do object to the inexplicable proposed requirement for state and federal approval of a change in frequency.

In the Proposal, EPA states specifically that "written justification from local responders will allow facilities ... relief from this proposed provision."³⁰⁰ Yet, the proposed regulatory text states, "the owner or operator shall conduct a field exercise at least once every 10 years unless the appropriate *Federal, State, and local* emergency response agencies agree in writing that such

²⁹⁶ *Id.* at 53,561 (total undiscounted cost estimate of \$38 million).

²⁹⁷ *Id.* at 53596–53597.

²⁹⁸ 40 CFR 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.").

²⁹⁹ Proposal at 53,599.

³⁰⁰ *Id.*

frequency is impractical.”³⁰¹ The preamble makes no mention of the approval from federal and state agencies, which would deem the requirement arbitrary and capricious. In addition, there are no good reasons for requiring federal and state approval. Given their front-line role in responding to emergencies, the regulations require coordination with LEPCs – not federal and state officials – to plan and participate in exercises. Accordingly, it is reasonable for LEPCs to have a role in setting the frequency of the field exercises. It would be inappropriate for EPA to provide federal and state officials veto power over scheduling an exercise for which they have no required role. Thus, we recommend EPA remove the reference to Federal and State agencies in this provision, to clarify that RMP facilities need not obtain approval from State or Federal agencies if the local emergency responders have identified the frequency of an exercise is impractical.

In another problematic change to the emergency response requirements, EPA proposed to mandate certain information be included in the required evaluation report. Current regulations provide a list of information that “should” be included in an evaluation report prepared following each field and tabletop exercise.³⁰² The Proposal would modify the “should” to “shall,” which would establish a prescriptive reporting requirement that breaks from the performance-based nature of RMP. EPA simply states the change would be consistent with the required information in an incident investigation report.³⁰³ This is an insufficient rationale as incident investigations are distinguishable from emergency response exercises. Further, EPA provides no indication existing emergency response exercise reports are flawed or that mandating such information would meaningfully change emergency response. In addition, EPA fails to consider the paperwork burden hours and costs associated with requiring the reporting of such information. For these reasons, EPA should not proceed with finalizing the change.

XVI. EPA’S PROPOSED REINSTATED INFORMATION DISCLOSURE REQUIREMENTS ARE UNJUSTIFIED AND POSE SIGNIFICANT SECURITY RISKS.

AFPM’s members support proactive engagement with local stakeholders to promote the safety of employees, contractors, and our surrounding communities. Engagement necessarily requires regular communications between facilities, local responders, and the community. We therefore support EPA’s goal of enhancing communications on RMP issues in a manner that leads to meaningful improvements in safety. However, EPA’s Proposal to reinstate public information disclosure requirements similar to the 2017 rule fails to achieve that goal and should not be finalized as proposed.

EPA proposed that RMP facilities publicly disclose numerous categories of information that lack any practical utility to mitigate or prevent impacts from a potential release of hazardous substances and do not significantly benefit LEPCs. The reality is that a wealth of emergency response information is already readily available to the public and LEPCs. RMP facilities, for example, already provide information on chemicals that they manufacture and store under the EPCRA. Tabletop and field exercises likewise help to fulfill this goal. Nevertheless, EPA’s Proposal would impose an overly burdensome requirement on facilities to provide a suite of

³⁰¹ *Id.* (emphasis added).

³⁰² 40 CFR 68.96 (b)(3).

³⁰³ Proposal at 53,599.

information to any requester, in the language of their preference, residing within a 6-mile radius of the facility. Such disclosure requirements are not only beyond EPA’s RMP authority, but also expose facilities to security risks the Agency failed to appropriately consider. For these reasons, we urge EPA not to proceed with the disclosure requirements in this rulemaking.

A. EPA has limited authority to mandate public disclosure of RMP information.

Several subsequently enacted statutes have limited EPA’s authority under the CAA, including the RMP program, to mandate public disclosure of the information proposed. These statutes include:

- The Critical Infrastructure Information Act (“CIIA”) enacted as part of the Homeland Security Act of 2002;
- The Chemical Facilities Anti-Terrorism Standards Act (“CFATS Act”) of 2007;
- The Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 (“CFATS Act of 2014”), which reauthorized the CFATS program; and
- S. 4148 in 2020, which again reauthorized the CFATS program.

