May 13, 2016

U.S. Environmental Protection Agency
Attention: Docket ID No. EPA–HQ-OEM-2015-0725
Mr. James Belke & Ms. Kathy Franklin
Office of Land and Emergency Management
1200 Pennsylvania Ave. NW
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Re: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Proposed Rule, Docket ID No. EPA-HQ-OEM-2015-0725, 81 Fed. Reg. 13,638 (Mar. 14, 2016)

The American Forest & Paper Association, American Iron and Steel Institute, International Liquid Terminals Association, National Association of Manufacturers, and U.S. Chamber of Commerce (collectively, "the Associations")[1] appreciate the opportunity to submit the following comments in response to the Environmental Protection Agency's ("EPA's") proposed Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Docket ID No. EPA-HQ-OEM-2015-0725, 81 Fed. Reg. 13,638 (Mar. 14, 2016) (hereinafter, "proposal" or "proposed rule").

As trade associations whose members are regulated by EPA under the Clean Air Act, the Associations have a strong interest in EPA's proposed amendments to its Risk Management Plan ("RMP") regulations. The safety and security of facilities, employees, and communities are paramount to the Associations and their members. The Associations' members prudently engage in risk management planning, invest in security, and believe that fostering a continued partnership between businesses and federal, state, and local officials is fundamental to ensuring facility safety now and in the future. The Associations observe that certain aspects of the RMP program align with industry efforts to achieve these goals.

[1] A description of each Association is included in Appendix A.

At the same time, the Associations have a number of significant concerns with EPA's proposal to expand and complicate the RMP program through the proposed rule. In these comments, six of these concerns have been prioritized for consideration by EPA:

- First, the Associations are concerned that the proposed revisions to the RMP program will overlap and conflict with other federal programs designed to promote safety and security, meaning that EPA's proposal will be duplicative and add regulatory burdens—and likely inconsistencies—with no additional benefits. In particular, EPA's expansion of the definition of "catastrophic release" to include releases that only produce on-site impacts conflicts with the Occupational Safety and Health Administration's ("OSHA's") statutory authority over such releases.

- Second, the numerous inadequacies of a prescriptive "inherently safer technology" ("IST") analysis have been well documented in response to similar proposals from other federal agencies and are not any more suitable under the RMP program.

- Third, EPA's proposed disclosure requirements raise concerns related to sensitive business and security data.

- Fourth, EPA's proposal to require third-party audits is infeasible in certain circumstances due to the high costs and the lack of availability of third-party auditors, which have not been shown to provide any improvements in safety in comparison to self-audits. They are likely to introduce unnecessary complexity, burden, and hardship that are not justified.

- Fifth, as EPA itself acknowledges, the monetized costs of the proposed rule are likely to exceed the monetized benefits.[2] An appropriate cost-benefit analysis would further underscore how costly the rule would be in comparison to its benefits.

- Sixth, EPA has ignored its obligations under the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA") by submitting the proposed rule to the Office of Management and Budget ("OMB") before the Small Business Advocacy Review ("SBAR") panel completed its report. Failing to wait until the completion of the SBAR panel report raises serious questions about EPA's commitment to the public comment process that is central to EPA's rulemaking authority under the Clean Air Act.

Each of these concerns will be expanded upon below.

[2] EPA, Regulatory Impact Analysis 91 (February 24, 2016) ("RIA").

I. EPA Must Avoid Regulatory Overlap and Inconsistencies with Other Federal Programs

In addition to industry programs, best practices, and standards that promote the safety and security of their facilities, the Associations' members also comply with a suite of regulatory programs administered by several federal agencies including EPA, OSHA, the Department of Homeland Security ("DHS"), the Department of Transportation ("DOT"), the Mine Safety and Health Administration ("MSHA") and the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("BATFE"). Each of these agencies has existing regulatory programs that require stationary sources to evaluate their facilities and make them safe and secure.

