OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

October 31, 2022

Via Federal eRulemaking Portal
The Honorable Michael Regan, Administrator
U.S. Environmental Protection Agency
EPA Docket Center
EPA-HQ-OLEM-2022-0174 Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington DC 20460

Re: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention (Docket ID No. EPA-HQ-OLEM-2022-0174)

Dear Administrator Regan:

The Attorneys General of the States of Oklahoma, Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, South Carolina, Texas, and Utah respectfully submit these comments on the Environmental Protection Agency's proposed rule, "Accidental Release Prevention Requirements: Risk Management Programs under Clean Air Act; Safer Communities by Chemical Accident Prevention." 87 Fed. Reg. 53,556 (Aug. 31, 2022) (the "Proposed Rule"). Our states are committed to keeping our communities safe. We write to you with objections to the Proposed Rule because it would reduce the safety of our citizens and because it would come at the cost of a greater regulatory burden without providing sufficient corresponding benefits.

In previous comments to rulemakings on this subject, many of our states explained concerns about protecting our citizens from risks of intentional releases by bad actors. We warned that Risk Management Program rules must address the dangers of making sensitive information about chemical facilities readily available to the public. *See* Letter from States of Louisiana, et al. to the Honorable Gina McCarthy, Administrator, EPA (May 3, 2016) (incorporated herein); Letter from States of Oklahoma, et al. to The Honorable Gina McCarthy, Administrator, EPA (July 27, 2016) (incorporated herein); Petition for Reconsideration and Stay of the 2017 rule entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act", Final Rule, 82 Fed. Reg. 4594 (Jan. 13, 2017), Docket No. EPA-HQ-OEM-2015-0725 (incorporated herein). The Proposed Rule attempts to revisit the security shortcomings we warned about with respect to the 2017 rule. So here, we once again urge EPA to rethink its course and meaningfully address our concerns, and we attach those documents to adopt them by reference in these comments.

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Moreover, the Proposed Rule imposes burdensome new regulatory requirements that do not lead to improvements in preventing accidental releases or minimizing the consequences any such releases. The changes EPA proposes would potentially apply to numerous facilities ranging from petroleum refineries and large chemical manufacturers to water and wastewater treatment systems; chemical and petroleum wholesalers and terminals; food manufacturers, packing plants, and other cold storage facilities with ammonia refrigeration systems; agricultural chemical distributors; midstream gas plants; and other sources that use Risk Management Plan-regulated substances. On this broad spectrum of facilities, EPA seeks to impose additional Risk Management Plan requirements that incorporate "climate change risks" and impacts into the regulations and expand the application of so-called "environmental justice," neither of which is an appropriate basis for regulating under the statutory provisions at issue in this proposed rule. 87 Fed. Reg. 53556, 53563.

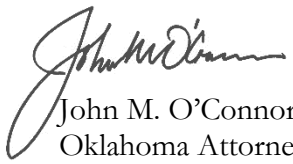
While we appreciate EPA's proposal to limit the applicability of its "safer technology and alternatives analysis," which is the largest annualized cost of the proposed rule, we are still concerned that EPA has offered no evidence that such analysis would have any effect on the number of chemical accidents that occur at the regulated entities. EPA's proposal would increase costs and add onerous reporting requirements on the regulated facilities, but EPA has not made clear how the heightened requirements would lead to improvements in accident prevention and response other than weak speculation that was correctly rejected by EPA in 2019.

Additionally, we note EPA's assertion that while several commenters offered support in the 2019 reconsideration comment period for rescinding information availability requirements on the part of the facility, no commenters provided additional information to support security concerns. With respect, we disagree. There is an inherent security risk in requiring public disclosure of information of sensitive information about chemical facilities without protections sufficient to mitigate that risk. For example, a list of chemicals available at a site or a description of access routes to them has obvious value for nefarious actors. In light of that inherent risk, we urge EPA to weigh the security risks against the benefits of disclosure and to ensure adequate safeguards are in place to protect any sensitive information that is required to be disclosed.