1. CIIA

The Homeland Security Act, through the CIIA, established certain information disclosure protections for critical infrastructure, which includes chemical facilities. Recognizing that over 85% of critical infrastructure is privately owned, these information disclosure protections were necessary to promote public-private sharing regarding security risks in order to prevent, protect against, mitigate, and recover from terrorism, other threats, and hazards.³⁰⁴ The CIIA defines critical infrastructure information to mean “information not customarily in the public domain and related to the security of critical infrastructure or protected systems—

- (A) actual, potential, or threatened interference with, attack on, compromise of, or incapacitation of critical infrastructure or protected systems by either physical or computer-based attack or other similar conduct (including misuse of or unauthorized access to all types of communications and data transmission systems) that violates federal, state, or local law, harms interstate commerce of the United States, or threatens public health and safety;
- (B) the ability of critical infrastructures or protected systems to resist such interference, compromise, or incapacitation, including any

³⁰⁴ See, e.g., DHS, CFATS Fact Sheet, available at <https://www.dhs.gov/sites/default/files/publications/cfats-fact-sheet-04-16-508.pdf> (“Many regulated facilities are part of the chemical sector – which employs nearly one million people and earns revenues between \$600 billion and \$700 billion per year. Other types of facilities with high-risk chemicals include universities, oil and natural gas operators, and hospitals. The majority of facilities with high-risk chemicals are privately owned, requiring [government] to work closely with the private sector and industry to assess risks, implement protective programs, and measure effectiveness.”).

planned or past assessment, projection or estimate of the vulnerability of critical infrastructure or a protected system, including security testing, risk evaluation thereto, risk management planning, or risk audit; or,

- (C) any planned or past operational problem or solution regarding critical infrastructure...including repair, recovery, reconstruction, insurance, or continuity to the extent it relates to such interference, compromise, or incapacitation.”³⁰⁵

The phrase “in the public domain” was further defined by DHS through the CIIA implementing regulation as “information lawfully, properly and regularly disclosed generally or broadly to the public.”³⁰⁶ Examples of this information include the ability of a system to resist a potential attack, the misuse of data communications, and any past operational problems regarding the system including repairs or reconstruction.³⁰⁷ Although numerous information disclosure protections apply, CIIA does provide that critical infrastructure information can be obtained by state, local, and federal government through other applicable laws including those that disclose the information generally or broadly to the public.³⁰⁸ It is possible that the CIIA and RMP could be read in harmony for certain facilities and activities; however, given the underlying concerns about information sharing, public information sharing and information sharing without adequate disclosure protections, as proposed by the EPA, disregard Congress’ direction to minimize security risks.

2. CFATS

EPA notes that like OSHA’s PSM, DHS’s CFATS is related to RMP, and that “EPA routinely coordinates with DHS as part of the Chemical Facility Security and Safety Working Group and commits to working with DHS to find regulatory solutions that balance community right-to-know with security concerns.”³⁰⁹ However, the Proposal fails to balance these goals and EPA has not provided a summary of these communications or its coordination with other federal regulatory agencies. EPA’s Proposed Rule may place mandatory information disclosure requirements on substantially the same information that CFATS requires to be protected from disclosure. The authority for determining the scope of protections surrounding information related to these high-risk facilities was clearly given to DHS—not just once, but repeatedly and recently.

CFATS, as authorized in 2007 and reauthorized in various subsequent years, establishes Chemical-terrorism Vulnerability Information (“CVI”) as the information protection regime to protect from inappropriate public disclosure any information developed or submitted pursuant to CFATS authority. The following information (whether written, verbal, electronic, digital, or otherwise) constitutes protected CVI:

³⁰⁵ Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified at 6 U.S.C. § 101).

³⁰⁶ Procedures for Handling CII, 71 Fed. Reg. 52,252, 52,272 (Sept. 1, 2006) (Final Rule, 6 C.F.R. pt. 29).

³⁰⁷ 6 U.S.C. § 131.

³⁰⁸ *Id.* § 133(a)(2)(c).

³⁰⁹ Proposal at 53,603.

- Security Vulnerability Assessments under 6 CFR § 27.215;
- Site Security Plans under 6 CFR § 27.225;
- Documents relating to DHS review and approval of Security Vulnerability Assessments and Site Security Plans, including Letters of Authorization, Letters of Approval, and responses thereto; written notices; and other documents developed pursuant to 6 CFR §§ 27.240 or 27.245;
- Alternative Security Programs under 6 CFR § 27.235;
- Documents relating to inspections or audits under 6 CFR § 27.250;
- Any records required to be created or retained by a covered facility under 6 CFR § 27.255;
- Sensitive portions of orders, notices or letters under 6 CFR § 27.300;
- Information developed pursuant to 6 CFR §§ 27.200 or 27.205 (such as the CSAT Top-Screen and the determination by the Assistant Secretary that a chemical facility presents a high level of security risk); and
- Other information developed for chemical facility security purposes that the Secretary, in his discretion, determines is similar to the information protected in 6 CFR § 27.400(b)(1) through (8).

