

**Joint Comments to the U.S. Environmental Protection Agency  
on the *RMP Safer Communities by Chemical Accident Prevention* Proposed Rule**

Docket ID No. EPA-HQ-OLEM-2022-0174

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These comments address EPA's proposed rule, *RMP Safer Communities by Chemical Accident Prevention* (87 FR 53556) and are submitted jointly by these nine organizations:

**International Brotherhood of Teamsters (IBT)** represents 1.4 million members.

**International Chemical Workers Union Council (ICWUC)** represents 15,000 members.

**United Food and Commercial Workers International Union (UFCW)** represents 1.3 million members.

**Utility Workers Union of America (UWUA)** represents 50,000 members.

The labor unions listed above represent workers employed at facilities in one or more sectors that are regulated by the Risk Management Program (RMP) that manufacture, use, and/or store extremely hazardous chemicals, including: chemical manufacturing and wholesalers; food and beverage manufacturing; agricultural chemical distributors and wholesalers; water and wastewater treatment; electric utilities; oil refining and petroleum wholesalers.

**National Education Association (NEA)** represents 3 million members. NEA represents educators and other school staff in 14,000 communities across the United States.

**American Federation of Teachers (AFT)** represents 1.7 million members. AFT represents teachers, other school staff, and nurses and health professionals in over 3,000 local affiliates.

The members of all the unions listed above and their families often live in areas near facilities that manufacture, use, and/or store extremely hazardous chemicals, including minority and low-income communities disproportionately harmed by chemical releases.

**American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)** is a federation of 58 national unions, representing 12.5 million working union members across industries.

**National Council for Occupational Safety and Health (National COSH)** is a federation of 26 local and state coalitions, representing 500,000 workers and labor advocates.

**New Jersey Work Environment Council (NJ WEC)** is an alliance of 70 labor, community, and environmental organizations. NJ WEC coordinated submission of these joint comments to EPA.

We thank EPA leadership and staff for proposing this rule and for their extensive efforts to address many important chemical safety issues.

Overall, we urge EPA to significantly strengthen the proposal's provisions to **prevent** chemical releases.

Below we offer comments on the following parts of the proposed rule:

- 1) Safer Technology Alternatives Analysis (STAA)
- 2) Natural Hazards and Facility Siting
- 3) Root Cause Analysis and Incident Investigations
- 4) Third-Party Compliance Audits
- 5) Participation of Employees and Their Representatives
- 6) Solutions Data from RMP Facilities
- 7) EPA Public Posting of More RMP Information
- 8) Public Access to Information
- 9) Emergency Response

#### **1) Safer Technology Alternatives Analysis (STAA)**

**What EPA Proposes:** (1) Requiring a STAA and assessing practicability of inherently safer technologies and designs considered for (a) RMP-regulated processes in oil refining and chemical manufacturing within one mile of another RMP-regulated facility that also has a similar process, and (b) RMP-regulated hydrofluoric acid alkylation processes used in oil refineries. (2) Requiring a justification in the risk management plan when STAA recommendations are not adopted.

**Our Comments:** A central purpose of the RMP program is to *prevent* harm from *all* RMP-covered facilities. EPA's RMP responsibilities are to protect communities, workers, and emergency responders from catastrophic chemical releases, including at sites that have not yet had reportable incidents or sites that estimate that no residential population would be harmed after a release.

There are three problems with the proposal's STAA requirements:

1. The small percentage of RMP-regulated facilities covered by STAA;
2. Inadequately addressing environmental justice inequities; and
3. Not requiring implementation of practicable safety measures identified by STAA.

**Scope: EPA should require *all* RMP-regulated facilities to conduct STAA.**

The current proposal requires STAA only in processes in oil refining and chemical manufacturing located within one mile of another RMP-regulated facility that also has a similar process, as well as all oil refineries using hydrofluoric acid (HF) in an alkylation unit.

Thus, EPA's proposal requires STAA at approximately 590 of 11,740 RMP facilities – *less than 5% of facilities covered by RMP*.<sup>1</sup>

The main reason EPA uses to justify this severely limited scope is the higher incident frequency of co-located facilities. But especially for the type of low frequency, but high impact events that RMP targets, past frequency of accidents cannot reliably predict rare catastrophic releases, whether unintentional or intentional (e.g., sabotage).<sup>2</sup>

The limited scope of the STAA provision makes this a far weaker proposal than what the Obama-Biden Administration adopted in 2017 (since revoked by the Trump Administration), which covered RMP-regulated oil refiners, chemical plants, and pulp and paper mills *regardless of location*.

Since 2008, on the other hand, New Jersey has required *all* facilities covered by its Toxic Catastrophe Prevention Program (TCPA), which implements RMP in the state, regardless of Program Level or proximity, to conduct Inherently Safer Technology (IST) reviews, similar to the STAA type reviews proposed by EPA.<sup>3</sup>

In a July 2022 analysis,<sup>4</sup> the NJ Department of Environmental Protection concluded that these IST reviews contributed to chemical safety. From 2016 to mid-2021:

- Approximately 40% of the 91 facilities covered by the state's program stated that they had implemented or scheduled to implement one or more safety measures after conducting their most recent review. (In addition to measures adopted before 2016).

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<sup>1</sup> Even if EPA applies the STAA requirement to all RMP petroleum refineries (NAICS 324) and chemical manufacturers (NAICS 325) for a total of 1,800 facilities, some 85% of all RMP facilities would remain exempt. Calculations based on U.S. Environmental Protection Agency, Technical Background Document for Notice of Proposed Rulemaking: Risk Management Programs Under the Clean Air Act, Section 112(r)(7) Safer Communities by Chemical Accident Prevention, Section 5 and Appendix A, April 9, 2022.

