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May 10, 2024

**By Email and First Class Mail**

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

**Re: 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; Safer Communities by Chemical Accident Prevention***

Dear Administrator Regan:

Please find enclosed a petition for reconsideration and request for stay for the U.S. Environmental Protection Agency's final rule, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention*, 89 Fed. Reg. 17,622, published in the Federal Register on March 11, 2024. This petition and request is filed on behalf of the RMP Coalition, consisting of the National Association of Chemical Distributors, d/b/a Alliance for Chemical Distribution, the American Chemistry Council, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States of America, and the Society of Chemical Manufacturers & Affiliates.

Please contact me with any questions you may have.

Sincerely,

Justin A. Savage

CC: Janet McCabe, Deputy Administrator, EPA
Dan Utech, Chief of Staff, EPA
Barry Breen, Principal Deputy Assistant Administrator, EPA

**BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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| In re: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention | Docket No. EPA-HQ-OLEM-2022-0174 |

## PETITION FOR RECONSIDERATION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act ("CAA" or the "Act"),[1] the National Association of Chemical Distributors, d/b/a Alliance for Chemical Distribution, the American Chemistry Council, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States of America, and the Society of Chemical Manufacturers & Affiliates (collectively, "RMP Coalition") hereby petition the Administrator of the U.S. Environmental Protection Agency ("EPA" or the "Agency") to reconsider and rescind its final rule entitled *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention*, 89 Fed. Reg. 17,622 (Mar. 11, 2024) ("Final Rule"), and to stay the effective date of the Final Rule.[2]

The RMP Coalition shares EPA's goal of maintaining an effective Risk Management Program ("RMP") regulation that has driven remarkable improvements in process safety over the last 30 years. Members of the associations represented by the RMP Coalition, which are subject to the Final Rule's requirements, expend significant time and resources to promote process safety and to operate their facilities in a way that protects the environment and surrounding communities. The RMP Coalition thus supports reasonable and necessary regulations that are designed to further these goals.

However, the Final Rule is neither reasonable nor necessary to ensure that covered facilities remain safe, reliable, and operating in an environmentally sound way. The Final Rule instead imposes multiple unlawful and highly prescriptive mandates that undermine the performance-based flexibility that is the linchpin of process safety. The Final Rule's requirements will inevitably create confusion, impose undue burdens (including burdens on members of the RMP Coalition's

[1] 42 U.S.C. § 7407. EPA promulgated the Final Rule under its authority in Section 112(r) of the CAA to issue rules to prevent, detect, and respond to accidental releases of regulated substances. CAA Section 112(r)(7)(E) provides that regulations or requirements under that subsection are to "be treated as a standard in effect under [CAA Section 112] subsection (d)," which in turn are subject to the rulemaking and review procedures of Section 307(d). Thus, rulemaking and petition requirements of Section 307(d) apply to regulations issued under Section 112(r).

[2] EPA added significant new materials to the docket after the promulgation of the Final Rule. The RMP Coalition reserves the right to supplement this petition with additional material.

associations), divert resources, and force the regulated community to expend significant time and resources on investments and activities that accomplish little to no safety benefits.

These substantive deficiencies are compounded by the significant procedural flaws in this rulemaking. Despite a nearly decades-long RMP regulatory history and successful implementation of RMP requirements (including by members of the associations represented by the RMP Coalition), EPA imposed several new requirements that tripled the cost of the Rule yet appeared for the first time in the Final Rule, depriving the public of an opportunity to comment. Similarly, the Agency offered several new legal and technical rationales to defend the Final Rule that never appeared in the proposal or the proposed rule docket.[3]

The RMP Coalition therefore files this petition to raise objections that either were impracticable to raise during the comment period or arose subsequent to the end of the comment period and are of central relevance to the Final Rule. Section 307(d)(7)(B) of the CAA thus requires EPA to "convene a proceeding for reconsideration of the rule" and impart all the procedural rights that "would have been afforded had the information been available at the time the rule was proposed."[4]

An administrative stay is appropriate and necessary in order for EPA to remedy the Final Rule's deficiencies. The RMP Coalition requests that EPA grant a 90-day stay of the Final Rule pending reconsideration pursuant to Section 307(d) of the CAA. The RMP Coalition is ready and willing to work with EPA, the Occupational Safety and Health Administration ("OSHA"), and other federal stakeholders to assist in improving chemical accident prevention, mitigation, and detection regulations to ensure that operations at RMP-regulated facilities are reliable, safe, and environmentally sound.