EPA fails to explain the limits of its authority in this area of overlap or how the Proposed Rule provides a reasonable alternative to the existing, available solutions. EPA has previously testified to Congress that DHS should be responsible for ensuring the consistency of high-risk chemical facility security across all critical infrastructure sectors.³¹⁰ CFATS also requires sites reach out to local emergency responders. It makes little sense why, as a matter of law or policy, this rule proposes conflicting requirements for the same information for certain facilities. The EPA has no new statutory authority that reflects congressional intent more clearly or recently than the July 2020 reauthorization of CFATS.

While EPA acknowledges RMP is related to CFATS and that it routinely coordinates with DHS concerning DHS' regulation of CFATS, EPA also argues that CFATS is not intended to regulate RMP information.³¹¹ Here EPA contradicts itself — saying that it is committed to working with DHS to balance community right-to-know with security concerns via the Chemical Facility Security and Safety Working group, while at the same time arguing that CFATS is not applicable. In doing so, EPA also notes that during 2021 listening sessions, an industry trade association argued that certain information about RMP facilities needed to be kept confidential, including information pursuant to CFATS, but that the industry organization “did not specifically explain

³¹⁰ See Testimony of Peter S. Silva, Assistant Administrator for Water, Environmental Protection Agency, before the Senate Committee on Homeland Security and Governmental Affairs, March 3, 2010 (“DHS should be responsible for ensuring consistency of high-risk chemical facility security across all 18 critical infrastructure sectors.”).

³¹¹ Proposal at 54,603.

how releasing risk management plan data would increase particular security risks.”³¹² This impermissibly shifts EPA’s own burden of explaining why it’s changing its policy concerning security concerns in its 2019 reconsideration of the 2017 RMP information disclosure requirements to the public. In any case, RMP regulates extremely hazardous substances. It is common sense that releasing regulated substances along with 5-year accident history information (including type of release event and its source, initiating event and contributing factors, etc.) can give someone with ill intent a roadmap for causing a release.

The Proposal also fails to consider the limits on EPA’s authority to mandate such disclosure for certain facilities under the Maritime Transportation Security Act (“MTSA”) of 2002. The MTSA imposes stringent security requirements on port authorities and facilities adjacent to waterways under U.S. jurisdiction to protect the U.S. maritime industry and commerce. While the Proposed Rule refers to prior industry comments that cited concerns with the RMP disclosures under the MTSA, EPA provided no discussion of the Proposal’s implications under the MTSA. EPA must ensure compliance with the MTSA and provide the public an opportunity to comment on its proposed rationale.

B. EPA’s proposed information disclosure requirements fail to properly consider security risks.

EPA’s Proposal would reinstate information disclosure requirements from the 2017 rule without adequately considering the security risks posed by such disclosures. Other federal agencies raised security concerns with the proposed disclosure requirements during interagency review of the Proposed Rule and the 2017 rule that EPA failed to address. EPA’s dismissive approach to input from the intelligence community is deeply concerning, particularly given EPA’s lack of expertise and authority in this area. These concerns, coupled with the increase in cybersecurity attacks on the industrial sector in recent years, invalidate the proposed requirements.

1. The Proposed Rule dismisses security concerns from other federal agencies, including the intelligence community.

The interagency comments on the Proposed Rule reveal other federal agencies voiced security concerns with the proposed disclosure requirements that EPA either ignored or deflected for public comments.

One of the first interagency comments on the Proposed Rule noted the security implications of the proposed disclosure of certain RMP information and asked EPA for details to fully assess the impacts.³¹³ In response, EPA simply referred to the Technical Background Document in the docket that identifies certain variables for a potential future database and said the Agency solicits public comment on the topic.³¹⁴ This dismissive response suggests EPA did not provide

³¹² *Id.*

³¹³ OMB redline at 1 (“EPA intends to make at least some RMP data publicly available, but the specifics are unclear. We are concerned there could be security implications associated with the release of certain information, and we would like EPA to provide specifics so we can better assess the impacts of the rule modifications.”).

³¹⁴ OMB redline at 1 (“Please note that in the Technical Background Document in Section 10 (“Information availability of non-offsite consequence analysis data: variables slated for inclusion”), EPA has outlined the

interagency reviewers in the intelligence community an opportunity to fully assess the security impacts of the proposed disclosure. Such omission also limits the public's ability to assess the impact of the proposed requirements and meaningfully comment.

Elsewhere in the Proposal, an interagency reviewer struck an EPA statement that inaccurately suggested posting RMP data did not result in security threats to RMP facilities, and explained the statement was “contrary to the position of security/risk experts.”³¹⁵ A similar sentence was struck by interagency reviewers who said EPA “seems to be implying that simply because some RMP data can be found in various places on the internet, there is no security risk in EPA making that information publicly available in a centralized location for anyone to access. This is *not* something security experts agree with.”³¹⁶ This correction highlights EPA's lack of expertise in this area.