<sup>2</sup> For example, assume that an event that kills 1,000 people has the unacceptably high probability of 1 in 1,000 per year under current RMP regulations and that stricter RMP regulations would be required to reduce this risk. In a period of two decades, there would be a 98% probability that such an event would *not* have occurred. At the same time, there would be an egregiously high 2% probability (1 in 50) that an event killing 1,000 people would occur in the next two decades. Hence looking at the actual data from the last two decades, which would likely reflect that no such severely adverse event had occurred, would not provide adequate information as to whether the risks faced over the next two decades were acceptably controlled. Analysis by Dr. Darius Sivin, PhD., United Auto Workers International Union, Comments on Proposed Rule: 40 CFR Part 68, EPA-HQ-OLEM-2022-0174, October 28, 2022.

<sup>3</sup> New Jersey Department of Environmental Protection, Toxic Catastrophe Prevention Act rules, N.J.A.C. 7:31, February 1, 2016, page 38.

[https://www.nj.gov/dep/rules/njac7\\_31.html](https://www.nj.gov/dep/rules/njac7_31.html)

<sup>4</sup> New Jersey Department of Environmental Protection,

Inherently Safer Technology (IST) Implementation Summary/Update, July 26, 2022.

[https://www.nj.gov/dep/enforcement/tcpa/downloads/IST\\_SUMWEB.pdf](https://www.nj.gov/dep/enforcement/tcpa/downloads/IST_SUMWEB.pdf) Also see

[https://www.nj.gov/dep/enforcement/tcpa/downloads/ist\\_summary\\_2022\\_update\\_7-26-22.pdf](https://www.nj.gov/dep/enforcement/tcpa/downloads/ist_summary_2022_update_7-26-22.pdf)

- While 70 of the 118 safety measures implemented or scheduled were in chemical production or oil refining, 48 safety measures were implemented or scheduled in other sectors, including ammonia refrigeration, and water/wastewater treatment.

In 2008, when the IST provision was issued, “...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, indeed, that such a deeper look at safety is inherent to their business.”<sup>5</sup> New Jersey industry has accepted their legal obligation to consider new IST safeguards.

Since 2008, there have been no efforts to weaken TCPA through legislative or regulatory changes. Management compliance with the TCPA rules approaches 100%.

EPA should require STAA from all high hazard facilities, which can include not only petroleum, chemical, and pulp/paper manufacturing, but also smelting operations, bulk storage terminals, chemical distributors, bleach wholesalers, water and wastewater treatment plants, power plants, hazardous waste treatment, and other sectors.

#### Environmental Justice: STAA language should better address environmental justice inequities

Executive Order 12898 requires Federal agencies to identify and address, “...disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States”.

By definition, *all* RMP facilities use or store extremely hazardous substances in quantities that can pose severe risks to workers, neighbors, and emergency responders. If they did not, these sites would not be regulated by RMP.

By requiring only a narrow subset of high hazard facilities to conduct STAAs, however, the current proposal fails to address environmental justice (EJ) disparities around many types of RMP facilities. Disparities in terms of housing value, household income, race and ethnicity, education levels, and poverty are consistently found near many high-hazard facilities, not just those 5% of facilities where EPA plans to require an STAA.<sup>6</sup>

By denying the benefits of STAAs and opportunities for fair treatment in the *prevention* of inherent hazards at 95% of RMP facilities that are not co-located within one mile of other similar sites, this proposal fails to protect disproportionately affected persons living near most RMP sites.

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<sup>5</sup>New Jersey Department of Environmental Protection, letter to U.S. Environmental Protection Agency, December 17, 2019. <https://www.regulations.gov/comment/EPA-HQ-OLEM-2021-0312-0039>

<sup>6</sup> Environmental Justice and Health Alliance, *Who's in Danger; Race, Poverty, and Chemical Disasters*, Environmental Justice and Health Alliance, 2014. <https://comingcleaninc.org/assets/media/images/Reports/Who%27s%20in%20Danger%20Report%20FINAL.pdf>

Further, less than 9% of the workers employed at RMP sites would be protected from a chemical release by the proposed STAA requirements.<sup>7</sup>

STAA Implementation: EPA should require all RMP facilities to adopt identified safety measures identified by STAA, where practicable

We urge EPA to require *all* RMP-regulated facilities to conduct STAA, and, where practicable, adopt identified safety measures.<sup>8</sup>

The STAA analysis as proposed, must be completed just once every five years (or more often if there is an incident or RMP update) and requires only assessment – but not actual adoption – of any safety measures identified in the STAA process. *Given the potential hazards in RMP facilities, requiring adoption of these measures, where practicable, would be reasonable for covered sites.*

We support EPA’s proposal requiring justification in the risk management plan when STAA recommendations are not adopted. The information should be in meaningful detail and posted to EPA’s RMP website.

EPA should also require owners or operators to apply the hierarchy of controls to STAA and development of corrective actions in the following order: inherently safer technology or design; passive safeguards; active safeguards; and procedural safeguards. Owners or operators should also document implementation dates for corrective actions.

Moreover, facilities should not be permitted to reject practicable, higher order corrective actions solely on the basis of cost.

STAA definition of inherently safer technology/design (IST/ISD)

Based on experience with IST reporting in New Jersey, EPA should clarify that the term inherently safer technology/design does not include any technology or practice that is not itself integral to, inseparable from, and necessary for the operation of a process. This will disqualify add-on controls, such as warning systems, from being reported as IST/ISD.

