Attorneys General of New York, Illinois, Iowa, Maine, Maryland, Massachusetts, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington

August 23, 2018

Submitted electronically via www.regulations.gov

Re: Comments on Accidental Release Prevention Requirements: Risk Management Program Under the Clean Air Act (Docket EPA-HQ-OEM-2015-0725); published at 83 Fed. Reg. 24,850 (May 30, 2018)

Dear Sir/Madam:

The Attorneys General of New York, Illinois, Iowa, Maine, Maryland, Massachusetts, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington ("States") hereby submit these comments on the above-referenced proposed rule ("Proposal"). The Proposal, which would largely eviscerate the safeguards added by the Environmental Protection Agency's (EPA) 2017 Accident Prevention Amendments, represents a step backward on preventing and mitigating harms to public health and the environment from chemical accidents. A strong federal Risk Management Program is critical to protect our residents from the grave dangers posed by chemical accidents at facilities in our States. As the D.C. Circuit Court of Appeals concluded last Friday in the attached decision vacating EPA's rule that delayed the effective date of the Amendments, "EPA had found, and the record shows, that there was a need for improvements to protect worker and community safety, and to reduce fatalities, injuries, life disruption, and other harm." *Air Alliance Houston v. EPA* (D.C. Cir. Aug. 17, 2018), slip op. at 29 (citing 82 Fed. Reg. at 4,599-600), attached hereto as appendix 1. Like the delay rule, the Proposal is inconsistent with EPA's findings in the record and with the Clean Air Act. The States therefore urge EPA to abandon the Proposal and to implement the Accident Prevention Amendments as promulgated.

I. Introduction

A. The Risk Management Program Under the Clean Air Act

The Accident Prevention Amendments, which the Proposal would largely rescind, were published as final regulations in January 2017, 82 Fed. Reg. 4,594 (Jan. 13, 2017), under section 112(r) of the Clean Air Act. Congress added section 112(r), 42 U.S.C. § 7412(r), as part of the 1990 Clean Air Act Amendments in response to several catastrophic chemical accidents, including the release of toxic gas from a pesticide plant in Bhopal, India, in 1984 that killed thousands of people. That new section was entitled, "Prevention of Accidental Releases" and directed EPA to list substances that could cause serious harm to human health or the environment if accidentally released. *Id.* § 7412(r)(3). For each listed substance, EPA must establish a threshold quantity at which an accidental release would cause injury or death. *Id.* § 7412(r)(5). In 1994, EPA published the list of regulated substances and the types of facilities subject to regulation under section 112(r), as well as the required threshold quantities. 59 Fed. Reg. 4,478 (Jan. 31, 1994).

Congress further directed EPA to "promulgate reasonable regulations . . . to provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated

substances." 42 U.S.C. § 7412(r)(7)(B)(i). Such regulations must require facilities with listed substances that exceed the threshold quantities to prepare and implement risk management plans to prevent accidental releases. *Id.* § 7412(r)(7)(B)(ii). In 1996, EPA published these Risk Management Program (RMP) regulations. 61 Fed. Reg. 31,668 (June 20, 1996), codified at 40 C.F.R. Part 68.

The RMP regulations cover industrial processes that involve the use, storage, manufacturing, or handling of listed substances. 40 C.F.R. § 68.3. Facilities are divided by their industrial processes into three tiers: Programs 1, 2, and 3. *Id.* § 68.10. EPA assigns a facility to a tier based on the potential for offsite consequences associated with a worst-case accidental release, as well as on the facility's accident history and whether it is subject to Occupational Safety and Health Administration (OSHA) safety requirements. *Id.* Under this scaled approach, facilities subject to Program 1 have the least stringent requirements, while those covered by Program 3 have the most stringent.

Each regulated facility must submit to EPA a certified risk management plan that includes the facility's accidental release prevention and emergency response policies, regulated substances handled, five-year accident history, emergency response program, planned changes to improve safety, worst-case release scenarios, and registration form. *See* 40 C.F.R. § 68, subpart G. Facilities subject to Programs 2 and 3 must also include a hazard review or process hazard analysis, respectively, addressing the risks associated with regulated processes and the safeguards in place to control associated hazards. *See id*. §§ 68.50, 68.67, 68.170, 68.175. Approximately 12,500 facilities have filed current risk management plans with EPA. 81 Fed. Reg. 13,638, 13,641 (Mar. 14, 2016).

Despite the enhanced protection provided by the 1996 RMP regulations, frequent chemical releases and disasters at U.S. facilities continue to pose a significant risk to workers and communities. For instance, in 2005, explosions at a British Petroleum refinery in Texas killed fifteen people and injured more than 170 individuals. 81 Fed. Reg. at 13,644. In 2010, an explosion and fire at the Tesoro Refinery in Washington killed seven people. *Id*. In 2012, a fire at the Chevron Refinery in California created a large plume of hazardous chemicals, forcing nearly 15,000 residents to seek medical treatment. *Id*.

To prevent similar disasters, over fifty organizations and individuals petitioned EPA in July 2012 to strengthen the existing regulations. *See* EPA-HQ-OEM-2015-0725-0249. Petitioners urged EPA to improve existing safeguards by, among other things, requiring safer technologies where feasible to reduce the need to use and store dangerous quantities of hazardous substances at facilities. *Id*. In addition, following the explosion and fire at the West Fertilizer plant in Texas in 2013, President Obama issued an executive order directing federal agencies to improve safety and security at chemical facilities. Exec. Order No. 13,650 (Aug. 1, 2013). The Executive Order instructed federal agencies to ensure that state and local partners have access to key information to prevent, prepare for, and respond to chemical incidents. *Id*. The Order also directed federal agencies, including EPA, to improve chemical safety regulations and determine if additional chemicals should be covered by federal regulatory programs. *Id*.

EPA published proposed amendments for public comment in March 2016. 81 Fed. Reg. 13,638. EPA found that although existing regulations had been effective in preventing and mitigating some chemical accidents, "revisions could further protect human health and the environment from chemical hazards through advancement of process safety management based on lessons learned." *Id.* at 13,640. By reviewing past chemical accidents and investigation reports from the U.S. Chemical Safety and Hazard Investigation Board (CSB) and other entities, EPA identified four areas of poor performance that contributed to the severity of chemical accidents: (1) inadequate accident investigations; (2) flawed compliance audits; (3) insufficient coordination between chemical facilities and local emergency responders; and (4) lack of communication between facility personnel and first responders, and facility personnel and communities. *Id.* at 13,649, 13,654, 13,671, 13,678.

To strengthen accident prevention programs and auditing requirements, EPA proposed that Program 2 and 3 facilities conduct "root cause" analyses to determine the system-related reasons for incidents that result in catastrophic releases (or near misses). *Id.* at 13,648. It also proposed that those facilities arrange for independent third-party compliance audits after an accident or finding of significant non-compliance. *Id.* at 13,654. Certain Program 3 facilities also would be required to analyze potential safer technology and alternatives and their feasibility. *Id.* at 13,667. To improve emergency-response preparedness, EPA proposed requiring that certain facilities coordinate annually with local response authorities to ensure that appropriate resources and capabilities are in place to respond to accidental releases, conduct emergency notification exercises annually, and regularly perform emergency field and tabletop exercises. *Id*. at 13,671-77. Finally, to improve community awareness of potential risks, EPA proposed that each subject facility: (1) provide certain basic information to the public; (2) hold a public meeting after a reportable incident; and (3) annually prepare a report containing a facility's chemical hazard information that would be provided to local officials upon request. *Id*. at 13,677-82.

EPA published the final Accident Prevention Amendments in January 2017. 82 Fed. Reg. 4,594. EPA made some modifications to the proposed rule in response to comments. For example, with respect to security concerns raised by some commenters, EPA eliminated the requirement that owners and operators prepare an annual summary of chemical hazard information for submission to local officials. *Id*. at 4,666. Instead, the final rule required that, in addition to providing its emergency response plan, the facility provide "any other information that local emergency planning and response organizations identify as relevant to local emergency response planning." *Id.* at 4,701; *see also* 40 C.F.R. § 68.93(b). This approach, EPA explained, would allow facility owners and emergency response officials "to identify information that may need to be maintained securely and discuss strategies to secure the information or to provide only information that is pertinent to emergency response planning without revealing security vulnerabilities." 82 Fed. Reg. at 4,667. EPA also eliminated the requirement that facilities post chemical hazard information on the internet. *Id.* EPA determined that March 14, 2017 was an appropriate effective date for certain identified parts of the rule because it was practicable for regulated entities to comply with those provisions immediately. Because EPA determined that facilities would need additional time to prepare to comply with other provisions, *id.* at 4,675-76, it established a 2018-

2022 compliance phase-in period for those other provisions, *id*. at 4,696; *see also* 40 C.F.R. § 68.10(b)-(e).

EPA anticipated that implementation of the Accident Prevention Amendments would "result in a reduction of the frequency and magnitude of damages from releases." 82 Fed. Reg. at 4,683. It conservatively estimated the costs of chemical accidents without the Amendments at $274.7 million annually, a figure that did not reflect emergency response costs, property value impacts in surrounding communities, or environmental impacts. *Id*. at 4,684. EPA expected that "some portion of future damages would be prevented through implementation of this rule." *Id.* at 4,683. Moreover, it found that "[r]educing the probability of chemical accidents and the severity of their impacts, and improving information disclosure by chemical facilities, as the provisions intend, would provide benefits to potentially affected members of society." *Id.* at 4,684.

In March 2017, however, EPA issued a three-month administrative stay of the effective date of the Accident Prevention Amendments, pending reconsideration, until June 2017. 82 Fed. Reg. 13,968 (Mar. 16, 2017). In April 2017, EPA issued a proposed rule to further delay the effective date of the Accident Prevention Amendments to February 19, 2019. 82 Fed. Reg. 16,146 (Apr. 3, 2017). EPA stated that "[t]his timeframe would allow the EPA time to evaluate the objections raised by the various petitions for reconsideration of the [Accident Prevention Amendments], consider other issues that may benefit from additional comment, and take further regulatory action." *Id.* at 16,148-49. In June 2017, EPA finalized this delay rule, which postponed the effective date of the Accident Prevention Amendments for twenty months, until February 2019. 82 Fed. Reg. 27,133 (June 14, 2017).

The delay rule had an immediate effect on the regulated community and the public because some of the Accident Prevention Amendments' requirements were triggered upon that rule's effective date. *See* 82 Fed. Reg. at 4,696 (40 C.F.R. § 68.10(a)(4)). Other requirements pertaining to emergency response coordination were designed to come into effect within the twenty-month delay period, and so were also necessarily put off by the delay rule. *See id.* (40 C.F.R. § 68.10(b)). Eleven of the States, numerous public health and community groups, and labor unions challenged the delay rule in court. As noted at the outset of this letter, the D.C. Circuit vacated the delay rule last week. The court held that EPA had exceeded its statutory authority under the Clean Air Act in issuing the delay rule and additionally that EPA's promulgation of the delay rule was arbitrary and capricious. *See Air Alliance Houston*, slip op. at 19-31 & 31-36. In light of the court's ruling, the States of New York, Illinois, Iowa, Maryland, New Jersey, Rhode Island and the Commonwealth of Massachusetts requested that EPA extend the current comment deadline of August 23, 2018 by at least 60 days to enable interested parties to have sufficient time to fully consider the legal and practical impacts of the court's decision on the Proposal. State Letter to Jim Belke (Aug. 21, 2018), attached as appendix 2. EPA, however, denied the States' request. Response Email from Jim Belke (Aug. 21, 2018), attached as appendix 3. As discussed in section II, *infra*, the Proposal would exacerbate the harm caused by the delay rule by largely gutting the improved safeguards mandated under the Amendments.

B. RMP Facilities and Chemical Accidents in Coalition States

This section provides an overview of facilities regulated under the RMP in the States, and highlights notable chemical accidents that have impacted our residents and natural resources. The information below demonstrates the large number of our residents at risk from chemical accidents and the importance of a strong federal program, which the Proposal would undermine.

New York

New York is home to 169 RMP facilities. As shown in the figure below, many of these facilities are located in areas with large populations. Each RMP facility estimates a vulnerability zone, which is the maximum possible area where a worst-case release of chemicals could harm people.[1] More than 9.1 million people live within the vulnerability zones of New York RMP facilities.[2] People who live in vulnerability zones are disproportionately susceptible to the consequences of chemical accidents. Generally, those living in vulnerability zones have lower levels of educational attainment, lower home values, and experience poverty at a rate 50 percent above the U.S. average. *See id.* at 3. People of color are also more likely to live in the vulnerability zones of chemical plants than are non-Hispanic white Americans, *id.*, raising environmental justice concerns.

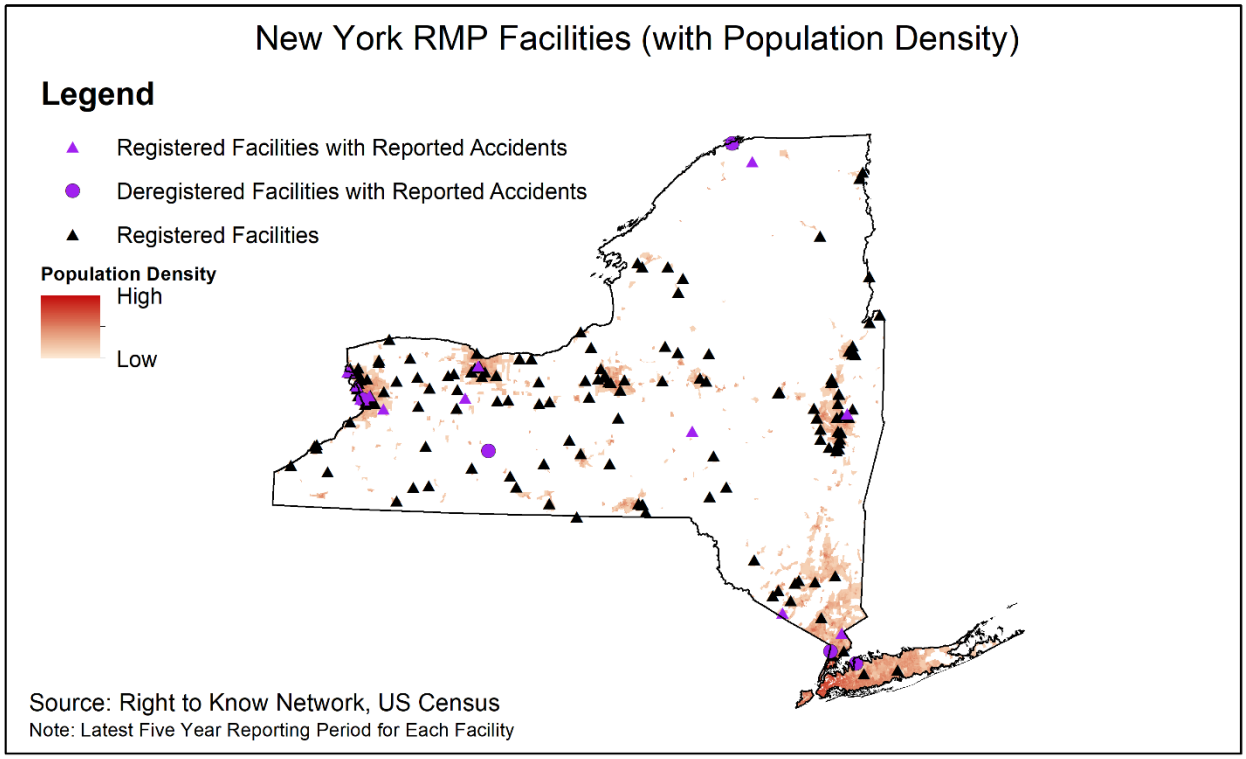
There are also numerous chemical facilities located across the border in New Jersey, in close proximity to New York City. According to a report by the Center for Effective Government, New York had the fifth-highest number of schools and number of students located in vulnerability zones.[3]

---

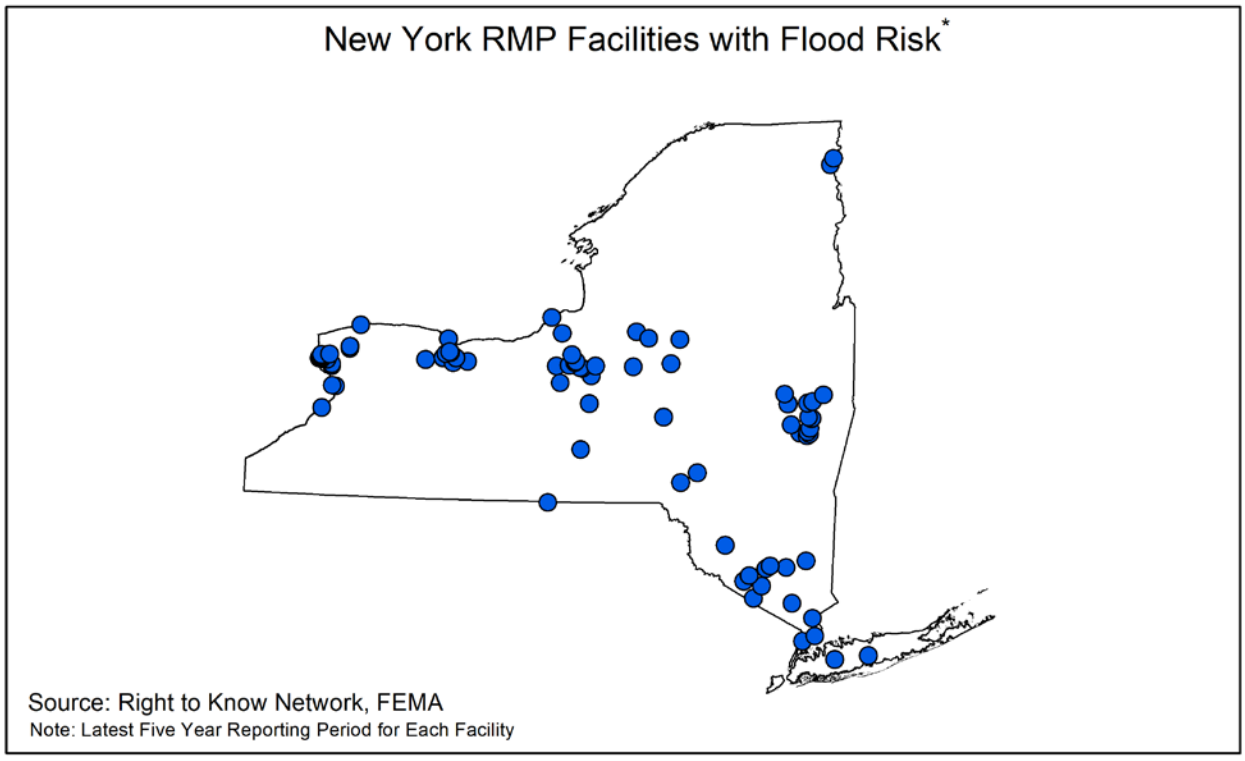
[1] PAUL ORUM, RICHARD MOORE, MICHELE ROBERTS & JOAQUÍN SÁNCHEZ, ENVIRONMENTAL JUSTICE AND HEALTH ALLIANCE FOR CHEMICAL POLICY REFORM, WHO'S IN DANGER? RACE POVERTY AND CHEMICAL DISASTERS 1 (May 2014) (hereinafter "WHO'S IN DANGER?"), *available at* https://comingclean inc.org/assets/media/images/Reports/Who's%20in%20Danger%20Report%20and%20Table%20FINAL.pdf.

[2] *See id.* at 47, 130-33 (describing the report's methodology and then listing all RMP facilities in New York that have 100,000 or more people in their vulnerability zone, as well as all facilities in the potable water treatment, wastewater treatment, commercial bleach manufacturing, electric power production, petroleum refining, pulp and paper production, and chemical manufacturing sectors, with the 2014 population of the vulnerability zone listed in the right-most column).

[3] CENTER FOR EFFECTIVE GOVERNMENT, "KIDS IN DANGER ZONES," (Sept. 2014) (hereinafter "KIDS IN DANGER ZONES"), App. 2, Tbl. A, available at https://www.foreffectivegov.org/sites/default/files/kids-in-danger-zones-report.pdf.



In addition, as shown below, about 85 facilities in New York regulated under the Risk Management Program (over 50 percent of all New York RMP facilities) are in flood zones defined by the Federal Emergency Management Agency (FEMA).



**Facilities with "flood risk" are defined as those located in one of the following FEMA flood zones: 1) FEMA Zone A, areas with a 1 in 100 chance of flooding each year (12 facilities or 7 percent of registered RMP facilities in New York); 2) FEMA Zones B or X, areas with an estimated 1 in 500 chance of flooding each year (3 facilities or 2 percent of registered RMP facilities in New York); and 3) FEMA Zones C or X, areas with flood risk but higher than the elevation of areas with a 1 in 500 chance of annual flooding (70 facilities or 41 percent of registered RMP facilities in New York).*

According to New York RMP facilities' most recent five-year accident histories, there were 16 reported accidents in New York that released more than 21,000 pounds of toxic chemicals into the surrounding communities. As summarized in the table below, these accidents resulted in 14 injuries, the evacuation of more than 1,000 people, and property damage totaling more than $200,000.

New York RMP Facilities: Most Recent 5-Year Accident History

# of RMP Facilities	# of Accidents	lbs of chemicals released	# of Injuries	# of People Evacuated	Property Damage
169	16	21,117	14	1,075	$203,153

Source: April 30, 2018 EPA Risk Management System database (RMP).

For example, on May 25, 2011, a flash fire ignited at Momentive Performance Materials in Waterford, New York.[4] The fire severely burned two Momentive employees: Mike Deshaw, a father to two children, and Mike Stephanowicz.[5] Both men spent weeks recovering in a hospital burn unit from second- and third-degree burns, and months more recovering at home; weeks after the accident, Deshaw's skin was still red from the waist up.[6] OSHA investigated Momentive after the fire, and ultimately fined Momentive $81,000[7] for violations including failure to review

[4] Danielle Sanzone, *Explosion, flash fire severely burns two Momentive employees*, THE TROY RECORD, May 25, 2011, *available at* http://www.troyrecord.com/general-news/20110525/explosion-flash-fire-severely-burns-two-momentive-employees.

[5] Danielle Sanzone, *Tugboat Tavern to host fundraiser to benefit injured Momentive Performance Materials workers, American Red Cross*, THE TROY RECORD, Sept. 17, 2011, *available at* http://www.troyrecord.com/general-news/20110917/tugboat-tavern-to-host-fundraiser-to-benefit-injured-momentive-performance-materials-workers-american-red-cross.

[6] *Id.*

[7] OCCUPATIONAL SAFETY AND HEALTH ADMIN., Invoice/Debt Collection Notice 1 (Nov. 22, 2018), *available at* https://www.scribd.com/doc/74084886/mmp#download&from_embed.

operating procedures as often as necessary, exposing employees to "fire and explosion hazards," and failing to address all factors that contributed to the accident in its post-accident report.[8]

Momentive is far from the only RMP facility with a history of accidents in the State of New York. Since 1999, there have been at least 31 accidents at RMP facilities in New York, injuring ten workers and two public responders.[9] The most recent accident at a New York RMP facility took place in May 2017, when a chemical explosion at the Occidental Chemical Corporation plant in Niagara injured four people.[10]

2012 fire at the Alcoa-Massena Operations Plant, then a regulated RMP facility, in Massena, NY.[11]

Illinois

Illinois has over 900 facilities that have prepared risk management plans pursuant to the RMP.[12] According to the five-year accident histories for these facilities, there have been 85 accidents resulting in five deaths and 452 injuries.[13] Outside this time frame, a significant release occurred on April 23, 2004—an explosion and fire destroyed the Formosa Plastics plant in

[8] OCCUPATIONAL SAFETY AND HEALTH ADMIN., Citation and Notification of Penalty to Momentive Performance Materials 15, 6, 14 (Nov. 22, 2018), *available at* https://www.scribd.com/doc/74084886/mmp#download&from_embed.

[9] The Right-to-Know Network, (reflecting data last compiled from EPA sources on Apr. 30, 2018) (hereinafter Right-to-Know Network), http://www.rtk.net/rmp/search.php. The website was used to conduct an RMP program search for New York facilities.

[10] *Id.*

[11] *Fire Contained at Alcoa in Massena (Updated)*, ALUMINUM PLANT SAFETY BLOG (Mar. 31, 2012), http://aluminiumplantsafety.blogspot.com/2012/03/fire-contained-at-alcoa-in-massena_31.html.

[12] Right-to-Know Network, *supra* note 9.

