HYDRITE CHEMICAL CO.

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U.S. Environmental Protection Agency
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Via email: Free.Laura@epa.gov

Re: Comments for RMP Small Business Advocacy Review

Dear Laura:

On behalf of Hydrite Chemical Co., I am pleased to provide you and other members of the SBREFA Panel with these comments on EPA's soon-to-be-proposed revisions to its Risk Management Program (RMP) rules. We appreciate this opportunity to comment on the potential impact of these revisions and on ways that EPA could minimize their economic impact on Hydrite and other members of the Society of Chemical Manufacturers and Affiliates (SOCMA).

At the outset, I would like to thank you (and EPA) for the efficient and responsive way that you have administered this small business advocacy review, and for the completeness of the information that you have shared with us. It has informed these comments, and hopefully will help EPA avoid imposing unnecessary burdens on Hydrite and other small businesses.

We begin with three overall comments. We then address each of the six proposed revisions. Slide references are to the corrected slides distributed on November 23.

I. Overall Comments

A. Please Enforce the Rules You Have

More than two years ago, SOCMA filed an initial set of comments in response to the listening session that EPA, OSHA and DHS held on E.O. 13650. One of the principal themes of SOCMA's comments was "make the most of existing law." As SOCMA explained then:

> [T]he Working Group's first, baseline task ought to be to determine whether and to what extent those existing authorities are being fully implemented and complied with. Put very simply, there is no point creating new law if people aren't doing what existing authorities require. Creating additional requirements will likely only further diminish such entities' overall compliance rates.[1]

Unfortunately, EPA's explanation of the rationale for many of the proposed revisions suggests that EPA is falling into the trap of proposing new regulatory requirements because people are not complying with existing ones:

- *Third party auditing:* Slide 89 says that "[t]he CSB recommended that Citgo complete a third-party audit of all Citgo HF alkylation unit operations after finding that Citgo had never conducted a safety audit of hydrofluoric acid (HF) alkylation operations at either of its U.S. refineries equipped with HF alkylation units in accordance with industry recommended practices."

- *Incident investigation:* During the conference call on November 19, EPA's Jim Belke explained that the fundamental problem with the existing RMP requirement to investigate incidents is that "people aren't doing them."

- *Local coordination:* Slide 30 describes how "States and locals have indicated that some RMP facilities have not adequately coordinated with Local Emergency Planning Committees (LEPCs) and local emergency responders," and "CSB accident investigations have identified poor coordination between RMP facilities and local responders."

- *Information sharing:* Slide 39 says "LEPCs, first responders, and members of the public have indicated that . . . [c]hemical facility information and data-sharing efforts, at the local level, needs significant improvement."

In each case, the appropriate – and less burdensome – approach is for EPA to enforce these requirements more actively, not to add to them.

B. Changing the Rules Is Not "Clarifying" Them

The discussion on the 19th also suggested that EPA and the regulated community have broadly divergent understandings of at least two important issues:

- *Scope of incident investigation requirement.* EPA staff confirmed on November 19 that the Agency's intent was to define "catastrophic release" to mean the same thing as an RMP reportable incident. I believe it is fair to say that the

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[1] SOCMA, Comments on Implementation of Executive Order 13650, "Improving Chemical Facility Safety & Security," at 1 (Oct. 17, 2013).

predominant view within the regulated community is that a "catastrophic release" means something worse – since it is a different term, and since "catastrophe" is generally defined to mean a "terrible disaster" or a "momentous tragic event."[2] Again, Mr. Belke said EPA intended to "clarify" facilities' obligations to investigate incidents – but this redefinition would greatly expand the scope of that obligation, not clarify it. A shelter-in-place order would now trigger an investigation, including a root cause analysis.

