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March 13, 2017

VIA FACSIMILE-CERTIFIED MAIL-EMAIL

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460
pruitt.scott@epa.gov
Fax No: 202-501-1450

The Honorable Barry Breen
Acting Assistant Administrator
Office of Land and Emergency Management
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code: 5101T
Washington, DC 20460
breen.barry@epa.gov

Re: Petition for Reconsideration and Stay Request

Dear Administrator Pruitt and Acting Assistant Administrator Breen:

Please find attached a Petition for Reconsideration and Stay filed on behalf of the Chemical Safety Advocacy Group (CSAG) with respect to the rule entitled *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule*, 82 Fed. Reg. 4594 (Jan. 13, 2017), Docket No. EPA-HQ-OEM-2015-0725.

Please contact me at sbroome@hunton.com or 415.975.3718 as CSAG would appreciate the opportunity to discuss the concerns with this rule outlined in the attached petition at your earliest convenience.

Sincerely,

Shannon S. Broome

Shannon S. Broome

Attachments

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN RE: ACCIDENTAL RELEASE PREVENTION REQUIREMENTS: RISK MANAGEMENT PROGRAMS UNDER THE CLEAN AIR ACT, FINAL RULE, 82 FED. REG. 4595 (JAN. 13, 2017)	)	DOCKET NO. EPA-HQ-OEM-2015-0725

PETITION FOR RECONSIDERATION AND STAY

Submitted by

THE CHEMICAL SAFETY ADVOCACY GROUP

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Dated: March 13, 2017

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PETITION FOR RECONSIDERATION AND STAY

Pursuant to Section 307(d)(7)(B) of the Clean Air Act (CAA or the Act)[1] and the Administrative Procedure Act (APA),[2] the Chemical Safety Advocacy Group (CSAG) respectfully petitions the U.S. Environmental Protection Agency (EPA or the Agency) to reconsider the nationally applicable final action entitled, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule*, 82 Fed. Reg. 4594 (Jan. 13, 2017), codified at 40 C.F.R. Part 68, Docket No. EPA-HQ-OEM-2015-0725 (RMP Rule or the rule). CSAG also requests that EPA issue an immediate three-month stay of the rule under CAA Section 307(d).[3] Before the three-month stay expires, CSAG requests that EPA issue a rule delaying the RMP Rule's effective date by 18 months from March 21, 2017 and tolling the rule's compliance dates for the same period. To the extent that EPA does not issue a rule extending the effective and compliance dates, CSAG requests that EPA issue a stay of the rule pursuant to Section 705 of the APA.[4] These actions would ensure that the status quo is maintained during the reconsideration process and that states, local responders, and companies are not forced to expend resources complying with rule provisions that may change.[5] The RMP Rule imposes extensive new requirements on covered facilities and on state and local governments. It would be impracticable and unreasonable to require these entities to expend resources to achieve compliance with the rule when it is subject to change. An immediate stay and extension of the RMP Rule's effective and compliance dates are therefore appropriate.

CSAG is a coalition of companies focused on implementation of EPA's and the Occupational Safety and Health Administration's (OSHA) regulations addressing the Risk Management Program (RMP) and Process Safety Management (PSM) programs, respectively. CSAG members include companies in the refining, oil and gas, chemicals, and general

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[1] 42 U.S.C. § 7607(d)(7)(B).

[2] 5 U.S.C. § 551 *et seq*. The D.C. Circuit has explained in *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), that "the public's right to petition the Administrator for revision of a standard of performance and the Administrator's duty to respond substantively to such requests exist completely independently of Section 307." 515 F.2d at 667 (emphasis added); *see also*, e.g., *PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981) (counseling that amendment or repeal of a Clean Air Act regulation could be sought under APA Section 553(e) in conjunction with Section 307(d)(7)(B) even well outside the 60-day review window); *see also, e.g.*, *National Emission Standards for Hazardous Air Pollutants: Halogenated Solvent Cleaning; Final Rule and Notice of temporary stay*, 63 Fed. Reg. 24,749 (May 5, 1998) (granting three-month EPA stay of emissions standard promulgated nearly four years earlier). Thus, regardless of the additional provisions for reconsideration under Section 307(d) (*i.e.,* for those issues of central relevance for which it was impracticable to raise issues during or for which grounds arose after the close of the public comment period), the APA provides an independent basis for members of the public like CSAG to petition EPA to reconsider and revise its rule on issues that were raised during the public comment period and that were addressed in the final rule preamble or response to comments, albeit inadequately. Although the Administrator has broad authority to reconsider provisions noted herein, to the extent necessary, CSAG requests that this petition also be treated as a petition for rulemaking.

[3] 42 U.S.C. § 7607(d).

[4] 5 U.S.C. § 705.

[5] CAA Section 112(r), the provision under which the RMP Rule was promulgated, provides that such regulations "shall have an effective date, as determined by the [EPA] Administrator, assuring compliance as expeditiously as practicable." 42 U.S.C. § 7412(r)(7)(A). Under this provision, EPA therefore has latitude to determine the appropriate effective date for the RMP Rule, based upon considerations of practicability.

manufacturing sectors with operations throughout the United States that are subject to the RMP Rule. CSAG has participated in EPA's proceedings leading to issuance of the RMP Rule, having filed extensive comments on the Information Collection Request (ICR) for the Proposed Rule on April 13, 2016[6] and the Proposed Rule on May 13, 2016.[7] In addition, CSAG raised its concerns with the inadequate consideration of costs in the RMP Rule at a meeting with the Office of Management and Budget (OMB) on November 21, 2016.[8] As a courtesy, CSAG informs EPA that it will also be filing a petition for judicial review of the RMP Rule in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) and that it intends to raise in that litigation the issues on which reconsideration is requested below.

Background

The RMP regulations as codified at 40 C.F.R. Part 68 prior to issuance of the January 13, 2017 revisions were comprehensive and widely considered (even by EPA) adequate to assure safety. Nevertheless, after the explosion of a fertilizer plant in West, Texas (which turned out to be an intentional act of arson at a facility that was not covered by the RMP regulations), then-President Obama issued Executive Order 13650, "Improving Chemical Facility Safety and Security" (EO 13650) on August 1, 2013.[9] EO 13650 ordered EPA to determine if the program should be expanded to address additional regulated substances and types of hazards.

Following a March 2016 proposal,[10] EPA finalized extensive new RMP regulations that were published in the *Federal Register* on January 13, 2017.[11] EPA has characterized the new rule as an effort to "modernize" the regulations governing risk management for accidental releases to the air of chemicals under CAA Section 112(r), suggesting that the rule would streamline regulation and make it more efficient. The opposite is true. The result of EPA's efforts, as reflected in the new RMP Rule, is a deeply flawed approach that is detrimental to chemical safety and security. The elements of the revised rule simply add

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[6] *See* Comments of CSAG on the Information Collection Request for the *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule*, 81 Fed. Reg. 13,638 (Mar. 14, 2016), dated Apr. 13, 2016, Docket No. EPA-HQ-OEM-2015-0725-0363 (Attach. 2) (CSAG ICR Comments), *available at* https://www.regulations.gov/searchResults?rpp=25&po=0&s=EPA-HQ-OEM-2015-0725-0363&fp=true&ns=true.

[7] *See* Comments of the CSAG on the *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule*, 81 Fed. Reg. 13,638 (Mar. 14, 2016), dated May 13, 2016, Docket No. EPA-HQ-OEM-2015-0725-0594 (Attach. 1) (CSAG Proposed Rule Comments), *available at* https://www.regulations.gov/searchResults?rpp=25&po=0&s=EPA-HQ-OEM-2015-0725-0594&fp=true&ns=true.

[8] *See* CSAG Presentation to the Office of Information and Regulatory Affairs (OIRA) during Executive Order 12866 meeting regarding Modernization of the Accidental Release Prevention Regulations under Clean Air Act, 2050-AG82 (Nov. 21, 2016) (Attach. 3).

[9] *See* Exec. Order No. 13650, *Improving Chemical Facility Safety and Security*, (Aug. 1, 2013), 78 Fed. Reg. 48,029 (Aug. 7, 2013).

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

[11] EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule*, 82 Fed. Reg. 4594 (Jan. 13, 2017).

regulation, impose significant new mandates on emergency responders and state governments, and themselves create risks to communities and company employees. Most importantly, the RMP Rule threatens homeland security and local communities by requiring security sensitive information about chemical facilities to be publicly disclosed without adequate safeguards. It also imposes upon regulated facilities, local emergency responders, and state governments numerous new regulatory burdens without commensurate benefits.

The fact that accidents have occurred at a very small number of facilities failing to comply with existing rules does not establish that these rules, which have been on the books since the 1990s, are inadequate. Indeed, there is no reason to believe that those who are not complying with the existing rules will find themselves more able or more willing to comply with more complex and more costly rules. The new rules do not improve safety but rather increase the regulatory burdens for companies that were already meeting existing requirements.

EPA has broad authority to reconsider the RMP Rule under both the APA and the CAA. APA Section 553(e) requires that each federal agency provide interested persons the right to petition for the repeal of a rule.[12] CAA Section 307(d)(7)(B) requires EPA to convene reconsideration of its rules upon objection where certain criteria are met.[13] In addition, both the APA and the CAA provide EPA with broad discretion to stay the effectiveness of its rules during reconsideration and review, particularly in this instance where there was no statutory mandate for the rule's issuance.[14] The purpose of these provisions is to ensure that regulated entities are not adversely affected by ill-considered regulations that are procedurally and/or substantively defective. Such circumstances are presented here.

For these reasons, the RMP Rule should be reconsidered and ultimately withdrawn. EPA should immediately stay the effective date of the RMP Rule for three months as allowed under the CAA, and it should ultimately initiate a rulemaking to delay the rule's effectiveness for 18 months while the Agency undertakes reconsideration.

Bases for Reconsideration

I. EPA Must Convene a Reconsideration Proceeding Where, As Here, Objections That Are of Central Relevance to the Outcome of a Rule Were Impracticable to Raise During the Comment Period and/or Arose After It Closed.

The CAA contemplates reconsideration of EPA actions upon petition by an interested party. Specifically, under Section 307(d)(7)(B) of the Act, the Administrator is required to convene a proceeding for reconsideration where

[12] 5 U.S.C. § 553(e).
[13] 42 U.S.C. § 7607(d)(7)(B).
[14] *See id.* (allowing EPA to stay the effectiveness of a rule during reconsideration for a period not to exceed three months). As explained further in this petition, CSAG is also seeking judicial review of the RMP Rule and requests that EPA grant a stay of the rule under APA Section 705 while its petition for judicial review is pending. *See* 5 U.S.C. § 705 (allowing the Agency to postpone the effective date of any action taken by it pending judicial review).

> the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the time provided for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.[15]

These criteria for convening a reconsideration proceeding are plainly met here because:

- EPA finalized in the RMP Rule several provisions of central relevance that were not contained in the Proposed Rule, therefore making it impracticable for commenters to raise objections during the comment period;

- The RMP Rule reflects that EPA completely disregarded significant and substantial concerns with its information disclosure, emergency response, and other provisions raised during the rulemaking process;

- The RMP Rule as finalized creates numerous burdensome obligations that are not justified by any quantifiable benefit, some with tight compliance deadlines requiring facilities to expend resources now in anticipation of compliance;

- The RMP Rule was finalized using a faulty cost and benefit analysis; and

- The RMP Rule was issued in violation of clear Congressional directives to EPA requiring coordination, accurate cost estimates, and public engagement.

In light of these considerations, which are explained in more detail below, EPA should grant reconsideration in order to rescind or revise the RMP Rule.

II. The RMP Rule Threatens Homeland Security by Allowing Disclosure of Security Sensitive Information Regarding Vulnerabilities at Industrial Plants Without Any Safeguards, Which Could Make Facilities Less Safe.

The RMP Rule requires disclosure of information that can provide a roadmap to facility vulnerabilities, thereby creating risks to public safety. These provisions, rather than contributing to security, make it easier for individuals or organizations to opportunistically seek out facility vulnerabilities and to perpetrate harm to facilities and their surrounding communities. EPA should reconsider these provisions of the RMP Rule because they present substantial threats to homeland security and because they were not presented for comment by the public during the rulemaking process.

[15] 42 U.S.C. § 7607(d)(7)(B) (emphasis added).

Section 68.93(b) Information Disclosure Requirements

The RMP Rule requires facilities to provide to local emergency planning and response organizations "any . . . information" such organizations deem "relevant" to local emergency response planning.[16] This provision contains virtually no limitation on the information to be disclosed, nor does it provide protections for sensitive information that is requested. Because this requirement was not included in the Proposed Rule, stakeholders were not on notice during the rulemaking process of the very significant security issues it creates and were therefore not able to raise their objections during the comment period.

The Proposed Rule did, however, contain proposed Section 68.205, which would have required facilities to automatically provide specific categories of information to Local Emergency Planning Committees (LEPCs) and local emergency responders.[17] Although EPA deleted this requirement in the RMP Rule, it added Section 68.93(b) cited above, which has a much greater potential for harm, given its breadth and lack of safeguards. Section 68.93(b) allows local response organizations to obtain <u>any</u> information deemed "relevant" to local emergency response planning, a potentially broad category likely to include the information in proposed Section 68.205 that EPA deleted due to security concerns raised by numerous commenters, including the Department of Homeland Security (DHS).[18]

The RMP Rule provides no bounds on what can be requested under this provision, no ability for a facility to refuse to provide it, no protection for confidential business information, and no safeguards for security sensitive information. The local organizations (which are undefined in the RMP Rule) to which information would have to be disclosed are subject to no security clearance requirements, but even if they were, EPA has made clear that any information provided to such organizations becomes *public* information.[19] The benefit of deleting proposed Section 68.205 in response to commenters' concerns was therefore upended by the addition of Section 68.93(b) in the Final Rule, a far more dangerous provision for which EPA did not provide the opportunity for full comment and participation during the rulemaking process.[20]

Section 68.210 Information Disclosure Requirements

In addition to the above requirements, the RMP Rule requires all facilities to provide specific types of information to the public upon request (within 45 days of receiving the request) and to provide ongoing notification of availability of facility information on company websites, social medial platforms, or through some other publicly accessible means.[21] It also

[16] 40 C.F.R. § 68.93(b).
[17] *See* Proposed 40 C.F.R. § 68.205, 81 Fed. Reg. at 13,711.
[18] *See, e.g.,* 82 Fed. Reg. at 4667 (reflecting that the same information subject to disclosure under proposed Section 68.205 may be requested under Section 68.93(b) of the RMP Rule).
[19] Proposed Rule, 81 Fed. Reg. at 13,680.
[20] Had EPA sought comment on this new provision, it would have received extensive comments explaining why adding the new language to Section 68.93 not only fails to address commenters' concerns with proposed Section 68.205, but also as to why it would be ill-advised or need to be limited. The public was therefore deprived of an opportunity to comment on this provision in contravention of CAA Section 307 and the APA.
[21] 40 C.F.R. §§ 68.210(b); (c).

requires all facilities to hold a public meeting for the local community within 90 days of an RMP reportable accident.[22] The RMP Rule specifies no protections for the information to be provided to the public, stating only that facilities asserting confidential business information (CBI) for such information must provide a "sanitized version."[23] These requirements were also expanded from the versions contained in the Proposed Rule. In finalizing them, EPA ignored substantial concerns about facility security articulated by stakeholders, law enforcement officials, and sister federal agencies.

Security Concerns with the RMP Rule

EPA's proposal to increase facility information disclosure requirements in the RMP regulations engendered widespread comment and concern from industry, lawmakers, and the public alike. Even before EPA released the RMP Proposed Rule, federal government stakeholders raised concerns, specifically during the Office of Management and Budget's (OMB) pre-proposal review. For example, during the interagency review process, one sister agency commenter stated that it had "concerns regarding the sharing of all the elements listed in [proposed Section 68.210] with the public" because doing so "is essentially providing a listing of vulnerabilities" that "could be used by a terrorist to either target a certain facility or the vulnerabilities could be exploited to increase the magnitude of an attack."[24] Another agency commenter stated, "there are national security concerns with four data points in § 68.210," which "could assist terrorists in selecting targets and/or increasing the severity of an attack by decreasing first responder capability."[25] Yet another stated that "[h]aving facilities share this information would be precedent setting—currently the [Chemical Facility Anti-Terrorism Standards (CFATS)], [Process Safety Management (PSM)], and [Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)] (licensee/permittee) programs do not share this level of detail with the public due to security concerns."[26]

State Attorneys General (AGs) articulated their concerns as well. AGs from Louisiana and Texas, for example, filed comments raising "serious concerns" with several aspects of EPA's proposal, including information dissemination, stating the "information sharing provisions give us great pause."[27] They noted release of the information would do "nothing to prevent accidents or reduce potential harm, but likely increases the vulnerability of multiple facilities." Subsequently, AGs from eleven states—*including current EPA Administrator*

[22] 40 C.F.R. § 68.210(e).
[23] 40 C.F.R. § 68.210(g).
[24] EPA, Interagency Communications Regarding EO 12866 Interagency Review of Risk Management Modernization, RIN 2050-AG8, *Summary of Interagency Working Group Comments on Draft Language Under EO12866/13563 Interagency Review*, at 8-9 (Jan. 13, 2016), EPA Docket No. EPA-HQ-OEM-2015-0725-0007 (Interagency Review of Risk Management Modernization), *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0007.
[25] *Id.* at 11.
[26] EPA, Interagency Communications Regarding EO 12866 Interagency Review of Risk Management Modernization, RIN 2050-AG8, *Notice of Proposed Rulemaking Comments (redline) and Regulatory Impact Analysis Comments (redline)*, at 145b, EPA Docket No. EPA-HQ-OEM-2015-0725-0004, *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0004.
[27] *See* Letter from Jeff Landry and Ken Paxton, Attorneys General of Louisiana and Texas, to Hon. Gina McCarthy, Adm'r, EPA (May 3, 2016), EPA Docket No. EPA-HQ-OEM-2015-0725-0433, *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0433.

Scott Pruitt, who was then the AG of Oklahoma—wrote to former EPA Administrator Gina McCarthy in July 2016, noting further security concerns with the rule and expressing their support of the Louisiana and Texas AG comments.[28]

In spite of commenters' concerns, EPA offers absolutely no safeguards to prevent security sensitive information from falling into the wrong hands, suggesting instead that disclosing all of this information is an inherent good that supersedes any concerns regarding homeland security and dismissing concerns of its sister agencies (including DHS),[29] and numerous state AGs who have vociferously objected to the provisions as their states' chief law enforcement officials. The attempts to remedy these concerns in the RMP Rule are insufficient. This rule stands against the backdrop of a dynamic threat environment of opportunistic terror activity in the U.S. over the past several years, as well as an extensive report prepared by the Department of Justice (DOJ) prior to 9/11, raising concerns about the terrorist-related threats to chemical facilities. The report, which recognized that even 17 years ago the vulnerability of chemical facilities to criminal and terrorist exploitation, concluded that:

- terrorists and other criminals have considered using chemical releases from industrial facilities as weapons,
- causing a release of toxic or flammable industrial chemicals is feasible, and
- industrial facilities are attractive targets for potential intentional releases of chemicals.[30]

The types of information required to be disclosed under the RMP Rule are the very types of information terrorists seek. By providing unfettered access to information by local response organizations without safeguards, and by requiring disclosure of extensive facility information to the public upon request, EPA has done nothing to protect sensitive facility information. Finally, the safety risks inherent in the information disclosure provisions of the RMP Rule cannot possibly be justified given that LEPCs, emergency responders, and the public already can obtain information they need to evaluate emergency response capabilities and concerns under existing laws like the Emergency Planning and Community Right to Know Act (EPCRA).

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[28] Letter from Scott Pruitt, Attorney General, State of Oklahoma, *et al*. to Gina McCarthy, Adm'r, EPA (July 27, 2016), EPA Docket No. EPA-HQ-OEM-2015-0725-0624, *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0624. This letter notes that "[t]he safety of the manufacturing, processing and storage facilities [covered by the RMP Rule] . . . encompasses more than preventing accidental releases of chemicals, it also encompasses preventing *intentional* releases caused by bad actors seeking to harm our citizens. . . [C]ompiling that information and making it easily accessible also aids those who might seek to cause an intentional release for nefarious purposes, by providing those bad actors with information that would help them both select a target and exploit any security vulnerabilities their target might have." *Id.*

[29] The White House Office of Management and Budget (OMB) records and EPA's rulemaking docket show that DHS raised repeated concerns during interagency review regarding significant security threats that would be posed by the proposed rule. EPA disagreed with DHS without explanation.

[30] *See* DOJ, *Assessment of the Increased Risk of Terrorist or Other Criminal Activity Associated with Posting Off-Site Consequence Analysis Information on the Internet* (Apr. 18, 2000), *available at* http://news.findlaw.com/cnn/docs/doj/dojinternetinfo041800.pdf.

Appropriateness of Reconsideration

The criteria for convening a reconsideration proceeding are plainly met here. EPA finalized changes to 68.93(b) that were not in the Proposed Rule. In so doing, (i) it was impossible for a member of the public to know that EPA might change these provisions, particularly in the manner it did, and thus impracticable to raise an objection during the comment period; and (ii) the grounds for objecting arose after the close of the comment period. The information disclosure requirements in Section 68.210 were also finalized without full consideration of the significant safety risks that they create for covered facilities. Because all of these requirements are of central relevance to this rulemaking, reconsideration and rescission is warranted. Indeed, had EPA sought comment on these provisions, CSAG would have raised substantial concerns regarding the scope of the requirements, the ability of recipients of information to protect it, the definition of "relevant," the procedure for disputing a request that a company deemed overbroad, and other issues. Clearly, these new provisions would have benefited from compliance with the statutory notice and comment requirements.

III. The RMP Rule Will Impose Unfunded Mandates on Already-Overtaxed State and Local Emergency Response and Planning Organizations.

The coordination and emergency response exercise requirements in the RMP Rule impose significant burdens on LEPCs, state/regional response teams, and first responders, diverting resources from safety issues that require attention. Specifically, the RMP Rule requires facilities to coordinate response needs with local emergency planning and response organizations at least once annually; to provide extensive facility information to these organizations; to request an opportunity to meet with the LEPC (or equivalent) and/or local fire department to review and discuss these materials; to document coordination with local authorities; and to coordinate with and invite local response officials to participate in field and tabletop exercises, which must be conducted at least once every ten and three years, respectively.[31] In reconsidering the RMP Rule, EPA should properly assess the demands that compliance with these requirements will impose upon local response and planning organizations, and the extent to which they constitute unfunded mandates finalized without regard for current emergency preparation and management activities.

Several commenters on the Proposed Rule suggested that EPA should focus its regulatory efforts on improving safety through increased support and funding for local response organizations.[32] EPA did not address these comments in the RMP Rule and instead imposed burdensome new requirements for local responders to participate in facility exercises without regard for current emergency preparation and management. EPA has acknowledged that the new coordination and emergency response exercise requirements will result in significant cost and personnel burdens.[33] While the RMP Rule decreased the frequency of

[31] *See* 40 C.F.R. §§ 68.93; 68.96(b).
[32] *See* 82 Fed. Reg. at 4665.
[33] *See* 82 Fed. Reg. at 4661 ("EPA notes that its own regulatory impact analysis for the NPRM projected the emergency response exercise provisions to be the costliest provision of the NPRM."); *see also* EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Regulatory Impact Analysis* (RIA), at 9, Ex. B (Dec. 16, 2016), EPA Docket No. EPA-HQ-OEM-2015-0725-

emergency response field exercises (*i.e.* from five years to ten years) in which local responders will be expected to participate, this will do little to alleviate the burden on local communities and emergency response teams where there are numerous facilities in proximity to one another. Rather than impose these additional burdens on these local committees/first responders, EPA should focus on the needs of state and local emergency planners, so that they can effectively implement inspection, prevention, and education programs required in the existing regulations.

Reconsideration of the RMP Rule will allow EPA the opportunity to consider fully the extent of the burdens imposed on emergency response and planning organizations.

IV. There Are Numerous Other Substantive Issues in the RMP Rule That Warrant Reconsideration.

Many of the substantive provisions of the RMP Rule are flawed and warrant reconsideration. CSAG submitted detailed comments on the Proposed Rule in May 2016, noting several of these issues. While EPA addressed some of CSAG's concerns, there remain numerous problems with the rule's substantive provisions, as summarized below.[34] These must be addressed on reconsideration, in order to ensure that the rule is practicable in implementation and that its considerable burdens are proportionate to its purported benefits. CSAG requests reconsideration of all aspects of the following new and modified provisions in the RMP Rule: Compliance and Third-Party Auditing, Incident Investigation, Safer Technology and Alternatives Analysis (STAA), Emergency Response and Preparedness, Information Disclosure, and Training. To aid the Agency in reviewing this request but in no way limiting the scope of our request for reconsideration, we highlight below several examples of specific concerns with the RMP rule.

0734, *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0734, (showing total undiscounted exercise costs of $247.4 million, the second most expensive provision in the rule).

[34] While CSAG provides comment on particular provisions in the RMP Rule in Section III, these comments are not intended to be exhaustive. Rather, they should be understood as examples of the many flaws in the rule. CSAG requests reconsideration of the entirety of the RMP Rule, and in the comments and tables that follow it has merely noted some—but not all—bases for reconsideration. Where CSAG previously commented on an issue, citation is provided to CSAG's comments on the Proposed Rule, submitted to EPA on May 13, 2016. *See supra* note 7.

A. Compliance and Third Party Auditing

CSAG requests reconsideration of the compliance auditing provisions in the RMP Rule. The rule significantly expands the current RMP compliance auditing provisions, requiring compliance audits for "each covered process" and third-party audits in certain situations. The new third-party audit (TPA) requirements will pose significant burdens on facilities by creating, among other things, (1) an expanded scope of compliance auditing to "each covered process; (2) ill-defined and potentially expansive triggers for third-party auditing; (3) onerous and impracticable requirements for third-party audit reports and facilities' audit findings response report; and (4) overly restrictive auditor qualifications, which will severely limit the available pool of third-party auditors. These and other specific issues for reconsideration are set forth in more detail below.

Topic/Provision	Basis for Reconsideration
Expansion of compliance audits to "each covered process," §§ 68.58(a); 68.79(a).	Although EPA described the inclusion of the "each covered process" provision as "clarifying language," that conclusion is not supported in the rulemaking record. This addition represents a dramatic expansion of the original RMP regulations and is a departure from past policy and the opinions of several reputable organizations, including OSHA and the Center for Chemical Process Safety (CCPS), that compliance audits covering a statistical sampling of covered processes is adequate.[35] Compliance auditing for all covered processes would be a substantial undertaking, involving significant in-house and third party auditor time, the costs of which were not taken into account in the RMP Rule. EPA's assertion that this was always its policy is belied by past practices and, in any case, would represent an inappropriate allocation of resources. Accordingly, it should be reconsidered. *See* CSAG Proposed Rule Comments, at p. 1 and Appendix A.
Third-party audit accidental release trigger, §§ 68.58(f)(1); 68.79(f)(1).	Given that an "accidental release" includes elements that are not consistently defined across all covered processes (*e.g.*, "significant property damage") and that these elements may include on-site only impacts, this TPA trigger creates undue burdens and should be reconsidered. The rulemaking record establishes no connection between having a reportable release and conducting a TPA for each covered process (or even the process where the release occurred). Audits are designed to find systemic issues and yet EPA has not supported the conclusion that a reportable release is an indicator of a systemic problem. The response to a release under the original RMP rules is an incident investigation, the purpose of which is to determine the factors that contributed to the release. The record does not

[35] *See* CCPS, *Guidelines for Auditing Process Safety Management Systems*, at 83-84 (2d ed. 2011); OSHA, *Process Safety Management Guidelines for Compliance*, OSHA 3133 (1994).

Topic/Provision	Basis for Reconsideration
	establish what additional value a TPA will have beyond the incident investigation and the routine compliance audits. Thus, there is no rational basis for requiring a TPA in every instance where a reportable release occurs. *See* CSAG Proposed Rule Comments, at p. 2 and Appendix A.
Third-party audit implementing agency trigger, §§ 68.58(f)(2); 68.79(f)(2).	The implementing agency request trigger is ill-defined (conditions "that could lead to an accidental release") with no other criteria to consider. This could lead to arbitrary action by implementing agencies and inconsistent treatment of stationary sources. CSAG submits that the appropriate mechanism to require third parties to be involved in audits is in the enforcement function. As EPA noted in the RMP rulemaking, EPA has required TPAs as part of settlements under the RMP program. Transforming a practice applied to non-complying sources in enforcement actions into a mandatory requirement based on a low-threshold trigger has not been justified in the rulemaking record and should be reconsidered. The "appeal process" in the regulations does not cure these problems, as it is inadequate to address the concerns raised by the commenters and itself is ill-defined. *See* CSAG Proposed Rule Comments, at p. 3 and Appendix A (discussing similar concerns with respect to the implementing agency finding of "non-compliance" trigger in the Proposed Rule).
Timeframe for conducting third-party audit and preparing audit report, §§ 68.58(h); 68.79(h).	The 12-month timeframe for completing a third-party audit and audit report is too restrictive and should be reconsidered. This timeframe does not account for the fact that gearing up for an audit and working around other constraints—such as the schedules of key people and plant maintenance turnarounds, the need to contract with a suitable consultant who meets all the auditor qualifications criteria, and working around other legal and other commitments—may make the timeframe unworkable. In addition, depending upon when a release or other TPA trigger occurs, the next regular compliance audit could be quite soon after the trigger occurs. If a facility has another three-year audit scheduled in close proximity to such an event, it may have to do the regular compliance audit first, simply because it is unable to contract with the auditor in time to serve the dual purpose of both types of audits. This would result in a situation where a facility conducts two redundant audits within a short timeframe.
Auditor qualification requirements, §§ 68.59(c); 68.80(c).	These overly restrictive requirements would severely narrow the pool of available third-party auditors and may be impossible to implement. *See* CSAG Proposed Rule Comments, at p. 2.
Timeframe for developing findings response report, §§ 68.59(f)(1); 68.80(f)(1).	The requirement to determine the appropriate response to each TPA finding and prepare the findings response report "as soon as possible" but "no later than 90 days" from receiving the final TPA report is too restrictive and in some cases impossible to implement, particularly

Topic/Provision	Basis for Reconsideration
	where TPA finding responses involve complex solutions or require capital investment and engineering time.
Senior corporate officer certification requirement, §§ 68.59(f)(1)(iv); 68.80(f)(1)(iv).	It is inappropriate to have a senior corporate officer certify the findings response report. While Title V permits impose requirements on responsible officials, this is defined as a plant manager, not a senior corporate officer. This onerous requirement puts corporate officers in the position of certifying items for which such an officer would not be expected to have personal knowledge and includes a level of detail that is inappropriate for a board of directors level person even if they are relying on those who prepared the report. There are numerous reports of substantial importance that are prepared in companies, and EPA has not established why this level of certification is appropriate for the findings response report, other than providing conclusory statements with no record support.
Implementation of schedule for "promptly addressing deficiencies," §§ 68.59(f)(2); 68.80(f)(2).	The word "promptly" is undefined and gives rise to potential enforcement exposure under a vague standard.
Findings response report submission to Board of Directors, §§ 68.59(f)(3); 68.80(f)(3).	This requirement may create confusion on the part of the Board of Directors as far as what to do with this information, and its effectiveness is questionable.
Owner/operator responsibility for third party audit process, §§ 68.59(d); 68.80(d).	The requirements for owner and operator oversight of the third-party auditor and auditing team are unrealistic and are inconsistent with the independence requirements in the RMP Rule, in that they impose facility oversight for auditors that are otherwise required to be independent from the facility. In addition, these requirements are much more extensive than those included in the Proposed Rule, and therefore stakeholders were unable to provide comment on these issues.

B. Incident Investigation

CSAG requests reconsideration of the incident investigation requirements in the RMP Rule, including (1) the overly broad requirements for "near miss" investigations; (2) the requirement for a Process Hazard Analysis (PHA) to address incident investigation findings as well as "any other potential failure scenarios;" (3) the assumption in the root cause definition that a systemic failure exists for every incident; and (4) investigation report requirements. These and other specific issues for reconsideration are set forth in more detail below.

Topic/Provision	Basis for Reconsideration
"Near Miss" incident investigation trigger, §§ 68.60(a)(2); 68.81(a)(2).	The RMP Rule specifies that "near misses" are subject to the incident investigation requirements in the rule. In addition, the RMP Rule preamble includes a detailed explanation of the many scenarios that EPA will construe as a "near miss."[36] Because the definition of near miss drives the scope of the incident investigation requirements, it is of central relevance to the final rule and CSAG requests reconsideration of the overly expansive

[36] The preamble to the Final RMP rule states:

> EPA is finalizing the language in paragraph (a)(2) of §§ 68.60 and 68.81 as proposed, and has elected not to finalize a regulatory definition of "near miss" to identify incidents that require investigation. The criteria for determining incidents that require investigation will continue to include events that "could reasonably have resulted in a catastrophic release."
>
> . . .
>
> For example, a runaway reaction that is brought under control by operators is a near miss that may need to be investigated to determine why the problem occurred, even if it does not directly involve a covered process both because it may have led to a release from a nearby covered process or because it may indicate a safety management failure that applies to a covered process at the facility. Similarly, fires and explosions near or within a covered process, any unanticipated release of a regulated substance, and some process upsets could potentially lead to a catastrophic release.
>
> . . .
>
> Examples of incidents that should be investigated include some process upsets, such as: excursions of process parameters beyond pre-established critical control limits; activation of layers of protection such as relief valves, interlocks, rupture discs, blowdown systems, halon systems, vapor release alarms, and fixed vapor spray systems; and activation of emergency shutdowns.
>
> Near misses should also include any incidents at nearby processes or equipment outside of a regulated process if the incident had the potential to cause a catastrophic release from a nearby regulated process. An example would be a transformer explosion that could have impacted nearby regulated process equipment causing it to lose containment of a regulated substance. Near misses could also include process upsets such as activation of relief valves, interlocks, blowdown systems, or rupture disks.
>
> 82 Fed. Reg. at 4605-06.

Topic/Provision	Basis for Reconsideration
	application of the incident investigation requirements. EPA entirely failed to address comments of CSAG that indicated near miss should not be defined or described as a one-size-fits-all approach, but rather must be defined consistent with each facility's risk tolerance. CSAG explained that EPA should have instead established a performance-based standard for companies to have a program to address near misses but not to prescriptively dictate what constitutes a near miss.[37] *See* CSAG Proposed Rule Comments, at pp. 8-11 and Appendix B. EPA failed to explain its basis for the approach it took in the RMP Rule. The Agency's suggestion that it will address the definition through guidance to be issued in the future is inadequate and places companies at risk of EPA creating retroactive requirements through guidance—an approach that runs directly counter to the principle that Administrator Pruitt articulated in his February 2017 address to EPA staff that the Agency would avoid using guidance to issue rules.[38]
Requirement for PHA to address "any other potential failure scenarios," § 68.67(c)(2).	The requirement for the PHA to address the "findings from all incident investigations required under § 68.81, as well as any other potential failure scenarios" is open-ended and too vague to apprise a regulated entity regarding what its compliance obligations will entail, and it should be reconsidered. *See* CSAG Proposed Rule Comments, at p. 25.
Inclusion of "system-related reason" in root cause definition, § 68.3.	"Root cause" is defined as "a fundamental, underlying, system-related reason why an incident occurred."[39] CSAG commented on the root cause definition in the Proposed Rule because it required identification of a management system failure despite the fact that management system failures are not always the root cause of an incident. *See* CSAG Proposed Rule Comments, at pp. 9, 11. Although EPA removed the term "management

[37] Because of the variability in facilities and operations, it is critical that any "near miss" requirements be able to be tailored to the plant in question and the potential hazards given operations, proximity of the community, *etc*. EPA can accomplish its objective of focusing facilities on incident prevention by establishing a general requirement for a performance-based plan to address near misses. In this way, each facility would be addressing the highest priority near misses for its operations in a manner consistent with continuous improvement. Otherwise, in a prescriptive program, a facility that has not been working on near misses may be overwhelmed and unable to comply. The focus needs to be on having the top facilities continue to improve from their current level of performance and on those that have not been conducting near miss investigations also improving (but not coming to the level of the top facilities immediately). This plan would address those incidents which could reasonably have resulted in a release that presented an imminent and substantial endangerment to public health and the environment. *See* CSAG Proposed Rule Comments, at p. 10.