[13] *Id.*

Illiopolis. The accident resulted in the deaths of five workers and serious injuries to three others. About 150 persons were evacuated to avoid contact with toxic fumes and smoke.[14]

Further, of those over 900 facilities, 24 have a vulnerability zone Census population of greater than 100,000 and up to 4.9 million people, within vulnerability zones ranging from 1.7 to 25 miles.[15] Of even greater significance is the fact that Illinois has 2,466 schools located in these facilities' vulnerability zones, serving a student population of 1,084,352.[16]

Iowa

On October 7, 2016, a tanker truck burst into flames while fueling at a Southwest Iowa Renewable Energy plant near Council Bluffs, Iowa.[17] The driver of that tanker truck, Kenneth Krumwiede, suffered severe burns and died later that month due to his injuries.[18] Containing the fire demanded the resources of six area fire departments, and it took nearly an hour to bring the fire under control.[19] In addition to the loss of life, the blaze led to approximately $1 million in property damage and released over 40,000 pounds of flammable material into the environment.[20] OSHA investigated Southwest Iowa Renewable Energy after the fire and ultimately fined it several thousands of dollars for its failure to comply with rules on personal protective equipment and the handling of flammable liquids.[21]

Southwest Iowa Renewable Energy is far from the only Iowa facility subject to RMP regulations[22] with a history of accidents. Since April 2006, there have been at least 45 accidents at RMP facilities in Iowa, killing one and injuring dozens.[23] These accidents have forced hundreds of individuals to evacuate or shelter in place, have caused millions of dollars in property damage,

---

[14] *CSB Issues Final Report and Safety Video on Formosa Plastics Explosion in Illinois, Concludes That Company and Previous Owner Did Not Adequately Plan for Consequences of Human Error*, U.S. CHEM. SAFETY AND HAZARD INVESTIGATION BD., (Mar. 6, 2007), https://www.csb.gov/csb-issues-final-report-and-safety-video-on-formosa-plastics-explosion-in-illinois-concludes-that-company-and-previous-owner-did-not-adequately-plan-for-consequences-of-human-error/.

[15] "WHO'S IN DANGER?" *supra* note 1, at 88-92.

[16] "KIDS IN DANGER ZONES," *supra* note 3.

[17] *Man injured in tanker truck fire at plant near Council Bluffs dies from injuries*, OMAHA WORLD-HERALD, Oct. 27, 2016, *available at* https://www.omaha.com/news/metro/man-injured-in-tanker-truck-fire-at-plant-near-council/article_901859d2-9cb0-11e6-8735-b3edf1ac46a8.html.

[18] *Id.*

[19] *Id.*

[20] Right-to-Know Network, *supra* note 9. The website was used to conduct an RMP program search for Iowa facilities.

[21] OCCUPATIONAL HEALTH AND SAFETY ADMIN., Inspection Detail (Oct. 10, 2016), *available at* https://www.osha.gov/pls/imis/establishment.inspection_detail?id=1183384.015.

[22] "WHO'S IN DANGER?" *supra* note 1, at 8 (industrial facilities handling large amounts of dangerous chemicals must prepare and submit Risk Management Plans to EPA).

[23] Right-to-Know Network, *supra* note 9.

and have released tens of thousands of pounds of toxic materials into Iowa's environment, at times causing water and soil contamination.[24] Despite the evident danger posed by their operations, numerous facilities do not consistently comply with regulations. In fiscal year 2017 alone, EPA conducted nine enforcement actions against Iowa facilities for RMP violations and assessed tens of thousands of dollars in fines.[25]

Many Iowans face significant risks of harm from accidents at RMP facilities, of which there are 835 in Iowa.[26] Over half a million Iowans, roughly a sixth of the state,[27] live in the vulnerability zones of just five of Iowa's facilities.[28] ADM Corn Processing alone has over 240,000 Iowans living in its vulnerability zone.[29]

The dangers presented by living in vulnerability zones do not affect all Americans, or Iowans, equally. People of color, the poor, and the less educated are all more likely to live in vulnerability zones.[30] Iowa's vulnerable populations are no exception. For example, in Waterloo, Iowa, poor and minority populations live in close proximity to Hydrite Chemical Company, whose vulnerability zone is eighteen miles.[31] The EPA's Environmental Justice Screening and Mapping Tool provides demographic information by Census block group,[32] including the block group's percent of residents who are low income[33] and the percent who are racial minorities.[34] The Census

[24] *Id.*

[25] Concluded EPA Enforcement Cases Map, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/enforcement/enforcement-annual-results-concluded-cases-map-fiscal-year-2017.

[26] Right-to-Know Network, *supra* note 9.

[27] *Quickfacts: Iowa*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/ia/PST045217 (last visited July 6, 2018).

[28] *See* "WHO'S IN DANGER?" *supra* note 1, at 47, 86-87 (describing the report's methodology and then listing all RMP facilities in Iowa that have 100,000 or more people in their vulnerability zone, as well as all facilities in the potable water treatment, wastewater treatment, commercial bleach manufacturing, electric power production, petroleum refining, pulp and paper production, and chemical manufacturing sectors, with the 2014 population of the vulnerability zone listed in the right most column. The five facilities are Hydrite Chemical Company in Waterloo, Vertex Chemical Corporation in Camanche, the University of Iowa Water Plant in Iowa City, ADM Corn Processing in Cedar Rapids, and the Des Moines Wastewater Reclamation Authority in Des Moines).

[29] *Id.* at 87.

[30] *Id.* at 2-3.

[31] *Id.* at 86.

[32] *How to Interpret a Standard Report in EJSCREEN*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/ejscreen/how-interpret-standard-report-ejscreen#census (last visited July 6, 2018) ("A block group is an area defined by the Census Bureau that usually has in the range of 600-3,000 people living in it. The US is divided into more than 200,000 block groups.").

[33] *Overview of Demographic Indicators in EJSCREEN*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/ejscreen/overview-demographic-indicators-ejscreen (last visited July 6, 2018) (defining percent low-income as "[t]he percent of a block group's population in households where the household income is less than or equal to twice the federal 'poverty level'").

[34] *Id.* (defining percent minority as "[t]he percent of individuals in a block group who list their racial status as a race other than white alone and/or list their ethnicity as Hispanic or Latino").

block group that Hydrite is in is 64% low income and 24% of its residents are racial minorities.[35] Compared to the rest of the nation, only 11% of Census block groups have higher poverty rates while 55% have higher proportions of people of color residing in them.[36] These numbers become more extreme when compared to other Iowa block groups. Only 6% of Census block groups in Iowa have higher poverty rates and only 15% have greater proportions of people of color living in them.[37] Hydrite's fenceline zone[38] of 1.8 miles crosses into portions of other block groups whose percentages of low income residents or residents who are people of color are at or above the ninetieth percentiles for the state.[39]

Additionally, many of Iowa's schoolchildren learn in close proximity to these facilities. The Center for Effective Government found that 22% of Iowa's schoolchildren, more than 100,000 students, attend school in a vulnerability zone.[40] For example, ADM Corn Processing in Cedar Rapids, Iowa has a vulnerability zone of sixteen miles.[41] Within that single zone are several dozen schools.[42]

Maine

There are 36 RMP facilities in Maine. These facilities each have vulnerability zones within which the resident population, infrastructure, and natural resources are particularly susceptible to the impacts of an accident. Representative vulnerability zones include the following:

a. Westbrook Energy Center, Vulnerability Zone: 4.4 miles, 49,447 people.
b. Rumford Paper Company, Vulnerability Zone: 2.40 miles, 1,159 people.

---

[35] EJSCREEN: EPA's Environmental Justice Screening and Mapping Tool, U.S. ENVTL. PROT. AGENCY, https://ejscreen.epa.gov/mapper/ [hereinafter EJSCREEN] (For demographic index map near Hydrite Chemical Company, search Hydrite's address of 2815 Wcf and N Dr, Waterloo, IA 50703, use the "Add Maps" function to display demographic indicators (both for national and state comparison), and click on Hydrite's block group (Block Group ID 190130017021)).

[36] *Id.* For a full explanation of interpreting these percentiles, *see EJSCREEN Technical Documentation*, U.S. ENVTL. PROT. AGENCY, 26-28 (Aug. 2017), https://www.epa.gov/sites/production/files/2017-09/documents/2017_ejscreen_technical_document.pdf.

[37] EJSCREEN, *supra* note 35.

[38] "WHO'S IN DANGER?", *supra* note 1, at 1 (defining a fenceline zone as "[a]n area designated as one-tenth the distance of the vulnerability zone, in which those affected are least likely to be able to escape from a toxic or flammable chemical emergency").

[39] EJSCREEN, *supra* note 35 (*see, e.g.*, Block Group IDs 190130017011; 190130017022; 190130016001).

[40] "KIDS IN DANGER ZONES," *supra* note 3, at 21-25 (listing student populations by state who attend schools in an RMP vulnerability zone. Examined RMP facilities are those that have 100,000 or more people in their vulnerability zone, as well as all facilities in the potable water treatment, wastewater treatment, commercial bleach manufacturing, electric power production, petroleum refining, pulp and paper production, and chemical manufacturing sectors. The total at-risk student population for Iowa is 114,198.).

[41] "WHO'S IN DANGER?" *supra* note 1, at 87.

[42] EJSCREEN, *supra* note 35 (search ADM Corn Processing's address of 1350 Waconia Ave SW, Cedar Rapids, IA 52404, then use the "Add Maps" function to display area schools).

c. Rumford Power, Inc., Vulnerability Zone: 4 miles, 4,523 people.
d. Red Shield Acquisition, LLC, Vulnerability Zone: 9.3 miles, 39,913.
e. Casco Bay Energy Company, LLC, Vulnerability Zone: 0.3 miles, 166 people.
f. S.D. Warren Somerset Mill, Vulnerability Zone: 2 miles, 1,420 people.
g. GAC Chemical – New England, Vulnerability Zone: 2 miles, 126,229 people.
h. Domtar Maine LLC, Vulnerability Zone: 25 miles, 13,136 people.[43]

The vulnerability zones for these eight facilities alone include at least 235,993 residents, or 17.6% of Maine's population, and also include 72 schools with 13,477 students.[44] Two of Maine's RMP facilities, Woodland Pulp LLC and Expera Old Town LLC, border Native American Reservations.[45] Expera Old Town LLC has a history of reported accidents.[46] Two facilities, Rumford Paper Company and Woodland Pulp LLC, are very close to high flood risk areas, designated as "Zone AE."[47]

Maryland

As of April 2018, there are 79 Maryland facilities regulated under the RMP.[48] These facilities include, among others, grocers, produce companies, dairy companies, water filtration plants, wastewater treatment plants, and power plants.[49] Prior to EPA's issuance of the final Accident Prevention Amendments in 2017, there were a total of nine accidents at RMP facilities in Maryland.[50]

Nearly two million Marylanders live within an RMP vulnerability zone.[51] These zones include residential areas that are situated within close proximity to facilities that are, among other things, involved in the potable water treatment, wastewater treatment, commercial bleach manufacturing, electric power production, pulp and paper production, or chemical manufacturing

[43] "WHO'S IN DANGER?", *supra* note 1, at 111.

[44] "KIDS IN DANGER ZONES," *supra* note 3, at 24.

[45] EJSCREEN, *supra* note 35. Expera Old Town LLC borders the Penobscot River, and the Penobscot Indian Reservation consists of islands in the River from Old Town northward to Medway. *See* 30 M.R.S.A. § 6203(8).

[46] Right-to-Know Network, *supra* note 9.

[47] FEMA Flood Map Service Center: Search By Address, FED. EMERGENCY MGMT. AGENCY, https://msc.fema.gov/portal/search?AddressQuery=maine

[48] Right-to-Know Network, *supra* note 9. The website was used to conduct an RMP program search for Maryland facilities.

[49] *Id.*

[50] *Id.*

[51] "WHO'S IN DANGER?", *supra* note 1, Appendix C. Specifically, 1,948,722 Marylanders live within vulnerability zones.

sectors.[52] In 2014, Maryland's population was over 5.97 million.[53] This means that roughly one-third of Marylanders reside within an RMP vulnerability zone.

Furthermore, many of Maryland's public and private educational institutions are close enough to a regulated facility to be at risk from a chemical accident, as shown in the two figures below.[54] As of 2014, there were 432 K-12 schools directly inside vulnerability zones, rendering over 178,000 young students exposed to the potential harms of a chemical accident. For example, Protenergy Natural Foods, Inc. is a mere mile and a half away from Cambridge-South Dorchester High School, and within two miles of Mace's Lane Middle School, Choptank Elementary School, and Dorchester High School.[55] Protenergy Natural Foods, Inc. uses anhydrous ammonia as the refrigerant to chill process water and maintain temperatures in the cold storage section of its plant.[56] This facility has had three accidents since 2016, which involved the release of several pounds of ammonia gas.[57] C&S Wholesale Grocers, which also uses anhydrous ammonia as a refrigerant and has experienced two reportable releases of 361 and 374 pounds, respectively, since 2012, is less than a mile away from G. Lisby Elementary in Aberdeen. Additionally, Montebello Filtration Plant is 0.3 miles away from Mergenthaler Vocational-Technical High School in Baltimore.[58] This facility stores liquid chlorine[59] in several large cylinders and uses it to treat the water it processes.[60] Finally, the Cumberland Wastewater Treatment Plant, which uses gaseous

[52] *Id.*

[53] Data from U.S. Census Bureau.

[54] "KIDS IN DANGER ZONES," *supra* note 3.

[55] EJSCREEN, *supra* note 35 (last visited July 17, 2018).

[56] Anhydrous ammonia, a colorless gas with pungent, suffocating fumes, is used as an agricultural fertilizer and industrial refrigerant. When handled improperly, anhydrous ammonia can be immediately dangerous to life or health. As liquid anhydrous ammonia is released from its container into the air, it expands rapidly, forming a large cloud that acts like a heavier-than-air gas for a period of time. Because the vapors hug the ground initially, the chances for humans to be exposed are greater than with other gases. Symptoms of anhydrous ammonia exposure include: eye, nose, and throat irritation, breathing difficulty, wheezing, or chest pain, pulmonary edema, pink frothy sputum, burns, blisters and frostbite. Exposure can be fatal at high concentrations. Gateway to Health Communication, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/healthcommunication/toolstemplates/entertainmented/tips/AnhydrousAmmonia.html.

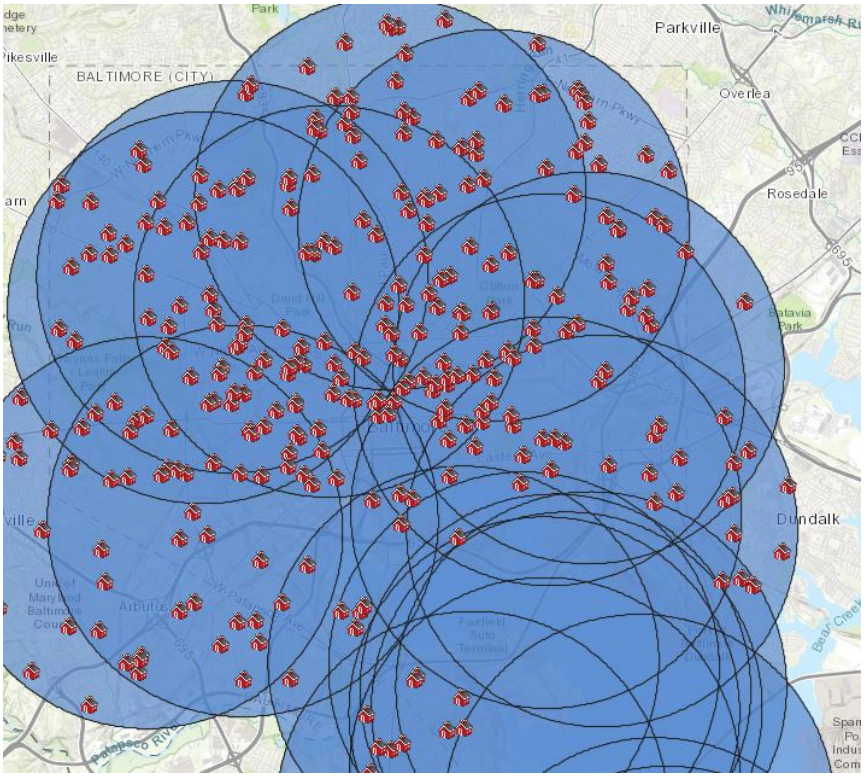
[57] Right-to-Know Network, *supra* note 9.

[58] EJSCREEN, *supra* note 35.

[59] Chlorine is sometimes in the form of a poisonous gas. Chlorine gas can be pressurized and cooled to change it into a liquid so that it can be shipped and stored. When liquid chlorine is released, it quickly turns into a gas that stays close to the ground and spreads rapidly. Chlorine gas can be recognized by its pungent, irritating odor, which is like the odor of bleach. The strong smell may provide adequate warning to people that they are exposed. Chlorine gas appears to be yellow-green in color. Chlorine itself is not flammable, but it can react explosively or form explosive compounds with other chemicals such as turpentine and ammonia. Emergency Preparedness and Response, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://emergency.cdc.gov/agent/chlorine/basics/facts.asp.

[60] Right-to-Know Network, *supra* note 9.

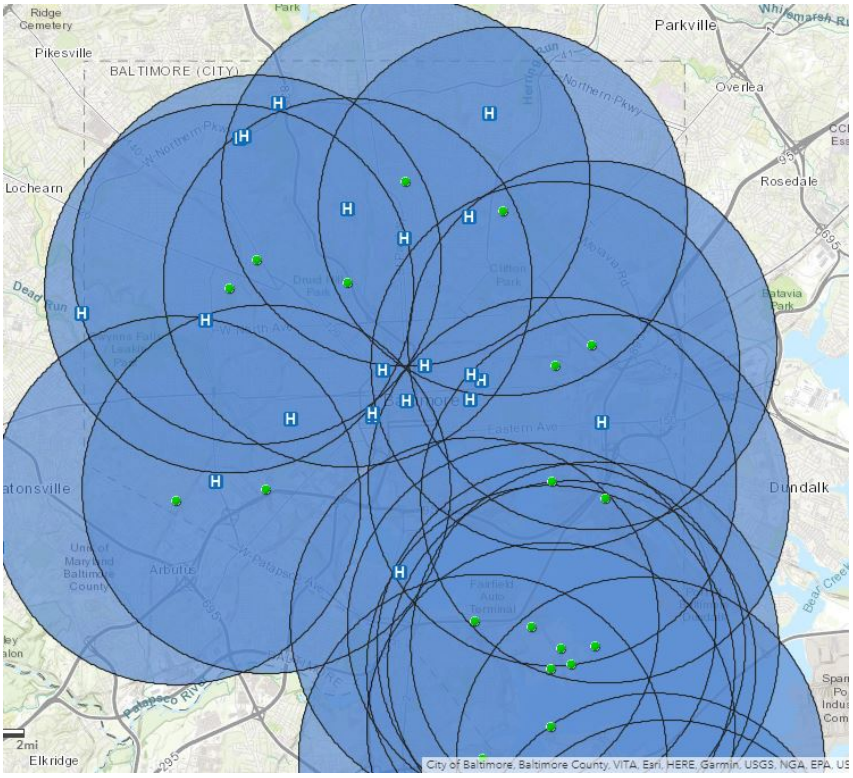
chlorine for the disinfection of the wastewater, is situated within three miles of ten different K-12 schools.[61]



Baltimore educational facilities within a three-mile radius of an RMP facility. Not a single educational facility is over three miles away from an RMP facility. Source: ArcGIS RMP Facilities citing Esri, HERE, Garmin, FAO, NOAA, USGS, EPA and NPS.

Medical facilities in Maryland are also often located within three miles of RMP facilities, as shown in the figure below.

[61] EJSCREEN, *supra* note 35.



Baltimore medical facilities within a three-mile radius of an RMP facility. Again, note how not a single medical facility is outside the radius. Source: ArcGIS RMP Facilities citing Esri, HERE, Garmin, FAO, NOAA, USGS, EPA and NPS.

In light of their proximity to RMP facilities, accidents at those facilities can often impact schools and hospitals. For example, Luke Paper, now owed by Verso Corporation, located in Luke, Maryland, had an accident in 2011.[62] Specifically, on November 16, 2011, Luke Paper experienced a release of "chlorine dioxide residual combined with filtrate from the No. 2 CLO2 Tower within the pulp bleaching area."[63] The incident lasted approximately "35 minutes and resulted in a total release of 61 pounds of Chlorine; of which 30.5 pounds was released as a vapor cloud and 30.5 pounds was released as a liquid into the mill sewer system."[64] The released chemicals "entered the mill yard around the bleach plant. Five people were exposed to and treated for ClO2 inhalation, and transported to the local emergency room. They were all treated and released to return to work."[65] The local elementary school was instructed to shelter in place. The direction of the vapor cloud release was advancing upstream from the release area and a nearby community was advised to have all residents shelter in place.[66] Both a school and a medical facility are located within three

[62] Right-to-Know Network, *supra* note 9.

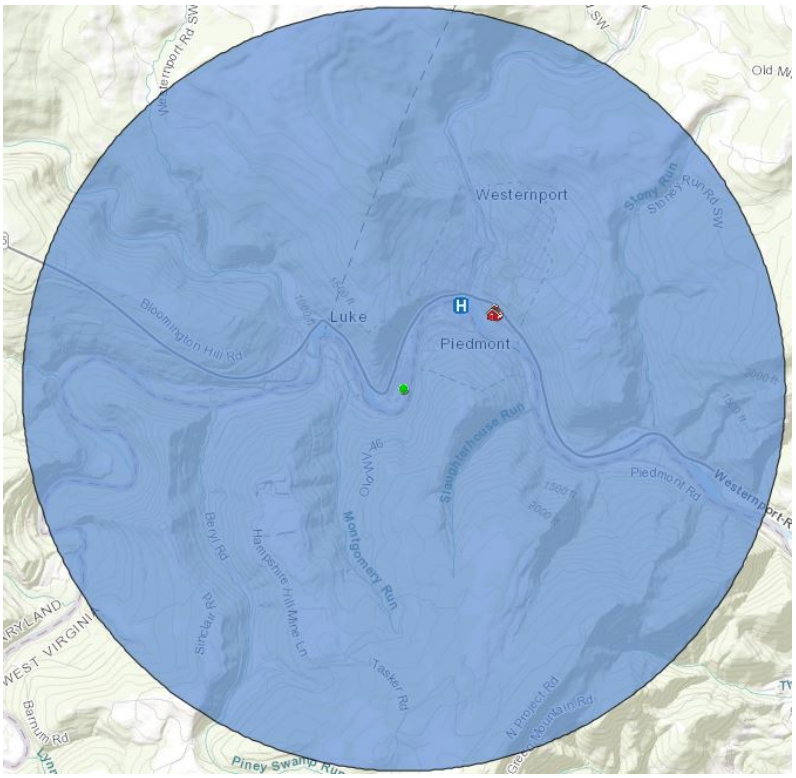
[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

miles of Luke Paper Company. Of major concern is the fact that the Luke Paper plant is situated near a river, making residents far from Luke vulnerable as well.



Luke Paper Company, the green dot, located on the Potomac River, is significantly less than three miles away from both Westernport Elementary and the Riverside Clinic.

Furthermore, nearly all of Baltimore City, Baltimore County, and the suburban counties in Maryland surrounding Washington, D.C., rank above the 80th percentile for being "Environmental Justice Communities."[67] Maryland's waterfront communities, regardless of their location in urban, suburban, or rural landscapes, tend to rank in either the 90-95th percentiles or the 95-100th percentiles.[68]

Maryland is also particularly vulnerable to accidents because of Maryland's high density of flood risk areas. Flash floods, like the ones that occurred in Ellicott City in 2016 and 2018, tend to pummel Maryland after short periods of heavy rain, affecting even small streams and creeks in western Maryland far from the Atlantic Ocean.[69] General flooding occurs after steady rain, and impacts larger streams and rivers.[70] Major rivers, like the Potomac and Susquehanna, often flood

[67] *Id.*

[68] EJSCREEN, *supra* note 35.

[69] *Are You in a Flood Prone Area? Flood Prone Zones*, MARYLAND EMERGENCY MANAGEMENT AGENCY, https://mema.maryland.gov/Pages/floodProneZones.aspx.

[70] *Id.*

because of events occurring in distant areas of their watershed.[71] Given that nearly all of Maryland's residents live near one of the aforementioned waterways, a significant amount of Marylanders are at risk if a chemical accident were to occur.

Accidents related to the transport of dangerous chemicals are also a source of concern for Maryland. On May 29, 2013, a collision of a freight train, carrying the chemicals terephthalic acid and fluoroacetic acid, and a trash truck caused a massive fire in Baltimore that lasted for over ten hours before being brought under control.[72] The shock of the collision blast could be felt for miles, and some residents initially thought they were experiencing an earthquake.[73] Windows from nearby homes and businesses were blown out.[74]

Since 2014, there have been several notable accidents related to RMP facilities. On May 20, 2015, a south Baltimore propane warehouse caught fire, resulting in three people suffering from serious burns.[75] Twelve days prior, over 30 firefighters responded to TAMKO Building Products Inc. in Frederick for a fire in an asphalt filtration system.[76] Although no one was injured in the fire, protective gear used by the firefighters was damaged. [77] The company reported that the fire was one in a string of fires that have occurred at the facility.[78]

Massachusetts

Accidents at RMP facilities pose a substantial risk to Massachusetts residents. There are 72 registered RMP facilities in the state.[79] Combined, the number of people within the self-estimated vulnerability zones of these RMP facilities is over one million.[80] The vulnerability zone for one facility—the Borden & Remington Corporation facility in Fall River—contains nearly

---

[71] *Id.*

[72] Jamieson, Alastair, et al., *Fire Rages for 10 Hours after Baltimore Chemical Freight Train Crash*, NBCNEWS.COM, May 29, 2013, *available at* usnews.nbcnews.com/_news/2013/05/29/18561840-fire-rages-for-10-hours-after-baltimore-chemical-freight-train-crash?lite.

[73] *Id.*

[74] *Id.*

[75] *3 Burned in Fire at Propane Warehouse*, WBAL, Oct. 9, 2017, www.wbaltv.com/article/3-suffer-serious-burns-in-fire-at-propane-warehouse/7093684.

