Hogan Lovells

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

February 28, 2017

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

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

RE: Petition for Reconsideration and Request for Agency Stay Pending Reconsideration and Judicial Review of Final Rule entitled *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*

Dear Administrator Pruitt:

Please find enclosed a petition for reconsideration and request for stay for the U.S. Environmental Protection Agency's final rule, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7), 82 Fed. Reg. 4594, published in the Federal Register on January 13, 2017. This petition and request is filed on behalf of the RMP Coalition, consisting of the American Chemistry Council, the American Forest & Paper Association, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the Utility Air Regulatory Group.

Please contact me with any questions you may have.

Sincerely,

Justin Savage

Partner
justin.savage@hoganlovells.com
D 202.637.5558

cc: Michael Flynn, Acting Deputy Administrator, EPA
John Reeder, Acting Chief of Staff, EPA
Barry Breen, Acting Assistant Administrator, EPA Office of Land and Emergency Management

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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act	)	Docket No. EPA-HQ-OEM-0725

PETITION FOR RECONSIDERATION AND STAY

Pursuant to Section 307(d)(7)(B) of the Clean Air Act ("CAA" or the "Act")[1] and Sections 553 and 705 of the Administrative Procedure Act (the "APA"),[2] the American Chemistry Council ("ACC"), the American Forest & Paper Association ("AF&PA"), the American Fuel & Petrochemical Manufacturers ("AFPM"), the American Petroleum Institute ("API"), the Chamber of Commerce of the United States of America (the "Chamber"), the National Association of Manufacturers ("NAM"), and the Utility Air Regulatory Group ("UARG") (collectively the "Coalition") hereby petition the Administrator of the U.S. Environmental Protection Agency ("EPA" or the "Agency") to reconsider and rescind its final rule entitled *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*, 82 Fed. Reg. 4594 (Jan. 13, 2017) ("RMP rulemaking" or "Final Rule"), and to stay the effective date of the Final Rule.[3]

The Coalition shares EPA's goal of promoting process safety. EPA's data shows that the pre-existing RMP regulation promoted safety, with a significant decline in the rate of accidental releases and incidents in the last twenty years. Unfortunately, the Final Rule undermines safety, creates significant security risks, and does nothing to further prevent criminal acts that threaten facilities, such as the sabotage that led to the tragedy in West, Texas. We stand ready to work

[1] 42 U.S.C. § 7407. EPA promulgated the Final Rule under its authority in Section 112(r) of the CAA to issue rules to prevent, detect, and respond to accidental releases of regulated substances. CAA Section 112(r)(7)(E) provides that regulations or requirements under that subsection are to "be treated as a standard in effect under [CAA Section 112] subsection (d)," which in turn are subject to the rulemaking and review procedures of Section 307(d). Thus, rulemaking and petition requirements of Section 307(d) apply to regulations issued under Section 112(r).
[2] 5 U.S.C. §§ 553(e), 705.
[3] Due to the imminent compliance deadlines for certain requirements in the RMP Rule, the Coalition submits this initial petition today and reserves the right to supplement with additional material.

with EPA, OSHA and other federal stakeholders to find ways to improve chemical process safety, assist local emergency responders in responding to accident releases, and safeguard the communities living around our member companies' facilities.

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

The Coalition submits this Petition on the grounds that the Final Rule was procedurally deficient so as to deprive commenters of effective notice and opportunity to comment; that circumstances changed—and undermined the factual predicate for the rule—when the comment period was nearly over such that it was impracticable to comment on how those circumstances impacted EPA's proposed provisions; and that EPA introduced new provisions or rationales in the Final Rule for which commenters had no notice and which were not a logical outgrowth from what was proposed.

An administrative stay is appropriate and necessary while the Agency considers and addresses the numerous flaws in the Final Rule. Under Section 307(d) of the Act, EPA may grant a 90-day stay pending reconsideration, and we respectfully request that it do so. The Coalition also requests a stay under Section 705 of the APA pending resolution of the petition for review that the Coalition is filing in the U.S. Court of Appeals for the D.C. Circuit challenging the lawfulness of the Final Rule. A stay under APA Section 705 is not subject to the three month limitation that restricts stays under CAA Section 307(d) while petitions for reconsideration are pending, and may be issued by EPA while judicial review is pending if "justice so requires." EPA and the courts have determined that "justice so requires" a stay under APA Section 705 where the party filing the petition for review is likely to succeed on the merits, the party will incur irreparable harm without a stay, other parties will not be harmed by staying the rule, and it is in the public interest to stay the effective date of the rule.

Justice so requires a stay here. The Coalition is likely to prevail on the merits of its challenges to the Final Rule due to its numerous procedural and substantive flaws. Staying the Final Rule will prevent irreparable harm to the Coalition's member companies and will serve the public interest. The Final Rule raises ***significant security concerns*** and compliance issues that will cause irreparable harm to the Coalition members. The Final Rule, for example, compels facilities to make available sensitive information about covered processes that could expose vulnerabilities to terrorists and others who may target refineries, chemical plants and other facilities. Certain provisions, such as the requirement to audit "each covered process" in a facility's compliance audit, impose costly and burdensome obligations on facilities immediately upon the Final Rule becoming effective. The Final Rule should be stayed to grant EPA, the Department of Homeland Security ("DHS"), the Federal Bureau of Investigation ("FBI"), and other relevant agencies the opportunity to engage with stakeholders to discuss appropriate

[4] 42 U.S.C. § 7607(d)(7)(B).

protections to avert potential security risks. Because of imminent deadlines in the rule, the Coalition requests that EPA act as expeditiously as possible.

BACKGROUND

In the wake of the 2013 ammonium nitrate explosion at a fertilizer plant in West, Texas, President Obama issued Executive Order 13650 directing EPA, the Occupational Safety and Health Administration ("OSHA"), and DHS, in connection with other agencies, to collaborate in order to consider changes that could be made to prevent future similar incidents.[5] Executive Order 13650 required EPA to "review the chemical hazards covered by the RMP . . . and determine if the RMP . . . can and should be expanded *to address additional regulated substances and types of hazards*."[6] Once such additional regulated substances and types of hazards were identified, EPA was directed to "develop a plan, including a timeline and resource requirements, to expand, implement, and enforce the RMP . . . *in a manner that addresses the additional regulated substances and types of hazards*."[7]

EPA accordingly issued a Request for Information in July 2014 and subsequently published a proposed rule, entitled *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*, 81 Fed. Reg. 13,638 (Mar. 14, 2016) ("Proposed Rule"), to amend its RMP regulations on March 14, 2016.

Though ostensibly intended to address the Executive Order directive and the West, Texas explosion, EPA instead used this opportunity to significantly expand its authority and increase the burden of the RMP requirements on regulated industries without squarely addressing the conditions giving rise to the West, Texas explosion. For example, the Proposed Rule included provisions that would require facilities use third parties to conduct compliance audits after any reportable release or when an implementing agency required it due to "substantial noncompliance." In connection with this requirement, EPA proposed to severely limit who might

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[5] The government has since determined that the explosion was the result of an intentional criminal act rather than an accidental release. *See* 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] Exec. Order No. 16,350; 78 Fed. Reg. 48,029, *Improving Chemical Facility Safety and Security* (Aug. 1, 2013) (emphasis added). Notably, ammonium nitrate is not a covered substance under the RMP Final Rule. *See* Final Rule, 82 Fed. Reg. 4602.