- *Facility response obligations.* EPA explained its view that, if the local fire department indicates its inability or unwillingness to respond to a fire at an RMP facility, the facility is legally obligated under the RMP rule to have the capability to fight the fire itself (or somehow arrange for some other private capability). With all due respect, I daresay that most, if not all, of the regulated community is not currently operating under that understanding. We also think EPA's explanation of this issue in 1996 supports our view. *See* Part II.D below. Slide 30 is not "clarify[ing] existing RMP coordination requirement[s]" if it is saying this understanding is now wrong.

C. Properly Allocate Costs and Benefits with the PSM Rulemaking

As Slides 68-71 make clear, on-site costs – principally employee deaths and injuries – make up the vast majority of the accident costs that EPA is hoping to reduce by revising the RMP rule. Based on Slide 71, offsite costs represent only 3.5% of total costs. But it was the *PSM rule* that Congress directed to focus on protecting employees from deaths and injuries from chemical process hazards, with RMP oriented toward offsite losses to life, health and the environment. The PSM rule would thus seem to account for the lion's share of chemical process safety costs and benefits. The RMP rule can properly be credited with protecting employees from release hazards to the extent that it reaches more broadly or requires more than the PSM rule. To the extent that RMP overlaps with or adopts PSM, however, the costs avoided by preventing harm to employees should be assigned to the PSM rulemaking. (The costs of compliance should be, also.) Whatever balance they ultimately strike, however, EPA and OSHA must ensure that their regulatory impact analyses do not double-count costs and benefits.[3] The figures shown on Slides 68-71 do not acknowledge PSM's contribution at all, and obviously must be substantially reduced.

II. Comments on Proposed Revisions

A. Third Party Compliance Audits

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[2] *E.g.*, http://www.merriam-webster.com/dictionary/catastrophe.

[3] Congress specifically required EPA to coordinate with OSHA in developing the RMP rule. *See* 42 U.S.C. § 7412(r)(7)(D).

We appreciate that EPA is only proposing this requirement for facilities that have had a reportable accident. That targets them where they could be most beneficial and is vastly less burdensome than any sort of across-the-board requirement.

Still, we question the value of this requirement in any case where EPA is going to do an inspection as a result of the accident. EPA's views on the requirements of the rule are by definition authoritative. One of the EPA staff on the November 19 call said the principal reason to have third party audits of facilities is because they would be comprehensive audits of compliance with 40 C.F.R. §§ 68.1-68.220, whereas EPA inspections are more focused on the reportable release. The caller said that, in his experience, EPA inspections have covered RMP compliance writ large. Our experience has been mixed. We encourage you to consult with OECA on this specific question before continuing to advance a third party audit requirement. At a minimum, we would urge you to provide that the third party audit requirement would not be triggered in any case where EPA does in fact conduct a comprehensive RMP audit following a reportable accident at a facility.

Also, the November 19 discussion and a December 4 call among the SERs confirmed that the proposed independence requirements would very likely discourage *any* businesses from seeking to do these audits. Any that did would probably be unqualified, or become so over time:

- There is a short list of consulting firms that are truly knowledgeable about process safety. Many of our members have already retained such firms within the past three years to conduct PHAs or to help design processes to be safer – and would like to be able to do so again in the next three years, since they already understand our processes and operations. Such firms also typically hire retirees from companies because of such individuals' experience and expertise.
- According to the Agency, there are only about 150 reportable accidents per year. The third party audits being proposed do not present a big business opportunity.
- If any of the circumstances if the first bullet would disqualify a company from doing RMP compliance audits, all or most of the leading companies would likely decline to conduct those audits. And if they did become compliance auditors, they would likely lose their expertise because they would not be doing consulting or hiring retirees who are knowledgeable.
- There may be firms that do nothing but audits, but these firms are likely to be experts in widely applicable standards (e.g. ISO 14001). It would be difficult for them to maintain expertise in chemical process safety.

As was pointed out, auditors need to understand specific industries. Auditors familiar with the petrochemical industry will seek to apply API standards to industrial process refrigeration instead of IIAR standards.