[76] Jones, Paige, *Building Fire Damages Filtration System, Firefighter Equipment*, THE FREDERICK NEWS-POST, May 9, 2015, *available at* www.fredericknewspost.com/news/disasters_and_accidents/building-fire-damages-filtration-system-firefighter-equipment/article_2fae1340-9a7b-514e-9baa-4973fcd9e77d.html.

[77] *Id.*

[78] *Id.*

[79] Right-to-Know Network, *supra* note 9. The website was used to conduct an RMP program search for Massachusetts facilities.

[80] "WHO'S IN DANGER?", *supra* note 1, at 108–09. The double-counting created by the overlap of some vulnerability zones only marginally decreases the expected number of people affected by accidents, since people living within the vulnerability zones of multiple facilities face a substantially heightened risk.

500,000 residents.[81] In addition to threatening nearby residents, chemical accidents pose a grave danger to Massachusetts students. Over 91,000 students attend school within the vulnerability zones of Massachusetts RMP facilities,[82] and nearly half of those students study less than a mile away from a facility.[83]

There have been at least 11 chemical accidents at RMP facilities in Massachusetts since 1995.[84] Massachusetts has suffered significant losses from industrial chemical accidents in recent years, including a major explosion at an ink and paint factory in Danvers, which destroyed two dozen homes and six businesses and hospitalized at least ten residents.[85] Additionally, two separate chemical explosions at a Dow Chemical Company facility in North Andover killed one worker and critically injured four others.[86]

The Accident Prevention Amendments' heightened requirements for RMP facilities would significantly benefit Massachusetts. The need for safety improvements was highlighted in 2012, when a fire at the New England Confectionary Company ("NECCO") caused the release of 8,000 pounds of ammonia within approximately 1,000 feet of a public middle school.[87] Fortunately, the accident occurred at night, when school was not in session; but unfortunately it still led to the hospitalization of two responding firefighters who were exposed to ammonia fumes.[88] The ammonia release also afflicted nearby residents with a noxious odor that caused coughing and burning sensations.[89] After the accident, OSHA conducted an investigation and fined NECCO $133,000 in penalties for failing to institute prevention measures.[90] OSHA found that NECCO had failed to develop safe operating procedures, adequately inspect and maintain its

---

[81] *Id.* at 108.

[82] "KIDS IN DANGER ZONES", *supra* note 3.

[83] Table of schools and students within a mile of RMP facilities by state, CENTER FOR EFFECTIVE GOVERNMENT, https://www.foreffectivegov.org/sites/default/files/info/RMPschoolstable.pdf.

[84] Right-to-Know Network, *supra* note 9. The website was used to conduct an RMP program search for Massachusetts facilities.

[85] U.S. CHEM. SAFETY AND HAZARD INVESTIGATIONS BD., INVESTIGATION REPORT: CONFINED VAPOR CLOUD EXPLOSION 1 (2006), *available at* https://www.csb.gov/assets/1/20/csbfinalreportcaiexplosion.pdf?13735.

[86] *See* Kaitlin Flanigan & Chris Caesar, *4 Seriously Injured in Chemical Explosion at Dow Chemical Company's North Andover, Massachusetts, Location*, NECN (Jan. 7, 2016), https://www.necn.com/news/new-england/Injuries-at-DOW-Chemical-Company-North-Andover-Massachusetts-364548401.html.

[87] *See* U.S. DEP'T OF LABOR, OSHA NEWS RELEASE – REGION 1 (Apr. 22, 2013), https://www.osha.gov/news/newsreleases/region1/04222013.

[88] *See Fire, Ammonia Leak at NECCO Factory Sends Two Firefighters to Hospital*, CBS BOSTON, Oct. 6, 2012, https://boston.cbslocal.com/2012/10/06/fire-ammonia-leak-at-necco-factory-sends-two-firefighters-to-hospital/.

[89] *See* Seth Daniel, *Sweet Surprise? Fire at NECCO Gave Neighbors More Than They Bargained For*, REVERE J., Oct. 17, 2012, http://www.reverejournal.com/2012/10/17/sweet-surprise-fire-at-necco-gave-neighbors-more-than-they-bargained-for/.

[90] U.S. DEP'T OF LABOR, *supra* note 87.

equipment, and update its procedures and inform workers of changes.[91] OSHA's area director for Middlesex and Essex counties described the leak as "a serious and preventable incident that could have resulted in the loss of human life."[92]

Indeed, the Accident Prevention Amendments prescribe precautionary measures directly and indirectly addressing the concerns raised by OSHA following the NECCO accident, including requirements that facilities conduct more extensive safer technology and alternatives analyses, adequately train supervisors who are responsible for process operations, and keep process safety information up-to-date.[93]

New Jersey

New Jersey is a delegated state for the RMP and administers its program pursuant to its Toxic Catastrophe Prevention Act (TCPA). Currently, there are 93 facilities subject to the TCPA Program rules. As of April 30, 2018, 79 of these facilities were also subject to the federal RMP rules, 40 C.F.R. Part 68.[94] Of these 79 facilities, five have a vulnerability zone Census population of greater than 100,000 and up to 1,000,000 people, and five have a vulnerability zone Census population of greater than 1,000,000 people; 12 facilities have vulnerability zones ranging from one to ten miles, and five facilities have vulnerability zones greater than ten miles.[95] Since New Jersey has the nation's highest population density and many facilities are in urban locations in close proximity to surrounding populations, the potential impact to the public is heightened. The figure below shows the location of the 93 TCPA registered facilities. Another matter of great significance is the fact that New Jersey has 1,492 schools located in these facilities' vulnerability zones, serving a student population of 648,641 for the 79 federally regulated facilities.[96]

[91] *Id.*

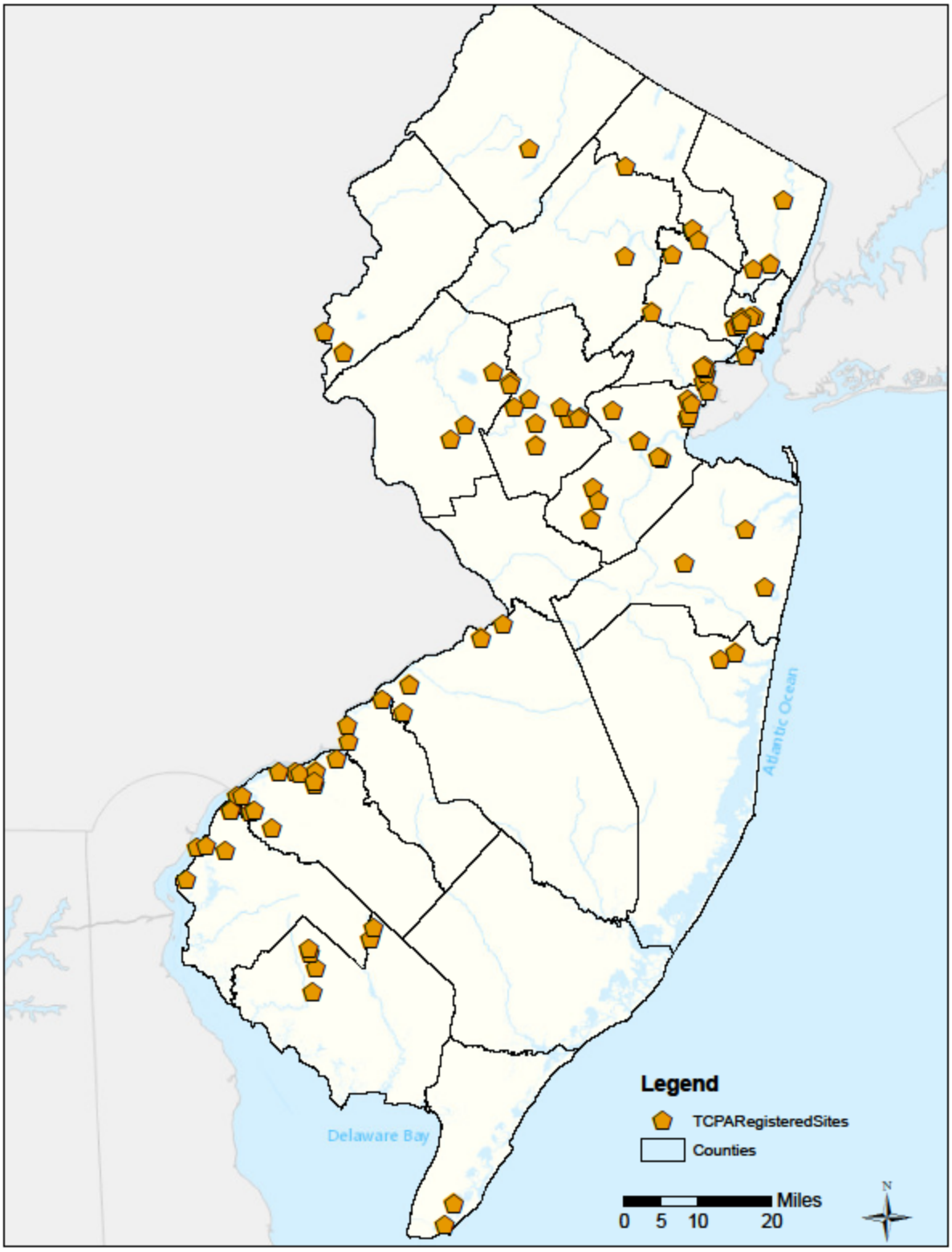
[92] *Id.*

[93] 82 Fed. Reg. 4,594 (Jan. 13, 2017).

[94] The Right-to-Know Network, *supra* note 9.

[95] "WHO'S IN DANGER?", *supra* note 1.

[96] "KIDS IN DANGER ZONES", *supra* note 3.



Map of New Jersey TCPA registered facilities.

According to the most recent five-year accident histories for the 79 federally regulated facilities in New Jersey, there were 12 reported accidents in New Jersey that released more than 55,000 pounds of toxic chemicals into the surrounding communities. These accidents resulted in 12 injuries and property damage totaling more than $10 million.

One of the 12 reported accidents occurred at Boasso America Corporation on March 9, 2015, in Newark, New Jersey. Four workers were injured in an explosion and two-alarm fire at the facility, which should have been but was not registered under the federal or New Jersey RMP rules. One of the injured workers was trapped in the building for about three hours before he was rescued by authorities.[97] The company reported that this accident involved 8,100 pounds of a flammable substance and resulted in $7 million property damage.[98]

New Mexico

On April 8, 2004, highly flammable gasoline components were released and ignited at the Giant Industries Ciniza refinery, located east of Gallup, New Mexico.[99] This incident occurred at "the refinery's hydrofluoric acid (HF) alkylation unit."[100] Six employees were injured, four with serious injuries including broken ribs and serious burns.[101] One of the employees, Mike Saunders, went on to be hospitalized for 16 months, enduring more than 30 operations.[102] He was burned over 80 percent of his body and lost four fingers on his dominant left hand.[103] Additionally, he suffered hearing loss, disfigurement and total blindness.[104] At the time of the incident, all non-essential employees were evacuated along with customers of a nearby travel center/truck stop.[105] The impact of this incident was such that production "was not resumed until the fourth quarter and the damage was in excess of $13 million."[106] Following the incident, the CSB conducted an investigation to ascertain the cause of the explosion and fire.[107] That investigation revealed that

---

[97] Checky Beckford, *4 Workers Injured in Newark Warehouse Fire: Police*, NBC 4 NEW YORK, Mar. 9, 2015, https://www.nbcnewyork.com/news/local/Newark-Warehouse-Fire-Workers-Injured-295693271.html.

[98] Right-to-Know Network, *supra* note 9.

[99] U.S. CHEM. SAFETY AND HAZARD INVESTIGATION BD., *Case Study: Oil Refinery Fire and Explosion*, No. 2004-08-1-NM 1 (Oct. 2005), *available at* https://www.csb.gov/giant-industries-refinery-explosions-and-fire.

[100] *Id*. at 2.

[101] *Id*. at 5.

[102] *Man Able to Return to Shooting Big Game After Being Blinded in Explosion*, ALBUQUERQUE J., Oct. 18, 2009, at B1, *available at* https://www.abqjournal.com/news/state/18223223state10-18-09.htm.

[103] *Id*.

[104] *Id*.

[105] *Supra* note 92 at 1.

[106] *Id*.

[107] *CSB to Pursue Full Investigation of April 8 Explosions and Fire at Giant Industries Refinery Near Gallup, NM*, U.S. CHEM. SAFETY AND HAZARD INVESTIGATION BD., Apr. 19, 2004, https://www.csb.gov/csb-to-pursue-full-investigation-of-april-8-explosions-and-fire-at-giant-industries-refinery-near-gallup-nm/.

"Giant's mechanical integrity program did not effectively prevent repeated pump seal failures. Problems were addressed when equipment broke down, not in a preventative manner."[108]

This incident is not the only example of a serious accident at an RMP facility in New Mexico. On March 3, 2010, a storage tank at the Navajo Refinery in Artesia, New Mexico exploded, killing two men (Natividad Andajo and Victor Villa) and critically injuring two others.[109] The accident occurred while the employees were performing welding operations on top of a storage tank at the refinery.[110] A welder ignited vapors from flammable liquids within the tank and the tank exploded, starting a fire that lasted for more than an hour.[111] The injured workers were airlifted to Lubbock, Texas.[112] Following the incident, OSHA officials launched an investigation into the explosion.[113] OSHA issued citations to the refinery as a result of the incident, which included citations for failing to properly inspect, failing to instruct employees, and permitting welding in an area where flammable liquids and vapors were present.[114] The Navajo Refinery entered into a settlement with the State of New Mexico Environment Department in which it agreed to pay a $400,000 fine, which is the largest penalty ever collected by the state OSHA program.[115]

Since 2012, there have been ten accidents at RMP facilities in New Mexico resulting in 18 injuries to workers and one death.[116] These accidents have caused over $5.6 million in property damage, and have released over 138,000 pounds of toxic material into the environment.[117]

The Giant Industries Ciniza Refinery and the Navajo Refinery are among 97 chemical facilities, 59 of which are registered RMP facilities, located in New Mexico.[118] As a potential vulnerability zone for each facility has the capacity to extend from 0.01 to 25 miles, the number

---

[108] *CSB Issues Case Study on April 2004 Oil Refinery Explosions and Fire at Giant Industries' Ciniza Refinery near Gallup, NM*, U.S. CHEM. SAFETY AND HAZARD INVESTIGATION BD., Oct. 26, 2005, https://www.csb.gov/csb-issues-case-study-on-april-2004-oil-refinery-explosions-and-fire-at-giant-industries-ciniza-refinery-near-gallup-nm/.

[109] Associated Press, *Two Workers Killed in New Mexico Oil Refinery Fire*, FOXNEWS.COM, Mar. 3, 2010, http://www.foxnews.com/story/2010/03/03/two-workers-killed-in-new-mexico-oil-refinery-fire.html.

[110] *New Mexico Refinery to Pay Highest State Penalty Ever Following Worker Deaths*, INDUSTRIAL SAFETY AND HYGIENE NEWS, Oct. 31, 2012, https://www.ishn.com/articles/94452-new-mexico-refinery-to-pay-highest-state-penalty-ever-following-worker-deaths.

[111] *Id.*

[112] *Supra* note 109.

[113] *Id.*

[114] *Supra* note110.

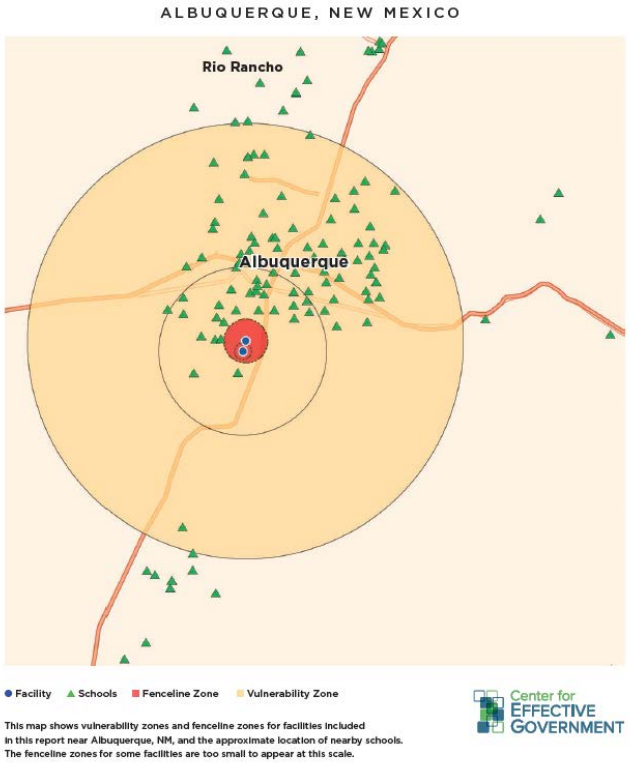
[115] *Id.*

[116] Right-to-Know Network, *supra* note 9. The website was used to conduct an RMP program search for New Mexico facilities.

[117] *Id.*

[118] *Id.*

of New Mexicans affected by these RMP facilities is extensive.[119] In the work entitled *Who's In Danger? Race Poverty and Chemical Disasters*¸ the authors explored a case study involving a sewage treatment plant located in Albuquerque, New Mexico.[120] The authors noted that a chemical accident involving this facility could potentially impact an area of up to 5.40 miles downwind of the plant and hundreds of thousands of New Mexicans.[121]



[122]

As of 2014, over 840,000 of New Mexico's residents live in vulnerability zones.[123] Further, New Mexico has 248 schools located in a vulnerability zone affecting approximately 106,360 students.[124] Among those schools closest to RMP facilities is an elementary school located approximately one-tenth of a mile from an RMP facility.[125]

[119] "WHO'S IN DANGER?", *supra* note 1, at 8.

[120] *Id*. at 20.

[121] *Id*.

[122] *Id*. at 21.

[123] *Id*. at 129.

[124] "KIDS IN DANGER ZONES", *supra* note 3, at 25.

[125] *Id*.; *see also* EJSCREEN, *supra* note 35 (taking facility locations and placing them on EJSCREEN with school map overlay) (Facility: AG Country Propane; School: Quemado Elementary).

Oregon

Oregon has 110 registered RMP facilities across the state.[126] There have been at least nine accidents at Oregon RMP facilities since 2006, which have caused over 14,000 pounds of toxic chemicals to be released in total.[127] Over one million people live in the vulnerability zones of these Oregon facilities, equal to 26.7 percent of Oregon's population.[128] As shown in the table below, Oregon has five facilities with over 100,000 residents living in each respective vulnerability zone.[129] A chemical accident at one of these facilities alone would put a large number of people at risk.

Facility Name	Dyno Nobel Inc.- St. Helens Plant	ATI Wah Chang	Rivergate Terminal	Hercules Incorporated-Portland Plant	Intel Corporation Ronler Acres Campus
Chemical	Ammonia (anhydrous)	Chlorine	Ammonia (anhydrous)	Epichlorohydrin	Ammonia (anhydrous)
Vulnerability Zone Census Population	222,065	166,325	183,488	217,613	113,953

Facility data from "Who's in Danger?", supra note 1.

At least six Oregon facilities handle anhydrous ammonia, with 544,537 Oregon residents living in those vulnerability zones.[130] When released, anhydrous ammonia is a heavy gas that hugs the ground, creating greater opportunity for human exposure.[131] Contact with the chemical "can be immediately dangerous to life or health," and exposure symptoms include "eye, nose, and throat irritation, breathing difficulty, wheezing, or chest pain, pulmonary edema, pink frothy sputum, burns, blisters and frostbite."[132] Anhydrous ammonia is just one of many chemicals that Oregon residents would be in greater danger of being exposed to if EPA weakens facility safety measures.

Oregon has at least 110,724 students within facility vulnerability zones, accounting for 19 percent of students in the state and 279 individual schools.[133] According to the World Health

[126] Right-to-Know Network, *supra* note 9.

[127] *Id.*

[128] "WHO'S IN DANGER?", *supra* note 1.

[129] *Id.*

[130] *Id.*

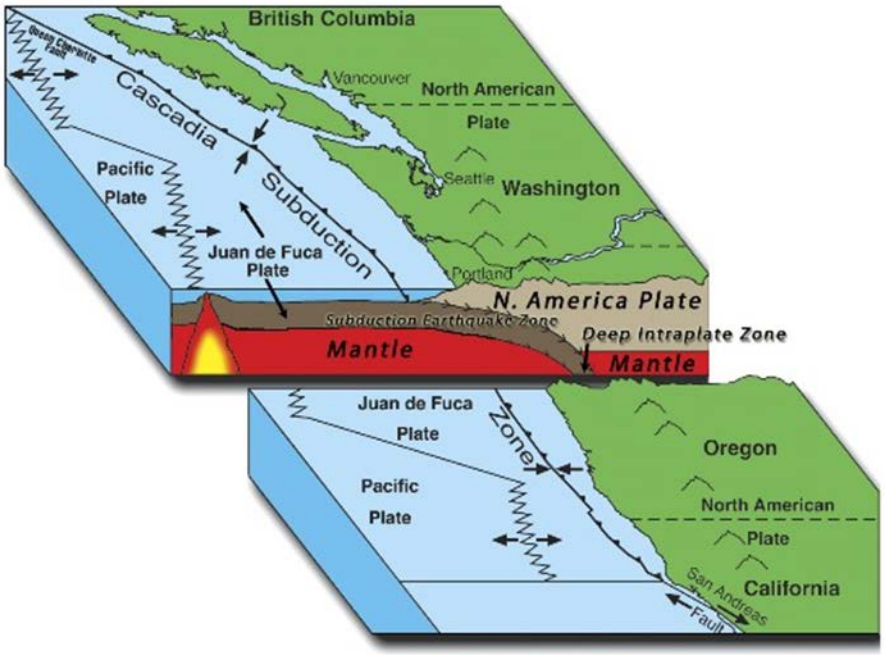
[131] *Gateway to Health Communication & Social Marketing Practice: Anhydrous Ammonia*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept.15, 2017), https://www.cdc.gov/healthcommunication/toolstemplates/entertainmented/tips/AnhydrousAmmonia.html.

[132] *Id.*

[133] "KIDS IN DANGER ZONES", *supra* note 3.

Organization, children are more vulnerable than adults to environmental risks because their "central nervous, immune, reproductive, and digestive systems are still developing. At certain early stages of development, exposure to environmental toxicants can lead to irreversible damage."[134] Rolling back the Accident Prevention Amendments would increase the likelihood that Oregon schoolchildren will be harmed.

Oregon also is situated along the Cascadia Subduction Zone fault, which puts the state at risk of experiencing severe earthquake events in the future.[135] In 1993, the 5.6-magnitude Scotts Mills earthquake caused $30 million in damage in the Portland metro area.[136] A Cascadia Subduction Zone earthquake may reach a magnitude of nine.[137] In the case of such events, the safety of chemical facilities would be of major concern.



Source: https://www.oregon.gov/oem/hazardsprep/Pages/Cascadia-Subduction-Zone.aspx.

Flooding also threatens chemical facilities, especially facilities that are located in FEMA 100-year flood plains. In the Portland metro region, FEMA 100-year flood plains are along the

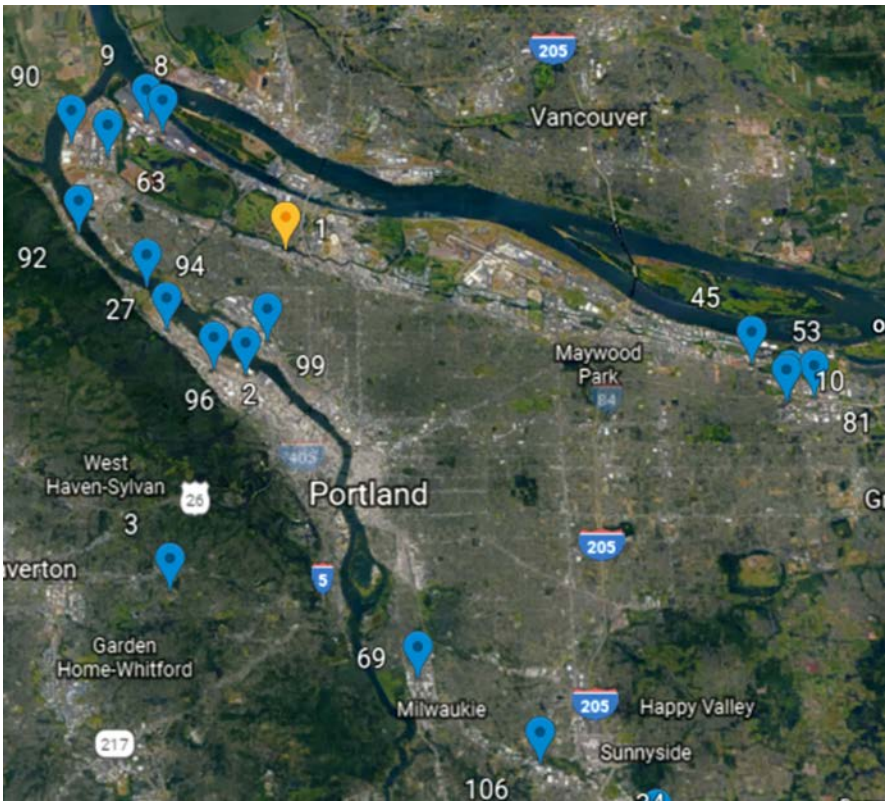
[134] *Children's environmental health: Environmental risks*, WORLD HEALTH ORGANIZATION (2018), http://www.who.int/ceh/risks/en/.