[7] *Id.*; *see also* Office of the Press Secretary, White House, Fact Sheet: Executive Order on Improving Chemical Facility Safety and Security (Aug. 1, 2013), *available at* https://obamawhitehouse.archives.gov/the-press-office/2013/08/01/fact-sheet-executive-order-improving-chemical-facility-safety-and-security ("Today, the President signed an Executive Order to improve the safety and security of chemical facilities and reduce the risks of hazardous chemicals to workers and communities. Chemicals and the facilities that manufacture, store, distribute and use them are essential to our economy. However, incidents such as the devastating explosion at a fertilizer plant in West, Texas in April are tragic reminders that the handling and storage of chemicals present serious risks that must be addressed.").

be considered an independent and competent "third-party." EPA also took the opportunity to impose numerous requirements on the audit itself that would increase the burden on affected facilities without any demonstrated safety benefit. For example, third-party audits would require having a licensed professional engineer on the audit team, retaining all draft audit reports, submitting draft and final audit reports to the implementing agency and the Board of Directors for the company, and generating a schedule for addressing all deficiencies identified in the audit report to be submitted to the implementing agency with a certification from a director of the company. Furthermore, neither the audit reports nor any "related records" were to be entitled to the protections of attorney-client privilege.

EPA also proposed to require safer technology alternatives analysis ("STAA") as part of the process hazard analysis ("PHA") for Program 3 facilities in certain NAICS code industries. Conducting an STAA would require these facilities to assess during the PHA whether any inherently safer technologies ("IST") or inherently safer designs ("ISD") might be available throughout the entirety of each covered process. For any IST or ISD identified, the facility would be required to conduct a feasibility analysis to determine whether the alternative could practicably be implemented. The Proposed Rule only vaguely alluded to how a facility might conduct such an analysis, without defining the relevant terms or adequately addressing how EPA might evaluate these analyses.

The Proposed Rule also addressed emergency response and disclosure obligations to local emergency planning committees ("LEPCs"), emergency responders, and the public. Among these provisions were separate but overlapping requirements for disclosing specific types of information to LEPCs and to the public. Facilities would be obligated to release extensive, highly sensitive, and detailed emergency response information—including STAA reports, compliance audit reports, accident histories, and incident investigation reports—to LEPCs upon request. EPA also proposed that information, including accident histories, be made readily available to the public at all times.

EPA's Proposed Rule was bereft of the basic details, diligent analysis, and procedural safeguards necessary for a major rulemaking. The Proposed Rule provided many questions but few answer on how to approach each topic and whether EPA should consider alternatives. As a result, the text read more like an advanced notice of proposed rulemaking than a proposed rule.

In the Proposed Rule, EPA failed to provide a rationale for certain changes. In the case of extending compliance audits to "each covered process," EPA not only failed to provide a rationale for the change but failed to even identify it as a proposed change to the regulatory text. More strikingly, EPA failed to conduct a proper cost-benefit analysis, declining to apportion benefits to particular provisions in the Proposed Rule or indeed even attempt to identify or quantify the expected benefits. Instead, EPA simply averred that it expected that some amount of the calculated costs of hazardous chemical accidents would be avoided due the proposed revisions. In describing each particular provision, EPA failed to connect the rationale of each provision to the costs and benefits of the proposal, much less consider costs or benefits of each provision at all. Finally, though OMB recommended a 90-day comment period, EPA allowed only 60 days to comment and refused to grant any of the many requests for an extension.

In its rush to finalize the rule before the new administration took office, EPA gave short shrift to the procedures mandated by the CAA and APA for promulgating new regulations. For example, EPA is required by statute to take the Proposed Rule's impact on small businesses into account through the Small Business Regulatory Enforcement Fairness Act ("SBREFA") process. However, EPA sent the Proposed Rule to the Office of Management and Budget ("OMB") for review just two weeks after EPA received the Small Business Advocacy Review ("SBAR") report, affording little time for EPA to thoughtfully consider and respond to the small businesses' concerns. This quick turnaround to OMB suggests that the Proposed Rule was already finalized when the SBAR report was issued. Moreover, EPA failed to provide for public comment supporting evidence for its proposed provisions. When EPA published its Proposed Rule, numerous documents were missing from the regulatory docket that EPA claimed it relied on, such as safety data from jurisdictions that require IST.

The comment period closed on May 13, 2016, despite multiple requests from Coalition members and others that EPA extend the comment period. After the close of the comment period, EPA added more than 100 new documents to the docket, several of which EPA cited to support its position on core provisions of the Final Rule, including the STAA and third-party audit provisions. Because the comment period had already closed, affected parties were denied the opportunity to review and provide informed comment on the additional materials EPA used to form its Proposed Rule. EPA signed the Final Rule on December 21, 2016, and published it on January 13, 2017, exactly one week before the inauguration of a new administration. The Final Rule goes into effect on March 21, 2017.

ISSUES MERITING RECONSIDERATION

EPA should reconsider its RMP Final Rule. Numerous procedural deficiencies deprived the public of a full and fair opportunity to comment. Among other shortcomings, EPA's comment period did not allow for thoughtful consideration of the many open-ended questions and technical regulatory provisions put forth in connection with the Proposed Rule. EPA significantly changed the Final Rule's required disclosures to LEPCs and the public in a manner that could not be anticipated from the proposed rule and threatens continued security of facilities. EPA also failed to conduct an adequate assessment of the costs and benefits of the various provisions of its proposed or Final Rule, as required by *Michigan v. EPA*[8] and Executive Order 13563, such that it could not demonstrate that the benefits exceeded the expected costs for any of its proposed requirements. EPA also failed to provide a rationale for its new requirement that compliance audits address "each covered process," preventing the public from being able to comment on the data and policy reasons underpinning this substantial revision to the RMP requirements.[9] Finally, data and documents supporting EPA's third-party audit and STAA

[8] 135 S. Ct. 2699 (2015).

[9] *See* AFPM, Comment on EPA's Proposed Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7) (EPA-HQ-OEM-2015-0725), Docket # EPA-HQ-OEM-2015-0725-0579 and EPA-HQ-OEM-2015-0725-0580, at 39-42 (May 13, 2016) ("AFPM Comments"); API, Comments of the American Petroleum Institute on EPA Docket ID No EPA-HQ-OEM-2015-0725 Accidental Release Prevention Requirements: Risk

requirements were either added to the docket too late to practicably comment on the Agency's underlying support or are not publicly available at all. In accordance with the CAA, EPA therefore must reconsider its RMP Final Rule and remedy these procedural defects by providing adequate notice and opportunity to comment on the provisions, policy rationales, granular cost-benefit analyses of each new regulatory requirement, and record support it intends to rely on for any final rule.