In light of this existing regulatory framework, the Associations urge EPA to proceed with caution as it considers whether to expand its own regulatory programs, such as the RMP program. Many of the sources that EPA would regulate under the RMP program are also subject to regulation by the agencies listed above. Imposing new obligations on these sources under the RMP program would add costs, confusion, and inefficiencies with little or no improvement in safety or security because similar obligations are already imposed under other federal programs. Indeed, Executive Order 13563 directs federal agencies to "simplif[y] and harmoniz[e] rules" and to avoid regulations "which may be redundant, inconsistent, or overlapping."[3] Consistent with the President's instruction, EPA must take every effort to understand how the RMP program operates alongside other federal safety and security programs and must avoid regulatory overlap that adds compliance costs without an accompanying safety or security benefit.

A. EPA's Proposed Definition of "Catastrophic Release" Overlaps with OSHA's Process Safety Management Program

EPA must avoid unnecessary overlap with OSHA's Process Safety Management ("PSM") program. When Congress amended the Clean Air Act in 1990, it created a comprehensive program to address risks of accidental releases. However, it divided the authority to implement that program between EPA and OSHA. Under Section 112(r) of the Clean Air Act, EPA was given authority to address accidental releases into the ambient air that could affect the environment and public health.[4] Specifically, Section 112(r) defines "accidental release" as "an unanticipated emission of a regulated substance or other extremely hazardous substance *into the ambient air* from a stationary source."[5] In contrast, OSHA was given authority over accidental releases that pose threats to workers located on-site at the stationary source.[6] As a result of this

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[3] *Available at* https://www.whitehouse.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review (last visited May 10, 2016); s*ee also Paralyzed Veterans of Am. v. C.A.B.*, 752 F.2d 694, 713 (D.C. Cir. 1985) (commending Department of Transportation's "effort to avoid redundant overlapping regulations"), *rev'd on other grounds*, *Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986).

[4] *See* 42 U.S.C. § 7411(r)(2)(A).

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

[6] PL 101-549, Section 304, 104 Stat 2576.

division, EPA has authority over accidental releases that impact the ambient air beyond the source, while OSHA has authority over accidental releases that impact workers on-site. To respect Congress' division of authority, EPA must avoid regulating on-site impacts under the RMP program.

EPA ignores this important distinction by proposing to modify the definition of "catastrophic release" to explicitly include releases (or near misses[7]) that produce only on-site impacts.[8] While EPA suggests that this is merely a clarification of the existing definition, the proposal substantially expands the scope of the current definition, which is limited to releases "that present imminent and substantial endangerment to public health and welfare."[9] This expansion extends beyond the scope of EPA's authority under Section 112(r) of the Clean Air Act and is troubling because it would lead to a false public perception of risk, be an unlawful expansion into OSHA's regulatory sphere, and trigger several substantive RMP requirements that apply only in response to catastrophic releases. For these reasons, EPA should not change the current definition of "catastrophic release."

EPA's RMP and OSHA's PSM program are intended to be complementary and, in some cases, may overlap when accidental releases have both on-site and off-site impacts. Nonetheless, there are important boundaries between the two programs. When the risks from an accidental release are limited to workers present on-site, that release falls solely under OSHA's authority under the PSM program. EPA's proposal unlawfully encroaches into OSHA's jurisdiction by defining "catastrophic release" as "a major uncontrolled emission, fire, or explosion, involving one or more regulated substances that result in *deaths, injuries, or significant property damage onsite, or* known off-site deaths, injuries, evacuations, sheltering in place, property damage, or environmental damage."[10] By proposing to define "catastrophic release" to cover impacts that occur exclusively on-site, EPA is expanding into OSHA's regulatory domain and creating a risk that facilities will have to comply with duplicative and unnecessary regulations under both the RMP and PSM programs. In addition, such an expansion could lead to confusion and public misperception of the risk associated with the release.

EPA's proposal to expand the scope of "catastrophic release" also would introduce significant new compliance burdens, as that term serves as a trigger for several other regulatory obligations under the RMP program. For example, a "catastrophic release" triggers the

[7] EPA's expansion of the definition of "catastrophic release" to include near misses is particularly problematic because the term is subjective and undefined in EPA's regulations. Unless EPA resolves this legal uncertainty by providing a reasonable and narrow definition for near misses, facilities may spend unnecessary time and resources investigating events that have not (and potentially could not have) resulted in catastrophic releases.