Although EPA states it has and will continue to work with the U.S. Department of Homeland Security, DOJ, and other agencies in identifying security risks, the Agency fails to address, let alone acknowledge, the explicit security concerns raised by government agencies on disclosure provisions similar to that of the 2017 rule.³¹⁷ During the development of the 2017 rule, other federal agencies raised security concerns. For example, other government agencies noted during the interagency review process of the pre-2017 rule Proposal that the scope of disclosure and lack of standards for dissemination “could assist terrorists in selecting targets and/or increasing the severity of an attack by decreasing first responder capability.”³¹⁸ The 2017 rule failed to address these significant security concerns, which led to several state Attorneys General objecting to the rulemaking and seek reconsideration.³¹⁹

The 2019 rule rescinded much of the disclosure requirements in the 2017 rule due to security risks, placing particular reliance on a 2000 report issued by the Department of Justice on the Assessment of the Increased Risk of Terrorist or Other Criminal Activity Associated with Posting Off-Site Consequence Analysis Information on the Internet.³²⁰ The DOJ's report explained that “assembling the otherwise-public data is valuable in identifying and focusing on sources that have conducted criminal acts...”³²¹ In the Proposed Rule, EPA states that it now “believes the proposed amendment to add a 6-mile radius ensures that even if community members obtain information related to offsite consequences analysis (“OCA”) data, it would require a difficult

variables slated for inclusion in a future online database. EPA intends for this to be a process that involves working with the security community to provide a level of information that balances information sharing with affected communities and security concerns.”).

³¹⁵ OMB redline at 176 (“This statement seems out of place in a section that is supposed to simply be explaining how information currently is available. More concerningly, it seems to imply that this information does not pose a security threat, which is contrary to the position of security/risk experts. Recommend this sentence be deleted.”).

³¹⁶ OMB redline at 179 (emphasis added).

³¹⁷ Proposal at 53,603.

³¹⁸ See EO 13866 Interagency Review Risk Management Modernization RIN 2050-AG82 NPRM Proposal Rule 20160223 (Redline) 20160223 REV, Docket# EPA-HQ-OEM-2015-0725-0004, at 150 (Mar. 14, 2016).

³¹⁹ See Letter from Scott Pruitt, Attorney General, State of Oklahoma et al. to Gina McCarthy, Adm'r, EPA, EPA Docket No. EPA-HQ-OEM-2015-0725-0624 (July 27, 2016).

³²⁰ Department of Justice, Assessment of the Increased Risk of Terrorist or Other Criminal Activity Associated with Posting Off-Site Consequence Analysis Information on the Internet (Apr. 2000), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/departement-justice-assessment-increased-risk-terrorist-or-other>.

³²¹ *Id.*

nationwide-coordinated effort among people within 6-miles of each facility to create the type of online database described in DOJ's report."³²² However, EPA provides little to no explanation for this conclusion or discussion of how facilities would verify a requester's proof of residency. Moreover, the risks extend beyond the possibility of an on-line database. Even someone living within 6-miles of a facility can use information from just one facility to cause a catastrophic release, as described above.

To mitigate security risks, EPA states that it "acknowledges that the Agency must consider whether some non-OCA data elements...may not be suitable for public release and should be restricted based on potential security risks. EPA has been and will continue to work with DHS, DOJ, and other Federal partners on identifying these risks."³²³ However, EPA does not provide information on how it plans to work with DHS and DOJ to address security risk concerns, nor has the Agency provided sufficient information about how its 6-mile radius criteria will mitigate risk. Instead, EPA arbitrarily offers its 6-mile radius criteria as a mechanism by which it claims will make cyberattacks more difficult due to requiring "nationwide-coordinated effort[s]." This statement ignores the ease of bypassing the 6-mile radius through the sharing of information over the internet and the growing sophistication of cybersecurity threats, and displays that EPA has not provided information on how it plans to actually enforce its 6-mile radius criteria or verify proof of residency. EPA's failure to specify how it plans to address these concerns deprives the public a meaningful opportunity to comment by failing to provide Proposals for a key element of its information disclosure amendments.

In addition, EPA's broad requests for public comment unfairly burden commenters that would be vulnerable to the security risks of the Proposal. Security attacks are highly sensitive and not discussed openly, let alone in a public comment letter for which EPA has directed commenters to not provide confidential business information or other sensitive information. Further, it is inappropriate for EPA to expect commenters to provide a level of specificity on information that poses security risks when the Agency has not described the information to be required. EPA also failed to consider the proposed new information to be disclosed under 68.120(d) in the context of the dramatic expansion of the PHA and new requirement for rejected PHA recommendations to be included in RMPs, that are also subject to public disclosure.