## **2) Natural Hazards and Facility Siting**

**What EPA Proposes:** (1) Adding regulatory text to emphasize that natural hazards (including those that result from climate change) and loss of power are among the hazards that must be addressed in Program 2 hazard reviews and Program 3 process hazard analyses. (2) Requiring a

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<sup>7</sup> Ray Curry, President, United Auto Workers International Union, Comments on Proposed Rule: 40 CFR Part 68, EPA–HQ–OLEM–2022–0174; FRL–5766.6–01–OLEM; RIN 2050–AH22, October 28, 2022. Analysis using RMP database by Dr. Darius Sivin, PhD.

<sup>8</sup> The New Jersey Department of Environmental protection also recommends that *all* RMP facilities be covered by a STAA review requirement.

justification in the Risk Management Plan when hazard evaluation recommendations are not adopted.

**Our Comments:** These changes will help prevent releases. However, EPA should also apply these provisions to Program Level 1 facilities and should specify for all facilities that RMP evaluations of external events include human induced events (e.g., sabotage) as well as natural hazards, as found in industry guidance from the Center for Chemical Process Safety.<sup>9</sup>

EPA should also state in the regulatory text that separation distances found in industry facility siting guidance are generally not intended to protect the public, and that owners or operators should carefully determine consequence-based separation distances that protect the public from catastrophic releases.

We support requiring owners or operators to justify decisions not to adopt hazard evaluation recommendations (as well as recommendations that result from updates to recognized and generally accepted good engineering practices, RAGAGEP). The information should be included in meaningful detail in risk management plans and posted to EPA's RMP website.

### **3) Root Cause Analysis and Incident Investigations**

**What EPA Proposes:** Requiring a formal root cause analysis incident investigation after facilities have an RMP-reportable accident.

**Our Comments:** Incident investigation is a critical tool for learning from lagging indicators. Investigations should identify root causes so that the event, or a similar one, won't repeat. Root cause analysis is a best practice in incident investigation and is used by the U.S. Chemical Safety and Hazard Investigation Board. The 2017 Chemical Disaster Rule required all facilities with Program 2 or 3 processes to conduct a root cause analysis as part of an incident investigation of a catastrophic release, or an incident that could have reasonably resulted in a catastrophic release, i.e., a near-miss.

We urge EPA to restore this requirement and apply it to all RMP Program levels and require a root cause analysis after each release and near miss. We also urge that a root cause analysis be required when a process or piece of equipment is decommissioned or destroyed by the incident.

EPA proposes this definition of "root cause": "Root cause means a fundamental, underlying, system-related reason why an incident occurred."

This definition should be revised to state: "Root cause means a fundamental, underlying, system-related reason why an incident occurred **that identifies a correctable failure(s) in**

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<sup>9</sup> Center for Chemical Process Safety, American Institute of Chemical Engineers, Guidelines for Hazard Evaluation Procedures, 3rd Edition, 2008.

**process design and/or management systems.”** (Bold text indicates recommended additional language). This language clarifies that identification of underlying factors is intrinsic to this analysis.

EPA requested comment on the definition of a near-miss. We urge EPA to consider this definition: “A near-miss is an unintended event which could have caused death, serious injury, or significant damage to property or the environment, but did not.”

The event may be an actual release of hazardous materials or energy where the main factor preventing injury or damage is luck. For example, the release of an explosive vapor cloud which dissipates before it finds a source of ignition; or a potential accident prevented by one or more safety systems, such as the diversion of toxic gasses to a scrubber and containment tank; or, a deviation from safe practices which could have resulted in a release, such as improper storage of incompatible chemicals.

EPA should also require a prompt timeline for near-miss investigations. We urge EPA to require initiation of incident investigations and root cause analyses within 24 hours after the incident or near miss; that the owner or operator complete a preliminary report within 90 days and a final report within six months with the possibility of an extension for major catastrophic releases.

Because workers who are at or near the scene of the incident often know what precipitated the incident or near miss, workers and their representatives must be involved in the investigation process and the owner or operator must share all information and documentation with them. EPA should include text requiring this (see our comments on employee participation).

EPA should also require that incident investigation procedures include, at a minimum, a person with expertise in the process involved, a person with expertise in the facility’s root cause analysis method, and a person with expertise in overseeing the incident investigation analysis.

Owners or operators must share investigation root causes, investigation results, recommended findings, and corrective actions with all employees whose work assignments are relevant to the incident findings. The investigation materials and reports must also be shared with employee representatives.

Draft and final incident reports must include all written comments provided to the auditor by the employee representative and must include the owner or operator’s response to the analysis and recommendations.

All final incident investigation reports should be sent to EPA. To promote learning, EPA should post the reports on the agency’s website.

#### 4) Third-Party Compliance Audits

**What EPA Proposes:** (1) Requiring the next scheduled compliance audit be a third-party audit when an RMP-regulated facility experiences: (a) two RMP-reportable accidents within five years, or (b) one RMP-reportable accident within five years by a facility with a Program 3 process classified under NAICS code 324 (oil refineries) or 325 (chemical sector) within one mile of another RMP-regulated facility that also has a similar process. (2) Requiring a justification in the Risk Management Plan when third-party compliance audit recommendations are not adopted.

**Our Comments:** We support the inclusion of third-party compliance audits in the rule and believe this provision should be strengthened. Third party audits are a valuable tool that EPA should be able to use upon a finding of significant non-compliance at *any* RMP facility, regardless of program level or accident history. EPA shouldn't wait for multiple disasters to occur before third-party audits are triggered. Third party compliance audits should be implemented as part of a chemical disaster prevention strategy to prevent incidents from occurring in the first place, rather than a secondary prevention strategy to prevent an incident from reoccurring.