One of the EPA participants on November 19 indicated that the Interior Department's Bureau of Safety and Environmental Enforcement (BSEE) has a requirement for third party audits. BSEE's audit qualification requirements are less strict, however: they

simply require the individual leading the audit team to be unaffiliated with the operation being audited.[4] And this is so even though an accident at the average offshore drilling platform could have more catastrophic consequences than an accident at the average RMP facility.

We strongly disagree with the proposed requirement that the compliance audit team include a licensed PE:

- Based on SOCMA members' experience, the costs shown on Slide 50 are already roughly $10,000-15,000 too low. A PE requirement will greatly increase the cost of audits.
- A PE license is a very general credential. Would the PE need to be licensed in chemical engineering? If not, what other licensure areas would qualify? PEs are often not available in rural areas, and a requirement to be licensed in a particular area would only exacerbate that problem.

EPA should consider more common credentials that are more specifically focused on hazardous materials, such as the Certified Hazardous Materials Manager (CHMM) certification[5] or the Dangerous Goods Safety Advisor (DGSA) qualification.[6]

EPA should clarify that a company would be free to require auditors to submit to the company's security policies, including criminal background checks or evidence of terrorist background screening (e.g., by possession of a TWIC or similar credential).

Slide 20 says that Citgo was an example of "a lack of rigorous compliance audits which failed to identify key safety deficiencies as a contributing factor in several accidents" – but Slide 89 indicates that the problem at Citgo was that they did not audit at all. Again: please enforce existing obligations rather than imposing new ones.

Slides 20 and 91 highlight that SOCMA's ChemStewards and ACC's Responsible Care initiatives require third party auditors – but that is because no government agency enforces them. If such an agency existed, there would be no need for these standards to require third party auditors. With RMP, there is such an agency: EPA.

B. Incident Root Cause Analysis

We appreciate EPA's limitation of this proposal to facilities that have had a release that resulted in, or reasonably could have resulted in, a catastrophic release. Again, this is an appropriate, risk-based application of resources.

We also support defining "near miss" to mean a phrase already used in the RMP rule.

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[4] *See* 30 C.F.R § 250.1920(a).
[5] http://www.ihmm.org/certificants/chmm.
[6] http://www.sqa.org.uk/sqa/1571.html.

As noted above, however, we believe "catastrophic release" should mean something more than an RMP reportable incident. Does EPA really intend for incident investigations and root cause analyses to be triggered by releases from conservation valves or vents, rupture disks or other pressure relief devices? Such a requirement would create an incentive for facilities to set such safety equipment to release only at higher pressures. This could damage their tanks, reactors, etc., and could be inconsistent with the proper RAGAGEP codes for vessels requiring pressure relief. For all these reasons, it would also be unsafe.

We appreciate:

- EPA's clarification that a facility's obligation is to "resolve" the recommendations of an investigation (and to document that resolution), not necessarily to implement them.
- That facilities could use "any recognized [root cause] method or approach."
- That EPA intends to develop guidance to implement its root cause requirement, addressing issues such as (i) what to do if the root cause cannot be determined because the relevant evidence was destroyed or (ii) whether all root causes really have management system solutions.
- That EPA also recognizes the need to develop this guidance contemporaneously with the rule or, at a minimum, to issue it before the effective date of the rule.

C. Safer Alternatives

We appreciate that EPA has not proposed that facilities be required to implement the results of safer alternatives analyses, but only to determine their feasibility. As has been explained many times, EPA is likely never to have the resources or expertise to second-guess these decisions.

We appreciate EPA's focus on CCPS (and the NAS Bayer CropScience report) as sources of expertise, as these institutions have demonstrated the fullest understanding of the issues involved in inherent safety.

We appreciate EPA's confirmation on November 19 that facilities manufacturing chemicals that are, or are ingredients in, government regulated products, could not be expected to conduct safer alternatives analyses for these chemicals. As EPA understands, FDA-regulated pharmaceuticals or pesticides subject to regulation under FIFRA must be manufactured in specified ways.