[38] Scott Pruitt, EPA Administrator, Remarks to EPA Employees (Feb. 21, 2017), *transcript available at* https://www.c-span.org/video/?424362-1/administrator-scott-pruitt-addresses-epa-employees (noting that the use of guidance to do rulemaking bypasses the procedures required in the APA).

[39] 40 C.F.R. § 68.3 (emphasis added).

Topic/Provision	Basis for Reconsideration
	system failure" from the root cause definition in the RMP final rule, it retained "system-related reasons" as part of the root cause definition in all cases. For the same reasons that a management system failure is not always present, there is not always a "system-related reason" why an incident occurred either. Accordingly, CSAG requests reconsideration of this definition.
Incident investigation report requirements, §§ 68.60(d)(3); 68.81(d)(3).	The requirement to include "all relevant facts" in incident investigation reports is impermissibly vague and overbroad and should be reconsidered. The Agency needs to provide notice to regulated entities of the facts to record that will be considered sufficient to satisfy the report requirement. Because responsible officials are required to certify compliance with Part 68 requirements, it is important that the requirements of the rule be clear.

C. Safer Technology and Alternatives Analysis (STAA)

CSAG requests reconsideration of the requirements in Section 68.67(c)(8) for Program 3 facilities to conduct a STAA as part of the PHA conducted every five years and to determine the practicability of the inherently safer technologies and designs considered.

Topic/Provision	Basis for Reconsideration
Safer Technology and Alternatives Analysis (STAA), § 68.67(c)(8).	Commenters on the Proposed Rule, which was virtually identical to the Final Rule, explained that STAA is best applied to new processes. For existing processes, STAA is inappropriate and the current rule's PHA provisions already require owners-operators to identify and control hazards. *See, e.g.,* CSAG Proposed Rule Comments, at p. 24. EPA's explanation for rejecting these comments is simply inadequate.[40] Moreover, EPA attributes a $70 million annual cost to the STAA requirement, but cannot point to any benefits. EPA has not justified why the STAA is appropriate for existing processes (as compared with new processes for which design decisions have not yet been made). Nor has the Agency explained adequately why the PHA is the proper vehicle for this evaluation. As commenters, including CSAG, noted, the PHA team is not a design team. Making the STAA part of the PHA will entail including additional resources in the PHA process. During the interagency review process for the RMP Rule, EPA received comments from sister agencies making this very point.[41] Moreover, the Agency has not shown why conducting this effort anew every five years is warranted. For the foregoing reasons, EPA should reconsider this provision.
STAA Compliance Date, § 68.10(d)(3)	CSAG is concerned with the four-year compliance deadline provided in the rule for the STAA requirements. Such analysis is highly complex, and—given that the STAA would have to be part of the PHA for a covered process within four years—facilities will have to begin working immediately on incorporating this analysis without a commonly accepted methodology. In the RMP Rule preamble, EPA notes future "guidance" that will be developed for complying with RMP PHA and STAA requirements before sources must

[40] *See* 82 Fed. Reg. at 4636.

[41] *See* Interagency Review of Risk Management Modernization, *supra* note 23, at p. 6. *See also* E-mails dated June 11, 2015 and June 18, 2015 from Myron Casada ABS Consulting to Jim Belke EPA Regarding IST Review Costs, Docket No. EPA-HQ-OEM-2015-0725-0678, *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0678 ("I personally would not do an IST review like I do a PHA . . . Frankly, some companies might do an IST review his [sic] way but it really is inefficient/expensive.").

Topic/Provision	Basis for Reconsideration
	comply with the STAA provision and its plans to make draft guidance available for public comment.[42] Without the benefit of this guidance to reflect its intentions with respect to enforcement of the STAA provision, complying with the new requirements within four years will be extremely challenging.

[42] 82 Fed. Reg. at 4640.

D. Emergency Response and Preparedness

CSAG requests reconsideration of the emergency response program revisions in the RMP Rule. The rule contains overly restrictive coordination, exercise, and other emergency response requirements that are potentially at odds with the goal of advancing and ensuring adequate community emergency response capabilities. In addition, as noted above in Sections II and III, certain emergency response requirements in the rule threaten facility security and impose unfunded mandates upon already overtaxed local emergency response and planning organizations.

Topic/Provision	Basis for Reconsideration
Annual coordination requirements with local emergency planning and response organizations to address changes, § 68.93(a).	CSAG notes that the requirements in § 68.93(a) to coordinate annually with local emergency planning and response organizations to address changes at the stationary source (including its emergency response and/or action plan) and/or the community emergency response plan overlap with coordination activities that already occur between facilities and the community under EPCRA. If enforced effectively, the current EPCRA requirements would help to achieve EPA's goal in enacting this provision. *See* CSAG Proposed Rule Comments, at p. 19 and Appendix D.
Other coordination requirements with local emergency planning and response organizations, § 68.93(b).	As noted above in Section II, CSAG is concerned with the vague and potentially expansive requirement to provide to LEPCs any information deemed "relevant" to local emergency response planning, a requirement that was not included in the Proposed Rule. In addition, in requiring "consultation" with local emergency response officials on schedules and plans for field and tabletop exercises required under § 68.96(b), the rule not only imposes burdens and costs upon already-overtaxed LEPCs but also potentially holds facilities responsible for the participation of these entities, over which they have no control. *See* CSAG Proposed Rule Comments, at p. 20 and Appendix D.
Field and tabletop exercise requirements, § 68.96(b).	As CSAG previously commented, the exercise requirements in the rule are too rigid and will lead to a misallocation of resources. *See* CSAG Proposed Rule Comments, at p. 20 and Appendix D. Further, ECPRA already requires appropriate exercises. *See* 42 U.S.C. §§ 1103(b); 1103(c). In addition, the tabletop and field exercise requirements may impose overwhelming burdens upon LEPCs and smaller facilities.[43] *See* CSAG Proposed Rule Comments, at p. 20 and Appendix D.

[43] In fact, the National Association of SARA Title III Program Officials (NASTTPO) made this very point in their comments on the RMP Rule, stating that "[t]o be valid and useful, [facility exercises] must involve all of the external agencies that will respond in support of the facility. This places a substantial burden on LEPCs and response agencies, especially as these organizations are routinely composed of volunteers." Comments of the NASTTPO on the *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule*, 81 Fed. Reg. 13,638 (Mar. 14, 2016), dated May 12, 2016, Docket No. EPA-HQ-OEM-2015-0725-0594, at p. 8, *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0510. In a related

Topic/Provision	Basis for Reconsideration
Alternative means of meeting exercise requirements, § 68.96(c).	While CSAG appreciates the addition of this provision to allow for alternative means of satisfying the exercise requirements in the rule, this is not a true "alternative" to compliance given that the requirements of § 68.96 subsections (a) and (b) must be met in all cases. This provision therefore does nothing to alleviate the significant compliance burdens a facility may face where it has conducted similar facility exercises to meet other regulatory requirements or has recently responded to a release.
Requirement to provide in the RMP a "list of Federal or state emergency plan requirements" to which facility is subject, § 68.180(a)(3).	This provision is vague and potentially burdensome for facilities, with no clear safety benefit.
Obligation to identify in the RMP whether the facility is a "responding" or "non-responding" stationary source, § 68.180(b).	As CSAG previously commented, the designation of a facility as either a complete "responding" or complete "non-responding" source is contrary to reality, as most situations are a "hybrid," in which some response functions are handled by internal resources and others by community resources. *See* CSAG Proposed Rule Comments, at p. 19 and Appendix D.

comment on the coordination requirements of the rule, NASTTPO stated "that it is not a facility's responsibility to 'ensure resources and capabilities' are in place," as this can only be "evaluated in the context of some desired outcome for response capacity and that is a community decision." *Id.* at 5.

E. Information Disclosure

CSAG requests reconsideration of all of the information disclosure provisions in the RMP Rule. As noted above, CSAG has significant concerns about these provisions and their potential impacts upon the security of covered facilities and the safety of surrounding communities. EPA appears to have adopted the view in the RMP Rule that facility information-sharing is beneficial in all circumstances, without demonstrating that this is actually the case. CSAG therefore requests that EPA reconsider and rescind these provisions, as discussed in more detail below.

Topic/Provision	Basis for Reconsideration
Requirement to provide any information deemed "relevant" by local emergency response and planning organizations, § 68.93(b).	As noted above in Section II, this disclosure requirement is troubling because it is open-ended and contains no safeguards or requirements for the LEPCs and response organizations to protect security-sensitive material from public disclosure. The RMP Rule provides no method for a facility to dispute whether information requested is relevant to local emergency response planning, thereby placing it in the position of refusing to provide information and risking enforcement by EPA. Moreover, also as noted above, EPA has stated that any information obtained by the LEPC is subject to public disclosure. EPA has not shown why the pre-existing mechanisms for information exchange and disclosure were inadequate. From CSAG's perspective, the exchange of information with responders is important, but it must be done in a responsible manner.
Requirement to provide chemical hazard information to the public upon request, § 68.210(b).	This provision, which allows the public to directly request information from facilities, is largely unprecedented. Under comparable regulatory programs, the public is required to request information about regulated facilities from the government and there is no regulatory obligation for facilities to respond to individuals. To the extent that the information required to be disclosed under this provision is already publicly available under EPCRA, facilities should not have the additional burden of repackaging it for individual requests. Further, the requirement to provide to the public upon request a "list of scheduled exercises required under § 68.96" potentially endangers facilities and responders by providing advance notice of when such exercises will occur. In addition to the potential compliance burdens and dangers inherent in this provision, EPA has provided no safeguards for the protection of sensitive facility information nor any process for facilities to appeal a request from the public. Without explanation, EPA has also been unwilling to use a reading room approach like that used under other statutory schemes that require information disclosure, such as the Chemical Safety Information, Site Security, and Fuels Regulatory Relief Act (CSISSFRA). *See* CSAG Proposed Rule Comments, at pp.

Topic/Provision	Basis for Reconsideration
	16-18 and Appendix C.
Timeframe for responding to public requests, § 68.210(d).	The 45-day timeframe for fulfilling public requests for information is unreasonable and inadequate to allow facilities time to protect SSI/CBI.
Ongoing notification requirement, § 68.210(c).	This requirement adds to the already-onerous burdens of the information disclosure provisions in the RMP Rule. In addition, the requirement to identify where the public can access information on community preparedness may potentially be construed as putting an obligation on facilities to organize this information and to facilitate its access and availability to the public. Where an LEPC has made the information available on a public website identified by the company, it may also be interpreted to require the company to constantly monitor the LEPC website to ensure that it is active and up to date. This is at odds with the vital roles that local emergency response and planning organizations—and not companies—play as the entities primarily responsible for community preparedness. Finally, the phrase "information on community preparedness" is vague, creating difficulties for facility personnel required to certify compliance with this provision.
Public meeting requirement, § 68.210(e).	The requirement to hold a public meeting within 90 days after any reportable accident is overly broad. It is not necessary for facilities to hold a public meeting every time that a release occurs. EPA provided no evidence that public meetings were requested or needed and not held under the pre-existing rules. Often a release does not warrant a public meeting, and this expense should not be imposed automatically. *See* CSAG Proposed Rule Comments, at p. 17.

F. Training

CSAG requests reconsideration of the provision in the RMP Rule that expressly includes "supervisors responsible for directing process operations" within the term "employee" for the purposes of the RMP Rule training requirements.

Topic/Provision	Basis for Reconsideration
Training Requirements, §§ 68.54(e); 68.71(e).	While EPA asserted in the preamble that it has traditionally interpreted "employee" to be any worker that is involved in operating a process, including supervisors, CSAG notes that there is variability in supervisor roles and responsibilities within and among facilities. EPA has therefore created considerable ambiguity in promulgating this change.[44] Accordingly, CSAG requests reconsideration of this change. Supervisors no longer universally come from operational ranks that they used to run. Supervisors (first-line management) are often process engineers but are not certified operators trained in all of the operating procedures. This change in the regulation would require every supervisor to be certified in all operational procedures, which is a significant undertaking. Supervisors do not require all of the same training that operators require because they are not operating the process. Further, the rule's preamble is ambiguous with respect to which "supervisors" are subject to training requirements, and therefore does not reasonably apprise regulated entities of their obligations. To add to the lack of clarity, no compliance date is provided for this training requirement. CSAG also notes that EPA's use of the phrase "involved in operating a process" (as explained in the RMP Rule preamble) appears to be inconsistent with OSHA's interpretation of the same phrase in the comparable PSM standards. While EPA intends the phrase to include "process engineers and maintenance technicians,"[45] in preamble statements for operational training requirements promulgated in 1992, OSHA took the opposite stance, specifically stating its intent to include within the class of employees "involved in operating a process" only "direct hire employees not involved in maintenance" (covering these non-

[44] 82 Fed. Reg. at 4675. Further, the plain language of the RMP Rule does not reflect what we understand to have been the intent of EPA to limit the scope of the training requirements to "front-line supervisors."
[45] *Id.* (emphasis added).

Topic/Provision	Basis for Reconsideration
	operations employees under different paragraphs of its regulations, i.e. 29 C.F.R. 1910.119(j)(3)).[46] Further, while EPA evinces an intent in the RMP Rule preamble to extend training requirements to supervisors with "decision-making" authority, OSHA training requirements are more restrictive, covering only those employees actually involved in "operating" the process.[47] Again, these inconsistencies reflect a failure of EPA to closely coordinate with OSHA in promulgating the RMP Rule. In light of the above considerations, CSAG requests that EPA remove this provision in order to avoid unnecessarily expanding RMP training requirements and creating confusion in implementation.

[46] OSHA, *Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents; Final Rule*, 57 Fed. Reg. 6356, 6381 (Feb. 24, 1991).
[47] *Id.*

IV. The RMP Rule Should Be Reconsidered Because It Was Finalized Using Faulty Cost and Benefit Analysis.

Contrary to its obligations under EO 13563 and other directives applicable to the rulemaking process, EPA has failed to conduct an accurate and thorough analysis of the costs and benefits of the RMP Rule. In addition, EPA has failed in fulfilling a central purpose of EO 13650, to "moderniz[e]" the RMP regulations.[48] Rather than streamlining and enhancing the efficacy of the current RMP regulations, EPA finalized requirements that impose significant new compliance costs upon regulated facilities without any demonstrable or quantifiable benefit. EPA should correct these errors and omissions by reconsidering the RMP Rule.

A. EPA's Costs Estimates Are Inaccurate.

CSAG provided extensive information to EPA and to OMB on the costs of the Proposed Rule. While EPA made several adjustments in response to data provided by CSAG during the rulemaking process, the adjustments were insufficient to adequately represent the costs of the regulation. As an initial matter, the hourly wage rates used by EPA to estimate costs associated with RMP Rule implementation are inaccurate and do not reflect the costs that companies face in reality. This error permeates all of EPA's cost estimates in its Regulatory Impact Analysis (RIA).[49] The rule familiarization estimates in the RIA provide just one example of this problem. Although EPA increased the rule familiarization allowance from 4 hours to 292 hours, because of the flawed wage rates used in the RIA, the Agency's cost estimates are dramatically different from the more realistic high and low wage estimates provided to EPA by CSAG. For instance, EPA increased its hour estimate for production staff rule familiarization at complex facilities to 125 hours in the RIA (from a mere 4 hours originally estimated in the EPA Information Collection Request (ICR) for the rule), generating total costs of $5,476.25 when multiplied by EPA's estimated wage rate of $43.81.[50] If EPA had used CSAG high and low wage rate estimates for production staff, however, it would have calculated total costs of $13,500 and $10,625, respectively (approximately $8,000 and $5,000 higher than EPA's figures).[51] These much higher numbers, based upon CSAG high and low wage estimates, reflect the actual wages paid by RMP-regulated facilities.[52]

To compound the issues created by EPA's flawed wage rate estimates, the Agency grossly underestimated the number of hours required for rule familiarization and other compliance burdens. For example, EPA estimated only 4 hours of implementing agency

[48] *See* EO 13650, *supra* note 9, at Sec. 6.
[49] *See* RIA, *supra* note 32, at pp. 35-36.
[50] *See id.*
[51] *See* CSAG ICR Comments *supra* note 6, at pp. 18-19 (providing a high estimate for production staff hourly wage rates of $108.00 and a low estimate of $85.00).
[52] Similar results are achieved by using CSAG's hour estimates in other labor categories as well. For example, using EPA's attorney wage ($128.73) and hour (12) estimates for rule familiarization at complex facilities generates a total cost estimate of $1,544.76 for this labor category. Yet CSAG more realistic low and high estimates for attorney time ($130.33 and $700,00, respectively) generate estimates ranging from $1,563.96 to $8,400.00. *See id.*

management time and 5 hours of LEPC time for rule familiarization.[53] It is inconceivable that such entities, who are charged with critical roles in rule enforcement and implementation, would take so few hours to become familiar with the complex and myriad provisions of the RMP Rule. There are numerous other inaccuracies in the cost estimates outlined in CSAG's comments on the Proposed Rule and on the ICR. We request that EPA undertake a comprehensive review of the costs to facilities and to communities of these regulations.

B. EPA's Benefit Estimates Are Inaccurate or Non-Existent.

EPA provided no meaningful benefits estimates, instead simply estimating the costs of incidents should they occur. EPA admits that the benefits of the rule were difficult to quantify.[54] EPA knows that there are means of accounting for uncertainty in benefits yet still quantifying them, but EPA did not even engage in this exercise or at least did not disclose those results if it did engage in it. We request a comprehensive analysis and attempt to quantify if there will be benefits and also consideration of disbenefits—*i.e.*, taking into account the possibility that information disclosure will lead to adverse consequences.

V. The RMP Rule Was Issued In Violation of Congress's Directive that EPA Coordinate with OSHA, Accurately Estimate Costs, and Engage the Public.

The fundamental flaws outlined above are not surprising when one considers that the process for issuing this regulation violated numerous Congressional directives that, had they been followed, would have prevented the significant errors reflected in the RMP Rule.

A. EPA Failed to Coordinate with OSHA and DOT as Mandated by Congress.

Stakeholders have repeatedly asked EPA why it is pursuing this effort in isolation when Congress directed it to coordinate any requirements under Clean Air Act Section 112(r) with certain industry standards, and with those issued for comparable purposes by OSHA and U.S. Department of Transportation (DOT).[55] This directive to coordinate was repeated in EO 13650.[56] Harmonizing the RMP rule with both industry standards and OSHA's PSM standard is critical, particularly with respect to operational management of compliance. EPA claims in the RMP Rule preamble that it coordinated with OSHA, but there is no evidence of this coordination in the rule. EPA informing OSHA of what it was planning to do does not constitute coordination, and this is evidenced by the disconnect between the regulations. In addition, CSAG notes that concurrent with EPA's rulemaking was OSHA's effort to draft a proposed worker safety standard for first responders.[57] It does not appear, however, that EPA coordinated with OSHA on this rulemaking, an effort that could have been especially beneficial to EPA in order to learn about emergency response organizations.

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[53] *See* RIA, *supra* note 32, at p. 36.

[54] *See* 82 Fed. Reg. at 4597 ("[W]e are unable to quantify what specific reductions may occur as a result of these revisions . . .").

[55] Clean Air Act Section 112(r)(7)(C) provides that any RMP regulations shall "to the maximum extent practicable" be consistent with the recommendations and standards established by the American Society of Mechanical Engineers (ASME), American National Standards Institute (ANSI), and the American Society of Testing Materials (ASTM). 42 U.S.C. § 7412(r)(7)(C). *See also* Section 112(r)(7)(D), which directs the

B. EPA Used Inaccurate and Woefully Incomplete Cost Estimates and Provided No Showing of Benefits.

Despite extensive comments and data provided by stakeholders, EPA grossly understated the rule's costs. The new requirements for third party audits, incident investigation, and technology analyses will create substantial personnel burdens and result in exorbitant additional costs. While EPA admitted its methodology was faulty and attempted to remedy it in the RMP Rule, the revised cost estimates still fail to take into account the realities of implementing such extensive new requirements. Finally, EPA completely ignored significantly increased burdens on Local Emergency Planning Committees and first responders which alone should have warranted OMB disapproval.

The record demonstrates no benefits. Indeed, EPA admitted it was "unable to quantify what specific reductions may occur as a result of these proposed revisions."[58] EPA's analysis summarizing historical accidents over the past ten years may have only a slight relevance to the future, a fact that EPA recognized when it stated that it expects that "*some portion* of future damages would be prevented through implementation of a final rule."[59] There is no way to tell whether that "portion" will be large or small or a null set. EPA's analysis violated numerous OMB directives on how to evaluate costs and benefits. Given this significant uncertainty, the amorphous and speculative benefits references, the most supportable conclusion is that enforcing the existing rules would actually be more effective than revising the rules as EPA has done.

C. EPA Dismissed Small Business and Regulated Stakeholder Comments.

Despite a specific statutory requirement to take into account the impacts of major rulemakings on small businesses, EPA conducted a truncated Small Business Regulatory Enforcement Fairness Act (SBREFA) review and then failed to take into account their concerns. EPA received significant comments during the SBREFA process, yet failed to address the stated concerns in the proposed and final rules.

D. EPA Refused to Meet with Stakeholders After the Comment Period Closed, Preventing it from Considering the Implications of Rule Language Changes in Response to Comments.

EPA could have worked with stakeholders to ensure that the rule would reflect the breadth and depth of RMP experience that exists. Instead, significantly breaking from historical practice, EPA refused to meet with any members of the public during the critical

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Administrator to consult with the Secretary of Labor and Secretary of Transportation and coordinate any requirements established for "comparable purposes" by OSHA or DOT. *Id.* at § 7412(r)(7)(D).

[56] *See* EO 13650, *supra* note 9, at Sec. 4.

[57] *See, e.g.,* OSHA, Process Safety Management (PSM) of Highly Hazardous Chemicals, Docket No. OSHA-2013-0020, *available at* https://www.regulations.gov/docket?D=OSHA-2013-0020.

[58] Proposed Rule, 81 Fed. Reg. at 13,642; *see also* EPA, *Response to Comments on the 2016 Proposed Rule Amending EPA's Risk Management Program Regulations (March 14, 2016; 81 FR 13637)* at 220 (Dec. 19, 2016) (Response to Comments).

[59] Proposed Rule, 81 Fed. Reg. at 13,642 (emphasis added).

post-comment period timeframe, when the agency normally engages with commenters to ensure it understands the comments received and responds appropriately. As an example of particular relevance to this petition, CSAG requested a meeting with EPA on multiple occasions to discuss comments it submitted in May 2016 on the Proposed Rule.[60] These requests were either declined or ignored by the Agency, reflecting its unwillingness to engage meaningfully with stakeholders on their substantive concerns with the proposal.

Even where EPA claimed it was addressing a commenter's concerns, in many instances the new rule language to address the comment creates additional concerns that could have been avoided if a dialogue had occurred. If any rule would have benefited from such engagement, it was this one. It addresses a complicated subject matter with numerous interdependent provisions, such that a revision of one necessarily changes the consequences and effect of several others. In other rulemakings where EPA was considering significant applicability or substantive changes, the Agency has not only met with stakeholders but it has also published notices of data availability or supplemental notices of proposed rulemaking to allow for public input on changes contemplated in response to comments made during the comment period.

Here, the rulemaking was fast-tracked to allow for promulgation in advance of the presidential transition, an approach that disserved the public's interest and undoubtedly will result in negative consequences for the regulated industry and the communities where they operate. The problems with the RMP Rule flow from the Agency's haste in finalizing its proposal and its refusal to engage commenters on its substantive provisions as the rule was being finalized. Additional time to engage commenters in a robust dialogue would help to improve the rule. Accordingly, EPA should convene a reconsideration proceeding as expeditiously as possible and stay the RMP Rule for the full period of time necessary to generate a satisfactory revision of the rule.

Bases for Stay and Delay of Effective Date

An immediate stay, followed by a rulemaking to delay the rule's effectiveness to be no earlier than 18 months from March 21, 2017, is necessary to ensure that the implications of the rule—for regulated entities, for localities and states, and for homeland security—are fully understood and carefully considered. EPA has broad discretion to issue such a stay and effective date delay and should do so under the circumstances presented.

I. A Stay Pending Reconsideration is Appropriate Under CAA Section 307(d)(7)(B).

CAA Section 307(d)(7)(B) provides that the Administrator may stay the effectiveness of a rule during reconsideration for a period not to exceed three months.[61] In this Petition,

[60] *See, e.g.,* Letter from Shannon S. Broome to Hon. Mathy Stanislaus (EPA), re: Follow up on Requests for Meeting (Sept. 15, 2016) (requesting reconsideration of EPA's decision to deny CSAG meeting requests to discuss its comments submitted on the RMP Proposed Rule). CSAG notes that despite being public document relevant to the RMP rulemaking process, this letter was never posted to the public docket.

[61] 42 U.S.C. § 7607(d)(7)(B); *NRDC v. Reilly*, 976 F. 2d 36, 41 (D.C. Cir. 1992) (noting that EPA's authority to issue a stay for up to three months under CAA Section 307(d)(7)(B) is "unambiguous").

CSAG requests that EPA reconsider and make substantial revisions to the RMP Rule or that it rescind the RMP Rule altogether. A stay is appropriate and necessary here because regulated entities will have to take steps and commit significant resources to comply the RMP Rule once it becomes effective on March 21, 2017. These efforts will be wasted if the RMP Rule is rescinded or substantially revised under the new Presidential administration and as a result of the reconsideration proceedings.

Further, many of the provisions of the RMP Rule were finalized without proper notice to the regulated community about their intended scope. Had EPA provided notice, CSAG would have provided significant adverse comments and would have been able to establish on the record the reasons that such changes to the RMP regulations should not be adopted or should be substantially revised. Section 307(d)(7)(B) provides that EPA is compelled in these circumstances to convene a reconsideration proceeding and to afford "the same procedural rights as would have been afforded had the information been available at the time the rule was proposed."[62] If CSAG had known that EPA intended to expand the scope and associated compliance burdens beyond the provisions of the Proposed Rule, it could have commented on these unreasonable and costly provisions prior to the rule's finalization and effective date. The same right should be afforded now.[63]

CSAG recognizes that EPA has authority to promulgate a final rule that differs in some particulars from its proposed rule. In many instances for this rule, however, the final rule deviates too sharply from the proposal, such that the final rule is not a logical outgrowth of the proposal.[64] More fundamentally, however, even with respect to provisions noted above for which notice was provided, the agency has the authority to reconsider prior actions and should do so here. Although the Administrator has broad authority to reconsider provisions noted herein, to the extent necessary, CSAG requests that this petition also be treated as a petition for rulemaking. The final rule will benefit from additional public input, and EPA will ensure that fair notice of provisions has been provided. Balancing the public interest in expedition and finality against the problems presented by this final regulation strongly supports convening a reconsideration proceeding on the RMP Rule.

The expanded scope and increased requirements of the RMP Rule will impose significant costs on CSAG members, in terms of rule familiarization, taking actions needed to comply with the new substantive requirements, and developing systems to assure compliance.

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[62] 42 U.S.C. § 7607(d)(7)(B) (emphasis added).

[63] Even if Section 307(d) did not compel reconsideration, EPA should undertake reconsideration on its own accord given the lack of adequate response to comments raised on the proposal and the substantial concerns raised herein.

[64] *See Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F. 2d 506, 546- 47 (D.C. Cir. 1983) ("EPA undoubtedly has authority to promulgate a final rule that differs in some particulars from its proposed rule . . . However, if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal."). In *Small Refiner*, the D.C. Circuit also explained the importance of public notice, articulating the role that it plays in improving the quality of agency rulemaking. 705 F. 2d at 547 ("First, notice improves the quality of agency rulemaking by ensuring that agency regulations will be 'tested by exposure to diverse public comment.' . . . Second, notice and the opportunity to be heard are an essential component of 'fairness to affected parties.' . . . Third, by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review.") (internal citations omitted).

In addition, the RMP Rule will impose costs and require commitment of resources by states and local emergency response and planning organizations immediately upon becoming effective. Finally, there is no question that CSAG is likely to succeed in any challenge to the RMP Rule in this regard because there is no question that EPA failed to meet its rulemaking obligations. Thus, a stay is warranted.

II. It Is Appropriate to Issue a Rule to Change the Effective Date and Toll Compliance Dates.

CSAG requests that during the three-month stay of the RMP Rule, EPA propose and finalize a rule to amend the RMP Rule's effective date to be 18 months from March 21, 2017 and that it simultaneously toll the compliance dates set in the rule during this time so that they are extended by the same 18-month period. As promulgated, the RMP Rule was to become effective on March 14, 2017. On January 20, 2017, White House Chief of Staff Reince Priebus issued a memorandum to executive department and agency heads directing them, among other things, to postpone until March 21, 2017 the effective date of any regulations published in the *Federal Register* but that had not taken effect as of the date of the memorandum.[65] The RMP Rule was subject to this temporary postponement, which EPA has effectuated by issuing a Final Rule delaying the effective dates of 30 regulations—including the RMP Rule—that have been published in the *Federal Register* but have not yet taken effect.[66]

The Priebus Memo further directs agencies to "consider," where "appropriate and as permitted by applicable law," proposing for notice and comment a rule to delay the effective date for regulations beyond the initial 60-day period.[67] Proposing a rule to delay the effective date of the RMP Rule is consistent with this directive, in that it will allow EPA to consider carefully the significant questions of fact, law, and policy raised by the RMP Rule.[68]

Such a delay in effective date—accompanied by a tolling of the compliance dates in the rule—would not in itself change the substantive requirements of the RMP Rule. Rather, it would simply preserve the status quo in order to allow for careful reconsideration of the rule. An effective date delay is also consistent with EPA's authority under CAA Section 112(r) to set effective dates for regulations promulgated under that section necessary to assure compliance "as expeditiously as practicable."[69] Compliance with the RMP Rule at this point in time is not practicable because the rule contains several vague and ill-defined provisions—as highlighted by the statements in the final rule and response to comments that additional guidance is needed to elucidate the requirements. Moreover, it is clear that if this petition is granted, the rule requirements could change upon reconsideration.

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[65] Reince Priebus, Mem. for the Heads of Exec. Dep'ts and Agencies, *Regulatory Freeze Pending Review*, (Jan. 20, 2017) ("Priebus Memo").
[66] *See* EPA, *Delay of Effective Date for 30 Final Regulations Published by the Environmental Protection Agency Between October 28, 2016 and January 17, 2017; Final rule*, 82 Fed. Reg. 8499, 8501 (Jan. 26, 20176) ("EPA Delay Notice").
[67] *See* Priebus Memo, *supra* note 62, at 1-2.
[68] *See id.* (directing agencies to delay effective dates of published but not-yet-effective rules in order to undertake factual, legal, and policy review).
[69] 42 U.S.C. § 7412(r)(7)(A) (emphasis added).

For these reasons, an 18-month delay of the RMP Rule effective date and compliance dates in the rule is warranted.

III. A Stay Pending Judicial Review is Also Appropriate Under APA Section 705.

If EPA does not proceed as recommended above to issue a rule changing the effective and compliance dates by 18 months to allow for the reconsideration process to be completed, CSAG requests that EPA issue a stay under APA Section 705. As previously noted, CSAG is filing a Petition for Review of the RMP Rule in the D.C. Circuit. APA Section 705 allows EPA to stay the effective date of a final rule while judicial review is pending, if it finds that "justice so requires."[70] Both the Agency and the courts have applied the four-part test for a preliminary injunction to determine whether "justice so requires" a stay of agency action pending judicial review. This test includes consideration of: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.[71] Each of these factors weighs in favor of staying the RMP Rule while it is subject to judicial review.

First, CSAG's petition for review is likely to succeed on the merits. The RMP Rule contains several costly provisions that are unjustified by any concrete and quantifiable benefits. Further, it was finalized without regard to specific Congressional and EO directives to EPA, including that it "modernize" the RMP regulations, that it coordinate with OSHA and DOT in doing so, that it accurately estimate costs, that it address impacts on small businesses and stakeholders in the rulemaking process. Perhaps most significantly, the RMP Rule imposes significant unfunded mandates upon emergency response and planning organizations and may in fact increase risks to regulated facilities and surrounding communities via its extensive public disclosure provisions. Given these notable and fundamental flaws, CSAG's reconsideration request is likely to succeed on the merits.

Second, CSAG member companies will suffer irreparable harm absent a stay. Facilities will be obligated to expend resources and personnel time in complying with many of the RMP Rule provisions immediately as of the rule's effective date. These include the requirements to audit "each covered process," to incorporate STAA into the PHA, and to begin emergency response coordination activities.[72] Commitment of time and resources to comply with these vague, expansive provisions without any certainty that they will survive the reconsideration process will irreparably harm CSAG member companies.

Third, granting a stay will not harm other parties. Because the safety benefits of the RMP Rule are not well-defined, it is very unlikely that a stay of the RMP Rule's effective date will pose any harm to facilities or their surrounding communities. Moreover, EPA itself has maintained that the existing RMP requirements have resulted in decreases in accidental releases and are adequate to ensure safety.

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[70] 5 U.S.C. § 705.
[71] *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 31 (D.D.C. 2012).
[72] *See* Declaration of Shannon S. Broome (Mar. 13, 2017) (Attach. 4).

Fourth, a stay of the RMP Rule effective date pending judicial review is in the public interest. The public will benefit from a careful reconsideration of the potentially dangerous information disclosure provisions in the rule before they are implemented. In addition, a stay will ensure the preservation of state and local emergency response resources that would otherwise be tapped as a result of the costly emergency coordination and facility exercise requirements in the rule. Finally, the public interest would be served by EPA carefully reconsidering the RMP Rule to ensure that all expenditures associated with compliance are justified by commensurate benefits.

Conclusion

For the foregoing reasons, we respectfully request that you convene a reconsideration proceeding to address the issues outlined above. In addition, we request that the RMP Rule be subject an immediate three month stay under CAA Section 307(d) and that EPA issue a rule amending the RMP Rule's effective date to be 18 months from March 21, 2017, including tolling the compliance dates set in the rule by the same period. CSAG reserves the right to supplement this petition as it deems appropriate.

CSAG remains willing and able to work with Agency to resolve the issues raised in this petition, as well as any issues raised by other petitioners.

Attachments

1. Comments of the CSAG on the Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule, 81 Fed. Reg. 16,338 (Mar. 14, 2016), dated May 13, 2016, Docket No. EPA-HQ-OEM-2015-0725-0594.

2. Comments of CSAG on the Information Collection Request for the Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule, 81 Fed. Reg. 13,638 (Mar. 14, 2016), date Apr. 13, 2016, Docket No. EPA-HQ-OEM-2015-0725-0363.

3. CSAG Presentation to the Office of Information and Regulatory Affairs (OIRA) during Executive Order 12866 meeting regarding Modernization of the Accidental Release Prevention Regulations under Clean Air Act, 2050-AG82 (Nov. 21, 2016).

4. Declaration of Shannon S. Broome (Mar. 13, 2017).

5. Letter from Shannon S. Broome to Hon. Mathy Stanislaus (EPA), re: Follow up on Requests for Meeting (Sept. 15, 2016).

CERTIFICATE OF SERVICE

A copy of the preceding was sent on March 13, 2017 to the Honorable Scott Pruitt *via* facsimile, certified mail and email. In addition, a copy was also sent to the Honorable Barry Breen and the Honorable Kevin Minoli *via* certified mail and email.