## BACKGROUND

EPA's failure to give the public an opportunity to comment on numerous provisions of the Final Rule is remarkable given the highly controversial back and forth between the Obama, Trump, and Biden administrations over revisions to the RMP. In 2013, following a catastrophic accident at a fertilizer plant in Texas, President Obama issued Executive Order 13650, directing EPA and other agencies "to enhance safety and security in chemical facilities by modernizing key policies, regulations, and standards," including the RMP.[5] In response, EPA published a proposed rule amending the RMP regulations in March 2016.[6] Despite strenuous objection from the regulated

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[3] EPA, *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) ("Proposed Rule").

[4] 42 U.S.C. § 7607(d)(7)(B).

[5] Exec. Order No. 16,350, *Improving Chemical Facility Safety and Security*, 78 Fed. Reg. 48,029, 48,031(Aug. l, 2013).

[6] EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*, 81 Fed. Reg. 13,638 (Mar. 14, 2016).

community, EPA published a final rule in January 2017—just days before the end of the Obama Administration.[7]

In February 2017, the RMP Coalition filed a petition for reconsideration of the Obama Administration's eleventh-hour action, and EPA's Administrator convened a proceeding to reconsider the 2017 Amendments. EPA also issued several stays of the 2017 Amendments before ultimately publishing a new rulemaking that rescinded many of the Obama Administration's changes to the RMP, finding those changes to be "no longer . . . reasonable or practicable."[8]

Following yet another change in administration, EPA acted in August 2022 to propose reinstating many of the requirements that had been rescinded by the Trump Administration in 2019. The comment period on the 2022 proposed rule closed on October 31, 2022, and despite serious opposition by members of the RMP Coalition and the regulated community, EPA published the Final Rule on March 11, 2024. The Final Rule goes into effect on May 10, 2024.

## ISSUES MERITING RECONSIDERATION

EPA should reconsider the Final Rule because multiple procedural deficiencies deprived stakeholders of a full and fair opportunity to comment on the Final Rule's requirements. These deficiencies included numerous additions to the Final Rule that did not appear in the Proposed Rule. For example, the Final Rule takes the unprecedented step of mandating that certain facilities implement measures identified during a safer technology and alternatives analysis ("STAA"), which dramatically increased the cost of the Final Rule.[9] The Final Rule arbitrarily requires facilities to favor certain types of mitigation measures over others and forbids them from declining to implement those measures based on their cost alone, no matter how severe the cost. EPA's Final Rule also changes the scope of EPA's information-availability provisions, the extent of employee participation in hazard reviews, and the type of information included in facility hazard reviews or process hazard analyses ("PHA").

EPA's failure to provide adequate notice of these changes obligates the Agency to convene a reconsideration proceeding so that stakeholders can comment on these changes in the first instance. These changes are also independently arbitrary and unlawful. For many, EPA provided no reasoned justification for their adoption or justified them based on untenable legal rationales. EPA also failed to grapple with the consequences of the new requirements. EPA must reconsider the Final Rule to remedy its serious substantive and procedural defects.

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

[8] EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*, 84 Fed. Reg. 69,834 (Dec. 19, 2019) ("2019 Reconsideration Rule").

[9] 89 Fed. Reg. at 17,651, 17,689.

## I. The Multitude of Procedural Flaws and Added Requirements in the Final Rule Precluded Effective Notice and Comment.

Numerous procedural deficiencies in EPA's Final Rule prevented RMP Coalition members from being able to comment effectively on the provisions of and support for EPA's Final Rule. Because of these flaws, the Final Rule should be reconsidered.

### A. The Final Rule Unlawfully Mandates New and Extraordinarily Burdensome STAA Requirements.

EPA's Final Rule not only requires facilities to *conduct* STAAs, but also mandates that they *implement* some measures identified by the STAAs. For the following reasons, the Final Rule's implementation mandate is unlawful and unjustified. It requires reconsideration.