We are disappointed, however, that EPA seems not to fully understand the quandary of tollers and other contract manufacturers – i.e., the great majority of SOCMA's manufacturing members. In the typical case, a customer comes to the SOCMA member and asks to bid on manufacturing the customer's chemical according to a process that is specified in the contract.

- We understand and agree that, even if you're a contract manufacturer, you still

have to understand the hazards of your process, etc. No argument there — and a contract manufacturer might conclude that what its customer wants it to do is too hazardous.

- But it ignores commercial realities to extend that requirement to say you not only have to understand the hazards of the process you are being contracted to use, you have to assess whether there are inherently safer ways to make the product, and to engage with your customer and potentially try to persuade them to agree to a safer formulation:
    - In such a case, most customers would just go look for another manufacturer.
    - Often customers want a manufacturer to start work in a matter of months. In such circumstances, there may not be enough lead time to allow the sort of analysis that EPA envisions.
    - Many contract manufacturing campaigns are quite short -- a month or so. It would not be cost-effective to manufacture on such a basis if you first had to do a safer alternatives analysis.

The costs of safer alternatives analyses shown on Slide 52 ($35,000 for small facilities; $55,000 for large facilities) are not significantly greater than the costs for third party audits shown on Slide 50. (And, as noted, we believe the latter are $10-15,000 too low.) EPA staff confirmed on the 19th that safer alternatives analyses should take into account life cycle considerations like transportation hazards and waste disposal issues – and we agree they should.) Given that, we think such analyses could easily be 50-100% more expensive – particularly if they become iterative exercises as a manufacturer debates these issues with its customer.

We are also concerned about the prospect for EPA's proposal to increase civil liability risks. Even though EPA would not require a facility to implement an identified safer alternative, courts would be tempted to hold a company liable if there was an accident and that alternative was not implemented.

We are even more concerned about the mysterious statement on Slide 28 about "[s]trengthening PHA requirements to incorporate the full hierarchy of hazard controls . . . ." Congress required EPA to coordinate with OSHA in developing the RMP program,[7] and one of the core ways EPA did that was to allow the PSM prevention program to satisfy the RMP prevention program requirements. It would blow up this coordination for EPA, for the first time, to add new, EPA-only requirements regarding PHAs. The 1996 preamble to the original RMP rule makes EPA's original coordination intent clear:

> The Program 3 prevention program includes the requirements of the OSHA PSM standard, 29 CFR 1910.119 (c) through (m) and (o), with minor wording changes

[7] *See* footnote 3 above.

> to address statutory differences. *This makes it clear that one accident prevention program to protect workers, the general public, and the environment will satisfy both OSHA and EPA.* . . . Commenters were particularly concerned about the phase-in of process hazard analyses (PHAs). *Under the final rule, PHAs conducted for OSHA are considered adequate to meet EPA's requirements.* They will be updated on the OSHA schedule (i.e., by the fifth anniversary of their initial completion). *This approach will eliminate any need for duplicative analyses. Documentation for the PHA developed for OSHA will be sufficient to meet EPA's purposes.*[8]

A few pages later on, the preamble makes these points even more clearly:

> EPA agrees that the Program 3 prevention program requirements should be identical to OSHA's PSM standard to avoid confusion and redundant requirements and to ensure that sources develop one accidental release prevention program that protects workers, the general public, and the environment.[9]

If the EPA imposes PHA requirements beyond those that OSHA requires, small businesses like Hydrite will be particularly burdened by the additional costs.