In addition to EPA's failures and omissions that rendered the rulemaking process deficient, the revelation two days prior to the end of the comment period that the West, Texas incident was a criminal act caused by an intentionally set fire changed the circumstances that prompted the Executive Order that resulted in this rulemaking. It was impracticable for commenters to account for these changed circumstances in time to address them in their comments. EPA should reconsider the RMP regulations given this new information, potentially emphasizing limited and narrowly tailored information disclosures with protective procedures and improvements to facility security, rather than implementing onerous procedural requirements that are unlikely to lead to greater public safety and may in fact jeopardize it.

I. The Numerous Procedural Flaws in the RMP Rulemaking Precluded Effective Notice and Comment

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

A. New LEPC Disclosure Requirements Pose Significant Security Risks

In the Final Rule, EPA introduced a new provision for disclosures to LEPCs, requiring facilities to provide information that could severely compromise security. Had EPA proposed this broad requirement to allow LEPCs access to any sensitive information they deemed "relevant" for emergency planning, including information about the security vulnerabilities associated with a facility's hazardous substances, Coalition members would have raised strenuous objection to such unfettered disclosure and recommended measures to insure proper access and public safety. Instead, EPA included broad LEPC disclosure requirements only in the Final Rule, precluding public input on these provisions. In light of the unjustified and unanticipated expansion of LEPC disclosure requirements, EPA should reconsider disclosure obligations in the Final Rule.

Without notice to the stakeholders, the Final Rule drastically expanded the scope of information subject to LEPC disclosure. The Proposed Rule included a list of specific material that facilities would be required to disclose to LEPCs upon request.[10] Coalition members opposed this disclosure of unnecessary and potentially sensitive information as a whole but

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Management Programs Under the Clean Air Act, Proposed Rule, Docket # EPA-HQ-OEM-2015-0725-0536, at 14 (May 13, 2016) ("API Comments").

[10] Proposed Rule, 81 Fed. Reg. at 13,711-12.

generally focused their objections on disclosure of one or more particular types of information.[11] However, in the Final Rule, EPA changed course: it replaced the delimited list of categories of information facilities had to disclose to an LEPC upon request with a broad requirement to provide "any other information that local emergency planning and response organizations identify as relevant to local emergency planning" upon request by an LEPC.[12] This new requirement gives nearly unfettered discretion to an LEPC to request any information it thinks might be helpful. Notably, where the Proposed Rule only required facilities to provide summaries of information on hazardous chemicals—itself objectionable on security grounds—the Final Rule requires facilities to release any relevant information that an LEPC might request, potentially including full documents with extensive details of security vulnerabilities. Against this nearly unfettered discretion, EPA did not provide a facility owner or operator any authorization to refuse to provide requested information on security grounds. In fact, by moving the disclosure requirement from its own provision to a subsection of the "Emergency response coordination activities" provision, EPA also eliminated the CBI and classified information protections of the Proposed Rule. EPA also did not provide any limits or protections on the disclosure of information by LEPCs to the public.

EPA's initial proposal—an enumerated list of specific information to disclose to an LEPC on request—did not provide notice that EPA might alter its requirement in the Final Rule to allow an LEPC to request any information it wants. If EPA had given any indication that it would finalize such an open-ended disclosure provision with no discretion given to the facility when a request raises significant security concerns, the regulated community, including the Coalition members, would have commented differently and urged EPA to provide adequate safeguards and limited access for sensitive information. Had EPA reviewed comments from the regulated community on the breadth of this final requirement and the significant information security risks posed by releasing any and all information the LEPC wants, it likely would have included necessary safeguards to protect public safety in the Final Rule.

B. EPA Introduced a New Third-Party Audit Trigger

EPA also introduced a new provision in the Final Rule for triggering its third-party audit requirements. The Proposed Rule included two triggers for EPA's proposed third-party audit requirement: an accidental release, as defined by the existing regulations, or "an implementing agency requir[ing] a third-party audit based on non-compliance with the requirements of this

[11] *See* ACC, Comments of the American Chemistry Council on EPA Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule, Docket # EPA-HQ-OEM-2015-0725-0537, at 57-59 (May 13, 2016) ("ACC Comments"); AF&PA, Docket ID No. EPA–HQ–OEM–2015-0725, Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act (81 Fed. Reg. 13,638 (March 14, 2016)), Docket # EPA-HQ-OEM-2015-0725-0551, at 25 (May 13, 2016) ("AF&PA Comments") (summaries of compliance audit reports, STAA, audit reports); AFPM Comments at 72 (names and quantities of regulated substances at facilities); API Comments at 27 (accident history, compliance audit reports, incident investigation reports, and STAA).
[12] Final Rule, 82 Fed. Reg. 4667.

subpart."[13] In the Final Rule, EPA retained the first trigger but replaced the second with a new triggering circumstance: "An implementing agency requires a third-party audit due to conditions at the stationary source that *could* lead to an accidental release of a regulated substance."[14] As examples of such conditions, EPA points to "significant deficiencies with process equipment containing regulated substances, such as unaddressed deterioration, rust, corrosion, inadequate support, and/or other lack of maintenance;" "small 'pinhole' releases, that do not meet the criteria in § 68.42(a) for RMP-regulated releases;" and the "occurrence of several prior accidental releases that did not meet the reporting criteria."[15] EPA seems to contemplate that a fully-compliant facility with a non-reportable event may still meet the criteria of having "conditions . . . that could lead to an accidental release" such that a third-party audit could be required.

Though EPA claims that it only "modifie[d] the criterion," the Final Rule provision transformed a predictable trigger (non-compliance with specific regulations) into an unpredictable one that relies entirely on the implementing agency's discretion to determine which conditions "*could* lead to an accidental release."[16] The Proposed Rule had identified a specific condition EPA thought was problematic, namely noncompliance with regulations. The Final Rule provision is unrelated to legal compliance and subject to the whims and imagination of the implementing agency. Commenters had no opportunity to object to the incredible breadth of a requirement that covers any conditions that *could* lead, no matter how remote the chance of the condition resulting an accidental release.

Accordingly, EPA's response to comments in the Final Rule does not address this point. In response to commenters' concerns that "third-party compliance audits will become an overwhelming compliance function," EPA "disagree[d]" and claimed that it had "limited applicability" of third-party audits.[17] However, EPA only addressed the expected rate of audits resulting from the "accidental release" trigger.[18] It could not respond to comments about how frequently "conditions . . . that could lead to an accidental release of a regulated substance" would trigger third-party audits because commenters had no opportunity to consider the matter. In response to commenters' concerns about the potential frequency of third-party audits, EPA created an entirely new triggering circumstance. EPA should reconsider its Final Rule to allow for appropriate notice and comment on this new, discretionary triggering provision.

C. EPA Omitted Information on its Cost-Benefit Findings in Violation of *Michigan v. EPA*

While the CAA requires EPA to include cost findings in proposed rules, EPA failed to quantify benefits, link costs and benefits to specific provisions of the Proposed Rule, and include cost findings in the Proposed and Final Rules. These failures violate EPA's obligations under the

[13] Proposed Rule, 81 Fed. Reg. at 13,706.
[14] Final Rule, 82 Fed. Reg. at 4699 (emphasis added).
[15] *Id.* at 4616.
[16] *Id.* at 4699.
[17] *Id.* at 4615.
[18] *Id.* at 4615.