As a threshold matter, EPA deprived RMP Coalition members of the ability to meaningfully comment on the implementation mandate by including it only in the Final Rule. Indeed, the Proposed Rule stated that "EPA is *not* requiring facilities to implement identified inherent safety measures,"[10] which indicated that such a requirement was not within the scope of the proposed rulemaking. And although the Proposed Rule solicited comments on whether the Agency should require implementation of inherently safer technology/inherently safer design ("IST/ISD") and STAAs,[11] the Agency did not specifically solicit comments on the relative benefits of implementing passive measures, active measures, or procedural measures. Most importantly, none of the particulars of the Final Rule's implementation mandate or its extensive new regulatory language were available for the public to comment on or even consider. This failure to permit public input on the Final Rule's requirements is unjustified, and EPA should reconsider the STAA requirements on that basis alone.

In addition to the inadequacy of the Agency's notice, the new provisions imposing the implementation mandate are themselves arbitrary and unlawful. The implementation mandate applies to many types of RMP-regulated facilities: chemical, coal, or petroleum manufacturing facilities "located within one mile of another" such facility; facilities with hydrofluoric acid alkylation ("HF") covered processes; and chemical, coal, or petroleum manufacturing facilities with one RMP-reportable accident since the most recent PHA.[12] But EPA fails to provide a sufficient reasoned basis for imposing massive costs on these specific facilities. Indeed, the Final Rule acknowledges that STAA implementation would account for more than half of the total cost of the RMP amendments—between $169 million and $205 million in annualized costs. Basic principles of reasoned decisionmaking require that the Agency explain itself more thoroughly before targeting these categories of facilities for unjustified burdens and costs.

The implementation mandate's onerous requirements are also arbitrary and unjustified. Covered facilities must implement "at least one passive measure at the stationary source, or an inherently safer technology or design, or a combination of active and procedural measures

[10] 87 Fed. Reg. at 53,575 (emphasis added).

[11] *See* 87 Fed. Reg. at 53,580.

[12] 89 Fed. Reg. at 17,689.

equivalent to or greater than the risk reduction of a passive measure."[13] Under this implementation hierarchy, "[i]f no passive measures are identified or all are not practicable, and no inherently safer technology or design is implemented, then the owner or operator shall implement at least one active measure," and "[i]f no active measures are identified or all are not practicable, the owner or operator shall implement at least one procedural measure."[14] How this hierarchy will work in practice, however, is far from clear. Suppose a facility's STAA identifies a passive measure that is extremely costly and provides only moderate risk reduction. The Final Rule's implementation mandate could be read to require a facility to adopt that costly passive measure before adopting a far less costly procedural measure that is nearly equivalent in risk reduction. This could occur so long as the passive measure was "practicable" under the Final Rule and therefore preferred.

That is not the only strange or uncertain implication of the Final Rule. For example, the Final Rule appears to assume that a facility does not already have existing passive measures, such as berms and pressure vessels, employed for a given process. If such measures are already in place, then the Final Rule would be requiring additional, perhaps duplicative or redundant measures for an already safe process. Likewise, the Final Rule also does not address how its requirements apply to sites with multiple—*e.g.*, 20—PHAs, leaving open the possibility that such sites must implement mitigation measures for each PHA, requiring multiple mitigation measures each year. Put differently, the rule is unclear as to whether a mitigation measure is required every 5 years (a PHA cycle), or whether the new regulation requires a mitigation measure every time a PHA is conducted at a covered source. Likewise, if mitigation measures are required because a process unit had a reportable event, the Final Rule does not specify whether the mitigation measure must be implemented at that same process unit. The Agency did not grapple with these issues or resolve these questions because stakeholders never had a chance to comment on these new, unclear requirements.

The Final Rule also imposes a definition of which measures are "practicable" that violates Section 112 and is unworkable. Again, facilities must document why measures they decline to adopt are not "practicable." But the Final Rule provides that "[a] claim that implementation is not practicable shall not be based solely on evidence of reduced profits or increased costs."[15] The upshot is that even if a passive measure is so costly that it would bankrupt a facility to implement it, that measure could still be "practicable" (and thus required) under the Final Rule. But the term "practicable" inherently includes at least some consideration of whether a course of action is financially "feasible"[16] or economically justified. EPA has previously rejected calls to limit consideration of costs in this way, explaining "that the Agency believes that cost is a valid

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *See* Black's Law Dictionary (6th ed. 1990).

consideration for practicability."[17] The Agency has not met its burden under *FCC v. Fox Television Stations, Inc.*,[18] to acknowledge and explain this reversal.