[135] *Cascadia Subduction Zone*, PACIFIC NORTHWEST SEISMIC NETWORK, https://pnsn.org/outreach/earthquakesources/csz.

[136] *Hazards and Preparedness: Hazards in Oregon*, OREGON OFFICE OF EMERGENCY MANAGEMENT, https://www.oregon.gov/oem/hazardsprep/Pages/Hazards-in-Oregon.aspx.

[137] *Id.*

Willamette and Columbia Rivers, which run directly through the city.[138] As shown in the map below, Portland has many facilities near these bodies of water that could put the state's most populous city in jeopardy during a major flood. Safeguards are necessary to ensure that emergency responses take place efficiently so as to mitigate the most harm in these circumstances.



[138] *FEMA 100 Year Flood Plains, Portland Metro Region, Oregon*, DATA BASIN (July 4, 2012), https://databasin.org/datasets/f55b00a6502c4e6ab971e0e89bc4ba3c.

II. Comments on the Proposed Rule

To justify its Proposal, EPA is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). An agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* Although agencies are free to change existing policies (within statutory boundaries), they must provide a reasoned explanation for the change. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Id.* Further, where, as here, a new policy rests on factual or legal determinations that contradict those underlying the agency's prior policy, the agency must provide a more detailed explanation for its policy. *Id.* "Unexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). An arbitrary and capricious regulation of this sort is itself unlawful and receives no deference. *Encino Motorcars, LLC v. Navarro*, -- U.S. -, 136 S. Ct. 2117, 2126 (2016).

This section provides the States' comments on the four main aspects of the Proposal: (A) accident prevention; (B) emergency response coordination; (C) information sharing; and (D) compliance deadlines. EPA has failed to justify its proposed weakening of accident prevention safeguards and its curtailment of information about chemical hazards to emergency responders and communities. Likewise, the agency has not provided a reasoned basis for further delays in implementing safeguards that it proposes to keep.

A. Accident Prevention Requirements

1. The Proposal

On May 30, 2018, EPA proposed to rescind key provisions of its 2017 rule that strengthen the chemical accident prevention program, which was designed to prevent accidents by triggering improvements in plant design, equipment, procedures, and operator training. *See* EPA, *Regulatory Impact Analysis, Reconsideration of the 2017 Amendments to the Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7)*, at 64 (Apr. 27, 2018) (hereinafter "RIA"). For instance, the Proposal would eliminate all requirements for third-party compliance audits (40 C.F.R. §§ 68.58, 68.59, 68.79, & 68.80), which evaluate the owner or operator's compliance with the accident prevention program requirements. 83 Fed. Reg. at 24,857-58. It would also rescind the requirement for safer technology and alternatives analysis (40 C.F.R. § 68.67(c)(8)), which refers to a process in which facility staff analyze their processes and practices to determine if there are safer alternatives to their current operating practice. 83 Fed. Reg. at 24,857-58.

In addition, the Proposal would weaken incident investigations by removing requirements that the investigations include root cause analyses (40 C.F.R. §§ 68.60(d)(7) & 68.81(d)(7)) and

that one investigation team member be knowledgeable in the process involved in the incident (*see id.* § 68.60(c) (for Program 2 processes)). 83 Fed. Reg. at 24,858. Facilities would no longer need to prepare, within 12 months, reports of the investigation's findings (40 C.F.R. §§ 68.60(d) & 68.81(d)). 83 Fed. Reg. at 24,858. Instead they would need only to provide a summary that omits key information such as: the time and location of the incident; all relevant facts of the incident; the name and amount of regulated substance involved in the release or near miss; the consequences of the incident including injuries, fatalities, and impact on the environment; the emergency response actions taken; the direct and indirect contributing factors of the incident; and recommendations resulting from the investigation (for Program 2 Processes) as well as a schedule for addressing them (40 C.F.R. §§ 68.60(d)(1)-(8) & 68.81(d)(1)-(7)). 83 Fed. Reg. at 24,858. Facilities would no longer need to investigate incidents that cause the affected process to be decommissioned or destroyed (40 C.F.R. §§ 68.60(a)(1) & 68.81(a)(1)). 83 Fed. Reg. at 24,858.

The Proposal would also weaken hazard reviews that evaluate the dangers associated with the regulated substances, processes and procedures at a facility. It would do so by eliminating the requirement that Program 2 Process hazard reviews identify findings from incident investigations that show vulnerabilities that could cause accidental releases (40 C.F.R. §§ 68.50(a)(2) & 68.67(c)(2)). 83 Fed. Reg. at 24,858. It would also eliminate the requirement that Program 3 Process hazard reviews address the findings from all incident investigations required under 40 C.F.R. § 68.81, as well as any other potential failure scenarios (40 C.F.R. § 68.67(c)(2)). 83 Fed. Reg. at 24,858. Rather, reviews would need only to identify any previous incident that had a likely potential for catastrophic consequences. In addition, process safety information would no longer need to be kept up to date (40 C.F.R. § 68.65), but instead, updated only every five years (40 C.F.R. § 68.67(f)). 83 Fed. Reg. at 24,858.

Finally, the Proposal would decrease safety training for facilities' employees. Supervisors responsible for process operations and employees involved in operating a Program 2 process would no longer need to be trained on operating procedures (40 C.F.R. §§ 68.54 & 68.71). 83 Fed. Reg. at 24,858.

2. States' Comments

Rescission of enhanced safeguards to protect workers and communities from dangerous chemical accidents is inconsistent with the purpose and goals of the Clean Air Act. EPA's proposed rationales in support of the rescissions would be arbitrary and capricious if finalized. EPA claims in the Proposal that EPA can lawfully rescind improved accident prevention requirements because "the [Clean Air Act] did not require EPA to promulgate the RMP Amendments rule," as "EPA had met all of its regulatory obligations under section 112(r) prior to promulgating the RMP." 83 Fed. Reg. at 24,856. However, the proposed rescissions would be inconsistent with section 112(r)'s purpose and goals, which are to "prevent" and "minimize" risks from chemical accidents "to the greatest extent practicable." *See* 42 U.S.C. § 7412(r). Congress authorized the Accident Prevention Amendments in response to catastrophic chemical accidents such as the Bhopal disaster, with a clear intent to prevent such accidents in the future by harnessing federal regulatory capabilities and expertise. Congress deliberately used the strong language "to the greatest extent practicable" to reflect its intent for EPA to oversee a maximally strong program and gave EPA broad authority and duty to adopt appropriate regulations to achieve this goal.

Moreover, EPA's claim is at odds with its prior findings. In response to Executive Order 13,650, which directed EPA to improve its chemical safety regulations, EPA determined that it was necessary to revise the accident prevention program. EPA found that "including root cause analyses for catastrophic releases and near misses, and including root cause information in incident investigation reports is *vital* for understanding the nature of these events." 82 Fed. Reg. at 4,607 (emphasis added). EPA also determined that "conducting the third-party compliance audits immediately after an accidental release is *necessary* to identify and correct existing noncompliance at prevention program facilities that could lead to future releases." *Id.* at 4,616 (emphasis added). Further, EPA found that all facilities in certain industries "should consider [Inherently Safer Technology] to ensure that they are considering all options to operate their facility safer." *Id.* at 4,642. Accordingly, consistent with Congress' intent, EPA used its authority under section 112(r)(7) to take reasonable regulatory action to improve the accident prevention program and fulfill the statutory goal of preventing chemical accidents. EPA's proposed rescissions run counter to its prior position that such improvements were, among other things, "vital" and "necessary." And, as discussed below, EPA failed to provide a reasoned explanation for the elimination of these improvements.

a. The Need for Greater Coordination with OSHA Does Not Justify the Proposed Rescissions

One of EPA's rationales for rescinding the accident prevention requirements is that before modifying the RMP, EPA needs a better understanding of OSHA's plans for updating its Process Safety Management (PSM) standard so that EPA can move forward with regulatory changes in a more coordinated fashion without causing undue burden and regulatory conflicts. 83 Fed. Reg. at 24,864. EPA asserts that "[t]his approach would better fulfill the Congressional purpose of coordination between the two agencies." *Id*.

EPA's contention is wrong for four reasons, as detailed below. First, Congress did not intend for the OSHA coordination requirement to prevent EPA from taking action. Second, EPA did in fact coordinate with OSHA throughout the development of the 2017 rule. And in any event, coordination is not required for Program 2 processes because they are not covered by OSHA regulations. Third, there is no conflict between the accident prevention requirements and OSHA's regulations. Fourth, EPA should not wait for OSHA to act because, as EPA previously found, its regulations are needed now.

Because EPA's rationale of coordinating with OSHA does not provide a reasonable justification for eliminating the benefits of the accident prevention requirements, the Proposal would be arbitrary and capricious if finalized. *See FCC v. Fox*, 556 U.S. 502, 515-16 (2009) (When an agency has reversed course from a prior rule in a way that contradicts the factual findings that underlay its prior policy, it must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

i. Congress Did Not Intend for the Coordination Requirement to Bar EPA Action

Section 112(r)(7)(D)'s command that the Administrator "shall coordinate any requirements under this paragraph with any requirements established for comparable purposes by the

Occupational Safety and Health Administration," does not conflict with EPA's statutory duty to regulate. 42 U.S.C. § 7412(r)(7)(A)(D). EPA has an independent statutory duty under section 112(r)(7) to issue regulations to prevent chemical accident-related harm. 42 U.S.C. § 7412(r)(7)(A) ("In order to prevent accidental releases of regulated substances, the Administrator is authorized to promulgate release prevention . . . requirements."); *cf. Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (rejecting the argument that EPA lacked the statutory authority to regulate greenhouse gas emissions from motor vehicles on the basis that Congress directed the National Highway Traffic Safety Administration to establish fuel economy standards that served a similar purpose).

Congress did not intend for EPA to forego amending RMP regulations as necessary in the absence of action by OSHA. The Senate Report for the 1990 Clean Air Act Amendments, which added the RMP provisions, specifically states that the coordination requirement "in no way diminishes the Administrator's authority to act and does not imply that requirements under this section must be set aside or delayed where OSHA is acting with respect to the same hazard." S. REP. NO. 101-228 (101st Cong., 1st Sess. 1989-1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3628.

The Senate Report recognized that separate and additional EPA regulation of chemical facility safety was necessary for several reasons. First, EPA and OSHA have different missions when it comes to chemical safety. "OSHA is charged with assuring that the health and safety of workers is protected from the adverse effects of [accidental releases]." *Id*. EPA, on the other hand, is responsible for protecting the communities and environment surrounding chemical facilities. Second, OSHA had the authority to implement requirements similar to the RMP, but chose not to, "even in light of the evidence from its own post-Bhopal study . . .which indicated that existing OSHA regulations are not effective in preventing or mitigating the threat of catastrophic chemical accidents." *Id*. Third, EPA has expertise in chemical safety regulation and authority for preventing hazardous releases under other statutory programs. EPA "has been assigned significant responsibilities in emergency planning and the coordination of reporting and record-keeping requirements for releases of extremely hazardous substances under CERCLA and SARA." *Id*. at 3629. Section 112 "does not create entirely novel authorities for EPA; nor does it move the Agency into a field fully and effectively occupied by OSHA standards." *Id*.

Moreover, the statutory structure of the 1990 Amendments contemplates that OSHA and EPA rulemakings may proceed on different schedules. "OSHA's rulemaking under section 304 of the [Clean Air Act Amendments] of 1990 was due within 1 year of enactment, while EPA's list rule was due 2 years after the enactment and the RMP rule was due 3 years after enactment. Due to the statutory structure, it is not unreasonable for there to be some lack of synchronous process." EPA, *Response to Comments on the 2016 Proposed Rule Amending EPA's Risk Management Program Regulations*, at 251 (Dec. 19, 2016) (hereinafter "Response to Comments").

ii. EPA Coordinated with OSHA on the Development of the Accident Prevention Amendments

EPA's extensive coordination with OSHA belies its stated rationale of needing to better understand OSHA's plans so the two agencies can move forward "in a more coordinated fashion." 83 Fed. Reg. at 24,864. The record shows that EPA and OSHA consulted on the path each agency would take to update its chemical safety regulations and determined that they need not do so

simultaneously. *See* Response to Comments at 232 ("EPA does not believe it is necessary for the Agency to conduct its rulemaking on exactly the same timeline as OSHA.").

The Department of Labor (DOL) (which houses OSHA) and EPA, along with the Department of Homeland Security (DHS), were tri-chairs of the Chemical Facility Safety and Security Working Group created by Executive Order 13,650, which among other things, directed those agencies to modernize policies, regulations, and standards to enhance safety and security in chemical facilities. The Working Group provided consultation and direction on EPA's development of the Accident Prevention Amendments. Response to Comments at 250. In May 2014, the Working Group issued a report for the President entitled *Actions to Improve Chemical Facility Safety and Security – A Shared Commitment*.[139] In that report, both EPA and OSHA outlined their short-term plans for modernizing their respective chemical safety regulations. EPA's plan was to "propose any appropriate priority amendments to the RMP regulation to advance increased safety in 2015 with the intent to finalize such amendments in 2016." *Shared Commitment* at 35. In contrast, OSHA's short-term plan to modernize the PSM standard was to initiate a Small Business Regulatory Enforcement Fairness Act (SBREFA) review. *Id*. at 34. OSHA did not give a date by which it would propose or finalize any PSM updates, but instead stated that its rulemaking would consider "continuing harmonization with EPA's RMP regulation." *Id*. at xvi. Thus, the Working Group did not determine that the two agencies needed to proceed on the same timeline to ensure a consistent outcome.

EPA acknowledges in the Proposal that "EPA has regularly communicated and coordinated with OSHA on its prevention program and process safety efforts so far." 83 Fed. Reg. at 24,864. Indeed, EPA and OSHA have regular meetings to coordinate the RMP and PSM programs. During at least twenty-four of those regular meetings, they discussed EPA's development of the Accident Prevention Amendments and OSHA's exploration of potential PSM amendments. Response to Comments at 250. Eight other coordination meetings between EPA and OSHA are listed at page 254 of EPA's Response to Comments on the Accident Prevention Amendments. And there is additional evidence of coordination that is not in the record because "EPA has not docketed confidential, deliberative material regarding the substance of intra-agency and interagency deliberations." *Id.* at 252. When EPA found in one instance that it was unwise to act before OSHA, EPA waited. EPA's decision not to consider the regulation of Ammonium Nitrate in its 2017 rulemaking "explicitly is based on an effort to coordinate any potential regulatory requirements for this substance with actions contemplated by other agencies, including OSHA." Response to Comments at 250. This evidence disproves EPA's new assertion that it "generally focused on the legal permissibility of proceeding on separate schedules rather than the policy wisdom of doing so." 83 Fed. Reg. at 24,864.

Furthermore, Program 2 Processes are not covered by the PSM standard. Therefore, the alleged need for more coordination with OSHA could not provide a reasoned explanation to delay EPA regulatory changes affecting those processes. And EPA does not provide a satisfactory alternative rationale for rescinding Program 2 requirements. Because the OSHA consistency

[139] Chemical Facility Safety and Security Working Group, *Executive Order 13650 Actions to Improve Chemical Facility Safety and Security – A Shared Commitment* (May 2014) (hereinafter *Shared Commitment*) at 35, *available at* https://www.osha.gov/chemicalexecutiveorder/final_chemical_eo_status_report.pdf.

rationale cannot explain why the Program 2 requirements should be rolled back, EPA states that it would like to keep the Program 2 requirements less burdensome than the Program 3 requirements because "small businesses make up a greater percentage of the processes subject to Program 2." 83 Fed. Reg. at 24,864. Yet, in enacting the Accident Prevention Amendments, EPA "disagree[d] that the final rule will be disproportionately burdensome on small entities. In fact, the costliest final rule provisions – STAA and facility exercises – will affect relatively few small entities." Response to Comments at 232. Accordingly, EPA gives no justification for rescinding the Program 2 accident prevention requirements.

iii. There is No Conflict Between the RMP and PSM Standard

EPA has neither identified any conflict between the current PSM standard and the Accident Prevention Amendments, nor pointed to problems that could arise if OSHA were to modify the PSM standard in the future. The only potential divergence mentioned by EPA is the requirement for third-party audits, and this is based on the fact that the OSHA SBREFA review panel recommended further review of the need and benefits of third party audits. 83 Fed. Reg. at 24,864. But EPA does not explain why it would be problematic for the RMP to have a third-party audit requirement if the PSM standard does not. In fact, prior to the Accident Prevention Amendments, both the RMP and the PSM standard permitted the use of third-party audits, and they were utilized by some of the RMP and PSM regulated community, both voluntarily and pursuant to enforcement settlement agreements. 81 Fed. Reg. at 13,655. Moreover, given the differences in EPA's and OSHA's missions, divergence in the RMP and PSM standard is reasonable and to be expected.

iv. EPA Should Not Wait for OSHA to Act in Light of the Pressing Need for Additional Protections to Prevent and Mitigate Accident Harms

OSHA's timing for the PSM standard rulemaking is uncertain at best, while the need for the Accident Prevention Amendments is definite and pressing. As discussed in Section I.A, above, EPA issued the Accident Prevention Amendments after a series of catastrophic chemical incidents underscored the pressing need for improved safeguards. *See* 81 Fed. Reg. at 13,644. The agency concluded it needed to do more to "further protect human health and the environment from chemical hazards," 82 Fed. Reg. at 4,595, and that specific regulatory improvements were critical to reduce the probability and severity of chemical accidents, 81 Fed. Reg. at 13,643. EPA found that the rule would reduce fatalities, injuries and property damage, and avoid emergency response costs and environmental impacts from the chemical accidents that occur roughly every other day. 82 Fed. Reg. at 4,597, 4,684. EPA's desire to further coordinate with OSHA provides no reasonable justification for eliminating these urgently needed benefits.

b. EPA's Desire to Reduce Unnecessary Regulations and Regulatory Costs Does Not Justify the Proposed Rescissions

EPA also argues that the accident prevention requirements "place an unnecessary and undue burden on regulated entities" because there is a purportedly low and declining accident rate. 83 Fed. Reg. at 24,873. EPA claims this is inconsistent with executive orders that require agencies to place greater emphasis on reducing regulatory costs and burdens to industry.

This contention is wrong for three reasons. First, chemical accidents continue to occur on a regular basis. Second, EPA fails to properly consider the benefits of the accident prevention requirements. In 2017, EPA found that although existing regulations had been effective in preventing and mitigating chemical accidents, "revisions could further protect human health and the environment from chemical hazards through advancements of process safety management based on lessons learned." 81 Fed. Reg. at 13,640. It anticipated that implementation of the accident prevention requirements "will result in a reduction of the frequency and magnitude of damages from releases." 82 Fed. Reg. at 4,683. Third, EPA's focus on costs is inconsistent with the Clean Air Act. In short, EPA's cost-saving rationale does not provide the "more detailed justification" necessary for EPA to disregard its previous findings to the contrary. *See FCC v. Fox*, 556 U.S. at 515.

i. Accidents Continue to Occur on a Regular Basis

EPA is incorrect that there has been, or will be, any material decrease in accidents at RMP facilities without the 2017 Accident Prevention Amendments. EPA data shows that there was an average of 152 reportable accidents per year between 2004 and 2013. RIA at 34. While the current accident data for 2014-2016 show a slight decline in the number of RMP-reported accidents, the agency concedes that it expects that number will increase with future reporting: "Past experience with RMP facility accident reports suggests that following the next 5-year reporting wave . . . the current 2014, 2015, and 2016 accident totals will increase." RIA at 32.

Moreover, in the one year and several months during which the protections from the Amendments have been delayed, at least 58 publicly-known accidents have occurred at facilities in 20 states.[140] Seven employees have been killed. Fifty-eight others have been hospitalized. Nearby residents have been forced to shelter-in-place. Schools and hospitals have been evacuated.

For example, in May 2017, combustible dust explosions at the Didion Milling facility in Wisconsin killed five employees and injured 14 others.[141] In June 2017, an ammonia leak at the Fresh Express food processing plant in Illinois sent five employees and two firefighters to the hospital.[142] And in April 2018, a set of explosions ripped through the Husky Energy Oil Refinery in Wisconsin.[143] Those explosions developed into a large fire, injuring at least 20 people and spreading noxious black smoke, which caused local officials to evacuate nearly 27,000 people living around the plant.[144]

---

[140] *A Disaster in the Making*, EARTHJUSTICE (Apr. 3, 2018, updated July 31, 2018), https://earthjustice.org/features/toxic-catastrophes-texas-national-chemical-disaster-rule.

[141] *Update on Investigation in Didion Milling Explosion*, NBC15, Apr. 30, 2018, http://www.nbc15.com/content/news/New-information-released-in-Didion-Milling-explosion--481264561.html.

[142] *7 people taken to hospital after ammonia leak at Streamwood food plant: officials*, CHICAGO TRIBUNE, June 6, 2017, *available at* http://www.chicagotribune.com/suburbs/elgin-courier-news/news/ct-streamwood-hazmat-0607-20170606-story.html.

[143] *Wisconsin city lifts evacuation order after refinery blast hurts 20*, REUTERS, Apr. 27, 2018, https://www.reuters.com/article/us-husky-energy-refinery-blast/wisconsin-city-lifts-evacuation-order-after-refinery-blast-hurts-20-idUSKBN1HY0KI.

[144] *Id.*

In 2017, EPA concluded that the promulgation of the Accident Prevention Amendments "would result in a reduction of the frequency and magnitude of damages from releases" such as these. 81 Fed. Reg. at 13,642. In the Proposal, EPA acknowledges that the Accident Prevention Amendments "produced a variety of benefits from prevention and mitigation of future RMP and non-RMP accidents at RMP facilities, avoided catastrophes at RMP facilities, and easier access to facility chemical hazard information." 83 Fed. Reg. at 24,854. EPA also concedes that the "proposed rescission of the prevention program requirements (*i.e.*, third-party audits, incident investigation, STAA), would result in a reduction in the magnitude of these benefits." *Id*. The continuing occurrence of accidents at RMP facilities reinforces the urgent need for the accident prevention requirements.

ii. EPA Fails to Properly Consider the Benefits of the Accident Prevention Requirements

Next, EPA has failed to properly consider the benefits of the accident prevention requirements. The assumptions underlying EPA's estimate of the Proposal's costs and benefits are no longer accurate since the D.C. Circuit vacated the delay rule in *Air Alliance Houston*. This is because EPA estimates the costs and benefits of the Proposal based on the assumption that the 2017 Accident Prevention Amendments will not go into effect. EPA assumes that RMP facilities have not begun implementing or preparing for the implementation of the Accident Prevention Amendments due to the delay rule. RIA at 38. EPA further assumes that due to the Proposal, the labor burden and familiarization costs of the Accident Prevention Amendments—worth approximately $35 million—will never be imposed on regulated entities. RIA at 53-54. Similarly, EPA estimates that the Proposal's cost savings will include the elimination of requirements for third-party compliance audits, root cause analysis, STAA, and information disclosure. EPA calculates that, combined, all averted costs total $881.9 million. RIA at 60. But since the Accident Prevention Amendments will soon be in effect when the D.C. Circuit issues its mandate, at least some of these costs will no longer be avoided by regulated entities.

EPA further improperly ignores the benefits of the accident prevention requirements by relying on the fact that they are unquantified. In the proposed rescission, EPA notes that it "is now placing greater weight on the uncertainty of the accident reduction benefits than we had when we promulgated the RMP Amendments, especially in contrast to the extensive record on the costs of the rule." 83 Fed. Reg. at 24,871. EPA adds that it "is uncertain about whether the additional requirements (*i.e.*, third party audits, STAA, and root cause analysis) add environmental benefits beyond those provided by the existing requirements that are significant enough to justify their added costs." *Id*. And EPA concludes that the "costs associated with the prevention program provisions of the RMP Amendments exceed their benefits unless significant non-monetized benefits are assumed." *Id*.