[8] *See* 81 Fed. Reg. at 13,702 (proposed 40 C.F.R. § 68.3).

[9] 40 C.F.R. § 68.3.

[10] 81 Fed. Reg. at 13,702 (proposed 40 C.F.R. § 68.3) (emphasis added).

obligation to conduct an incident investigation.[11] EPA's proposal would expand the scope of such incident investigations to include near misses.[12] In addition, the content of the incident investigations is expanded by, among other things, requiring a root cause analysis.[13] Thus, this proposed expansion would impose significant burdens in response to accidental releases (or near misses) that have no impact outside the boundary of the stationary source, even though OSHA's PSM program already provides for investigations of such incidents. Because such accidental releases are already regulated by OSHA, EPA should refrain from modifying the definition of "catastrophic release."

B. Overlap with DHS's Chemical Facility Anti-Terrorism Standards

Likewise, DHS's Chemical Facility Anti-Terrorism Standards ("CFATS") program already includes a process for sources to evaluate and adopt alternative technologies and designs that are safer and more secure. EPA must avoid burdensome requirements that overlap with the CFATS program at additional cost without added benefit.

C. Overlap with Existing Regulations for the Storage of Explosive Materials

Moreover, explosives storage and manufacturing regulations are enforced by the BATFE and OSHA. Other agencies that have regulations addressing explosives include MSHA, DOT, and EPA, through other regulatory programs. Safe storage of explosive materials is also achieved by complying with the American Table of Distances ("ATD"), which has been developed by the Institute of Makers of Explosives ("IME"). Compliance with the ATD, along with other federal safety measures, ensures that the public is protected in the event of an unplanned detonation. Because the ATD has been developed to ensure public safety, and compliance with the ATD is mandated by the BATFE and other federal agencies, expanding the list of materials that require an RMP to include explosives would create confusion and potential inconsistencies for the regulated community, given the already substantial number of regulations addressing safety and security in the context of explosives. For example, BATFE requires compliance with the ATD at locations where explosives are stored either alone or in combination with ammonium nitrate, and OSHA adopts the ATD by reference. Furthermore, OSHA

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[11] *See* 40 C.F.R. §§ 68.60(a); 68.81(a). The challenges associated with requiring incident investigations in response to incidents limited to on-site impacts are exacerbated by the lack of clear guidance with respect to on-site responses, such as sheltering in place. If such responses are initiated unnecessarily, they would result in significant additional investigative burdens on facilities.

[12] 81 Fed. Reg. at 13,705, 07 (proposed 40 C.F.R. §§ 68.60(a)(2); 68.81(a)(2)). While many facilities subject to RMP conduct internal investigations of near misses and seek to learn from those events, the Associations do not believe that expanding the definition of "catastrophic release" to include near misses is appropriate, particularly in light of the substantive RMP obligations that are triggered by catastrophic releases.

[13] *Id.* (proposed 40 C.F.R. §§ 68.60(d)(7); 68.81(d)(7)). The term "root cause analysis" is specific to certain methods or software used to evaluate incidents. Requiring a root cause analysis would unduly constrain a facility's discretion to determine the best and most appropriate evaluation methodology which could also include proven processes such as cause mapping, 5 why analysis, fish bone diagrams, and other alternative methods.

standards govern explosives manufacturing and storage as related to employee safety.[14] Finally, MSHA standards also incorporate the ATD.[15] Compliance with the ATD negates the need for a risk management plan for explosives because additional regulations to address the risk of potential off-site effects would be duplicative.

II. EPA Should Not Include the Proposed Alternatives Analysis Requirements in the RMP Program

The Associations are opposed to EPA's proposal to require an alternatives analysis that incorporates IST for certain facilities in the RMP program. Specifically, EPA proposes "to require analysis of potential safe technology and alternatives that would include, in the following order of preference: IST or [inherently safer design], passive measures, active measures, and procedural measures" for Program 3 processes.[16] Owners and operators of Program 3 processes would be required to evaluate the feasibility of IST measures, but would not be required to implement them.[17] EPA considered a similar requirement in 1996, but ultimately concluded that "EPA does not believe that a requirement that owners or operators conduct searches or analyses of alternative process technologies for new or existing processes will produce significant additional benefits."[18] That conclusion remains true today, particularly since the federal government already has other programs in place that provide incentives for sources to conduct similar analyses to improve safety and security. As a result, imposing IST requirements in the RMP program would be duplicative and produce no additional benefits.