CAA and *Michigan v. EPA*, and deprived Coalition members of an opportunity to provide comments that would have impacted EPA's analysis. EPA should grant the petition to reconsider so that it may include the required cost findings and provide the public an opportunity to comment on the analysis.

1. Michigan v. EPA *requires EPA to provide an assessment of the reasonableness of its proposed provisions' costs for public comment.*

The CAA requires EPA to propose cost findings for most proposed rules, including the RMP rulemaking. Well before EPA issued the RMP Proposed Rule, the Supreme Court made clear in *Michigan v. EPA* that the CAA imposes a duty on the Agency to propose cost findings for public comment unless Congress expressly and unequivocally prohibits consideration of costs.[19] In *Michigan v. EPA*, the Court reviewed an EPA regulation addressing emissions from power plants, referred to as the Mercury and Air Toxics Standards ("MATS") rule. EPA had promulgated the MATS rule pursuant to Section 112(n)(1) of the Act, which requires EPA to determine whether such regulation was "appropriate and necessary" in light of the other requirements imposed on power plants in the statute.[20] The Court held that EPA had unreasonably refused to analyze costs when deciding whether it was "appropriate" to regulate hazardous air pollutants from power plants.

The Court considered "appropriate" a "broad and all-encompassing term" that required "consideration of all relevant factors."[21] The Agency cannot consider "all relevant factors" if it "entirely fai[ls] to consider an important aspect of the problem"—namely, cost.[22] The Court held that "[n]o regulation is 'appropriate' if it does significantly more harm than good."[23] It explained:

> Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions. It also reflects the reality that too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.[24]

Because EPA failed to weigh "the advantages *and* disadvantages of" regulation to ensure that its rule would not "do[] significantly more harm than good," the Court found EPA's assessment that regulation was "appropriate" unreasonable.[25]

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[19] 135 S. Ct. 2699 (2015).
[20] 42 U.S.C. § 7412(n)(1).
[21] *Michigan v. EPA*, 135 S. Ct. at 2707.
[22] *Id.*
[23] *Id.*; *see also id.* ("One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.").
[24] *Id.* at 2707-08 (emphasis in original).
[25] *Id.* (emphasis in original).

The Court's rulemaking requirement in *Michigan v. EPA* applies equally to the RMP rulemaking. Section 112(r)(7) obligates EPA to consider costs when promulgating these RMP amendments. Specifically, Section 112(r)(7) requires "*reasonable* regulations and *appropriate* guidance to provide, to the greatest extent *practicable*, for the prevention and detection of accidental releases of regulated substances and for response to such releases by the owners or operators of the sources of such releases."[26] This statutory language closely tracks the "necessary and appropriate" framework that compelled EPA to consider costs under Section 112(n)(1) of the Act in *Michigan v. EPA*. Thus, to promulgate a "reasonable" and "appropriate" RMP regulation that is "practicable," EPA must adequately assess the costs of its Proposed Rule and determine whether they are disproportionate to the benefits the Proposed Rule would confer.

2. *EPA failed to assess costs as required by* Michigan v. EPA.

Without any explanation, the RMP rulemaking wholly ignored the dictate of *Michigan v. EPA* and failed to make cost findings that complied with the decision. While the Proposed Rule summarized annualized costs, in lieu of a true analysis of benefits, EPA quantified the damages from releases and accidents over the past ten years and summarily claimed that "some portion of future damages would be prevented through implementation of a final rule."[27] EPA stated that it was "unable to quantify what specific reductions [in damages] may occur as a result of these revisions."[28] Instead it flatly asserted that it "anticipates that promulgation and implementation of this rule would result in a reduction of the frequency and magnitude of damages from releases."[29] EPA did not even attempt to link the cost of the proposed provisions with the potential benefit, much less analyze the impact on industry and the public. Instead, with no detailed explanation, EPA simply claimed that, by reducing accidents and improving disclosure, the Proposed Rule would "provide benefits to potentially affected members of society."[30] The cost findings contained in the Proposed Rule were a far cry from the detailed analysis required by *Michigan v. EPA*.

EPA's perfunctory analysis of the costs and benefits of the Proposed Rule denied Coalition members the ability to participate in this rulemaking in a meaningful and informed manner. By providing no information quantifying the benefits and the costs of EPA's proposed revisions, Coalition members could not meaningfully provide alternative solutions that would have less of an impact on industry functions and specific cost data for EPA's consideration. Nonetheless, EPA received a number of comments critiquing EPA's low cost estimates in the Proposed Rule.[31] In response, EPA recalculated and revised some of the costs in the Final Rule.

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[26] 42 U.S.C. § 7412(r)(7)(B)(i) (emphasis added).
[27] Proposed Rule, 81 Fed. Reg. at 13,642, 13,694.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 13,643, 13,694.
[31] Response to Comments ("RTC") at 226-27; ACC Comments at 32; API Comments at 13-14; American Forest & Paper Association, American Iron and Steel Institute, ILTA, National Association of Manufacturers, and U.S. Chamber of Commerce, Comment on EPA's Proposed Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air

However, EPA's limited analysis provided no basis to review and comment on EPA's summary conclusion.

Several commenters, including Coalition members, identified this glaring omission and requested that EPA issue a supplemental notice of rulemaking to explain how it intended to comply with *Michigan v. EPA*.[32] In response to these comments, EPA offered a general statement of its "belief" as analysis of the relationship of costs and benefits of the Final Rule:

> When considering the rule's likely benefits that are due to avoiding some portion of the monetized accident impacts, as well as the additional non-monetized benefits described previously, EPA believes the costs of the rule are reasonable in comparison to its benefits.[33]

In the cost and benefits section of the Final Rule, EPA attempted to make it appear that it had performed a quantitative analysis to comply with its obligations under *Michigan v. EPA*.[34] EPA's statement, however, simply concluded that the annual projected cost of compliance was half of the annual estimated damages from accidents and releases. This apples-to-oranges comparison reiterates EPA's statement in the Proposed Rule without providing any meaningful assessment of the relationship between costs to benefits of the Final Rule. Apart from these two conclusory statements, EPA attempted no further analysis of the cost findings. This overarching flaw in the RMP rulemaking warrants reconsideration.

D. <u>EPA Made a Stealth Change to the Scope of Compliance Audits</u>

Consistent with longstanding agency guidance and best practices, facilities typically audit a representative sample of covered process units to determine compliance with certain requirements when conducting an RMP or Process Safety Management audit. The Proposed Rule abruptly broke from this precedent. EPA revised the regulatory text in the Proposed Rule from the existing requirement for an owner or operator to evaluate "compliance with the provisions of this subpart at least every three years" to the proposed requirement to evaluate "compliance with the provisions of this subpart *for each covered process*, at least every three years . . . ."[35]

Act, Section 112(r)(7) (EPA-HQ-OEM-2015-0725), Docket # EPA-HQ-OEM-2015-0725-0559, at 12 (May 13, 2016) ("NAM, AF&PA, and Chamber Comments").

[32] *See, e.g.*, AFPM Comments at 56-59; NAM, AF&PA, and Chamber Comments at 12.