The Honorable Scott Pruitt
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Shannon S. Broome

Attachment 1

CHEMICAL SAFETY ADVOCACY GROUP

May 13, 2016

VIA EMAIL & REGULATIONS.GOV

The Honorable Mathy Stanislaus
Assistant Administrator
Office of Land and Emergency Management
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 5101T
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Re: Comments on the *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule,* 81 Fed. Reg. 16,338 (Mar. 14, 2016), Docket Id. No. EPA–HQ–OEM–2015–0725

Dear Assistant Administrator Stanislaus:

On behalf of the Chemical Safety Advocacy Group (CSAG), please find attached comments on the U.S. Environmental Protection Agency's (EPA's) *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule*, 81 Fed. Reg. 16,338 (Mar. 14, 2016). CSAG is a coalition of companies focused on implementation of EPA's and the Occupational Safety and Health Administration's regulations addressing the Risk Management Program (RMP) and Process Safety Management (PSM), respectively. CSAG members include companies in the refining, oil and gas, chemicals, and general manufacturing sectors with operations throughout the United States that are subject to the RMP rule.

CSAG appreciates the opportunity to provide input throughout the process and looks forward to working with you in a spirit of cooperation as you move forward with your regulatory efforts.

Please contact me (415.293.5818 or 510.816.1710) with any questions regarding these comments.

Sincerely,

Shannon S. Broome

Shannon S. Broome

Attachments

cc: EPA Docket No. EPA–HQ–OEM–2015–0725
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CHEMICAL SAFETY ADVOCACY GROUP

COMMENTS ON

ACCIDENTAL RELEASE PREVENTION REQUIREMENTS: RISK MANAGEMENT PROGRAMS UNDER THE CLEAN AIR ACT; PROPOSED RULE

81 FEDERAL REGISTER 16,338 (MAR. 14, 2016)

SUBMITTED MAY 13, 2016

CHEMICAL SAFETY ADVOCACY GROUP

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> *"EPA BELIEVES THAT THE RISK MANAGEMENT PROGRAM REGULATIONS HAVE BEEN EFFECTIVE IN PREVENTING AND MITIGATING CHEMICAL ACCIDENTS IN THE UNITED STATES."*
>
> *"EPA BELIEVES THAT REVISIONS COULD FURTHER PROTECT HUMAN HEALTH AND THE ENVIRONMENT ... BASED ON LESSONS LEARNED."*
>
> *EPA, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule, 81 Fed. Reg. at 13,640/col.1* (Mar. 14, 2016)

The Chemical Safety Advocacy Group (CSAG) agrees with the U.S. Environmental Protection Agency (EPA) that the Clean Air Act (CAA) Section 112(r) Risk Management Program (RMP) has been tremendously successful and that the lessons learned from how that success has been achieved should guide any revisions to the program, so as to enhance rather than impede or reverse continual improvement. After reviewing the proposal, we conclude generally that promoting those attributes of RMP that caused the program to be successful should have resulted in a dramatically different proposed rule. To be sure, improvements are possible. It has been and continues to be our goal along with the EPA to identify those changes to the rule that will support continual improvement and seek to find and bring outliers into the program and supporting their progress towards achieving the same improvements in risk management performance that CSAG members and other high-performing industry members have achieved.

Our experience confirms that non-prescriptive, performance standards established a sustainably strong safety culture that incrementally improves over time at responsible facilities. Contrary to that, EPA has apparently rejected the idea of focusing its resources to seek out poorly-performing facilities and bring them into compliance with the law. Instead, this proposal would impose a massive set of new, highly-prescriptive requirements on all RMP Program 2 and Program 3 sources, outliers as well as top performers, in the hopes that facilities that either entirely ignored the prior rules or complied with them poorly will now see the light and do that which they had never done before. EPA expects a different result from these very same facilities by promulgating new and expanded rules, yet there is no reason to believe that anything different will happen now.

Indeed, CSAG fears that EPA's approach will actually be counterproductive for everyone, no matter where a plant sits on the spectrum of continual improvement:

- Well-performing facilities will divert resources to address the new requirements (since these companies internally monitor and enforce company policies that require compliance with EPA rules) causing them to freeze or backtrack on other innovations and best practices in order to comply. The changes proposed in RMP will incentivize performing facilities to reduce their exposure under the new rule's extensive administrative requirements rather than incentivizing them to continual improvement. While facilities will sustain compliance with the letter of the rule, it will be at the sacrifice of innovation to further mitigate risk.

- Poorly-performing or entirely non-compliant facilities will be overwhelmed by the scope of the tasks and likely frustrated in attempting to implement the myriad new requirements or

worse, they will simply ignore the rules and risk enforcement. This is not acceptable to CSAG as such poor performance hurts all.

The goal of this rule *must* be improvement in performance—particularly for the outliers—not establishing automatic enforcement cases that can be brought after the consequences of a significant release. A great enforcement case cannot be the goal. The focus of this rulemaking activity should not be on enforcement-enhancement but must instead be on lowering the actual risk profile and ensuring adequate response when a release occurs.

These comments provide a roadmap for EPA to reconsider and improve upon its proposed approach:

- First, for each major topic area on which EPA has proposed revisions, (*i.e.*, compliance/third party auditing, incident investigation/root cause analysis, disclosure to local emergency planning committees (LEPC), disclosure to the public, safer technology and alternatives analysis (STAA)), we restate EPA's objectives for that portion of the proposed rule (many of which are objectives with which we agree).

- Second, we explain which aspects of the proposal need to be changed in that they seem ineffective, counterproductive and/or likely to produce unintended consequences relative to the identified objectives.

- Third, we provide recommendations to align the rulemaking package with the objectives identified in the first step and to truly build on the lessons learned in the historic implementation of the program (both successes and opportunities).

CSAG is mindful not only of its members' practical experience with these rules but also of the directives provided by the President to EPA in Executive Order 13650. In particular, the President directed the Working Group (of which EPA and the Occupational Safety and Health Administration (OSHA) are members) to consider "modernizing key policies, regulations, and standards" to "implement[ ] practical and effective improvements to chemical risk management" all for the purpose of "enhance[ing] *safety and security* in chemical facilities."[1]

Measured against this yardstick—and this is a good yardstick—the proposal fails in many respects.

1. <u>The proposal is not practical</u>. We provide numerous examples in the attached. One is the proposal's redefinition of "catastrophic release" to include minor off-site impacts, like dusting of a car with particulate or other minor property effects, as "catastrophes." This will either inappropriately alarm the public or numb them to the term, such that they no longer react to categorized "catastrophes." As a second example, proposed § 68.67 includes a requirement to address "any other potential failure scenarios" in the process

[1] *See* Exec. Order No. 13650, 78 Fed. Reg. 48,029, 48,031 § 6 (Aug. 1, 2013) (emphasis added).

hazard analysis (PHA). This provision is not only vague, it is open ended, yet EPA requires facilities to "certify" that they have done so. The proposal lists examples in the preamble, presumably in an attempt to provide clarity, but these examples run counter to the language of the rule that they seek to illustrate. EPA includes "incidents that occurred at other similar facilities" and "failure mechanisms discovered in literature or from other sources of information."[2] Of course, this fails to recognize that after incidents preliminary findings that are released often turn out to be wrong in terms of causes of an incident or counterproductive in terms of a remedy. That is why there is a process for vetting, testing, and establishing industry standards (*e.g.*, API standards). By putting this "standard" on facilities, EPA is actually codifying approaches that may detract from safety.

2. The proposal is not effective. We provide numerous comments in the attached illustrating that the proposal fails to effectuate what are otherwise legitimate goals. For example, the new third-party audit proposed requirements prohibit auditors from providing any services to a company for three years prior to or after a third party audit. This is presumably intended to ensure impartiality. Whether or not it accomplishes that goal (and we do not believe a three year ban is needed to do so), it will reduce the quality of the audit when EPA's overall goal is to improve audit quality because it will create a shortage of qualified auditors. Another example is the requirement to provide LEPCs (upon request) with a host of information that is wholly unrelated to their statutory charge. On top of that, facilities must prepare this information and update it annually even if never requested, which is an administrative burden and waste of resources.

3. The proposal is not enhancing safety. As EPA explains in its Regulatory Impact Assessment, it could not quantify benefits.[3] EPA has no data to project an impact on accidents made by the proposal. EPA posits that "[r]educing the risk of such accidents and the severity of the impacts when accidents occur, and improving information provision, *as the proposed provisions intend*, would provide benefits to the potentially affected members of society."[4] True enough. The key phrase in EPA's statement is "as the proposed provisions intend." It is not enough to intend benefits. As discussed in the attached, CSAG believes that these intentions will not be realized and in fact are not going to be realized under the proposal as written.

4. The proposal is not enhancing security. In fact, many of the new provisions may endanger public safety. The proposal fails entirely to take into account security in chemical facilities.

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[2] 81 Fed. Reg. at 13,654.

[3] *See* EPA, *Regulatory Impact Analysis Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7)* at 138 (Feb. 24, 2016), EPA-HQ-OEM-2015-0725-0037 (RIA) ("The benefits analysis is qualitative. There were no data to connect the specific rule elements with specific reductions in expected probabilities or magnitudes of RMP chemical accidents. In addition, many of the accident impacts expected to be reduced by the rule, such as lost productivity or emergency response costs, could not be quantified even for the 10-year baseline accident record. Lack of data also meant that other benefits of the rule such as improved information could not be quantified.")

[4] *Id*. at 101 (emphasis added).

The President instructed the Working Group—of which EPA is a mandatory member—that it must enhance both safety and security. The information disclosure provisions lack any safeguards to protect security sensitive information, which could be used by those intending harm to a facility and the community to accomplish those aims. This week's determination by the Bureau of Alcohol, Tobacco, and Firearms (ATF) that the horrific event in West, Texas was or may have been a criminal act highlights this concern (though that conclusion was not necessary to this point).[5] For even if West, Texas was an accident, the information proposed to reside with LEPCs, who are ill-equipped to protect it, or to be disclosed directly to the public could easily provide a roadmap for criminals.

EPA completely fails to address security risk in the proposal. It would be one thing if EPA had evaluated the issue and explained why communities should not be alarmed by disclosures in this proposal and solicited comment in this regard. It is quite another for EPA to wholly ignore an important aspect of the problem. We can think of no better example of a failure of reasoned decision-making than this. As EPA is aware, when an agency fails to consider factors identified as relevant by Congress and the President, as it has done here, it has not "examined the relevant data," or examined each "important aspect of the problem."[6] Indeed, the requirement of reasoned rulemaking is heightened under the CAA.[7]

The criticality of this security failure is highlighted by the fact that the issue was raised to EPA by CSAG specifically prior to the proposed rule being signed as a major concern. In addition, small business representatives in the Small Business Regulatory Enforcement Fairness Act (SBREFA) process raised the issue. Next, CSAG raised this issue at the Office of Management and Budget (OMB) and was encouraged to comment during the public comment period on the concern. We do so now. Yet we remain perplexed at why EPA ignored these concerns raised prior to proposal. While one might not be surprised by EPA and OMB discounting security concerns raised by industry on what is surely an incredibly costly rule, what is most concerning is the decision by EPA, sanctioned by OMB, to ignore the comments and concerns raised during the interagency review process by the Department of Homeland Security (DHS) as well as a report prepared by the Department of Justice (DOJ) prior to 9/11 raising concerns about the threat to chemical facilities from terrorists. Indeed, when other federal agencies raised questions regarding the potential security vulnerabilities that would be created by the proposed disclosure provisions, EPA's response was to simply state its disagreement without explanation, offering only to solicit comment as a conciliation rather than coordinating with the agencies that hold the expertise on chemical security issues.[8] Not only is this inconsistent with Executive Order

[5] *See* ATF, *ATF Announces $50,000 Reward in West, Texas Fatality Fire* (May 11, 2016) *available at* https://www.atf.gov/news/pr/atf-announces-50000-reward-west-texas-fatality-fire.

[6] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43. (1983); *see also, e.g.*, *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984) ("the reviewing court will consider the contents of the preliminary or final regulatory flexibility analysis, along with the rest of the record, in assessing not only the agency's compliance with the Regulatory Flexibility Act, but the validity of the rule under other provisions of law").

[7] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 518-19 (D.C. Cir. 2006) (agency must set forth, inter alia, "the major legal interpretations and policy considerations underlying the proposed rule").

[8] For example, one docket entry provides the following comment from an interagency reviewer:

12866,[9] it flies in the face of the directive to coordinate with other relevant agencies in Executive Order 13650 and abandons the moral and ethical obligation that every single federal agency holds to protect the citizenry of the United States.

It is not enough for EPA to consider these comments now. EPA must re-propose any information disclosure requirements and ensure that it has fully considered every important aspect of the problem. Increased criminal activity as a result of this rule is surely an important aspect of the problem.

Finally, EPA has failed to coordinate with the most critical agency, OSHA, as directed by the Executive Order 13650.[10] This is not an empty, check the box requirement. This is also not simply "meeting" with OSHA to build on-the-record evidence the agencies periodically corresponded. It is a requirement contained directly in the statute and it has not been met. It requires close consultation, analysis and study of complex safety issues, going well beyond solely two agencies talking, in order to develop meaningful policy meeting OSHA and EPA statutory obligations. A prime example is OSHA's suggestion in its SBREFA materials that compliance audits may be deferred if a third party audit is performed. There is no corollary in EPA's rule. Surely, if the substance and timing had been coordinated, these requirements (as well as many others we are not yet aware of due to the pre-proposal stage of OSHA's rule) would have been not only coordinated but synchronized in accordance with congressional intent.[11]

> This reviewer has concerns regarding the sharing of all the elements listed in this section with the public. Sharing certain elements is essentially providing a listing of vulnerabilities. These vulnerabilities could be used by a terrorist to either target a certain facility or the vulnerabilities could be exploited to increase the magnitude of an attack. … We are also concerned that many facilities may not be experienced enough to develop one internal after action report and a second version of the after action report for the public.
>
> Recommend deleting lessons learned and recommendations for improvement from the documentation. Alternatively, EPA could consider being more specific and have facilities develop a separate document (or Appendix to the AAR) that is designed to be shared with the public that just provides a high level description of the scenario and participants.

EPA, EO 12866 Interagency Review Communications on Risk Management Modernization, RIN 2050-AG82, regarding NPRM Interagency Comments RMP EPA Response 20160208 at 15-16 (Feb. 8, 2016), EPA-HQ-OEM-2015-0725-0027. There are numerous examples of such comments in the docket. In response, EPA's uniform answer to these concerns was not coordination as was directed by the Executive Order. Rather, EPA stated:

> EPA disagrees. EPA believes the elements for the report described in this section should remain. However, EPA added language … [to] the preamble (in the section discussing information disclosure to the public) seeking comment on how to limit sharing of information that could reveal security vulnerabilities.").

Id.

[9] *See* Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[10] *See* Exec. Order No. 13650, 78 Fed. Reg. at 48,030-31, § 4.

[11] Further, had EPA provided a more reasonable comment period, commenters would be in a better position to flesh out the implications of OSHA's recent regulatory actions in conjunction with EPA's proposal.

CSAG reiterates its commitment to working with EPA to move the RMP rules forward. We look forward to discussing the ideas and recommendations in the attached with you in the coming months.

Chemical Safety Advocacy Group Comments and Suggestions Table for Achieving EPA's Objectives

May 13, 2016

COMMENT TABLE SUBJECT: COMPLIANCE & THIRD PARTY AUDITING

CHEMICAL SAFETY ADVOCACY GROUP COMMENTS AND SUGGESTIONS FOR ACHIEVING EPA'S OBJECTIVES

EPA Proposal[1]

§ 68.58 Compliance audits.*

(a) The owner or operator shall certify that they have evaluated compliance with the provisions of this subpart for each covered process, at least every three years to verify that the procedures and practices developed under the rule are adequate and are being followed. When required as set forth in paragraph (f), the compliance audit shall be a third-party audit.

(b) The compliance audit shall be conducted by at least one person knowledgeable in the process.

(c) The owner or operator shall develop a report of the audit findings.

(d) The owner or operator shall promptly determine and document an appropriate response to each of the findings of the compliance audit and document that deficiencies have been corrected.

(e) The owner or operator shall retain the two (2) most recent compliance audit reports. This requirement does not apply to any compliance audit report that is more than five years old.

(f) *Third-party audit applicability*. The next required compliance audit shall be a third- party audit when one of the following conditions apply:

(1) An accidental release meeting the criteria in § 68.42(a) from a covered process at a stationary source has occurred; or

(2) An implementing agency requires a third-party audit based on non-compliance with the requirements of this subpart, including when a previous third-party audit failed to meet the competency, independence, or impartiality criteria of § 68.59(b).

(g) *Implementing agency notification and appeals.*

(1) If an implementing agency makes a preliminary determination that a third-party audit is necessary pursuant to paragraph (f)(2) of this section, the implementing agency will provide written notice to the owner or operator stating the reasons for the implementing agency's determination.

(2) Within 30 days of receipt of such written notice, the owner or operator may provide information and data to, and may consult with, the implementing agency on the determination. Thereafter, the implementing agency will provide a final determination to the owner or operator.

(3) If the final determination requires a third-party audit, the owner or operator shall comply with the requirements of § 68.59, pursuant to the schedule in paragraph (h) of this section.

(4) Appeals. The owner or operator may appeal a final determination made by an implementing agency under paragraph (g)(2) of this section within 30 days of receipt of the final determination. The appeal shall be made to the EPA Regional Administrator, or for determinations made by other implementing agencies, the administrator or director of such

EPA's Objective: EPA seeks to strengthen the compliance audit provisions by requiring:

(1) a broadened scope of the compliance audit ("each covered process");

(2) objective auditing (third party audit or TPA) triggered by an accident meeting the criteria of § 68.42(a) or a finding of significant non-compliance by an implementing agency; and

(3) where objective auditing is required, EPA is imposing competency and independence/impartiality criteria for auditors. EPA cites CSB findings ("lack of rigorous compliance audits") following incidents that have occurred and other reports by government agencies including consent decrees to support the proposed requirements for TPAs. 81 Fed. Reg. at 13,654.

EPA states that it believes these new requirements will allow facilities, EPA, and the public to better determine whether a facility's practices and procedures are adequate and being followed.

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences:

(1) Expanding the scope of compliance audits to "each covered process" is a dramatic expansion of the existing requirement and is contrary to fundamental auditing principles. The Proposal is so burdensome that it will prevent effective, useful audits. The overwhelming weight of authority is that representative sampling is an appropriate technique, and is the best way to achieve effective auditing of large or complex processes. Indeed, this expansion is inconsistent with EPA's own reference to OSHA and CCPS guidance, both of which strongly recommend representative sampling to evaluate a facility's regulatory compliance. To the extent it is EPA's intention to require an audit that does a point-by-point evaluation of each system for every single covered process, The RIA includes substantially and unjustifiably low costs (as would be estimated costs in the original rulemaking to the extent this is a "clarification," indicating that the reading of the rule allowing representative sampling is plainly correct).

[1] EPA proposes similar changes for Program 3 facilities in proposed § 68.79-68.80. CSAG's concerns and recommendations provided herein apply equally to Program 2 and Program 3 facilities.

implementing agency. The appeal shall contain a clear and concise statement of the issues, facts in the case, and any relevant additional information. In reviewing the appeal, the implementing agency may request additional information from the owner or operator. The implementing agency will provide a written, final decision on the appeal to the owner or operator.

(h) Schedule for conducting a third-party audit. The audit and audit report shall be completed, and the audit report submitted to the implementing agency pursuant to § 68.59(c)(3) as follows, unless a different timeframe is specified by the implementing agency:

(1) Within 12 months of when any third-party audit is required pursuant to paragraphs (f) and/or (g) of this section; or

(2) Within three years of completion of the previous compliance audit, whichever is sooner.

§ 68.59 Third-party audits.

(a) The owner or operator shall engage a third-party auditor to evaluate compliance with the provisions of this subpart in accordance with the requirements of this section when either criterion of § 68.58(f) is met.

(b*) Auditor qualifications*. The owner or operator shall determine and document that the auditor and/ or audit team are independent and impartial, and that the auditor's or audit team's credentials address the following competency requirements:

(1) *Competency requirements*. The auditor/auditor team shall be:

(i) Knowledgeable with the requirements of this part;

(ii) Experienced with the stationary source type and processes being audited and applicable recognized and generally accepted good engineering practices;

(iii) Trained or certified in proper auditing techniques; and

(iv) A licensed Professional Engineer (PE), or shall include a licensed PE on the audit team.

(2) *Independence and impartiality requirements*. The auditor/audit team shall:

(i) Act impartially when performing all activities under this section;

(ii) Receive no financial benefit from the outcome of the audit, apart from payment for the auditing services;

(iii) Not have conducted past research, development, design, construction services, or consulting for the owner or operator within the last 3 years. For purposes of this requirement, consulting does not include performing or participating in third-party audits pursuant to §§ 68.59 or 68.80;

(iv) Not provide other business or consulting services to the owner or operator,

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences:

(2) Linking TPA to all reportable accidents will significantly increase audit frequency while providing little, if any, corresponding benefit in safety performance and risk minimization. Such incidents are already required to be investigated and most companies' investigations commonly address both the incident itself and the elements of RMP involved in the incident. No amount or type of proposed auditing will prevent all incidents. With respect to TPAs triggered by significant non-compliance, this amounts to a privatization of enforcement and an inappropriate shift of enforcement authority to third parties.

(3) The expansive requirements surrounding auditor qualifications will result in a shortage of available auditors thereby undermining the effectiveness and substantially increasing the costs of audits. It is indisputable that a TPA requirement will dramatically increase the costs of RMP auditing for all operators, and will have an especially heavy impact on small business. Any approach should recognize that audits will strain available resources and that third party auditing requirements will potentially threaten the viability of some operators. EPA has not, however, provided support that the use of an independent auditor will result in an incremental improvement in compliance or reduction in incidents as compared to non-third party audits. EPA's assertion that a third party auditor will uncover more information or prevent future incidents more often than more-qualified in-house auditors is not supported by the evidence.

including advice or assistance to implement the findings or recommendations in an audit report, for a period of at least 3 years following submission of the final audit report;

(v) Ensure that all personnel involved in the audit sign and date the conflict of interest statement in § 68.59(d)(8); and

(vi) Ensure that all personnel involved in the audit do not accept future employment with the owner or operator of the stationary source for a period of at least 3 years following submission of the final audit report. For purposes of this requirement, employment does not include performing or participating in third-party audits pursuant to §§ 68.59 or 68.80.

(3) The auditor shall have written policies and procedures to ensure that all personnel comply with the competency, independence, and impartiality requirements of this section.

(c) *Third-party audit report*. The owner or operator shall ensure that the auditor prepares and submits an audit report as follows:

(1) The scope and content of each audit report shall:

(i) Identify the lead auditor or manager, participating individuals, and any other key persons participating in the audit, including names, titles, and summaries of qualifications demonstrating that the competency requirements in paragraph (b)(1) of this section are met;

(ii) Document the auditor's evaluation, for each covered process, of the owner or operator's compliance with the provisions of this subpart to determine whether the procedures and practices developed by the owner or operator under this rule are adequate and being followed;

(iii) Document the findings of the audit, including any identified compliance or performance deficiencies;

(iv) Include a summary of the owner's or operator's comments on, and identify any adjustments made by the auditor to, any draft audit report provided by the auditor to the owner or operator for review or comment; and

(v) Include the following certification, signed and dated by the auditor or supervising manager for the audit:

"I certify that this RMP compliance audit report was prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information upon which the audit is based. I further certify that the audit was conducted and this report was prepared pursuant to the requirements of subpart C of 40 CFR part 68 and all other applicable auditing, competency, independence, impartiality, and conflict of interest standards and protocols. Based on my personal knowledge and experience, and inquiry of personnel involved in the audit, the information submitted herein is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations."

(2) The auditor shall retain copies of all audit reports and related records for a period of five years, and

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences (cont'd):

(4) Company audits are actually more reliable, which is why the rule does not substantiate that third party audits are more reliable or robust. To suggest that internal compliance auditors would somehow overlook noncompliance with the increased stakes associated with RMP-compliance is without basis in the record and is simply not supported by analogies to wholly unrelated subject matters, like financial auditing. Moreover, the record does not establish that the strictures proposed by EPA are the same that were imposed in the emissions testing or financial contexts quoted. Further, one of the key studies cited for the proposition that independent auditors are needed was from Gujarat, India. 81 Fed. Reg. at 13,657. There is no basis to conclude that the results of this study would be applicable in the United States, and EPA's statement that it seems "reasonable" to conclude that it is applicable is wholly without basis. First, India's regulatory scheme is far less rigorous than that in the U.S. Second, the differences in enforcement of the regulatory requirements in a foreign country and the impact of those differences on private behavior are not taken into account.

(5) The regulatory non-compliance trigger is too broad. The implementing agency could require a TPA based only on "non-compliance" as compared with significant non-compliance as stated in the preamble. This is an undefined universe, which could result in a large number of requests and an inappropriate delegation of the enforcement and inspection role of agencies to third parties.

make them available if directed by the owner or operator, to the owner or operator and/or the implementing agency.

(3) The auditor shall submit the audit report to the implementing agency at the same time, or before, it provides it to the owner or operator.

(4) The audit report and related records shall not be privileged as attorney-client communications or attorney work products, even if written for or reviewed by legal staff.

(d) *Third-party audit findings*.

(1) *Findings response report*. As soon as possible, but no later than 90 days after receiving the final audit report, the owner or operator shall determine an appropriate response to each of the findings in the audit report, and develop and provide to the implementing agency a findings response report that includes:

(i) A copy of the final audit report;

(ii) An appropriate response to each of the audit report findings;

(iii) A schedule for promptly addressing deficiencies; and

(iv) A certification, signed and dated by a senior corporate officer, or an official in an equivalent position, of the owner or operator of the stationary source, stating:

"I certify under penalty of law that the attached RMP compliance audit report was received, reviewed, and responded to under my direction or supervision by qualified personnel. I further certify that appropriate responses to the findings have been identified and deficiencies were corrected, or are being corrected, consistent with the requirements of subpart C of 40 CFR part 68, as documented herein. Based on my personal knowledge and experience, or inquiry of personnel involved in evaluating the report findings and determining appropriate responses to the findings, the information submitted herein is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations."

(2) *Schedule to address deficiencies*. The owner or operator shall implement the schedule to address deficiencies identified in the audit findings response report in paragraph (d)(1)(iii) of this section and document the action taken to address each deficiency, along with the date completed.

(3) *Submission to board of directors*. The owner or operator shall immediately provide a copy of each document required under paragraphs (d)(1) and (d)(2) of this section, when completed, to the owner or operator's audit committee of the Board of Directors, or other comparable committee, if one exists.

(e) *Recordkeeping*. The owner or operator shall retain at the stationary source, the following:

(1) The two most recent third-party audit reports, related findings response reports, documentation of actions taken to address deficiencies, and related records. This requirement does not apply to any document that is more than five years old.

(2) Copies of all draft third-party audit reports. The owner or operator shall provide draft third-party audit reports to the implementing agency upon request. This requirement does not apply to any draft audit reports that are more than five years old.

CSAG's Recommendations:

1. To the extent it believes that third party presence enhances audits, EPA should adopt an approach that would impose far less cost while still achieving its objective. One approach would be to enhance the regular compliance audits with a required non-facility auditor, which may be a third party external to a company or a company employee that is not affiliated with the facility being audited. This could be coupled with bringing in a TPA in the event of clearly defined significant non-compliance. Such an approach would consist of the following:

   a. EPA should allow representative sampling for all audits to be consistent with the most fundamental auditing principles as well as existing EPA guidance.

   b. EPA could require one professional engineer* (licensed in any state) to be included on the auditing team (not required to stamp the report), and this person should be able to be a company employee, provided he or she does not work at the audited facility. Although CSAG does not believe there is a conflict of interest concern under current auditing requirements, having a professional engineer on the team is a way to address the perceived conflict of interest EPA notes in the Proposal. Professional engineers are subject to ethical standards that reach their conduct generally (*i.e.*, typically beyond the state in which they are licensed). Including an auditor that is external to the facility also serves to address any concern regarding a need for additional impartiality and accountability.

   c. The trigger for a TPA should be revised. First, EPA should delete the "reportable accident" trigger for a TPA because it is inappropriate. The incident investigation is the proper mechanism to address incidents that occur.

   d. EPA should require a TPA only where significant non-compliance has been established. Any final rule that includes such a requirement would need to list what constitutes "significant non-compliance" sufficient to trigger a TPA and these should be limited to:
      i. Failure to submit an RMP;
      ii. Failure to conduct a required OCA;
      iii. Absence of an emergency response program (not merely one the agency deems insufficient);
      iv. Failure to conduct a compliance audit; and
      v. Failure to identify a covered process.

   **We think that professional auditors may actually be more qualified than PEs. There is nothing in the PE license that indicates expertise in auditing. While we are suggesting a licensed PE because of EPA's desire (as proposed) for one due to perceived obligations for impartiality over those of other qualified auditors, we urge EPA to consider the importance of expertise in auditing and the overall goal for a high quality audit. The PE requirement seems divorced from this concept and is not consistent with the requirement for a reasoned rulemaking.*

CSAG's Recommendations (cont'd):

2. If it includes a non-compliance trigger determined by the implementing agency, EPA should ensure the appeal process provides the subject facility due process. The result of this proposed requirement is effectively a penalty process without a right to an appeal. EPA must ensure due process is afforded to such facilities and revise § 68.58(g) and 68.79(g) to include appropriate safeguards for facilities. Accordingly, EPA should revise proposed § 68.58(g)(4) and § 68.79(g)(4) to provide for appeal to the Environmental Appeals Board and to provide for a stay of the request to conduct a TPA while the appeal is pending. To the extent that EPA or an implementing agency believes an appeal would cause unacceptable delays and that conduct of an audit is urgent, that agency can allocate its enforcement and inspection resources to address any such concern.
3. The regulations must provide a reasonable period of time within which to conduct a TPA. Because of the way the Proposal sets the deadlines, in theory, the language could lead to the absurd result of a company having just *one day* to schedule and complete a TPA. Specifically, depending on where a facility lies in its three-year audit cycle (when the "next required compliance audit" is required) at the time a TPA is triggered, the facility could be faced with having to scramble to find qualified independent auditors on impossibly short notice. EPA should revise proposed § 68.58(h) and § 68.79(h) to require a TPA be conducted within 12 months of the triggering event, which then would reset the 3-year cycle for the next compliance audit. EPA should also consider some of the options being considered by OSHA, such as extending the compliance audit period if a TPA is used, an issue that highlights why these rulemakings should have been coordinated as these agencies could reach different conclusions for similar, if not the same, requirements.
4. Requirements related to auditor competency should be reasonable and directed at achieving EPA's objective, which can be accomplished through less restrictive means than the proposal would require. Specifically, EPA should modify the auditor qualifications of proposed § 68.59(b) and § 68.80(b) as follows:
   a. Delete proposed § 68.59(b)(1)(ii) and § 68.80(b)(1)(ii). Auditing skills are the most important qualification and supersede experience/knowledge of a given stationary source type. Knowledge of process can be acquired as needed. For sources with unique processes, it may be nearly impossible to find auditors "experienced" with that specific stationary source type.
   b. Modify proposed § 68.59(b)(1)(ii) and § 68.80(b)(1)(ii). It is not necessary or practical for the entire audit team to be knowledgeable in the facility's selected RAGAGEP; only the particular person conducting that portion of the audit requires this knowledge.

c. Delete proposed § 68.59(b)(2)(iii) and (iv). Delete proposed § 68.80(b)(2)(iii) and (iv). Limiting pre and post-employment of third party auditors will severely limit the pool of available auditors and may make compliance impossible (at least with high quality auditors). Excluding auditing contracting firms or auditors based on performance of past research, development, design, construction services, or consulting for the owner or operator within the last three years is not practical and would unnecessarily narrow the pool of qualifying and competent auditors available to the industry. Further, facilities will have significant difficulty tracking auditors given the frequency of job changes and mergers/acquisitions within the consulting world. It is impractical, if not impossible, for a facility to keep track of the six year timeframe surrounding the time in which that facility may employ an auditor.
d. Delete proposed § 68.59(b)(3) and § 68.80(b)(3). This provision's attempt to make companies responsible for third party auditor policies and procedures imposes an unattainable burden and should be deleted.

5. Reporting and Recordkeeping: The proposed audit report and response report requirements are overly broad and ambiguous and should be clarified as follows:
   a. Delete proposed § 68.59(c)(4). EPA does not provide sufficient justification for removal of attorney client privilege with respect to draft audit reports. As described above, errors and inaccuracies are inherent in draft audit reports. In addition, draft audit reports may contain confidential or other sensitive information that should not be released to the public. Often times, such information is redacted prior to a report becoming final. EPA's removal of the privilege associated with such content means that potentially confidential and sensitive information could be released to the public.
   b. Revise proposed § 68.59(d)(3). Reporting individual deficiencies at particular plants is inappropriate for company boards and is inconsistent with the *oversight* function of such boards. Where there is value is in ensuring that *summary information* of compliance status be reported to relevant *board committees* at an appropriate interval.
   c. Delete proposed § 68.59(e)(2). The requirement to maintain draft audit reports is burdensome and is of no utility. It is normal for draft audit reports to contain questions, ambiguities, and inaccuracies and these are answered or corrected through dialogue with the subject of the audit. Indeed, it is the rare audit report that is entirely accurate in its draft form. The requirement to retain all drafts will be overwhelming and will lead to issues (and surely EPA guidance to address those issues) over what drafts/communications must be retained. The Proposal implies that there will be undue influence, yet the Proposal has crafted a third-party requirement to address that very issue. Keeping all drafts is overkill.

§ 68.3 Definitions.

Catastrophic release means a major uncontrolled emission, fire, or explosion, involving one or more regulated substances that results in deaths, injuries, or significant property damage on-site, or known offsite deaths, injuries, evacuations, sheltering in place, property damage, or environmental damage ~~presents imminent and substantial endangerment to public health and the environment~~.

§ 68.60 Incident investigation.[2]

(a) The owner or operator shall investigate each incident that:

(1) ~~which r~~ Resulted in~~, or could reasonably have resulted in~~ a catastrophic release (including when the affected process is decommissioned or destroyed following, or as the result of, an incident); or

(2) Could reasonably have resulted in a catastrophic release (i.e., was a near miss)..

(b) An incident investigation shall be initiated as promptly as possible, but not later than 48 hours following the incident.

(~~d~~e) A summary shall be prepared at the conclusion of the investigation which includes at a minimum:

(1) Date of incident;

(2) Date investigation began;

(3) A description of the incident;

(4) The factors that contributed to the incident; and,

(5) Any recommendations resulting from the investigation.

(c) An incident investigation team shall be established and consist of at least one person knowledgeable in the process involved and other persons with appropriate knowledge and experience to thoroughly investigate and analyze the incident.

(d) A report shall be prepared at the conclusion of the investigation. The report shall be completed within 12 months of the incident, unless the implementing agency approves, in writing, an extension of time. The report shall include:

(1) Date, time, and location of incident;

(2) Date investigation began;

(3) A description of the incident, in chronological order, providing all relevant facts;

(4) The name and amount of the regulated substance involved in the release (e.g., fire, explosion, toxic gas loss of containment) or near miss and the duration of the event;

(5) The consequences, if any, of the incident including, but not limited to: injuries, fatalities, the number of people evacuated, the number of people sheltered in place, and the impact on the environment;

(6) Emergency response actions taken;

EPA's Objective: EPA believes that the existing practice of investigating incidents has led to future incidents that EPA believes could have been prevented if the prior incidents were more thoroughly investigated and follow up actions had been implemented.. To better address the causes and reduce occurrence of incidents, EPA proposes that more incidents be investigated and to broaden investigations' scope to include "root cause analysis."