In promulgating the 2017 Accident Prevention Amendments, EPA was not able to quantify what specific reductions in accident harms would occur as a result of implementation of the amendments, but it found that they "would provide benefits to potentially affected members of society," including reducing the probability and severity of chemical accidents. 81 Fed. Reg. at 13,642-43. There are numerous direct costs avoided by preventing serious accidents, including worker, responder, and public fatalities and injuries, public evacuations, public sheltering-in-place,

and property and environmental damage. EPA, *Regulatory Impact Analysis for Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7)* at 83 (Feb. 24, 2016) (hereinafter "2016 RIA"). There are also indirect costs avoided, such as lost productivity due to product damage and business interruption both on-site and off-site, expenditure of emergency response resources and attendant transaction costs, and reduced offsite property values. *Id*. Moreover, prevention of accidents in RMP-covered processes is likely to prevent non-RMP accidents at the same facilities, often at minimal additional cost. *Id*. at 84. EPA may not ignore these benefits just because they are unquantified. *See Am. Trucking Assocs., Inc. v. EPA*, 175 F.3d 1027, 1052 (D.C. Cir. 1999), *rev'd on other grounds sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

For the safer technologies and alternatives analysis (STAA), EPA asserts that it "now questions the implicit assumption that a sufficient number of sources would implement STAA improvement to offset the costs of the provision." 83 Fed. Reg. at 24,872. But recent experience of the State of New Jersey shows that inherently safer technology (IST) regulations are effective. New Jersey's Department of Environmental Protection adopted a rule in 2008 to implement the State's TCPA, mentioned in the New Jersey section above. The goal of the TCPA is to protect the public from catastrophic releases of extraordinarily hazardous substances into the environment. N.J.S.A. 13:1K-19 to -31. The 2008 rule implementing the TCPA required all facilities regulated under the law to conduct IST reviews. The rule followed the 2005 Best Practices Standards for chemical sector facilities, which were adopted by the New Jersey Domestic Security Preparedness Task Force. The Task Force acted under authority of the Domestic Security Preparedness Act, N.J.S.A. App. A:9-64 to -74, enacted in October 2001. Among other things, the Task Force was directed to provide statewide coordination and supervision of all activities related to domestic preparedness for a terrorist attack, to identify and assess potential risks to domestic security and to the public well-being, and to adopt domestic security and preparedness standards. The Best Practices Standards required TCPA chemical facilities to conduct an IST review, after the Task Force determined that additional measures were appropriate to ensure accountability that proper prevention and response measures are implemented by the chemical sector to address emerging domestic security threats.[145]

When New Jersey adopted the IST program as part of its TCPA rules, the State found that performing an IST review would not be financially burdensome, and that the cost was further justified by the potential to identify additional risk reduction measures to protect the public and the environment. The IST program received wide support from industry, environmental groups, worker unions, and environmental justice groups. The New Jersey Petroleum Council, the State Chamber of Commerce, the Business and Industry Association, and the Chemistry Council of New Jersey all supported the rule, recognizing that performing IST reviews is crucial to the chemical industry's sustainability and growth and inherent to the business. 40 N.J.R. 2254(a) (May 5, 2008). New Jersey's review of the 85 initial IST reports showed that 45 facilities (53 percent) chose to

[145] *Best Practices Standards at TCPA/DPCC Chemical Sector Facilities* (Nov. 21, 2005), *available at* https://www.nj.gov/dep/enforcement/security/downloads/ChemSectBPStand.pdf; Inherently Safer Technology (IST) Implementation Summary (Jan. 15, 2010), EPA-HQ-OEM-2015-0725-0412.

implement a total of 205 IST measures.[146] For example, two water treatment facilities replaced chlorine with sodium hypochlorite.

Some critics opposed to the similar STAA provision in the Accident Prevention Amendments have argued that because the number of reportable incidents in New Jersey has not decreased in the five years after adoption of the IST rule, the IST program does not work.[147] This argument is flawed for several reasons. As EPA noted in its proposed rule to require STAA, the four major inherently safer strategies are: reducing the amount of extraordinarily hazardous substances that potentially may be released; substituting less hazardous materials; using extraordinarily hazardous substances in the least hazardous process conditions or form; and designing equipment and processes to minimize the potential for equipment failure and human error. 81 Fed. Reg. at 13,663. IST is one tool to reduce the risk of a catastrophic release. Thus, even if the implementation of IST measures did not result in a decrease in the frequency of releases of hazardous substances, IST could still yield benefits by reducing the impact of releases that do occur. Also, as facilities have developed better accident investigation and release reporting systems in their risk management programs, it is reasonable to expect that more accidents would be reported due to the implementation of better investigating and reporting programs. Failures that occur in other risk management programs could also contribute to the occurrence of a reportable accident. Finally, with so few reportable accidents in New Jersey, it is not accurate to make a judgment of the effectiveness of the facilities' IST Review studies based on the number of reportable accidents before and after the implementation of New Jersey's IST program.

Moreover, in promulgating the STAA requirement, EPA found that since 1996 there have been "advances in ISTs and safer alternatives are becoming more widely available and are being adopted by some companies." 81 Fed. Reg. at 13,663. EPA noted that some companies consider safer alternatives as a matter of course and identified prior instances of voluntary adoption of ISTs. 82 Fed. Reg. at 4,645. It concluded that "facilities will only incur additional costs beyond the analysis when the benefits of the change make adoption of the change reasonable for the facility." *Id*. at 4,644. In light of this, EPA believed "there is value in requiring facilities with extremely hazardous substances to evaluate whether they can improve risk management of current hazards through potential implementation of ISTs." *Id*. at 4,645.

Massachusetts' experience with its Toxics Use Reduction Act (TURA) confirms that analyzing safer alternatives can have verifiable benefits. TURA, which took effect in 1989, requires companies that use large quantities of certain toxic chemicals to document their good-faith efforts to consider technically feasible, safer alternatives. Companies must compare feasible alternatives with current practices, considering the full costs of their current use of toxic chemicals, including compliance costs and costs in the event of an accidental release. Mass Gen. Laws ch. 21I, § 11(A); 310 Mass. Code Regs. 50.46, 50.46A. In Massachusetts' experience, requiring companies to consider safer alternatives has generated real benefits for both the companies and the public. The full accounting of alternatives required by the TURA often reveals sensible cost-saving opportunities that companies otherwise would have failed to recognize. This has led companies to

[146] NJDEP comments dated June 28, 2018, EPA-HQ-OEM-2015-0725-0973. *See also* Inherently Safer Technology (IST) Implementation Summary (Jan. 15, 2010), EPA-HQ-OEM-2015-0725-0412.

[147] EPA-HQ-OEM-2015-0725-1481.

implement voluntary changes that save money while reducing the risk of accidents. For instance, as documented in a 2009 assessment of the TURA program by the Massachusetts Toxics Use Reduction Institute, surveyed companies described many benefits associated with the identification and implementation of safer alternatives, including improved worker health and safety, reduced risk of accidents, financial savings, production efficiency improvements, improved product quality, and improved community relations.[148] In short, safer alternatives can be smart business choices.

In focusing solely on potential costs in the Proposal, EPA ignores the benefits that STAA may have in decreasing accidents and increasing facility security, one of the reasons cited by military commenters for supporting the Accident Prevention Amendments. *See* Comments of Lt. General Russel Honor (Ret), et al. on Proposed Accident Prevention Amendments (Mar. 28, 2016), EPA-HQ-OEM-2015-0725-0315 at 1 ("As former holders of U.S. national security positions, we believe EPA should require the use of safer alternatives for all hazardous facilities where they are feasible"); *see also* Comments of Lt. General Russel Honor (Ret), et al. on Proposed Delay Rule (Apr. 21, 2017), EPA-HQ-OEM-2015-0725-0778 at 1 (opposing Delay Rule because blockage of the Amendments "poses serious risks to our nation's security"). Accidents from the three sectors that would be required to complete STAA account for 49 percent of all RMP reportable accidents. RIA at 30. And the number of processes that would be covered by the STAA provision has increased by 136 between 2015 and 2017. *Id.* at 30. Given that this subset of processes is responsible for so many accidents, it makes economic sense to require those facilities to consider potential changes that would eliminate the possibility of a release entirely, by making a process more tolerant of fault or security breaches. For example, if after conducting STAA, a facility switches to a less dangerous chemical, that switch would make the facility more secure and reduce the risk of it being a terrorist target. Especially in light of the security concerns cited by EPA as a basis for cutting back on chemical hazard information that must be shared with local emergency response officials and communities, *see* Section II.B and C, *infra*, the agency's failure to consider potential security benefits from keeping the STAA requirement is arbitrary and capricious.

iii. EPA's Focus on Costs to Industry is Inconsistent with the Clean Air Act

EPA argues that economic "burdens are directly relevant to whether the Amendments are 'practicable' for sources, as that term is used in [Clean Air Act] section 112(r)(7)." 83 Fed. Reg. at 24,871. But EPA's focus on reducing costs is inconsistent with Congress's notion of regulations that require industry to take practicable measures to prevent accidents to the fullest extent.

The language of section 112(r) reflects Congress's intent that EPA ensure adequate safeguards are in place to protect workers and surrounding communities from accidental releases of dangerous chemicals. The Clean Air Act mandates that EPA "shall promulgate reasonable regulations … 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 …." and regulations shall "assur[e] compliance as expeditiously as

[148] Rachel Massesy et al., Mass. Toxics Use Reduction Inst., Massachusetts Toxics Use Reduction Act Program Assessment: Executive Summary 5-6 (2009).

practicable." 42 U.S.C. § 7412(r)(7)(A), (B). The Proposal, if finalized, would violate this statutory mandate by excusing rather than assuring industry compliance, and would do so based solely on the fact that new safeguards would impose *some* costs. EPA has not shown that financial burden to implement requirements such as root cause analysis, third party auditing, or STAA is undue to make those obligations impracticable for regulated facilities. Despite EPA's changed policy focus on compliance burdens to industry, mere added cost does not make a compliance obligation "impracticable" under the statutory text.

c. The Possibility of Increased Enforcement Does Not Justify the Proposed Rescissions

EPA additionally asserts that it can "retain much [of the] benefit" of the accident prevention improvements at a fraction of the cost through an "enforcement-led approach." 83 Fed. Reg. at 24,873. This contention is erroneous for multiple reasons.

First, the Clean Air Act charges EPA with issuing regulations that "provide, to the greatest extent practicable, for the *prevention* . . . of accidental releases of regulated substances." 42 U.S.C. § 7412(r)(7)(B)(i) (emphasis supplied). That statutory directive reflects common sense: it is better to stop harm before it happens, rather than responding after the fact, when serious or even irreparable damage has already been done to lives and property. Relying only on after-the-fact enforcement at facilities where accidents have already occurred is inconsistent with the statutory directive. Indeed, in the States' experience, in order to sufficiently protect public health and the environment, a successful regulatory program requires both adequate prevention and robust enforcement.

This sentiment is reflected in the Senate Report for the 1990 Clean Air Act Amendments, which noted that prevention is preferable to after-the-fact mitigation:

> Systems and measures which are effective in preventing accidents are preferable to those which are intended to minimize the consequences of a release. Measures which entirely eliminate the presence of potential hazards (through substitution of less harmful substances or by minimizing the quantity of an extremely hazardous substance present at any one time), as opposed to those which merely provide additional containment, are the most preferred.

1990 U.S.C.C.A.N. at 3594.

Second, the factual predicate is questionable for EPA's new position that chemical accidents are only attributable to a few bad apples, and that increasing enforcement of those facilities will therefore sufficiently address risks nationwide. The agency appears to have accepted—without any confirming analysis—industry trade association data regarding the percentage of facilities at which accidents have occurred. *See* 83 Fed. Reg. at 24,872. But even if that data is taken at face value, it still shows that accidents occurred at over 1,200 facilities, according to the facilities' most recent five-year histories. These accidents resulted in 19 deaths, almost 17,000 injuries, the evacuation of over 160,000 people, and over $1.1 billion in property

damage. EPA does not explain how individualized enforcement measures at more than a thousand facilities can plausibly address such widespread risks and harms.

Third, EPA's contention in the Proposal that the Amendments inappropriately swept in too many facilities ignores that EPA *already* limited applicability of the STAA to just the three industries with the highest accident rates —chemical manufacturing, petroleum refining, and paper manufacturing.

Fourth, in the States' experience, enforcement only serves as a deterrent to violations of the law if it is perceived by the industry as credible. On that front, EPA currently has low credibility. The President's Fiscal Year 2019 budget proposes a $53 million (16 percent) cut to EPA's enforcement budget (excluding Superfund enforcement), including an 18 percent cut to civil enforcement and a 14 percent reduction in criminal enforcement.[149] According to a recent analysis by NBC News of federal enforcement data, the past fiscal year marked an historic low for EPA enforcement actions across the board: the number of new civil and criminal cases, defendants charged, federal inspections and evaluations all reached their lowest levels in at least a decade.[150] In addition, the Trump Administration has called for elimination of the CSB, which would make EPA efforts to enforce RMP requirements even more difficult. EPA's Proposal did not identify any concrete plans to actually implement an "enforcement-led approach." There is no commitment, for example, to use additional federal enforcement resources or any discussion of providing resources to bolster state enforcement.

In short, EPA's "enforcement-led approach" is a poorly-reasoned and factually unsupported idea. Only by strengthening the program's underlying accident prevention requirements and vigorously enforcing them can real progress be made to protect our workers and communities.

d. EPA Fails to Heed Lessons Learned from Recent Accidents

EPA's proposal to rescind the rule's third-party audit provisions fails to heed the findings of several CSB investigations into accidents at RMP facilities. The CSB cited deficient compliance audits as a contributing factor to the severity of: the 2008 explosion at Bayer CropScience, LP in Institute, West Virginia; the 2003 chlorine release at DPC Enterprises, L.P. in Glendale, Arizona; and the 2005 explosion and fire at the at BP refinery in Texas City, Texas, which killed 15 people, injured another 180, led to a shelter-in-place order that required 43,000 people to remain indoors, and damaged houses three-quarters of a mile from the refinery. 81 Fed. Reg. at 13,654-55. Furthermore, during its investigation of the 2009 explosion and fire at the Citgo refinery in Corpus Christi, Texas, the CSB found that the facility had never conducted a safety audit of certain operations that contributed to the incident. *Id.* at 13,655. EPA's proposed rescission of the third-party audit requirement ignores its previous finding—citing these CSB investigations—that self-

[149] *Understanding the Full Impacts of the Proposed FY 2019 EPA Budget*, ENVIRONMENTAL PROTECTION NETWORK (Mar. 14, 2018), https://docs.wixstatic.com/ugd/375dc4_b66955a5afac46e98dc6a813f8782c43.pdf .

[150] Suzy Khimm, *EPA Enforcement Actions Hit 10-Year Low in 2017*, NBC NEWS, Feb. 8, 2018, https://www.nbcnews.com/politics/white-house/epa-enforcement-actions-hit-10-year-low-2017-n846151.

auditing may be insufficient to prevent accidents, determine compliance with RMP prevention program requirements, and ensure safe operations. *Id.* at 13,654.

EPA's Proposal also inexplicably fails to heed lessons learned from the August 2017 disaster at the Arkema Crosby chemical facility in Texas. After the facility was flooded during Hurricane Harvey, its refrigeration of organic peroxide, an unstable chemical produced onsite, failed. As the temperature rose, the organic peroxide decomposed and ignited, causing large fires and releases of the chemical. Approximately a dozen first responders on the scene became sick and were treated at a nearby hospital.[151]

In its report on the Arkema fire, the CSB found that the facility had not properly assessed the risk posed by increasingly severe weather. The Arkema team that performed the process hazard analysis for the low temperature warehouses did not document any flooding risk. Arkema Report at 84. The CSB noted that in recent years, flooding from extreme rainfall events has increased, and that a 2015 EPA report found that this trend is projected to continue as a result of climate change, increasing the flood risk in many parts of the country. *Id*. at 119. The CSB recommended that chemical manufacturing, handling or storage facilities perform analyses to determine their susceptibility to these extreme weather events and evaluate the adequacy of relevant safeguards. *Id*. at 16, 103-16, 127.

Rescinding the accident prevention requirements would ignore the CSB's recommendation because it would reduce opportunities for facilities to learn about their vulnerabilities to severe weather and improve their resiliency. For example, EPA proposes to eliminate the requirement that Program 2 Process hazard reviews identify findings from incident investigations showing vulnerabilities, such as severe weather, that could cause accidental releases (40 C.F.R. § 68.50(a)(2)). Moreover, the root cause analysis requirement that EPA seeks to repeal could help a facility determine if a release was caused by a vulnerability to severe weather. The STAA, which EPA also seeks to eliminate, could help a facility determine if there is safer technology that could reduce severe-weather impacts on a process.

EPA should not only retain the accident prevention requirements but also expand those regulations to include CSB's recommendation that facilities consider increased accident risks from severe weather and CSB's reiterated recommendation to cover catastrophic reactive hazards that may seriously impact the public. Such hazards include those resulting from self-reactive chemicals and combinations of chemicals and process-specific conditions. The CSB report shows that more safeguards—not fewer—are necessary, and EPA must take account of this new, proven concern in its reconsideration proceeding. Consideration of extreme weather events is further warranted because of the disproportionate impact on environmental justice communities, as discussed below.

[151] *Organic Peroxide Decomposition, Release, and Fire at Arkema Crosby Following Hurricane Harvey Flooding*, Report Number: 2017-08-I-TX, U.S. CHEM. SAFETY AND HAZARD INVESTIGATION BD. (May 2018) (hereinafter Arkema Report), *available at* https://www.csb.gov/csb-releases-arkema-final-report/.

e. The Proposal Would Have a Disproportionate Impact on Environmental Justice Communities

The Proposal's blithe recognition that low-income, minority communities will bear the brunt of saving industry compliance costs is extremely alarming. Further troubling is the agency's feeble effort to analyze how such a result could be avoided. Indeed, the agency makes no effort to square its rescission of accident prevention safeguards with its environmental justice policy, which is designed to address the very kind of disproportionate impacts at issue here.[152]

EPA explicitly states that the Proposal "may have disproportionately high and adverse human health or environmental effects on minority populations, low income populations and/or indigenous peoples." 83 Fed. Reg. at 24,881. This conclusion is based on the fact that populations surrounding RMP facilities are ten percent more likely to be low-income, eleven percent more likely to be minorities, and three percent more likely to be linguistically isolated (meaning that no one over age 14 in the household speaks English well and some other language is spoken at home). RIA at 79. As minority and low-income populations are more likely to be in proximity to RMP facilities, they are at greater risk of chemical hazards than other populations. *Id.* at 78. They may be exposed to chemical hazards through inhalation, ingestion, or dermal contact. *Id*. As the States discussed in Section I.B, above, it is often the case that environmental justice communities are located close to RMP facilities.

One example of such a community is the Ironbound district within the City of Newark, New Jersey, which historically has been a community where industrial facilities operate next to homes. The district is bound on all four sides by the airport, highways, rail lines and the Passaic River. The neighborhood is home to six RMP facilities, a notorious dioxin Superfund site and one of the largest waste-to-energy facilities in the country. On March 9, 2015, the Boasso America Corporation facility located in Newark experienced an explosion and two-alarm fire, as described in section I.B. At the time, the facility was not registered as an RMP facility and thus the community and emergency responders did not have a full understanding of the health threats posed to workers and residents from the fire and explosion.

Moreover, floodwater inundation from extreme weather events, such as was the case with Hurricanes Katrina, Sandy, Harvey, and Maria, can cause chemicals to become fugitive, resulting in chemical exposure with unknown consequences to human health.[153] The threats caused by fugitive chemicals are distributed unequally across waterfront areas, with low-income or communities of color adjacent to or mixed into areas that have manufacturing and industrial

[152] *Learn About Environmental Justice*, U.S. ENVIRONMENTAL PROTECTION AGENCY (Apr. 8, 2018), https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (defining "environmental justice" as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations and policies. Fair treatment means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.").

[153] Jamie Madrigano, et al., *Fugitive Chemicals and Environmental Justice: A Model for Environmental Monitoring Following Climate-Related Disasters*, 11 ENVIRONMENTAL JUSTICE No. 3, 95, 96 (2018).

uses.[154] Approximately 12 percent of the population in the U.S. coastal floodplain lives in poverty.[155]

Despite acknowledging the disproportionate impact to environmental justice communities, EPA failed to adequately consider (much less propose to address) the consequences of its action on those communities and populations. The agency found that accident risks may increase, and to the extent risks increase, they will be felt by minority and low-income populations "since [these populations] bear a larger portion of the risk." RIA at 80. Yet EPA was "unable" to associate the magnitude of risk increases with the removal of specific accident prevention requirements and so concluded that "the extent to which risks faced by populations in close proximity to RMP facilities will increase or decrease is unknown." *Id.* at 80.

It would be unjust and unlawful for the agency to enact the Proposal without considering its consequences for environmental justice communities. EPA may not ignore the increased risk just because it is unquantified. *See Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) ("[t]he mere fact that the magnitude of [an effect] is *uncertain* is no justification for *disregarding* the effect entirely."). EPA must take a closer look at increased risk to environmental justice communities that would be caused by the rescission of the accident prevention requirements and either address the disproportionate impacts or explain why it believes that saving industry compliance costs should take precedence over exposing environmental justice communities to greater chemical hazards.

By ignoring the impact to environmental justice communities, EPA will additionally undermine efforts of states such as New Jersey, which recently reaffirmed and expanded its ongoing commitment to addressing environmental justice issues.[156] New Jersey recognizes the need to reduce the impacts to environmental justice communities by industrial facilities. New Jersey also recognizes the need to empower local communities by insuring access to critical information and meaningful opportunities for the community to participate in the decision making process. An empowered community can influence decisions and protect itself from known hazards in its community. The Proposal to rescind community information sharing would be devastating to environmental justice communities and is inconsistent with the principles of environmental justice.

EPA's definition of environmental justice includes the "meaningful involvement of all people" with respect to the implementation of EPA regulations. Yet, EPA failed to meaningfully involve affected environmental justice communities in this rulemaking. EPA claims it did so "[b]ecause this proposed rule does not impose any additional costs on affected communities." RIA at 81. But that contention is incorrect and contradicted directly by the agency's own, alarming acknowledgment that the Proposal "may have disproportionately high and adverse human health or environmental effects" on environmental justice communities. 83 Fed. Reg. at 24,881. While minority and low-income communities may not have to pay any compliance costs associated with

[154] *Id.*

[155] *Id.*

[156] Governor Murphy, *Executive Order No. 23* (Apr. 20, 2018), *available at* https://www.state.nj.us/infobank/eo/056murphy/pdf/EO-23.pdf.

EPA's rollback, they will certainly suffer the costs associated with the increased risk of chemical hazards. "'Cost' includes more than the expense of complying with regulations; any disadvantage could be termed a cost." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Rescinding the accident prevention requirements would eliminate the protections that those regulations would have provided to environmental justice communities, thereby imposing a cost in the form of foregone benefits. Therefore, instead of simply writing these communities off as if they are an inconvenient accounting exercise, EPA must, as it did in developing the Accident Prevention Amendments, meaningfully engage these communities by conducting listening sessions, public communication efforts, and webinars addressing potential hazards of the rollback. *See* RIA at 81.

B. Emergency Response Coordination Requirements

1. Proposed Rule

The Proposal would revise two aspects of the emergency response coordination requirements: the information facilities must provide annually to emergency responders and the minimum frequency of exercises to prepare for emergency response to accidents.

Regarding the first aspect, the Accident Prevention Amendments require that facilities annually provide information to local emergency planning and response organizations, including a facility's emergency response plan, emergency action plan, updated emergency contact information, "and any other information that local emergency planning and response organizations identify as relevant to local emergency response planning." 40 C.F.R. § 68.93(b). EPA proposes to delete the quoted last category of information from the regulations or alternatively to replace this language with the phrase "and other information necessary for developing and implementing the local emergency response plan." 83 Fed. Reg. at 24,853. The Proposal further adds specific provisions to make it easier for facilities to withhold certain types of responsive information from emergency responders on grounds that it is classified or confidential business information (CBI). *Id.*

With respect to emergency response exercises, the Proposal would remove the minimum frequency requirement for field exercises. In the alternative, EPA would rescind the field and tabletop exercise requirements entirely. *Id.* at 24,853.

2. States' Comments

a. EPA Fails to Justify Proposed Revisions to Information-Sharing Requirements

EPA asserts that eliminating the requirement that facilities share "any other information that local emergency planning and response organizations identify as relevant to local emergency response planning" is necessary to address security risks. The agency fails to adequately explain its reversal in position. Previously, EPA found that this information-sharing requirement does *not* pose a security risk because emergency responders and facility owners can work together to identify sensitive information and, if necessary, take steps to protect it from wider disclosure. In the final Accident Prevention Amendments, EPA explained that in response to comments received

on the draft rule, it had abandoned the proposed requirement that facility owners prepare an annual summary of chemical hazard information (including information on regulated substances, accident histories, compliance audit reports, incident investigations, inherently safer technologies, and emergency exercises) for submission to local officials. 82 Fed. Reg. at 4,666. EPA changed its approach in response to comments that "the proposed requirements could be perceived as limiting the flexibility of LEPCs [local emergency planning committees] and emergency response officials to collect the information they need to develop a local emergency response plan that addresses their community's specific chemical risks." *Id.* The final rule required that, in addition to providing its emergency response plan, emergency action plan, and updated emergency contact information, a facility provide "any other information that local emergency planning and response organizations identify as relevant to local emergency response planning." *Id.* at 4,701 (40 C.F.R. § 68.93(b)).

With respect to security concerns, EPA explained that this approach would allow facility owners and emergency response officials on a case-by-case basis "to identify information that may need to be maintained securely and discuss strategies to secure the information or to provide only information that is pertinent to emergency response planning without revealing security vulnerabilities." *Id.* The agency reiterated this position at the same time it issued the delay rule. *See* EPA Activities Under EO 13,650: Risk Management Program Final Rule Questions & Answers, at 6 (June 2017) ("Fact Sheet").[157] Thus, EPA recognized that facility owners and emergency response organizations share the goals of ensuring emergency responders are adequately informed of potential risks from chemical accidents while protecting sensitive information from disclosure to individuals who might seek to use that information for nefarious purposes.

In the Proposal, EPA reversed course and accepted the view of reconsideration petitioners that the language added in the Accident Prevention Amendments raised security concerns, stating that "EPA may have inadvertently opened the door to local emergency officials requesting and receiving security-sensitive information." 83 Fed. Reg. at 24,866. EPA now contends that this language calls for "open-ended disclosure." *Id.* The agency's preferred alternative is to delete the language, limiting the required information disclosure to the facility's emergency response plan, emergency action plan, and updated emergency contact information. *Id.*

EPA has failed to explain why its previous conclusion was erroneous, much less offered a more robust explanation of its reversal in position as required by *FCC v. Fox Television*. *See* 556 U.S. at 515. EPA has not identified any evidence—submitted by reconsideration petitioners or any other party—that facts or circumstances have materially changed since the agency concluded in the final Accident Prevention Amendments that the rule would enable local emergency planning officials "to obtain the information they require to meet their emergency response planning needs . . . without revealing security vulnerabilities." 82 Fed. Reg. at 4,667.