Because EPA seeks particular information on security concerns during this rulemaking, we further encourage EPA to again review the particular objections raised in the attached documents incorporated by reference herein. *See e.g.*, Petition for Reconsideration and Stay, Section III.A. (identifying specific security concerns related to provisions of the rule that: require facilities to provide information automatically without opportunity for appeal or review; contain no screening process for requestors or limitations on use and distribution; conflict with anti-terrorism laws; ignore comments from on the ground responders to terrorism incidents and other disasters; and ignore comments from State AGs, Department of Homeland Security, and other stakeholders).

In short, we share in EPA's goal to promote safety in our communities. That is why we urge you to address these serious concerns before finalizing any rule on this matter.

Sincerely,



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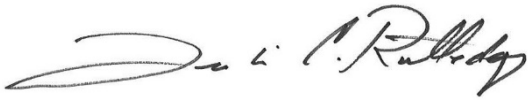
Alabama Attorney General



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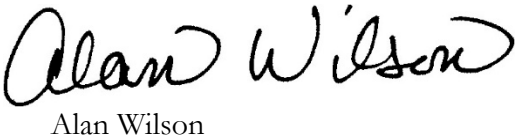

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Jeff Landry
Attorney General

May 3, 2016

The Honorable Gina McCarthy
Administrator, U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Docket: EPA-HQ-OEM- 2015-0725-0001

Comments: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Proposed Rule (RIN 2050-AG82)

Dear Administrator McCarthy:

As the chief legal officers of our states, we write to express our serious concerns about EPA's proposed sweeping changes to the Accidental Release Prevention Requirements and Risk Management Programs under Clean Air Act §112(r).

As officials tasked ultimately with ensuring that appropriate and legal safeguards are in place to protect the citizens of our states, we share the EPA's goals of preventing or minimizing the consequences of accidental chemical releases. However, we believe that many of the proposed regulatory changes to the RMP rules fall outside of EPA's purview, and would in many cases represent a drastic departure from the current regulatory framework, without corresponding benefits to chemical accident prevention.

The concern with these new requirements is not solely that they do not provide any benefit for prevention of accidental release or accident response. The disclosure of some of the information the proposal mandates may actually lead to an increased risk of intentional release by those with nefarious motives. In light of recent and significant terrorist attacks that have resulted in the loss of life, as well as the perpetual cyber-attacks and data breaches on and from our federal government that are leading to disclosure of personal and sensitive information, we are dumfounded as to why you would like to acquire and then make readily available sensitive information pertaining to chemical facilities to the public at large.

The Clean Air Act states clearly that the "objective of the regulations and programs authorized…(shall be) to prevent the accidental release and to minimize the consequences of any such release" of listed substances and other extremely hazardous substances. [1] "Accidental Release" is defined as " an unanticipated emission of a regulated substance…into the ambient air.[2]" As such, any regulatory requirements under the program

[1] 42 USC 7412(r)(1)

[2] 42 USC 7412(r)(2)(A)

must be focused on the objective of preventing an accidental release or minimizing the consequence thereof. Numerous provisions contained in the proposed RMP proposals fall outside of this clear statutory authority.

For example:

- Under the current regulations, when a facility experiences a "catastrophic release," certain regulatory requirements are triggered. A "catastrophic release" is defined as a "major uncontrolled emission, fire or explosion…that presents imminent and substantial endangerment to public health and the environment.[3]" EPA is proposing to change the definition to an uncontrolled emission "that resulted in deaths, injuries, or significant property damage on-site, or known offsite deaths, injuries, evacuations, sheltering in place, property damage, or environmental damage."[4] This proposed change creates an improper intrusion of the EPA into the authority of the Occupational Safety and Health Administration of the Department of Labor to ensure workplace safety. The proposed regulatory requirements that are based on this expanded definition are clearly not authorized under the Clean Air Act.

- There is currently no requirement under the RMP rule for a facility to subject itself to a "third-party" audit conducted by an entity other than the owner or operator of the facility. Despite the fact that a diverse group of industrial sectors are subject to the program, covering processes ranging from chemical to paper to food processing, EPA is proposing a third party audit requirement that takes a "one-size fits all approach." EPA assumes that a third party auditor who has sufficient knowledge of a process will be available to competently perform an audit. But to complicate matters further, EPA is demanding that the auditors have no relationship with the audited entity for three years prior to the audit and three years subsequent. EPA is demanding that a professional engineer be part of the auditing team, that attorney client privilege cannot apply to the audits, and finding and reports be released to the public. It is difficult to fathom how this collection of burdensome, costly, bureaucratic regulatory requirements does anything to enhance accidental chemical release prevention.