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences:

(1) The Proposal would fundamentally transform the current definition of "catastrophic release" into something that is far broader than only catastrophic, thereby sweeping into incident investigations numerous events that could not reasonably lead to catastrophes. This is particularly so when combining the "near miss" preamble discussion with the expanded catastrophic release definition. Accidents involving actual releases meeting § 68.42(a)'s criteria are evaluated, but the Proposal's requirements would be overwhelming when one imports the § 68.42(a) definition and then combines it with the "could reasonably have resulted in" language (*i.e.*, bringing in incidents that "could reasonably have resulted in" a shelter in place, property damage, or environmental damage). More basically, whatever incidents or "almost incidents" are to be investigated, it is simply irresponsible to promulgate a rule that labels as "catastrophic" or potentially catastrophic incidents that clearly could not be, because they merely cause a precautionary shelter in place or dust cars in a parking lot. The existing definition, which involves "present[ing] imminent and substantial endangerment to public health and the environment" is far more consistent with the understood meaning of catastrophic enacted by Congress and promulgated by EPA. The current definition is also better aligned with OSHA's PSM definition of "catastrophic incident" involving "*serious danger* to employees."

(2) The prescriptive proposed requirements diverge from the performance-standard program originally promulgated that has reduced risk and accidental releases, while allowing facilities to tailor investigations to the degree of incident and focus on continuous improvement *from that facility's performance level at this time*. The Proposal will stifle or in some cases, reverse, the continuous improvement evolution that has occurred over the past 20 years. With these prescriptive requirements, companies will be forced to direct resources only at meeting the letter of the requirements rather than innovating safety improvements through open and thorough investigations.

[2] EPA proposes similar changes for Program 3 facilities in proposed § 68.81. CSAG's concerns and recommendations provided herein apply equally to Program 2 and Program 3 facilities.

(7) The factors that contributed to the incident including the initiating event, direct and indirect contributing factors, and root causes. Root causes shall be determined by conducting an analysis for each incident using a recognized method; and

(8) Any recommendations resulting from the investigation and a schedule for addressing them.

(ed) The owner or operator shall promptly address and resolve the investigation findings and recommendations. Resolutions and corrective actions shall be documented.

(fe) The findings shall be reviewed with all affected personnel whose job tasks are affected by the findings.

(gf) Incident ~~Investigation~~ investigation reports ~~summaries~~ shall be retained for five years.

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences:

(3) The existing requirements are already working to reduce risk and prevent accidents. To the extent that EPA believes companies are not investigating incidents adequately at this time (based on the citation in the Preamble to CSB reports suggesting lack of investigation of prior incidents), the remedy should be to enforce the existing requirement to determine the contributing factors to an incident. Focused enforcement can make a difference by bringing "outliers" (*i.e.*, those that are not currently conducting the adequate investigations already required by the rules) into compliance. Indeed, there is no logical reason to believe that promulgating enhanced requirements will make non-compliant companies comply.

(4) With respect to root cause analysis, not every incident can be linked to a management system failure, and it is inappropriate to tie the definition of "root cause" solely to management system failures. The "root cause" definition inappropriately assumes that a management system failure is always present and that whatever that failure is, it is correctable. EPA only acknowledges this as a footnote in the preamble: "EPA recognizes that some root causes could be events that management systems could not have prevented or protected against. The analytic techniques used to identify root causes account for such events." 81 Fed. Reg. at 13,648 n21. Further, the U. S. Department of Energy has already determined that, in some cases, the root cause of an incident is not necessarily due to a management system failure but the performance of individuals. *See U.S. Department of Energy (November 1999), Workbook for Conducting Accident Investigations, Revision 2.* Such a concept should be directly and clearly reflected in the regulatory language.

CSAG's Recommendations:

1. Retain Current Catastrophic Release Definition: EPA should not revise the catastrophic release definition (even if EPA imposes new investigation requirements for incidents that are not catastrophic or could not reasonably be catastrophic) to avoid alarming the public and conveying inaccurately that numerous "catastrophic" events or near events have occurred by mischaracterizing the term. Not all accidental releases are catastrophic.

2. Adopt Separate Incident Investigation Trigger Consistent with § 68.42(a). EPA can achieve its goal of alignment without calling all incidents catastrophic. This aspect of the program would address actual releases, not near misses.

3. Establish a Requirement for a "Near Miss" Program. Because of the variability in facilities and operations, it is critical that any "near miss" requirements be able to be tailored to the plant in question and the potential hazards given operations, proximity of the community, *etc*. EPA can accomplish its objective of focusing facilities on incident prevention by establishing a general requirement for a performance-based plan to address near misses. In this way, each facility would be addressing the highest priority near misses for its operations in a manner consistent with continuous improvement. Otherwise, in a prescriptive program, a facility that has not been working on near misses may be overwhelmed and unable to comply. The focus needs to be on having the top facilities continue to improve from their current level of performance and those that have not been conducting near miss investigations also improving (but not coming to the level of the top facilities immediately). The plan would address those incidents which could reasonably have resulted in a release that presented an imminent and substantial endangerment to public health and the environment.

4. Scope of Investigation Should Be Tailored to the Incident: Companies routinely evaluate the appropriate scope of an investigation and what is needed to determine the contributing factors including root causes. It is important that the incident investigation requirements provide the flexibility to tailor the investigation to the incident itself. The key is to ensure quality investigation and foster a continually improving safety culture, while resisting the temptation to create a series of prescriptive requirements that create a "check the box" culture. Facilities need to be able to exercise the judgment regarding which incidents warrant a more in depth look, which is one reason why the performance oriented approach of this program has worked to achieve the significant accomplishments to date.

CSAG's Recommendation (cont'd):

5. Root causes should not be treated separately from the contributing factors and should not be biased towards a management system failure. Proposed § 68.60(d)(7) and § 68.81(d)(7) should be revised to reflect that numerous methodologies are available for root cause analysis. So long as the person conducting the analysis is trained in the particular methodology, the facility should have the discretion to choose the methodology, whether it is "recognized" or not.

6. With respect to the reporting requirements:
   a. In proposed § 68.60(d)(3) and § 68.81(d)(3), the report should include a description of the incident, which will necessarily include the facts surrounding the incident. Adding the term "relevant" is unnecessary and will prove difficult to enforce.
   b. It is difficult, if not impossible, to calculate the exact amount and the exact duration of the release. EPA should modify proposed § 68.60(d)(4) and §68.81(d)(4) to allow for an estimate of emissions and an approximation of the duration of the event. This is consistent with the accident reporting requirements found in § 68.42.
   c. Facilities should only be required to report information they are capable of knowing. For example, facilities do not know the number of injuries, fatalities, evacuees, how many people were sheltered in place and what the impact is on the environment. With the exception of the impact on the environment, this information is in the hands of the LEPCs or other local ERs. EPA should delete the requirement to report this information. With respect to impact on the environment, it is often difficult to determine, especially within a 12 month timeframe, the impact on the environment. Proposed § 68.60(d)(5) and §68.81(d)(5) should be deleted.
   d. Proposed § 68.60(d)(7) and §68.81(d)(7) should be revised to reflect that not all incidents have root causes. Only those root causes that are identified are required to be reported.

EPA Proposal

§ 68.205 Availability of information to the LEPC or emergency response officials.

(a) RMP availability. The RMP required under subpart G of this part shall be available to local emergency responders and LEPCs under 42 U.S.C. 7414(c) and 40 CFR part 1400.

(b) Chemical hazard information. The owner or operator of a stationary source shall develop summaries of chemical hazard information for all regulated processes and provide the information, upon request, to the LEPC or emergency response officials. Information shall include, as applicable:

(1) Information on regulated substances. Names and quantities of regulated substances held in a process.

(2) Accident history information. Provide the five-year accident history information required to be reported under § 68.42.

(3) Compliance audit reports. Summaries of compliance audit reports developed in accordance with §§ 68.58, 68.59, 68.79, or 68.80, as applicable, updated as part of the calendar year submission described in subparagraph (c). The summary shall include:

(i) The date of the report;

(ii) Name and contact information of auditor and facility contact person; (iii) Brief description of the findings;

(iv) An appropriate response to each of the findings; and

(v) Schedule for addressing each of the findings, as applicable.

(4) Summaries of incident investigation reports developed in accordance with §§ 68.60(d) or 68.81(d), as applicable. The summary shall include:

(i) Description of the incident and events leading up to it, including a timeline; (ii) Brief description of the process involved;

(iii) Names and contact information of personnel on the investigation team; (iv) Direct, contributing, and root causes of the incident;

(v) On-site and offsite impacts;

(vi) Emergency response actions taken; (vii) Recommendations; and

(viii) Schedule for implementing recommendations, as applicable.

(5) Inherently safer technology. For each process in NAICS codes 322, 324, and 325, provide a summary of the inherently safer technologies (IST) or inherently safer designs (ISD) implemented or planned, in accordance with § 68.67(c)(8). Update the summary, as part of the calendar year submission described in subparagraph (c), and following any revisions prepared in accordance with 68.67(f) and indicate when no revisions are incorporated, as applicable. The summary shall include:

(i) The RMP process ID and process description, if provided, of the process affected; (ii) A brief description of the IST or ISD and which IST/ISD type of measure best characterizes it: minimization, substitution, moderation or simplification;

(iii) The name of the RMP regulated substance(s) whose hazard, potential exposure or risk was or will

EPA's Objectives: EPA seeks to ensure that local planners and local first responders have the hazard-related information needed to support planning and preparedness efforts. EPA asserts the following bases for the detailed requirements it imposes in support of this objective:

(1) this disclosure requirement is critical for assisting government agencies in assessing the quality and thoroughness of a source's hazard assessment, prevention program, and emergency response program;

(2) the proposed information disclosure ensures the emergency plans for impacts on the community are based on more relevant and accurate information than would otherwise be available;

(3) summary information on findings from incident investigations, compliance audits, exercises, and IST employed can demonstrate to local emergency response officials how a facility is improving its management of chemical risks and assist local emergency planners to understand and better prepare for these risks when developing community emergency response plans;

(4) disclosing information related to IST can help responders and planners to prioritize and allocate response resources. For example, IST implementation information may be relevant for emergency response personnel who are maintaining response capabilities to address a specific hazard that would no longer apply once an IST is implemented (such as by substituting a less hazardous chemical for an RMP regulated substance).

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences:

(1) The Proposal would convert LEPCs from their statutory role of providing notification of and facilitating response to releases, into a clearinghouse for RMP information and into a regulatory body designed to influence the technologies in use at facilities. The LEPCs are not authorized under EPCRA to have this information and it is outside of their scope/statutory purpose. Moreover, under EPCRA, arguments can be made that this information is automatically publicly available once provided to the LEPCs. EPA is effectively legislating new authority and amending EPCRA. It is also bad policy as discussed below.

be reduced as a result of the implementation and whether the substance is listed as a toxic or flammable. If the chemicals affected are a mixture of flammables, the name "flammable mixture" may be used rather than the individual flammable substance names; and (iv) The date of implementation or planned implementation.

(6) Exercises. Information on emergency response exercises required under § 68.96. The information shall include schedules for upcoming exercises, reports for completed exercises as described in § 68.96(b)(3), and any other related information.

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences:

(2) It is dangerous and irresponsible to mandate disclosure of the range of information EPA suggests should be given on request to LEPCs, who lack the capability to protect it from those who would do harm, and in fact are required to provide it to the public if requested. LEPCs are not authorized to and indeed have no capability to maintain the necessary security of this information. This presents a security threat to facilities and surrounding communities, thereby potentially increasing the risks to the public and the environment. EPA states in the preamble that an "owner or operator should be aware that anything they send to their LEPC in accordance with § 68.205(e) becomes public information." 81 Fed. Reg. 13,638, 13,680 (Mar. 14, 2016). EPA has not included any security provisions to protect such information and merely suggests that trade secrets and confidential business information should be protected. While such information should be protected, the lack of protection for security sensitive information will have the unintended consequence of creating public access to key information without means for monitoring who is accessing it. The Executive Summary, Appendices, and Attachments contain further information in support of this concern.

(3) EPA is taking over the communication process between LEPCs and facilities and usurping the expertise of LEPCs and emergency responders by dictating to them what they should request when in fact LEPCs already have access to the information that they need through existing coordination functions (in place under EPCRA). The key information that LEPCs need is what regulated substances are present on site in what amounts and their hazards. While EPA posits that other information would help LEPCs know "how a facility is improving its management of chemical risks and assist [them] to understand and better prepare for these risks," fundamentally, the detail in incident investigations and compliance audits has absolutely nothing to do with this planning. 81 Fed. Reg. at 13,679. Moreover, this suggestion is directly contrary to the conclusion that EPA reached in the 1990's RMP rulemaking. The emergency response is unaffected by audit reports and incident investigations so this requirement would simply add burden – they do not inform the response in any meaningful manner. To the extent LEPC members have questions, they can ask them at the coordination meeting or at any other time and need not overwhelm facilities with preparing annual summaries that will likely never be read. In practice, members of LEPCs (*e.g.*, first responders) frequently reach out to facilities when they have questions on response issues.

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences:

(4) The Proposal creates a substantial burden on facilities to prepare annual summaries of information that (as discussed above) is not needed by LEPCs in case an LEPC might request it. EPA downplays the burdens by using the word "summaries" but then requires extensive information in such summaries.

(5) IST that has been implemented or is planned is of little to no use to LEPCs. First, if IST has been implemented the RMP will address it. Second, if IST is "planned" there is no current reason for the LEPC to take it into account. For the emergency responder members of the LEPC, technology that is not in use at the plant(and even if planned, may be changed) is not useful in evaluating their response to a potential incident at the facility. Moreover, any IST or ISD is likely to be proprietary in any event.

CSAG's Recommendations:

1. CSAG supports the objective of local planners having facility information that *they* need for emergency planning and coordination. EPA must delete all elements that convert the LEPC from its authorized role under EPCRA.

2. Proposed § 68.205 should be deleted as existing EPCRA coordination requirements provide the information that LEPCs require and the authority, if needed, to compel access to it.

3. Even if there was authority to add these disclosure requirements (which there is not), EPA would have to include requirements for security clearance of LEPC members who would have access to security sensitive information and ensure that LEPCs have the capability and authority to physically and electronically secure any security sensitive information that they receive. Otherwise, the unfettered access to security sensitive information puts first responders, communities and facilities at risk, unnecessarily.

4. EPA cannot proceed with these provisions because it has not followed EO 13650 and coordinated its rulemaking with DHS, the FBI, and other appropriate agencies and recognize that its obligations to protect the public and prevent disclosure of security sensitive information extend beyond Chemical Safety Information, Site Security, and Fuels Regulatory Relief Act. EPA has a moral and ethical obligation to ensure that its actions do not endanger the public.

5. Any information that is required to be provided "upon request" by the LEPCs should not be required to be prepared until the request is made in writing from the head of the LEPC to the responsible official for the RMP and a reasonable time must be provided to prepare the summaries. In addition, a reasonable period of time must be provided to furnish the information, commensurate with the quantity of information requested (*i.e.*, no less than 120 days, unless a shorter duration is required under EPCRA) to ensure that the summaries can be prepared and necessary confidentiality claims can be established.

EPA Proposal

§ 68.210 Availability of information to the public.

(a) RMP Availability. The RMP required under subpart G of this part shall be available to the public under 42 U.S.C. 7414(c) and 40 C.F.R. part 1400.

(b) Chemical hazard information. The owner or operator of a stationary source shall distribute chemical hazard information for all regulated processes to the public in an easily accessible manner, such as on a company website including as applicable: The disclosure of classified information by the Department of Defense or other Federal agencies or contractors of such agencies shall be controlled by applicable laws, regulations, or executive orders concerning the release of classified information.

(1) Regulated substances information. Names of regulated substances held in a process.

(2) Safety data sheets (SDS). SDSs for all regulated substances located at the facility.

(3) Accident history information. Provide the five-year accident history information required to be reported under § 68.42.

(4) Emergency response program. Summary information concerning the source's compliance with § 68.10(b)(3) or the emergency response provisions of subpart E, including:

(i) Whether the source is a responding stationary source or a non-responding stationary source;

(ii) Name and phone number of local emergency response organizations with which the owner or operator last coordinated emergency response efforts, pursuant to § 68.180; and

(iii) For sources subject to § 68.95, procedures for informing the public and local emergency response agencies about accidental releases;

(5) Exercises. The summary information required under § 68.205(b)(6).

(6) LEPC contact information. Include LEPC name, phone number, and web address as available.

(c) Submission dates and updates. The owner or operator shall update and submit information required under § 68.210(b) every calendar year, including all applicable information that was revised since the last update.

(d) Public meetings. The owner or operator of a stationary source shall hold a public meeting to provide information required under § 68.42 as well as other relevant chemical hazard information, such as that described in paragraph (b), within 30 days of any accident subject to reporting under § 68.42.

(e) The disclosure of information classified by the Department of Defense or other Federal agencies or contractors of such agencies shall be controlled by applicable laws, regulations, or executive orders concerning the release of classified information.

(f) CBI. An owner or operator asserting CBI for information required under this section shall provide a sanitized version to the public. Assertion of claims of CBI and substantiation of CBI

EPA's Objective: EPA seeks to ensure that the public has the hazard-related information needed to effectively participate in emergency response preparedness and planning. EPA suggests that the public will use the information to understand the risks posed by accidental releases and to respond to warnings and advice should a release occur. EPA also seeks to provide assurance to the public that covered facilities are prepared to properly handle a chemical emergency, should it arise.

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences:

(1) It is dangerous and irresponsible to mandate disclosure of information that could present a security threat resulting in *increased risk* without corresponding benefits. The Proposal would require facilities to disclose the very information EPA has previously withheld from disclosure. EPA has provided no reason to change course now. Further, the original Chemical Safety Information, Site Security, and Fuels Regulatory Relief Act (CSISSFRRA) assessments analyzing risk of terrorist or other criminal activity have not been updated since 2000 even though new threats and criminal strategies have likely developed. Protecting CBI is not security protection. Indeed, DHS has protected similar information through the Chemical Facility Anti-Terrorism Standards (CFATS).

(2) The majority of the non-security sensitive information proposed to be disclosed to the public will not serve to enhance the public's understanding of how to respond to an incident. The proposed § 68.210(b)(3), (4), and (5) (accident history, emergency response program information, and exercise information) information is already covered by the facility's RMP and therefore presumably addressed in the community emergency response plan. LEPCs and local ERs are responsible for maintaining the community response plan and ensuring incident response situations are covered and being the established source of emergency preparedness information for the community. Accordingly, any public concerns should already be addressed in the local plan. Adding these provisions simply adds costs and foists what is a joint responsibility in the regulations, on to the shoulders of facilities. This is wholly inconsistent with EPCRA's stated role of LEPCs as described in EPA's June, 2015 guidance: "LEPCs and TEPCs play a key role in meeting the goals of EPCRA. They are required to develop and implement an emergency plan for their community, as well as to ensure that the people in the community are aware of the chemical risks and know what to do if a chemical accident occurs." *See* EPA, *How to Better Prepare Your Community for a Chemical Emergency: A Guide for State, Tribal and Local Agencies*, at 4 (June 2015). The contradictory roles of the LEPC and facility, as proposed, will just confuse the community.

claims shall be in the same manner as required in 40 CFR 68.151 and 68.152 for information contained in the RMP required under subpart G. As provided under 40 CFR 68.151(b)(3), an owner or operator of a stationary source may not claim five-year accident history information as CBI. As provided in 40 CFR 68.151(c)(2), an owner or operator of a stationary source asserting that a chemical name is CBI shall provide a generic category or class name as a substitute.

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences (cont'd):

(3) The proposed requirement to hold a public meeting within 30 days of any reportable accident is too soon, will divert resources away from incident investigation, and fails to recognize the fact that when a community meeting has been needed, they have been held. Holding a public meeting for every reportable accident, including those events with only onsite consequences (injuries or on-site property damage), invites community confusion and engenders general distrust. The current "trigger" could result in overly alarming the public and become a counterproductive exercise. While community meetings can be valuable tools for accidents having the potential to impact offsite receptors, if held before reliable information is available, such meetings can lead to frustration. It is a rare event that a facility will have reliable information that is appropriate for public consumption in the short 30-day timeframe EPA proposes. Further, because facility personnel will be focused on preparing information that is suitable for public consumption in such a short timeframe, attention will be diverted from the incident investigation at perhaps the most critical time (*e.g.*, the first 30 days following an incident) for discovering the cause and developing a resolution to prevent further incidents. Finally, if a community meeting is needed for safety or other reasons, local public safety officials call those meetings and there is no reason for EPA to mandate such a meeting in all situations, even where one is not needed.

(4) Creating databases and requiring unfettered website access to volumes of information that cannot be monitored and is not tailored to the local LEPC needs is unlikely to aid planning for chemical accidents. It also creates a security threat because there is no way to monitor who is looking at the information.

***CSAG's Recommendations*:**

1. To the extent that EPA requires public disclosure of information as proposed, it must ensure that both security-sensitive and confidential business information are protected. There is some information, the disclosure of which is so potentially dangerous when held in the wrong hands, that the perceived benefit to the public from transparency for transparency's sake is counterbalanced by the risks created. The government has an obligation to ensure the security of such information. EPA has an affirmative ethical and moral duty to coordinate with DHS, the FBI, DOJ and other relevant agencies to ensure that its actions do not put the public at risk.

2. Proposed § 68.210(a) should be deleted because facility RMPs are already available to the public. EPA should maintain its position that only RMP plan elements that are not CBI or trade secrets can be publicly available.

3. Proposed § 68.210(b)(3)-(5) should be deleted because such information is of no practical utility to the public and because it is already covered by the RMP. Furthermore, the public already has means under EPCRA to request and receive chemical hazard information for facilities. See 40 CFR § 370 Subpart D.

4. Proposed § 68.210(c) should be deleted, or in the alternative, revised to require consultation with the LEPC/ERs determine if a community meeting is needed to adequately apprise the public of information regarding the incident or if other communication mechanisms are adequate.

5. Companies should not be required to post information on their websites for security reasons. To the extent that EPA seeks to make the format "easy" to access, it must ensure protection against release of CBI or use of the information for criminal purposes. The only entities/individuals that should be entitled to easy access are the local responders and EPA.

6. Public meetings within 30-days of reportable accidents should be left to the discretion of the local public safety officials with the input of the facility and should be held only for those reportable releases with offsite consequences.

EPA Proposal

§ 68.90 Applicability.

(a) Non-responding stationary source. The owner or operator of a stationary source need not comply with § 68.95 of this part provided that:

(1) The coordination activities required under § 68.93 indicate that adequate local public emergency response capabilities are available to appropriately respond to any accidental release of the regulated substances at the stationary source;

(2) Appropriate mechanisms are in place to notify emergency responders when there is a need for a response; and

(3) The LEPC or equivalent has not requested in writing that the owner or operator comply with the requirements of § 68.95.

~~Except as provided in paragraph (b) of this section, the owner or operator of a stationary source with Program 2 and Program 3 processes shall comply with the requirements of §68.95.~~

(b) Responding stationary source. The owner or operator of stationary source shall coordinate response activities as described in § 68.93. The owner or operator shall also comply with the requirements of ~~whose employees will not respond to accidental releases of regulated substances need not comply with~~ §68.95 when: ~~of this part provided that they meet the following:~~

(1) The outcome of the response coordination activities demonstrates that local public emergency response capabilities are not adequate to appropriately respond to an accidental release of the regulated substances at the stationary source; or

(2) The LEPC or equivalent requests in writing that the owner or operator of the stationary source comply with the requirements of § 68.95.

~~(1) For stationary sources with any regulated toxic substance held in a process above the threshold quantity, the stationary source is included in the community emergency response plan developed under 42 U.S.C. 11003;~~

~~(2) For stationary sources with only regulated flammable substances held in a process above the threshold quantity, the owner or operator has coordinated response actions with the local fire department; and~~

~~(3) Appropriate mechanisms are in place to notify emergency responders when there is a need for a response.~~

§ 68.93 Emergency response coordination activities.

The owner or operator of a stationary source shall coordinate response needs with local emergency planning and response organizations to ensure resources and capabilities are in place to respond to an accidental release of a regulated substance.

(a) Coordination shall occur at least annually, and more frequently if necessary, to address changes: At the source; in the source's emergency action plan; in local authorities' response resources and

EPA's Objective re Coordination: EPA believes that poor coordination between chemical facilities and local emergency responders has contributed to the severity of chemical accidents. EPA seeks to have a functioning LEPC in every part of the country or in the alternative, convert non-responding facilities to responding facilities thereby avoiding situations where neither the facility or the local emergency responders are prepared to respond to a release incident.

Why Proposal Is Ineffective or Counterproductive to the Objective and/or Has Unintended Consequences: Fundamentally, the Proposal departs from EPCRA's principle that the *community as a whole* is responsible for emergency response planning, shifting the burden to facilities. While this approach may be politically appealing, it is inconsistent with the responsibility and authority of the community to own preparation and response, and thereby advance emergency preparedness for all community hazards.

(1) The Proposal appears premised on the notion that facilities are either complete responders or complete non-responders, which is contrary to reality. In practice LEPCs or local responders always play some role in a response. Most situations are "hybrid," in which some response functions (e.g., employee evacuation, firefighting) are handled by internal resources and other functions (e.g., traffic control, shelter-in-place) are handled by community resources. *See* OSHA's Integrated Contingency Plan, addressing multiple regulatory requirements, including EPA's Risk Management Program, 40 CFR part 68, guidance for preparing emergency response plans.

(2) EPCRA already requires coordination that if enforced would achieve EPA's goal:

Proposed § 68.93 would require facilities to coordinate annually with LEPCs to ensure response capabilities exist and that the facility is within the scope of the community response plan.

- Such information (response capabilities of facilities) is a key component of the community response plan and such coordination occurs under EPCRA. Otherwise, LEPCs would have no way of fulfilling their task of developing the facility-specific information in the community response plan. *See* 42 U.S.C. § 11003.

Proposed § 68.96 would require facilities to conduct notification and tabletop exercises annually and field exercises every five years.

- EPCRA calls for exercising the community emergency plan, which inherently involves the participation of affected facilities. 42 U.S.C. § 11103(b) and (c). Moreover, the local responders determine the timing and scope of exercises that best advance the preparedness of the community response capability.

capabilities; or in the local community emergency response plan.
(b) The owner or operator shall document coordination with local authorities, including: The names of individuals involved and their contact information (phone number, email address, and organizational affiliations); dates of coordination activities; and nature of coordination activities.
(c) The owner or operator shall coordinate potential response actions as follows:
(1) For stationary sources with any regulated toxic substance held in a process above the threshold quantity, the owner or operator shall coordinate potential response actions with the LEPC or equivalent and ensure that the stationary source is included in the community emergency response plan developed under 42 U.S.C. 11003; and/or
(2) For stationary sources with only regulated flammable substances held in a process above the threshold quantity, the owner or operator shall coordinate response actions with the local fire department.

§ 68.95 Emergency response program.
(a) The owner or operator shall develop and implement an emergency response program for the purpose of protecting public health and the environment. Such program shall include the following elements:
(1) An emergency response plan, which shall be maintained at the stationary source and contain at least the following elements:
(i) Procedures for informing the public and the appropriate Federal, state, and local emergency response agencies about accidental releases;
(ii) Documentation of proper first-aid and emergency medical treatment necessary to treat accidental human exposures; and
(iii) Procedures and measures for emergency response after an accidental release of a regulated substance;
(2) Procedures for the use of emergency response equipment and for its inspection, testing, and maintenance;
(3) Training for all employees in relevant procedures; and
(4) Procedures to review and update, as appropriate, the emergency response plan to reflect changes at the stationary source and ensure that employees are informed of changes. The owner or operator shall review and update the program annually, or more frequently if necessary, to incorporate recommendations and lessons learned from emergency response exercises and/or incident investigations, or other available information.
(b) A written plan that complies with other Federal contingency plan regulations or is consistent with the approach in the National Response Team's Integrated Contingency Plan Guidance ("One Plan") and that, among other matters, includes the elements provided in paragraph (a) of this section, shall satisfy the requirements of this section if the owner or operator also complies with paragraph (c) of

Why Proposal Is Ineffective or Counterproductive to the Objective and/or Has Unintended Consequences (cont'd):

(3) The underlying problem is a lack of funding of LEPCs. The Proposal does nothing to address this issue. Many LEPCs are completely inactive due to lack of funding or other reasons like consolidation that has occurred with the Federal Emergency Management Administration (FEMA) addressing all community hazards. 42 U.S.C. § 11005. Rather than increase the funding mechanism for and thereby support the very entities statutorily responsible for developing/implementing the community emergency response plan, the Proposal would shift the community response burden entirely to facilities either by requiring the facility to become a responding facility or by requiring it to outsource the response capabilities to contractors of the LEPC/ERs. This will not improve community response planning or capability because the facility has no authority over community resources (e.g., hospitals, evacuation routes) or the hazards or resources of other facilities. Finally , the Proposal accounts for none of these costs.

(4) The Proposal's exercise requirements are too rigid, leading to misallocation of resources. As discussed above, EPCRA already requires appropriate exercises. 42 U.S.C. § 1103(b) ("Each local emergency planning committee shall evaluate the need for resources necessary to develop, implement, and exercise the emergency plan, and shall make recommendations with respect to additional resources that may be required and the means for providing such additional resources."); 42 U.S.C. §1103(c)("Each emergency plan shall include (but is not limited to) each of the following: . . . (9) Methods and schedules for exercising the emergency plan.").

In particular, the Proposal for tabletop and field exercises is too rigid and does not take into account the appropriate level of coordination that is needed (or not needed) for different facilities. The result will be overwhelming for already overtaxed LEPCs, and imposing on smaller facilities obligations that they may be unable to meet. This will not advance community emergency response capabilities. The fundamental issue is that the level of exercises that are appropriate should be determined by the individual facility and the LEPC/ERs together, which have detailed knowledge of facility processes and release risks, as well as the capacity of the facility and the LEPC/ERs to assist in the response. This also allows the community to focus exercises on the priority emergency response needs of the community, which may not be that particular RMP facility.

this section.
(c) The emergency response plan developed under paragraph (a)(1) of this section shall be coordinated with the community emergency response plan developed under 42 U.S.C. 11003. Upon request of the LEPC ~~local emergency planning committee~~ or emergency response officials, the owner or operator shall promptly provide to the local emergency response officials information necessary for developing and implementing the community emergency response plan.

§ 68.96 Emergency response exercises.
(a) *Notification exercises.* At least once each calendar year, the owner or operator of a stationary source with any Program 2 or Program 3 process shall conduct an exercise of the source's emergency response notification mechanisms required under § 68.90(a)(2) or § 68.95(a)(1)(i), as appropriate. Owners or operators of responding stationary sources may perform the notification exercise as part of the tabletop and field exercises required in § 68.96(b). The owner/operator shall maintain a written record of each notification exercise conducted over the last five years.
(b) *Emergency response exercise program.* The owner or operator of a stationary source subject to the requirements of § 68.95 shall develop and implement an exercise program for its emergency response program, including the plan required under § 68.95(a)(1). 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. The emergency response exercise program shall include:
(1) *Emergency response field exercises.* The owner or operator shall conduct a field exercise involving the simulated accidental release of a regulated substance (*i.e.*, toxic substance release or release of a regulated flammable substance involving a fire and/or explosion).
(i) *Frequency.* The field exercise shall be conducted at least once every five years, and within one year of any accidental release required to be reported under § 68.42.
(ii) *Scope.* The field exercise shall include tests of: Procedures to notify the public and the appropriate Federal, state, and local emergency response agencies about an accidental release; procedures and measures for emergency response actions including evacuations and medical treatment; communications systems; mobilization of facility emergency response personnel, including contractors, as appropriate; coordination with local emergency responders; equipment deployment; and any other action identified in the emergency response program, as appropriate.
(2) *Tabletop exercises.* The owner or operator shall conduct a tabletop exercise involving the simulated accidental release of a regulated substance. The exercise shall involve facility emergency response personnel, response contractors, and local emergency response and planning officials, as appropriate.
(i) *Frequency.* The owner or operator of a stationary source shall conduct tabletop exercises annually, except during the calendar year when a field exercise is conducted.

Why Proposal Is Ineffective or Counterproductive to the Objective and/or Has Unintended Consequences: (cont'd)

(5) In addition, CSAG notes the following:

- The Proposal would inappropriately delegate to LEPCs (or equivalent) the ability to impose a regulatory requirement on facilities. *See* Proposed § 68.90(a)(3) ("The LEPC or equivalent has not requested in writing that the owner or operator comply with the requirements of § 68.95."). EPA cannot delegate rulemaking and enforcement authority to LEPCs, particularly without providing any procedural safeguards.
- The Proposal assumes without basis that facilities will know (absent notification by the LEPC or fire department) that a change in community emergency response resources and capabilities has occurred. *See* Proposed § 68.93(a) ("Coordination shall occur at least annually, and more frequently if necessary, to address changes: at the source; in the source's emergency action plan; in local authorities' response resources and capabilities; or in the local community emergency response plan.").

(ii) *Scope.* The exercise shall include tests of: Procedures to notify the public and the appropriate Federal, state, and local emergency response agencies; procedures and measures for emergency response including evacuations and medical treatment; identification of facility emergency response personnel and/or contractors and their responsibilities; coordination with local emergency responders; procedures for equipment deployment; and any other action identified in the emergency response plan, as appropriate.

(3) *Documentation.* The owner/operator shall prepare an evaluation report within 90 days of each exercise. The report shall include: A description of the exercise scenario; names and organizations of each participant; an evaluation of the exercise results including lessons learned; recommendations for improvement or revisions to the emergency response exercise program and emergency response program, and a schedule to promptly address and resolve recommendations.

CSAG Recommendations:

1. Eliminate the distinction between responding and non-responding facilities. All facilities, regardless of whether they are responding or non-responding facilities, have a partnership with the LEPC or local emergency responders.

2. On coordination generally, CSAG agrees that facilities should seek to annually coordinate with local responders under Proposed § 69.93(a). On more frequent coordination, the determination of "if necessary" must be tied to an objectively knowable change in circumstance and notification to the source must occur. Otherwise, the obligation is too vague to apprise a party of its obligations (*e.g.*, *see* Proposed § 68.93(a), changes in "local authorities' response resources and capabilities").

3. On Proposed § 68.95, CSAG agrees that an update of the emergency response plan is appropriate but is concerned with the requirement to which facilities must certify that the plan be updated "if necessary" to incorporate "other available information." This standard is too vague for facilities to be apprised of what their obligations are and will inevitably lead to enforcement based on 20-20 hindsight should an incident occur. Again, objectively knowable information should be specified to identify what must be considered in the updating process.

4. If the facility is captured in the scope of the community response plan, this should be all the documentation needed to demonstrate coordination. To require more documentation when the facility is already within the community plan will unnecessarily burden the facility and local responders with documentation/paperwork.

5. To the extent EPA seeks to specify particular response exercises, flexibility is needed. That said:
   a. CSAG supports annual notification exercises in Proposed § 68.96(a). All facilities should conduct these exercises under current rules anyway.
   b. Frequency of tabletop exercises under Proposed § 68.96(b) should be agreed upon between the facility and the LEPC/ERs. Annual tabletops may not be necessary and may overwhelm LEPCs/ERs with numerous responsibilities/facilities in their region. Annual tabletop exercises are not necessary at many facilities.
   c. Field exercises should not be prescribed under Proposed § 68.96(b) and if included, (1) frequency should be dictated by agreement between LEPC/ERs and facility and (2) the facility should be considered in compliance if it seeks to conduct such an exercise but cannot obtain participation of the ERs/LEPC. This is consistent with comments made by NASTTPO.
   d. Any actual incident that triggers an emergency response should be deemed to satisfy the requirement for all of these exercises, which is consistent with the approach taken by EPA in signing off on the recently updated PREP program. *See* DHS, EPA, DOT, DOI, *2016 National Preparedness for Response Exercise Program (PREP) Guidelines*, at 2-21 – 2-22, Docket No. USCG-2011-1178-0109.

§ 68.3 Definitions.

For the purposes of this part:

Feasible means capable of being successfully accomplished within a reasonable time, accounting for economic, environmental, legal, social, and technological factors. Environmental factors would include consideration of potential transferred risks for new risk reduction measures.

Active measures means risk management measures or engineering controls that rely on mechanical, or other energy input to detect and respond to process deviations. Examples of active measures include alarms, safety instrumented systems, and detection hardware (such as hydrocarbon sensors).

