



Environmental Data & Governance Initiative

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May 19, 2017

Re: Public Comment on Proposed Rule: [Accidental Release Prevention Requirements: Risk Management Programs under Clean Air Act; Further Delay of Effective Date](#)

Docket ID: EPA-HQ-OEM-2015-0725

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

Dear Mr. Pruitt,

As part of the Environmental Data & Governance Initiative (EDGI), a network of non-profits and academic researchers that promotes evidence-based policy and robust data governance, the members of EDGI's Capacity and Governance Working Group appreciate the opportunity to submit a written comment regarding the amendments to the EPA's Risk Management Program (RMP) and the proposal to delay the implementation of those amendments.

These RMP amendments were created based on significant study and stakeholder consultation. After Executive Order 13650 instructed the EPA to work with stakeholders to improve chemical facility safety and security, a working group spanning three agencies, formed in response to the order, conducted multiple listening sessions, meetings with stakeholders, and webinars.¹ The working group collected input from nearly 1,800 participants from more than 25 states across the country,² 61,716 written comments were submitted regarding this proposed rulemaking, and 22 stakeholders commented at a public hearing on the topic.³ Before issuing a final rule, the EPA carefully studied this feedback and accounted for industries' and other stakeholders' concerns.⁴

¹ Executive Order (EO) 13650: Improving Chemical Facility Safety and Security, <https://obamawhitehouse.archives.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security>.

² EPA Activities Under EO 13650: Proposed Changes to the Risk Management Program (RMP) Rule Questions & Answers (February, 2016), https://www.epa.gov/sites/production/files/2016-02/documents/rmp_proposed_rule_qs_and_as_2-26-16_removed_public_number_fixed_date.pdf.

³ See discussion of comments throughout the Final Rule publication, 82 Fed. Reg. 4594, 4599, (January 13, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-01-13/pdf/2016-31426.pdf>.

⁴ The EPA addresses the comments in the Final Rule and in a separate response published in the Fed. Reg. (81 Fed. Reg. 13637 (March 14, 2016)) and made available online, https://www.epa.gov/sites/production/files/2016-12/documents/rmp_rtc_compiled_12-21-16.pdf.

According to our research, the RMP amendments will improve the safety of chemical processing, improve information access for first responders, and protect local communities. The amendments also implement good data governance practices to ensure that Local Emergency Planning Committees (LEPCs)⁵, emergency response officials, and members of the public can better access risk assessments and emergency-response information from facilities. By improving accident prevention program requirements and enhancing emergency preparedness, the RMP amendments protect communities and first responders.

Background: The Original RMP Rule

Section 112(r) of the Clean Air Act requires the EPA to draft regulations and guidance to prevent chemical accidents at facilities that use, distribute, and process certain kinds of hazardous chemicals.⁶ These regulations are articulated in the EPA's original RMP rule⁷ and have effectively prevented chemical accidents since they were implemented in 1996, though they have not been as effective as they should have been.⁸ In the past decade, there have been more than 1,500 reportable accidents at regulated facilities, and approximately 500 of those accidents had off-site impacts. These accidents have killed 60 people, injured approximately 17,000 more, and forced evacuations or shelter-in-place orders affecting approximately 500,000 others. The costs of these accidents have exceeded \$2 billion.⁹

The original RMP rule established three program levels for regulated processes that “progressively gain granularity and rigor” to address the particular scales of risks and needs at different facilities.¹⁰ Program 1 applies a limited set of requirements to facilities that have processes that would not affect the public even in the worst case of a chemical release and that have not had a major accident in the last five years.¹¹ Program 1 requirements include basic

⁵ Local Emergency Planning Committees (LEPCs) are committees composed of local elected officials; police, fire, civil defense, and public health professionals; environmental, transportation, and hospital officials; facility representatives; members of the media; and community groups. The Emergency Planning and Community Right to Know Act (EPCRA) tasks LEPCs with developing and regularly reviewing emergency response plans and with providing local citizens with emergency response information to prepare for chemical accidents. Establishment of State commissions, planning districts, and local committees, 42 U.S.C. § 11001(a) (2014), <https://www.gpo.gov/fdsys/pkg/USCODE-2014-title42/pdf/USCODE-2014-title42-chap116-subchapl-sec11001.pdf>.