[33] *See* Final Rule, 82 Fed. Reg. at 4598; RTC at 219 ("EPA acknowledges that many of these provisions will require time and monetary commitments to implement. EPA also believes that many of these provisions are necessary updates to the existing RMP rule to ensure continued public safety concerning the operation of chemical facilities in and near communities.").

[34] "The 10-year RMP baseline suggests that considering only the monetized impacts of RMP accidents would mean that the rule's costs may outweigh the portion of avoided impacts from improved prevention and mitigation that were monetized. The annualized cost of the final rule (approximately $142 million annually) is approximately 52% of the average annual monetized costs in the 10-year baseline." Final Rule 82 Fed. Reg. at 4597-98.

[35] Proposed Rule, 81 Fed. Reg. at 13,704.

However, nothing in the preamble to the proposal alerted the public to this change, much less provided a discussion of the rationale for this revision and the significant impacts that would result from such a change. EPA provided neither notice of nor a justification for this regulatory amendment. Though a few commenters detected EPA's revision and questioned its inclusion,[36] most missed this buried revision.

In the Final Rule, EPA responded to those few commenters who noticed the change, providing a lengthy defense for extending the audit requirement to "each covered process," but never analyzing—let alone justifying—the extreme increase in auditing expenses associated with this change. Putting aside the merits of EPA's defense, stakeholders had no opportunity to review EPA's rationale. The Agency, for example, alleged that facilities arbitrarily designate covered process units to evade compliance audit obligations, an unsubstantiated allegation that the Agency had never aired in any RMP rulemaking proceeding.[37] With proper notice, everyone would have had a fair opportunity to comment on EPA's proposed revision, produce data on costs facilities would incur from this revision, and identify flaws in EPA's underlying rationale. EPA must therefore reconsider the "each covered process" requirement and initiate a new notice-and-comment period with the benefit of the Agency's factual support, policy rationale, and cost-benefit analysis in order to allow commenters to understand and address EPA's proposed regulatory amendment.[38]

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[36] AFPM Comments at 39-42; API Comments at 15.

[37] Final Rule, 82 Fed. Reg. at 4615 ("EPA has determined that further self-auditing may be insufficient to prevent accidents and ensure safe operation.").

[38] In response to comments that "each covered process" constituted a substantive change, EPA asserts in the Final Rule that this modification was simply a clarification to render the RMP regulations consistent with longstanding EPA interpretation. However, neither EPA's current General Risk Management Guidance nor OSHA's Appendix C to § 1910.119—Compliance Guidelines and Recommendations for Process Safety Management (Nonmandatory), cited by EPA in the Final Rule to support its contention, discuss auditing each covered process. EPA's original Proposed Rule for RMP regulations in 1993 would have required "that over each three-year period, all covered processes are audited." 58 Fed. Reg. 54,190, 54,199 (Oct. 20, 1993). However, the original RMP regulations underwent significant changes between the proposed and final rules, including to the auditing provisions, and EPA did not confirm this position. Moreover, based on EPA's past inspections and enforcement actions, it is clear that EPA has condoned industry's longstanding use of representative sampling in the RMP auditing context. Furthermore, auditing "all covered processes" is not preclusive of auditing a representative sample that represents all of the covered processes, as compared to "each covered process," which necessarily requires each covered process to have its own audit. Finally, even if EPA generally interpreted its regulations to require an audit of each covered process, such a policy or interpretation is a matter of agency discretion that could be changed without rulemaking and disputed in court. In contrast, as part of the regulatory requirements, facilities must now audit each covered process separately or be subject to enforcement action. EPA therefore had a duty to identify this clause as a substantive change and to provide factual support and policy rationale for the change in the proposed and final rules.

E. New Legal Rationales for Third-Party Audits and STAA Merit Reconsideration of the Final Rule

Reconsideration is warranted because EPA failed to explain its statutory authority for the RMP rulemaking, depriving the public of a fair and full opportunity to engage with the Agency on the legal basis for the rulemaking. In the preamble to the proposal, EPA merely quoted the statutory text of Section 112(r)(7)(B)(i) and referred the public to the original RMP rulemaking.[39] Nowhere did EPA explain these existing authorities, nor did EPA justify the numerous novel RMP obligations found in the proposal. When Coalition members raised issues concerning EPA's lack of statutory authority, the Agency revealed several new legal rationales in the Final Rule, none of which were provided to the public for comment.

Two examples below illustrate the need for EPA to propose for public comment the legal rationale for the RMP rulemaking.

First, none of the Agency's legal justification of third-party audits was ever made available for public comment. Coalition members pointed out in comments that the Administrative Conference of the United States ("ACUS") wrote a report recommending that agencies explain the legal basis for third-party audits before imposing such audits.[40] That recommendation was well-known to EPA, as the ACUS report was cited repeatedly in the preamble to the Proposal.[41] When commenters pressed EPA on its authority to enlist private parties to enforce the Act through third-party audits,[42] the Agency purported to rely on a 1989 Senate Committee report that makes a passing reference to "consultants." That Senate report was not part of any analysis in the Proposal. Nor does it explain how the statutory text of Section 112—as enacted in 1990—provides legal authority for third-party audits for RMP.

Besides the Senate report, EPA argues in the preamble to the Final Rule that "[t]hird-party audits do not constitute enforcement,"[43] and therefore third-party audits do not run afoul of the constitutional, statutory, and policy limits on EPA using private parties to enforce the CAA, none of which EPA contests as limitations on its authority. Yet in other parts of the preamble to the Final Rule and in the Response to Comment document, EPA states that third-party audits are an enforcement tool to push companies toward the Agency's view of "compliance."[44] None of this equivocating analysis appeared in the Proposed Rule.

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[39] Proposed Rule, 81 Fed. Reg. at 13,646.

[40] *See* L. McCallister, Administrative Conference of the U.S., Third-Party Programs Final Report, 5 (Oct. 22, 2012) ("In many cases, Congress provided legislative authority for the third-party program and set forth certain design elements in statute. In other cases, agencies have implemented third-party programs under existing statutory authority."); Proposed Rule, 81 Fed. Reg. at 13,655-56.

[41] Proposed Rule, 81 Fed. Reg. at 13,655-56.

[42] *See, e.g.*, AFPM Comments at 93-94.

[43] Final Rule, 82 Fed. Reg. at 4613.

[44] RTC at 59 ("EPA believes that conducting the third-party compliance audits .... is necessary to identify and correct existing non-compliance ...."); *id* at 83 (The "final rule will require the

Second, EPA's legal defense of STAA rested on a wholly novel invocation of Section 112(r)(7)(A) of the Act, a provision that, until the Final Rule, EPA had never interpreted in any prior rulemaking. Consistent with that regulatory history, EPA relied upon Section 112(r)(7)(B) as the authority for the proposal, citing that provision in the "Statutory Authority," "Compliance Dates," and "Paperwork Reduction Act" sections of the preamble to the proposal.[45] When Coalition members argued that the text of Section 112(r)(7)(B) provided no authority for STAA, EPA changed tack and invoked Section 112(r)(7)(A), providing a lengthy analysis of that provision in the Final Rule that no one had an opportunity to comment upon. Indeed, the only time EPA has considered its rulemaking authority pursuant to Section 112(r)(7)(A), EPA stated that it was "investigating whether regulations, other than today's proposed rule on risk management programs, are necessary to prevent and detect accidental releases."[46] EPA has not relied on or promulgated regulations in connection with that statutory authority since that time.