We urge EPA to institute a 30-day timeframe for an owner or operator to review the draft report and develop a written response that includes a schedule for addressing deficiencies, and that all deficiencies be corrected promptly, absent a written extension from EPA.

Third party compliance audits are most valuable when they are available for review by the public. EPA should require third-party audits as a primary prevention strategy and make the results publicly available through posting them on the RMP website. EPA should ensure that reporting on the justification for declined audit recommendations is sufficient to describe and convey the information in meaningful detail.

Selection of third-party auditors should be mutually approved by the owner or operator *and* the employee representative, if there is one for the facility. Draft and final third-party audit reports must include all written comments provided to the auditor by the employee representative. EPA should allow employees and their representatives to be involved in all stages of the audit, including the opening conference, on-site investigation, interviews, closing conference, review of the audit report, and development of the schedule for addressing deficiencies.

#### 5) Participation of Employees and Their Representatives

**What EPA Proposes:** (1) Requiring, in Program 3 facilities, employee participation in resolving process hazard analyses, compliance audit and incident investigation recommendations and



findings. (2) Requiring, in Program 3 facilities, adoption of work refusal and stop work procedures. (3) Requiring, in Program 2 and Program 3 facilities, employee participation, plans to include opportunities for employees to anonymously report RMP-reportable accidents or other related RMP non-compliance issues.

**Our Comments:** EPA requested comment on the Agency’s proposed approach to employee participation.

We support the agency’s analysis, citing the industry-supported Center for Chemical Process Safety (CCPS) that:

“Employees directly involved in operating and maintaining a process are most exposed to its hazards. These same employees are typically the most knowledgeable about the daily requirements for safely operating the process and maintaining process equipment; they may sometimes be the only source of process-specific knowledge—knowledge that has been gained through their unique experiences. Their direct participation and involvement in ensuring and enhancing the safety of process operations are often essential to protecting their own welfare. Such actions help keep communities safe as well. A long-standing premise of the RMP rule is that actions that promote worker safety as part of a well-designed process safety system generally help protect the public and the environment.”<sup>10</sup>

EPA has also stated that:

“...it has been the Agency’s longstanding position that incidents that primarily or even exclusively impact **on-site** (emphasis added) receptors are potentially relevant to protection of the public and the environment from the risks of an accidental release.”<sup>11</sup>

The *existing* rule includes requirements for facilities with Program 3 processes to encourage participation of employees and their representatives, focusing on the written plan of action, consultation on process safety elements, and employee access to all information required by the rule.<sup>12</sup> The proposed rule builds on these long-standing requirements and we support EPA’s

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<sup>10</sup> Center for Chemical Process Safety, American Institute of Chemical Engineers, Guidelines for Risk Based Process Safety, March 2007, page 124.

<sup>11</sup> The U.S. Environmental Protection Agency also explained in the Response to Comments document for the 1996 RMP rule, that certain on-site accident impacts are relevant because they “may reflect safety practices at the source” and because “accidental releases from covered processes which resulted in deaths, injuries, or significant property damage on-site, involve failures of sufficient magnitude that they have the potential to affect offsite areas.” U.S. Environmental Protection Agency, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Federal Register, January 13, 2017, page 4603.

<sup>12</sup> The employee participation element in the current RMP rule states in full: “§ 68.83 Employee participation.

goal to enhance worker and union participation as an essential means to protect the public from chemical disasters.

#### Simplification and expansion of employee participation provisions

Based on facility self-reporting to EPA's RMP database, there are between 1.135 million and 1.87 million full-time equivalent employees employed at RMP facilities.<sup>13</sup> These workers can help prevent chemical releases and protect the public.

We again emphasize that, by definition, *all* RMP facilities use or store extremely hazardous substances in quantities that can pose severe risks to workers, emergency responders, and the public and all RMP facilities must assess possible "worst case" releases. If they did not have to meet these requirements, these sites would not be regulated by RMP in the first place. Also, the risk of a Program 2 process could be even greater than a Program 3 process because of the regulated substance or quantity that is handled.

Under the proposed text, however, workers at Program 1 and 2 processes would not have additional consultation opportunities, task refusal, or stop work authorities. This includes workers at chemical distributors and wholesalers. It also includes publicly owned water and wastewater facilities that are using chlorine and are not in states with OSHA-approved state plans. Those public facilities are therefore not covered by OSHA's Process Safety Management standard.<sup>14</sup>

**No worker's fundamental rights to protect their safety or the safety of the community should be limited because of facility type or complexity.** Employees and their representatives at all RMP facilities, regardless of the program level of their processes, should have the same equitable and clearly stated rights and authorities to prevent hazards. Providing for employee participation as uniformly as possible across all program levels will also simplify the regulation and employer implementation.

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(a) The owner or operator shall develop a written plan of action regarding the implementation of the employee participation required by this section.

(b) The owner or operator shall consult with employees and their representatives on the conduct and development of process hazards analyses and on the development of the other elements of process safety management in this rule.

(c) The owner or operator shall provide to employees and their representatives access to process hazard analyses and to all other information required to be developed under this rule."

<sup>13</sup> Curry, Citation 7.

<sup>14</sup> U.S. Environmental Protection Agency, Regulatory Impact Analysis, Safer Communities by Chemical Accident Prevention Proposed Rule, April 19, 2022, page 12. <https://www.epa.gov/rmp/risk-management-program-safer-communities-chemical-accident-prevention-proposed-rule#additional-resources>

The rule should apply the proposed Program 3 employee participation provisions across all RMP facilities by requiring the owner or operator to consult and collaborate with employees and their representatives on addressing, correcting, resolving, documenting, and implementing recommendations and findings of hazard reviews, process hazard analyses, compliance audits, third party audits, and incident investigations.