⁶ Hazardous air pollutants, 42 U.S.C. § 7412(r), <https://www.gpo.gov/fdsys/granule/USCODE-2011-title42/USCODE-2011-title42-chap85-subchapl-partA-sec7412>.

⁷ Chemical Accident Prevention Provisions, 40 CFR 68 et seq., <https://www.gpo.gov/fdsys/pkg/CFR-2016-title40-vol17/pdf/CFR-2016-title40-vol17-part68.pdf>.

⁸ Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section 112(r)(7); Final Rule, 61 Fed. Reg. 31668 (June 20, 1996) (codified at 40 CFR 68 et seq.), <https://www.gpo.gov/fdsys/pkg/FR-1996-06-20/pdf/96-14597.pdf>.

⁹ EPA Activities Under EO 13650: Proposed Changes to the Risk Management Program (RMP) Rule Questions & Answers (February, 2016), https://www.epa.gov/sites/production/files/2016-02/documents/rmp_proposed_rule_qs_and_as_2-26-16_removed_public_number_fixed_date.pdf.

¹⁰ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, 4595 (January 13, 2017) (amending 40 CFR 68 et seq.), <https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.

¹¹ *Ibid.*, 4595

coordination with local emergency responders and submission of a risk management plan.¹² Program 3 applies to facilities that are subject to the Process Safety Management (PSM) standard¹³ of the Occupational Safety and Health Administration (OSHA) or that fall within ten specific industry sectors with an elevated frequency of serious accidents.¹⁴ Program 3 requirements include more extensive procedures and reviews for operating equipment and training and reviews of management, employees and contractors.¹⁵ Program 2 facilities, which are not eligible for Program 1 status but do not fall under one of the Program 3 categories, are subject to more robust requirements than Program 1 but less than those applied to Program 3.¹⁶

The RMP Amendments and Why They Matter

On August 1, 2013, President Obama issued Executive Order 13650, “Improving Chemical Facility Safety and Security.”¹⁷ The Executive Order requires the EPA to “improve operational coordination with state, tribes and local partners; enhance federal agency coordination and information sharing; modernize policies, regulations and guidance; and work with stakeholders to identify best practices.”¹⁸

In response to the Executive Order, the EPA amended the existing RMP regulations to improve safety standards in facilities that use, distribute, and process hazardous chemicals, improve accident prevention program requirements, and ensure emergency preparedness.¹⁹ Specifically, the amended regulations require facilities to thoroughly research accidents and near misses; regularly implement safer technologies; require third-party audits when facilities have RMP reportable accidents, the implementing agency determines that facility conditions could lead to an accidental release of a regulated substance, or a prior third-party audit fails to meet the proper competency and independence criteria; and enhance the availability of chemical hazard

¹² Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, 4595 (January 13, 2017) (amending 40 CFR 68 et seq.), <https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.

¹³ Process safety management of highly hazardous chemicals, 29 CFR 1910.119; Occupational Safety and Health Standards: <https://www.ecfr.gov/cgi-bin/text-idx?rgn=div8&node=29:5.1.1.1.8.8.33.13>.

¹⁴ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, 4595 (January 13, 2017) (amending 40 CFR 68 et seq.), <https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.

¹⁵ Ibid., 4595

¹⁶ Ibid., 4595

¹⁷ Executive Order (EO) 13650: Improving Chemical Facility Safety and Security, <https://obamawhitehouse.archives.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security>.

¹⁸ EPA Activities Under EO 13650: Proposed Changes to the Risk Management Program (RMP) Rule Questions & Answers (February 2016), https://www.epa.gov/sites/production/files/2016-02/documents/rmp_proposed_rule_qs_and_as_2-26-16_removed_public_number_fixed_date.pdf.

¹⁹ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, (January 13, 2017) (amending 40 CFR 68 et seq.), <https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.

information to LEPCs, local emergency response officials, and the public.²⁰ Facilities with Program 2 or 3 processes are required to coordinate annually with local emergency response agencies and conduct regular preparedness exercises.²¹

In the following section, we elaborate on four key RMP provisions and describe some of the catastrophic accidents that motivated them.