Nor is EPA empowered to define "practicable" any way it wishes. Section 112 of the Clean Air Act itself requires that the RMP regulations be "practicable" *and* that they be "reasonable."[19] And Section 112 expressly contemplates that something could be "not practicable due to . . . *economic* limitations."[20] Yet the Final Rule's arbitrary and capricious definition of "practicable" effectively prohibits facilities from conducting a common-sense assessment of whether a given measure is cost justified. That plainly contradicts Section 112 and basic principles of reasoned decisionmaking. Indeed, it is hard to see how EPA's rule itself could be practicable when it requires impracticable implementations.

Finally, even if the particulars of the implementation mandate were reasonable (which they are not), the mandate itself would still be unlawful because EPA lacks the authority to mandate adoption of IST/ISD. EPA claimed its authority to adopt the implementation mandate based on a legal rationale that appears nowhere in the Proposed Rule. According to EPA, it is "clear on the face of the statute" that "the CAA authorizes EPA to require implementation of IST/ISD and other STAA measures" because "both subparagraphs (A) and (B) of CAA section 112(r)(7) authorize requiring implementation of safer technologies."[21] That is wrong. Subparagraph (B) of Section 112(r)(7) covers only "the use, operation, repair, replacement, and maintenance of equipment to monitor, detect, inspect, and control" accidental releases.[22] Nothing in that language suggests that EPA may require facilities to mothball existing technologies and adopt wholly new technologies or processes. As for subparagraph (A), that at least refers to regulations covering "design . . . requirements."[23] But subparagraph (A) is plainly aimed at "design . . . requirements" for *new* processes; it cannot be fairly read to permit EPA to require that all facilities' existing processes be thrown out based on new process designs.[24] Yet that is precisely the implication of EPA's interpretation of Section 112(r)(7). On the Agency's telling, it could mandate that all RMP-covered facilities adopt entirely new IST/ISD for all their covered processes.

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[17] 82 Fed. Reg. at 4637 ("EPA also disagrees with the suggestion to limit consideration of reduced profits when assessing a risk management measure[.]").

[18] 556 U.S. 502, 515 (2009).

[19] 42 U.S.C. § 7412(r)(7)(B)(i).

[20] *Id.* at § 7412(h)(2)(B) (emphasis added).

[21] 89 Fed. Reg. at 17,644.

[22] 42 U.S.C. § 7412(r)(7)(B)(i).

[23] *Id.* at § 7412(r)(7)(A).

[24] Additionally, EPA had never relied on subparagraph (A) in any RMP rulemaking before the 2017 Final Rule. The Agency's 2016 proposed RMP amendments had invoked only subparagraph (B), but when stakeholders argued that the text of that subparagraph provided no authority for STAA, the Agency changed course in the Final Rule and invoked subparagraph (A). The Agency's relatively recent invocation of subparagraph (A) undermines the agency's reliance on it here.

The authority to impose a mandate to adopt IST/ISD for all processes, however, presents a "major question" that would require "clear congressional authorization."[25] For one thing, such a mandate would have "vast economic . . . significance."[26] After all, the Final Rule acknowledges that even its comparatively modest STAA implementation mandate may impose several hundred million in annualized costs. A much broader mandate would clearly "entail billions of dollars in compliance costs."[27] Whether to mandate STAA is also a question of great "political significance,"[28] as evidenced by the fact that Congress has repeatedly considered and rejected CAA amendments that would have allowed EPA to mandate IST.[29] Congress's "consistent judgment" against empowering EPA to mandate STAA undercuts the Agency's claim to congressional authorization.[30]

Nor can EPA duck the major questions doctrine by arguing that its mandate is, for the time being, more modest. In applying the major questions doctrine, the Supreme Court has focused on the *implications* of the underlying claim of authority—not just the direct effects of the action at issue.[31] Here, the implications of the Final Rule's implementation mandate—the ability for EPA to potentially require the redesign and rebuilding of *all* covered processes—plainly involve economic and political questions that suffice to trigger major questions scrutiny. Yet nothing in subparagraph (A) or (B) provides the clear authorization for the mandate that the major questions doctrine requires.

In sum, the Final Rule's implementation mandate is arbitrary and unlawful in multiple respects. Moreover, the RMP Coalition members' objections to the STAA requirements in the Proposed Rule were serious and are still relevant to the rule as finalized, highlighting the lack of meaningful safety benefit the STAA provides, EPA's use of flawed data, and the overbroad and arbitrary nature of the requirements.[32] But the implementation mandate involves the most troubling set of requirements. Because of the defects in that mandate—and because the RMP Coalition members were deprived of an adequate opportunity to comment on those defects in the first instance—the Agency should reconsider its Final Rule.