Similarly, EPA's proposed new language for additional authorities, which we support with amendment, should also apply to Programs 1 and 2:

§ 68.83(d) The owner or operator shall provide the following authorities to employees and their representatives, and document and respond, in writing within 30 days of the authority being exercised:

(1) Refuse to perform a task when doing so could reasonably result in a catastrophic release.

(2) Recommend to the operator in charge of a unit that an operation or process be partially or completely shut down, in accordance with procedures established in § 68.69(a), based on the potential for a catastrophic release.

(3) Allow a qualified operator in charge of a unit to partially or completely shut down an operation or process, in accordance with procedures established in § 68.69(a), based on the potential for a catastrophic release.

We urge EPA to clarify that the response within 30 days in § 68.83(d) is to employees and their representatives, and if so, recommend amending the requirement to read “.... in writing promptly after the authority is exercised”. (Please see our comments on reporting to EPA below, under Stop Work Authority.)

Unless EPA addresses this scope of coverage issue, workers and supervisors will find it highly challenging to understand what participation provisions cover the specific processes where they are assigned.

An analysis of RMP's database indicates that many thousands of employees work at each process Program level. Under the proposal:

- At Program 1 processes, employees will continue to have no RMP participation opportunities.<sup>15</sup> *Program 1 includes 660 stationary sources<sup>16</sup> with 30,000 - 178,000 employees.*<sup>17</sup> EPA would deny Program 1 employees all RMP participation opportunities at 300 oil and gas extraction sites; 79 warehouses; 67 manufacturers; 54 chemical plants; 40 non-government owned utility/water facilities; 23 petroleum wholesalers; and 55 other workplaces.<sup>18</sup>
- At Program 2 processes, employees, for the first time, will have *some* RMP participation opportunities. Program 2 employees, however, will not have work refusal or stop work authorities under RMP. *Program 2 includes 3,975 stationary sources<sup>19</sup> with 39,000 - 156,000 employees.*<sup>20</sup> Stationary sources include 2,635 agricultural chemical distributors/wholesalers; 129 non-government owned utility/water facilities; 75 warehouses; 86 chemical wholesalers; and 63 chemical manufacturing plants.<sup>21</sup>
- At Program 3 processes, employees will have a wider range of participation rights. *Program 3 includes 7,105 stationary sources<sup>22</sup> with 930,000-1.76 million employees.*<sup>23</sup>

It also appears that employees working at Program 1 and 2 processes will not have the same authorities as those at Program 3 processes *within the very same facility*. Is it EPA's intent for an operator who walks a short distance from a Program 3 process to a nearby Program 2 process to not have authority to refuse to perform a task that could result in a catastrophic release? Or to lose authority to suggest that an operator shut down an operation based on a catastrophic risk?

Moreover, it is conceivable that an incident at a program level 1 process could trigger a catastrophic failure at a program level 3 process. A worker at a program level 1 process could foresee a catastrophic chain reaction and not have the authority to prevent it. And once that incident began, it could be too late for the workers at the program level 3 process to prevent it.

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<sup>15</sup> *Some* Program 1 facilities are also regulated by OSHA's Process Safety Management Standard (29 CFR 1910.119) and workers would have the limited rights delineated in that standard. <https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.119>

<sup>16</sup> U.S. EPA, Regulatory Impact Analysis, page 22.

<sup>17</sup> Curry, citation 7.

<sup>18</sup> U.S. EPA, Regulatory Impact Analysis, page 23.

<sup>19</sup> U.S. EPA, Regulatory Impact Analysis, page 22.

<sup>20</sup> Curry, citation 7.

<sup>21</sup> U.S. EPA, Regulatory Impact Analysis, page 23.

<sup>22</sup> U.S. EPA, Regulatory Impact Analysis, page 22.

<sup>23</sup> Curry, citation 7.

Clearly, the proposed requirement is both inequitable and needlessly complex. We reiterate that the rule should apply proposed and improved Program 3 employee participation provisions to Programs 1 and 2, as well.

### Stop Work Authority

Stop work authority (SWA) is a “last line of defense” for worker, public, and environmental safety in certain imminently hazardous situations.

The proposed Program 3 employee SWA text provides an excellent framework for development of more specific stop work authority processes at the facility level through engagement with employees and their representatives.<sup>24</sup> However, as discussed earlier, the narrow scope of Program 3 facility coverage is a significant weakness.

We strongly support EPA’s proposed text as follows at § 68.83(d), with these recommended changes below:

We urge EPA, in § 68.83(d) to clarify and possibly remove the 30-day response period or clarify whether this 30-day period applies to documentation or exercise of stop work authority. It is not clear whether the 30-day response period refers to the actual shut-down or just documentation. Stop work authority is most frequently used in imminent danger and emergency situations where rapid response by the owner or operator is essential. Therefore, in that context, the 30-day response period makes no sense. If it refers only to documentation, rather than actual response, the language should be clarified.

Reporting stop work process utilization to EPA can incentivize owners or operators to address and resolve refusal and stop work authority before they are actually utilized by employees and would provide useful information to EPA.

Thus, we propose the following text:

Additionally, If the owner or operator learns that an authority in § 68.83(d) may be used or has been used, “...the owner or operator shall report this to the implementing agency within 30 days of when the owner or operator was made aware of this information.”