1. The amendments require facilities with Program 2 or 3 processes to conduct thorough root cause analyses of accidents and near-misses.²²

This provision ensures that facilities investigate and learn from past incidents. The RMP amendments list a number of catastrophes that could have been prevented if prior incidents and “near-misses” had been properly analyzed and the results from investigations had been used to update processes and safety protocols.²³ These include:

- An explosion caused by over-pressurization at the Morton International chemical plant in Paterson, New Jersey on April 8, 1998. The explosion spewed gas and liquid through the roof of a building and exposed the surrounding community to harmful chemicals.²⁴ Nine workers were injured, two with severe burns, and residents of a 100 city-block area had to shelter in their homes. The U.S. Chemical Safety Board (CSB) determined that, if Morton had more thoroughly investigated the eight prior instances where temperatures exceeded the normal range at this facility, the facility could have corrected the safety problems and prevented the explosion.²⁵
- Explosions and fires on March 23, 2005, at the BP Texas City Refinery in Texas City, Texas, which killed 15 people, injured 180, and forced 43,000 to shelter in place. The disaster also damaged nearby houses and caused over \$1.5 billion in damages.²⁶ The fatal and destructive “flammable liquid geyser,” caused because a tower containing

²⁰ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, (January 13, 2017) (amending 40 CFR 68 et seq.), <https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.

²¹ Ibid., 4595

²² Ibid., 4595

²³ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Proposed Rule. 40 CFR 68. 81 Fed. Reg. 13638, 13648 (March 14, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-03-14/pdf/2016-05191.pdf> (list is located in the “Lack of Root Cause Analysis for Prior Incidents”).

²⁴ Ibid., 13648

²⁵ CSB. 2000. Investigation Digest: Morton International Explosion, Paterson, NJ (April 8, 1998), http://www.csb.gov/assets/1/19/Morton_Digest.pdf.

²⁶ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Proposed Rule, 40 CFR 68. Fed. Reg. 13638, 13649 (March 14, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-03-14/pdf/2016-05191.pdf>.

flammable fluid was overfilled, could have been avoided by more thoroughly investigating prior incidents where similar fluid releases had occurred.²⁷

2. The amendments require facilities with Program 3 regulated processes to regularly assess the possibility of implementing safer technologies and testing procedures.²⁸

Facilities designated as Program 3 are involved in processes that disproportionately cause RMP-reportable releases, like paper manufacturing, petroleum and coal products manufacturing, and chemical manufacturing.²⁹ Program 3 facilities must update their “process hazard assessments” every five years, conducting a “safer technology and alternatives analysis” and evaluating the practicability of implementing “inherently safer technology.”³⁰ Investigations into chemical disasters show that these assessments will help prevent chemical accidents. For example:

- An investigation of the 2008 explosion and resulting fire at Bayer CropScience in Institute, West Virginia, which killed two workers and injured eight others, found that Bayer’s failure to assign a Public information Officer to communicate directly with local emergency officials harmed the public. Additionally, the facility’s lack of working air monitors prevented detection of the toxic chemical release. A CSB chairperson concluded that the deaths and injuries could have been prevented if “Bayer CropScience provided adequate training, and required a comprehensive pre-startup equipment checkout and strict conformance with appropriate startup procedures.”³¹

3. The amendments ensure that facilities with Program 2 or 3 processes coordinate annually with local emergency response agencies and conduct regular emergency notification exercises as well as regular field exercises and tabletop exercises.³²

These provisions ensure that emergency responders are “aware of the regulated substances at the source, their quantities, the risks presented by covered processes, and the resources and

²⁷ CSB. March 2007. Investigation Report: Refinery Explosion and Fire, BP, Texas City, Texas, March 23, 2005. Report No. 2005–04–I–TX. <http://www.csb.gov/assets/1/19/CSBFinalReportBP.pdf>; Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Proposed Rule. 40 CFR 68. Fed. Reg. 13638, 13649 (March 14, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-03-14/pdf/2016-05191.pdf>.

²⁸ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, 4595 (January 13, 2017) (amending 40 CFR 68 et seq.), <https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.

²⁹ Ibid., 4595

³⁰ Ibid., 4595

³¹ “CSB Issues Report on 2008 Bayer CropScience Explosion: Finds Multiple Deficiencies Led to Runaway Chemical Reaction; Recommends State Create Chemical Plant Oversight Regulation” <http://www.csb.gov/csb-issues-report-on-2008-bayer-cropscience-explosion-finds-multiple-deficiencies-led-to-runaway-chemical-reaction-recommends-state-create-chemical-plant-oversight-regulation/>.

³² Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, 4595 (January 13, 2017) (amending 40 CFR 68 et seq.), <https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.

capabilities at the facility to respond to an accidental release of a regulated substance.”³³ In addition, regular exercises ensure that facilities’ emergency contact information is up to date and that notification and monitoring mechanisms are in place to be able to quickly communicate with first responders and provide them with accurate information about emergency conditions.³⁴ These provisions will mitigate the harms of chemical disasters:

- The EPA found that the majority of RMP-regulated facilities are “non-responding,” meaning that they rely on outside emergency responders during chemical incidents.³⁵ The EPA also found, however, that these facilities were often *not* included in community emergency plans and had not developed coordinated response plans with local officials.³⁶ The RMP amendments recognize that, for facilities that rely on emergency responders for their safety plans, informing and coordinating with those responders is key to a proper and timely response to an accidental chemical release and to keeping first responders who arrive safe.
- In investigating the Bayer CropScience explosion, the CSB found that a lack of effective coordination between facility and local responders prevented responding agencies from receiving timely information updates, which may have resulted in toxic exposure to the public and to emergency responders.³⁷ In fact, facility authorities initially prevented local responders from gaining access to the site of the incident.³⁸ The CSB also found that the air monitors that should have detected toxic chemicals were not working when the incident occurred, resulting in inaccurate reports that no toxic chemicals were released because they were consumed in the intense fires.³⁹ These coordination and monitoring failures may have led to the exposure of first responders to toxic chemicals.⁴⁰

³³ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, 4595 (January 13, 2017) (amending 40 CFR 68 et seq.), <https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.

³⁴ *Ibid.*, 4595

³⁵ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Proposed Rule. 40 CFR 68. Fed. Reg. 13638, 13671, (March 14, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-03-14/pdf/2016-05191.pdf>.

³⁶ *Ibid.*, 13671

³⁷ CSB. January 2011. Investigation Report: Pesticide Chemical Runaway Reaction Pressure Vessel Explosion, Bayer CropScience, LP, Institute, West Virginia, August 28, 2008. Report No. 2008– 08–I–WV, http://www.csb.gov/assets/1/19/Bayer_Report_Final.pdf; Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Proposed Rule. 40 CFR 68. Fed. Reg. 13638, 13649, (March 14, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-03-14/pdf/2016-05191.pdf>.

³⁸ CSB. January 2011. Investigation Report: Pesticide Chemical Runaway Reaction Pressure Vessel Explosion, Bayer CropScience, LP, Institute, West Virginia, August 28, 2008. Report No. 2008– 08–I–WV, http://www.csb.gov/assets/1/19/Bayer_Report_Final.pdf; Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Proposed Rule. 40 CFR 68. Fed. Reg. 13638, 13649, (March 14, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-03-14/pdf/2016-05191.pdf>.

³⁹ CSB. January 2011. Investigation Report: Pesticide Chemical Runaway Reaction Pressure Vessel Explosion, Bayer CropScience, LP, Institute, West Virginia, August 28, 2008. Report No. 2008– 08–I–WV, http://www.csb.gov/assets/1/19/Bayer_Report_Final.pdf; Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Proposed Rule. 40 CFR 68. Fed. Reg. 13638, 13649, (March 14, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-03-14/pdf/2016-05191.pdf>.

⁴⁰ RMP Final Rule FAQs

https://www.epa.gov/sites/production/files/2017-03/documents/rmp_final_rule_qs_and_as_3-13-17.pdf.

4. The amendments require facilities to share emergency response plans and contact information with LEPCs, making reliable information accessible to the public.⁴¹

The RMP amendments require facilities to provide certain basic information about facility substances and hazards to the public, either on a website or another publicly accessible platform.⁴² The amendments also require facilities to hold meetings shortly after RMP-reportable incidents to document the aftermath and any ongoing concerns to the public.⁴³ Also, as part of annual coordination with emergency responders, facilities must coordinate with LEPCs to provide public access to appropriate facility chemical hazard information and to improve emergency preparedness and help the public understand how facilities are addressing risks.⁴⁴ These measures will help prevent public chemical exposures like those that have occurred during past catastrophes, including:

- A 2012 pipe failure at a Chevron Refinery in Richmond, California, that was made worse by major information-access issues and coordination deficiencies. Nineteen employees were engulfed in a vapor cloud of flammable fluid, putting them in severe danger, and 15,000 citizens in surrounding communities had to seek medical attention. A multi-agency investigation of the incident found that citizens were uninformed about how to respond safely to the black clouds they saw rapidly forming. People also did not know what to do when the siren alerts sounded and information was poorly disseminated to media sources. And, because the 911 system used to communicate instructions to shelter-in-place was not functional, members of the public were not informed of a necessary step to ensure their safety.⁴⁵ The RMP amendments ensure that LEPCs will be better prepared to take on the important role of communicating information and protecting public health during such a catastrophe.
- After the Bayer CropScience explosion, the CSB similarly found that poor coordination with local officials prevented a public shelter-in-place order from reaching the local community.⁴⁶ Adherence to the standards specified in the RMP amendments will result in improved communication of emergency information to the public and better assure of public safety.

⁴¹ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, 4596 (January 13, 2017) (amending 40 CFR 68 et seq.), <https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.

⁴² Ibid., 4596

⁴³ Ibid., 4596

⁴⁴ Ibid., 4596

⁴⁵ Brown Jr, Edmund G. "Improving Public and Worker Safety at Oil Refineries." *State of California, USA* (2014), <https://www.calepa.ca.gov/files/2016/10/Publications-Reports-2014yr-RefineryRpt.pdf>.

⁴⁶ CSB. January 2011. Investigation Report: Pesticide Chemical Runaway Reaction Pressure Vessel Explosion, Bayer CropScience, LP, Institute, West Virginia, August 28, 2008. Report No. 2008-08-I-WV, http://www.csb.gov/assets/1/19/Bayer_Report_Final.pdf; Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Proposed Rule. 40 CFR 68. Fed. Reg. 13638, 13649, (March 14, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-03-14/pdf/2016-05191.pdf>.

Response to Petitioners' Claims

On February 28, 2017, the RMP Coalition submitted a petition for reconsideration and a request for a stay of the RMP amendments.⁴⁷ Among their concerns, the RMP Coalition emphasized the RMP amendment's provision regarding third-party audits, other provisions' potential undermining of national security, and the role of criminality in the West Fertilizer Company incident. In this section, we address the RMP Coalition's concerns and point out several contradictions to the Coalition's claims.

Third-Party Audits

The RMP Coalition's petition claims that the third-party audit required by the RMP amendments is financially and logistically burdensome.⁴⁸ We disagree, and, moreover, we find that these third-party audits are crucial in ensuring safety and preparedness.

The RMP amendments require third-party audits when facilities have RMP reportable accidents, the implementing agency determines that facility conditions could lead to an accidental release of a regulated substance, or a prior third-party audit fail to meet the proper competency and independence criteria. To satisfy this requirement, one member of the audit team must be independent and impartial and must not benefit financially from the audit's outcome.⁴⁹ Importantly, the third-party audit requirement only extends to facilities where there are conditions that could lead to an accidental release of a regulated substance; other facilities are not bound by this requirement.⁵⁰ The EPA proposed the third-party audit requirement because RMP post-accident investigations found that several accidents happened, in part, due to a lack of rigorous audits by internal auditing groups.⁵¹ More specifically, internal audits were insufficient because they failed to identify "key safety deficiencies" or information that could have prevented some of the accidents from occurring.⁵²

⁴⁷ The RMP Coalition consists 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. See Savage, Justin. February 28, 2017. Petition for Reconsideration and Request for Agency Stay Pending Reconsideration and Judicial Review of Final Rule entitled Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, EPA-HQ-OEM-2015-0725-0759, <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0759>.

⁴⁸ Ibid.

⁴⁹ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Proposed Rule. 40 CFR 68. Fed. Reg. 13638, 13649, (March 14, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-03-14/pdf/2016-05191.pdf>.

⁵⁰ RMP Final Rule FAQs https://www.epa.gov/sites/production/files/2017-03/documents/rmp_final_rule_qs_and_as_3-13-17.pdf.

⁵¹ EPA Activities Under EO 13650: Proposed Changes to the Risk Management Program (RMP) Rule Questions & Answers (February 2016), https://www.epa.gov/sites/production/files/2016-02/documents/rmp_proposed_rule_qs_and_as_2-26-16_removed_public_number_fixed_date.pdf.