EPA also fails to explain why it has changed its position that "assertions of Chemical-terrorism Vulnerability Information (CVI) status for certain information can be addressed on a

[157] *Available at* https://www.epa.gov/sites/production/files/2017-06/documents/rmp_final_rule_qs_and_as_6-12-17_0.pdf.

case-by-case basis" during the annual coordination between facilities and emergency responders. EPA does not dispute that greater coordination between facilities and local emergency response officials is necessary to protect emergency responders from harms caused by chemical accidents. The Proposal's approach suggests that EPA now believes that emergency response officials cannot be trusted to secure sensitive information, even if the information is critical to chemical hazard preparedness. But the agency never provides any evidence to support this changed position. An agency must, however, provide a "reasoned explanation" for departing from a prior policy – it may not "depart from prior policy *sub silento*[.]" *FCC v. Fox Television*, 556 U.S. at 515.

EPA's attempt to argue that its Proposal will result in security benefits is erroneous. EPA states that the Proposal will result in "improved chemical site security, by modifying previously open-ended information sharing provisions of the Amendments rule that might have resulted in an increased risk of terrorism against regulated sources." 83 Fed. Reg. at 24,855. As discussed above, however, EPA fails to reasonably connect the dots between the Proposal's removal of certain language and security concerns. As such, any claimed benefits are entirely speculative and fail to justify proposed revisions.

EPA proposes in the alternative to replace the phrase "any other information that local emergency planning and response organizations identify as relevant to local emergency response planning" with the phrase "other information necessary for developing and implementing the local emergency response plan." 83 Fed. Reg. at 24,866. The agency explained that the latter phrase is "virtually identical" to language that governs facility response obligations to local emergency response officials under the Emergency Planning and Community Right-to-Know Act (EPCRA). *Id.* (citing 42 U.S.C. § 11003(d)(3)). In addition, the same language appears in a different section of the RMP regulations, which applies to facilities with Program 2 and Program 3 processes whose employees respond to accidental releases of regulated substances. *Id.* (citing 40 C.F.R. § 68.95(c)). EPA believes that requiring all RMP facilities to comply with this requirement "should not create any security vulnerabilities." 83 Fed. Reg. at 24,866.

The States prefer this option to the agency's preferred alternative. We note, however, that this fallback option is further evidence of EPA's failure to adequately explain the problems purportedly caused by the existing language EPA claims must be revised to address security concerns. EPA does not explain what it views to be the material difference between the current language of section 68.95(b) and the proposed alternative revision. Indeed, part of EPA's explanation for the proposed alternative language is that "virtually identical" language has been used under EPCRA and a different section of the RMP regulations without raising "security vulnerabilities." *See* 83 Fed. Reg. at 24,866; *see also id.* at 24,867 (asking "[i]f stakeholders believe the alternative language also presents new security concerns, how is it that this language has not caused such concerns in relation to its presence in EPCRA section 303(d)(3) or in § 68.95(c) of the currently in-effect RMP rule?"). EPA's apparent inability to articulate a material difference between the two phrases further undercuts the need to replace the current language in section 68.93(b).

b. EPA Fails to Justify Proposed Revisions to Emergency Response Exercise Requirements

EPA proposes to either remove the minimum frequency requirement for field exercises or rescind the field and tabletop exercise requirements entirely. 83 Fed. Reg. at 24,853. EPA contends that it "is not certain that it properly assessed the actual demands of these provisions or the increased burden on LEPCs in the final rule." *Id.* at 24,874. EPA has not changed its estimates of the costs of emergency response exercises, however. *See id.* at 24,874, n. 59. Unless and until EPA has additional information showing that the costs to local emergency response officials were not accurately reflected in the Accident Prevention Amendments, and that such costs outweigh the benefits EPA previously identified from better coordination with emergency responders, the agency may not lawfully change the current provisions.

EPA also has not established a basis for rescinding the field and tabletop exercise requirements in their entirety. In rejecting the elimination of these requirements when it finalized the Accident Prevention Amendments, EPA explained that field and tabletop exercises constitute "an important component of an emergency response program" because they allow stationary sources "to implement their emergency response plans, test their actual response procedures and capabilities, identify potential shortfalls, and take corrective action . . . and will ultimately mitigate the effects of such releases at RMP facilities." *Id.* at 4,661. The agency has not said anything in the Proposal that explains why these reasons are no longer valid.

C. Community Information Sharing Requirements

1. The Proposal

EPA proposes to curtail the scope of the information that facilities are required to share with the public about chemical hazards. As noted above, the Accident Prevention Amendments required facilities to distribute to the public upon request information concerning the facility's regulated substances, accident history, emergency response exercises, and contact information for local emergency planning officials. EPA explained the purpose was to enable people who live near or work in RMP facilities to become better aware of, and prepared for, possible risks from an accidental release. 82 Fed. Reg. at 4,668.

The Proposal would rescind the requirements for providing to the public chemical hazard information detailed in section 68.210(b). EPA also proposes to rescind the requirement that facilities provide this chemical hazard information at mandatory public meetings. 83 Fed. Reg. at 24,853. EPA asserts that these changes are necessary because increased disclosure of information to the public created potential security risks. 83 Fed. Reg. at 24,867. EPA also stated that it had a new concern that a would-be terrorist could pose as a member of the public and obtain a "synthesis" of information about a chemical facility that is generally not available to the public from any single source. *Id.* The agency also contended that "[i]nformation on most of the required disclosure elements would still be available via other means, such as through an LEPC, by visiting a Federal RMP reading room, or making a request under the Freedom of Information Act (FOIA)." *Id.* at 24,868.

2. States' Comments

EPA has failed to supply a reasoned explanation for rescinding the current requirements. Although the States concur that the RMP regulations should strike a balance between increasing public awareness of chemical hazards and maintaining facility security, the Proposal upsets that balance by focusing too much on the latter concern without addressing the myriad benefits of increased public awareness.

EPA points to no record evidence that improved disclosure of chemical hazard information will lead to terrorist attacks or other intentional acts at RMP facilities. Although EPA references one reconsideration petitioner's citation of the West Fertilizer explosion, even that passage does not show that a third party (*i.e.*, someone who was not a West employee) obtained sensitive information about the facility and used it to commit arson. *See* 83 Fed. Reg. at 24,867. At the same time, EPA fails to consider the foregone benefits of improving fence-line communities' access to chemical hazard information. EPA stated in the preamble to the final Accident Prevention Amendments that improved disclosure of chemical hazard information would increase community awareness of risks and therefore enable community members to be better prepared to protect themselves in the event of an accidental release. 82 Fed. Reg. at 4,668. EPA does not appear to have adequately considered the lost benefit of improved community preparedness for accidental releases.

EPA's contention that the public can access "most" of the same information by other means is not supported by the record. Regarding the option of obtaining chemical hazard information from local emergency response officials, EPA fails to acknowledge that, as discussed above, it is proposing to curtail the information facilities have to provide to local response officials. *See* Point II.B.1, *supra*. Furthermore, EPA has not proposed to change its finding that coordination between facilities and local emergency response officials is often lacking. 81 Fed. Reg. at 13,671.

EPA also fails to address the fact that visiting a federal reading room to view chemical hazard information from a particular facility may not be feasible for some members of the public given that each state only has a handful of such reading rooms, meaning that the closest reading room may be far away from the community and the facility of interest. In addition, in the States' experience, access to federal reading rooms is limited (typically only one visit per month is permitted), and there are limits placed on the information that can be obtained (typically, information on a maximum of ten facilities may be obtained on each visit). In fact, it took interns from the New York Attorney General's office over three weeks, and repeated prodding, to secure appointments to review requested facilities' information. EPA does not explain how this limited option is a meaningful substitute for the current requirements EPA proposes to rescind.

Finally, EPA's suggestion that chemical hazard information can be obtained by submitting a public records request is cumbersome at best. Private facilities are not directly subject to the Freedom of Information Act, so relevant information would presumably have to be obtained from a local emergency planning committee, a state agency, or EPA. In our experience, obtaining materials from EPA through a public records request can be very time consuming and costly,

taking months or even years to obtain relevant information, even if one is experienced with navigating the process.

D. Revisions to Compliance Deadlines

1. The Proposal

For the obligations under the Accident Prevention Amendments that EPA proposes to retain, EPA would further delay the compliance deadlines set forth in the Amendments. Compliance with emergency response coordination obligations would be further postponed to one year after the effective date of the finalization of the Proposal, for which EPA has not provided a date certain. The requirement to hold a public meeting following an accident would be delayed to two years after the effective date of the public meeting provision. Facilities would also get four years after the effective date of field and tabletop exercise requirements (if the requirement to conduct such exercises is maintained), and five years after the effective date of the remaining risk management plan provisions. 83 Fed. Reg. at 24,875.

EPA states that it "is relying on the same rationale it used in establishing the compliance dates under the final Amendments rule." 83 Fed. Reg. at 24,875. Specifically, the agency says that it needs time to develop guidance materials that will be useful to facilitate compliance with the regulatory requirements. In addition, EPA accepted the position of reconsideration petitioners that regulated sources and emergency responders "should not be expected to expend resources complying with rule provisions that may change, and that owners and operators will require this additional time to familiarize themselves with the revised rule and implement appropriate programmatic changes." *Id.*

2. States' Comments

The deadlines in the Proposal were founded on the assumption that EPA's delay rule, which postponed the effective date of the Accident Prevention Amendments to February 2019, was lawful. EPA's approach of piggybacking off these delayed compliance deadlines now has been rendered obsolete by the D.C. Circuit's decision in *Air Alliance Houston* vacating the delay rule. Once the court issues its mandate, likely within six weeks if not sooner, the Accident Prevention Amendments will take effect. Thus, the provisions of the Amendments that required compliance upon that rule's effective date of March 14, 2017 (such as investigating a "near miss" and completing investigation reports within twelve months, 40 C.F.R. §§ 68.60(a)(2), 68.60(d)) or by March 2018 (emergency response coordination, 40 C.F.R. § 68.93) will be in force before EPA could complete this rulemaking. Therefore, EPA's positions that compliance with the immediate requirements should be deferred until finalization of the Proposal and that facilities can hold off on complying with the emergency responder coordination requirements until a year after the Proposal's finalization, are no longer tenable because facilities will already be adhering to these obligations and the prospect that EPA may change the regulations in the future would not supply a lawful basis for suspending compliance now. *See Air Alliance Houston*, slip op at 32-33 (rejecting such rationale as arbitrary and capricious).

Similarly, for longer term deadlines (such as implementation of field and tabletop exercises within four years and revision of risk management plans within five years, 40 C.F.R. §§ 68.10 (d), (f)), EPA relied largely on the rationale provided in the Amendments that facilities needed this time to ramp up to comply with these requirements. The Proposal measures the four- and five-year compliance dates, however, as running from the date EPA promulgates a final rule taking action on the Proposal. Such an approach is flawed in two respects: first, it assumes the more than one-year delay pursuant to the delay rule was lawful; second, even if the time during the unlawful delay is not counted in that ramp up time, the Proposal's deadlines no longer match EPA's rationale because facilities can begin now (or at least, the date the court's mandate is issued) to prepare to comply with the provisions of the Amendments the Proposal would not change.

Despite this new reality, EPA has thus far refused to propose revised compliance deadlines or extend the comment deadline to allow for sufficient time for stakeholders to consider this aspect of the court's decision. *See* appendix 2 and 3. The States therefore reserve the right to comment further if the agency seeks input on revised deadlines for the Proposal. Apart from being rendered obsolete and/or arbitrary by the court's decision, the States had additional concerns with the compliance deadlines contained in the Proposal as written and explain those below in order to preserve the record.

First, EPA failed to provide a reasoned basis in the Proposal for deferring the mandatory emergency response coordination requirements until a year after the Proposal is finalized. EPA assumed that neither the owners and operators of RMP facilities nor local emergency response officials have spent or will spend any time familiarizing themselves with the Accident Prevention Amendments prior to finalization of the Proposal. This assumption is unreasonable, however, because EPA proposed to change only one aspect of the coordination requirements, leaving the bulk of the coordination obligations unaffected.

More specifically, the Accident Prevention Amendments require facility owners and operators to improve coordination with emergency responders—including determining if the response organizations' emergency plans address their facilities and ensuring that emergency response organizations are aware of the existence, quantities, and risks posed by regulated substances at their facilities (40 C.F.R. § 68.93)—by no later than March 2018 (one year after the effective date of the Amendments). *See* 82 Fed. Reg. at 4,676. EPA previously postponed this compliance date to February 2019 in the delay rule. Like the first delay, the Proposal does not set forth a permissible basis to postpone the compliance deadline. Delaying obligations until a year after the effective date of the Proposal means that compliance likely will not be required until at least until late 2019 (assuming the agency were to finalize the Proposal in late 2018, which it has not promised to do). But the emergency response coordination provision in section 68.93, as EPA proposes to revise it, largely mirrors the requirements in the Accident Prevention Amendments, with the exception of the phrase that EPA is proposing to delete in the information-sharing requirement in section 68.93(b). Thus, the regulated community and emergency responders have been on notice regarding the requirements of section 68.93 since EPA proposed it in 2016. EPA has provided no reason why an additional year beyond finalization of the Proposal is needed to

allow for familiarity with this provision. Instead, the coordination requirements should be mandatory within sixty days of the finalization of the Proposal.

Second, the new deadline for emergency response coordination is also inconsistent with the Clean Air Act. Section 112(r)(7) of the Clean Air Act authorizes EPA to set an effective date solely for purposes of "assuring compliance *as expeditiously as practicable*" with a rule's standards "for the prevention and detection of accidental releases of regulated substances and for response to such releases." 42 U.S.C. § 7412(r)(7)(A), (B) (emphasis added). The statutory language reflects Congress's intent that EPA ensure adequate safeguards are promptly put in place to protect workers and surrounding communities from releases of dangerous chemicals. The Senate Report makes this clear, noting that "requirements for new facilities may be applicable to facilities which begin construction at any time after the requirement is first proposed" and that "requirements which only mandate changes in procedure can be implemented by new and existing facilities almost immediately." S. REP. NO. 101-228, at 245 (101st Cong., 1st Sess. 1989-1990). Here, there is no reason why the emergency response coordination requirements, "which only mandate changes in procedure," should not be made mandatory "almost immediately" upon final agency action. Given that these requirements were finalized in January 2017 and EPA has only proposed to change one small aspect, postponing the compliance deadline until one year after finalization of the Proposal does not meet the statute's directive to assure compliance as expeditiously as practicable. *Id.*; c*f. Union Elec. Co. v. EPA*, 427 U.S. 246, 264 n.13 (1976) ("as expeditiously as practicable" entails consideration of "whether it is economically or technologically possible" to meet standard with "more rapid progress"); *Ashton v. Pierce*, 541 F. Supp. 635, 641 (D.D.C. 1982) (a rule "assur[es] compliance as expeditiously as practicable" when it directs regulated entities to comply with the rule as soon as those entities are able to "put into practice" their obligations).

III. Conclusion

The Proposal would largely eviscerate the safeguards EPA added in the Accident Prevention Amendments after a multiyear stakeholder process to determine how best to avoid and limit public health and environmental harms from chemical accidents. The Proposal represents a step backward on preventing and mitigating these harms. As discussed above, the Proposal is inconsistent with the Clean Air Act and unsupported by the record. The States therefore urge EPA to abandon the Proposal and to implement the Accident Prevention Amendments without revision.

Respectfully submitted,

BARBARA D. UNDERWOOD
Attorney General of the
State of New York

By: */s/ Laura Mirman-Heslin*
MICHAEL J. MYERS
Senior Counsel
LAURA MIRMAN-HESLIN
Assistant Attorney General
The Capitol
Albany, New York 12224
(518) 776-2382

FOR THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
MATTHEW J. DUNN
GERALD T. KARR
Assistant Attorneys General
Illinois Attorney General's Office
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-3369

FOR THE STATE OF MAINE

JANET T. MILLS
Attorney General
GERALD D. REID
Natural Resources Division Chief
6 State House Station
Augusta, ME 04333
(207) 626-8800

FOR THE STATE OF IOWA

TOM MILLER
Attorney General
JACOB LARSON
Assistant Attorney General
Environmental Law Division
Hoover State Office Building
1305 E. Walnut St., 2nd Floor
Des Moines, IA 50319
(515) 281-5341

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General
STEVEN M. SULLIVAN
Solicitor General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202
(410) 576-6427

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Attorney General
CHRISTOPHE COURCHESNE
Assistant Attorney General
Chief, Environmental Protection Div.
MEGAN M. HERZOG
Special Assistant Attorney General
1 Ashburton Place
Boston, MA 02108
(617) 963-2423

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General
PAUL GARRAHAN
Attorney-in-Charge
STEVE NOVICK
Special Assistant Attorney General
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL
Attorney General
JUNG KIM
Deputy Attorney General
Division of Law, Environmental Permitting and Counseling
R.J. Hughes Justice Complex
25 Market St., P.O. Box 93
Trenton, NJ 08625
(609) 376-2804

FOR THE STATE OF RHODE ISLAND

PETER F. KILMARTIN
Attorney General
GREGORY S. SCHULTZ
Special Assistant Attorney General
Rhode Island Department
of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

FOR THE STATE OF NEW MEXICO

HECTOR H. BALDERAS
Attorney General
WILLIAM GRANTHAM
BRIAN E. McMATH
Assistant Attorneys General
Consumer & Environmental
Protection Division
New Mexico Office of the Attorney General
201 Third St. NW, Suite 300
Albuquerque, NM 87102
(505) 717-3500

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-6902

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General
WILLIAM R. SHERMAN
Assistant Attorney General
Counsel for Environmental
Protection
800 5th Ave Suite 2000, TB-14
Seattle, WA 98104-3188
(206) 442-4485

Appendix 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 16, 2018 Decided August 17, 2018

No. 17-1155

AIR ALLIANCE HOUSTON, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY AND ANDREW WHEELER, ACTING ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, ET AL.,
INTERVENORS

Consolidated with 17-1181

On Petitions for Review of a Final Rule of the
United States Environmental Protection Agency

Steven C. Wu, Deputy Solicitor General, Office of the Attorney General for the State of New York, argued the cause for State Petitioners. With him on the briefs were *Eric T. Schneiderman*, Attorney General, *Barbara D. Underwood*, Solicitor General, *David S. Frankel*, Assistant Solicitor General, *Michael J. Myers*, Assistant Attorney General, *Ellen F. Rosenblum*, Attorney General, Office of the Attorney General for the State of Oregon, *Paul Garrahan*, Attorney-in-Charge, *Peter F. Kilmartin*, Attorney General, Office of the Attorney General for the State of Rhode Island, *Gregory S. Schultz*, Special Assistant Attorney General, *Thomas J. Donovan, Jr.*, Attorney General, Office of the Attorney General for the State of Vermont, *Nicholas F. Persampieri*, Assistant Attorney General, *Lisa Madigan*, Attorney General, Office of the Attorney General for the State of Illinois, *Matthew J. Dunn*, *Gerald T. Karr*, *James P. Gignac*, Assistant Attorneys General, *Tom Miller*, Attorney General, Office of the Attorney General for the State of Iowa, *Jacob Larson*, Assistant Attorney General, *Janet T. Mills*, Attorney General, Office of the Attorney General for the State of Maine, *Gerald D. Reid*, Natural Resources Division Chief, *Robert W. Ferguson*, Attorney General, Office of the Attorney General for the State of Washington, *William R. Sherman*, Assistant Attorney General, *Brian E. Frosh*, Attorney General, Office of the Attorney General for the State of Maryland, *Steven M. Sullivan*, Solicitor General, *Maura Healey*, Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, *Christophe Courchesne*, Assistant Attorney General, *Hector H. Balderas*, Attorney General, Office of the Attorney General for the State of New Mexico, and *William Grantham*, Assistant Attorney General.

Emma C. Cheuse and *Susan J. Eckert* argued the cause for Community Petitioners and Petitioner-Intervenor. With them

on the briefs were *Gordon E. Sommers* and *Joseph M. Santarella, Jr.*

Scott L. Nelson and *Allison M. Zieve* were on the brief for *amici curiae* Former Regulatory Officials in support of petitioners and vacatur.

Richard L. Revesz, *Bethany A. Davis Noll*, *Denise A. Grab*, and *Jason A. Schwartz* were on the brief for *amicus curiae* Institute for Policy Integrity at New York University School of Law in support of petitioners.

Jonathan Brightbill, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for respondents. With him on the brief were *Jeffrey H. Wood*, Acting Assistant Attorney General, *Stephanie J. Talbert*, Attorney, and *Brian Doster*, Assistant General Counsel, U.S. Environmental Protection Agency.

Shannon S. Broome argued the cause for intervenor Chemical Safety Advocacy Group, et al. With her on the brief were *C. Frederick Beckner III*, *Justin A. Savage*, *Ryan C. Morris*, *Kurt A. Johnson*, *Charles H. Knauss*, *Peter Tolsdorf*, *Steven P. Lehotsky*, *Michael B. Schon*, *Leslie A. Hulse*, and *Richard S. Moskowitz*.

Elizabeth B. Murrill, Solicitor General, Office of the Attorney General for the State of Louisiana, argued the cause for intervenor State of Louisiana. With her on the brief were *Jeff Landry*, Attorney General, *Michelle M. White*, Assistant Solicitor General, *Leslie Rutledge*, Attorney General, Office of the Attorney General for the State of Arkansas, *Lee Rudofsky*, Solicitor General, *Nicholas J. Bronni*, Deputy Solicitor General, *Derek Schmidt*, Attorney General, Office of the Attorney General for the State of Kansas, *Jeffrey A. Chanay*,

Chief Deputy Attorney General, *Bryan C. Clark*, Assistant Solicitor General, *Mark Brnovich*, Attorney General, Office of the Attorney General for the State of Arizona, *Dominic E. Draye*, Solicitor General, *Pamela Jo Bondi*, Attorney General, Office of the Attorney General for the State of Florida, *Edward M. Wenger*, Chief Deputy Solicitor General, *Mike Hunter*, Attorney General, Office of the Attorney General for the State of Oklahoma, *Mithun Maninghani*, Solicitor General, *Ken Paxton*, Attorney General, Office of the Attorney General of the State of Texas, *Scott A. Keller*, Solicitor General, *Patrick Morrisey*, Attorney General, Office of the Attorney General for the State of West Virginia, *Erica N. Peterson*, Deputy Solicitor General, *S. Chad Meredith*, Deputy General Counsel, Office of the Attorney General for the Commonwealth of Kentucky, *Alan Wilson*, Attorney General, Office of the Attorney General for the State of South Carolina, *James Emory Smith, Jr.*, Deputy Solicitor General, *Sean Reyes*, Attorney General, Office of the Attorney General for the State of Utah, *Tyler R. Green*, Solicitor General, *Brad Schimel*, Attorney General, Office of the Attorney General for the State of Wisconsin, and *Misha Tseytlin*, Solicitor General. *Paul A. Martin*, Chief Deputy Attorney General, Office of the Attorney General for the State of West Virginia, *Harry J. Vorhoff*, Assistant Attorney General, Office of the Attorney General for the State of Louisiana, and *Jonathan L. Williams* entered appearances.

Before: ROGERS, KAVANAUGH[*] and WILKINS, *Circuit Judges*.

Opinion for the court filed PER CURIAM.

---

[*] Judge Kavanaugh was a member of the panel at the time the case was argued but did not participate in this opinion.

PER CURIAM: This appeal presents the question whether the Environmental Protection Agency ("EPA") had authority under Sections 307(d)(7)(B) and 112(r)(7) of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7607(d)(7)(B), 7412(r)(7), to delay the effective date of the Chemical Disaster Rule of January 13, 2017, for twenty months for the purpose of reconsideration, and, if so, whether it properly exercised that authority. We hold that where EPA has exercised its Section 7607(d)(7)(B) authority to delay the effectiveness of a final rule, it cannot avoid that statute's express limitations by invoking general rulemaking authority under a different statutory provision. EPA's action was arbitrary and capricious in any event. Accordingly, we vacate the Delay Rule of June 14, 2017.

I.

A.