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[25] *See West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022).

[26] *See id.* at 2605.

[27] *See id.* at 2604.

[28] *See id.* at 2605.

[29] *See, e.g.*, Chemical Security Act of 1999, S. 1470, 106th Cong. § 3(b) (1999); Chemical Security Act of 2001, S. 1602, 107th Cong. § 3(7) (2001); Chemical Facilities Security Act of 2003, S. 994, 108th Cong. (2003).

[30] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147–48, 160 (2000).

[31] *See id.* at 2612 ("[O]n this view of EPA's authority, it could go further, perhaps forcing coal plants to 'shift' away virtually all of their generation—*i.e.*, to cease making power altogether."); *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) ("Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act.").

[32] AFPM Comments at 37–45.

B. The Final Rule's Expanded Information Availability Requirements Improperly Compel Disclosure of Additional Sensitive Information Without an Adequate Justification.

Back in 2017, EPA introduced new information availability requirements, which required facilities to provide sensitive chemical hazard information to any member of the public who requested it. EPA then rescinded those requirements in 2019 on the ground that the Agency had mistakenly "underweighted security concerns" regarding "the negative effects on public safety from the utility to terrorists and criminals of the newly available information and dissemination methods."[33] EPA's 2022 Proposed Rule then sought to reinstate the general information-availability requirements but mitigate their national security implications by allowing only individuals residing within 6 miles of a facility to request the facility's chemical hazard information.[34]

In the Final Rule, EPA inexplicably expanded the universe of those who could request this sensitive information to include individuals "*working, or spending significant time* within 6 miles" of the facility.[35] The Final Rule simultaneously expanded facilities' disclosure obligations to include: declined recommendations and justifications from IST/ISD analyses; natural hazard, power loss, and siting hazard evaluations; and RAGAGEP gap analyses.[36] These changes—and the concomitant verification and documentation requirements—raise a host of unaddressed security concerns and must be set aside as arbitrary and capricious.

The expansion of the disclosure requirements to anyone who "spends significant time" near a facility unreasonably resurrects the safety and national security concerns that led EPA to rescind these disclosure obligations in 2019. Nor does the Final Rule satisfy the Agency's burden under *FCC v. Fox Television Stations, Inc.* to explain its repudiation of its 2019 position.[37] The problem, of course, is that anyone—whether they work for a public interest group or an international terrorist organization—could claim to "spen[d] significant time" near a facility, thereby obligating the facility to disclose sensitive hazard information. On this point, the Final Rule simply states that EPA interprets "spending significant time as frequently using services, volunteering, visiting with family or friends, etc."[38] EPA's reliance on the word "etc." speaks volumes. It highlights that there is no objective standard that facilities can use to determine what qualifies as "spending significant time" near a facility. The Final Rule's sparse analysis of this expansion unreasonably fails to grapple adequately with these concerns.[39]

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[33] 84 Fed. Reg. at 69,885.

[34] 87 Fed. Reg. at 53,600.

[35] 89 Fed. Reg. at 17,692 (emphasis added).

[36] *Id.* at 17,692.

[37] *FCC*, 556 U.S. at 515.

[38] 89 Fed. Reg. at 17,672.

[39] One issue the Final Rule leaves unaddressed, for instance, is how often in the past decades RMP incidents have had impacts beyond one mile. EPA presented no data for stakeholders to comment on or judge the reasonableness of the 6-mile radius requirement.

Rather than mount a defense of this expansion, the Final Rule tries to shift responsibility for addressing the safety and national security concerns to facilities, by requiring the facilities themselves to develop mechanisms for verifying that individuals requesting information satisfy the "presence within 6-miles" requirement.[40] Yet EPA provides no guidance to regulated facilities regarding how they should accomplish this task. EPA justifies its failure to give facilities adequate guidance on the theory that the Final Rule "leaves substantial flexibility for facilities to design a process for obtaining verification."[41] But EPA and other federal agencies—rather than refineries, chemical plants, and other RMP-regulated facilities, many of which are small businesses—are best qualified and best situated to "design a process" for protecting sensitive information with massive national security implications. Yet EPA anomalously places the industry in the position of the "regulator," tasked with determining which individuals may access sensitive information.[42] This simply highlights the arbitrary nature of the Agency's expanded requirement.