Inherently safer technology or design means risk management measures that minimize the use of regulated substances, substitute less hazardous substances, moderate the use of regulated substances, or simplify covered processes in order to make accidental releases less likely, or the impacts of such releases less severe.

Passive measures means risk management measures that use design features that reduce the hazard without human, mechanical, or other energy input. Examples of passive measures include pressure vessel designs, dikes, berms, and blast walls.

Procedural measures means risk management measures such as policies, operating procedures, training, administrative controls, and emergency response actions to prevent or minimize incidents.

§68.10 Applicability.

(d) By [DATE 4 YEARS AFTER THE EFFECTIVE DATE OF THE FINAL RULE], the owner or operator shall comply with the following provisions promulgated on [PUBLICATION DATE OF FINAL RULE]:

(3) Safer technology and alternative analysis provisions in § 68.67(c)(8);

§ 68.67 Process hazard analysis.

(a) The owner or operator shall perform an initial process hazard analysis (hazard evaluation) on processes covered by this part. The process hazard analysis shall be appropriate to the complexity of the process and shall identify, evaluate, and control the hazards involved in the process. The owner or operator shall determine and document the priority order for conducting process hazard analyses based on a rationale which includes such considerations as extent of the process hazards, number of potentially affected employees, age of the process, and operating history of the process. The process hazard analysis shall be conducted as soon as possible, but not later than June 21, 1999. Process hazards analyses completed to comply with 29 CFR 1910.119(e) are acceptable as initial process hazards analyses. These process hazard analyses shall be updated and revalidated, based on their completion date.

(b) The owner or operator shall use one or more of the following methodologies that are appropriate

EPA's Objective: EPA states that it has seen that advances in ISTs and safer alternatives are becoming more widely available and are being adopted by some companies. EPA now, as compared with 1996, believes that there is a benefit in requiring that some facilities evaluate whether they can improve risk management of current hazards through potential implementation of ISTs or risk management measures that are more robust and reliable than ones currently in use at the facility. EPA believes that (1) facilities should be required to look for additional opportunities to increase safety; and (2) facility owners or operators are in the best position to identify which changes are feasible.

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences:

(1) For existing processes, the Proposal would require a huge expenditure of resources for little, if any benefit. The existing PHA process already focuses on identification of hazards and mitigation of those hazards. It is widely recognized that STAA is most valuable and cost-effective during the *design* phase for a new plant or covered process, *before fundamental design decisions and investments have been made*. Also well-known is that there is very little benefit to be gained by applying STAA to existing sources because changes in fundamental design are almost certainly infeasible after construction is complete, and there is almost no benefit to re-applying STAA to existing sources every five years. *See DHS, Final Report: Definition for Inherently Safer Technology in Production, Transportation, Storage, and Use (July 2010).* As currently drafted, the Proposal will divert a large amount of resources to evaluating and re-evaluating already-designed existing sources, which will not achieve EPA's objective.

(2) The Proposal's focus on STAA acts to elevate what might appear to be an inherently safer technology above a technology that can be managed to a similarly safe or even safer level with passive or active safeguards. Elevation of IST and ISD above other approaches can compromise safety and stifle innovation. Facilities need the discretion to consider and apply any combination of applicable and appropriate risk management measures to the individual facility's risk management needs, including the use of well understood, reliable, time-tested technology. Because EPA is not requiring implementation (and CSAG agrees with this decision), facilities should be able to choose the most appropriate method of safeguards in any order of preference. To prescribe safety systems would violate the performance-centric nature of highly functioning process safety management systems which is a core tenet of RMP.

to determine and evaluate the hazards of the process being analyzed.

(1) What-If;
(2) Checklist;
(3) What-If/Checklist;
(4) Hazard and Operability Study (HAZOP);
(5) Failure Mode and Effects Analysis (FMEA);
(6) Fault Tree Analysis; or
(7) An appropriate equivalent methodology.

(c) The process hazard analysis shall address:

(1) The hazards of the process;
(2) The findings from all ~~identification of any previous~~ incident investigations required under section 68.81, as well as any other potential failure scenarios; ~~which had a likely potential for catastrophic consequences.~~
(3) Engineering 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.);
(4) Consequences of failure of engineering and administrative controls;
(5) Stationary source siting;
(6) Human factors; and
(7) A qualitative evaluation of a range of the possible safety and health effects of failure of controls.
(8) For processes in NAICS 322, 324, and 325, safer technology and alternative risk management measures applicable to eliminating or reducing risk from process hazards.
(i) The owner or operator shall consider, in the following order of preference, inherently safer technology or design, passive measures, active measures, and procedural measures. A combination of risk management measures may be used to achieve the desired risk reduction.
(ii) The owner or operator shall determine the feasibility of the inherently safer technologies and designs considered.

(d) The process hazard analysis shall be performed by a team with expertise in engineering and process operations, and the team shall include at least one employee who has experience and knowledge specific to the process being evaluated. Also, one member of the team must be knowledgeable in the specific process hazard analysis methodology being used.

(e) The owner or operator shall establish a system to promptly address the team's findings and recommendations; assure that the recommendations are resolved in a timely manner and that the resolution is documented; document what actions are to be taken; complete actions as soon as possible; develop a written schedule of when these actions are to be completed; communicate the

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences:

(3) The Proposal is likely to result in risk shifting which could lead to greater overall risk to the community. There are external consequences to eliminating/substituting/ minimizing the chemical risks at a facility, and they often arise in the transportation sector. For example, minimizing the quantity of a stored chemical, a strategy EPA seems to be promoting, will result in increased deliveries of that chemical to the facility. This means increased truck/rail trips through communities thereby resulting in increased risk of spills/accidents occurring directly in the community (not at the facility where safety management systems and emergency action plans are in place). *See DHS, Final Report: Definition for Inherently Safer Technology in Production, Transportation, Storage, and Use (July 2010).* EPA fails to account for this risk shifting and potential consequences.

(4) Proposed § 68.67(c)(2)'s requirement to address "any other potential failure scenarios" is highly burdensome and impermissibly vague. The provision is open-ended and vague making it impossible for facilities to determine whether the government will consider them to be in compliance. The problem with such an approach is further heightened by the fact that facilities are required to certify to the government that they have complied with it. Even the list of examples in the Preamble (incidents at other facilities and failure mechanisms discovered in literature or from other sources of information) is too vague. EPA is not permitted to promulgate a requirement from which a reasonable person cannot determine the expected conduct. For example, the meaning of "potential failure scenarios," "failure mechanisms," and "other sources of information" cannot be determined from the proposed regulation. Further, it is counterproductive to base PHA decisions on lessons learned at other facilities (which commonly turn out to be wrong) without such lessons going through a process of vetting and testing, and eventual publishing as an industry standard (i.e., API standards).

actions to operating, maintenance and other employees whose work assignments are in the process and who may be affected by the recommendations or actions.
(f) At least every five (5) years after the completion of the initial process hazard analysis, the process hazard analysis shall be updated and revalidated by a team meeting the requirements in paragraph (d) of this section, to assure that the process hazard analysis is consistent with the current process. Updated and revalidated process hazard analyses completed to comply with 29 CFR 1910.119(e) are acceptable to meet the requirements of this paragraph.
(g) The owner or operator shall retain process hazards analyses and updates or revalidations for each process covered by this section, as well as the documented resolution of recommendations described in paragraph (e) of this section for the life of the process.

Why Proposal Is Ineffective or Counterproductive to EPA's Objective and/or Has Unintended Consequences:

(5) The approach of mandating learning from other facilities' mistakes through regulation is misguided and will be ineffective in practice. Improving the safety and reliability of complex processes must proceed carefully and conservatively. RMP covered facilities are not like cell phones, where glitches and failures of new systems are of little consequence. Rather, new ideas in literature and findings from incidents must be thoroughly evaluated, tested, and proved effective before being adopted by industry and implemented in potentially high hazard processes. The proposed requirement to address all findings and scenarios will encourage the premature adoption of technologies and recommendations, including those that, with more experience, will later prove unsafe.

(6) Proposed §68.67(c)(2)'s requirement to address "findings from all incident investigations" is highly burdensome and impractical. The requirement to document "findings" from all incident investigations, while eliminating the reference to those that had a "likely potential for catastrophic consequences" creates an undue burden that will detract resources from evaluating incidents that are appropriate and material to the PHA process. Taken to its extreme, this requirement might be interpreted to require each RMP facility to obtain and try to understand the findings from facilities it does not own or operate, Freedom of Information Act requests and asking LEPCs for all such information regarding incidents will not improve PHA and hazard assessments/mitigations.

CSAG's Recommendations:

1. If it proceeds at all, EPA should apply the STAA requirement to new processes or new plants only where the design phase affords the only realistic opportunity to possibly improve safety performance through this process. Under such an approach, in designing a new covered process, a facility would conduct an STAA which would evaluate a combination of risk management approaches and measures, though the regulations would not require a plant to implement any particular measure. Projects that are already in the design or construction phase at the time of promulgation should not be disrupted by this new requirement, so EPA must include appropriate lead-time/grandfathering provisions, particularly since EPA is (appropriately) not requiring implementation. Due to the lead time for engineering and constructing new processes, the compliance date must be at least seven years after promulgation. Nothing in this recommendation should be read to suggest that facilities should be required to implement inherently safer technologies or inherently safer designs identified.

2. If EPA nonetheless applies the requirement to existing processes:
   a. The trigger for conducting the STAA must be limited to situations where the process hazard analysis team's review results in a recommendation that action be taken to address an identified risk. As no requirements exist within the current regulations to research and collect information related to technologies/designs not already in-use at the source, and no costs were estimated to collect such safety information for use in a PHA, applying STAA to a PHA recommendation would makes the cost estimates in the RIA less inaccurate.
   b. The hierarchy of controls must be removed and a combination of risk management measures must be allowed to be considered to achieve any desired *additional* risk reduction.
   c. There should be no requirement to determine and document the feasibility of IST and ISD. Because the facility will be evaluating STAA measures (including active, passive, etc.), the requirement would be to document that the facility selected particular measures to address the recommendation of the PHA team. The point is that the identified risk be addressed.

3. EPA should delete the requirement to address "other potential failure scenarios" from proposed § 68.67(c)(2) because otherwise, the rule is not sustainable. As written, this provision would require facilities to locate, retrieve, and analyze every incident investigation report for every incident regardless of type of facility, type of incident, impact of the incident, and location of the incident, the majority of which will provide little, if any, useful information.

APPENDIX A

COMPLIANCE & THIRD PARTY AUDITING

CSAG offers the following additional information supporting our explanation of why specific aspects of the proposal are ineffective, counterproductive, or cause unintended consequences and our recommendations.

1. Compliance Auditing for Each Covered Process

As noted CSAG recommends not to add "each covered process" for compliance audits. Expanding the regulations in this manner is inconsistent with sound audit principles not to mention EPA's own guidance. Indeed EPA's own General RMP Guidance urges facilities to reference the Center for Chemical Process Safety's (CCPS) Guidelines for Auditing Process Safety Management Systems as well as the Occupational Safety and Health Adminstration's (OSHA) Guidance on process safety management (PSM). This expanded audit policy is a departure from the approaches that are recommended by recognized authorities on auditing issues, like the Auditing Roundtable and CCPS.[1] For example, Auditing Roundtable explains:

> While on site, auditors must gather information necessary to fulfill the audit objectives. The information collected must be relevant, accurate, and sufficient to support findings, conclusions, and recommendations. Appropriate sampling schemes should be utilized in selecting samples.[2]

CCPS guidelines provide:

> In medium-to-large facilities with PSM programs, there are generally multiple processes or units covered by that program. If there are 20-25 complex processing units included within the scope of the PSM program (as would be typical of an oil refinery) and there are 15-25 elements in the program, the amount of potential auditing is almost always beyond the available time and resources. Therefore, to reduce the audit to a manageable scope, the choices are the following:
>
> - Audit some elements of the PSM program in all covered process and units; or
> - Audit all elements of the PSM program in some of the process and units.[3]
>
> The CCPS guidelines further state:
>
> Another question is how many representative units need to be chosen. Experience has shown that typically, two to four units should be enough to provide an adequate sampling of records and personnel that meet the selection criteria described above. This, of course, depends on the size of the facility and how many units there are; for a very large refinery with ~80 units, two to four units might not be adequate, and a larger number of units might be needed to sample enough of the refinery to evaluate the PSM program adequately.

Further, the ISO 19011 Auditing Guidelines provide:

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[1] *See* CCPS, *Guidelines for Auditing Process Safety Management Systems*, at 83-84 (2d ed. 2011); OSHA, *Process Safety Management Guidelines for Compliance*, OSHA 3133 (1994).
[2] The Auditing Roundtable, Minimum Criteria for the Conduct of EH&S Audits, (Section II (C) (3)) (1993).
[3] CCPS, Guidelines for Auditing Process Safety Management Systems, p. 83-84 (2011).

> Audit evidence is verifiable. It is based on samples of the information available, since an audit is conducted during a finite period of time and with finite resources. The appropriate use of sampling is closely related to the confidence that can be placed in the audit conclusions. (Section 4(e))
> …
> During the audit, information relevant to the audit objectives, scope and criteria, including information relating to interfaces between functions, activities and processes, should be collected by appropriate sampling and should be verified. Only information that is verifiable may be audit evidence. Audit evidence should be recorded. The audit evidence is based on samples of the available information. Therefore there is an element of uncertainty in auditing, and those acting upon the audit conclusions should be aware of this uncertainty. (Section 6.5.4) [4]

The purpose of representative sampling is to gather sufficient information to *evaluate* a facility's compliance with the RMP regulations; it verifies that a facility's procedures and practices are adequate and are being followed. This determination can plainly be made by evaluating a representative sample of data from representative units; additional data collection is duplicative.

2. Third Party Auditing

Scope of/Need for Audit: As noted in the comment table, requiring a complete third party audit of every process for every element after every reportable accident is unlikely to yield the benefits EPA assumes. This is because such incidents are already required to be investigated. Moreover, when an RMP-reportable release occurs, EPA and other regulatory agencies often conduct inspections and initiate enforcement actions. Indeed, EPA cites as the basis for several of the proposed requirements findings made by the Chemical Safety Board (CSB) following incidents that have occurred and other reports by government agencies including consent decrees under which third party audits were negotiated terms. But these findings are not necessarily indicative of a need for independent audits, especially when EPA could more effectively enforce the existing requirement to conduct compliance audits every three years using either internal or external resources. Indeed, refinery inspections conducted in association with OSHA's National Emphasis Program found that only 4% of the citations issued were related to PSM compliance audits,[5] lending credence to the proposition that EPA has not shown that a third party audit will result in a reduction of accidental releases at a greater rate than the existing requirements. As noted above, EPA has not examined the other part of the dataset, including whether facilities that did use third parties for RMP auditing revealed information that would have prevented a release and whether facilities that had no releases or no releases with impacts used internal auditors.

Moreover, companies' investigations of incidents commonly address both the incident itself and the elements of RMP involved in the incident. This, coupled with the fact that the existing regulations require compliance audits every three years—such that information provided by additional audits is otherwise available to EPA through review of the investigations and previous audit or the next scheduled audit—illustrates the duplicative nature of the proposed third party audit requirement.[6] As explained in our Executive Summary, while EPA's goal may actually be to reach those facilities that are either not

[4] International Organization for Standardization, ISO 19011:2002(E), Guidelines for quality and/or environmental management systems auditing (2002).
[5] Presentation by Jordan Barab, Deputy Assistant Sec'y, OSHA, *OSHA's Refinery & Chemical National Emphasis Program* at 3 (July 20, 2012) *available at* http://www.csb.gov/UserFiles/file/Barab%20(OSHA)%20PowerPoint.pdf
[6] 40 C.F.R. §§ 68.58; 68.79.

conducting the currently-required compliance audits at all or are conducting inadequate ones, the fact is that if a company is failing to comply with the current auditing requirements, the solution is not to additionally require third party audits. Stepped up enforcement of current requirements is far more likely to reap benefits and though it might impose additional costs on the government, would not impose the significant costs expected from this proposal. Enforcement can be targeted on key sectors and potential vulnerabilities, such as those areas identified as having the highest non-compliance rate in OSHA's National Emphasis Program. Indeed, rather than focus on those elements which had the highest rate of non-compliance as evidenced by OSHA's study, EPA has chosen to focus on the least common violations (e.g., compliance auditing, incident investigation). Instead, EPA should focus on increased enforcement of those facilities that fail to comply with existing requirements. Such an approach will yield the greatest benefit for the least cost. Accordingly, for the vast majority of plants that would be subject to the third party audit requirement, the proposed requirements will be duplicative.

We note also that requiring increased auditing triggered by accidental releases will only serve to stifle the open safety culture that CSAG members have strived to create. OSHA has been pressuring facilities to cease tying bonus metrics to safety performance because of the risk that employees will not report incidents. This is in line with OSHA's objective. This could significantly affect the safety culture and rather than improving safety and minimizing risk will more likely stifle it.

Cost of Audit: As stated in CSAG's comments submitted in response to the Information Collection Request, the proposal vastly underestimates the costs associated with the proposed requirements. Given these estimates, the only logical reading of the proposed requirements is these audits are to be simple check-the-box exercises, rather than a comprehensive, deep-dive into a facility's RMP systems. If, in fact, EPA intended a more comprehensive audit, it must re-evaluate and consider the costs associated with conducting a comprehensive third party audit covering each covered process after every reportable accident. Alternatively, if EPA believes its cost estimates are correct, it should clarify that the scope of the TPA required is far more narrow than CSAG is assuming in these comments (e.g., an administrative examination of safety systems).

Likelihood of Benefits: EPA has not provided support that the use of an independent auditor will result in the discovery of additional information or reduced accidents. The assertion that a third party auditor will uncover more information or prevent future incidents more often than more-qualified in-house auditors is not supported by the evidence in the record and thus does not meet the non-duplication requirement of the Paperwork Reduction Act. Indeed, EPA cites to several studies purportedly showing the "importance of establishing criteria and features for auditor independence to promote accurate audit reports."[7] This basis is flawed, however, for at least three reasons:

(1) the studies cited involve a subject matter unlike that faced by RMP-facilities;
(2) there is no indication that the studies cited utilized audits structured in the manner proposed by the Agency; and
(3) foreign studies are not good indicators of how a complex American regulatory scheme would react under similar circumstances.

With respect to subject matter differences, EPA cites studies involving vehicle emission testing audits and financial audits to illustrate undue influence involved in audits with insufficient auditor independence. Neither vehicle emission testing nor financial reporting are matters that involve the serious risks associated with operating a RMP-regulated facility and they are not subject to the multiple regulatory requirements and scrutiny that are provided for RMP facilities. To suggest that internal compliance auditors would somehow overlook noncompliance with the increased stakes associated with RMP-

[7] 81 Fed. Reg. at 13,656-57.

compliance is without basis in the record and is simply not supported by analogies to wholly unrelated subject matters, like financial reporting. Moreover, the record does not establish that the strictures proposed by EPA are the same that were imposed in the emissions testing or financial contexts quoted. Further, one of the key studies cited for the proposition that independent auditors are needed was from Gujarat, India.[8] There is no basis to conclude that the results of this study would be applicable in the United States, and EPA's statement that it seems "reasonable" to conclude that it is applicable is wholly without basis. First, India's regulatory scheme is far less rigorous than ours. Second, the differences in enforcement of the regulatory requirements in a foreign country and the impact of those differences on private behavior are not taken into account.

Thus, no causal connection between the proposed requirements and the claimed benefits of these particular third party audit provisions and qualifications for being such an auditor has been established.

[8] 81 Fed. Reg. at 13,657.

APPENDIX B

INCIDENT INVESTIGATION AND ROOT CAUSE ANALYSIS

CSAG offers the following additional information supporting our explanation of why specific aspects of the proposal are ineffective, counterproductive, or cause unintended consequences and our recommendations.

The differences between the accidents included in the accident history and those considered "catastrophic" were intentional when the rule was originally written and it is inaccurate to characterize this change as mere clarification. This concern was raised by other agencies during the interagency review of the Proposed Rule. Specifically, one agency (presumably the Occupational Safety and Health Administration (OSHA) based on the context) made the following comment:

> Clearly the current accident history requirement applies to many more accidents and potential accidents than "catastrophic release." EPA is now asking the public as to whether it should equate the threshold for the two requirements, but without saying so. EPA should explain why it is now proposing to reduce the threshold for catastrophic release to be any sort of damage, instead of "substantial" or "major" as addressed in the current OSHA and EPA definitions. EPA needs to more transparently explain what it is doing. Why shouldn't EPA retain consistency with the OSHA definitions? EPA should request comment also on retaining the current catastrophic release definition and retaining consistency with OSHA.[1]

The Proposed Rule would require facilities to conduct incident investigations and root cause analyses (RCA) for every incident that "could reasonably have resulted in a catastrophic release (*i.e.*, was a near miss)."[2] The original RMP regulations contain virtually identical language – absent the parenthetical phrase, *i.e., was a near miss*. When EPA originally promulgated the language, however, it stated:

> The range of incidents that reasonably could have resulted in a catastrophic release is very broad and cannot be specifically defined. EPA decided to leave it up to the discretion of the owner or operator to determine whether an incident could reasonably have resulted in a catastrophic release and to investigate such incidents.[3]

With respect to accident history, EPA also indicated in the final RMP rule that it was excluding near misses, stating:

> At this time, EPA has decided not to require near misses in the accident history. EPA believes that identifying and documenting information regarding near misses would be difficult and that requiring their reporting would be more burdensome than beneficial. Most of the data being collected on accidents (*e.g.*, release quantity, durations, consequences) would not be applicable to near misses and, therefore, their inclusion would add limited information.[4]

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[1] EPA, EO 12866 Interagency Review Communications on Risk Management Modernization, RIN 2050-AG82, regarding NPRM Interagency Comments RMP EPA Response 20160208 (Feb. 8, 2016), EPA-HQ-OEM-2015-0725-0027 (emphases added).

[2] 81 Fed. Reg. at 13,705 (proposed 40 C.F.R. § 68.60(a)(2)); 81 Fed. Reg. at 13,707 (proposed 40 C.F.R. § 68.81(a)(2)).

[3] *RTC, Vol. 1* at 16-4 (emphasis added).

[4] EPA, Risk Management Plan Rule: Summary and Response to Comments, Vol. 1, (May 24, 1996) (RTC), at 17-1 (emphasis added).

EPA should provide clear examples of what is not considered a near miss, e.g., where designed safety barriers were effective in preventing a release since in such a case, the system worked and a "near miss" did not occur.

APPENDIX C

INFORMATION DISCLOSURE

CSAG offers the following additional information supporting our explanation of why specific aspects of the proposal are ineffective, counterproductive, or cause unintended consequences and our recommendations.

Threat to Confidential Business Information: Section 114(c) of the Clean Air Act provides access to information obtained under the Clean Air Act except for information (other than emission data) that would divulge trade secrets.[1] Information may be claimed as CBI if it meets certain criteria. Specifically, EPA's regulations classify information as CBI if:

> (1) the business has asserted a claim which has not expired, been waived, or been withdrawn;
> (2) the business has shown that it has taken and will continue to take reasonable steps to protect the information from disclosure;
> (3) the information is not and has not been reasonably obtainable by the public (other than governmental bodies) by use of legitimate means;
> (4) no statute requires disclosure of the information; and
> (5) disclosure of the information is likely to cause substantial harm to the business' competitive position.[2]

On August 5, 1999, Congress enacted the Chemical Safety Information, Site Security, and Fuels Regulatory Relief Act[3] (CSISSFRA) and, pursuant to CSISSFRA, EPA amended the RMP regulations to restrict the information that could be provided to the public under Section 112(r) of the Clean Air Act. Specifically, EPA provided that only the RMP data elements relating to source-level registration information (sections 68.160(b)(1)–(6), (8)–(13)) and the five-year accident history (section 68.168) are "emission data," which cannot be protected as CBI, and that all other information in an RMP is potentially subject to a claim of CBI.[4] Citing the public's interest in obtaining RMP information, EPA also imposed in Section 68.151, a requirement that claims of CBI be substantiated by the facility submitting the RMP at the time of submittal (as compared with the normal procedure in which a facility need only substantiate a CBI claim at the time the information is requested by a member of the public).[5] In addressing the release of trade secret information, EPA explained:

> Given the statute's direction to protect whatever trade secret information is contained in an RMP, EPA is not authorized to release such information even when the public's need for such information arguably outweighs a business' interest in its confidentiality. The Agency also cannot issue a ''corporate sunshine rule'' that conflicts with existing law requiring EPA (and other agencies) to protect trade secret information.[6]

The Proposed Rule would require facilities to disclose certain information that may be considered CBI. In particular, EPA proposes to require facilities to disclose summaries of incident investigation reports and summaries of inherently safer design technologies implemented or planned to be implemented, all of which often contain CBI. While the Proposed Rule does include a process by which an owner/operator can assert a claim of CBI, such a process is complex, time-consuming, and not necessarily an assurance that such information will not be released. In addition, it may not be practical or possible to sanitize a document in such a way that it still provides useful information.

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[1] 42 U.S.C. § 7414(c).
[2] 40 C.F.R. § 2.208.
[3] Pub. L. No. 106-40, 113 Stat 207 (1999).
[4] 64 Fed. Reg. 964, 970 (Jan. 6, 1999).
[5] *Id*. at 971-72; *see also* 40 C.F.R. § 68.151(c)(3).
[6] 64 Fed. Reg. at 970.

Threat to Public Safety: EPA has historically recognized the security risks posed by disclosing certain facility information. Following promulgation of the original RMP regulation, the Federal Bureau of Investigation (FBI) and other representatives of the law enforcement and intelligence communities raised concerns over the release via the internet of offsite consequences analysis (OCA) information contained in a facility's RMP. As a result, in 2000, EPA amended the RMP regulations to limit information associated with the offsite consequences analysis with respect to access to such information via the internet.[7] As part of CSISSFRRA,[8] the President was required to assess "the increased risk of terrorist and other criminal activity associated with the posting of off-site consequence analysis information on the Internet" as well as "the incentives created by public disclosure of off-site consequence analysis information for reduction in the risk of accidental releases."[9] The risk assessment determined that off-site consequence analysis information

> supplies some pieces of information that would be useful to someone seeking to target or maximize an industrial chemical release. The risk assessment noted that information such as the population that could be affected, the distance that a plume of chemical could radiate, and the types of buildings and landmarks in the local area are precisely the type of information that would be of interest to a terrorist seeking to maximize the effect of an industrial chemical attack. Thus, even if OCA information does not provide a ''roadmap'' for terrorists or all of the necessary information for an attack, it still provides crucial pieces of information that would increase the risk of terrorist or other criminal activity.[10]

In addressing the completed assessments of disclosing RMP information for both the increased risks of terrorist and other criminal activity, and the incentives created through public disclosure, EPA further explained:

> After considering the comments received, we have sought to craft a final rule that meets CSISSFRRA's requirements and reflects consideration of both assessments' findings. CSISSFRRA's requirements include providing any member of the public with access to paper copies of OCA information for a ''limited number'' of facilities (CAA section 112(r)(7)(H)(ii)(II)(aa)) and other access ''as appropriate'' (CAA section 112(r)(7)(H)(ii)(II)(bb)). <u>The risk assessment concluded that posting certain portions of OCA information on the Internet would increase the risk that terrorists or other criminals will attempt to cause an industrial chemical release in the United States. Easy access to OCA information would assist someone seeking to identify the most lethal potential targets from among the 15,000 facilities that have submitted OCA information.</u> The benefits assessment, however, concluded that public disclosure of OCA information would likely lead to a significant reduction in the number and severity of accidental chemical releases. Widespread access to OCA information would serve the functions Congress originally intended in enacting the CAA and requiring the collection of OCA information to inform members of the public of potential environmental hazards and to allow them to participate in decisions that affect their lives and communities.
>
> While chemical accidents take a significant toll on life, property, and the environment each year, we believe that the property damage, personal injuries, and loss of life resulting from a single, successful terrorist attack on a chemical facility could be considerable and would likely cause more damage than would many accidental chemical

[7] *See* 65 Fed. Reg. 48,108 (Aug. 4, 2000).
[8] Pub. L. No. 106-40, 113 Stat 207 (1999).
[9] 42 U.S.C. § 7412(r)(7)(H)(ii).
[10] 65 Fed. Reg. at 48,112.

> releases. We therefore have attempted to balance those concerns by making as much OCA information as appropriate available online, but not posting the information that the risk assessment found would, if disseminated without restriction, pose a significant risk for terrorist or criminal purposes. Although the Internet provides a tremendous benefit by offering people easy access to a wealth of information, we also recognize that it provides a new means for criminals and terrorists to carry out traditional criminal activities. The final rule provides several means for individuals to obtain OCA information not only for facilities within their community but also for a sufficient number of facilities located elsewhere, thereby enabling individuals to compare facilities' safety and prevention measures and records.[11]

EPA went a step further in 2004 when it amended the RMP regulations to remove the requirement to include OCA information in the RMP executive summary.[12]

In addition, other federal agencies, such as the Department of Homeland Security (DHS), have also focused on protecting sensitive information. For example, facilities regulated under DHS's Chemical Facility Anti-Terrorism Standards (6 C.F.R. Part 27) are required to maintain the confidentiality of "Chemical-terrorism Vulnerability Information or CVI."[13]

With respect to the disclosure of incident investigations and compliance audits, EPA acknowledged industry concern over the disclosure of such information in its response to comments of the initial RMP regulation:

> EPA notes that although the final rule contains incident investigations and compliance audit provisions, the RMP does not require full disclosure of these accident investigations and audit reports in the RMP. The Agency recognizes the public's interest regarding this information, however, EPA must consider the sensitivity of these data. The Agency believes sensitive information should remain on-site and available to EPA and the implementing agency for review and auditing purposes. Because the purpose of the audits and investigations is to assist the source in identifying and addressing problems, it is important that the source do as thorough a review as possible, without concern for the use that might be made of the information by others. If these reports were made public, it is likely that many sources would not include any information that could be used against the source and, therefore, might produce reports that were of little use to anyone. EPA does, however, require information on accidents in the five-year accident history. Nothing in the risk management program rule prevents the public from requesting this information. Further, this information may be subject to discovery in the course of a lawsuit.[14]

The Proposed Rule would require facilities to disclose the very information EPA has previously decided should not be disclosed. EPA has not provided a compelling reason to change course now. Further, the original CSISSFRRA assessments analyzing risk of terrorist or other criminal activity have not been updated since 2000 even though new threats and criminal strategies have likely developed. Accordingly, EPA must revise the Proposed Rule to address the safety and security of the industry and the general public is maintained, particularly in light of new and evolving domestic security threats and

[11] 65 Fed. Reg. at 48,126-27 (emphasis added).
[12] 69 Fed. Reg. 18,819, 18,824 (Apr. 9, 2004) ("The Agency continues to believe that the requirement for briefly describing OCA in executive summaries should be removed in the face of ongoing concerns about the potential misuse of such information by terrorists, particularly if the information can be easily and anonymously accessed.").
[13] 6 C.F.R. § 27.400.
[14] EPA, *Risk Management Plan Rule: Summary and Response to Comments, Vol.1*, at 6-78 (May 24, 1996) (emphasis added).

the ability of terrorists and criminals to access facility information and optimize the harm they can plan and execute.

APPENDIX D

LOCAL COORDINATION AND EMERGENCY RESPONSE PREPAREDNESS

CSAG offers the following additional information supporting our explanation of why specific aspects of the proposal are ineffective, counterproductive, or cause unintended consequences and our recommendations.

The community emergency response plan is the central element in emergency preparedness and while individual facilities play a key role in the plan, the LEPCs/local emergency responders are ultimately responsible for it. LEPCs are comprised of various categories of people including "at a minimum, representatives from each of the following groups or organizations: elected State and local officials; law enforcement, civil defense, firefighting, first aid, health, local environmental, hospital, and transportation personnel; broadcast and print media; community groups; and owners and operators of facilities" subject to the EPCRA.[1] LEPCs are required to develop and implement the community emergency plan as follows:

> §11003. Comprehensive emergency response plans
>
> (a) Plan required
> Each local emergency planning committee shall complete preparation of an emergency plan in accordance with this section not later than two years after October 17, 1986. The committee shall review such plan once a year, or more frequently as changed circumstances in the community or at any facility may require.
> . . .
> (c) Plan provisions
>
> Each emergency plan shall include (but is not limited to) each of the following:
>
> (1) Identification of facilities subject to the requirements of this subchapter that are within the emergency planning district, identification of routes likely to be used for the transportation of substances on the list of extremely hazardous substances referred to in section 11002(a) of this title, and identification of additional facilities contributing or subjected to additional risk due to their proximity to facilities subject to the requirements of this subchapter, such as hospitals or natural gas facilities.
> (2) Methods and procedures to be followed by facility owners and operators and local emergency and medical personnel to respond to any release of such substances.
> (3) Designation of a community emergency coordinator and facility emergency coordinators, who shall make determinations necessary to implement the plan.
> (4) Procedures providing reliable, effective, and timely notification by the facility emergency coordinators and the community emergency coordinator to persons designated in the emergency plan, and to the public, that a release has occurred (consistent with the emergency notification requirements of section 11004 of this title).

[1] 42 U.S.C. § 11001(c).

(5) Methods for determining the occurrence of a release, and the area or population likely to be affected by such release.

(6) A description of emergency equipment and facilities in the community and at each facility in the community subject to the requirements of this subchapter, and an identification of the persons responsible for such equipment and facilities.

(7) Evacuation plans, including provisions for a precautionary evacuation and alternative traffic routes.

(8) Training programs, including schedules for training of local emergency response and medical personnel.

(9) Methods and schedules for exercising the emergency plan.[2]

Cost for Converting Non-Responding to Responding Facility: Omitted from the RIA are costs associated with non-responding facilities becoming responding facilities. For example, facilities that are required to become responding facilities pursuant to the Propose Rule will be required to develop an emergency response plan, procedures for the use of response equipment (including testing, inspection, and maintenance), training for employees, and procedures to review and update the emergency response plan.[3] This could be a significant undertaking, especially for small facilities. Indeed, CSAG members report having facilities with less than five employees. It will be extremely difficult, not to mention impractical, to require such a limited staff to be the sole emergency responders. EPA recognizes this impracticality, and in addressing it suggests that such facilities should either become responders themselves or fund the local emergency responders. Under either scenario, EPA fails to consider the costs associated with these requirements. Under the Proposed Rule, not only would non-responder facilities have to become responding facilities with very limited resources by way of personnel, but they would also have to purchase the entirety of the emergency response equipment necessary to respond to an incident. This includes equipment such as: firefighting bunker gear, communications equipment and radios, furnishing a command center or mobile command center, fire trucks and fire hose, first aid medical equipment, rescue equipment, and portable lighting.

[2] 42 U.S.C. § 11003(c) (emphasis added).
[3] 81 Fed. Reg. at 13,671, 13,708 (proposed 40 C.F.R. §§ 68.90, 68.95).

Attachment 2

CHEMICAL SAFETY ADVOCACY GROUP

Comments on Information Collection Request Submittal for Proposed *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule,* 81 Fed. Reg. 16,338 (Mar. 14, 2016); Docket Id. EPA–HQ–OEM–2015–0725

EPA ICR No. 2537.01
Office of Management and Budget (OMB) No. 2050-NEW

I. Introduction

The Chemical Safety Advocacy Group (CSAG) submits the following comments in response to the submittal by the U.S. Environmental Protection Agency (EPA or Agency) of an information collection request (ICR) to the Office of Management and Budget (OMB) for approval of information collection activities associated with the *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule,* 81 Fed. Reg. 16,338 (Mar. 14, 2016) (Proposed Rule).