Conducting alternatives analysis as proposed under the RMP program would be of limited value to existing facilities. IST and other safer alternatives are best evaluated during the initial design of a facility when owners and operators have maximum flexibility to make design changes that can promote safety. Once a facility has been constructed, past decisions regarding facility design will constrain the available options. Thus, even if a source identifies ISTs or other alternatives, they may well prove infeasible for their specific application due to facility design constraints and prohibitive costs.[19]

Further, including an IST analysis in the RMP program is unlikely to provide additional safety benefits. Sources that would be subject to the proposed IST requirement already have ample incentives to identify and implement ISTs and other alternatives that promote safety and

[14] 29 C.F.R. § 1910.109.

[15] 30 C.F.R. Part 56.

[16] 81 Fed. Reg. at 13,667.

[17] *Id.*

[18] 61 Fed. Reg. 31,688, 31,674 (June 20, 1996).

[19] *See, e.g.*, Center for Chemical Process Safety, *Inherently Safer Chemical Processes: A Life Cycle Approach* 24 (2d ed. 2009) ("As the process moves through its life cycle, it becomes more difficult and expensive to change the basic process.").

security. For example, including IST requirements in the RMP program will duplicate the CFATS program, adding further regulatory burdens without providing additional benefits.

In addition, the narrow focus of the RMP program may distort the IST analysis and may shift or even increase safety and security risks instead of reducing them. EPA itself acknowledges this in the preamble to the proposed rule.[20] To be effective, IST analyses must be as holistic as possible, evaluating a chemical's entire value chain from cradle to grave. Such an approach can identify all risks associated with a given chemical or product and seek to minimize those risks in an integrated manner. In contrast, an IST analysis focused on a specific facility may identify opportunities that shift, rather than eliminate, risks. For example, a reduced quantity of a hazardous chemical at a plant can lead to greater risk in transportation systems or at the originating plant.[21] Likewise, eliminating the use of a hazardous catalyst could create other risks if a chemical manufacturing facility had to increase the temperature and pressure of chemical processes.[22] Substitution of chemicals could raise other regulatory concerns if specific chemical processes are subject to regulatory approval and changes to such processes could produce supply chain disruptions pending regulatory approval.[23] All of these examples demonstrate that a more holistic approach to IST analyses—including those already employed by facilities under other voluntary programs—would be better able to minimize risks rather than simply shift them off-site.

III. EPA's Proposed Public Disclosure Requirements May Create Security Risks

The Associations are also concerned that EPA's proposed public disclosure requirements could create security risks. EPA's proposed public disclosure regulations would require sources to disclose, among other things, the facility's accident history report, procedures for informing the public and local emergency response agencies about accidental releases, and the reports from emergency response exercises. While limited disclosure of this information to appropriate government agencies helps to improve safety, public dissemination could have the opposite effect.[24] Public dissemination of such information could create significant security risks if the information would give a would-be terrorist insight into how to create a release and/or impede the response to such a release.

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[20] 81 Fed. Reg. at 13,663.

[21] *See, e.g.*, statement of Stephen Poorman on behalf of the Society of Chemical Manufacturers and Affiliates at 5, *Hearing on the Chemical Facility Anti-Terrorism Act of 2009 (H.R. 2868) Before the Subcomm. on Energy & Environment of the H. Comm. on Energy & Commerce*, 111th Cong. (Oct. 1, 2009).

[22] *Id.*

[23] *Id.* at 6.

[24] The Associations also have concerns about EPA's proposal to require a public meeting within thirty days after any incident included in a five-year accident history. Requiring a public meeting so soon after incident will impose significant costs on facilities, but may provide little useful information because investigations will be incomplete, and ultimately may do little, if anything, to reduce the risk of future incidents.