The same is true of the Final Rule's new requirement that facilities "maintain a record of the members of the public requesting chemical hazard information for five years."[43] The Final Rule offers no justification for imposing these requirements—and the Final Rule again makes facilities responsible for dealing with the negative effects of expanding the RMP's information availability requirements. Nor does EPA plausibly tie these information availability and reporting requirements to the Agency's grant of accident prevention or mitigation authority in Section 112(r). EPA claims that these requirements will contribute to "measures for emergency response," but the Agency does little to explain how.[44] And for certain of the information availability requirements—*e.g.*, declined recommendations in hazard evaluations—the Agency's authority to regulate is even more tenuous. EPA cannot credibly claim these requirements relate to emergency response, so it changes tack and weakly claims that their rules will motivate facilities to "further improve their safety performance in response to *community oversight*."[45]

And, again, because EPA's Proposed Rule included none of these problematic requirements, the RMP Coalition members had no way to raise these objections or offer alternative solutions in the first instance. EPA's failure in that regard violated the APA's notice and comment requirements and prevented the Agency from taking into account these important safety and national security concerns—concerns that EPA itself highlighted in its 2019 Reconsideration Rule.

C. The Final Rule Imposes Additional, Unnecessary Employee Participation Provisions.

The RMP Coalition recognizes the great value that employee participation provides in ensuring safe workplaces. Ensuring safe facilities—both for employees and for the surrounding

[40] 89 Fed. Reg. at 17,692.

[41] *Id.* at 17,673.

[42] Nor does EPA explain what would happen if two facilities located next to each other come to different conclusions on how to enforce these requirements. Would the facility that denies an individual information be in violation of the RMP regulations simply because a neighboring facility allowed that same individual access to the information? Again, the Agency does not grapple with these difficult questions.

[43] 89 Fed. Reg. at 17,692.

[44] *Id.* at 17,631.

[45] *Id.* at 17,641 (emphasis added).

communities—is the RMP Coalition's top priority. Substantial employee participation, however, is already required by OSHA's parallel Process Safety Management ("PSM") program. And given OSHA's expertise in (and responsibility for) ensuring worker safety, it is unclear why EPA would deviate from the PSM's requirements. EPA's Proposed Rule nonetheless included new employee participation requirements. And now the Final Rule has imposed further employee participation requirements. EPA's decision to surprise stakeholders with these extra requirements lacks a reasoned basis and requires reconsideration.

Again, the immediate and most apparent procedural deficiency is the inclusion of multiple new requirements for employee participation in both Program 2 and Program 3 prevention programs that were not included in the Proposed Rule, including: annual written or electronic notices to employees, additional training, additional methods for reporting unaddressed hazards, recordkeeping of such reports, and the ability to report unaddressed hazards either to the facility or EPA itself.[46] None of these requirements appeared in the Proposed Rule, and, therefore, EPA deprived RMP Coalition members of the fair notice and meaningful opportunity for comment that the APA requires. That alone justifies reconsideration.

The new employee participation provisions themselves are also largely unexplained. EPA's Proposed Rule acknowledged RMP incidents are typically followed by amendments to "specific prevention program areas" rather than increased employee participation requirements.[47] Put differently, a *lack* of employee participation is generally not the cause of an RMP-reportable release. The lack of any obvious benefit resulting from increased employee participation should require the Agency to thoroughly explain why additional requirements are justified. Yet in its Final Rule EPA provides no data or reasoned basis for believing that the Final Rule's new requirements are appropriate or cost-justified. Nor does EPA provide data to support the Agency's *belief*[48] that the additional employee participation requirements will enhance process safety. Principles of reasoned decisionmaking require the agency to do more.

In sum, EPA's Final Rule added these new employee participation requirements with no notice to the regulated community, despite the increased burdens that the requirements impose. Commenters had no opportunity to assess the new provisions, question their usefulness, or suggest changes. EPA should therefore reconsider its Final Rule to allow RMP Coalition members and the regulated community to have a meaningful opportunity to comment on the new employee participation requirements.

D. The Final Rule Adds New Provisions Relating to Monitoring Equipment.

The Final Rule also imposed two entirely new requirements aimed at supporting the continuous operation of monitoring equipment. The first requires that hazard reviews and PHAs include confirmation that "monitoring equipment associated with prevention and detection of accidental releases from covered processes has standby or backup power to provide continuous

[46] 89 Fed. Reg. at 17,688, 17,691.