2. Proposal fails to consider the rise and risks of cybersecurity attacks.

In addition, EPA failed to consider how the proposed disclosure would appropriately balance cybersecurity risks. On May 17, 2021, President Biden issued Executive Order 14028, *Improving the Nation's Cybersecurity*, which places significant emphasis on the need to for agencies to increase cybersecurity measures. E.O. 14028 explains that the increased focus on cybersecurity is due to "persistent and increasingly sophisticated malicious cyber campaigns that threaten the public sector." The E.O. also explains that the private sector must also "adapt to the continuously changing threat environment to ensure its products are built and operate securely, and partner with the Federal Government to foster a more secure cyberspace." Despite this call to

³²² Proposal at 53,600.

³²³ *Id.* at 53603.

partner with industry to ensure a secured environment, EPA failed to consider its obligations under E.O. 14028 in the Proposed Rule.

EPA also failed to appropriately address the data demonstrating a rise in cybersecurity attacks and the enhanced level of sophistication at which such attacks are taking place in the U.S. that could be exacerbated by the proposed disclosure requirements. For instance, in September 2022, the Cybersecurity and Infrastructure Security Agency (“CISA”) published its 2023–2025 Strategic Plan which lays out the current risk landscape in the cybersecurity sector.³²⁴ According to CISA, cybersecurity risks are becoming increasingly sophisticated, in part due to “the operational boundaries between government organizations; the complexity of cyber infrastructure that spans public and private networks; and sponsorship by foreign adversaries.”³²⁵ In addition, a May 2020 U.S. Government Accountability Office report warned that, “[t]housands of high risk chemical facilities may be subject to the risk posed by cyber threat adversaries— terrorists, criminals, or nations. These adversaries could potentially manipulate facilities’ information and control systems to release or steal hazardous chemicals and inflict mass casualties to surrounding populations.”³²⁶

This recent federal emphasis on cybersecurity is well-warranted. Cyberattacks have turned sharply upwards in both the number and sophistication. For instance, in 2021, a major pipeline was the target of a ransomware attack which resulted in a multimillion dollar ransom payment, significantly reduced fuel supply on the East Coast, and an emergency declaration covering 17 states and the District of Columbia.³²⁷ Also in 2021, at least two wastewater treatment plants — one in Florida and one in the San Francisco Bay Area — were the targets of cyberattacks. While the wastewater treatment plant attacks did not result in significant enduring consequences, they made clear that threat actors can and will target the nation’s infrastructure. Outside of the U.S., the recent Nord Stream pipeline gas leak demonstrate the significant environmental impacts associated with such attacks. EPA should have taken such risks into account in its Proposed Rule. EPA must do so and provide a supplemental notice with opportunity to comment before the Agency can proceed with the rulemaking.

C. EPA’s 6-Mile Radius Criteria for Information Disclosure is Arbitrary and Lacks Sufficient Justification.

As one point of departure from the 2017 rule, EPA proposes to reinstate the same disclosure requirements in response to requests from residents within an arbitrarily selected 6-mile radius of the facility. That geographic test for releasing information is flawed for several reasons. First, it would be burdensome and costly to verify residence for anyone who requests information within 6-miles, particularly in densely populated areas. Second, the 6-mile radius limit on releasing information is illusory. Once information is released, it could be released to anyone in the world. The Proposal contains no provisions limiting the original requester to keeping the information

³²⁴ CISA, 2023–25 Strategic Plan, https://www.cisa.gov/sites/default/files/publications/StrategicPlan_20220912-V2_508c.pdf.

³²⁵ *Id.*

³²⁶ Critical Infrastructure Protection: Actions Needed to Enhance DHS Oversight of Cybersecurity at High-Risk Chemical Facilities, U.S. Gov’t Accountability Office, GAO-20-453, at 1 (May 14, 2020).

³²⁷ Axios, Emergency declaration issued in 17 states and D.C. over fuel pipeline cyberattack (May 10, 2021), <https://www.axios.com/2021/05/10/fuel-pipeline-cyberattack-us-state-of-emergency>.

confidential. It could all be posted on the internet or otherwise released widely. Third, the 6-mile radius is arbitrarily set. EPA proposes a 6-mile radius because 90 percent of all toxic worst-case endpoints are 6-miles or less while acknowledging almost all flammable worst-case distances are less than 1-mile and other endpoints are at longer and shorter distances than the one proposed.³²⁸ This variability demonstrates the ease with which EPA could slice and dice the endpoints and percent threshold as a reason to select a particular distance. Yet, EPA fails to articulate any reason for why one endpoint or percentage over another is appropriate for mandating the information disclosure requirements of the Proposed Rule. Absent a clear explanation for this criteria, EPA's Proposal is arbitrary and leaves commenters with an insufficient understanding of the criteria proposed to meaningfully comment.