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<sup>24</sup> A recent and extensive publication on Stop Work Authority is Steve Sallman and Rick Engler, Bargaining for Stop Work Authority to Prevent Injuries and Save Lives, United Steelworkers Health, Safety, and Environment Department, 2022. It includes an extensive list of background materials on this topic. [https://m.usw.org/get-involved/hsande/resources/publications/StopWorkAuthority\\_July2022.pdf](https://m.usw.org/get-involved/hsande/resources/publications/StopWorkAuthority_July2022.pdf)

## Training and Information

EPA requested comment on “Whether owners and operators should distribute an annual written or electronic notice to employees that employee participation plans and other RMP information is readily accessible upon request and provide training for those plans and how to access the information.”

From our experience training our members about chemical hazards, it is clear that workers are often unaware of the offsite consequence documentation developed by management for their own sites and have limited awareness of the overall RMP rule. Existing RMP training requirements do not address this problem.

Workers who do not understand the RMP process or who are not aware of the documentation and analysis required by RMP are less likely to participate in hazard prevention, frustrating RMP’s purpose. Conversely, with provision of information and training, workers will be better able to participate in hazard prevention.

OSHA recognizes that workers must understand the content of its standards and recent OSHA standards require employees to be trained on the provisions of the standard as well as the addressed hazards. Under OSHA’s Hazard Communication Standard, for example, workers must be informed about “(i) The requirements of this section;” meaning the provisions of the standard.<sup>25</sup>

The RMP rule should state for all Program levels that:

“The owner or operator shall provide employees and their representatives with readily accessible information and effective training about the provisions of this rule before the time of their initial assignment to a process; before a new process begins operation; or before major modifications to a process. Refresher training shall be provided every three years or more often, as necessary. The owner or operator must inform and train each employee in a language which he/she comprehends.”

In addition, training on anti-retaliation should be provided to workers and supervisors (see anti-retaliation section, below).

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<sup>25</sup> Occupational Safety and Health Administration, U.S. Department of Labor, Hazard Communication Standard, (h) Employee information and training. <https://www.osha.gov/hazcom/HCS-Final-RegText>

We urge EPA to further consult with the Occupational Safety and Health Administration concerning adoption of the most effective information and training provisions.

In addition, the annual written or electronic notice to employees that EPA proposes should include the statement that “Owners and operators are prohibited from discharging or in any manner discriminating against employees for exercising their rights under the Clean Air Act or this rule.”

Various laws include notice requirements. For example, the New Jersey Conscientious Employee Protection Act at Section 34:19 requires that:

“An employer shall conspicuously display, and annually distribute to all employees, written or electronic notices of its employees' protections, obligations, rights and procedures under this act, and use other appropriate means to keep its employees so informed. Each notice posted or distributed pursuant to this section shall be in English, Spanish and at the employer's discretion, any other language spoken by the majority of the employer's employees.”

#### Involvement of Workers and Their Representatives

EPA requested comment on “Whether there should be a representative number or percentage of employees and their representatives involved in these recommendations decision teams as well as the development of other process safety elements as outlined in 40 CFR 68.83(b).”

We propose the following specific rule language to address this question, which should apply to all Program levels:

“At stationary sources with an employee representative, the employee representative may designate two members, or more members with the owner or operators’ agreement, to each RMP-related committee, team, and/or other entity established by the owner or operator, including those engaged in hazard reviews, process hazard analysis, safer technology and alternatives analysis, management of change reviews, recommendations decisions, compliance audits, third party audits, incident investigations and root cause analysis, and emergency response planning.”

There should also be a general statement to support collaboration, such as:

“The owner or operator shall collaborate with employees and their representatives to develop, conduct, and periodically evaluate the facility risk management plan, hazard reviews, process hazards analyses, a written plan of action describing how the owner or operator will comply with this rule, and all other requirements of this rule.”

### Anonymous Reporting of Hazards

At § 68.62(b), for Program Level 2 processes, EPA proposes that “The owner or operator shall develop and implement a process to allow employees and their representatives to anonymously report unaddressed hazards that could lead to a catastrophic release, unreported RMP-reportable accidents, or any other non-compliance with 40 CFR part 68.”

At § 68.83(e), for Program Level 3 processes, this language is repeated precisely. EPA does not propose such a provision for Program Level 1 processes.

The proposed text is problematic.

First, the provision is unclear concerning what the reporting “process” is. Is it a reporting mechanism to the owner or operator or to EPA or to both entities? EPA should clarify this.

Second, the provision alone is of limited value since an employee can already report anonymously any of the specified issues to management and/or to an implementing agency, whether or not there is a formal management policy or process for doing so.

Third, the proposed text appears restrictive. For example, it seems that, as written, it could exclude reporting in situations where the employee or employer representative *wants* to be identified as the originator of the report as opposed to remaining anonymous.

However, integrated with the recommended text below, the provision could be valuable for addressing risks.

“The owner or operator shall collaborate with employees and their representatives to develop, implement and evaluate a process for employees and their representatives to report, including anonymously, unaddressed RMP-related hazards to the owner or operator and EPA, including but not limited to those that could lead to a catastrophic release, unreported RMP reportable accidents, or any non-compliance with this rule.”

In addition:

“The owner or operator shall:

- 1) document and maintain reports of all RMP-related safety issues reported by workers and their representatives, including near-miss events;



- 2) respond in writing within seven days indicating their response to the submitted information to the employee and employee representatives submitting the information; and
- 3) disclose all information developed under this rule to implementing agencies and third-party auditors, including during RMP inspections, safety audits, or incident investigations.”