CSAG is a coalition of companies focused on implementation of EPA's and the Occupational Safety and Health Administration's (OSHA) regulations addressing the Risk Management Program (RMP) and Process Safety Management (PSM), respectively. CSAG members include companies in the petroleum refining, upstream oil and gas, chemicals, paper, and general manufacturing sectors with operations throughout the United States that are subject to the RMP rule. With a diverse group of companies across multiple industry sectors, CSAG offers a unique perspective on chemical safety and security. It is from this perspective that CSAG developed these comments and seeks to aid OMB and EPA in fulfilling its goal of continuing to implement an effective RMP rule designed to prevent and mitigate accidental releases. CSAG supports effective implementation of the Clean Air Act's RMP regulations, which, like so many other Clean Air Act standards, is performance-oriented.

As OMB considers its action on this ICR, it must independently exercise its judgment regarding the justification for the substantially increased burdens and obligations in light of the Paperwork Reduction Act (PRA)[1], including whether EPA has satisfied its obligations. Given the issues raised in these comments, OMB should (1) disapprove the ICR or (2) require EPA to revise either (a) the Proposed Rule to match the ICR or (b) the ICR to match the Proposed Rule. Specifically, EPA has not met its obligations under the PRA as follows:

- The proposed collection of information goes beyond that necessary to properly perform EPA's functions under Clean Air Act Section 112(r), and EPA has not shown that it has taken every reasonable step to ensure that it is imposing the least burden necessary to perform such functions;
- EPA has not taken every reasonable step to ensure that the proposed collection of information is not duplicative of information otherwise accessible to the Agency;

[1] 44 U.S.C. §§ 3501 *et seq.*

- EPA has not demonstrated the practical utility of the information proposed to be collected, nor has it demonstrated that the proposed requirements do anything more than shift an agency obligation to collect, process, and use information from itself to the public; and
- The Agency's estimate of the burden of the proposed collection of information is inaccurate.
- The Agency's proposed requirements for local emergency planning committees (LEPCs) are counter-productive to the statutory mission Congress established for LEPCs, and the ICR fails to account for the increased burden associated with utilizing them for these expanded purposes.

Since EPA has not met its obligations under the PRA for this ICR, OMB cannot approve it. CSAG highlights these issues of concern with EPA's compliance with the PRA as well as OMB's ability to approve the ICR below. CSAG will also be providing detailed comments on the Proposed Rule, which will include additional data supporting the points raised here.

II. The Proposed ICR Fail to Meet the Obligations Imposed by the PRA.

Under the PRA, federal agencies must obtain OMB approval for all information collection activities before implementation.[2] In seeking approval of an ICR, EPA must demonstrate that the information collection is the least burdensome necessary, is not duplicative, and has practical utility.[3] OMB may approve the ICR only after it has determined that "the collection of information by the agency is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility."[4]

Pursuant to 44 U.S.C. Section 3506(c)(2), EPA is required to do the following:

> (c) With respect to the collection of information and the control of paperwork, each agency shall—
> . . .
> (2)(A) except as provided under subparagraph (B) or section 3507(j), provide 60-day notice in the Federal Register, and otherwise consult with members of the public and affected agencies concerning each proposed collection of information, to solicit comment to—
>
> > (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;
> > (ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
> > (iii) enhance the quality, utility, and clarity of the information to be collected; . . .[5]

[2] 44 U.S.C. § 3507(a)(2).
[3] 44 U.S.C. § 3506(c)(2), (3); 5 C.F.R. § 1320.5(d)(1).
[4] 44 U.S.C. § 3508.
[5] 44 U.S.C. § 3506(c)(2) (emphasis added).

EPA's obligations are described further in 5 C.F.R. Section 1320.5(d)(1):

> To obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that the proposed collection of information:
>
> > (i) Is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;
> > (ii) Is not duplicative of information otherwise accessible to the agency; and
> > (iii) Has practical utility. The agency shall also seek to minimize the cost to itself of collecting, processing, and using the information, but shall not do so by means of shifting disproportionate costs or burdens onto the public.[6]

The proposed collection of information goes beyond that necessary for EPA to perform its functions under Clean Air Act Section 112(r); moreover, EPA has not shown that it has taken every reasonable step to ensure that it is imposing the *least burden necessary* to perform such functions as required by the PRA and OMB regulations.[7]

A. EPA Has Not Taken Every Reasonable Step to Ensure that the Proposed Collection of Information Is Not Duplicative of Information Otherwise Accessible to the Agency.

The Proposed Rule would require RMP-regulated facilities to make certain information related to the RMP available to the local community and their LEPCs).[8] It would also require RMP-regulated facilities to hold public meetings within 30 days of an accident subject to reporting under 40 C.F.R. Section 68.42.[9] Much of the information required to be disclosed, including information on regulated substances, accident history information, and information from emergency exercises, is *already accessible* by the Agency, the LEPC, and the public either through submittals to EPA required elsewhere in the existing RMP rule, or submittals to LEPCs required by the Emergency Planning and Community Right to Know Act (EPCRA). Requiring facilities to take the additional step of disclosing this information as required in the Proposed Rule therefore duplicates requirements already included in the existing RMP rule or other federal regulations.

EPA further proposes revised accident prevention program requirements, which also involve information already accessible to the Agency. Specifically, the Proposed Rule would require facilities to hire a third party to conduct a full scale compliance audit after an RMP

[6] 5 C.F.R. § 1320.5(d)(1) (emphasis added).
[7] 44 U.S.C. § 3566(c)(2), (3); 5 C.F.R. § 1320.5(d)(1).
[8] 81 Fed. Reg. at 13,679-80.
[9] 81 Fed. Reg. at 13,692, 13,695.

reportable accident.[10] When an RMP-reportable release occurs, EPA and other regulatory agencies often conduct inspections and initiate enforcement actions. Indeed, EPA cites as the basis for several of the proposed requirements findings made by the Chemical Safety Board (CSB) following incidents that have occurred and other reports by government agencies including consent decrees under which third party audits were negotiated terms. But these findings are not necessarily indicative of a need for independent audits, especially when EPA could more effectively enforce the *existing requirement* to conduct compliance audits every three years. Indeed, refinery inspections conducted in association with OSHA's National Emphasis Program found that only 4% of the citations issued were related to PSM compliance audits,[11] lending credence to the proposition that EPA has not shown that a third party audit will result in a reduction of accidental releases at a greater rate than the existing requirements.

Moreover, companies' investigations of incidents commonly address both the incident itself and the elements of RMP involved in the incident. This, coupled with the fact that the existing regulations require compliance audits every three years—such that information provided by additional audits is otherwise available to EPA through review of the previous audit or the next scheduled audit—illustrates the duplicative nature of the proposed third party audit requirement.[12]

Leading to further duplication of existing requirements is the proposed requirement that compliance audits evaluate "each covered process." As described further below, representative sampling is permissible under the existing rule and is explicitly recommended by OSHA and the Center for Chemical Process Safety (CCPS).[13] The purpose of representative sampling is to gather sufficient information to evaluate compliance with the provisions of the RMP to verify a facility's procedures and practices are adequate and are being followed. Once the facility has gathered a representative sample of data from representative units, additional data collection is duplicative. Requiring an audit of each covered process is not the least burdensome method to verify that procedures and practices are adequate and are being followed. Representative sampling accomplishes the same goal, is not duplicative of existing requirements, and is less burdensome.

Further, EPA's assertion that a third party auditor will uncover more information or prevent future incidents more often than more-qualified in-house auditors is not supported by the evidence in the record and thus does not meet the non-duplication requirement of the PRA. Indeed, EPA cites to several studies purportedly showing the "importance of establishing criteria and features for auditor independence to promote accurate audit reports."[14] This basis is flawed, however, for at least three reasons:

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[10] 81 Fed. Reg. at 13,690, 13,695.
[11] Presentation by Jordan Barab, Deputy Assistant Sec'y, OSHA, *OSHA's Refinery & Chemical National Emphasis Program* at 3 (July 20, 2012) *available at* http://www.csb.gov/UserFiles/file/Barab%20(OSHA)%20PowerPoint.pdf
[12] 40 C.F.R. §§ 68.58; 68.79.
[13] *See* CCPS, *Guidelines for Auditing Process Safety Management Systems*, at 83-84 (2d ed. 2011); OSHA, *Process Safety Management Guidelines for Compliance*, OSHA 3133 (1994).
[14] 81 Fed. Reg. at 13,656-57.

(1) the studies cited involve a subject matter unlike that faced by RMP-facilities;
(2) there is no indication that the studies cited utilized audits structured in the manner proposed by the Agency; and
(3) foreign studies are not good indicators of how a complex American regulatory scheme would react under similar circumstances.

With respect to subject matter differences, EPA cites studies involving vehicle emission testing audits and financial audits to illustrate undue influence involved in audits with insufficient auditor independence. Neither vehicle emission testing nor financial reporting are matters that involve the serious risks associated with operating a RMP-regulated facility. To suggest that internal compliance auditors would somehow undercut or gloss over noncompliance with the increased stakes associated with RMP-compliance is without basis in the record and is simply not supported by analogies to wholly unrelated subject matters, like financial reporting. Moreover, the record does not establish that the strictures proposed by EPA are the same that were imposed in the emissions testing or financial contexts quoted. Further, one of the key studies cited for the proposition that independent auditors are needed was from Gujarat, India.[15] There is no basis to conclude that the results of this study would be applicable in the United States, and EPA's statement that it seems "reasonable" to conclude that it is applicable is wholly without basis. First, India's regulatory scheme is far less rigorous than ours. Second, the differences in enforcement of the regulatory requirements in a foreign country and the impact of those differences on private behavior are not taken into account.

Thus, EPA has not in any way established a causal connection between the proposed requirements and the claimed benefits of these particular third party audit provisions and qualifications for being such an auditor. In sum, the cited studies do not support the propositions that independent auditors are more qualified or will result in greater risk reduction. Further, EPA's cost analysis incorrectly evaluates the frequency component. Because of the way the Proposed Rule establishes the trigger for a third party audit, this proposal could commonly require a third party audit on an annual basis as opposed to the three-year basis used in the EPA estimate. Such frequent auditing will result in duplicative findings. In addition, while EPA's goal may actually be to reach those facilities that are either not conducting the currently-required compliance audits at all or are conducting inadequate ones, the fact is that if a company is failing to comply with the current auditing requirements, the solution is not to require third party audits but rather to enforce the current requirements, an approach that might impose additional costs on the government but would not impose the significant costs expected form this proposal. Accordingly, for the vast majority of plants that would be subject to the third party audit requirement, the proposed requirements will be duplicative. EPA fails to provide any analysis as to this duplication, making the ICR submittal inadequate and not approvable.

The requirement to maintain all draft audit reports is also duplicative. The Proposed Rule would require facilities that conduct third party audits to ensure that the auditor submits the audit report to the implementing agency and to maintain copies of all draft audit reports.[16] Even though EPA and implementing agencies would already have access to the final report once

[15] 81 Fed. Reg. at 13,657.
[16] 81 Fed. Reg. at 13,662.

submitted. It is duplicative to require the maintenance of draft audit reports for the same audit. In addition, the Proposed Rule would require the auditor to certify that the audit was conducted and the audit report was prepared in accordance with the Agency's requirements, further indicating that maintenance of draft audit reports duplicative.

Additionally, the Proposed Rule includes new emergency preparedness requirements, including a requirement to annually meet and coordinate with local responders, conduct annual notification drills, and conduct and document field exercises.[17] LEPCs are already required to implement these requirements under EPCRA.[18] With EPA's oversight of the LEPCs and EPCRA, this information is already accessible to the Agency and thus, this new requirement is duplicative.

Finally, the Proposed Rule would require facilities to provide a list of all federal and state regulations and industry-specific and company-established design codes and standards, and identify those followed to demonstrate compliance with the safety information requirements.[19] Section 68.65 of the regulations already requires facilities to compile such information. Accordingly, such information is already accessible to the Agency, and requiring it in the new requirements is duplicative.

B. The Proposed ICR Does Not Show Practical Utility of the Information Proposed to be Collected, Nor Is There Any Demonstration that the Proposed Requirements Accomplish Anything Other than a Shifting of Government Enforcement/Paperwork Obligations to the Public.

Part of EPA's PRA obligation is to establish that the collection of information is of "practical utility." The PRA defines "practical utility" as "the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion."[20] OMB's rules further define practical utility as follows:

> (l) *Practical utility* means the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects (or a person's ability to receive and process that which is disclosed, in the case of a third-party or public disclosure) in a useful and timely fashion. In determining whether information will have "practical utility," OMB will take into account whether the agency demonstrates actual timely use for the information either to carry out its functions or make it available to third-parties or the public, either directly or by means of a third-party or public posting, notification, labeling, or similar disclosure requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction. In the case of recordkeeping requirements or general purpose

[17] 81 Fed. Reg. at 13,692, 13,695-96.
[18] EPCRA §§ 303, 305, 42 U.S.C. §§ 11003, 11005.
[19] 81 Fed. Reg. at 13,710 (proposed 40 C.F.R. § 68.170).
[20] 44 U.S.C. § 3502(11).

> statistics (see §1320.3(c)(3)), "practical utility" means that actual uses can be demonstrated.[21]

EPA claims that this information collection is "critical for assisting government agencies in assessing the quality and thoroughness of a source's hazard assessment, prevention program, and emergency response program."[22] Further, the Proposed ICR asserts that the information is also used by state and local emergency planners to "prepare or modify community response plans; to identify hazards to the community; and provide a basis for working with sources to prevent accidents."[23] Finally, EPA suggests that the public will use the information to understand the risks posed by accidental releases and to respond to warnings and advice should a release occur.[24]

There is no factual basis in the record to support these assertions. Indeed, the bulk of the information being collected is of such a technical nature that neither LEPCs nor the public will have the time or capability to absorb it, much less make it "practically useful." Key to the analysis of practical utility is "a person's ability to receive and process that which is disclosed, in the case of a third-party or public disclosure."[25] LEPCs include members with a range of backgrounds, including community members, and it is rare that these members will have chemical analysis or manufacturing background or experience that would allow them to utilize the type of information proposed to be collected. For example, the Proposed Rule would require facilities to disclose safer technology that is *planned* to be implemented. Examples of safer technology include different metallurgy in piping and modifications in automated control systems. LEPCs cannot practically use such safer technology information. For the emergency responder members of the LEPC, technology that is not in use at the plant is not useful in evaluating their response to a potential incident at the facility. For other members, the information is not of practical utility, in that "planned" technology would not be required by the Proposed Rule to be implemented. There is no practical utility in disclosing this information. And, there is a likelihood that covered facilities may provide information to an LEPC that is ultimately changed or modified, making it impractical for an LEPC to use such planned, but not required, safer technology information. Further, the concept of safer technology is highly specialized and many LEPC members do not have the expertise to process such information. The same applies to such information being disclosed to the public. The majority of the public has neither the background nor the experience to process the information being disclosed. As discussed, even if the public *could* process the information, it would not be of practical utility.

The key is to identify the information that is of practical utility to LEPCs and the public—*i.e.*, the identity of the chemical and the potential hazards, all of which are found in existing safety data sheets. This information allows the LEPCs and public to respond to warnings should a release occur. The host of other information proposed to be collected and summarized or provided to LEPCs (compliance audit summaries, accident history information, Safer Technology and Alternatives Analysis (STAA) information, and summaries of exercises)

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[21] 5 C.F.R. § 1320.3(l) (emphasis added).
[22] EPA ICR No. 2537.01, § 2(b), at 2, EPA-HQ-OEM-2015-0725-0038.
[23] EPA ICR No. 2537.01, § 2(b), at 2, EPA-HQ-OEM-2015-0725-0038.
[24] EPA ICR No. 2537.01, § 2(b), at 2, EPA-HQ-OEM-2015-0725-0038.
[25] 5 C.F.R. § 1320.3(l).

not only imposes tremendous burdens on regulated entities, requiring it actually *decreases* the practical utility of the information that should in fact be provided.

Such extraneous information that is unrelated and/or unnecessary to the LEPCs' statutory mission is not useful to incident command and provides no guidance as to how the public should respond in an emergency. Such a responsibility rests on the shoulders of the LEPCs and local responders in preparing and implementing the community response plan, which is their primary purpose under EPCRA.[26] Indeed, EPCRA requires states to designate LEPCs "in order to facilitate preparation and implementation of emergency plans.[27] Much of the information that the regulated community would be expected to prepare if the Proposed Rule is issued is unrelated to this statutory purpose, is confidential in nature, is relevant to security measures, and when received by the LEPC, is subject to recordkeeping, retention, and dissemination requirements. The LEPCs have limited resources and will quickly become overly burdened by their role in keeping and disseminating information that does not pertain to actual chemical hazards or emergency planning. If promulgated, this rule would plainly result in EPA (potentially inadvertently) converting the LEPC's legitimate role of planning for emergencies and providing emergency planning information to the public into a role of collecting and publicizing information that is unrelated to emergency planning. Such an approach is counter-productive to the very focused and important emergency planning role of LEPCs and is of no practical utility.

Further, with respect to the proposed third party audit requirements, there is no practical utility in maintaining draft third party audit reports. The Proposed Rule would require facilities that must conduct third party audits to maintain drafts of all audit reports and provide them to the implementing agency upon request. It is normal for draft audit reports to contain questions, ambiguities, and inaccuracies and these are answered or corrected through dialogue with the subject of the audit. Indeed, it is the rare audit report that is entirely accurate in its draft form. Given the requirement to submit a final audit report certified by a competent and impartial auditor, the contents of a draft audit report provide no useful information to the Agency or implementing agency. As a result, there is no practical utility in maintain them.

Finally, the Proposed Rule largely represents an attempt by the government to avoid its direct enforcement obligations by having private companies conduct its enforcement through information supply and paperwork burden. This type of action is exactly what the PRA was enacted to avoid.

C. The ICR's Estimate of the Burden of the Proposed Collection of Information Is Inaccurate.

Prior to requesting an ICR, an agency must, among other mandated tasks, produce a "specific, objectively supported estimate of [the] burden" imposed by the request.[28] OMB regulations define burden as follows:

[26] EPCRA § 301, 42 U.S.C. § 11001.
[27] EPCRA § 301(b), 42 U.S.C. § 11001(b).
[28] 44 U.S.C. § 3506(c)(1)(A).

(b)(1) *Burden* means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency, including:

(i) Reviewing instructions;
(ii) Developing, acquiring, installing, and utilizing technology and systems for the purpose of collecting, validating, and verifying information;
(iii) Developing, acquiring, installing, and utilizing technology and systems for the purpose of processing and maintaining information;
(iv) Developing, acquiring, installing, and utilizing technology and systems for the purpose of disclosing and providing information;
(v) Adjusting the existing ways to comply with any previously applicable instructions and requirements;
(vi) Training personnel to be able to respond to a collection of information;
(vii) Searching data sources;
(viii) Completing and reviewing the collection of information; and
(ix) Transmitting, or otherwise disclosing the information.

(2) The time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the normal course of their activities (e.g., in compiling and maintaining business records) will be excluded from the "burden" if the agency demonstrates that the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary.

(3) A collection of information conducted or sponsored by a Federal agency that is also conducted or sponsored by a unit of State, local, or tribal government is presumed to impose a Federal burden except to the extent that the agency shows that such State, local, or tribal requirement would be imposed even in the absence of a Federal requirement.[29]

EPA's estimate of the burden associated with the Proposed Rule is dramatically low for several categories. The Proposed Rule would impose several new requirements, certain interpretations of which, could lead to cost burdens dramatically different than EPA estimates. As described below, the proposed requirements as written would impose significantly higher costs on RMP-regulated facilities.

1. Given the Complex Nature of the Proposed Requirements, the Estimate for Rule Familiarization is Significantly Low.

The Proposed Rule would impose significant and extensive new requirements on RMP-regulated facilities, yet the ICR assumes that the time required for facility personnel to become acquainted with these complex requirements is minimal and only at the management level. This

[29] 5 C.F.R. § 1320.3(b).

approach, where only managers are familiar with a rule, is inconsistent with typical industry's approach at compliance with environmental regulations which is to include all employees involved in implementing any part of the new requirements. Further, it seems unlikely that in an enforcement scenario, EPA would consider it acceptable for a facility not to have trained all relevant employees regarding applicable rule provisions.

Nonetheless, EPA assumes that the burden of rule familiarization will only require 2-4 hours of manager time depending on the facility type. This estimate is dramatically low given the nature of the proposed requirements. Additionally, the ICR seems to have overlooked the need for facilities to update all affected policies and procedures and train employees in accordance with the proposed requirements. Indeed, CSAG members estimate that the burden attached to familiarizing facility staff at P3 Complex facilities with the new requirements are much higher than EPA's estimates as illustrated in Table 1, below.

Table 1: Rule Familiarization*

Facility Type	Total # of Affected Facilities	Mgr.	Corp Mgr.	Atty.	Eng.	Prod. Staff	LEPC
P3 Complex							
EPA Estimate[30]	1476	4	0	0	0	0	1
CSAG High Estimate	1476	20	30	8	174	220	See discussion below.
CSAG Low Estimate	1476	20	66	16	0	30	See discussion below.

*The CSAG estimates presented in the tables throughout these comments are based on the highest/lowest overall burden reported by CSAG members. Accordingly, each row represents a single company, even though that company's estimate for a given personnel type or other cost may not be the highest/lowest considered separately.

Accordingly, EPA's burden estimate for rule familiarization is grossly inadequate. OMB should disapprove the ICR, or in the alternative, require EPA to revise the ICR to reflect accurate burden estimates for rule familiarization.

2. With Respect to Third Party Audits, EPA Underestimates the Labor Costs Associated with In-house Personnel As Well As Third-Party Auditors.

The Proposed Rule would require facilities to conduct a third party audit after one of two triggers occurs. The first trigger requires a third party audit after an accidental release meeting the criteria in Section 68.42(a) of the regulations occurs.[31] The second trigger requires a third party audit if an implementing agency requires one based on non-compliance with the prevention program requirements found in Subpart C (Program 2 facilities) or Subpart D (Program 3 facilities).[32]

[30] EPA ICR No. 2537.01, Table 1, at 8, EPA-HQ-OEM-2015-0725-0038.
[31] 81 Fed. Reg. at 13,704, 13,706 (proposed 40 C.F.R. §§ 68.58(f)(1), 68.79(f)(1)).
[32] 81 Fed. Reg. at 13,704, 13,706 (proposed 40 C.F.R. §§ 68.58(f)(2), 68.79(f)(2)).

Neither of these two triggers is clear and this lack of clarity could result in more frequent third party audits than EPA actually intended. For example, the first trigger imposes a third party audit when a facility has a reportable incident that meets the criteria in Section 68.42(a). While at first blush the regulatory language may seem understandable, the preamble's rhetoric surrounding on-site only impacts being covered under the RMP, either through the accident history reporting requirements or through the proposed definition of catastrophic release, means that facilities may trigger a third party audit by having an incident with only on-site impacts. This could result in a facility triggering the requirement on an annual basis. In addition, the second trigger allowing an implementing agency to require a third party audit based on non-compliance will likely increase the frequency of third party audits. EPA has not adequately accounted for the frequency at which third party audits will be triggered, nor has it accurately accounted for actual costs such as in-house wage rates and third party auditor costs associated with this requirement.

a. The ICR Fails To Account for Increased In-House Resources Associated with Third Party Audits.

The ICR provides burden estimates for the contracting process associated with hiring a third party auditor to conduct a compliance audit. This is because EPA assumes that in-house staffing levels will remain the same as what was previously necessary to conduct a compliance audit. While CSAG agrees with the estimates provided for this limited portion of the costs associated with third party audits, we disagree that contracting costs are the only incremental costs associated with this new requirement. In-house staff members are necessary to support a third party audit. This would impose an increased burden over current requirements because in-house staff would be required to escort and educate third party auditors. Some facilities already utilizing third party auditors for their compliance audits may need to increase internal audit staffing for standard compliance audits to compensate for the potential unavailability of qualified auditors due to a potential market shift from standard compliance audits to the new independent third party audit. Additionally, the ICR fails to account for the in-house burden associated with the recordkeeping provisions for third party audits. Developing a schedule to address deficiencies, maintaining prior draft audit reports, and submitting the findings response report and schedule to address deficiencies to the board of directors will all require significant personnel time. The preparation and submittal of these reports to a company's board of directors requires significant effort, and the ICR estimates zero burden for this task.

In addition, many facilities are required by their boards to conduct audits under a defined schedule that is laid out years in advance. It is unlikely that a facility would replace (or perform concurrently) the normally-scheduled audit, conducted by the facility's own experts, with EPA's third party audit. Accordingly, such facilities would be incurring the entire cost of a third party audit. EPA fails to estimate these burdens.

Further, the proposed estimate for the number of affected facilities is low. The estimate fails to include the number of third party audits required under the second trigger, when an implementing agency requires one based on non-compliance. It is unclear how often the requirement will be triggered by non-compliance, but even assuming it is triggered one time in

each state, EPA's estimate is off by 50. As a result, the number of affected facilities, or required third party audits for a given year, goes up substantially. Accordingly, EPA' estimate is inaccurate.

b. Third Party Auditor Fees Are Dramatically Higher than EPA Estimates Especially Given the Proposed Strict Qualification Requirements for Third Party Auditors.

EPA estimates that the total third party auditor costs, including auditor fees and travel costs, range from $15,000 for simple facilities to $40,000.[33] Despite receiving input during the small business panel review that third party audits covering a representative sampling of covered processes could range from $125,000 to $150,000, EPA maintains that third party audit fees are much lower.[34] These costs are dramatically low unless EPA's intent is actually something different than what is written in the proposed regulatory language. The proposed regulatory language and preamble language indicate that EPA would require the compliance audit to be a robust and comprehensive audit for all covered processes. This is a departure from past policy and the opinions of several reputable organizations, including OSHA and CCPS, that compliance audits covering a statistical sampling of covered processes is adequate.[35] Compliance auditing for all covered processes would be a substantial undertaking, involving significant in-house and third party auditor time. As a result, the only way EPA's estimates can be considered accurate is if EPA actually intended to continue with OSHA and CCPS policy.

At such a low estimate, EPA either made inaccurate assumptions as to the market hourly rate for third party auditors or it underestimated the amount of time necessary to conduct the required audit, especially in light of the Proposed Rule's broadening of the scope of the compliance audit to reach each covered process. Indeed, CSAG members estimate that third party audit costs can range from $25,000 to $1,000,000 depending on the type of facility. With respect to hourly rates for third party auditors, CSAG members report rates ranging from $175 per hour to $371 per hour. The Proposed Rule's strict qualification restriction to be a third party auditor would likely result in a shortage of qualified auditors and thus, substantially higher hourly rates. In addition, to meet the new auditor qualifications criteria, a facility may be faced with hiring *multiple* third party auditors, costs that are unaccounted for in the ICR. Further, CSAG members report that the number of hours a third party auditor needs to conduct a meaningful audit ranges from 240 hours to 3600 hours depending on the type of facility and that travel costs associated with third party audits range from $10,120 to $20,290. Given these values, the only logical way to interpret EPA's assumption is that the third party audit requirement merely involves a basic, "check-the-box" analysis, which would require a limited amount of auditor time. Ironically, such an exercise would actually represent a decrease in rigor compared to how compliance audits are currently conducted.

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[33] EPA, *Regulatory Impact Analysis Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7)* at 38 (Feb. 24, 2016), EPA-HQ-OEM-2015-0725-0037 (RIA).

[34] Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule Risk Management Modernization Rule at 32 (Feb. 19, 2016), EPA-HQ-OEM-2015-0725-0032 (SBAR Panel Report).

[35] *See* CCPS, *Guidelines for Auditing Process Safety Management Systems*, at 83-84 (2d ed. 2011); OSHA, *Process Safety Management Guidelines for Compliance*, OSHA 3133 (1994).

Finally, the ICR's assumption that only 10 percent of the overall burden hours are devoted to information collection[36] is inconsistent with OMB regulations. The entire time, effort, and financial resources required to comply with these expanded audit requirements meet the definition of "burden." The purpose of an audit is to collect, generate, and maintain information concerning the regulatory compliance of the facility. Accordingly, EPA's burden estimate is inaccurate and should consider 100 percent of the burden associated with conducting third party audits.

3. Incident Investigations and Root Cause Analyses Require Significantly More Time Than EPA Estimates.

The Proposed Rule would require facilities to conduct incident investigations and root cause analyses whenever a catastrophic release occurs or could reasonably have occurred. These two triggers are not clearly defined or explained. For example, the Proposed Rule's preamble asserts that the definition of catastrophic release is being revised to be consistent with/have the same meaning as those incidents required to be reported in the five-year accident history.[37] This revision will significantly broaden the definition of catastrophic release by including onsite impacts as well as offsite property and environmental damage. Further, EPA does not define "near miss" in the regulation. The preamble discussion provides specific examples of what is a near miss but fails to provide examples of what is not a near miss.[38]

This lack of clarity could lead to a substantial number of incident investigations and root cause analyses, the magnitude of which EPA has drastically undervalued in its burden estimate. It certainly indicates that "plain, coherent, and unambiguous" language that is "understandable to respondents" has not been used, though EPA has certified this is the case. For example, EPA estimates that for the entire universe of P3 facilities (10,628 facilities), there will only be 143 near misses (75 simple, 68 complex) and 143 accidents (75 simple, 68 complex). This amounts to far less than one accident or near miss per facility per year. Even if a facility only has one near miss in a year, under the proposed requirement to conduct an incident investigation and root cause analysis for every near miss, this would result in 10,628 investigations per year!

As illustrated in Table 2, below, CSAG members report that a typical incident investigation and root cause analysis for a P3 complex incident are significantly higher than estimated by EPA.

[36] EPA ICR No. 2537.01, § 6(a) at 8, EPA-HQ-OEM-2015-0725-0038.
[37] 81 Fed. Reg. at 13,647.
[38] 81 Fed. Reg. at 13,651-52.

Table 2: IIRCA*						
Facility Type	**Total # of Affected Facilities**	**Mgr.**	**Corp Mgr.**	**Atty.**	**Eng.**	**Prod. Staff**
P3 accidents-complex						
EPA Estimate[39]	68	0	0	0	4.8	0
CSAG High Estimate	>68	132	1	10	40	40
CSAG Low Estimate	68	4	0	2	20	16

*The CSAG estimates presented in the tables throughout these comments are based on the highest/lowest overall burden reported by CSAG members. Accordingly, each row represents a single company, even though that company's estimate for a given personnel type or other cost may not be the highest/lowest considered separately.

In addition, the assumption that only 10 percent of the overall hours are devoted to information collection[40] is inconsistent with OMB regulations. The proposed requirements of conducting an incident investigation and a root cause analysis would involve the collection, generation, and maintenance of information about the root cause of the incident. Accordingly, 100 percent of the investigation process meets the definition of "burden" and the exclusion of 90 percent of the cost is inappropriate, rendering the ICR not able to be approved at this time. The inaccurate assumption of the number of affected facilities (the number of accidents and near misses requiring investigation) coupled with its inaccurate assumption of the facility resources required to meet the new requirements results in a significant understatement of the overall burden.

4. Safer Technology and Alternatives Analysis (STAA) Is Far More Complex Than EPA Estimates.

The Proposed Rule would require certain facilities to consider safer technology and alternative risk management measures and determine the feasibility of inherently safer technologies and designs considered.[41] Such a complex analysis requires significant expertise as well as time. As illustrated in Table 3, below, CSAG members report an overall burden significantly higher than EPA assumes.

[39] EPA ICR No. 2537.01, Table 3 at 9, EPA-HQ-OEM-2015-0725-0038.
[40] EPA ICR No. 2537.01, § 6(a) at 9, EPA-HQ-OEM-2015-0725-0038.
[41] 81 Fed. Reg. at 13,667-69.

Table 3: STAA*						
Facility Type	**Total # of Affected Facilities**	**Mgr.**	**Corp Mgr.**	**Atty.**	**Eng.**	**Prod. Staff**
Large Complex						
EPA Estimate[42]	2514	0	2.4	0	60.8	0
CSAG High Estimate	2514	20	1	2	120**	2
CSAG Low Estimate	2514	20	0	5	45	45

*The CSAG estimates presented in the tables throughout these comments are based on the highest/lowest overall burden reported by CSAG members. Accordingly, each row represents a single company, even though that company's estimate for a given personnel type or other cost may not be the highest/lowest considered separately.
**This company also uses an outside consultant at 40 hours.

It is difficult to estimate the overall burden for this proposed requirement because there is no agreed-upon methodology for conducting the analysis. It is also difficult to estimate (which perhaps is why EPA did not attempt to do so) the burden associated with implementing any of the feasible options. While EPA is not requiring implementation at this time, it is seeking comment as to whether it should. It seems unreasonable to wholly exclude costs of implementation when the apparent purpose is to create pressure to implement such technologies. For these reasons, CSAG encourages EPA either to remove the proposed requirement or to assume a certain percentage of implementation and properly estimate the burden associated with such implementation. In addition, EPA's assumption that only 10 percent of the overall hours are devoted to information collection[43] is inconsistent with OMB regulations. The entire process of conducting the analysis and determining the feasibility involves the collection, generation, and maintenance of information for the purpose of determining the regulatory compliance of a facility. Accordingly, EPA's estimates are inaccurate and OMB should disapprove the ICR or, in the alternative, require EPA to revise the ICR to reflect the true overall burden.

5. The Burden Associated with Coordination Activities Is Higher than the ICR Assumes.

The Proposed Rule would require facilities to coordinate with local response authorities, document that coordination, and in some cases, develop an emergency response program. The ICR estimates merely four hours of facility time to accomplish this task and four hours of LEPC time. CSAG believes these numbers are significantly low given the proposed requirements. For example, CSAG members report the following with respect to the burden associated with coordination activities:

[42] EPA ICR No. 2537.01, Table 4 at 9, EPA-HQ-OEM-2015-0725-0038.
[43] EPA ICR No. 2537.01, § 6(a) at 9, EPA-HQ-OEM-2015-0725-0038.

Table 4: Coordination Activities*							
Facility Type	**Total # of Affected Facilities**	**Mgr.**	**Corp Mgr.**	**Atty.**	**Eng.**	**Prod. Staff**	**LEPC**
P3 Complex							
EPA Estimate[44]	1555	4	0	0	0	0	4
CSAG High Estimate	1555	8	2	12	24	12	See discussion below.
CSAG Low Estimate	1555	4	0	0	0	16	See discussion below.

*The CSAG estimates presented in the tables throughout these comments are based on the highest/lowest overall burden reported by CSAG members. Accordingly, each row represents a single company, even though that company's estimate for a given personnel type or other cost may not be the highest/lowest considered separately.

As illustrated, the burden associated with these proposed requirements is significantly higher than EPA estimates. Omitted from EPA's estimate, are costs associated with non-responding facilities becoming responding facilities. For example, facilities that are required to develop an emergency response plan pursuant to the Propose Rule will be required to develop an emergency response plan, procedures for the use of response equipment (including testing, inspection, and maintenance), training for employees, and procedures to review and update the emergency response plan.[45] EPA fails to estimate the burden associated with these requirements. Further, as described below, EPA fails to account for the capital expenditures required for becoming a responding facility such as the cost of fire trucks and other response equipment. Finally, EPA fails to accurately account for the burden on LEPCs under the proposed requirements. LEPCs will likely spend a similar amount of time as the facilities under the proposed requirements. Accordingly, EPA's estimates are inaccurate and must be revised.

6. EPA's Assumption that Only Management Time Is Considered Information Collection When Conducting Exercises Is Inaccurate and Inadequate.

The Proposed Rule would require facilities to conduct tabletop and field exercises to ensure emergency preparation. Despite itemizing the two requirements for cost purposes in the Regulatory Impacts Analysis, EPA presents the burden as a single cost in the ICR. In addition, EPA assumes that only management time is considered information collection for the purposes of these new requirements. CSAG disagrees with this assumption and EPA's estimate of the associated burden. Many facilities utilize production staff in both tabletop and field exercises, yet EPA fails to account for this burden. Indeed, CSAG members estimate that production staff involvement could be as high as 72 hours for tabletop exercises and as high as 152 hours for field exercises. EPA's burden estimate for "Complex Responding 100+" facilities is also substantially low. In contrast to the estimate of 94.4 hours of management time for both tabletop and field

[44] EPA ICR No. 2537.01, Table 5 at 9, EPA-HQ-OEM-2015-0725-0038.
[45] 81 Fed. Reg. at 13,671, 13,708 (proposed 40 C.F.R. §§ 68.90, 68.95).

exercises combined, CSAG members report an estimated 80-100 hours of management time for tabletop exercises and 80-150 hours of management time for field exercises. When combined, CSAG estimates the management time required is as high as 250 hours, significantly higher than EPA's estimate. Further, EPA fails to account for the LEPC contribution to exercises. One LEPC may be participating in numerous exercises depending on location, yet EPA estimates zero hours of LEPC time with respect to this ICR. This is inaccurate and must be revised.