Finally, we remind EPA of what it said in 1996 in explaining why it was not requiring analysis of safer alternatives:

> EPA has decided not to mandate inherently safer technology analyses. EPA does not believe that a requirement that sources conduct searches or analyses of alternative processing technologies for new or existing processes will produce additional benefits beyond those accruing to the rule already. As many commenters, including those that support such analyses, pointed out, an assessment of inherently safer design alternatives has the most benefit in the development of new processes. Industry generally examines new process alternatives to avoid the addition of more costly administrative or engineering controls to mitigate a design that may be more hazardous in nature. Although some existing processes may be superficially judged to be inherently less safe than other processes, EPA believes these processes can be safely operated through management and control of the hazards without spending resources searching for unavailable or unaffordable new process technologies. Good PHA techniques often reveal opportunities for continuous improvement of existing processes and operations. EPA encourages sources to continue to examine and adopt viable alternative processing technologies, system safeguards, or process modifications to make new and existing processes and operations inherently safer. EPA included questions related to process modifications in the RMP so that sources can

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[8] 61 Fed. Reg. 31672-73 (June 20, 1996) (emphasis added).
[9] *Id.* at 31687.

> demonstrate, and users of the RMP information can observe, progress toward safer processes and operations.[10]

We submit that nothing has changed to compel a different result.

D. Local Coordination

As noted in Part I.B above, the discussion on November 19 raised a serious question about whether EPA is "clarifying" – or changing – the requirements of the RMP rule regarding the responsibilities of non-responding facilities. Very commonly, a fire department will tell such a facility that it will not go inside the fenceline in the event of a fire, but will just control the fire so it won't affect property and people outside the fence. Most if not all of the regulated community have been operating under the view that nonresponding facilities in that circumstance have no further obligation to fight the fire itself (or somehow to arrange for some other private capability). Rather, facilities have interpreted § 68.90(b) to exempt them from the duty to respond further so long as they have complied with its obligations; i.e., they have (i) either notified the SERC and LEPC that they are covered under EPCRA (for toxics) or coordinated with the local fire department (for flammables), and (ii) have mechanisms in place to notify responders when there is a need for a response. Facilities generally have understood that, once they have made those notifications, they would be "included in the community emergency response plan developed under 42 U.S.C. 11003" since that provision *requires* LEPCs to include within such a plan "facilities subject to the requirements of this subchapter that are within the emergency planning district."[11]

We submit that the preamble to the final RMP rule supports this view:

> The final rule also provides relief for sources that are too small to respond to releases with their own employees; these sources will not be required to develop emergency response plans provided that procedures for notifying non-employee emergency responders have been adopted and that appropriate responses to their hazards have been addressed in the community emergency response plan developed under EPCRA (42 U.S.C. 11003) for toxics or coordinated with the local fire department for flammables.[12]

The preamble is even more clear about this issue when it discusses Program 2 requirements:

> EPA recognizes that some sources will only evacuate their employees in the event of a release. For these sources, EPA will not require the development of

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[10] *Id.* at 31699-700.
[11] 42 U.S.C. § 11003(c)(1).
[12] 61 Fed. Reg. 31673.

> emergency response plans, provided that appropriate responses to their hazards have been discussed in the community emergency response plan developed under 42 U.S.C. 11003 for toxics or coordinated with the local fire department for flammables.[13]

If EPA now has a different view, it needs to be clear that it is rewriting the rule to effectuate it. Also, in that case, the costs on Slide 56 are seriously understated. They need to be supplemented to capture the enormous cost of turnout gear, hoses, and in some cases fire trucks. Also, the cost analysis should take into account that such facilities would then be covered by an OSHA standard covering fire brigades.[14] Collectively, these costs could be prohibitive for many small companies.

E. Exercises

Periodic exercises with local responders can be valuable in educating them about our facilities and operations. But EPA should only mandate tabletop exercises. Live exercises require huge amount of planning and are really demanding – for the firefighters as much as for the facilities. That is especially true in the case of volunteer fire departments. By necessity, firefighters work on different schedules, and so any exercise would need to be repeated at least once and potentially multiple times to include all of the potential responders. During such an exercise, firefighters and equipment would be tied up and response to an actual emergency could be delayed. The additional benefit of holding live exercises does not, in our view, justify the vastly greater costs and disruption.