In 1990, Congress amended the CAA, and addressed among other things multiple high-profile chemical accidents that harmed workers, local communities, and the environment. *See* 136 CONG. REC. S16,899, S16,926–27 (1990) (Conf. Rep.). Section 112(r) of the 1990 Amendments, "Prevention of Accidental Releases," provides that "[i]t shall be the objective of the regulations and programs authorized under this subsection to prevent the accidental release and to minimize the consequences of any such release of any [listed substance] or any other extremely hazardous substance." 42 U.S.C. § 7412(r)(1). "Accidental release" is defined as "an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source." *Id.* § 7412(r)(2)(A). Congress also established the Chemical Safety Board ("CSB") to investigate major accidental releases and issue reports to EPA "recommending measures to reduce the likelihood or the

consequences of accidental releases and proposing corrective steps to make chemical [industrial processes] as safe and free from risk of injury as is possible." *Id.* § 7412(r)(6)(C)(ii). "Whenever the [CSB] submits a recommendation with respect to accidental releases to [EPA], the Administrator shall respond to such recommendation . . . not later than 180 days after receipt," indicating whether EPA will "initiate a rulemaking or issue such orders as are necessary to implement the recommendation in full or in part, pursuant to any timetable contained in the recommendation." *Id.* § 7412(r)(6)(I). If the Administrator decides not to implement the CSB's recommendation in whole or part, "including any variation from the schedule contained in the recommendation," the Administrator must provide a statement "setting forth the reasons for such determination." *Id.*

Section 7412(r)(7) authorizes EPA to "promulgate release prevention, detection, and correction requirements which may include monitoring, record-keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements." *Id.* § 7412(r)(7)(A). "Regulations promulgated pursuant to this subparagraph shall have an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable." *Id.* That section also requires EPA to "promulgate 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," and requires that such regulations "be applicable to a stationary source 3 years after the date of promulgation." *Id.* § 7412(r)(7)(B)(i). These regulations must direct stationary sources to implement a Risk Management Plan ("RMP") to "detect and prevent or minimize accidental releases . . . and to provide a prompt emergency response to

any such releases in order to protect human health and the environment." *Id.* § 7412(r)(7)(B)(ii). The RMPs must be registered with the EPA and available to the public. *Id.* § 7412(r)(7)(B)(iii).

Under Section 307(d)(7)(B) of the CAA, 42 U.S.C. § 7607(d)(7)(B), EPA must convene a proceeding to reconsider a rule if a person "raising an objection can demonstrate to the Administrator that [1] it was impracticable to raise such objection within [the notice and comment period] . . . and [2] if such objection is of central relevance to the outcome of the rule." *Clean Air Council v. Pruitt*, 862 F.3d 1, 4–5 (D.C. Cir. 2017) (alterations in original). "Such reconsideration shall not postpone the effectiveness of the rule." 42 U.S.C. § 7607(d)(7)(B). "The statute also provides that the 'effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.'" *Clean Air Council*, 862 F.3d at 5 (quoting § 7607(d)(7)(B)).

B.

EPA first promulgated accidental release prevention regulations in 1996. Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section [7412(r)(7)], 61 Fed. Reg. 31,668 (June 20, 1996). In July 2012, a coalition of environmental groups, community organizations, unions, and health workers petitioned EPA for a rulemaking under Section 7412(r)(7) to "require the use of inherently safer technologies, where feasible, by facilities that use or store hazardous chemicals." Greenpeace, United Steelworkers, Sierra Club *et al.*, Petition to Prevent Chemical Disasters to EPA Administrator Lisa Jackson (July 25, 2012). The petition cited dangers from releases caused both by accidents and by terrorist attacks on U.S. chemical facilities.

Soon after, several chemical accidents occurred that received significant public attention and became subjects of CSB investigations. These accidents included the April 2013 explosion of a fertilizer plant in West, Texas and the June 2013 explosion of a chemical plant in Geismar, Louisiana. *See Oversight of Federal Risk Management and Emergency Planning Programs to Prevent and Address Chemical Threats, Including the Events Leading Up to the Explosions in West, TX and Geismar, LA, Hearing Before the S. Comm. on Envt. & Pub. Works*, 113th Cong. (2013) (statement of Rafael Moure-Eraso, Chairperson of the U.S. Chemical Safety Board). The West, Texas disaster involved a fire and explosion that crushed buildings and sent projectiles into neighboring communities, killing twelve first responders and two members of the public and causing $230 million in damage. The Geismar, Louisiana disaster also involved a fire and explosion, which killed two workers and injured many more.

On August 1, 2013, President Obama issued an executive order establishing a Chemical Facility Safety and Security Working Group co-chaired by the EPA Administrator and the Secretaries of Labor and Homeland Security. Exec. Order No. 13,650 § 2, *Improving Chemical Facility Safety and Security*, 78 Fed. Reg. 48,029 (Aug. 1, 2013). The Executive Order directed that within 90 days,

> [T]he Administrator of EPA and the Secretary of Labor shall review the chemical hazards covered by the Risk Management Program (RMP) . . . and determine if [it] can and should be expanded to address additional regulated substances and types of hazards. In addition, the EPA . . . shall 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.

Id. § 6(c).

One year later, EPA published a request for information in the Federal Register seeking comment on "potential revisions to its [accidental release] regulations and related programs." Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section [7412(r)(7)], 79 Fed. Reg. 44,604, 44,604 (July 31, 2014). The request solicited comments on dozens of potential regulatory actions under Section 7412(r), citing several chemical accidents that had occurred since the most recent promulgation of accidental release prevention requirements under that section. EPA received over 100,000 responses, including a 50-page letter from the CSB recommending dozens of regulatory regulations based on research and recent accident investigations.

In March 2016, EPA issued a Notice of Proposed Rulemaking proposing amendments to the accidental release prevention regulations. Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act ("Disaster Rule NPRM"), 81 Fed. Reg. 13,638 (Mar. 14, 2016). The Disaster Rule NPRM explained that although EPA "believe[d] the [existing regulations] ha[ve] been effective in preventing and mitigating chemical accidents . . . [,] major incidents, such as the West, Texas explosion, highlight the importance of reviewing and evaluating current practices and regulatory requirements, and applying lessons learned . . . to advance process safety where needed." *Id.* at 13,646. EPA also explained that "[i]n addition to the tragedy at the West Fertilizer facility, *a number of other incidents* have demonstrated a significant risk to the safety of

American workers and communities," and proceeded to discuss several recent explosions and fires that resulted in death, injury, and property damage to workers, first responders, and local communities. *Id.* at 13,644 (emphasis added). EPA estimated the annualized cost of on-site damages from chemical releases was $274.7 million, and estimated the cost of carrying out the proposed rule would be $131.2 million annually for the 12,500 facilities potentially subject to its requirements. Although EPA was "unable to quantify what specific reductions [in damages] may occur as a result of these proposed revisions [to the accidental release regulations]," it "anticipate[d] that promulgation and implementation of this rule would result in a reduction of the frequency and magnitude of damages from releases," and "expect[ed] that some portion of future damages would be prevented through implementation of a final rule." *Id.* at 13,642. Further, EPA found, "the monetized impacts omit many important categories of accident impacts including lost productivity, the costs of emergency response, transaction costs, property value impacts in the surrounding community . . . , and environmental impacts." *Id.* at 13,643. The Disaster Rule NPRM specifically solicited comments on proposed compliance and effective dates for the various requirements.

EPA promulgated a final rule on January 13, 2017. Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act ("Chemical Disaster Rule"), 82 Fed. Reg. 4594 (Jan. 13, 2017). The final rule revised dozens of Section 7412(r)(7) requirements in three major areas: (1) accident prevention, including expanded post-accident investigations, more rigorous safety audits, safety training, and safer technology requirements; (2) emergency response, including more frequent coordination with local first responders and emergency response committees, and more intensive incident-response exercises; and (3) public

information disclosure, including public disclosure of safety information and public-meeting requirements. EPA responded to comments it received regarding the appropriate effective and compliance dates for various provisions of the rule and explained in detail why it chose to adopt or reject these recommendations. The final rule set an overall effective date of March 14, 2017, sixty days after promulgation. *Id.* at 4594. Some provisions related to clarifying regulatory definitions went into effect on that date. Others, including most local emergency-response coordination requirements, became effective in one year, on March 14, 2018. *Id.* at 4678. The requirements for emergency response exercises, public information-sharing and post-accident public meetings, third-party audits, more rigorous post-incident analyses, and safer technology requirements became effective three years later, on March 15, 2021. *Id.* The compliance deadline for covered facilities to submit an updated RMP was March 14, 2022. *Id.*

C.

Following a change in presidential administration, EPA delayed the effective date of the final Chemical Disaster Rule three times. On January 26, 2017, less than two weeks after promulgation of the rule, EPA published a final rule delaying its effective date by one week, to March 21, 2017, along with the effective dates of twenty-nine other final EPA rules. Delay of Effective Date for 30 Final Regulations Published by the Environmental Protection Agency Between October 28, 2016 and January 17, 2017, 82 Fed. Reg. 8499-02 (Jan. 26, 2017). This initial delay implemented a January 20, 2017 memorandum from then-White House Chief of Staff Reince Priebus directing agency heads to "temporarily postpone [the] effective dates for 60 days" of regulations that had been promulgated but not yet taken effect. Memorandum from Reince Priebus to Heads of Executive Departments and

Agencies: Regulatory Freeze Pending Review (Jan. 20, 2017) ("Priebus Memorandum"). The Priebus Memorandum also directed agency heads to "consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period." *Id.*

On February 28, 2017, a coalition of industry groups submitted a petition for reconsideration of the Chemical Disaster Rule. A group of states also petitioned for reconsideration. About two weeks later, the EPA Administrator announced his determination that the criteria for reconsideration under Section 7607(d)(7)(B) had been met and, pursuant to that section, administratively stayed the Chemical Disaster Rule's effective dates for ninety days, until June 19, 2017. *See* Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date ("90-Day Stay"), 82 Fed. Reg. 13,968-02 (Mar. 16, 2017). During that stay, on April 3, 2017, EPA issued a notice of proposed rulemaking proposing to delay the effective date of the Chemical Disaster Rule by an additional 20 months, until February 19, 2019. Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date ("Delay Rule NPRM"), 82 Fed. Reg. 16,146-01, 16,148 (Apr. 3, 2017).

EPA promulgated the final rule on June 14, 2017, delaying the effective date of the Chemical Disaster Rule until February 19, 2019. Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date ("Delay Rule"), 82 Fed. Reg. 27,133-01 (June 14, 2017). The Delay Rule recounted that EPA has received three petitions for reconsideration of the Chemical Disaster Rule "as provided for in [Section 7607(d)(7)(B)]," and that EPA issued a three-month stay under that section because "the criteria for reconsideration ha[d] been met for at least one

of the three objections." *Id.* at 27,134–35. However, EPA explained, Section 7607(d)(7)(B) limits a stay "to three months," and "EPA believed that three months was insufficient to complete the necessary steps in the reconsideration process for the [Chemical Disaster Rule]." *Id.* at 27,135.

Thus, according to EPA, the Delay Rule has the purpose of "allow[ing] EPA to conduct a reconsideration proceeding and to consider other issues that may benefit from additional comment." *Id.* at 27,133. The Delay Rule further explained that EPA might take additional action during the 20-month delay period, "which could include proposing and finalizing a rule to revise or rescind [the Chemical Disaster Rule]." *Id.* EPA justified its choice of a 20-month delay because of the complex issues involved and "[b]ased on EPA rulemaking experience," without further elaboration. *Id.* at 27,140. It justified its delay of the first-responder coordination provisions — which otherwise would have been effective on March 14, 2018 — because "[i]n agreeing to convene a proceeding for reconsideration of the final rule, EPA agreed to provide the public with an opportunity to comment on other issues . . . . By finalizing these provisions immediately, EPA would not be allowing the public an additional opportunity to comment on them." *Id.* at 27,142. The Delay Rule also explained that "[a] delay of effectiveness will allow EPA time for a comprehensive review of objections to the [Chemical Disaster Rule] without imposing the rule's substantial compliance and implementation resource burden when the outcome of the review is pending." *Id.* at 27,136. EPA stated that "[c]ompliance with all of the rule provisions is not required as long as the rule does not become effective. The EPA did not propose and is not taking any action on any compliance dates at this time." *Id.* As authority for promulgating the Delay Rule, EPA cited Sections 7607(d) and 7412(r)(7). *Id.* at 27,135.

Two groups petitioned for review of the Delay Rule: over a dozen community and environmental groups, including Air Alliance Houston ("Community Petitioners"), and a number of states ("State Petitioners"). The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC ("United Steelworkers"), intervened on behalf of Community Petitioners. A group of industry interests ("Industry Intervenors"), many of whom had petitioned EPA for reconsideration of the Chemical Disaster Rule, intervened on EPA's behalf.

II.

As a threshold matter, EPA and Industry Intervenors challenge the Article III standing of Community Petitioners and State Petitioners to bring these petitions. Standing is a structural, constitutional restraint on the subject matter jurisdiction of the federal judiciary. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013). Petitioners in an agency appeal must, in their opening brief, either identify "record evidence" or "submit additional evidence to the court of appeals" to support their standing. *Pub. Citizen, Inc. v. NHTSA* ("*Public Citizen I*"), 489 F.3d 1279, 1289 (D.C. Cir. 2007). "When evaluating such evidence concerning standing, we 'assume that on the merits the plaintiffs would be successful in their claims.'" *Id.* (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)).

To establish standing, a petitioner must show (i) it has "suffered a concrete and particularized injury in fact, (ii) that was caused by or is fairly traceable to the actions of the defendant, and (iii) is capable of resolution and likely to be redressed by judicial decision." *Sierra Club v. EPA*, 755 F.3d 968, 973 (D.C. Cir. 2014) (citing *Lujan v. Defs. of Wildlife*, 504

U.S. 555, 560–61 (1992)). "An allegation of future injury may suffice" to show injury in fact "if the threatened injury is 'certainly impending' or there is a 'substantial risk that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper*, 568 U.S. at 414 n.5). The party asserting standing must also demonstrate "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. When challenging failure to regulate, a petitioner need demonstrate only a "substantial probability that local conditions will be adversely affected, and thus will harm members of the petitioner organization." *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000) (quotation marks omitted). At the same time, "when the [petitioner] is not himself the object of government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

"An organization has standing to sue on behalf of its members when . . . 'its members would otherwise have standing to sue in their own right.'" *Public Citizen I*, 489 F.3d at 1289 (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). When organizations assert such representational standing, "they must demonstrate that at least one of their members would otherwise have standing to sue in his or her own right; that the interests they seek to protect are germane to their organizations' purposes; and that neither the claim asserted nor the relief requested requires the participation of individual members." *Sierra Club*, 755 F.3d at 973. "When more than one association brings suit, 'we need only find one party with standing' to satisfy the [standing] requirement." *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C.

Cir. 2017) (quoting *Ams. for Safe Access v. DEA*, 706 F.3d 438, 443 (D.C. Cir. 2013)).

A.

EPA and Industry Intervenors do not contest that a challenge to the Delay Rule is germane to Community Petitioners' organizational purposes. Nor do they argue that the participation of individual members is necessary. The question, then, is whether Community Petitioners have adequately shown that at least one of their members meets the requirements of injury, traceability, and redressability. *See Sierra Club*, 755 F.3d at 973. They have.

Even if the only tangible impact of the Delay Rule were delay of the Chemical Disaster Rule's first-responder provisions, the potential harm to members of United Steelworkers is alone sufficient to provide standing to Community Petitioners. *Ctr. for Biological Diversity*, 861 F.3d at 182 (only one organization need have standing). Approximately 25,000 of United Steelworkers' members work in 350 covered chemical plants in the United States, and United Steelworkers-represented "refineries account for almost two-thirds of United States production. No single company, and no other union, either operates, or represents the workers in more plants that are the subject of the [RMP] regulations than" United Steel. Nibarger Decl. ¶ 2 (DEC. 96). Several declarations from United Steelworkers members describe hazards that they face from accidental releases as plant workers and that their families face as residents of communities close to the covered facilities. *See, e.g.*, Kelley Decl. ¶¶ 3–16 (DEC. 21–24); Lilienfeld Decl. ¶¶ 1–11 (DEC. 56–58); Nibarger

Decl. ¶¶ 1–20 (DEC. 96–99). For example, Ben Lilienfeld, a United Steelworkers member in Baytown, Texas, avers that:

> [A] butadiene release in 2015 at Shell Deer Park Refinery & Chemical in Deer Park, Texas, put our members at risk . . . . At the LyondellBasell facility in Houston, Texas, multiple fires have occurred over the last several years causing releases. The same risks that caused the explosions at the Phillips Pasadena complex in 1989 [— a series of explosions at a Texas chemical plant resulting from the accidental release of flammable process gases that killed 23 employees, injured 100 more, and caused $1.4 billion in damage —] still exist today and our members and communities were, are and will remain on the front line.

Lilienfeld Decl. ¶ 10 (DEC. 58); Comment, Coalition to Prevent Chemical Disasters (Oct. 29, 2014), J.A. 497. Such risks are particularized to chemical plant workers such as the United Steelworkers' members, and EPA found that the Chemical Disaster Rule would reduce the kinds of accidents that Lilienfeld and the other United Steelworkers declarants face in their workplace and communities, and would mitigate such harms by improving coordination between facilities and local first responders. *See* Chemical Disaster Rule, 82 Fed. Reg. at 4597; EPA Activities Under EO 13650: Risk Management Program (RMP) Final Rule Questions & Answers (June 2017) ("EPA's changes to the RMP rule will help protect local first responders, community members and employees from death or injury due to chemical facility accidents."). Living and working with a higher risk of such harms than

would exist if the Chemical Disaster Rule became effective on time is therefore directly traceable to the Delay Rule.

B.

State Petitioners also have Article III standing. "[T]here is no difficulty in recognizing [a state's] standing to protect proprietary interests or sovereign interests." 13B WRIGHT & MILLER, FED. PRAC. & PROC. § 3531.11.1, *Government Standing – States* (3d ed.). The Supreme Court has recognized "[t]wo kinds of nonsovereign interests" for state standing purposes: proprietary interests such as "own[ing] land or participat[ing] in a business venture," and private interests of another when the state is the "real party in interest." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601–02 (1982).

The Delay Rule affects State Petitioners' proprietary interests due to the expenditures states have previously made and may incur again when responding to accidental releases during the delay period. State Pet. Br. 22–26. Hundreds of covered industrial facilities are located in State Petitioners' territory. Petitioner Washington State spent $370,000 responding to and investigating a refinery explosion that EPA specifically cited as an example of why the existing regulations needed to be strengthened. State Pet. Br. 26; Chemical Disaster Rule, 82 Fed. Reg. at 4599; *see also* Disaster Rule NPRM, 79 Fed. Reg. at 44,621 (explaining that the CSB found that this explosion in Washington State "could have been avoided if safer technologies had been employed"). Monetary expenditures to mitigate and recover from harms that could have been prevented absent the Delay Rule are precisely the kind of "pocketbook" injury that is incurred by the state itself. *See Snapp*, 458 U.S. at 602. Because State Petitioners have demonstrated their independent proprietary interests in

avoiding chemical releases in their territory sufficient to support standing, the court need not reach the alternative argument that Congress has abrogated the prudential bar on state *parens patriae* standing under the CAA. *See Md. People's Counsel v. FERC*, 760 F.2d 318, 320 (D.C. Cir. 1985).

III.

EPA has thrice delayed the effective date of the Chemical Disaster Rule, 82 Fed. Reg. 4594 (Jan. 13, 2017) (eff. Mar. 14, 2017). *First*, in response to a White House memorandum of January 20, 2017, EPA delayed the effective date by one week. Priebus Memorandum, 82 Fed. Reg. 8499-02 (Jan. 26, 2017). *Second*, on March 16, 2017, EPA granted industry petitions for reconsideration and stayed the effective date and compliance dates of the Chemical Disaster Rule for three months pursuant to Section 7607(d)(7)(B). 90-Day Stay, 82 Fed. Reg. 13,968-02 (Mar. 16, 2017). *Third*, during this stay, EPA promulgated the Delay Rule, 82 Fed. Reg. 27,133 (June 14, 2017). The preamble to the Delay Rule states that it allows EPA, beyond the three-month period authorized in Section 7607(d)(7)(B), "an additional 20 months . . . to conduct reconsideration proceedings and to consider *other issues that may benefit* from additional comment." *Id.* (emphasis added).

"[I]t is 'axiomatic' that 'administrative agencies may act only pursuant to authority delegated to them by Congress.'" *Clean Air Council*, 862 F.3d at 9 (quoting *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014)). This court reviews "an agency's construction of the statute which it administers" under the framework of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). If "Congress has spoken directly to the precise question at issue" and "the intent of Congress is clear,

that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. But "if the statute is silent or ambiguous with respect to the specific issue," the court will uphold the agency's interpretation if it is reasonable. *Id.* at 843.

Section 7607(d)(7)(B) provides that reconsideration of a final rule pursuant to that section "shall not postpone the effectiveness of the rule" and that the "effectiveness of the rule may be stayed during such reconsideration . . . for a period not to exceed three months." It is beyond dispute that EPA relied upon Section 7607(d)(7)(B) when delaying the Chemical Disaster Rule in response to reconsideration petitions. Delay Rule, 82 Fed. Reg. at 27,134. Throughout the Delay Rule, EPA repeatedly justified delay of effective dates on the basis that it needs more time to reconsider the Chemical Disaster Rule than was provided under Section 7607(d)(7)(B). *See id.* at 27,136 ("A delay of effectiveness will allow EPA time for a comprehensive review of objections to the [Chemical Disaster Rule] without imposing the rule's substantial compliance and implementation resource burden when the outcome of the review is pending."); *id.* at 27,138 ("EPA concurs with commenters to the extent that they argue for finalizing the proposed delay in effective date . . . *in order to conduct a reconsideration proceeding*." (emphasis added)); *id.* at 27,140 ("[T]hese issues may be difficult and time consuming to evaluate."). The only justification offered in EPA's short summary of the Delay Rule is that it "allows the Agency time to consider petitions for reconsideration of the [Chemical Disaster Rule] and take further regulatory action, as appropriate." *Id.* at 27,133. But regardless whether EPA "believe[s] that three months [is] insufficient to complete the necessary steps in the reconsideration process," *id.* at 27,135, that is not EPA's call. Congress saw fit to place a three-month statutory limit on "such reconsideration," 42 U.S.C.

§ 7607(d)(7)(B), and this court "must give effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 843. Because the Delay Rule arose from reconsideration petitions under Section 7607(d)(7)(B) and EPA's reliance on its authority to delay a rule for reconsideration under that provision, that statute's limitations apply.

Tellingly, EPA's briefing makes no mention of its reliance on Section 7607(d)(7)(B) in promulgating and justifying the Delay Rule. Rather, EPA argues that the Delay Rule is permissible under 42 U.S.C. § 7412(r)(7), which provides that a rule's effective date "as determined by the Administrator" must "assure[] compliance as expeditiously as practicable." *See* Respondent Br. 27–35. Even if Section 7412(r)(7) grants EPA authority to delay the effectiveness of a final rule in the absence of reconsideration under Section 7607(d)(7)(B), it is well established that an agency may not circumvent specific statutory limits on its actions by relying on separate, general rulemaking authority. As we explained in *NRDC v. Reilly*, a "general grant of rulemaking power . . . [cannot] trump the specific provisions of the act." 976 F.2d 36, 40 (D.C. Cir. 1992); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 169–70 (2007) (explaining that when two regulations conflict on the same subject matter, "the specific governs the general," and the more specific regulation applies). Similarly, in *Halverson v. Slater*, this court held that the Secretary of Transportation's general statutory authority to delegate "duties and powers of the Secretary to an officer or an employee of the Department" was trumped by a more specific provision that the "Secretary may delegate the duties and powers conferred by this subtitle . . . to any officer, employee, or member of the Coast Guard." 129 F.3d 180, 183–84 (D.C. Cir. 1997). This court rejected the Secretary's argument that he could use his general delegation authority absent an express restriction on

that authority, concluding that under *Chevron* step one, "the language of [the more specific provision] compels the conclusion that the Congress did not intend to authorize delegation of [these] functions to a non-Coast Guard official." *Id.* at 185; *see also Chemical Waste Mgmt., Inc. v. EPA*, 976 F.3d 2, 22 (D.C. Cir. 1992) (EPA may not "accommodate" two statutes by allowing one to "override" the more specific requirements of the other).

So too here. EPA cannot escape Congress's clear intent to specifically limit the agency's authority under Section 7607(d)(7)(B) by grasping at its separate, more general authority under Section 7412(r)(7). That would almost always allow EPA to avoid the restrictions of Section 7607(d)(7)(B) by simply insisting it was invoking Section 7412(r)(7), even when it is indisputably responding to a Section 7607(d)(7)(B) petition and reconsidering a rule under that specific provision. Such an unreasonable interpretation "would deprive [the more specific authority] of virtually all effect." *Halverson*, 129 F.3d at 189 (quoting *Am. Fed'n of Gov't Emps. v. FLRA*, 798 F.2d 1525, 1528 (D.C. Cir. 1986)).

The court's conclusion that the plain text of Section 7607(d)(7)(B) limits EPA's authority to delay final rules for the purposes of reconsideration under that provision is bolstered by the statute's history. Congress enacted the CAA in 1970 to encourage and promote "pollution prevention." 42 U.S.C. § 7401(c). It found that that air pollution posed "mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation." *Id.* § 7401(a)(2). It envisioned a cooperative effort by federal, state, and local governments to, among other things, "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." *Id.*

§ 7401(b), (c). EPA was directed to carry out these purposes by, for instance, identifying and listing hazardous air pollutants ("HAPs"), setting standards for mobile sources, and issuing rules for new stationary sources. In fact, statutory deadlines were not met for meeting the National Ambient Air Quality Standards ("NAAQS"), and Congress found that "many of the Nation's most important air pollution problems have failed to improve or have grown more serious." H.R. REP. No. 101-490, at 144 (May 17, 1990). Also, "a number of serious new air pollution problems have emerged." *Id.* In 20 years, EPA had established standards for only seven HAPs, "a small fraction of the many substances associated . . . with cancer, birth defects, neurological damage, or other serious health impacts." *Id.* at 151.