7. Preparing Chemical Hazard Information in a Format that Is Appropriate for LEPC/Public Consumption Will Require Significantly More Time than EPA Estimates.

The Proposed Rule would require facilities to distribute to the public information such as accident history information, a summary of the emergency response program, and a summary of exercises. It would also require facilities to distribute similar information with the addition of compliance audit reports, incident investigation reports, and information on inherently safer technology implemented or planned. These reports, however, may contain security sensitive information posing a risk to the facility and the community if accessible to those may mean harm to the plant or nearby communities.

To ensure such information is conveyed in a manner that the LEPCs and the public can understand, and without releasing security and commercially sensitive information, requires significant review by corporate personnel and legal counsel. Indeed, with respect to public disclosure requirements proposed in the Section 68.210, CSAG members report significantly higher burdens as illustrated in Table 5, below:

Table 5: Public Disclosure*

Facility Type	Total # of Affected Facilities	Mgr.	Corp Mgr.	Atty.	Eng.	Prod. Staff	LEPC
Large Complex							
EPA Estimate[46]	1056	8	0	0	8	0	4
CSAG High Estimate	1056	144	4	4	40**	305	See discussion below.
CSAG Low Estimate	1056	8	0	10	36	0	See discussion below.

*The CSAG estimates presented in the tables throughout these comments are based on the highest/lowest overall burden reported by CSAG members. Accordingly, each row represents a single company, even though that company's estimate for a given personnel type or other cost may not be the highest/lowest considered separately.
**This company also utilizes an outside consultant at 16 hours.

With respect to the disclosure of information to the LEPCs as proposed in Section 68.205, CSAG members report burden estimates as high as four times that which EPA estimates. Clearly the burden associated with preparing documents, ensuring the information is suitable for LEPC/public consumption including ensuring that security sensitive information is not released,

[46] EPA ICR No. 2537.01, Table 8 at 10, EPA-HQ-OEM-2015-0725-0038.

and distributing it in an easily accessible manner requires significant company resources. EPA has failed to accurately estimate this burden.

8. Planning, Preparation, and Conducting Public Meetings Require Significantly More Time than EPA Estimates.

The Proposed Rule would require facilities to hold a public meeting within 30 days of an RMP-reportable accident. The burden associated with conducting a public meeting can vary depending on the type of facility, whether the triggering event was simple, complex, or severe and whether there is public, media, or enforcement interest in the triggering event. Taking these factors into account, CSAG members estimate the burden as follows:

Table 6: Public Meetings*

Facility Type	Total # of Affected Facilities	Mgr.	Corp Mgr.	Atty.	Eng.	Prod. Staff	LEPC
Complex							
EPA Estimate[47]	70	8	0	0	8	4	0
CSAG High Estimate	70	20	50	25	20	20**	20
CSAG Low Estimate	70	8	0	0	8	4	See discussion below.

*The CSAG estimates presented in the tables throughout these comments are based on the highest/lowest overall burden reported by CSAG members. Accordingly, each row represents a single company, even though that company's estimate for a given personnel type or other cost may not be the highest/lowest considered separately.
**Facility reports admin support staff which is included here since it does not fit into EPA categories.

Such an increased burden coupled with the inaccurate estimate of cost associated with renting a facility, as discussed below, amounts to a burden significantly higher than EPA estimates. In addition, EPA fails to account for any LEPC time devoted to public meetings. Many LEPCs play a significant role in public meetings following an accident. Yet, EPA assumes they will not incur any burden for this proposed requirement. Accordingly, EPA's estimates are inaccurate and must be revised to better reflect the resources required for this requirement.

9. The Estimated Wage Rates Do Not Accurately Reflect Actual Wages Paid by Industry.

The estimated labor costs do not accurately reflect real wages paid by RMP-regulated facilities for each of the personnel types listed. In the case of attorney wage rates, EPA's estimate is considerably low given that many companies do not employ in-house counsel. This is significant because the overall burden estimate relies on the wage rates for establishing the impact of the ICR and the Proposed Rule. As illustrated in Table 7, below, CSAG members report significantly higher wage rates than EPA estimates.

[47] EPA ICR No. 2537.01, Table 10 at 11, EPA-HQ-OEM-2015-0725-0038.

Table 7: Wage Rates			
Labor Category—Complex Facilities	**EPA Estimate**[48]	**CSAG Low Estimate**	**CSAG High Estimate**
Management	$99.64	$105.00	$150.00
Corporate Management	$100.71	$131.40	$150.00
Attorneys	$113.33	$130.33	$700.00
Engineers	$76.21	$85.35	$135.00
Production Staff	$41.56	$85.00	$108.00

In addition, EPA fails to account for the multitude of personnel types that may be required to comply with a given requirement. For example, some companies may have several levels of management and production level staff paid at different wage levels. This comes into play in rule familiarization where every person responsible for compliance with the new requirements, not just the categories EPA has listed, will need to be apprised of the new obligations. In addition, incident investigation teams are often made up of more personnel than EPA assumes. Limiting personnel types to these five categories renders the assumptions of overall burden inaccurate.

As Table 7 shows, the real wage rates are dramatically higher than EPA estimates which will result in the overall burden of this ICR and the Proposed Rule being dramatically higher than EPA has calculated. EPA's estimates are inaccurate and OMB should disapprove the ICR, or in the alternative, require EPA to revise the overall cost burden to reflect real wage rates.

10. EPA's Estimates for Capital and Operations and Maintenance Costs Are Incomplete.

The conclusion that there will be no capital costs and estimates that operations and maintenance costs associated with the information collection requirements will be $1,000 to contract with a consultant for incident investigations and $550 to rent a meeting room to host the required public meetings[49] are substantially low and incomplete. With respect to capital costs, EPA fails to include costs associated with non-responding facilities becoming responding facilities. In some cases, this may require the purchase of a fire truck, which is very costly. EPA assumes that the purchasing of a fire truck will be a rare occurrence and one that will only be done by already-responding facilities, such as petrochemical companies.[50] This assumption, however, is incorrect given the number of non-responding facilities that are located in areas where there is no local responder presence. This means that more non-responding facilities than EPA assumes will become responding facilities and in order to comply with the proposed requirements, many will need to purchase a fire truck. EPA fails to account for this cost and as such, the burden estimate is inaccurate.

[48] EPA ICR No. 2537.01, Table 11 at 12, EPA-HQ-OEM-2015-0725-0038.
[49] EPA ICR No. 2537.01, § 6(b) at 12, EPA-HQ-OEM-2015-0725-0038.
[50] SBAR Panel Report at 37.

With respect to operations and maintenance costs, CSAG members estimate that the costs for incident investigation consultant services could range from $11,250 to $100,000. Additionally, meeting room rentals can cost as much as $4,000, well in excess of EPA's estimate. Further, EPA's estimate fails to account for the hiring of security to ensure the safety of employees and the public.

11. EPA Vastly Understates the Burden These Proposed Requirements Impose Upon the LEPCs.

The Proposed Rule would require LEPCs to collect, evaluate, and maintain numerous documents, many of which are complex and difficult to understand without significant education or experience in the chemical manufacturing world. In addition, the Proposed Rule would require LEPCs to participate in numerous emergency response drills and exercises, which will likely result in a substantial outlay of time depending on the number of facilities within their jurisdiction. Further, public meetings, which EPA proposes to require after every reportable accident, will require LEPC preparation and participation. Despite these significant new requirements and new burdens on LEPCs, EPA estimates zero to minimal time (4 hours maximum) for any given task proposed. Just as EPA fails to accurately estimate the burden on facilities, it fails to accurately estimate the burdens on its partner government entities. For this reason, OMB should disapprove the ICR or require EPA to revise the estimated burden to reflect the real impacts LEPCs would be facing under the Proposed Rule.

12. EPA Fails to Estimate the Burden Associated with the Revised Registration Requirements.

The Proposed Rule would require facilities to compile a list of all federal and state requirements and industry-specific or company design codes and standards that are applicable to the facility.[51] The existing regulation does not require this information to be compiled in a single list. This new requirement is unsupported in the record and will create a recordkeeping burden beyond what is usual and customary. EPA has provided no estimate of the burden associated with this collection of information.

III. To Meet Its PRA Obligations, OMB Must Disapprove the ICR or Otherwise Require Revisions to the Proposal or Revisions to the ICR to Match the Burdens that the Proposal Would Create if Finalized.

Because, as described above, EPA has failed to comply with its obligations under the PRA and because EPA's burden estimates are inconsistent with the Proposed Rule requirements, OMB should disapprove the ICR, or in the alternative, require revisions to the Proposed Rule or ICR to comport with what EPA actually intends to require. One of several actions can result from review of an ICR: Approval, Improperly Submitted, Withdrawn, and Disapproval.[52] OMB may approve an ICR with or without change or file comment instructing the agency to resubmit

[51] 81 Fed. Reg. at 13,710 (proposed 40 C.F.R. § 68.170).

[52] *See* Office of Info. and Regulatory Affairs, Reginfo.gov, *Frequently Asked Questions*, http://www.reginfo.gov/public/jsp/Utilities/faq.jsp#icr_info (last visited Apr. 7, 2016).

the ICR at the final stage of the rulemaking.[53] In addition, OMB may return an ICR as improperly submitted if the submitting agency fails to meet the procedural requirements of the PRA or OMB's PRA regulations.[54] Finally, OMB may disapprove an ICR if it finds statutory requirements are not met. If an ICR is not approved, the submitting agency cannot implement the information collection.[55]

A key component of OMB's approval process is ensuring it meets its own obligations under the PRA. OMB is charged by the PRA with minimizing the Federal information collection burden, with particular emphasis on those individuals and entities most adversely affected, and maximizing the practical utility of and public benefit from information collected by or for the Federal Government.[56] In pursuit of these mandates, OMB is obligated to ensure that an information collection is necessary for the proper performance of the functions of the agency.[57] Accordingly, in 2010, OMB issued guidance to agencies on OMB's review process. The guidance provided the following:

> What does OMB evaluate during its review of proposed collections?
>
> A central goal of OMB review is to help agencies strike a balance between collecting information necessary to fulfill their statutory missions and guarding against unnecessary or duplicative information that imposes unjustified costs on the American public. In this regard, OIRA evaluates whether the collection of information by the agency:
>
> - is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
> - minimizes the Federal information collection burden, with particular emphasis on those individuals and entities most adversely affected; and
> - maximizes the practical utility of and public benefit from information collected by or for the Federal Government.[58]

As described above with regard to EPA's obligations, this information collection is duplicative and without practical utility because:

> (1) much of the information proposed to be collected is already available through other accessible means; and
> (2) the type of information being collected is not efficiently and accurately processed or used by LEPCs or the public for the very purposes EPA suggests it might be used.

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[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] 44 U.S.C. § 3504 (c)(3), (c)(4).
[57] 44 U.S.C. § 3508.
[58] OMB, Mem. from Cass R. Sunstein, Admin. to Heads of Exec. Dep'ts and Agencies, and Indep. Regulatory Agencies at 5 (Apr. 7, 2010) (citing 44 U.S.C. §§ 3504, 3508) *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf (emphasis added).

Further, EPA's burden estimates are significantly underestimated for the requirements proposed. In addition, OMB cannot make its own finding of necessity or practical utility pursuant the PRA requirements. These mandatory findings are described below.

A. OMB cannot make its finding of "necessary for" "proper performance" of EPA functions under Clean Air Act Section 112(r) based on the information provided in the ICR and the proposal.

Pursuant to the PRA, 44 U.S.C. Section 3508, OMB must make the following finding:

> Before approving a proposed collection of information, the Director shall determine whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary for any reason, the agency may not engage in the collection of information.[59]

OMB's own regulation describe its obligations as follows:

> OMB shall determine whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions. In making this determination, OMB will take into account the criteria set forth in paragraph (d) of this section, and will consider whether the burden of the collection of information is justified by its practical utility. In addition:
>
> > (1) OMB will consider necessary any collection of information specifically mandated by statute or court order, but will independently assess any collection of information to the extent that the agency exercises discretion in its implementation; and
> >
> > (2) OMB will consider necessary any collection of information specifically required by an agency rule approved or not acted upon by OMB under §1320.11 or §1320.12, but will independently assess any such collection of information to the extent that it deviates from the specifications of the rule.[60]

Paragraph (d) as referenced above requires that EPA ensure that the proposed collection of information: (1) is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives; (2) is not

[59] 44 U.S.C. § 3508 (emphasis added).
[60] 5 C.F.R. § 1320.5(e) (emphasis added).

duplicative of information otherwise accessible to the agency; and (3) has practical utility.[61] Accordingly, OMB must determine that the ICR meets the above criteria before it can make a finding that the ICR is necessary and ultimately approve the ICR.

In its submittal to OMB, EPA states that it is necessary to require the proposed collection of information based on the following:

- State and local authorities use the information in RMPs to modify and enhance their community response plans.
- The agencies implementing the Risk Management Program rule use RMPs to evaluate compliance with part 68 and to identify sources for inspection because they may pose significant risks to the community; and
- Citizens may use the information to assess and address chemical hazards in their communities and to respond appropriately in the event of a release of a regulated substance.[62]

These statements do not suffice to demonstrate that the collection of information is necessary for the performance of EPA's functions. For one, as described above, the information being collected is duplicative of requirements already imposed by the existing regulation and other federal regulations. State and local authorities already have the information necessary to modify and enhance community response plans. And, citizens already have access to chemical hazards in their community pursuant to EPCRA. Second, EPA has not demonstrated that the proposed requirements are the least burdensome for achieving program objectives as this collection of information is already required elsewhere. Instead of requiring further paperwork and burden to once again provide such information, EPA can enforce the regulations on the books.

B. There Is No Basis in the Record for a Finding of "Practical Utility," and Even Assuming Amendments to the Proposal Are Adopted, Much of the Information Being Required Is Unnecessary and Will Not Be of Practical Use to the Government Consistent With the Burden Imposed.

As described above, EPA must establish and OMB must make a finding that the collection of information is of practical utility. Both the PRA and the OMB regulations provide definitions of "practical utility" which rely, in part, on the ability of the third party to process and use the information being collected.[63] The Proposed Rule would require facilities to disclose highly technical information. LEPCs and the general public are not in a position to effectively process and use such information in the manner EPA proposes. The substantial burden imposed on facilities as a result of these new requirements substantially outweighs any practical utility EPA, the LEPCs, or the public may have in receiving the information. Further, to comply with its own 2010 guidance, OMB should require revisions to the proposal and the ICR because the current proposal does not strike the appropriate balance between collecting information necessary to fulfill EPA's statutory mission and guarding against unnecessary or duplicative

[61] 5 C.F.R. § 1320.5(d)(1).
[62] EPA ICR No. 2537.01, § 2(a) at 2, EPA-HQ-OEM-2015-0725-0038.
[63] *See* 44 U.S.C. § 3502(11); 5 C.F.R. § 1320.3(l).

information that imposes unjustified costs on the American public.[64] Accordingly, OMB cannot make its finding of practical utility and must disapprove the ICR.

IV. OMB Must Also Review the ICR in Light of CBI, Security, and Privacy Concerns.

OMB's review extends beyond necessity and practical utility of the information into the security of the information proposed to be collected. In its 2010 guidance, OMB provided the following:

> OIRA also reviews the extent to which the information collection is consistent with applicable laws, regulations, and policies related to privacy, confidentiality, security, information quality, and statistical standards. In addition, OMB coordinates efforts across Federal agencies in shared areas of interest and expertise.[65]

Based on this guidance, OMB must disapprove the ICR because the information proposed to be collected poses a threat to confidential business information (CBI), personal data privacy, and the public's security.

A. The Proposed ICR Creates a Threat to Confidential Business Information.

Section 114(c) of the Clean Air Act provides access to information obtained under the Clean Air Act except for information (other than emission data) that would divulge trade secrets.[66] Information may be claimed as CBI if it meets certain criteria. Specifically, EPA's regulations classify information as CBI if:

(1) the business has asserted a claim which has not expired, been waived, or been withdrawn;
(2) the business has shown that it has taken and will continue to take reasonable steps to protect the information from disclosure;
(3) the information is not and has not been reasonably obtainable by the public (other than governmental bodies) by use of legitimate means;
(4) no statute requires disclosure of the information; and
(5) disclosure of the information is likely to cause substantial harm to the business' competitive position.[67]

On August 5, 1999, Congress enacted the Chemical Safety Information, Site Security, and Fuels Regulatory Relief Act[68] (CSISSFRA) and, pursuant to CSISSFRA, EPA amended the RMP regulations to restrict the information that could be provided to the public under Section 112(r)

[64] *See* OMB, Mem. from Cass R. Sunstein, Admin. to Heads of Exec. Dep'ts and Agencies, and Indep. Regulatory Agencies at 5 (Apr. 7, 2010) *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf
[65] *Id.*
[66] 42 U.S.C. § 7414(c).
[67] 40 C.F.R. § 2.208.
[68] Pub. L. No. 106-40, 113 Stat 207 (1999).

of the Clean Air Act. Specifically, EPA provided that only the RMP data elements relating to source-level registration information (sections 68.160(b)(1)–(6), (8)–(13)) and the five-year accident history (section 68.168) are "emission data," which cannot be protected as CBI, and that all other information in an RMP is potentially subject to a claim of CBI.[69] Citing the public's interest in obtaining RMP information, EPA also imposed in Section 68.151, a requirement that claims of CBI be substantiated by the facility submitting the RMP at the time of submittal (as compared with the normal procedure in which a facility need only substantiate a CBI claim at the time the information is requested by a member of the public).[70] In addressing the release of trade secret information, EPA explained:

> Given the statute's direction to protect whatever trade secret information is contained in an RMP, EPA is not authorized to release such information even when the public's need for such information arguably outweighs a business' interest in its confidentiality. The Agency also cannot issue a ''corporate sunshine rule'' that conflicts with existing law requiring EPA (and other agencies) to protect trade secret information.[71]

The Proposed Rule would require facilities to disclose certain information that may be considered CBI. In particular, EPA proposes to require facilities to disclose summaries of incident investigation reports and summaries of inherently safer design technologies implemented or planned to be implemented, all of which may contain CBI. While the Proposed Rule does contain a process by which an owner/operator can assert a claim of CBI, such a process is complex, time-consuming, and not necessarily an assurance that such information will not be released. In addition, it may not be practical or possible to sanitize a document in such a way that it still provides useful information. Moreover, the ability to provide a sanitized version of such a document itself imposes a PRA burden that has not been accounted for in the ICR or proposal.

B. The Proposed ICR Threatens Facility and the Public's Security.

In addition to concerns over CBI, EPA has historically recognized the security risks posed by disclosing certain facility information. Following promulgation of the original RMP regulation, the Federal Bureau of Investigation (FBI) and other representatives of the law enforcement and intelligence communities raised concerns over the release via the internet of offsite consequences analysis (OCA) information contained in a facility's RMP. As a result, in 2000, EPA amended the RMP regulations to limit information associated with the offsite consequences analysis with respect to access to such information via the internet.[72] As part of CSISSFRRA,[73] the President was required to assess "the increased risk of terrorist and other criminal activity associated with the posting of off-site consequence analysis information on the Internet" as well as "the incentives created by public disclosure of off-site consequence analysis

[69] 64 Fed. Reg. 964, 970 (Jan. 6, 1999).
[70] *Id*. at 971-72; *see also* 40 C.F.R. § 68.151(c)(3).
[71] 64 Fed. Reg. at 970.
[72] *See* 65 Fed. Reg. 48,108 (Aug. 4, 2000).
[73] Pub. L. No. 106-40, 113 Stat 207 (1999).

information for reduction in the risk of accidental releases."[74] The risk assessment determined that off-site consequence analysis information

> supplies some pieces of information that would be useful to someone seeking to target or maximize an industrial chemical release. The risk assessment noted that information such as the population that could be affected, the distance that a plume of chemical could radiate, and the types of buildings and landmarks in the local area are precisely the type of information that would be of interest to a terrorist seeking to maximize the effect of an industrial chemical attack. Thus, even if OCA information does not provide a ''roadmap'' for terrorists or all of the necessary information for an attack, it still provides crucial pieces of information that would increase the risk of terrorist or other criminal activity.[75]

In addressing the completed assessments of disclosing RMP information for both the increased risks of terrorist and other criminal activity, and the incentives created through public disclosure, EPA further explained:

> After considering the comments received, we have sought to craft a final rule that meets CSISSFRRA's requirements and reflects consideration of both assessments' findings. CSISSFRRA's requirements include providing any member of the public with access to paper copies of OCA information for a ''limited number'' of facilities (CAA section 112(r)(7)(H)(ii)(II)(aa)) and other access ''as appropriate'' (CAA section 112(r)(7)(H)(ii)(II)(bb)). The risk assessment concluded that posting certain portions of OCA information on the Internet would increase the risk that terrorists or other criminals will attempt to cause an industrial chemical release in the United States. Easy access to OCA information would assist someone seeking to identify the most lethal potential targets from among the 15,000 facilities that have submitted OCA information. The benefits assessment, however, concluded that public disclosure of OCA information would likely lead to a significant reduction in the number and severity of accidental chemical releases. Widespread access to OCA information would serve the functions Congress originally intended in enacting the CAA and requiring the collection of OCA information to inform members of the public of potential environmental hazards and to allow them to participate in decisions that affect their lives and communities.
>
> While chemical accidents take a significant toll on life, property, and the environment each year, we believe that the property damage, personal injuries, and loss of life resulting from a single, successful terrorist attack on a chemical facility could be considerable and would likely cause more damage than would many accidental chemical releases. We therefore have attempted to balance those concerns by making as much OCA information as appropriate available online, but not posting the information that the risk assessment found would, if

[74] 42 U.S.C. § 7412(r)(7)(H)(ii).
[75] 65 Fed. Reg. at 48,112.

> disseminated without restriction, pose a significant risk for terrorist or criminal purposes. Although the Internet provides a tremendous benefit by offering people easy access to a wealth of information, we also recognize that it provides a new means for criminals and terrorists to carry out traditional criminal activities. The final rule provides several means for individuals to obtain OCA information not only for facilities within their community but also for a sufficient number of facilities located elsewhere, thereby enabling individuals to compare facilities' safety and prevention measures and records.[76]

EPA went a step further in 2004 when it amended the RMP regulations to remove the requirement to include OCA information in the RMP executive summary.[77]

In addition, other federal agencies, such as the Department of Homeland Security (DHS), have also focused on protecting sensitive information. For example, facilities regulated under DHS's Chemical Facility Anti-Terrorism Standards (6 C.F.R. Part 27) are required to maintain the confidentiality of "Chemical-terrorism Vulnerability Information or CVI."[78]

With respect to the disclosure of incident investigations and compliance audits, EPA acknowledged industry concern over the disclosure of such information in its response to comments of the initial RMP regulation:

> EPA notes that although the final rule contains incident investigations and compliance audit provisions, the RMP does not require full disclosure of these accident investigations and audit reports in the RMP. The Agency recognizes the public's interest regarding this information, however, EPA must consider the sensitivity of these data. The Agency believes sensitive information should remain on-site and available to EPA and the implementing agency for review and auditing purposes. Because the purpose of the audits and investigations is to assist the source in identifying and addressing problems, it is important that the source do as thorough a review as possible, without concern for the use that might be made of the information by others. If these reports were made public, it is likely that many sources would not include any information that could be used against the source and, therefore, might produce reports that were of little use to anyone. EPA does, however, require information on accidents in the five-year accident history. Nothing in the risk management program rule prevents the public from requesting this information. Further, this information may be subject to discovery in the course of a lawsuit.[79]

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[76] 65 Fed. Reg. at 48,126-27 (emphasis added).

[77] 69 Fed. Reg. 18,819, 18,824 (Apr. 9, 2004) ("The Agency continues to believe that the requirement for briefly describing OCA in executive summaries should be removed in the face of ongoing concerns about the potential misuse of such information by terrorists, particularly if the information can be easily and anonymously accessed.").

[78] 6 C.F.R. § 27.400.

[79] EPA, *Risk Management Plan Rule: Summary and Response to Comments, Vol.1*, at 6-78 (May 24, 1996) (emphasis added).

The Proposed Rule would require facilities to disclose the very information EPA has previously withheld from disclosure. EPA has not provided a compelling reason to change course now. Further, the original CSISSFRRA assessments analyzing risk of terrorist or other criminal activity have not been updated since 2000 even though new threats and criminal strategies have likely developed. Accordingly, OMB must disapprove the ICR to ensure the safety and security of the industry and the general public is maintained, particularly in light of new and evolving domestic security threats and the ability of terrorists and criminals to access facility information and optimize the harm they can plan and execute.

V. To the Extent that EPA Disagrees that Its Proposal Imposes the Costs, Burdens, CBI, Security, and Privacy Concerns Discussed Above, Any Final Rule Must Include Regulatory Revisions from the Proposal or Explicit Clarifications as to the Extent of the Burdens and to Eliminate the Concerns.

The Proposed Rule imposes significant new requirements on RMP-regulated facilities. As written, certain interpretations of the proposed requirements would impose costs so significant and at such a greater expense than EPA estimates, that CSAG has concerns EPA has written the proposal in a way other than it intended. For example, for third party audit costs to be as low as EPA estimates, the proposed requirement must be a simple check-the-box audit rather than a comprehensive, deep-dive into each covered process. If, in fact, EPA intends to require a check-the box audit, CSAG sees little or no value in such a requirement even at the EPA-estimated expense. EPA should clarify the proposed regulatory language to comport with its estimated costs, or in the alternative, should revise the cost estimate to reflect the significant burden imposed when a comprehensive audit of each covered process is required.

With respect to incident investigation and root cause analysis, a similar issue is raised. EPA has proposed two triggers for incident investigations and root cause analyses, both of which are not clearly explained. For example, in the preamble, EPA asserts that the definition of catastrophic release is being revised to be consistent with/have the same meaning as those incidents required to be reported in the five-year accident history.[80] A closer look at both definitions, however, indicates that the two are not identical. Indeed, EPA has significantly broadened the definition of catastrophic release by including onsite impacts as well as offsite property damage. This lack of clarity could lead to incident investigations and root cause analyses being triggered at a frequency much larger than EPA intended. The same is true with respect to near misses. EPA does not define near miss in the regulation, but does provide specific examples in the preamble. Importantly, EPA provides no examples of what is *not* a near miss. This lack of clarity could lead to a substantial number of incident investigations and root cause analyses, the magnitude of which EPA has drastically undervalued in its burden estimate. Accordingly, EPA should clarify the proposed regulatory language to comport with its estimated costs, or in the alternative, revise the cost estimate to reflect the significant burden imposed when a facility is required to conduct an incident investigation and root cause analysis with every incident that meets the broadened definition of catastrophic release or near miss, which will at the very least now include all incidents on the facility's five-year accident history inventory.

[80] 81 Fed. Reg. at 13,647.

VI. EPA's Certification of Compliance with OMB Regulations Is Inaccurate.

Pursuant to OMB regulations, EPA submitted the following certification affirming that it had met all of the following topics: [81]

View ICR - Agency Submission

OMB Control No:
ICR Reference No: 201602-2050-003
Status: Received in OIRA
Previous ICR Reference No:
Agency/Subagency: EPA/SWER
Agency Tracking No: 2537.01
Title: Accidental Release Prevention Requirements: Risk Management Program Modernization Under the Clean Air Act (CAA), Section 112(r)(7) (Proposed Rule)
Type of Information Collection: New collection (Request for a new OMB Control Number)
Common Form ICR: No
Type of Review Request: Regular
Date Submitted to OIRA: 03/14/2016

	Requested	Previously Approved
Expiration Date	36 Months From Approved	
Responses	64,860	0
Time Burden (Hours)	623,969	0
Cost Burden (Dollars)	4,303,435	0

On behalf of this Federal agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9 and the related provisions of 5 CFR 1320.8(b)(3).

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

- ☑ (a) It is necessary for the proper performance of agency functions;
- ☑ (b) It avoids unnecessary duplication;
- ☑ (c) It reduces burden on small entities;
- ☑ (d) It uses plain, coherent, and unambiguous language that is understandable to respondents;
- ☑ (e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;
- ☑ (f) It indicates the retention periods for recordkeeping requirements;
- ☑ (g) It informs respondents of the information called for under 5 CFR 1320.8 (b)(3) about:
  - (i) Why the information is being collected;
  - (ii) Use of information;
  - (iii) Burden estimate;
  - (iv) Nature of response (voluntary, required for a benefit, or mandatory);
  - (v) Nature and extent of confidentiality; and
  - (vi) Need to display currently valid OMB control number;
- ☑ (h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected.
- ☑ (i) It uses effective and efficient statistical survey methodology (if applicable); and
- ☑ (j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of these provisions, identify the item by leaving the box unchecked and explain the reason in the Supporting Statement.

Certification Date: 03/14/2016

In light of the numerous burden inaccuracies, duplication of existing requirements, lack of necessity, and multiple ambiguities in the regulatory language that have been pointed out above, EPA must reconsider its prior decision to certify that its information request satisfied OMB requirements. For these same reasons, OMB has no choice but to disapprove the ICR.

VII. Conclusion

CSAG respectfully requests that OMB independently exercise its judgment regarding the justification for the substantially increased burdens and obligations in light of the PRA, including whether EPA has satisfied its obligations. Given the issues raised above, OMB should (1) disapprove the ICR or (2) require EPA to revise either (a) the Proposed Rule to match the ICR or (b) the ICR to match the Proposed Rule.

[81] *See* Office of Info. and Regulatory Affairs, Reginfo.gov, *View ICR-Agency Submission*, http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201602-2050-003 (last visited Apr. 12, 2016).

Attachment 3

Executive Order 12866 Meeting Regarding Modernization of the Accidental Release Prevention Regulations under Clean Air Act, 2050-AG82

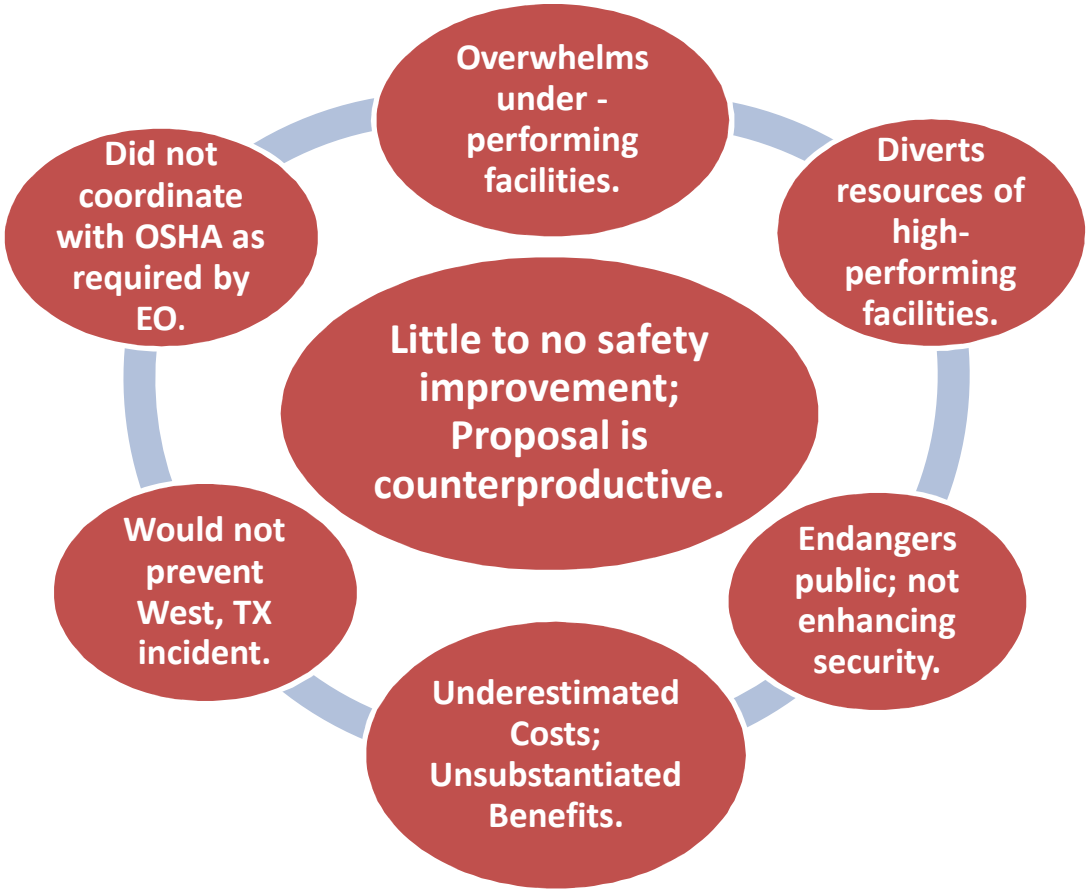
CHEMICAL SAFETY ADVOCACY GROUP

NOVEMBER 21, 2016

AGENDA

1. Requests to the Office of Information and Regulatory Affairs (OIRA)
2. Security Implications of Proposed Information Disclosure
3. Inadequate Consideration of Costs
   a) Third Party Audits
   b) Incident Investigation and Root Cause Analysis
   c) Safer Technology and Alternatives Analysis (STAA)
   d) Burdens on Local Economies
4. Ineffective Proposal
5. Closing Comments/Questions

STOP & RETURN



Proposal Will Not Achieve EPA's Stated Objectives.

OMB Cannot Approve Without Changes

- **Disclosure requirements create security risks.**
  - Delete Proposed § 68.205 and § 68.210.
- **On other provisions, costs can be reduced without impacting desired outcomes:**
  - Scale back triggers for third party audit;
  - Scale back triggers for IIRCA;
  - Scale back substantive requirements such as removal of the STAA requirements.

Extensive Cost Data from Commenters Must Be Considered and Scope of Rule Changed.

SECURITY CONCERNS: PROPOSED § 68.205

LEPCs: No restrictions. No protections. No controls. *ALL* public.

Audits:
Compliance Audit Findings/Responses

Incidents:
Details on Factors Contributing to Incidents (releases/near misses)

Personal Information:
Employees who Investigate Incidents

Safer Technology Alternatives Analysis (STAA):
Identification of Risk

Exercises:
Scenarios, "Lessons Learned," Improvement Recommendations

OMB Must listen to Agencies with Expertise: DHS, DOJ, FBI. EPA Lacks Security Expertise—No Deference.

SECURITY CONCERNS: PROPOSED § 68.210

- Anyone can obtain info from the LEPCs.
- Much info directly available to the public.
- Public Websites—information available anonymously.
  - Information re root causes of accidents;
  - Lessons learned and improvement recommendations of tabletop/field exercises;
  - Other emergency response information.
- Proposed action puts communities at risk.

Roadmap to Vulnerabilities:

LEPCs Don't Need It. Law Enforcement Opposes It. Terrorists Want It. EPA Has Not Addressed It.