- The information sharing provisions give us great pause. We all are cognizant of the potential threat that a chemical facility may face by someone with nefarious motivations (i.e. terrorists). Yet, citizens have a right to know of the risks posed by their neighbors, and the federal Emergency Planning and Community Right To Know Act addresses that right. However, that right needs to be carefully balanced against exploitation of that information. It was precisely that concern which motivated Congress to enact the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act of 1999. Yet, under the proposed RMP changes, EPA is mandating release of and easy access to information such as audit reports, exercise schedules and summaries, and emergency response details, the release of which does nothing to prevent accidents or reduce potential harm, but likely increases the vulnerability of multiple facilities.

Ultimately, we believe that the most influential steps EPA could undertake to improve chemical safety is through increased awareness of existing management and regulatory programs, enhanced training, and enforcement for companies that have not met their regulatory obligations. The record that exists today regarding safety and security at the nations chemical facilities does not indicate that weak or ineffective regulations are the problem. The problems that may exist are primarily a result of a lack of coordination between federal agencies and a failure of the federal government to communicate with the local communities and first responders. Indeed, none of the current proposals are contained in the recommendations of the U.S.

[3] 40 CFR 68.3

[4] 81 FR 13638 at 13647

Chemical Safety Board in their report on the West, Texas incident, which was supposed to be the impetus for these changes.

This unauthorized expansion of the program does not make facilities safer, but it does subject facilities to even more burdensome, duplicative and needless regulation. Industries resources need to be spent on what truly matters, making facilities safe and secure, not responding to unauthorized regulation that is perpetuated for regulation's sake.

On behalf of the undersigned states, we strongly urge the USEPA to modify the regulatory proposal to ensure that all provisions contained therein are in accordance with the explicit mandate granted to the EPA by Congress in the Clean Air Act Amendments of 1990. Executive Order 13563, issued by President Obama in 2011, provides that "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements" This proposal clearly does not meet the goals set by the Administration. These serious flaws must be rectified before any final regulation is adopted.

Jeff Landry
Louisiana Attorney General

Ken Paxton
Texas Attorney General

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

July 27, 2016

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

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

Dear Administrator McCarthy,

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

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

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

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

Sincerely,

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Luther Strange
Alabama Attorney General

Adam Paul Laxalt
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March 14, 2017

VIA FACSIMILE-CERTIFIED MAIL-EMAIL

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The Honorable Barry Breen
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Re: Petition for Reconsideration and Stay

Dear Administrator Pruitt and Acting Assistant Administrator Breen:

Please find attached a Petition for Reconsideration and Stay filed on behalf of the States of Louisiana, Arizona, Arkansas, Florida, Kansas, Texas, Oklahoma, South Carolina, Wisconsin, West Virginia, and the Commonwealth of Kentucky by and through Governor Matthew Bevin, with respect to the rule entitled *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule*, 82 Fed. Reg. 4594 (Jan. 13, 2017), Docket No. EPA-HQ-OEM-2015-0725.

Please contact me at murrille@ag.louisiana.gov or 225-326-6676. Our States would appreciate the opportunity to discuss the concerns with this rule outlined in the attached petition at your earliest convenience.

Sincerely,

Elizabeth Baker Murrill

Attachment

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

PETITION FOR RECONSIDERATION AND STAY

Submitted by

THE STATES OF LOUISIANA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, TEXAS, OKLAHOMA, SOUTH CAROLINA, WISCONSIN, WEST VIRGINIA, AND THE COMMONWEALTH OF KENTUCKY BY AND THROUGH GOVERNOR MATTHEW BEVIN