In 1999, Congress passed the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act ("CSISSFRRA").[25] In recognition that certain information about facilities regulated under the RMP program could be used to commit terrorist or criminal acts, particularly in light of increased availability of information on the internet, Congress limited access to certain off-site consequence analysis information to government agencies tasked with preventing or responding to accidental releases. The purpose of CSISSFRRA is to prevent the public disclosure of sensitive security information about preventing and/or responding to accidental releases that, if used by the wrong persons, could cause the very releases that the RMP program is designed to prevent.

Likewise, EPA's proposed public disclosure requirements are at odds with the security provisions adopted by DHS as part of the CFATS program. In addition to directing EPA to evaluate opportunities to improve chemical safety and security, Executive Order 13650 directs DHS to use the CFATS program to ensure that there are sufficient standards in place to minimize the risk of terrorist attacks at chemical facilities. Among other things, the CFATS program requires certain chemical facilities to meet additional regulatory requirements to prevent disclosure of sensitive information that could be used by terrorists in furtherance of a chemical attack. EPA's proposed expansion of public disclosure requirements is at odds with the emphasis placed by both Congress and the Administration on the protection of sensitive security information from disclosure.

In light of the risks identified by Congress in the CSISSFRRA, EPA must avoid compelling disclosure of any information from regulated sources that could be used by a terrorist or criminal in furtherance of a terrorist or criminal act involving the release of chemicals from a regulated facility. Certain information about accident histories, emergency response procedures, and conclusions and recommendations from emergency response exercises could, in certain instances, identify potential vulnerabilities that could be exploited for nefarious purposes. While the Associations agree that regulated facilities and appropriate government agencies must have access to that information to evaluate and mitigate risks of accidental releases, as well as risks of terrorist or criminal acts, such information must not become publicly available. Therefore, the Associations urge EPA to eliminate any public disclosure requirement that could include sensitive security information.

IV. EPA Should Not Require Third-Party Auditing or the Submittal of Draft Reports Under the RMP Program

The Associations have several significant concerns regarding EPA's proposal to add third-party auditing requirements to the RMP program. As described more fully below, in addition to the extraordinary costs to conduct such auditing, the proposal raises a number of important substantive and logistical concerns. Under the proposed rule, EPA would replace the

[25] Pub. L. 106-40, 113 Stat. 207 (Aug. 5, 1999).

RMP program's self-auditing requirements with third-party auditing "following an accident meeting the five-year accident history criteria in § 68.42(a)" and "under certain circumstances that suggest a heightened risk," as determined by the implementing agency.[26] EPA proposes that the third-party auditors be competent, independent, and impartial.[27] To ensure that the third-party auditors are independent and impartial, EPA is proposing that they cannot have a business relationship with the stationary source for three years before or after the audit and that no employee participating in the audit can accept employment at the stationary source for three years after the audit.[28] In addition, EPA proposes to require that the third-party auditor submit its final report to the implementing agency "at the same time, or before, it is provided to the owner" and solicits comment on imposing the same requirement on draft reports.[29] EPA also proposes to require facilities to prepare a corrective action plan within ninety days after the third-party audit report and to provide the audit committee of the Board of Directors with a findings response report and a schedule to address deficiencies.[30] This element of EPA's proposal raises a number of significant concerns, six of which are discussed below.

First, the Associations are concerned that the proposal will fail to provide safety benefits in comparison to the self-audits currently required by the RMP process. While the proposal includes competency requirements for auditors,[31] the reality is that there may be few, if any, truly qualified third-party auditors that can also meet EPA's independence and impartiality requirements because the auditors most familiar with a source's operations will be those who have an existing business relationship with the facility. The Associations recognize that there is often value in having a qualified external expert review a process. However, given the complexity of many Program 2 and Program 3 sources, an inspection performed by an auditor that lacks familiarity with a facility and its complex processes may result in mistakes and errors in judgment that could be avoided through the use of self-audits that rely on auditors with a deep understanding of the facility and its operations. Further, the requirement that an auditor must be a Professional Engineer ("PE") does not ensure knowledge of a process, regulatory applicability, or auditing competency. As a result, there is no certainty that EPA's proposal will improve the quality of audits in comparison to the self-audits that are already conducted.