The RMP rulemaking raised novel and important legal questions, including the first ever third-party audit mandate and STAA related requirements in an EPA rule. Those questions deserve public input and comment.

F. EPA Added Numerous Supporting Documents After the Close of the Comment Period and Still Failed to Support Its Position on Core Issues

After the close of the comment period, EPA posted 129 documents to the docket after the close of the comment period, 119 of which were posted on January 13, 2017, the day the Final Rule was published in the Federal Register. This additional support and information—which spans thousands of pages—was not available for review during the comment period. These were more than mere peripheral materials. EPA claimed that the newly disclosed materials included documents that support its position on core issues such as third-party audits, STAA, and LEPC disclosures. During the comment period, Coalition members raised concerns about the lack of data supporting increased safety in jurisdictions with STAA or supporting increased safety from third-party audits.[47] While EPA contends that the newly disclosed documents address these concerns, they plainly fail to do so.[48] Rather than justify its contention that the new STAA and third-party audit provisions would enhance safety, EPA merely cites to three white papers on how third-party monitoring impacts compliance. EPA does not use these materials to analyze how third-party audits impact safety at facilities, but merely infers that requiring audits will result in greater safety. While EPA claims that the new documents also address STAA requirements impact on safety, it cites to no additional documents in the record. Rather, EPA consistently presupposes that the new STAA regulations will improve safety. Moreover, the late—and insufficient—addition of these documents prevented commenters from reviewing and analyzing EPA's justification for these provisions. Given these deficiencies, EPA should reconsider the Final Rule.

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owner or operator to certify in the findings response report that deficiencies are being corrected.").

[45] Final Rule, 82 Fed. Reg. at 4675, 4687.

[46] 58 Fed. Reg. 54,191-93 (Oct. 20, 1993).

[47] AFPM Comments at 100-07, 137-140.

[48] Final Rule, 82 Fed. Reg. at 4622-23.

II. Changed Circumstances Regarding the West, Texas Incident

EPA also should reconsider the entire focus of the RMP Final Rule in light of the revelation that the West, Texas, incident was an intentional criminal act of arson. In addition to the need for EPA to reopen this rulemaking based on the substantive flaws identified in this petition, EPA should open a new notice-and-comment period to allow commenters the opportunity to address this critical fact. Though both accidental release prevention and security are RMP goals that commenters had in mind during the comment period, the fact that the explosion that gave rise to this rulemaking was an act of arson would refocus commenters' thinking and likely would provide EPA with ideas and recommended approaches to try to prevent such an occurrence in the future.

This RMP rulemaking is the result of an Executive Order from President Obama that instructed agencies to consider revising the RMP and other regulations in order to prevent further incidents like the one that occurred in West, Texas, in 2013. When the Executive Order was issued and during the entire period EPA was crafting its Proposed Rule, it was believed that the West, Texas, incident was a terrible accident caused by carelessness and improperly managed hazardous materials. From this understanding, EPA formulated a Proposed Rule that was supposed to address those particular hazards early, identify any noncompliance with regulatory programs that might lead to an accident, more thoroughly investigate accidents that did occur to prevent future ones, explore new technologies that might prevent such accidents, and inform LEPCs and the public about past and potential accident scenarios. EPA's proposed regulatory revisions were based on the mistaken understanding that West, Texas, incident was a preventable accident.

On May 11, 2016, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") announced that it had determined the fire that triggered the explosion at the West, Texas, fertilizer facility had been intentionally set and was the result of a criminal act.[49] This revelation undercut the assumptions underlying the Proposed Rule for both EPA and commenters. Different measures are required to increase security and prevent criminal acts than those designed to avoid accidental releases. At times, the goals of security and accident prevention and a policy supporting the "public's right to know" are at odds with one another. The outcome of the West, Texas, investigation suggests the weighting of those goals against the broad dissemination of information to the public should come out differently. Different measures are required to address the concerns raised by the incident. However, EPA's Proposed Rule was already written, and the comment period ended two days later on May 13, 2016.

Though some commenters briefly mentioned ATF's determination in their comments, EPA's refusal to extend the comment period or request supplemental comments, made it impracticable to consider the implications for each of EPA's proposed provisions and revise the comments to account for those changed circumstances. Furthermore, though EPA referenced ATF's announcement several times in the Final Rule, it was constrained under the CAA in how much it could adjust the Final Rule based on its Proposed Rule. Fully accounting for these

[49] 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.

changed circumstances requires reconsideration and a new Proposed Rule with notice and comment.

As the primary driver behind the Executive Order that inspired this rule, and the focus of EPA's introduction to the Proposed Rule, the circumstances surrounding the West, Texas, incident highlight the risks central to the Final Rule. Knowing that the incident was intentional would could have impacted the scope of the Executive Order, certainly have changed the comments EPA received, and likely would have caused EPA to construct its proposed and final rules differently had it known of these circumstances at the time of the proposed rulemaking. For example, EPA might have focused its proposal on enhanced security measures for facilities, strict scrutiny of the type of information that should be disclosed to LEPCs or the public, protections for that information, prohibitions against using any sensitive information from these facilities to cause harm to the public or the environment, or screening measures for third parties with access to the facility and its sensitive information. Reliance on the EO as the predicate for this rule, combined with the West, Texas, investigation results further merits reconsideration of the EPA's RMP Final Rule.

REQUEST FOR CAA 307(d) STAY PENDING RECONSIDERATION

While EPA is reconsidering a rule, Section 307(d)(7)(B) of the Clean Air Act permits EPA to stay the effectiveness of that rule "for a period not to exceed three months."[50] This stay gives the Agency time to reconsider its position and review the rule's requirements without imposing unnecessary compliance costs on regulated entities. EPA may also use a 307(d) stay to avoid any confusion in the regulated industry from the Agency implementing and then quickly revising its regulatory requirements. Staying the effective date of the rule until EPA completes its reconsideration process avoids any such regulatory whiplash.

The Coalition respectfully requests that EPA exercise this authority under the CAA to stay the effectiveness of the RMP Final Rule to the fullest extent permissible by statute pending reconsideration. Facilities with RMP covered processes will begin to incur significant compliance costs such as rule familiarization, training, revising manuals and operating procedures, and conducting compliance audits for "each covered process" soon after the Final Rule takes effect. Staying the rule during reconsideration will avoid imposing these compliance costs prematurely and avoid confusion among facility personnel from learning potentially unnecessary requirements imposed by the Final Rule. A stay would afford EPA the needed time to fully reconsider its Final Rule.

REQUEST FOR AN APA 705 STAY PENDING JUDICIAL REVIEW

In addition to this petition for reconsideration, the Coalition is filing a petition for review in the U.S. Court of Appeals for the D.C. Circuit challenging the Final Rule on the grounds that EPA exceeded its statutory authority, failed to follow procedures required by the APA and CAA for agency rulemaking, did not adequately consider costs or assess benefits, and did not adequately respond to all significant comments. While judicial review is pending, Section 705 of

[50] 42 U.S.C. § 7607(d)(7)(B).

the APA allows EPA to stay the effective date of a final rule if it "finds that justice so requires."[51] The Coalition requests that EPA make such a finding here.