⁵² This was the case at the BP Texas City refinery and Citgo Corpus Christi refinery, where accidents happened because of insufficient internal audits. EPA Activities Under EO 13650: Proposed Changes to the Risk Management Program (RMP) Rule Questions & Answers (February 2016), https://www.epa.gov/sites/production/files/2016-02/documents/rmp_proposed_rule_qs_and_as_2-26-16_removed_public_number_fixed_date.pdf.

Coalition concerns about the high cost and difficulty of finding and securing third-party auditors are unfounded because the RMP amendments require only that one third-party auditor lead the team and allow a wide range of people to serve as third-party auditors, abrogating the costs and burdens of creating an entire team composed of outside members.⁵³ Additionally, after collecting stakeholder and industry feedback, the EPA removed the initially proposed requirement for a professional engineer to be on third-party audit teams, alleviating concerns over a feared sparsity of these specialized auditors.⁵⁴ In the newest rule revisions, people who worked at the facility two years prior or retired employees at the facility are considered “independent” enough to satisfy the third-party auditor requirements, which makes it even easier to find people qualified to conduct these audits. By limiting the independence requirements for RMP third-party auditors, regulated facilities should have little or no issue with third-party auditor scarcity.

The Coalition’s concerns about the burdensome costs of securing third-party auditors are shortsighted justification for opposition to the RMP amendments, given that these costs are far less than the costs of the chemical accidents that can occur in the absence of rigorous audits. The final rule estimates that the cost of third-party audits would be about \$9.8 million annually spread across 12,542 facilities, while the cost of accidents annually is above \$260 million per year.⁵⁵ The burdens associated with being audited by an independent auditor when it appears a facility is putting its workers and the public in peril should be weighed against the huge costs to the public of allowing these risks to go unchecked. These include potential deaths, injuries, community disruptions, and damage to property, as well as the high costs to the facilities and companies themselves in terms of tangible and reputational damage. There are clear benefits of having a third party audit to protect against reputational harm or “headline risk”. Third-party audits are also thought to be a prudent and efficient way to avoid investor litigation and regulatory action in the event of worst-case scenarios, providing a clear factual defense should any legal disputes arise.

National Security and Data Governance

The RMP Coalition’s petition also states that the information-sharing requirements stipulated in the RMP amendments pose a risk to national security.⁵⁶ We find those fears to be unjustified.

Regulations safeguarding classified national security information have been in place at the EPA since 1972.⁵⁷ Information disclosed under the RMP amendments will be governed by these

⁵³ RMP Final Rule FAQs

https://www.epa.gov/sites/production/files/2017-03/documents/rmp_final_rule_qs_and_as_3-13-17.pdf.

⁵⁴ Ibid.

⁵⁵ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, 4597 (January 13, 2017) (amending 40 CFR 68 et seq.),

<https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.

⁵⁶ Savage, Justin. February 28, 2017. Petition for Reconsideration and Request for Agency Stay Pending Reconsideration and Judicial Review of Final Rule entitled Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, EPA-HQ-OEM-2015-0725-0759, <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0759>.

⁵⁷ “EPA Improved its National Security Information Program, but Some Improvements Still Needed,” Report No. 16-P-0196, 2, June 2, 2016,

same safety measures, and specific provisions will ensure that facilities can identify who is requesting sensitive information.⁵⁸ These provisions include the use of already-existing RMP reading rooms monitored by the Department of Justice.⁵⁹ The EPA's National Security Information (NSI) program has been assessed multiple times over the past few years, and the EPA continues to implement necessary improvements.⁶⁰ Further, in response to concerns raised by public commenters on the current proposal about the security of sensitive information, the RMP amendments include a provision that any assertions of chemical-terrorism vulnerability information can be addressed on a case-by-case basis.⁶¹

We agree that protection of classified national security information continues to be important, but misplaced discussions about the importance of this issue should not be used to justify withholding information that is critical to first responders' planning and preparation efforts, thereby undermining the safety and security of communities around chemical plants. We agree that it is essential to craft rules that protect the public, and we find that the RMP amendments do just that. Past catastrophes have demonstrated again and again the importance of publicly available data in promoting public safety.