Above, we recommend a response time of seven days. Under the Clean Air Act (and the Occupational Safety and Health Act), an employee has just 30 days to file a complaint of employer retaliation. If there was a 30-day owner or operator response time, the response could also involve retaliation against the employee – and the employee would fail to meet the statutory deadline specified by the Clean Air Act (and OSHA) for filing a complaint.

The text proposed above should also cover Program 1 for the reasons stated earlier.

### Anti-Retaliation

For employees to effectively participate in protecting public safety and the environment, they must be protected from all forms of employer retaliation, including discharge.

The Clean Air Act at 42 U.S.C. 7622 states that discharge or discrimination by employers for any actions to carry out the purposes of the Act is prohibited.

Despite the Act’s intent to prohibit employer retaliation, many employees continue to face discrimination for exercising their legal rights to protect the environment and public safety. In FY2016-FY2021, employees filed 280 whistleblower complaints under the Clean Air Act and five other federal environmental protection statutes.<sup>26</sup>

EPA proposes to expand worker authority to help prevent hazards, including through task refusals, stop work authority, and accident reporting. Yet if employees fear that their own employment could be jeopardized by exercising these authorities, they will be much less likely to use them.

The proposal addresses this by stating that “EPA recognizes that workers may often overlook hazards or areas that they know are non-compliant with standards for fear that it will affect their employment. This may particularly be the case for the stop work and accident reporting provisions. The Agency reminds owners and operators that OSHA enforces whistleblower

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<sup>26</sup> Occupational Safety and Health Administration, U.S. Department of Labor, Whistleblower Docketed Cases Received, FY2016 – FY2021.  
<https://www.osha.gov/sites/default/files/Data-and-Statistics-for-FY16-to-FY21.pdf>

protections provided under the CAA, the Occupational Safety and Health Act, and other Federal laws.”<sup>27</sup>

This mere reminder to employers is profoundly insufficient to discourage employer retaliation. Therefore, as discussed earlier under training and information, EPA’s proposed notice to employees should include this text in the final rule:

“Owners and operators are prohibited from discharging or in any manner discriminating against employees for exercising their rights under the Clean Air Act or this rule.”

In addition, the rule should require the owner or operator to collaborate with employees and their representatives to develop, implement, and periodically update a written program to ensure that there is no retaliation against any employee or employee representative for exercising their rights under the Clean Air Act or this rule. This written program shall address: 1) Management leadership, commitment, and accountability; 2) the system for listening to and resolving employees’ safety concerns; 3) the system for receiving and responding to reports of retaliation; 4) anti-retaliation training for employees and managers; and 5) program oversight.<sup>28</sup>

#### Summary of Recommended Regulatory Text on Employee Participation

To reiterate, all employee participation and anti-retaliation provisions should cover employees in all RMP-regulated facilities.

To make this understandable to employers, employees, and staff of implementing agencies, we urge EPA to adopt, in one section of the final rule, the following text:

A) The owner or operator shall:

- 1) Collaborate with employees and their representatives to develop, conduct, and periodically evaluate the facility risk management plan, hazard reviews, process hazards analyses, a written plan of action describing how the owner or operator will comply with this rule, and all other requirements of this rule.
- 2) Collaborate with employees and their representatives to address, correct, resolve, document, and implement findings and recommendations of hazard reviews, process hazard analyses, management of change reviews, compliance audits, third party audits, and incident investigations.

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<sup>27</sup> For information on federal whistleblower protections under the Clean Air Act and other statutes, see <https://www.whistleblowers.gov/>

<sup>28</sup> OSHA has published guidance for establishing effective anti-retaliation programs. Occupational Safety and Health Administration, U.S. Department of Labor, Recommended Practices for Anti-Retaliation Programs, 2017. <https://www.osha.gov/sites/default/files/publications/OSHA3905.pdf>

- 3) Provide the following authorities to employees and their representatives, and document and respond in writing promptly after the authority is exercised: (1) Refuse to perform a task when doing so could reasonably result in a catastrophic release. (2) Recommend to the operator in charge of a unit that an operation or process be partially or completely shut down, in accordance with procedures established in § 68.69(a), based on the potential for a catastrophic release. (3) Allow a qualified operator in charge of a unit to partially or completely shut down an operation or process, in accordance with procedures established in § 68.69(a), based on the potential for a catastrophic release.
- 4) Collaborate with employees and their representatives to develop, implement and evaluate a process for employees and their representatives to report, including anonymously, unaddressed RMP-related hazards to the owner or operator and EPA including, but not limited to those that could lead to a catastrophic release, unreported RMP reportable accidents, or any non-compliance with this rule.
- 5) Provide employees and their representatives with readily accessible information and effective training about the provisions of this rule before the time of their initial assignment to a process; before a new process begins operation; or before major modifications to a process. Refresher training shall be provided every three years or more often, as necessary. The owner or operator must inform and train each employee in a language which he/she comprehends.
- 6) Distribute annually a written or electronic notice to all employees and their employee representatives specifying that RMP information is readily available for review. The notice shall include the statement that "Owners and operators are prohibited from discharging or in any manner discriminating against employees for exercising their rights under the Clean Air Act or this rule."
- 7) Collaborate with employees and their representatives to develop, implement, and periodically update a written program to ensure that there is no retaliation against any employee or employee representative for exercising their rights under the Clean Air Act or this rule.
- 8) Promptly document and retain reports of all RMP-related safety issues reported by workers and their representatives, including accidents and near-miss events, and use of task refusal and stop work authority. This documentation shall include whether corrective action was taken and, if so, what the corrective action was.
- 9) Respond in writing within seven days to worker(s) and/or their representatives who submit a report of unaddressed hazards, unreported reportable accidents, or any non-

compliance. The response shall indicate action that has been or will be taken in response to the submitted information.