[47] 87 Fed. Reg. at 53,591.

[48] Indeed, the Final Rule's reliance on EPA's "belief"—the Final Rule uses a form of that word over 120 times—rather than on data and rigorous analysis is notable throughout the Final Rule.

operation."[49] The second requires that operating procedures document "when monitoring equipment associated with prevention and detection of accidental releases from covered processes is removed due to safety concerns from imminent natural hazards."[50] EPA's inclusion of these requirements violated the APA because neither requirement appeared in the Proposed Rule. And neither requirement is the product of reasoned decisionmaking.

Consider the first requirement. The Final Rule concedes that "there may be processes that do not require backup power," yet EPA inflexibly concludes that *all* monitoring equipment "associated with" preventing releases must have backup power.[51] Not only is the qualifying phrase "associated with" incredibly vague and likely to sweep in far more monitoring equipment than necessary,[52] but the Final Rule does not justify or adequately explain this new requirement. The Final Rule states that "once a facility has made and documented the determination that it is appropriate to have monitors for accidental releases, then ensuring their operation through requiring backup power is an appropriate operational requirement."[53] But this explanation essentially penalizes facilities for having monitors and, given the often massive cost of backup or standby power, creates the perverse incentive not to have monitors in the first place. The Agency failed to grapple with these perverse incentives.

The standby and backup power generation requirement also exceeds EPA's statutory authority. EPA justified the requirement based on its Section 112(r)(7)(A) authority to require "monitoring."[54] But that is a non sequitur. The authority to require monitoring at a facility does not imply the authority to dictate how that facility generates its power.

The requirement related to imminent natural hazards has similar defects. The burdens associated with documenting the removal of monitoring equipment may dissuade some facilities from doing so, even though EPA's Final Rule acknowledged that "in some situations, such as hurricane winds, there is a potential for damage to" monitoring equipment unless it is removed.[55] Tornadoes, too, are a paradigm case of a weather event that is unforeseeable and uncontrollable and may require facilities to act decisively to prevent damage to critical equipment. EPA's requirement will penalize facilities that must make difficult decisions regarding equipment removal, employee safety, and other factors during exigent circumstances. EPA acted unreasonably by failing to recognize and address these concerns.

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[49] 89 Fed. Reg. at 17,686–88.

[50] *Id.* at 17,686.

[51] 89 Fed. Reg. at 17,639.

[52] For example, EPA's discussion of these requirements seems to assume that they apply to ambient monitors *outside* the process at issue. But the language would also sweep in monitoring equipment that monitors specific parameters *within* the process. After all, arguably most parameters that are monitored are in part designed to prevent accidental releases by keeping the process within the control parameters. EPA did not grapple with or address the potential scope of this requirement.

[53] *Id.* at 17,639.

[54] *Id.* at 17,640.

[55] *Id.* at 17,640.

## REQUEST FOR CAA 307(d) STAY PENDING RECONSIDERATION

While EPA is reconsidering a rule, Section 307(d)(7)(8) of the Clean Air Act permits EPA to stay the effectiveness of that rule "for a period not to exceed three months."[56] Such a stay gives the Agency time to reconsider its position and review the rule's requirements without imposing unnecessary compliance costs on regulated entities. EPA may also use a Section 307(d) stay to avoid any confusion in the regulated industry from the Agency's implementing and then quickly revising its regulatory requirements. Staying the effective date of the rule until EPA completes its reconsideration process avoids any such regulatory whiplash.

The RMP Coalition respectfully requests that EPA exercise this authority under the CAA to stay the effectiveness of the Final Rule to the fullest extent permissible by statute pending reconsideration. Facilities with RMP covered processes will begin to incur significant compliance costs such as rule familiarization, training, revising manuals and operating procedures, and conducting PHAs and the requisite STAAs. Staying the rule during reconsideration will avoid imposing these compliance costs prematurely and will avoid confusion among facility personnel from being trained on potentially unnecessary, and indeed invalid and arbitrary, requirements imposed by the Final Rule. A stay would afford EPA the needed time to fully reconsider its Final Rule.

## CONCLUSION

For the above reasons, the RMP Coalition requests that EPA reconsider its Final Rule and stay the effective date of the Final Rule for the duration of the administrative proceedings.

May 10, 2024

Respectfully submitted,

/s/ *Justin A. Savage*

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[56] 42 U.S.C. § 7607(d)(7)(B).