INADEQUATE CONSIDERATION OF COSTS

Industry Cost Data Ignored

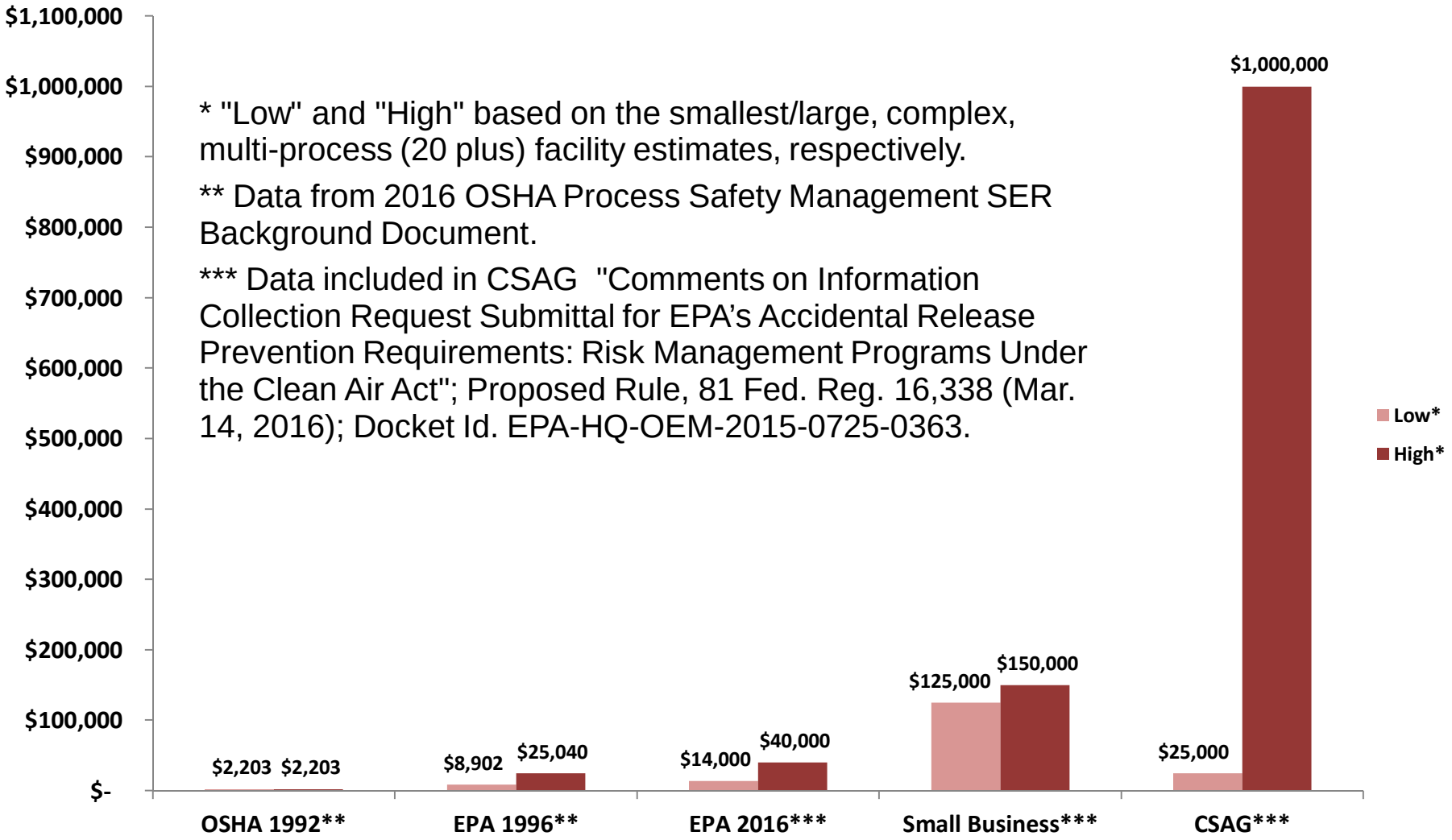
- *CSAG/OMB Pre-proposal Meeting*: February 2016
- *CSAG ICR Comments*: April 2016
- *CSAG Proposed Rule Comments*: May 2016

Regulatory Expansion ➡ Substantial Burden

- *Third Party Audits (TPA)*
- *Incident Investigation and Root Cause Analysis (IIRCA)*
- *Safer Technology Alternatives Analysis (STAA)*

Costs of Proposal Vastly Underestimated.

EPA Audit Costs Disconnected from Reality



EPA Costs Way Off for Investigations

Incident Investigation/Root Cause Cost Estimates for Complex Program 3 Facility

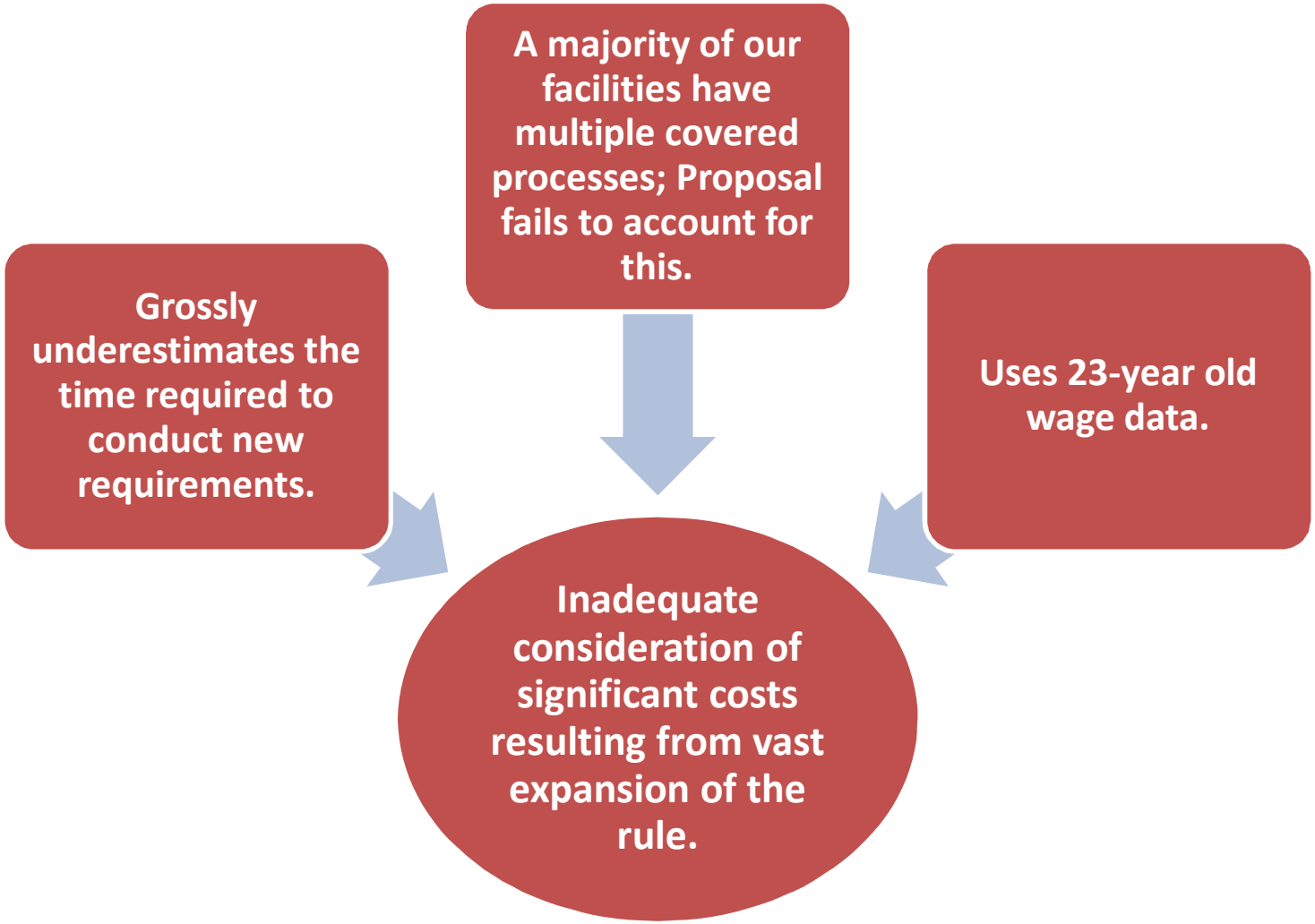
RIA Estimate

- RIA estimates a total of 48 hours of company time (engineers only) devoted to investigation. *RIA at 40*.
- RIA estimates a total facility cost of $3,658 per incident. *RIA at 40*.

Reality

- CSAG members report in-house time of **42-223 hours** between management, engineers, attorneys, and production staff.
- CSAG members estimate total facility cost of **$3,000-$42,000 per incident**. Some incidents may have significantly higher costs.

FAULTY METHODOLOGY → USELESS ESTIMATES



STAA Requirement/Cost Estimates Not Explained

- Proposal fails to explain:
  - How to conduct initial and feasibility analyses.
    - Requires significant work and documentation.
  - Methodology for generating cost estimates.
- CSAG members could not replicate EPA results and the Agency's results do match member experience.
- Safety benefits speculative, at best, especially for existing processes.
- Repeating every 5 years is wasteful.

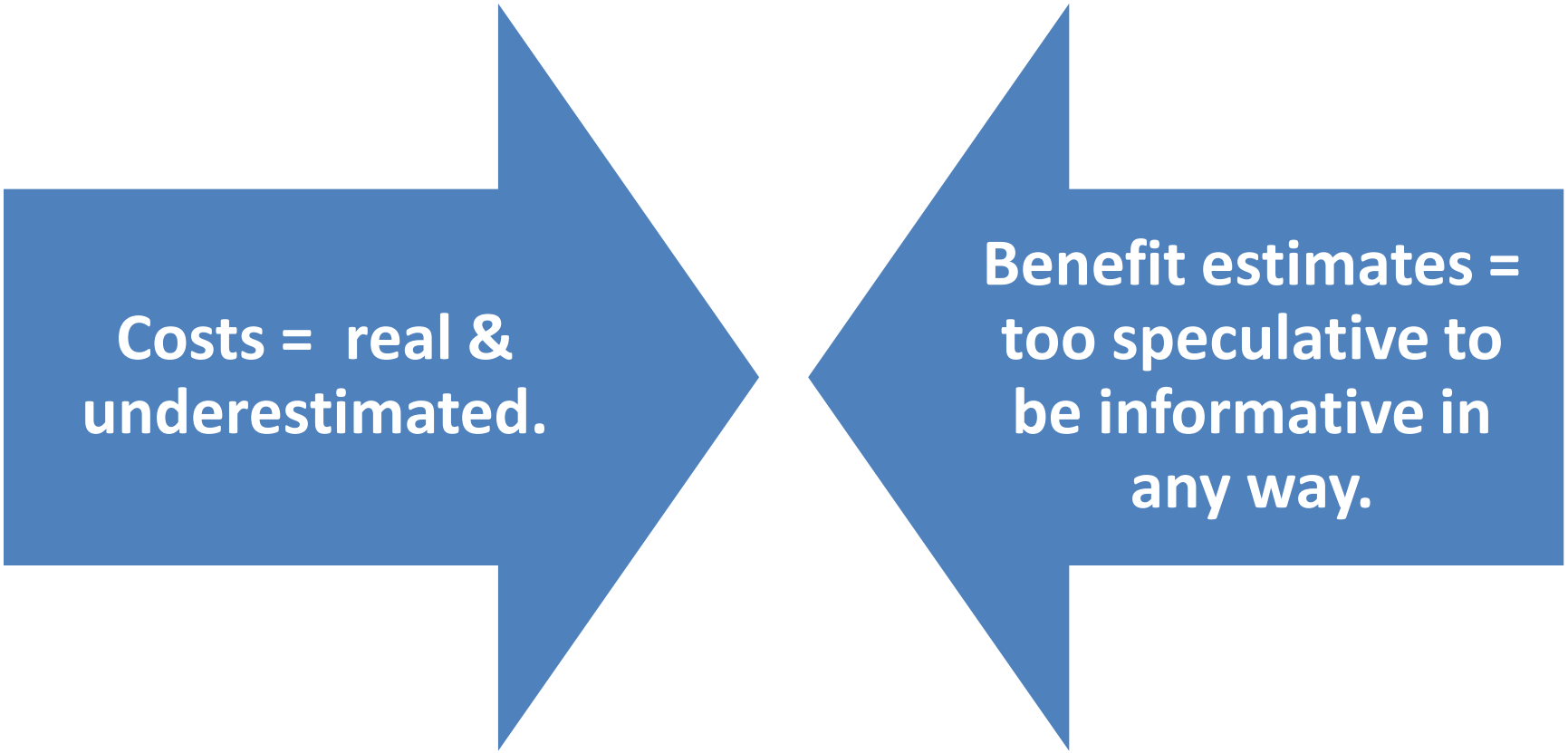
Design Phase = Only Meaningful Opportunity to Improve Safety Performance through STAA.

EMERGENCY PLANNING BURDENS ON LOCAL ECONOMIES

- **New exercises overly-burden emergency responders, many of whom are volunteers.**
  - *Notification Mechanism Exercises*: Annually.
  - *Tabletop Exercises*: Annually.
  - *Field Exercises*: Every 5 years and within 1 year of reportable release.
- **Burden multiplied by # of plants/ jurisdiction.**

Significant Increased Costs on Local Entities; Unfunded Mandate.

Costs/Benefits Estimate: Lacks Sound Basis



STOP & RETURN

- **Disclosure provisions increase security risk/create criminal threat.**
  - Delete Proposed § 68.205 and § 68.210.
  - OMB must listen to agencies with expertise in the area (DHS, DOJ, FBI).
  - EPA lacks this expertise.
- **Other provisions very costly; no identified benefit.**
  - Proposal irrationally assumes rule prevents all accidents.
  - Violates OMB procedures.
  - Defies logic.
- **Failure to coordinate with OSHA as required by EO 13650.**

Flaws Are So Significant and Risk So High that Returning Rule to EPA Is the Appropriate Action for OMB to Take.

BACKUP SLIDES—EPA RIA ESTIMATES

EPA's RIA Assumptions for TPAs

Exhibit 4-2: Hourly Assumptions and Unit Costs for Hiring Third-party Auditors

Facility Type	Total Hours for Contracting Process			Facility Labor Cost	Auditor Fee	Total Facility Cost
	Management	Attorneys	Engineers			
Simple w/ 0-19 FTEs	32	4	0	$2,807	$15,000	$17,807
Simple w/ 20-99 FTEs	44	4	18	$4,701	$15,000	$19,701
Simple w/ 100+ FTEs	30	4	56	$5,749	$15,000	$20,749
Complex w/ 0-19 FTEs	32	4	0	$3,642	$40,000	$43,642
Complex w/ 20-99 FTEs	44	4	18	$6,209	$40,000	$46,209
Complex w/ 100+ FTEs	30	4	56	$7,710	$40,000	$47,710
Small Government	30	0	25	$3,630	$15,000	$18,630
Large Government	60	0	39	$8,951	$40,000	$48,951

RIA at 39.

EPA's RIA Assumptions for Investigations/ Root Cause Analysis

Exhibit 4-3: Unit Cost for Root Cause Analysis and Near Miss Investigation

	Managers	Engineers	Production	Other Costs	Facility Cost
Near Miss - simple	6	4	4	$1,000	$1,785
Near Miss - complex	12	36	24		$4,937
Accidents - simple	0	4	4	$1,000	$1,335
Accidents - complex	0	48	0		$3,658

RIA at 40.

EPA's RIA Assumptions for STAA

Exhibit 4-4: Hourly Assumptions and Unit Costs for STAA

Sector	Labor Hours			Facility Cost
	Corporate Manager	Engineer	Consultant	
Initial Analysis				
Large facilities NAICS 324-325		608		$40,240
NAICS 322, Small/Medium 324, 325		252		$13,109
Other Manufacturers, Refrigeration Systems		100	$9,808	$17,429
Water/Gas Plants/Utilities		36	$6,000	$8,744
Storage Facilities		36	$6,000	$8,744
Feasibility Analysis				
Large facilities NAICS 324-325	24	80		$8,514
NAICS 322, Small/Medium 324, 325	16	80	$8,000	$15,708
Other Manufacturers	16	32	$8,000	$12,050
Water/Gas Plants/Utilities and Refrigeration Systems	8	32	$5,200	$8,444
Storage Facilities	8	32		$3,244

RIA at 42.

BACKUP SLIDES—BENEFITS AND COSTS

Benefit Estimates Are Too Speculative to Be Informative On Any Likely Benefits

- As EPA notes in the proposed rule, the Agency is "unable to quantify what specific reductions may occur as a result of these proposed revisions."

  Proposed Rule, 81 Fed. Reg. at 13,642.

- EPA also confirms in the RIA that it "had no data to project the specific impact of each proposed rule element on the probability and magnitude of chemical accidents. Indeed, the frequency and severity of the accidents themselves would be challenging to predict."

  RIA at 8.

Benefit Estimates Are Too Speculative to Be Informative on Any Likely Benefits

- As a result, EPA's analysis summarizing historical accidents over the past 10-years may have only a slight relevance to the future, a fact that EPA recognizes when it states that it expects that "some portion of future damages would be prevented through implementation of a final rule."
  Proposed Rule, 81 Fed. Reg. at 13,694.
- There is no way to tell whether that "portion" will be large or small. In fact, there are good reasons to believe that it may be small.
- Given this significant uncertainty, all of the benefits EPA references, such as reduced fatalities, reduced property damage, fewer evacuations, *etc*. are all equally speculative and uncertain. It is very possible that the net effect of the rule will be no greater than improved enforcement of existing regulations.

The Benefit Estimates Incorrectly Assume…

- Future accidents will be similar to past accidents in cause, nature and scope.
- Industry has taken no additional steps on its own over the past 10 years to reduce risk and will not do so in the future without this rule despite the significant cost to industry.
- States, such as California, have taken no additional action.
- The federal government has not and will not undertake any actions to improve enforcement of existing regulations.

The Benefit Estimates Incorrectly Assume…

- OSHA updates and enforcement efforts over the past 10 years have had no incremental benefit on industry practices. For instance in 2015, OSHA issued a new interpretation of its retail exemption that significantly expanded the number of facilities that are now subject to OSHA's PSM standard. As EPA explains:

  "In July 2015, OSHA issued a new interpretation of its retail exemption, a policy that exempted certain employers under OSHA's 1992 definition of 'retail facility.' *Prior to this change, most facilities that classified themselves as agricultural chemical distributors and many other wholesalers listed themselves as P2, because they were exempt from the OSHA PSM standard. The effect of the change in interpretation will make all of these facilities subject to OSHA's PSM standard and, therefore, subject to Program 3 of the RMP rule.* To take that into account for this RIA, EPA has reclassified all P2 facilities that listed themselves in NAICS 11, 12, 15, 424 (wholesalers), and 493 (warehouses) as P3. As a consequence almost 85 percent of all RMP facilities (10,628) are now subject to P3 (See Exhibit 3-6)."

  RIA at 30 (emphasis added).

The Benefit Estimates Incorrectly Assume…

- Technology relating to accident prevention has and will remain static -- i.e., technology innovations to better assess and monitor structural integrity, temperature, leaks, including real time digital monitoring systems do not occur.
- The proposed rule does not create additional technical risks by imposing requirements that: (1) shift resources away from safety enhancing uses; or (2) have unforeseen impacts on plant operation and worker safety.
- The continual replacement of aging capital equipment with more modern designs will have no impact on plant safety.
- Older facilities have not shut down. As EPA notes in the RIA, the "numbers in any category are EPA's best estimate, they should be viewed as approximations." *RIA at 35*.

Reasons Why EPA May Be Underestimating Costs

- ***Investment Loss in New Facilities and Expansions at Existing Units***: EPA's analysis fails to evaluate how the rule will affect new plant investments and expansions at existing facilities. Given the complexity of the rule's requirements and the uncertainty over whether they can be implemented (regardless of cost) may lead companies to invest capital in other countries. The loss in private and public revenues from these projects, and the loss of jobs from these avoided investments could significantly overwhelm EPA's current cost estimates.
- ***Negative Impact on Small Business Growth*****:** Given the complexity of the rule and challenge it imposes on small businesses, many small businesses may simply not invest. These engines of growth could have larger consequences for the economy, jobs and wages that are not assessed in EPA's narrow analysis.

Reasons Why EPA May Be Underestimating Costs

- ***Opportunity Cost of Financial and Human Capital*:** EPA's analysis also fails to adequately assess the opportunity cost of the financial and human capital required to meet these regulations. Investments that expand capacity and/or improve efficiency and US competitiveness may be sidelined due to the demand of meeting the proposed rules.
- ***Inadequate Agency Expertise Could Lead to Regulatory Delays, Uncertainty and Higher Costs Not Addressed in the RIA*:** The RIA simply assumes that EPA and other government officials can develop the expertise necessary to make ISA/STAA judgments that cover the breathe and complexity of the many different industries and processes covered by the rule. Inadequate technical experience can lead to prolonged conflicts, delays, and regulatory decisions that may have unforeseen negative consequences.

Reasons Why EPA May Be Underestimating Costs

- ***Labor Costs*:** EPA's weighted wage rates do not account for local supply and demand forces that may bid up the price of certain experts. EPA also under predicts the number of hours it will take experts to conduct necessary tasks. For instance on page 37 of the RIA, EPA states that it assumes that it would take only 2 hours of management time at P1 and P2 complex facilities and only 4 hours of management time at PE complex facilities. Given the complexity of EPA's proposal determining its potential impact on any given facility is likely to take much longer.

Reasons Why EPA May Be Underestimating Costs

- ***Low-Cost Options Not Fully Assessed***: EPA did not fully analyze other low-cost options. For instance, EPA proposes to limit the STAA requirements to P3 processes in three sectors that account for 49 percent of all RMP reportable accidents. *RIA at 28*.
  - EPA does not explain why further limitations were not evaluated, especially given that EPA acknowledges the significant benefit uncertainties.
- Similarly, EPA does not evaluate lower cost options for third party audits that might limit the requirement to just one sector, or sectors in P3, or not at all.
- Limiting the number of facilities that would be subject to STAA or third party audits would provide time to evaluate their effectiveness and the adequacy of the labor supply market.

Reasons Why EPA May Be Underestimating Costs

- ***Large Costs Omitted From Analysis:*** EPA's analysis recognizes that a significant source of uncertainty in its cost analysis revolves around potential actions regulated entities may take in response to third-party audits, incident investigation/root cause analysis, and STAA.
- As EPA notes, "These provisions can lead to a wide range of outcomes, and therefore costs, if and when the owner acts upon the findings and/or recommendations generated by the audit, investigation, or analysis."

  RIA at 78.

Attachment 4

DECLARATION OF SHANNON S. BROOME

I, Shannon S. Broome, declare and state as follows:

1. I am an attorney and serve as legal counsel for the Chemical Safety Advocacy Group (CSAG), a coalition of companies in the refining, oil and gas, chemicals, and general manufacturing sectors that are subject to the U.S. Environmental Protection Agency's (EPA) Risk Management Program (RMP) regulations at 40 C.F.R. Part 68. This declaration is submitted in support of CSAG's Petition for Reconsideration and Stay requesting reconsideration of EPA's nationally applicable final action entitled *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule*, 82 Fed. Reg. 4594 (Jan. 13, 2017), Docket No. EPA-HQ-OEM-2015-0725 (RMP Rule or the rule). Unless otherwise stated, I have personal knowledge of the matters stated herein and could and would testify competently thereto.

2. CSAG member companies will have to take immediate steps to comply with the extensive new requirements in the RMP Rule once it becomes effective on March 21, 2017. As an example, facilities will need to upgrade their recordkeeping and reporting systems and to develop completely new processes to ensure compliance with the rule's provisions.

3. The third party audit provisions require that auditors have independence from a company for a period of two years preceding an audit and after an audit. To ensure that auditors are available that also meet the competency requirements, companies will need to be evaluating the pool of auditors available that are familiar with the processes in their plants and factories and ensure that they do not retain those companies for compliance support or project development should the company trigger a third party audit. Because there are a limited number of qualified auditors, and because, once triggered, an audit must be completed within 12 months, companies are concerned about the ability to comply with this requirement in the regulations.

4. EPA's addition of the term "each covered process" to 40 C.F.R. §§ 68.58 and 68.79 also creates immediate costs and compliance obligations for facilities that are scheduled to

conduct a triennial compliance audit during the period of reconsideration, which could impose significant costs with no demonstrated benefit.

5. The requirement to incorporate a Safer Technology and Alternatives Analysis (STAA) into each facility's Process Hazard Analysis (PHA) (40 C.F.R. § 68.67(c)(8)) will also require immediate expenditures and commitment of resources. Undertaking this complex analysis will require a multi-year effort to meet the compliance deadline of March 15, 2021. *See* 40 C.F.R. § 68.10(d)(3).

6. There is no commonly accepted methodology for conducting an STAA, and EPA has provided no guidance on its expectations for compliance with this requirement. Complicating matters for companies is that EPA has stated its intent to develop such guidance in the future. This means that companies that begin their STAA work (as they must, in light of EPA's timeline for compliance) are at risk of their work needing to be redone based on EPA's potential future interpretations of the regulatory requirements. Such an approach creates uncertainty and means the regulated entities will not know what the requirements are that actually apply at the time they must conduct compliance activities. Thus the rule creates immediate harm.

7. The requirements to begin emergency response coordination activities with local emergency response and planning organizations (40 C.F.R. § 68.93) and to conduct regular emergency response exercises (40 C.F.R. § 68.96) will also require significant commitments of personnel time and facility resources immediately upon becoming effective. Complying with such requirements will also burden the resources of local responders and LEPCs.

8. CSAG is also petitioning for judicial review in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). If the rule is not stayed while these matters are pending, CSAG members will be faced with the unjust dilemma of either investing in compliance despite the fact that the rule may be substantially revised or even rescinded, or risking exposure to enforcement and penalties for non-compliance with regulatory requirements that are subject to change.

9. A stay of the rule would address the above and save CSAG members from significant, irreparable harm and waste of resources.

I certify under penalty of perjury that the foregoing is true and correct.

Dated this 13th day of March, 2017, in San Francisco, California.

By_____
Shannon S. Broome

Attachment 5

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SHANNON S. BROOME
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September 15, 2016

The Honorable Mathy Stanislaus
Assistant Administrator
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U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 5101T
Washington, DC 20460

Re: Follow up on Requests for Meeting

Dear Assistant Administrator Stanislaus:

I am writing on behalf of the Chemical Safety Advocacy Group (CSAG)[1] to ask you to reconsider the decision to deny the meeting requests of stakeholders who submitted significant and meaningful comments regarding the proposed amendments to the Risk Management Program (RMP), one of the most impactful rules proposed by this Administration.[2] This decision runs counter to core principles of the Administration for robust dialogue with stakeholders and the historical practices of EPA. Indeed, Executive Order 13650 directs EPA to work with regulated entities by including in its purpose statement that "additional measures can be taken by executive departments and agencies (agencies) with regulatory authority to further improve chemical facility safety and security *in coordination with owners and operators*."[3] Even more important, closing off communications after the close of the comment period runs counter to achieving a rule consistent with the law, science, and sound policy, and in particular, reducing risk and not exacerbating it. This approach is also inconsistent with your own past practice, which has been to bridge gaps among stakeholder perspectives on a proposed EPA action to truly understand the concerns *and address them* before finalizing a rule.

[1] CSAG focuses on risk management planning, general duty, and process safety issues affecting our industrial companies, with a primary goal of achieving implementable programs for safe operations and compliance. CSAG has actively participated in EPA's RMP rulemaking process, including comments on EPA's 2014 Request for Information, stakeholder discussions, and comments on the proposed rulemaking.
[2] EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule*, 81 Fed. Reg. 13,638 (Mar. 14, 2016), 40 C.F.R. Part 68.
[3] Executive Order 13650, *Improving Chemical Facility Safety and Security*, § 1, Aug. 1, 2013 (emphasis added).

We write today knowing that on July 27, 2016, eleven state attorneys general wrote the attached letter to EPA raising significant concerns regarding potential dangers created by the Agency's proposed rule if it were finalized, and we have not seen that this letter has been acknowledged by EPA as yet or any response the Agency might have sent. We understand the natural tendency to try to finalize actions already in progress, like the RMP proposed amendments, given the approaching end of the Administration. That said, we can think of no justification for finalizing a rule of this magnitude with the significant changes needed to be made given that the comment period only closed in May. This is a complicated rule with interdependent provisions, such that a revision of one necessarily changes the consequences and effect of several others. The apparent fast-track promulgation currently underway is in no one's interest and is likely to lead to unintended negative consequences for the facilities, compliance capability, and the public. It will also further delay EPA's promise of chemical safety because of inevitable and well-founded legal challenges.

It is incumbent on EPA to engage the public, including the affected industry, who submitted detailed recommendations for improving the proposal. In our view, EPA cannot proceed at its intended pace and still meet its obligations under the Administrative Procedure Act for reasoned decision-making, Clean Air Act Section 112(r)'s obligation to issue "reasonable regulations" and "appropriate guidance," and the Obama Administration EPA's repeated public commitments to public participation, transparency, and sound science in rulemaking.

CSAG has devoted significant resources to provide the Agency information on risk management plan issues and the real-world implications of the proposed rules for plants, with numerous examples and practical input to improve this regulation. Translating these discussions into regulatory text is always a challenge, which is why it is understandable that substantial changes were needed to the proposed regulations. CSAG's comments included extensive, constructive information to aid the Agency in achieving a workable and reasonable (as is required by the statute) final rule and also noted several aspects of the proposed rule language that in fact would run counter to EPA's goals.

As you know, I reached out immediately after the close of the comment period to try to arrange a meeting to discuss the complex issues addressed in our comments. You declined that meeting. I contacted you again in June, asking you to reconsider, and again was declined. I have called the contacts listed in the *Federal Register* as well, again to no avail. Thus, it appears that EPA has decided that there will not be further dialogue to understand and reconcile the comments filed on this rule, even though it is clear, at least to us, that the final rule would benefit from such discussions. We stand ready to assist EPA as it works on regulatory language and makes significant policy choices to help ensure that your goals for the rule are in fact advanced.

As Administrator Jackson made clear in her well-publicized April 23, 2009 memorandum to all EPA employees: "In all its programs, EPA will provide for the *fullest*

possible public participation in decision-making."[4] She also affirmed EPA's commitment to robust dialogue in rulemaking, stating that "[r]obust dialogue with the public enhances the quality of our decisions."[5] She directed EPA offices "to reach out as broadly as possible for the views of interested parties."[6]

These principles and commitments do not cease to apply merely because the end of the Administration is approaching. If the true goal is to achieve the best possible rule, dialogue must continue after the close of the comment period—just as it has in other EPA landmark rules, like the Clean Power Plan. We note that if EPA engaged in this process, it would learn that a diverse range of stakeholders also raised points that CSAG raised and on which CSAG provided detailed, specific suggestions for remedying the concerns through modifications to the Agency's proposal:[7]

Compliance Auditing

- Several public entities echoed CSAG's concern that expansive qualification and impartiality requirements for auditors is burdensome and will limit the pool of available auditors.
- Several public entities included their own comment, like CSAG's, that there is no credible evidence to support the proposition that third party RMP and process safety audits are more robust than those conducted by internal company auditors.

Incident Investigation and Root Cause Analysis

- Public entities stated the very concern that CSAG noted that EPA's revised definition of catastrophic release is overbroad.
- Public entities stated views (consistent with CSAG's) that facilities should have the discretion to determine which near misses to investigate. Even Contra Costa County Health Services (CCHS) seems to agree, commenting that facilities often have their own near miss reporting programs and facilities should be *encouraged* to report and investigate all near misses. CCHS also noted that California's incident investigation requirement is limited to actual incidents (no actual near miss investigation requirement).

Local Coordination

- Several public entities noted that the requirement to conduct exercises is expensive, burdensome, and results in an unfunded mandate.
- Public entities explicitly recognized that the emergency response burden should not rest solely on facilities— The National Association of SARA Title III Program Officials (NASTTPO) (it is not a facility's responsibility to ensure resources and capabilities are in place), TVA (current rule appropriately identifies division of responsibility between Local

[4] Mem. from Lisa P. Jackson, Administrator, EPA, to All EPA Employees, *Transparency in EPA's Operations* (Apr. 23, 2009) (emphasis added).
[5] *Id.*
[6] *Id.*
[7] The bulleted themes listed are based on a review of comments submitted to the docket.

Emergency Planning Committees (LEPCs) and facility), US SBA (unnecessary delegation of its responsibility to facility), just as CSAG explained.

LEPC Disclosure

- Public entities echoed CSAG's concern that security sensitive information should not be released.
- Public entities stated that the requirements include nonessential information, just as CSAG pointed out in its comments—NASTTPO (should only require disclosure of information LEPCs deem useful), NYC (should only disclose information directly related to entities' ability to safely and effectively respond to incidents), TVA (required disclosure includes nonessential information—unlikely to make LEPCs more functional or more effective).

Public Disclosure

- Public entities stated that security sensitive information should not be disclosed and that security controls are needed, making the same points that CSAG made in its comments.

Safer Technology and Alternatives Analysis (STAA)

- Public entities stated that EPA should limit STAA to the design process and keep it out of the Process Hazard Analysis (PHA) process where it is unduly burdensome and contrary to safety improvements, which is also consistent with CSAG comments.

The fact that industry and public entities agree on so many of these key issues is evidence that EPA needs to take the time necessary to fully evaluate all comments submitted, continue the dialogue, and make critical changes to the proposed rule. EPA received many comments, and a continuation of EPA's pre-proposal engagement with stakeholders will only serve to better this rule. As noted, CSAG, a group focused on risk management planning/process safety issues, has made available to EPA the process safety experts who actually implement these programs at plants. CSAG has given EPA constructive and practical advice about what is and is not productive in promoting the aims of the RMP rule. These contributions were evident in the proposed rule and we are certain that continued engagement will improve the final rule and is necessary at this critical stage.

We are available to meet with you anytime this month or next and look forward to discussing this rulemaking further.

Sincerely,

Shannon S. Broome

Attachment

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

July 27, 2016

The Honorable Gina McCarthy
Administrator, U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: Docket EPA-HQ-OEM-2015-0725-0001; Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Proposed Rule (RIN 2050-AG82)

Dear Administrator McCarthy,

As the chief legal officers of our states, we write to you to express our objection to your proposed revisions to the above-referenced Accidental Release Prevention Requirements, and to express our support for the comments filed on May 3, 2016, by Louisiana Attorney General Jeff Landry and Texas Attorney General Ken Paxton (attached hereto for ease of reference). The concerns raised by Attorneys General Landry and Paxton must be meaningfully addressed prior to finalization of this rule.

The rule potentially covers up to 12,500 facilities in the agriculture, food processing, chemical manufacturing, oil and gas, and water treatment sectors. The safety of these manufacturing, processing and storage facilities should be a priority for us all, but safety encompasses more than preventing accidental releases of chemicals, it also encompasses preventing *intentional* releases caused by bad actors seeking to harm our citizens. Your proposed rule seeks to make readily-available to the public information that you believe might be useful to the public in the event of an accidental release of chemicals. As the federal agencies responsible for national security have warned you, compiling that information and making it easily accessible also aids those who might seek to cause an intentional release for nefarious purposes, by providing those bad actors with information that would help them both select a target and exploit any security vulnerabilities their target might have.

With terrorist attacks becoming an unfortunately common occurrence, security concerns of this sort should be taken seriously, yet it appears your agency has largely dismissed them. We strongly urge

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you to rethink this course. A rule of this sort should prioritize national security and demonstrate an awareness that there are those in this world who seek to do us harm, and who might attempt to use our nation's chemical facilities as a means to do so. The proposed rule fails on this front, and should be withdrawn.

Sincerely,

Scott Pruitt
Oklahoma Attorney General

Derek Schmidt
Kansas Attorney General

Luther Strange
Alabama Attorney General

Adam Paul Laxalt
Nevada Attorney General

Mark Brnovich
Arizona Attorney General

Alan Wilson
South Carolina Attorney General

Leslie Rutledge
Arkansas Attorney General

Sean Reyes
Utah Attorney General

Pamela Jo Bondi
Florida Attorney General

Brad Schimel
Wisconsin Attorney General

Sam Olens
Georgia Attorney General

CERTIFICATE OF SERVICE

A copy of the preceding was sent on March 14, 2017 to the Honorable Scott Pruitt, the Honorable Barry Breen, and the Honorable Kevin Minoli *via* certified mail and email.

The Honorable Scott Pruitt
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The Honorable Barry Breen
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Shannon S. Broome