- 10) Provide to employees and their representatives access to all information required to be developed under this rule, regardless of facility program level.
  - 11) Disclose all information developed under this rule to implementing agencies and third-party auditors including during RMP inspections, safety audits, or incident investigations.
  - 12) Respond promptly to employees and their representatives and report to EPA within 30 days of when the owner or operator learned that use of a specific task refusal or stop work authority was anticipated or used.
- B) At stationary sources with an employee representative, the employee representative may designate two members, or more with the owner or operators' agreement, to each RMP-related committee, team, and/or other entity established by the owner or operator, including those engaged in hazard reviews, process hazard analysis, safer technology and alternatives analysis, management of change reviews, recommendations decisions, compliance audits, third party audits, incident investigations and root cause analysis, and emergency response planning.

## **6) Solutions Data from RMP Facilities**

**What EPA Proposes:** EPA proposes to collect information on the successful practices that covered facilities are using to reduce and remove chemical hazards and to make summary information available through an STAA clearinghouse. EPA plans, however, to collect such solutions data only from facilities that will conduct STAAs – proposed at about 5% of active RMP facilities – and from former RMP facilities as they deregister.

**Our Comments:** We support EPA's proposed "technology transfer" provisions for sharing successful hazard reduction practices. However, collecting solutions data from just 5% of RMP facilities leaves a large and unnecessary program data gap for IST/ISD activities at the remaining 95% of RMP facilities. There is a simple, low-cost solution. If EPA declines to require all facilities to conduct STAA, then the other 95% of facilities should all be required to report: 1) whether they have evaluated IST/ISD, and if so, 2) to identify and categorize the major options evaluated, implemented, and planned. Doing so will enable EPA to better assess the impacts of its own activities for promoting prevention of catastrophic releases.

## **7) EPA Posting of More RMP Information**

**What EPA Proposes:** EPA contends that improved access to non-restricted RMP information will help prevent and reduce the number and severity of chemical accidents. EPA plans to post additional RMP information to its publicly accessible website, citing that this may be required under the Freedom of Information Act (FOIA). EPA acknowledges that while the information is publicly available under FOIA by request, there are barriers to obtaining and using it.

**Our Comments:** We support making as much RMP information as feasible readily accessible to the public in an electronic format, as intended by Congress. Doing so through a national, multi-lingual database will help communities, workers, employers and others prepare for and prevent disasters. However, given that EPA anticipates hundreds of new registrations, de-registrations, revisions, and corrections each year, the agency should update the information at least monthly, rather than annually as proposed.

## **8) Public Access to Information**

**What EPA Proposes:** EPA proposes to allow individuals living within six miles of an RMP facility to obtain certain specified chemical hazard information directly from the facility within 45 days upon request. The specified information includes names of regulated chemicals; Safety Data Sheets; RMP-reportable accident history; whether the facility will respond to releases or rely on local emergency responders; name and phone of local emergency response organizations; procedures for informing the public and emergency responders about accidental releases; and where the public can access community preparedness information such as shelter-in-place and evacuation procedures.

**Our Comments:** First, basic safety and emergency preparedness information should be commonly available to any member of the public who lives, works, commutes, recreates, or goes to school near an RMP facility – including the community and environmental organizations that may assist them, as well as schools and other educational institutions. EPA should abandon any geographic limitation on access to this information.

EPA should shorten any required response time from 45 days to seven days, but also allow facilities to comply by posting the specified information to the owner or operator's public website.

Second, with limited exception, the specified information should be included in the non-restricted portions of RMP data reported to the agency. EPA should post the non-restricted RMP information to the agency's RMP website. This approach will provide a right to know to a

much broader public, including employees. In contrast, EPA's current local access proposal delays residents' access to information that may be urgently needed, discourages neighbors worried about management reprisal (including to relatives employed at a facility), and fragments EPA's RMP information policy.

For the limited specified information that is not included in RMP data, such as Safety Data Sheets (formerly Material Safety Data Sheets), EPA should require the owner or operator to post them to its own website, which employers frequently do already as one way to comply with requirements of OSHA's Hazard Communication standard (1910.1200).

## **9) Emergency Response**

**What EPA Proposes:** As part of EPA's proposed changes to emergency response provisions, the agency proposes to require a 10-year frequency for field exercises unless local responders indicate that frequency is infeasible.

**Our Comments:** A 10-year frequency for field exercises is inadequate to ensure effective emergency response. Within a 10-year period facilities typically change the chemicals they use or store, install new or modify existing processes, and turn over personnel. In addition, within ten years, new buildings (homes, schools, retirement homes, hospitals, stores, and industrial facilities, etc.) may be built within the impact zone.

New Jersey's Toxic Catastrophe Prevention Act rules require facilities to perform at least one *annual* full-scale emergency response (ER) exercise in which the ER team and ER containment, mitigation, and monitoring equipment are deployed at a strength appropriate to demonstrate the adequacy and implementation of the ER plan.<sup>29</sup> EPA should adopt such a similar requirement.<sup>30</sup>

We again thank EPA for considering our comments.

### **Address questions or responses to:**

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<sup>29</sup> New Jersey Department of Environmental Protection, Toxic Catastrophe Prevention Act Program, N.J.A.C. 7:31, February 1, 2016, page 41. [https://www.nj.gov/dep/rules/rules/njac7\\_31.pdf](https://www.nj.gov/dep/rules/rules/njac7_31.pdf)

<sup>30</sup> New Jersey Department of Environmental Protection, Accidental Release Prevention Listening Session Docket ID No. EPA-HQ-OLEM-2021-0312, July 14, 2021, page 2.