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[26] 81 Fed. Reg. at 13,655.

[27] *Id.* at 13,659.

[28] *Id.* at 13,660. This requirement would cripple existing relationships between facilities and competent, reliable auditors who would otherwise be engaged to provide services to those facilities, would unduly limit the pool of available auditors, and would increase the cost of both voluntary and mandatory audits due to the scarcity of qualified auditors.

[29] *Id.* at 13,662.

[30] *Id.* at 13,705, 07 (proposed 40 C.F.R. §§ 68.59, 68.80). Ninety days is too short a time to respond to a third-party audit report. Further, requiring submittal to the audit committee unduly constrains facilities that may have other processes to involve facility leadership in responding to findings from third-party audits.

[31] *Id.* at 13,6659-60.

Second, EPA's proposal would add significant and unnecessary costs to the auditing process. Under EPA's proposal, regulated sources would have to verify the qualifications of third-party auditors and pay for the audit and audit report, as well as any other incidental costs. This could be significant, depending on the scope of the audit and the travel and other expenses necessary to complete it. These costs are particularly troubling in light of the uncertain benefits that third-party audits will provide. In addition, because of the discretion that implementing agencies have in requiring third-party audits,[32] those additional costs could be triggered in cases that do not warrant third-party audits. In light of these uncertainties and risks, the significant costs of third-party audits are not justified.

Third, the Associations are concerned that they may not have sufficient access to third-party auditors, particularly in some rural areas. Many of the firms that could theoretically provide third-party auditing services are currently providing voluntary auditing services to the same sources. To meet EPA's proposed independence and impartiality requirements, such firms may have to make a choice between offering third-party auditing services under RMP or the voluntary auditing services that they currently provide. Regardless of the choice that these auditors make, there is likely to be a shortage of qualified auditors to meet both needs. As a result, sources may lack access to qualified and independent third-party auditors or, alternatively, may be forced to pay much higher costs to retain such third-party auditors. In either case, the Associations' members, and their small business members in particular, would be adversely impacted by the proposed requirement to use independent third-party auditors.

Fourth, the Associations are concerned that EPA's proposal could result in the disclosure of confidential business information ("CBI") or other sensitive security information. Making such information public provides *no* safety or environmental value and is in direct conflict with DHS regulations designed to prevent disclosure of sensitive security information. In order to ensure the independence and impartiality of the third-party auditors, EPA is proposing to require them to submit their final reports to the implementing agency at the same time, or before, the reports are sent to the source. Even more troubling, EPA solicits comments on imposing the same requirements for draft reports. Depending on the facility and the scope of the audit, third-party auditors may be given access to CBI or other sensitive security information that should not be disclosed to the public.[33] If the audited source is not given access to these reports before their official submission to implementing agencies, there is a risk that CBI or sensitive security information may be included in the report. Without appropriate safeguards in place, such disclosures could irreparably harm the audited source and threaten the safety of local communities.

[32] *See id.* at 13,704, 06.

[33] This brings into question whether EPA is requiring the waiver of the attorney client privilege that currently exists by demanding simultaneous submission of incomplete, draft, or yet approved audit reports.

Fifth, by requiring third-party audits in response to any incident that must be included in a five-year accident history report, EPA's proposal would impose substantive obligations in response to accidents that fall squarely within the sole jurisdiction of OSHA. As described above, any accident that only impacts workers located on-site is subject to regulation that falls under OSHA's jurisdiction pursuant to the 1990 Clean Air Act Amendments. However, EPA's five-year accident history report requires facilities to report accidents that "resulted in deaths, injuries, or significant property damage on-site."[34] Using the accident history report as a triggering mechanism for third-party audits unlawfully usurps OSHA's authority to promulgate standards to address on-site impacts to workers.

Sixth, in addition to the security and CBI reasons cited above, the Associations are concerned that requiring submittal of draft audit reports will result in unnecessary and time-consuming attention to arbitrary facts. Even under ideal scenarios, audit reports are the culmination of facts collected by a certain individual over several days. When drafting the report from these observations, there may be confusion or mistakes on the auditor's part, which are routinely addressed by plant personnel when reviewing the draft report. These clarifications may be addressed by phone or in writing, but lead to a much more accurate description of facility processes. Requiring the submittal of a draft report that may contain inaccurate information is not helpful to the Agency or the public.