EPA may stay the effective date of the Final Rule, currently set for March 21, 2017, if it "finds that justice so requires." Both EPA and the courts have applied the four-part test for preliminary injunctions to determine whether "justice so requires" a stay of agency action pending judicial review. Under that standard, the agency must consider and moving parties must demonstrate: (1) a likelihood of success on the merits of the judicial challenge, (2) irreparable harm to the moving party if the stay is not granted, (3) the potential for harm to others if the stay is granted, and (4) whether the public interest weighs in favor of granting the stay. As explained below, each of these factors weighs in favor of staying this Final Rule until the resolution of judicial review.

A. The Coalition Is Likely to Succeed on the Merits

The Coalition's petition for review is likely to be granted on its merits. The Final Rule contains several provisions that exceed EPA's statutory authority to issue regulations under CAA Section 112, including the requirements regarding third-party audits and STAA. EPA failed to identify its statutory authority for requiring third-party audits in the Proposed Rule. In the Final Rule, the Agency only referenced Senate Reports about its general enforcement authority. EPA also did not identify its statutory authority to require STAA until the Final Rule. Finally, to the extent that EPA imposes regulatory requirements for exclusively on-site effects that impact only workers and facility property, it exceeds its statutory directive to address public health and the environment, and encroaches on OSHA's jurisdiction.

The information disclosure requirements of the Final Rule also run afoul and undermine DHS's Chemical Facility Anti-Terrorism Standards ("CFATS").[52] As described in the comments of various Coalition members, EPA would require disclosure of information to LEPCs and the public that CFATS prohibits from being disclosed in the interest of national security and safety.[53] Though AFPM and others raised this objection during the comment period, EPA simply disagreed in its response to comments without conducting an analysis of the statutory requirements or adjusting its regulatory provision to comport with that statute.

Finally, EPA also failed to conduct a proper analysis of the costs and benefits of the Proposed and Final Rules, as required by *Michigan v. EPA*, by refusing to even estimate or qualitatively describe the expected benefits. It did not even attempt to explain how each provision might provide a benefit to EPA's ultimate goals of accident prevention and mitigation. EPA also did not attribute any specific benefits to any particular provisions in the rule. As a

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[51] 42 U.S.C. § 7607(d)(1) states that the "provisions of section 553 through 557 and section 706 of title 5 [the APA] shall not, except as expressly provided in this subsection, apply to actions to which this subjection [307(d)] applies." *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 23-26 (D.D.C. 2012).

[52] 6 C.F.R. Part 27.

[53] *See* ACC Comments at 26-27; AFPM Comments at 71-75; API Comments at 28; NAM, AF&PA & Chamber Comments at 7-8; UARG Comments at 12-13.

result, EPA could not evaluate the cost effectiveness of its proposed requirements and options because it did not know what, if any, benefits would flow from that provision in order to compare them to the relative costs.

For these reasons and others, the Coalition's petition is likely to succeed on the merits and be granted.

B. The Coalition's Members Will Suffer Irreparable Harm

Coalition member companies will suffer irreparable harm if the effective date of the Final Rule is not stayed.

1. Security Risks

New disclosure obligations in the Final Rule pose significant security concerns for facilities. For example, the Final Rule allows LEPCs to request information from facilities without limitation, including highly sensitive documents required by the Final Rule such as STAA analysis as part of the PHA process and third-party audits. These documents and others may contain detailed security information, the release of which may expose vulnerabilities and weaknesses in refineries, chemical plants, and other facilities. No background checks are required to serve on an LEPC. While LEPCs may act with the best of intentions and in good faith, once sensitive RMP documents are released to LEPCs, federal, state, and local Freedom of Information Act requirements or sunshine laws may allow their broader release to the public, including to terrorists and others groups that may wish to target facilities.

In addition, the public disclosure provisions of the Final Rule require facilities to provide on request the names of regulated substances, safety data sheets, five-year accident history information, first responder point of contact information, and other emergency response program information. During the interagency review process, multiple government officials identified security concerns with EPA's proposed public disclosures, which are still present in the Final Rule. Notably, other government agencies were concerned that the scope of disclosure and lack of standards for dissemination "could assist terrorists in selecting targets and/or increasing the severity of an attack by decreasing first responder capability."[54] Because of these concerns, the Attorneys General of several states objected to the RMP rulemaking.[55] The Final Rule failed to address these significant security concerns and the risks will continue if EPA does not stay the Final Rule.

2. Confusion Regarding Compliance Obligations

In the RMP rulemaking, EPA wrote that it "intends" to issue future guidance documents on (1) root cause analysis, (2) STAA, and (3) emergency response exercises, but only after the

[54] EO 13866 Interagency Review Risk Management Modernization RIN 2050-AG82 NPRM Proposal Rule 20160223 (Redline) 20160223 REV, Docket # EPA-HQ-OEM-2015-0725-0004, at 150 (Mar. 14, 2016).
[55] Letter from Scott Pruitt, Attorney General, State of Oklahoma et al. to Gina McCarthy, Adm'r, EPA, EPA Docket No. EPA-HQ-OEM-2015-0725-0624 (July 27, 2016).

rule is promulgated.[56] EPA also advises that OSHA will issue guidance on the root cause analysis.[57] None of these guidance documents have been released. OSHA, moreover, has yet to complete the PSM rulemaking process and the timeframe for that regulation is unclear. The statute requires EPA to "coordinate any requirements" under its RMP program with OSHA and its PSM program. In the meantime, the RMP regulations as revised by the Final Rule leave important gaps and create compliance uncertainties.

EPA has granted a Section 705 stay under similar circumstances. The Obama Administration repeatedly delayed the effective date of the New Source Review aggregation amendments promulgated by the prior administration. In the 2010 extension of the stay, EPA explained that a stay was warranted to avoid "confusion in the regulated community" and to allow the agency to consider the soundness of the policies underlying the aggregation amendments.[58] The same concerns are present here, justifying a stay.

3. Substantial Compliance Costs

Certain provisions, such as the requirement that compliance audits address "each covered process," become effective immediately with the Final Rule. That provision alone will require facilities to incur significant unrecoverable costs with no demonstrable corresponding benefit. Facilities with many processes will have to expend significantly more resources and time to prepare for and conduct an audit of each covered process. For example, they will need to hire additional auditors, lengthen the audit, provide additional documents to the auditors, and expand the final report to cover each process unit. Facilities with upcoming audits are already incurring these costs. Other provisions have a longer compliance deadline (*e.g.*, three or four years), but training and preparation must begin now in order to comply with the various requirements when they become effective. Indeed, some members have already started revising their compliance programs to address the Final Rule's requirements.