F. Information Sharing

It is misleading for Slide 39 to claim that, as shown on Slide 103, "LEPCs, first responders, and members of the public have indicated that [c]hemical facility information and data-sharing efforts, at the local level, needs significant improvement."

- No LEPCs or first responder organizations are listed on Slide 103.
- Most of the entities listed there are activist organizations (Center for Science and Democracy, the Coalition to Prevent Chemical Disasters, and the United Steel Workers).
- The comments of the Mary Kay O'Connor Process Safety Center at the cited pages (pp. 162 & 165) do not support EPA's contention. Rather, they note the extent to which "LEPCs have information directly from local facilities or EPA under EPCRA." They also note that, "[u]nder RMP, LEPCs can gain additional information," such as hazard assessments, accident prevention activities, past accidents and facility emergency response programs." The comments do not urge

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[13] *Id.* at 31681.

[14] 29 C.F.R. § 1910.156.

> EPA to require additional disclosure from facilities to the public, but call on LEPCs to "utilize the information [available to them] to understand the risk in the communities and involve local facilities, local officials, SERCs, local citizens and EPA to have dialogues. . . ."

The current RMP rules already require an RMP to include "an executive summary that includes a brief description of the following elements:

> (a) The accidental release prevention and emergency response policies at the stationary source;
> (b) The stationary source and regulated substances handled;
> (c) The general accidental release prevention program and chemical-specific prevention steps;
> (d) The five-year accident history;
> (e) The emergency response program; and
> (f) Planned changes to improve safety."[15]

There is no reason for EPA to require facilities to prepare any additional summary information.

A requirement to make compliance audits and investigation reports public will increase the involvement of lawyers and communications professionals in the drafting of such documents. It will discourage facilities from writing such audits in blunt, clear language and will encourage the use of opaque generalities – thus reducing their value in reducing noncompliance. And regardless of how helpful the lawyers are, routine disclosure of compliance audits and accident investigations can only increase the exposure of facilities to civil litigation.

Disclosure of such documents could potentially lead to inadequate or delayed response by firefighters or other emergency personnel, who may limit their response out of concerns triggered by a report of past noncompliance or accident potential. Vital time and resources – and potentially life and limb – could be at risk while a facility tried to persuade responders that the issue had been corrected – or was not really an issue at all.

The list under "What about security?" on Slide 46 omits the Sensitive Security Information (SSI)[16] and Chemical-Terrorism Vulnerability Information (CVI)[17] regimes for information protection. It should include them.

We think a requirement for meetings unconnected with specific events like an incident is wasteful. In our experience, members of the local community will not attend a meeting

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[15] 40 C.F.R. § 68.155.
[16] 49 C.F.R § 15; 49 C.F.R. Part 1520.
[17] 6 C.F.R. § 27.400.

unless it has some specific purpose. When Hydrite held public meetings to comply with Section 4(a) of CSISSFRRA,[18] no one from the public attended any of four meetings that were held at four different locations. Other SOCMA members' experience was similar. Why does the EPA think the public is more interested now?

Finally, we are concerned about how the public will perceive this information. Risk is the product of hazard times likelihood of exposure, but as general matter, our experience is that the public tends to focus on the hazard component and not the (un)likelihood of exposure. SOCMA members like Hydrite do not want to be driven away from locations or products by unrealistic public concerns – and the public does not benefit if it loses the value of useful products on the basis of misplaced fear.

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Thank you once again for including Hydrite Chemical Co. among the small entity representatives invited to comment on EPA's proposed revisions to its Risk Management Program (RMP) rules. If you have any questions about the foregoing, feel free to contact me at 608-839-8105 or Brenda.seggerman@hydrite.com.

Sincerely,

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[18] The Chemical Safety Information, Site Security, and Fuels Regulatory Relief Act, Pub. L. No. 106-40, § 4(a) (1999).