D. EPA's Proposed Disclosure Requirements are Costly Without Sufficient Benefits.

While EPA's Proposal discusses "solutions that balance community right-to-know with security concerns," it fails to provide quantifiable benefits and similarly underestimates costs associated with the proposed disclosure requirements. Other than some vague explanation of the public's right-to-know, EPA fails to explain how this type of information disclosure would mitigate or prevent potentially harmful effects of releases of hazardous substances more so than the current regulations. EPA also fails to adequately consider the costs and challenges with implementation such as the verification of the requester's proof of residency. Interagency reviewers of the Proposed Rule asked EPA about the estimated costs of the proposed changes, to which EPA simply said it did not expect there to be any additional costs associated with the change because current regulations already require an evaluation report be developed after exercises.³²⁹ In addition, EPA failed to consider the burden associated with the 45-day timeframe to respond to such requests.

1. The Proposed Translation Requirements Should be Reconsidered

The proposed language translation requirement is both costly and without sufficient benefits, and an attempt to hold industry to a higher standard than the Agency has itself. EPA proposes to require facilities provide the information "in the language requested." As proposed, this would subject a facility to an indeterminate number of languages to translate. Because the Proposal would not limit the of requests submitted by a requestor, a facility may be endlessly subjected to recurring requests for the information in every possible language. Without such a limitation, the Proposed Rule would impose a substantial cost on regulated facilities as there are more than 300 different languages spoken in the United States.³³⁰ EPA did not consider these potential challenges and the associated burden on facilities. In fact, EPA's RIA made no reference to the translation requirement.

In addition, the Proposed Rule imposes a greater translation burden on the regulated facilities than EPA does for its own operations. In 2017, EPA issued a Limited English Proficiency

³²⁸ Proposal at 53,601.

³²⁹ OMB redline at 166.

³³⁰ U.S. Census, "What Languages are Spoken in Your Area?" August 6, 2013, <https://www.census.gov/newsroom/blogs/random-samplings/2013/08/what-languages-are-spoken-in-your-area.html>.

Order (LEP Order) which details EPA’s compliance requirements under Title VI of the Civil Rights Act of 1964 and Executive Order 13166.³³¹ The LEP Order explains that part of these services include written language services (i.e., translation) of specific documents and guidance.³³² The LEP Order also stated that EPA would take “*reasonable steps* to ensure that vital documents related to the EPA’s services, programs, and activities are translated into the most frequently encountered languages of those LEP individuals affected by the services, programs, and activities or are interpreted for the LEP individuals.”³³³ While the LEP Order suggests that interpretation and translation are important parts of the Agency’s obligation under Title VI, it does *not* require translations or interpretations of all documents. Most RMP facilities do not have the capability of translating this information into Chinese, Russian or Farsi. Indeed, EPA itself does not provide these services in the context of this announcement (or any other). While it appears EPA’s website provides content in ten languages, including English, only a few webpages – not the entire EPA website – are translated into languages other than English.³³⁴ Moreover, we are unaware of any other EPA regulation that requires translation or interpretations. Instead, guidance for EPA programs related to pesticide labeling and RCRA public participation clarify that translation and interpretations are voluntary, not required.³³⁵ EPA has offered no reasonable explanation for why RMP facilities should be held to such a novel and overly broad requirement the Agency. Accordingly, EPA should not finalize the proposed translation requirements.

2. The Proposed Disclosure Requirements Lack Any Meaningful Analysis of Costs and Potential Benefits

While EPA’s Proposal pays lip service to “solutions that balance community right-to-know with security concerns,” it fails to provide benefits and similarly underestimates costs associated with the proposed disclosure requirements. Other than some vague explanation of the public’s right-to-know, EPA fails to explain how this type of information disclosure would mitigate or prevent potentially harmful effects of releases of hazardous substances more so than the current regulations. EPA also fails to adequately consider the costs and challenges with implementation such as the verification of the requester’s proof of residency. In addition, EPA failed to consider the burden associated with the 45-day timeframe to respond to such requests.

EPA has underestimated the social cost of the information disclosure requirement by not aligning the RIA analysis to the actual provisions included in the Proposed Rule. Therefore, the RIA’s break-even analysis yields an artificially low break-even value (15 incidents avoided) than would be true if EPA considered the required translation costs. In the RIA EPA provides estimates of the associated cost of labor for management, attorney, and engineer hours for the information disclosure requirements; however, the RIA asserts “other costs” associated with the provision will

³³¹ 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>.