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ATTORNEY GENERAL OF KANSAS

COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

ALAN WILSON
ATTORNEY GENERAL OF SOUTH CAROLINA

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

PATRICK MORRISEY
ATTORNEY GENERAL OF WEST VIRGINIA

BRAD SCHIMEL
ATTORNEY GENERAL OF WISCONSIN

I. INTRODUCTION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act (CAA or the Act)[1] and the Administrative Procedure Act (APA),[2] the States of Louisiana, Arizona, Arkansas, Florida, Kansas, Texas, Oklahoma, South Carolina, Wisconsin, West Virginia, and the Commonwealth of Kentucky by and through Governor Matthew Bevin (collectively "the States") respectfully petition the U.S. Environmental Protection Agency (EPA or the Agency) to reconsider the nationally applicable final action entitled, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule*, 82 Fed. Reg. 4594 (Jan. 13, 2017), codified at 40 C.F.R. Part 68, Docket No. EPA-HQ-OEM-2015-0725 (RMP Rule or the rule).

The States recognize that EPA has already issued a three-month administrative stay of the effective date of the RMP Rule and has determined to convene proceedings to reconsider the rule, re-opening it for public comment. The States support this decision and further request that EPA issue a rule deferring the RMP Rule's effective date and tolling compliance dates beyond this period, until 18 months from March 21, 2017.[3] Doing so would prevent needless expenditures by states and localities in order to meet their obligations under provisions of the rule that are potentially subject to change.

The States request reconsideration of the rule because it not only creates extensive new requirements that will burden emergency responders as well as state and local governments without commensurate benefit, it requires unprecedented public disclosure of facility information that will threaten local communities and homeland security. The States believe that the existing RMP regulations are adequate to ensure the protection of the public from accidental releases from covered facilities and encourage EPA to carefully reconsider the necessity of the rule.

II. Factual and Regulatory History

EPA finalized extensive new RMP regulations that were published in the *Federal Register* on January 13, 2017,[4] following the issuance of a Proposed Rule in March 2016.[5] In response to the Proposed Rule, EPA received numerous comments from members of the public, government agencies, organizations responsible for emergency response and planning, and regulated entities. These commenters—which included current EPA Administrator Scott Pruitt, then the Attorney General (AG) of Oklahoma, as well as AGs from Louisiana, Kansas, Alabama, Nevada, Arizona, South Carolina, Arkansas, Utah, Florida, Wisconsin, Texas, and Georgia, many of which are also petitioners here—expressed significant concerns with the proposed information disclosure requirements and other aspects of the Proposed Rule. They pointed out the potential threats to homeland security and local communities in the Proposed Rule's provisions that would require security-sensitive information about chemical facilities to be

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[1] 42 U.S.C. § 7607(d)(7)(B).

[2] 5 U.S.C. § 551 *et seq.*

[3] In the alternative, the States request that EPA stay the rule beyond the three-month period pursuant to APA Section 705. 5 U.S.C. § 705.

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

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

publicly disclosed without providing for any screening of requesters or protections for the information disclosed. They also pointed out the numerous burdens, unjustified by clear safety benefits, that would be imposed by the rule upon regulated facilities, local emergency responders, and state governments. [6]

Nevertheless, EPA finalized the provisions in the Proposed Rule with only limited modifications to address commenters' concerns. In some instances, the provisions of the RMP Rule as finalized increased the risks and burdens to states, local communities, responders, and regulated entities rather than fixing the problems in the Proposed Rule. In recognition of the many problems with the rule, on March 13, 2017 EPA decided to convene proceedings to reconsider the rule and took action to delay its effective date until June 19, 2017.[7]

The States have numerous companies within their respective geographical regions that are engaged in the refining, oil and gas, chemicals, agricultural, and general manufacturing sectors subject to the RMP rule, which cuts a very broad swath. The States participated in EPA's proceedings leading to issuance of the RMP Rule, having filed comments in response to the Proposed Rule.[8] EPA did not conduct any outreach to its state partners following submittal of their comments or transmission of the July 27, 2016 Pruitt Letter to Administrator McCarthy. Therefore, Louisiana and Kansas, on behalf of all the commenting states, took the additional step of requesting a teleconference meeting with the Office of Management and Budget (OMB), which was held on November 29, 2016, to raise concerns regarding the inadequate consideration of increased security risks, the lack of coordination with post-9/11 command structures, the lack of any real explanation or understanding of the impact of the exercise requirements, and the unfunded mandates and costs imposed as a consequence of the RMP Rule.