Focus on the West Fertilizer Company Incident

Finally, the RMP Coalition claims that the RMP amendments lack sound justification because they "were based on the mistaken understanding that West, Texas, incident was a preventable accident," rather than the result of criminal activity.⁶² Recalling the many tragic incidents described above, we strongly disagree.

The Coalition's reasoning ignores the fact that the harms resulting from a catastrophe caused by criminal activity can still be mitigated by improved emergency preparedness, which the RMP amendments help ensure. Moreover, as the documentation accompanying the proposed and final rules for the RMP amendments makes clear, implementation of the RMP amendments is motivated by chemical catastrophes resulting from a variety of causes. Many such incidents are

<https://www.epa.gov/sites/production/files/2016-06/documents/20160602-16-p-0196.pdf>.

⁵⁸ The EPA's current NSI program has been updated pursuant to President Obama's 2009 Executive Order 13526, Classified National Security Information, which lays out a uniform procedure for classifying, declassifying and managing NSI. Specifically, according to the EPA's NSI Handbook, access to classified information requires: A favorable determination of eligibility for access; a signed SF 312, Non-Disclosure Agreement; and a valid need to know. Link to EO 13526: <https://www.ise.gov/sites/default/files/EO13526.pdf>.

⁵⁹ The EPA's website for the the Federal Reading Rooms for RMP Rule: <https://www.epa.gov/rmp/federal-reading-rooms-risk-management-plans-rmp>.

⁶⁰ "EPA Improved its National Security Information Program, but Some Improvements Still Needed," Report No. 16-P-0196, June 2, 2016,

<https://www.epa.gov/sites/production/files/2016-06/documents/20160602-16-p-0196.pdf>.

⁶¹ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, 4667 (January 13, 2017) (amending 40 CFR 68 et seq.), <https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.

⁶² Savage, Justin. February 28, 2017. Petition for Reconsideration and Request for Agency Stay Pending Reconsideration and Judicial Review of Final Rule entitled Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, EPA-HQ-OEM-2015-0725-0759, <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0759>.

documented in Section II, the Background section, of the final rule for the RMP amendments,⁶³ and each of these could have been mitigated or prevented if the types of emergency coordination and information-sharing measures mandated by the amendments had been in effect at the time.

Further countering these concerns, a joint comment from officials from the Army, Defense Threat Reduction Agency, and National Security Council argued that “The EPA's decision to delay the RMP amendments poses serious risks to our nation's security,” rather than undermining it, as the RMP coalition has argued.⁶⁴ The statement points out that “the West [Fertilizer Company] explosion highlighted the failure by many in the chemical industry to minimize and safely secure toxic materials, and our government's failure to create comprehensive and fair rules to protect against such incidents.” The fact that the West Fertilizer Company explosion was intentional and could result in so much harm, in fact, strengthens the need for these amendments, rather than undermines them.

Conclusion

As our research shows, the RMP amendments mandate crucial improvements in emergency preparedness and address the community's right to know, protecting the health and well-being of the public and of first responders. By ensuring the implementation of good data and information governance practices, the RMP amendments ameliorate critical shortcomings in current practices in emergency coordination and preparedness. Two years' worth of public comments were considered in developing the final rule amending the RMP.⁶⁵ Delaying the implementation of these amendments only serves to delay important coordination measures that help safeguard citizens and those who work to protect them.

Thank you for considering this comment in response to the proposal to delay the effective date of the amendments to the Risk Management Program regulations under the Clean Air Act.

Respectfully submitted,

Capacity and Governance Working Group
Environmental Data & Governance Initiative

⁶³ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, 4599 (January 13, 2017) (amending 40 CFR 68 et seq.), <https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.

⁶⁴ Joint comment submitted April 27, 2017, by Lieutenant General Russel L. Honor, US Army (Ret), Former commander, Joint Task Force Katrina, and founder of the GreenARMY; Major General Randy Manner, US Army (Ret), Former Acting Director and Deputy Director, Defense Threat Reduction Agency; and David Halperin, Attorney, former staff member, National Security Council and Senate Select Committee on Intelligence, <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0778>.

⁶⁵ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule. 82 Fed. Reg. 4594, 4599 (January 13, 2017) (amending 40 CFR 68 et seq.), <https://www.federalregister.gov/documents/2017/01/13/2016-31426/accidental-release-prevention-requirements-risk-management-programs-under-the-clean-air-act>.