V. EPA Failed to Conduct an Appropriate Cost Benefit Analysis for the Proposed Rule

EPA's cost-benefit analysis for the proposed rule is deficient and raises serious questions about whether the costs of the rule can be justified. EPA fails to make any effort to quantify the expected benefits of the rule, making any comparison to the costs impossible. Moreover, EPA inappropriately includes projected benefits related to on-site impacts of accidental releases that overlap with OSHA's authority under the PSM program. In addition, EPA appears to underestimate the costs of complying with the proposed rule. If all of these deficiencies were addressed, it is likely that the costs of the proposed rule would significantly exceed the expected benefits. Proposing and finalizing such a rule would be contrary to Executive Order 13563, which directs agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs …."[35]

As an initial matter, EPA makes no effort to quantify the expected benefits of the proposed rule.[36] Instead, EPA simply asserts that "promulgation and implementation of this rule would result in a reduction of the frequency and magnitude of damages from releases."[37] EPA

[34] 40 C.F.R. § 68.42(a).

[35] *Available at* https://www.whitehouse.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review (last visited May 10, 2016).

[36] *See*.

[37] *Id.*

then quantifies the damages associated with accidental releases from RMP facilities and compares those costs to the costs of complying with the proposed rule.[38] This approach to a cost-benefit analysis is arbitrary and capricious because EPA makes no effort to determine how effective the proposed rule would be at preventing or mitigating the impact of accidental releases from RMP facilities. EPA cannot make a rational decision with respect to the proposed RMP provisions without an attempt to quantify those alleged benefits. As the Supreme Court recently explained, "[o]ne would not say that it is even rational, never mind 'appropriate' to impose billions of dollars in economic costs for a few dollars in health or environmental benefits."[39] Simply providing the amount of past damages without any attempt to understand the portion of those damages that would be avoided by the measures included in the proposed rule cannot provide a reasoned basis for concluding that the proposed rule is cost-effective.

Equally troubling is the fact that virtually all of the damages identified by EPA occur on-site. Only three percent of the damages identified by EPA over the past decade occurred off-site.[40] In fact, less than one-third of the accidental releases evaluated by EPA had any off-site damages at all.[41] As described above, Congress directed OSHA, not EPA, to develop a program to protect workers and prevent or mitigate the impact accidental releases that produce on-site impacts. While there is certainly some overlap when an accidental release has both on-site and off-site impacts, it is clear that an accidental release limited to on-site impacts is strictly the purview of OSHA, not EPA. By including on-site damages in its cost-benefit analysis, EPA is both inflating the costs of accidental releases that can be regulated by EPA and creating a risk of double-counting projected benefits between the RMP and PSM programs. At a minimum, EPA must exclude from its cost-benefit analysis accidental releases that have no off-site damages.

Finally, the Associations have concerns about EPA's projections regarding the costs of implementing the proposed rule. While the Associations have not had sufficient time to prepare cost estimates, many of EPA's assumptions appear to be conservative and likely underestimate the costs that each regulated source must expend to comply with the proposed rule. Moreover, EPA may also be underestimating the number of RMP facilities that will have to comply with third-party audits and root cause analyses. EPA acknowledges in the RIA that the projected costs of implementing the proposed rule would likely exceed the monetized benefits.[42] Correcting the data to exclude on-site damages and to fully incorporate the implementation costs will further reduce the cost-effectiveness of the proposed rule. Conducting an appropriate cost-

[38] *Id.*

[39] *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

[40] 81 Fed. Reg. at 13,694, table 18 (calculating on-site damages of $2,657,865,790 and off-site damages of $89,459,394).

[41] EPA, RIA at 91 ("Of the 1,517 reportable releases, 473 had reportable off-site impacts.").

[42] *Id.* at 96.

benefit analysis would undoubtedly demonstrate that the costs of the proposed rule cannot be justified.