The States believe that the rule would *not* streamline regulation and would *not* make it more efficient. The States strongly believe and have previously commented that the new RMP Rule is a deeply flawed approach that is detrimental not only to chemical safety but also to the safety of our communities as a whole. The rule changes, developed with a goal of ensuring greater safety, instead create significantly greater risk. The RMP Rule threatens homeland security and local communities by requiring sensitive information about chemical and other facilities to be publicly disclosed without adequate safeguards and without any demonstrable benefits. Eleventh-hour revisions EPA made to the RMP Rule did not address or resolve this major flaw. The rule also imposes upon regulated facilities, local emergency responders, and state governments numerous new regulatory burdens without any identifiable benefits. The States believe these requirements reveal a serious flaw with potentially fatal consequences—a

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[6] *See* Letter from Jeff Landry and Ken Paxton, Attorneys General of Louisiana and Texas, to Hon. Gina McCarthy, Adm'r, EPA (May 3, 2016), EPA Docket No. EPA-HQ-OEM-2015-0725-0433, *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0433 ("Landry and Paxton Letter"); Letter from Scott Pruitt, Attorney General, State of Oklahoma, *et al.* to Gina McCarthy, Adm'r, EPA (July 27, 2016), EPA Docket No. EPA-HQ-OEM-2015-0725-0624, *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0624 ("Pruitt Letter") (Attached).

[7] *See* EPA, *Further Delay of Effective Date for the Final Rule Entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act" Published by the Environmental Protection Agency on January 13, 2017; Final rule; Delay of Effective Date* (pre-publication version issued Mar. 13, 2017).

[8] *See id.*

top-down approach to incident and emergency response by drafters of the Rule who lack real experience in incident response that could have a cost in loss of life and property.

The States appreciate EPA's recent decision to reconsider the RMP Rule, and we urge the Agency to repeal or significantly revise the rule on reconsideration.

III. Detailed Explanation of Reconsideration Request

A. The Information Disclosure Provisions in the RMP Rule Threaten Homeland Security by Making Covered Facilities Less Safe.

The RMP Rule requires facilities to provide to local emergency planning and response organizations "any . . . information" such organizations deem "relevant" to local emergency response planning.[9] It also requires facilities to provide specific types of information to the public upon request (within 45 days of receiving the request) and to provide ongoing notification of availability of facility information on company websites, social medial platforms, or through some other publicly accessible means.[10] Further, the rule requires all facilities to hold a public meeting for the local community within 90 days of an RMP reportable accident.[11]

These provisions favor public disclosure of facility information in all circumstances, without common-sense protections for sensitive security information that could be used to harm facilities and their surrounding communities if the information falls into the wrong hands. The consequences of such an event could be quite serious and wide reaching, as many of these facilities are near or inside large population centers, government facilities, ports, schools, and water supplies, to name only a few.[12] On reconsideration, EPA should repeal or substantially modify these provisions because they present substantial threats to homeland security and critical infrastructure, and because they:

- Require facilities to provide the requested information automatically without any mechanisms for a facility to appeal or otherwise seek review of requests on issues such as whether information requested is truly "relevant" to local emergency response planning;

- Contain no screening process for requesters, nor limitations on the use and/or distribution of the information (such as a reading room or read-only format);

- Potentially conflict with the express or implicit restrictions contained in other anti-terrorism laws;

- Take a dismissive, top-down approach to rulemaking by ignoring comments from people who are on the ground responding to terrorist incidents and other disasters,

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[9] 40 C.F.R. § 68.93(b).
[10] 40 C.F.R. §§ 68.210(b); (c).
[11] 40 C.F.R. § 68.210(e).
[12] An attack on these facilities also exposes first responders to secondary attack in responding to the event.

constituting a dangerous approach to issues with national security implications and potentially fatal consequences;

- Ignore the numerous comments submitted by State AGs, the Department of Homeland Security (DHS) and other stakeholders regarding the inherent public safety and security risks in requiring unfettered public disclosure of sensitive facility information;[13] and

- Expand upon the provisions in the Proposed Rule (increasing the safety and security risks of the proposal in some instances), depriving stakeholders of the ability to comment on the significant implications of the rule as finalized.