³³² *Id.*

³³³ *Id.*

³³⁴ U.S. EPA, “Information for Individuals with Limited English Proficiency,” <https://www.epa.gov/lep>.

³³⁵ See EPA, Spanish Language Translation Guide for Pesticide Labeling, <https://www.epa.gov/pesticide-labels/spanish-translation-guide-pesticide-labeling>; see also RCRA Public Participation Manual – Tools, https://www.epa.gov/sites/default/files/2020-04/documents/translations-rcra_tools-508_compliant_12-20-19.pdf.

be \$0.³³⁶ Interagency reviewers of the Proposed Rule asked EPA about the estimated costs of the proposed changes, to which EPA simply said it did not expect there to be any additional costs associated with the change because current regulations already require an evaluation report be developed after exercises.³³⁷

Compounding matters, EPA suggests regulated facilities should “post the information at public libraries, publish it in local papers, or through other means appropriate for particular communities and facilities.”³³⁸ These methods of sharing information with the public are more costly and burdensome for regulated facilities to deploy than just updates on a website. Because these will also need to be translated, the omission of their associated costs means the RIA does not properly reflect the burdens and break-even value of the Proposed Rule.

XVII. THE PROPOSED 5-YEAR RETENTION PERIOD FOR HOT WORK PERMITS IS ARBITRARY, UNDULY BURDENSOME, AND CONFLICTS WITH OSHA’S PSM RULE

The proposed changes to the hot work permitting obligations represent another solution in search of a problem. EPA identified no instances where it required access to a hot work permit that was unavailable and which led to an RMP incident. Under the existing RMP rule, hot work permits must be maintained until the hot work ends. In the Proposal, EPA would extend that recordkeeping obligation for 5 years.

Imposing a 5-year recordkeeping obligation for hot work permits would be arbitrary and unnecessarily burdensome. Nothing in the administrative record suggests the existing recordkeeping obligation contributes to incidents, non-compliance, or other risk-based concerns that might justify an amendment.³³⁹ Instead, the Proposal states that a 5-year period of record retention would be consistent with the retention period for other RMP records.³⁴⁰ But uniformity for uniformity’s sake is arbitrary where, as here, the existing regulation functions well.

Moreover, EPA’s “uniformity” rationale is contradictory. While EPA grounds the new recordkeeping obligation in the need for consistency in recordkeeping obligations, the agency fails to acknowledge that a 5-year record retention period for hot work permits would break from the existing PSM rule. There, OSHA requires hot work permits to be maintained only during the hot work, consistent with the existing RMP rule.³⁴¹ EPA should maintain consistency with the PSM rule, particularly on a worker safety issue such as hot work permits that falls within OSHA’s primary jurisdiction over work place safety.

³³⁶ RIA, Exhibit 4-11.

³³⁷ OMB redline at 166.

³³⁸ RIA, p. 7.

³³⁹ See Proposal at 53,604.

³⁴⁰ *Id.*, see 40 CFR §68.200.

³⁴¹ 29 CFR §1910.119(k)(2).

XVIII. EPA'S PROPOSED CHANGES TO THE STATIONARY SOURCE DEFINITION ARE UNJUSTIFIED AND CREATE CONFUSION

EPA proposes to revise the definition of stationary source with respect to storage activities incidental to transportation. The proposed revisions expand the scope of covered facilities without sufficient explanation in the preamble, data in the record, or required cost-benefit analysis. These revisions also create confusion and should be clarified.

First, the Proposed Rule would add a 48-hour exception whereby transportation containers would be exempted from the threshold determination for stationary sources.³⁴² Put differently, the regulation *adds* a requirement that disconnected transportation containers *must be included* within the threshold determination even though they are incidental to transportation, when stored for 48 hours or more.³⁴³ This change would greatly extend the scope of the stationary source definition in relation to railyards and other transportation facilities. Yet, EPA justifies this change by stating only that it desires to add “clarity” regarding which containers used for onsite storage must be incorporated into the facility RMP. EPA provides no other explanation and does not support this change with any data or with the required cost-benefit analysis. In fact, data show that the number of non-accidental releases (NARs) for railcars, which are governed by American Association of Railroads standards for the commodities they haul, have decreased significantly and overall pose minimal risk.³⁴⁴

EPA's proposed expansion of the stationary source definition is further problematic for a number of reasons. In particular, EPA's approach lacks nuance in that it ignores that the U.S. Department of Transportation rule cited as the source of the 48-hour timeframe does not apply to railcars once they are on private track and also includes exclusions (e.g., for weekends and holidays).³⁴⁵ Bringing railcars that are located on private track (and not connected to a covered process) within the scope of the RMP would drastically increase the paperwork burden on railyards and similar facilities related to containers that are incidental to transportation, without a justifiable increase in safety. Also, evaluating these containers as part of a “process” for purposes of the RMP is wholly impractical as the containers are disconnected from any processes otherwise located at the facility.³⁴⁶ Finally, RMP is unnecessary for DOT-spec containers that are already designed to prevent releases and pose no significant risk of release.