VI. EPA Failed to Comply with the Small Business Regulatory Enforcement Fairness Act

Section 609(b) of the Regulatory Flexibility Act ("RFA"), as amended by the SBREFA requires EPA to convene an SBAR panel when a proposed action will have a significant impact on a substantial number of small businesses. The purpose of this requirement is to give representatives of such small businesses an opportunity to review and comment on EPA's proposed action *before* it is officially published so that EPA can make necessary changes in response to the SBAR panel's concerns. While EPA did convene an SBAR panel for this rulemaking, the Agency's actions demonstrate a failure to comply with the SBREFA amendments or to fully consider the SBAR panel's conclusions.

In this case, EPA convened the SBAR panel on November 4, 2015, and the deadline for submitting written comments to the SBAR panel was December 9, 2015. The SBAR panel submitted its report to EPA on February 19, 2016. Rather than waiting for the SBAR panel to complete its report before finalizing its proposal, EPA submitted the proposed RMP rule to the OMB on December 21, 2015, nearly two months before the SBAR panel report was finished. EPA issued a pre-publication version of the proposed rule on February 24, 2016, just five days after receiving the SBAR panel report. By moving forward with the proposed rule without waiting to receive the SBAR panel report, EPA failed to comply with the purpose of the SBREFA. The purpose of the SBREFA is not simply to generate a report, but to inform EPA's decision making. By submitting the proposed rule to OMB before the SBAR panel report was completed and issuing the proposed rule less than a week after receiving the SBAR report, EPA demonstrated a disregard for the SBREFA's purpose and failed to allow the SBAR panel's report to inform the content of the proposed rule.

Conclusion

As explained above, the Associations are committed to taking reasonable, appropriate, and affirmative action with respect to risk management, safety, and security. To ensure these goals are met, we urge EPA to make the following described changes to the proposed revisions to the RMP program.

- EPA must refrain from modifying the definition of "catastrophic release" or from taking any other action that would expand EPA's authority into areas regulated by other federal agencies or otherwise overlap with existing federal regulations for chemical safety and security.

- EPA must not include a requirement to evaluate ISTs or other alternatives as a mandatory part of the RMP program.

- EPA must eliminate any public disclosure requirements that are inconsistent with existing chemical security programs or could otherwise create risks for chemical facilities and the public.

- EPA should not require third-party auditing as part of the RMP program.

- EPA must conduct a complete cost-benefit analysis and avoid issuing regulations where costs will exceed the expected benefits.

- EPA must correct the deficiencies in its SBREFA process and ensure that the comments of small businesses and all interested stakeholders are fully and fairly accounted for in this rulemaking process.

The undersigned Associations appreciate your consideration of these consolidated comments on this proposal.

Respectfully Submitted,

American Forest & Paper Association

American Iron and Steel Institute

International Liquid Terminals Association

National Association of Manufacturers

U.S. Chamber of Commerce

Appendix A

The **American Forest & Paper Association** (AF&PA) is the national trade association of the paper and wood products industry, which accounts for approximately 4 percent of the total U.S. manufacturing gross domestic product. The industry makes products essential for everyday life from renewable and recyclable resources, producing about $210 billion in products annually and employing nearly 900,000 men and women with an annual payroll of approximately $50 billion.

The **American Iron and Steel Institute** (AISI) serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI also plays a lead role in the development and application of new steels and steelmaking technology. AISI is comprised of 19 member companies, including integrated and electric furnace steelmakers, and approximately 125 associate members who are suppliers to or customers of the steel industry.

The **International Liquid Terminals Association** (ILTA) represents more than 80 commercial operators of aboveground liquid storage terminals serving various modes of bulk transportation, including tank trucks, railcars, pipelines, and marine vessels. Operating in all 50 states, these companies own more than six hundred domestic terminal facilities and handle a wide range of liquid commodities, including crude oil, refined petroleum products, chemicals, biofuels, fertilizers, and vegetable oils. Customers who store products at these terminals include oil companies, chemical manufacturers, petroleum refiners, food producers, utilities, airlines and other transportation companies, commodity brokers, government agencies, and military bases.

The **National Association of Manufacturers** ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **U.S. Chamber of Commerce** is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.