B. The Coordination and Emergency Response Provisions in the Rule Constitute Unfunded Mandates that Impose Unjustified Burdens on State and Local Emergency Response and Planning Organizations.

The RMP Rule contains extensive new emergency response provisions that require facilities to consult and coordinate with local emergency response and planning organizations, encouraging their participation in facility emergency exercises and obliging facility owners to provide them with voluminous facility information. Numerous commenters on the Proposed Rule pointed to the significant burdens that such provisions would place on state and local emergency response personnel.[14] Without any provision for funding support of state and local emergency response entities, the RMP Rule imposes unfunded mandates and drains the resources of the entities that need them most—those charged with community emergency response.

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[13] *See, e.g.,* EPA, Interagency Communications Regarding EO 12866 Interagency Review of Risk Management Modernization, RIN 2050-AG8, *Summary of Interagency Working Group Comments on Draft Language Under EO12866/13563 Interagency Review*, at 8-9 (Jan. 13, 2016), EPA Docket No. EPA-HQ-OEM-2015-0725-0007 (Interagency Review of Risk Management Modernization), *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0007 (federal agency that the information sharing mandated by the provisions in the Proposed Rule "is essentially providing a listing of vulnerabilities" that "could be used by a terrorist to either target a certain facility or the vulnerabilities could be exploited to increase the magnitude of an attack"); *see also* Landry and Paxton Letter, *supra* note 6 (raising "serious concerns" with several aspects of EPA's proposal, including information dissemination, stating the "information sharing provisions give us great pause" and noting that release of the information mandated by the rule would do "nothing to prevent accidents or reduce potential harm, but likely increases the vulnerability of multiple facilities"); Pruitt Letter, *supra* note 6 (noting further security concerns with the rule and expressing their support of the Louisiana and Texas AG comments). None of these considerations were adequately addressed by the EPA, and in fact were summarily dismissed, raising serious questions as to the actual motivations behind the rule. It is difficult to imagine a reason that could justify EPA in overriding the Congressional concerns about terrorism threats and replacing that judgment with its own.

[14] The National Association of SARA Title III Program Officials (NASTTPO), for example, commented that the facility exercise requirements would "place[]a substantial burden on [Local Emergency Planning Committees (LEPCs)] and response agencies, especially as these organizations are routinely composed of volunteers." Comments of the NASTTPO on the *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule*, 81 Fed. Reg. 13,638 (Mar. 14, 2016), dated May 12, 2016, Docket No. EPA-HQ-OEM-2015-0725-0594, at 8, *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0510.

Various State and other entities raised these concerns during the comment period,[15] and they largely went unaddressed by EPA. These concerns remain and should be addressed by EPA on reconsideration, specifically:

- EPA has acknowledged that the new coordination and emergency response exercise requirements will result in significant cost and personnel burdens,[16] including on response organizations, but has not addressed sources of funding or even quantifiable benefits from the rule in order to offset such costs;

- In the rule's provisions on emergency response coordination, EPA has failed to take into account the overlapping requirements of Emergency Planning and Community Right to Know Act (EPCRA) and other laws touching upon emergency response, as well as state and local organizations' current emergency preparation and management plans and procedures;[17]

- EPA has failed to properly assess the *actual demands and additional staffing* that compliance with these requirements will impose upon already-overtaxed, under-funded state and local response and planning organizations, reflecting a rulemaking process completely bereft of a *realistic* assessment and acknowledgement of the *costs* of compliance (including that the rule's requirements would be ongoing, even while states may be in an active response mode during a declared disaster);

- EPA has made an unrealistic binary distinction between "responding" and "non-responding" sources, ignoring the reality in most communities, there is a "hybrid" model for response, in which some response functions are handled by internal resources and others by community responders; and

- EPA has made facility exercise and coordination requirements too rigid, creating substantial burdens on state and local response organizations without showing commensurate benefits.

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[15] *See, e.g.,* Comments of Scott A. Thompson, Oklahoma Dep't of Envtl. Quality (DEQ) on the *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule*, 81 Fed. Reg. 13,638 (Mar. 14, 2016), dated May 13, 2016, Docket No. EPA-HQ-OEM-2015-0725-0594, at 1, *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0490 (noting that while the Oklahoma DEQ was in favor of increasing coordination between RMP facilities and local responders, "DEQ feels strongly that LEPCs already have a significant burden placed upon them with no federal funding included").