Second, EPA's proposed language providing the 48-hour exception is unclear regarding what activities are encompassed within that exception. In the preamble, EPA describes the 48-hour

³⁴² Proposal at 53604-53605; *see* 40 CFR §68.3 (definition of “stationary source”)

³⁴³ The current requirement, as described by EPA, is that “‘stationary source’ does not apply to transportation activities, including storage incident to transportation.” Proposal at 53,604.

³⁴⁴ *See, e.g.*, Exhibit 2, Number of Tank Car Non-Accident Releases, U.S. and Canada: 2010-2019, AAR Annual Report of Non-Accident Releases of Hazardous Materials Transported by Rail (2019) *available at* <https://www.aar.org/wp-content/uploads/2021/02/BOE-19-2-2019-Annual-Leak-Report-2020-07-17-FINAL.pdf> (showing that number of Class I Tank Car NARs halved from 2010 to 2019).

³⁴⁵ Proposal at 53,606.

³⁴⁶ For example, it is unclear how to account for volumes of substances in railcars as part of the Process Hazard Analysis, when these substances are not actually being processed at the facility. Also, operating procedures for all of the different modes of operation at the facility do not apply for railcars which do not go through any modes of operation until they are connected to the process. And, railcars not owned by the site are treated differently by regulation for some programs.

exception by stating, “EPA is proposing additional regulatory language that includes a specified number of hours that a transportation container may be disconnected from the motive power that delivered it to the site before being considered part of the stationary source.”³⁴⁷ However, in the Proposed Rule, EPA sets forth that “railyards and other stationary sources *actively engaged in transloading activities* may store regulated substances up to 48 hours”³⁴⁸ We recommend eliminating “actively engaged in transloading activities” because this language is ambiguous in how it could be applied to activities that occur at railyards; for example, containers that are temporarily stored for purposes of subsequent delivery as opposed to transloading.³⁴⁹ Under this example (among others), if EPA’s intent is to *exclude* containers that are temporarily stored for delivery purposes as opposed to transloading purposes, then this requirement is not explained in the preamble and therefore is invalid for purposes of administrative law.

Third, both the preamble and the proposed regulatory text mention delivery to the “site” or “onsite storage.”³⁵⁰ This indicates that EPA does not intend to expand the scope of the RMP rule to cover railcars stored off-site from an RMP facility. However, it would be helpful for EPA to clarify this interpretation—i.e., that EPA intends the requirement to relate only to disconnected railcars at a site *that is otherwise covered* as a stationary source for purposes of the RMP rule. Indeed, an expansion of the RMP rule coverage to include disconnected railcars stored off-site from a facility would be entirely unexplained in the preamble, the data in the record, and without any cost-benefit analysis.

XIX. CONCLUSION

AFPM appreciates the opportunity to submit these comments on the Proposal. While AFPM shares EPA’s goal of promoting process safety, EPA’s Proposal would undermine our mutual goal, impose undue burdens without any corresponding benefit, and create deep uncertainty and confusion in the regulated community. In light of these concerns, we respectfully request that EPA withdraw its Proposal and seek additional comment once OSHA has proposed its amendments for the parallel PSM program, which Congress intended to work in lockstep with the RMP regulation.

There are aspects of EPA’s Proposal that AFPM partially supports. First, we support EPA’s intent to require root cause analysis after a reportable release. There are many ways to conduct such analysis so EPA should not be so prescriptive (e.g., mandating use of a “recognized method”) that it forecloses the opportunities of improving the outcome and efficiency of this important task. Second, we support STAA taking place during the design phase, but the Proposal is inappropriate in extending the requirement to existing processes. Third, regarding the community notification system, current regulations require regulated entities to provide notice of releases to the NRC. Congress intended the NRC to send the information to other affected parties. Our members promote good working relationships with the community and utilize the mechanism available to

³⁴⁷ Proposal at 53,606.

³⁴⁸ *Id.* at 53609 (emphasis added).

³⁴⁹ More generally, it is unclear whether the language refers to, on the one hand, facilities that are transloading facilities, or, on the other hand, a container that is actively being transloaded.

³⁵⁰ Proposal at 53604-05.

communicate with their LEPCs. But the Proposal goes far beyond these existing reporting obligations and raise substantial security concerns.

As part of our continuing dialogue with the agency, AFPM stands ready and willing to discuss any of our comments on this important safety program.

Should EPA wish to engage further, please contact me 202-552-8476 or lszett@afpm.org.