In 1990, Congress — no longer willing to wait for EPA to act — amended the CAA. Section 7412 of Title III, the HAPs provision, was amended to establish "a new program for the control of [HAPs]." *Id.* at 315. Congress identified and listed 189 HAPs and assigned specific timetables for the promulgation of regulations and the attainment of NAAQS. Significantly for present purposes, Congress was aware that "[a]ccidental releases of air toxics occur with surprising frequency." *Id.* at 154. The 1990 Amendments created "a new program under which EPA is to establish reasonable and appropriate regulations to prevent and detect accidental releases to the maximum extent practicable." *Id.* at 157; *see* S. REP. No. 101-228, at 237 (Dec. 20, 1989). The section-by-section analysis stated:

> *Accident prevention, detection, and response*.— [Section 7412(r)(7)] directs the Administrator within three years of enactment to promulgate, in consultation with the Secretaries of Transportation and Labor . . . regulations to provide, to the greatest

> extent practicable, for the prevention and detection of accidental releases into the ambient air. The regulations must also provide for effective responses to such accidental releases by regulated sources. The regulations are to take effect three years after promulgation.

H.R. REP. No. 101-490, at 334.

The Chemical Disaster Rule is the most recent outgrowth of Congress's effort in the 1990 Amendments to ensure adequate protections against highly dangerous accidental releases of chemicals. By Executive Order No. 13,650, *Improving Chemical Facility Safety and Security*, 78 Fed. Reg. 48,029 (Aug. 1, 2013), issued in the wake of serious disasters at chemical plants, EPA and several other agencies were directed to "improve chemical facility safety and security in coordination with owners and operators," *id.* § 1, and EPA was instructed to strengthen its accident prevention regulations, *id.* §§ 2–7. EPA issued a notice of proposed rulemaking in March 2016, held public hearings, and received written comments. The final rule revised and strengthened accident prevention, emergency response, and public information disclosure requirements. Chemical Disaster Rule, 82 Fed. Reg. at 4595; *see supra* Part [I.B]. It was to take effect in 30 days, on March 14, 2017, with different compliance dates for some provisions in order to accommodate industry needs. Chemical Disaster Rule, 82 Fed. Reg. at 4594, 4678.

EPA brought this regulatory action to a halt. Section 7607(d)(7)(B) provides:

> If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for

> such objection arose after the period for public comment . . . and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule . . . . *Such* reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for *a period not to exceed three months*.

42 U.S.C. § 7607(d)(7)(B) (emphasis added). In the Delay Rule, EPA interpreted that provision as "generally allow[ing] the EPA to set effective dates as appropriate unless other provisions of the CAA control." Delay Rule, 82 Fed. Reg. at 27,135. As an initial matter, EPA previously interpreted that provision as establishing the CAA's exclusive mechanism for staying the effectiveness of a final rule pending reconsideration. *See* EPA Mem. in Opp. to Sierra Club's Mot. for Summ. J. at 11, *Sierra Club v. Jackson*, No. 1:11-cv-01278 (D.D.C. Aug. 25, 2011). In any event, there is no textual basis for EPA's current interpretation.

The court has explained that Section 7607(d)(7)(B) "authorizes the agency to grant a stay during '*such* reconsideration,' a term that quite obviously refers back to the reconsideration EPA 'shall' undertake when someone presents an objection of 'central relevance' that was 'impracticable' to raise during the period for public comment." *Clean Air Council*, 862 F.3d at 9 (emphasis added) (quoting 42 U.S.C. § 7607(d)(7)(B)). Regardless whether the three-month stay authorized by Section 7607(d)(7)(B) is cabined by the word "such," the Delay Rule is the functional equivalent of a stay under that section. It is based on industry petitions for reconsideration and is the direct outgrowth of the three-month stay EPA issued under Section 7607(d)(7)(B). In the Delay

Rule, EPA makes no finding that a 20-month delay is required for regulated parties over and above the delayed compliance dates in the Chemical Disaster Rule. Instead, EPA repeatedly states that it was using the 20 months merely to reconsider concerns expressed by industry and unidentified "other issues that may benefit from additional comment." Delay Rule, 82 Fed. Reg. at 27,133, 27,135, 27,140. It has neither adopted industry concerns as its own nor proposed substantive changes to the programmatic requirements of the Chemical Disaster Rule. Because the Delay Rule is for all intents and purposes a Section 7607(d)(7)(B) stay pending reconsideration for EPA to decide what it wants to do, rather than a substantive amendment to tools and programs in the Chemical Disaster Rule, it cannot delay the effective date beyond three months.

Nor is the Delay Rule authorized by Section 7412(r)(7). Section 7412(r)(7) is a comprehensive accident prevention regime affording EPA broad discretion as to regulatory tools, albeit with multiple requirements. Subparagraph (A) references types of *substantive* actions that EPA may require by regulation: "release prevention, detection, and correction requirements which may include monitoring, record-keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements." Once EPA makes a substantive regulatory choice — to add, modify, or subtract requirements — EPA must set an effective date for that choice that will "assur[e] compliance as expeditiously as practicable." Subparagraph (B) requires EPA to determine that such regulations "provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances." And subparagraph (E) provides that the three-month time limit of Section 7607(d)(7)(B) applies to regulations promulgated pursuant to Section 7412(r)(7). Reading the plain text makes clear that Congress is seeking meaningful, prompt *action* by

EPA to promote accident prevention. In this way, the framework of Section 7412(r)(7) does not differ significantly from the "highly circumscribed schedule" analyzed in *Reilly*, 976 F.2d at 41, where the court held that EPA's general rulemaking authority under the CAA could not "trump the specific provisions of the Act," *id.* Section 7412(r)(7) contains several "highly circumscribed" timing components. *See* S. REP. No. 101-228, at 237–39.

The Delay Rule is not the type of substantive amendment authorized by Section 7412(r)(7). EPA has interpreted that section as according it "flexibility to make a rule effective with no specific outside date beyond that which 'assur[es] compliance as expeditiously as practicable.'" Delay Rule, 82 Fed. Reg. at 27,135. The Delay Rule states that "[i]n light of EPA's commitment to take further regulatory action *in the near future*, with the potential for a broad range of rule revisions . . . and the substantial resources required," "several industry trade associations" that had submitted "comment agreed that the 20-month delay in the effective date would be as expeditious[] as practicable." *Id.* (emphasis added). But EPA merely references arguments without standing behind any of them. By its own repeated admissions in the preamble to the Delay Rule, EPA has made no substantive decisions demanded by Section 7412(r)(7). The preamble reveals no attempt by EPA to consider how much time industry needs to comply, or why 20 months, as opposed to some other period of delay, are necessary. Nor does it engage with EPA's determinations and findings in the Chemical Disaster Rule with respect to compliance dates. *See* 82 Fed. Reg. at 4675–80 (Part VIII). Nor does EPA claim to have changed those findings or taken any action with respect to them. Instead, EPA posits instead that the Delay Rule is designed to allow *it* time to rethink "the difficulties of compliance planning" while also claiming it is not revisiting the compliance dates or the rationale underlying

them. Delay Rule, 82 Fed. Reg. at 27,137. *But see id.* at 27,144 n.23. To the extent EPA offers any reasoning — namely, that "[a] delay of 20 months is a reasonable length of time" for *it* "to engage in the process of revisiting issues in the underlying [Chemical Disaster Rule]," *id.* at 27,136 — that reasoning does not relate to what is "practicable" for compliance by regulated sources; its explanation relates to its own "unidentified, new 'policy preferences' and the mere fact of reconsideration." Cmty. Pet. Br. 42 (quoting Delay Rule, 82 Fed. Reg. at 27,136).

This makes a mockery of the statute. The Delay Rule does not have the purpose or effect of "assur[ing] compliance" with Section 7412(r)(7); it is calculated to enable non-compliance. The Delay Rule removes both immediate and future obligations under the Chemical Disaster Rule, authorizing regulated facilities to ignore all pre-2019 deadlines. Delay Rule, 82 Fed. Reg. at 27,142, 27,144 n.23. Read as a whole, Section 7412(r)(7)'s effective date provision is intended to provide a short window of notice before facilities are required to comply or prepare to comply with agency regulations. *See* 42 U.S.C. § 7412(r)(7)(E). In addition, the Delay Rule does not demonstrate, or even acknowledge, that EPA considered Section 7412(r)(7)'s statutory objectives, namely, to "prevent accidental releases," to "minimize . . . consequences of any such release," to "protect human health and the environment," and "to include procedures and measures for emergency response after an accidental release." *Id.* § 7412(r)(1), (r)(7)(A), (r)(7)(B). The Delay Rule undermines these objectives without explaining why implementation delay was necessary; it refers only to the fact of EPA's own reconsideration. By contrast with EPA's final, record-based determinations in setting the Chemical Disaster Rule's effective and compliance dates, EPA makes no findings of its own in the Delay Rule. It refers merely to alleged "security risks" and other hypotheticals raised by industry without

endorsing those findings or concerns. *See, e.g.*, Delay Rule, 82 Fed. Reg. at 27,136, 27,138, 27,140–41. Indeed, EPA *explicitly* conceded that it "has not concluded [the Chemical Disaster Rule] would increase such risks." *Id.* at 27,141. The Delay Rule thus contains no provisions that advance or accomplish these goals, but instead delays these objectives contrary to EPA's prior determinations in a rulemaking.

By delaying the effective date, EPA has delayed compliance, reduced or eliminated the lead-up time to achieve the compliance that EPA had earlier found necessary, and thus has delayed life-saving protections. EPA may not employ delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits. EPA states that it "does not wish to cause confusion among the regulated community and local responders by requiring these parties to prepare to comply with, or in some cases, immediately comply with, rule provisions that might be changed during the subsequent reconsideration." *Id.* at 27,139. But this "confusion" stems solely from the confusion EPA has caused by the almost two-years' reconsideration it desires in order to decide what it wants to do, not compliance concerns relevant to regulated facilities' implementation of the Chemical Disaster Rule. That is not a basis for delaying protections. That the pre-existing rule remains in effect during the delay period does not show the Delay Rule satisfies Section 7412(r)(7). In promulgating the Chemical Disaster Rule, EPA had found, and the record shows, that there was a need for improvements to protect worker and community safety, and to reduce facilities, injuries, life disruption, and other harm. Chemical Disaster Rule, 82 Fed. Reg. at 4599–600.

Without regard to context, purpose, or history, EPA has equated its authority to amend a final rule pursuant to

applicable statutory requirements with authority to delay a final rule merely because EPA is *considering* revising it. Delay Rule, 82 Fed. Reg. at 27,133, 27,136, 27,138. The overarching statutory purpose and design of the CAA, as well as the statutory context of Section 7412(r)(7) and Section 7607(d)(7)(B), reject an interpretation that EPA can further delay a final rule for reconsideration when it has neither explained it has reached a different conclusion about preventing accidental releases nor offered new evidence to support a different conclusion, but has delayed a final rule based on speculation about future amendments. That does not conform to the carefully designed regime Congress envisioned in the 1990 Amendments. Congress has twice emphasized the finality of CAA rules by prohibiting reconsideration from delaying a final rule. Section 7607(d)(7)(B) provides a strict limit of three months on stays of effective dates pending reconsideration, and Section 7607(b)(1) provides that a petition for judicial review "shall not affect the finality of such rule . . . and shall not postpone the effectiveness of such rule." These provisions (read in light of the history of the 1990 Amendments) show Congress intended EPA to act with appropriate dispatch, not to delay protections. EPA points to nothing that would allow a misuse of its substantive rulemaking authority to evade these limits.

EPA's interpretation of its delay authority is not reasonable because it has no stopping point. Nothing in the text, context, structure, or history of the CAA supports interpreting Section 7412(r)(7) as allowing delays akin to those that prompted Congress to adopt the 1990 Amendments in order to spur EPA action. As Community Petitioners note, the absence of a date from the "practicable" clause in Section 7412(r)(7)(B) does not reveal a lack of legislative urgency for effectiveness and compliance, but rather reflects Congress's acknowledgement that, depending on EPA's regulatory

choices, some flexibility in timing might be required. *See* Cmty. Pet. Br. 44 (citing S. REP. No. 101-228, at 234–35, 245). EPA may not "substitut[e] [its] desires for the plain text" of the Act. *New Jersey v. EPA*, 517 F.3d 574, 582–83 (D.C. Cir. 2008). Nor may it render illusory a limitation like Section 7607(d)(7)(B), which is designed to limit EPA's authority and facilitate judicial review by assuring finality and creating an agency record. *See* S. REP. No. 101-228, at 372.

For these reasons, the Delay Rule must be vacated. Our holding is narrow, as our analysis makes clear. In the Delay Rule, EPA has neither substantively amended — nor proposed any substantive amendments to — the Chemical Disaster Rule, but instead seeks to delay that rule pending reconsideration during which it decides what it wants to do. EPA retains authority under Section 7412(r)(7) to substantively amend the programmatic requirements of the Chemical Disaster Rule, and pursuant to that authority, revise its effective and compliance dates, subject to arbitrary and capricious review.

IV.

Moreover, EPA's promulgation of the Delay Rule was arbitrary and capricious. Although "[t]he scope of review under the 'arbitrary and capricious' standard is narrow . . . the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational explanation of the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks omitted). When an agency reverses itself, it "must show that there are good reasons for the new policy," but it need not show that "the reasons for the new policy are *better* than the reasons for the old one." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original). However, if the "new policy

rests upon factual findings that contradict those which underlay its prior policy," it must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 515–16; *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("[A]n 'unexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" (quoting *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005))).

EPA's explanations for its changed position on the appropriate effective and compliance dates are inadequate under *Fox* and *State Farm*, and therefore arbitrary and capricious, for several reasons. *See* 42 U.S.C. § 7607(d)(9).

First, EPA repeatedly justifies the 20-month delay as providing time for taking and considering public comment on the Chemical Disaster Rule and any potential revisions or rescission thereof. But EPA nowhere explains how the effectiveness of the rule would prevent EPA from undertaking notice and comment or other tasks for reconsideration, why a delay is necessary to EPA's process, or how the Chemical Disaster Rule becoming effective on schedule would otherwise impede its ability to reconsider that rule. *See Public Citizen v. Steed*, 733 F.2d 93, 102 (D.C. Cir. 1984) ("Without showing that the old policy is unreasonable, for [the agency] to say that no policy is better than the old policy solely because a new policy *might* be put into place in the indefinite future is as silly as it sounds." (emphasis in original)). Agencies regularly reconsider rules that are already in effect. But as the Second Circuit has pointed out, "a decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration." *NRDC v. NHTSA*, 894 F.3d 92, 111–12 (2d Cir. 2018) (citing *Clean Air Council*,

862 F.3d at 9). Thus, the mere fact of reconsideration, alone, is not a sufficient basis to delay promulgated effective dates specifically chosen by EPA on the basis of public input and reasoned explanation, particularly where the statute requires the agency to "assur[e] compliance as expeditiously as practicable." 42 U.S.C. § 7412(r)(7)(A). Further, under the plain text of Section 7412(r)(7), the timeframe for effective or compliance dates must be justified in terms of "*assuring compliance* as expeditiously as practicable," meaning that EPA must explain why its proposed timeline is practicable for regulated parties *to comply with the rule expeditiously* — not for the agency to engage in the regulatory process. *Id.* (emphasis added).

Second, nothing in the Delay Rule explains EPA's departure from its stated reasoning in setting the original effective date and compliance dates. In promulgating the Chemical Disaster Rule, EPA considered comments specifically about the rule's proposed effective date and the compliance timeline for various requirements, and explained why it adopted or rejected the comments. *See* Chemical Disaster Rule, 82 Fed. Reg. at 4675–78. For example, EPA "received comments supporting the proposed one-year compliance date for emergency response coordination activities," and "EPA agree[d] with commenters and [was] finalizing a one-year compliance date for emergency response coordination activities." *Id.* at 4,677. As another example, one commenter objected to a four-year compliance date for emergency-response exercises and argued the deadline should be one year; EPA disagreed because four years would "allow owners and operators to develop an exercise program," train personnel, and familiarize themselves with guidance EPA expected to develop after promulgation of the Chemical Disaster Rule. *Id.*

The Delay Rule does not explain its departure from EPA's previous conclusions regarding the appropriate and practicable timeline for implementing the Chemical Disaster Rule. Nor does it explain why the detailed factual findings regarding the harm that would be prevented upon implementation of the Chemical Disaster Rule are now only "speculative," *id.* at 27,139, or why the entire rule must be delayed wholesale despite its many different provisions with different effective and compliance dates. Although EPA need not show that "the reasons for the new policy are *better* than the reasons for the old one," it must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 515–16. EPA has not done so. Instead, EPA attempts to minimize the impact of the Delay Rule by asserting that by merely delaying the overall effective date until February 2019, it leaves the major compliance dates unaffected. Delay Rule, 82 Fed. Reg. at 27,137 ("This rule does not impact compliance dates except for those dates that would be triggered prior to February 2019."). This assertion is incompatible with the EPA's statement in the Delay Rule — and the common-sense conclusion — that "[a] delay of effectiveness will allow EPA time for a comprehensive review of objections to the [Chemical Disaster Rule] without imposing the rule's substantial compliance and implementation resource burden when the outcome of the review is pending." *Id.* at 27,136. EPA and the Industry Intervenors contend that the Delay Rule has no significant costs because it merely maintains the "status quo," as regulated sources are not required to comply with all but one "major" provision until 2020. Putting aside EPA's concession that the Delay Rule immediately delays multiple "minor" provisions and would delay the "major" first-responder coordination provisions, the baseline for measuring the impact of a change or rescission of a final rule is the requirements of the rule itself, not the world as it would have been had the rule

never been promulgated. *See Consarc Corp. v. OFAC*, 71 F.3d 909, 913 (D.C. Cir. 1995) ("The legal definition of *status quo ante* [is] . . . the last uncontested status which preceded the pending controversy." (quotations marks omitted)). The status quo would be a Chemical Disaster Rule that went into effect on March 14, 2017, with the ongoing compliance efforts by regulated parties to meet the compliance deadlines set in that rule.

EPA cannot have it both ways. Either there would be "substantial compliance and implementation" efforts by regulated parties absent the Delay Rule, or the rule has no effect on compliance requirements and does nothing more than maintain the status quo with "speculative but likely minimal . . . foregone benefits." Delay Rule, 82 Fed. Reg. at 27,139. Therefore, EPA has failed to rationally explain its departure from its previous conclusions about appropriate compliance periods that it reached after specifically soliciting and considering comments on the subject. *See NRDC, Inc. v. EPA*, 683 F.2d 752, 760–61 (3d Cir. 1982) ("By postponing the effective date of the amendments, EPA reversed its course of action up to the postponement. That reversal itself constitutes a danger signal.").

Third, contrary to EPA's statement in the Delay Rule that "the timing" of a "finding by the Bureau of Alcohol, Tobacco, and Firearms . . . that the West Fertilizer explosion was caused by arson" rather than an accident supports delay, that is not a reasoned basis for delaying the *entire* Chemical Disaster Rule. *See* 82 Fed. Reg. at 27,137–38. EPA cited many more incidents than just the West, Texas disaster throughout the development and promulgation of the rule. *See, e.g.*, Chemical Disaster Rule NPRM, 79 Fed. Reg. at 44,608 ("An April 8, 2011 explosion at [a plant in] Hawaii killed five workers who were disposing of fireworks."); *id.* at 44,616 ("In October

2007, five contractor workers were killed [at a plant] in Georgetown, Colorado, when a fire occurred inside a tunnel . . . . The CSB found that inadequate contractor safety practices and oversight contributed to the accident."); *id.* at 44,618 (citing the "CSB's findings concerning a lack of rigorous compliance audits in the 2005 BP Texas City Refinery explosion" that killed fifteen plant workers); Chemical Disaster Rule, 82 Fed. Reg. at 4599 (citing, in a section titled "Events Leading to This Action," "[i]n addition to the tragedy . . . in West, Texas," "an explosion and fire at the Tesoro Refinery in Anacortes, Washington," a fire "at the Chevron Refinery in Richmond, California," and "a fire and explosion at Williams Olefins in Geismar, Louisiana."). Even were the court to agree for purposes of argument that the cause of the West, Texas disaster being arson is relevant to some of the accident-prevention provisions of the Chemical Disaster Rule, it is irrelevant to the emergency-response and information-sharing provisions, including those that have indisputably been delayed from the original March 14, 2018 effective date. Given that twelve of the fifteen fatalities in the West, Texas disaster were local volunteer firefighters and other first responders, this would be a fairly weak explanation for delaying provisions that EPA previously determined would help keep first responders safe and informed about emergency-response planning.

Because EPA has not engaged in reasoned decisionmaking, its promulgation of the Delay Rule is arbitrary and capricious.

* * *

Accordingly, the court grants the petitions for review and vacates the Delay Rule.

Appendix 2

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

BARBARA D. UNDERWOOD
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

Via Electronic Mail (belke.jim@epa.gov)

August 21, 2018

James Belke, U.S. EPA
Office of Land and Emergency Management
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Re: EPA-HQ-OEM-2015-0725

Dear Mr. Belke:

On Friday August 17, 2018, the D.C. Circuit Court of Appeals issued a decision vacating EPA's rule delaying the effective date of the 2017 Accident Prevention Amendments (*Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date*, 82 Fed. Reg. 27,133 (June 14, 2017)). *See Air Alliance Houston v. EPA*, No. 17-1155 (D.C. Cir. Aug. 17, 2018). This decision is of central relevance to EPA's proposed rule rescinding numerous elements of the 2017 Accident Prevention Amendments. For example, EPA estimated the costs and benefits of the proposed rule based on the assumption that the 2017 Accident Prevention Amendments would not go into effect. *See* 83 Fed. Reg. 24,850 at 24,853-55, 24,878-80 (May 30, 2018). EPA also relied on the delay of the 2017 Accident Prevention Amendments in setting compliance dates for the proposed rule. *See id*. at 24,875. Therefore, the States of New York, Illinois, Iowa, Maryland, New Jersey, Rhode Island and the Commonwealth of Massachusetts hereby request that EPA extend the current comment deadline of August 23, 2018 by at least 60 days to enable interested parties to have sufficient time to fully consider the legal and practical impacts of the court's decision on the proposed rule. This period would also allow for the agency to determine whether it is appropriate to revise the proposal, or withdraw it altogether. Thank you for your prompt consideration and attention to this matter.

Respectfully Submitted,

FOR THE STATE OF NEW YORK

/s/ Laura Mirman-Heslin
LAURA MIRMAN-HESLIN
Assistant Attorney General
Environmental Protection Bureau
28 Liberty Street
New York, NY 10005
(212) 416-6091
Laura.Mirman-Heslin@ag.ny.gov

FOR THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
MATTHEW J. DUNN
GERALD T. KARR
JAMES P. GIGNAC
Assistant Attorneys General
Illinois Attorney General's Office
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0660

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Attorney General
CHRISTOPHE COURCHESNE
Assistant Attorney General
Chief, Environmental Protection Div.
MEGAN M. HERZOG
Special Assistant Attorney General
1 Ashburton Place
Boston, MA 02108
(617) 963-2423

FOR THE STATE OF IOWA

TOM MILLER
Attorney General
JACOB LARSON
Assistant Attorney General
Environmental Law Division
Hoover State Office Building
1305 E. Walnut St., 2nd Floor
Des Moines, IA 50319
(515) 281-5341

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL
Attorney General
JUNG KIM
Deputy Attorney General
Division of Law, Environmental Permitting and Counseling
R.J. Hughes Justice Complex
25 Market St., P.O. Box 93
Trenton, NJ 08625
(609) 376-2804

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General
STEVEN M. SULLIVAN
Solicitor General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202
(410) 576-6427

FOR THE STATE OF RHODE ISLAND

PETER F. KILMARTIN
Attorney General
GREGORY S. SCHULTZ
Special Assistant Attorney General
Rhode Island Department
of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

Cc: Jonathan Averback, Averback.Jonathan@epa.gov

Appendix 3

Mirman-Heslin, Laura

From: Belke, Jim <Belke.Jim@epa.gov>
Sent: Tuesday, August 21, 2018 12:17 PM
To: Mirman-Heslin, Laura
Cc: Averback, Jonathan; Doster, Brian; Jennings, Kim; Franklin, Kathy
Subject: RE: Docket No. EPA-HQ-OEM-2015-0725; Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act

Dear Ms. Mirman-Heslin,

Thank you for your email and letter. EPA does not intend to further extend the comment period for the proposed rule beyond the current deadline of August 23rd, 2018.

Sincerely,

Jim Belke

James C. Belke
Chemical Engineer
U.S. Environmental Protection Agency
Office of Emergency Management (5104A)
1200 Pennsylvania Ave., NW
Washington, DC 20460
Email: belke.jim@epa.gov
Ph: (202) 564-8023

From: Mirman-Heslin, Laura [mailto:Laura.Mirman-Heslin@ag.ny.gov]
Sent: Tuesday, August 21, 2018 11:11 AM
To: Belke, Jim <Belke.Jim@epa.gov>
Cc: Averback, Jonathan <Averback.Jonathan@epa.gov>
Subject: Docket No. EPA-HQ-OEM-2015-0725; Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act

Dear Mr. Belke,

Please find attached a letter from New York and several other States concerning the comment deadline for EPA's proposed rule entitled the "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act" as set forth at 83 Fed. Reg. 24,850 (May 30, 2018). Thank you for your prompt attention to this matter.

Sincerely,

Laura Mirman-Heslin
Assistant Attorney General
Environmental Protection Bureau
New York State Office of the Attorney General
28 Liberty Street
New York, New York 10005
Phone: (212) 416-6091