In the case of STAA, facilities must be *compliant* when the provision becomes effective in four years, but the regulations require facilities to update their PHAs every five years. Depending on the facility's PHA schedule, either a facility will have just conducted a PHA in the year before the Final Rule's effective date, or it will have a PHA scheduled in the four years between the effective date and the STAA compliance date. Any facility that conducted its PHAs in the last year will have to conduct its next PHA early in order to incorporate STAA by the compliance date. Facilities that have their PHAs scheduled in the next four years will have to

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[56] *See* Proposed Rule, 81 Fed. Reg. at 13,687 ("Lastly, EPA intends to publish guidance for certain provisions, such as STAA, root cause analysis, and emergency response exercises. Once these materials are complete, owners and operators will need time to familiarize themselves with the new materials and incorporate them into their risk management programs.").

[57] *See* Proposed Rule, 81 Fed. Reg. at 13,650 ("OSHA plans to develop a fact sheet on existing resources that explain how to conduct a root cause analysis so the regulated community can better understand the causes of incidents . . . .").

[58] 75 Fed. Reg. 27,643, 27,644 (May 18, 2010); *see also* 77 Fed. Reg. 64,908 (Oct. 24, 2012) (EPA granted Section 705 stay to provide additional time to consult with stakeholders on a Federal Implementation Plan, or FIP, under the CAA).

decide whether to include STAA in their next 5-year PHA update (which could occur immediately after the Final Rule takes effect, depending on the date of their last PHA update) or to conduct two PHAs in the next four years with the second one incorporating STAA—a significant expenditure of time and resources.

In the meantime, it is unclear exactly how EPA expects a facility to conduct an STAA. EPA acknowledged as much in both the Proposed and Final Rule by saying it "intends to publish guidance for certain provisions, such as STAA."[59] However, no timeframe was provided for this guidance and it is likely to arrive too late for facilities with PHAs scheduled soon after the effective date of the Final Rule. EPA itself recognized that "[o]nce these [guidance] materials are complete, owners and operators will need time to familiarize themselves with the new materials and incorporate them into their risk management programs."[60] In addition to this compliance uncertainty, the staff resource commitment and cost of conducting the STAA, particularly for existing processes, will be extremely high. Moreover, based on their engineering expertise, Coalition member companies expect that the likelihood of STAA identifying any practicable changes to existing processes is low.

The Final Rule should be stayed to avoid the irreparable harm of forcing Coalition member companies and other regulated facilities to comply with a legal standard that the agency is still working to complete.

C. Other Interested Parties Would Not Suffer Harm By Temporarily Staying the Rule

While Coalition member companies and other regulated entities will suffer irreparable harm if they must begin implementing the Final Rule's requirements while judicial review is pending, granting a stay would not cause substantial harm to any other parties. Many of the Final Rule requirements apply in reaction to specific events, such as accidental releases or incidents. Thus while the facility must prepare itself to address those criteria if the relevant circumstances arise, any alleged benefits from the new provisions would not accrue to the general public or environment until such an event occurred.

In addition, it is not clear—including apparently to EPA—how much or even whether the provisions of the Final Rule will in fact generate benefits. In both the Proposed Rule and the Final Rule, EPA explicitly stated that it could not quantify or even describe the benefits it expected to accrue from the proposed or final provisions. It instead resorted to quantifying and describing past harms to property and people from hazardous chemical incidents, including both on- and off-site impacts, and then asserting that it believed some undetermined amount of these damages could be prevented by implementing its proposed regulatory program as a whole. EPA thus has not, and presumably cannot, demonstrate that the provisions included in the Final Rule will generate benefits for the public or environment—as a whole or individually. Moreover, EPA's data shows that the RMP requirements in place over the past many years—before the Final Rule— have resulted in a significant decrease in accidental releases. As a result, staying

[59] Proposed Rule, 81 Fed. Reg. at 13,687; Final Rule, 82 Fed. Reg. at 4676.
[60] Proposed Rule, 81 Fed. Reg. at 13,687; Final Rule, 82 Fed. Reg. at 4676.

the implementation of those provisions temporarily while judicial review is pending cannot be shown to cause any harm to others.

D. A Stay Is in the Public Interest

Staying the effective date of the Final Rule is in the public interest. Allowing the Final Rule to remain in effect pending judicial review raises significant security concerns and imposes substantial costs on regulated entities that they will not recoup, while providing no demonstrable benefit to the general public or the environment. EPA has not demonstrated that any of its finalized provisions would improve safety or prevent accidents that harm American workers, citizens, or property. A stay is in the public interest to ensure that EPA does not jeopardize facility security. Similarly, the public interest would be furthered by ensuring that funds spent complying with regulatory demands in fact yield measurable benefits.

REQUEST FOR RECISSION UNDER SECTION 553(e) OF THE APA

As this Petition demonstrates, the Final Rule rests on a faulty foundation. The pre-existing RMP-PSM regulatory framework has proven to be a robust and effective process for improving safety and reducing accidental releases, as EPA's own data confirms.[61] Accordingly, the Coalition requests rescission of the 2016 Final Rule, leaving in place the effective pre-existing rule.[62] The Coalition commits to work with EPA, OSHA and other stakeholders on a new rulemaking in response to this Petition.

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[61] *See* EPA, *Regulatory Impact Analysis*, Docket # EPA-HQ-OEM-2015-0725-0037, at 16 (Dec. 16, 2016) ("[A]ccident histories submitted with RMPs have shown a reduction in the frequency of accidents since the beginning of the program . . . ."); EPA, *Regulatory Impact Analysis*, Docket # EPA-HQ-OEM-2015-0725-0734, at 16 (Dec. 16, 2016) (same); AFPM Comments at 64.

[62] Section 553(e) of the APA provides ample authority to rescind the Final Rule. *See* 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."); *Nat'l Ass'n of Homebuilders v. EPA*, 682 F.3d 1032, 1037 (D.C. Cir. 2012) (denying petition for review of EPA's repeal of a recently amended rule because "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances.") (citation and internal quotation marks omitted). Rescission is also consistent with Section 307(d) of the CAA, which only limits reconsideration to the scope of objections raised upon reconsideration. Where, as here, several overarching and interrelated objections are made to a rule, EPA may properly entertain rescission of the entire rule as part of the reconsideration proceeding. *See* 42 U.S.C. § 7607(d)(7)(B) (When granting a petition for reconsideration, "the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed . . . .").

CONCLUSION

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

February 28, 2017

Respectfully submitted,

Leslie A. Hulse – E.W.

Leslie A. Hulse
Assistant General Counsel
American Chemical Council

Jan Poling

Jan A. Poling
Vice President, General Counsel, and Corporate Secretary
Andrew J. Topps
Assistant General Counsel
American Forest & Paper Association

Richard Moskowitz

Taylor Hoverman

Richard Moskowitz
General Counsel
Taylor Hoverman
Associate Counsel
American Fuel & Petrochemical Manufacturers

Peter Tolsdorf – EW.

Peter Tolsdorf
Senior Counsel
American Petroleum Institute

Chamber of Commerce of the United States of America

Quentin Riegel – EW.

Linda E. Kelly
Senior Vice President & General Counsel
Quentin Riegel
Vice President, Litigation and Deputy General Counsel
Leland P. Frost
Associate General Counsel
National Association of Manufacturers

William L. Wehrum – EW.

William L. Wehrum
Counsel for the
Utility Air Regulatory Group