[16] *See* 82 Fed. Reg. at 4661 ("EPA notes that its own regulatory impact analysis for the NPRM projected the emergency response exercise provisions to be the costliest provision of the NPRM."); *see also* EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Regulatory Impact Analysis* (RIA), at 9, Ex. B (Dec. 16, 2016), EPA Docket No. EPA-HQ-OEM-2015-0725-0734, *available at* https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0734, (showing total undiscounted exercise costs of $247.4 million, the second most expensive provision in the rule).

[17] The States advised OMB and EPA that LEPCs are not integrated into a post-9/11 command structure and have little to no independent resources. The assumption that LEPCs operate similarly across the country would be a deeply flawed assumption. EPA demonstrated a deep lack of any practical knowledge or understanding of LEPCs actual functions and resources.

In light of these concerns, the States submit that on reconsideration EPA should consider fully the extent of the burdens imposed on state and local emergency response resources and engage in a more meaningful exchange with States regarding the implementation of existing rules.

C. The RMP Rule Is Unsupported by Accurate Costs and Benefits Estimates, as Required Under Applicable Laws.

Contrary to its obligations under Executive Order 13563 and other directives applicable to the rulemaking process, EPA has not supported its rulemaking efforts in this instance by an accurate and thorough estimate of the costs and benefits of the RMP Rule. The States request that EPA undertake upon reconsideration a careful review of the rule's implementation costs, in particular the collective burdens on States and localities. Moreover, EPA must recognize that many communities have differing levels of resource availability and experienced personnel, which will result in different cost impacts at the State level. EPA *grossly* understated costs and *completely* ignored significantly increased burdens on Local Emergency Planning Committees (LEPCs) (which have no resources) and State and local first responders, which alone should have warranted OMB disapproval of the rule. Further, EPA's analysis reflects a failure to fulfill its obligations under the Small Business Regulatory Enforcement Fairness Act (SBREFA), in neglecting to fully account for the impacts of the rule on small businesses.

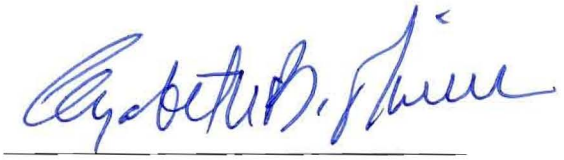
Further, EPA does not *meaningfully* estimate benefits, instead making unsupported conclusory statements dismissive of State concerns. The States request that EPA re-visit its cost-benefit analysis, including consideration of any potential drawbacks of the rule (*i.e.* potential adverse consequences associated with the information disclosure provisions and obligations imposed upon state and local responders).

D. EPA Should Carefully Reconsider and Substantially Revise or Repeal the RMP Rule Revisions.

As EPA has already acknowledged, the criteria for convening a reconsideration proceeding are met here. First, several of the issues noted above were finalized in the RMP Rule without being offered for comment in the Proposed Rule. Second, with respect to those provisions that were available for comment, the RMP Rule as finalized reflects that EPA dismissed without explanation or overlooked entirely significant and substantial comments offered by the States and other stakeholders. Because the provisions at issue are of central relevance to this rulemaking, reconsideration and rescission is warranted.

IV. Conclusion

The States appreciate EPA's decision to stay the rule for three months and to convene a reconsideration proceeding to address the issues outlined above. The States also request that you expeditiously complete a rule that delays the effectiveness and the compliance dates in the rule beyond the three-month stay issued on March 13, 2017. This will allow for the completion of the reconsideration process while the States' petition for judicial review is pending. The States look forward to meeting to discuss potential resolution of the concerns with the final rule stated above.



Elizabeth Baker Murrill

CERTIFICATE OF SERVICE

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

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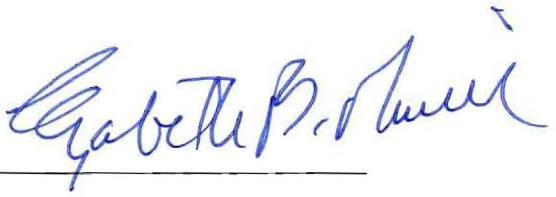

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