SOCMA
Society of Chemical Manufacturers & Affiliates

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United States Environmental Protection Agency
Office of Land and Emergency Management
1200 Pennsylvania Avenue NW
Washington, DC 20460-0001
Docket No. EPA-HQ-OEM-2015-0725

Via Regulations.gov submission

RE: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act

To whom it may concern:

The Society of Chemical Manufacturers & Affiliates (SOCMA) appreciates the opportunity to submit comments on the U.S. Environmental Protection Agency's proposed revisions to the final Risk Management Program (RMP) Amendments Rule issued on January 13, 2017.[1] As explained below, SOCMA supports the proposed actions in this reconsideration rule.

SOCMA is the only U.S.-based trade association solely dedicated to the specialty and fine chemical industry. Our members play an indispensable role in the global chemical supply chain, providing specialty chemicals to companies in markets ranging from aerospace and electronics to pharmaceuticals and agriculture.

Many manufacturing facilities operated by SOCMA members are subject to the requirements of EPA's Risk Management Program rule. SOCMA members also comply with an extensive regimen of other safety and security regulatory programs including OSHA's Process Safety Management (PSM) rule and Hazard Communication (Haz Com) Standard, DHS's Chemical Facility Anti-Terrorism Standards (CFATS), and EPA's Emergency Planning and Community Right-to-Know Act (EPCRA) regulations. SOCMA's members also implement ChemStewards®, an EHS&S performance improvement program that is a mandatory component of membership.

EPA's proposed changes to the RMP Amendments, if adopted, would significantly impact the processes and operations of SOCMA's member companies. For these reasons, SOCMA has a significant interest in the outcome of this rulemaking. As background, SOCMA has long been opposed to many of the provisions in the 2017 RMP Amendments. Many of those provisions would unnecessarily impose significant costs and burdens on the regulated community. SOCMA has consequently been supportive of EPA's delayed implementation of the RMP Amendments Rule to February 19, 2019 to allow the Agency to conduct reconsideration proceedings. As described in further detail below, SOCMA supports EPA's proposed reconsideration rule, particularly in regard to rescissions or modifications to requirements for third-party audits, safer technology & alternatives analysis (STAA), incident investigation root cause analysis, enhanced local emergency coordination, emergency exercises, information availability, and other changes.

[1] 83 FR 24850 (May 30, 2018).

I. SOCMA's Prior Comments

The 2017 RMP Amendments Rule implemented extensive programmatic changes to the regulation's accident prevention program requirements. In past public comments, SOCMA expressed opposition to many of EPA's proposed changes in the RMP Amendments. Among various areas of concern, SOCMA argued:

- The requirement for conducting regular safer technologies and alternatives analyses (STAAs) during a process hazard analysis is unnecessary, as industry has continued to adopt inherently safer processes and technologies without prior mandate from EPA. In the batch and specialty chemical industry, many processes are governed by FDA- or EPA-approved specifications, or by customer specifications, that the manufacturer is not free to alter, which would impose significant compliance difficulties. Any STAA requirement would also increase liability exposure on manufacturers.

- The requirement for third party compliance audits is not justified and is overly burdensome. The Agency did not adequately demonstrate that existing compliance audits are ineffective, or that more stringent audit requirements would have prevented reported releases. EPA should have focused instead on enforcing existing audit requirements.

- The requirement for information-sharing imposes significant security risks. SOCMA members have long provided Local Emergency Planning Committees (LEPCs) and the public with all the information necessary to understand the processes and hazards at facilities and to prepare for and respond to releases there – as required by the original RMP rule, EPCRA and the Haz Com Standard. The 2017 RMP Amendments went too far, however, in the provision requiring facilities to provide "any other information that [LEPCs] identify as relevant to local emergency response planning." The rule was also insufficiently clear regarding the ability of facilities to not disclose confidential business information or security-sensitive information.

- The original impetus behind the 2017 Amendments Rule came from the tragic West Texas Fertilizer Plant ammonium nitrate explosion, which led to the issuance of Executive Order 13650, "Improving Chemical Facility Safety and Security." Yet, law enforcement later discovered that the incident was the result of criminal sabotage, not of any regulatory inadequacy related to the existing RMP requirements. (The scale of the explosion was also enhanced by a violation of OSHA's Explosives and Blasting Materials Standard.) This revelation fundamentally changed the circumstances that prompted EPA's regulatory action, which had assumed that the West Texas incident was an accident that the RMP program might have prevented.

- EPA did not meaningfully assess the contribution of the PSM rule in reducing damages from accidental releases. What information EPA did present suggested that PSM, not EPA's RMP provisions, accounted for most of a facility's process safety benefits. As such, the administrative record did not substantiate EPA's claim that its proposed changes were needed to reduce accidental releases. EPA also failed to adequately coordinate development of the RMP Amendments Rule with potential changes to OSHA's PSM rule.

For these reasons (among others), SOCMA has been supportive of EPA's decision to grant reconsideration and stay implementation of the 2017 Amendments until February 2019. As detailed further in these comments, SOCMA is supportive of the provisions outlined in EPA's RMP Reconsideration Rule and believes that the rule adequately remedies concerns expressed by the regulated community.

II. Performance of the RMP Rule

Prior to E.O. 13650 and EPA's consequent decision to significantly revise the Risk Management Program, the RMP rule was a complete, mature regulatory program that was accomplishing its stated goals. RMP has maintained a proven track record of driving continuous improvement at chemical facilities, as confirmed by publicly available EPA data. The RMP database demonstrates that the number of reportable RMP accidents have progressively declined over time – from 197 in 2004 to 99 in 2016. Further, only a small minority of RMP-regulated facilities were responsible for these reported accidents. From 2003 to 2013, only 8% of total RMP facilities were responsible for 100% of the reportable accidents. That 92% of RMP facilities have never had a reportable accident indicates that the cause and frequency of reported accidents is not related to any inadequacy of existing regulatory requirements but rather to a specific subset of facilities that ought to be the subject of enhanced compliance attention.

This is demonstrated by the circumstances surrounding EPA's decision to revise the RMP rule. Following the ammonium nitrate explosion at a fertilizer plant in West, Texas in 2013, EPA was directed by the previous administration to consider regulatory changes that would prevent similar incidents from occurring. EPA's final RMP Amendments rule was then promulgated under the assumption that this particular incident was caused by regulatory negligence resulting in the mismanagement of hazardous substances. Ultimately though, the circumstances underlying the West, TX incident had nothing to do with EPA's Risk Management Program. The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) investigation determined that the West explosion resulted from an intentional criminal act – behavior that RMP is not intended to prevent. Such risks are (and should be) the focus of law enforcement.

Thus, even if all RMP facilities were required to comply with additional layers of accident prevention requirements, it does not necessarily mean that improved results will be generated at those small number of facilities where management is already willing to ignore identified process safety issues or where releases are caused by intentional acts. For this reason, SOCMA has long supported a focused approach that emphasizes more active EPA enforcement of existing RMP requirements. Doing so would address program areas that need better regulatory oversight while supporting the goals EPA was trying to achieve through the 2017 RMP Amendments.

III. STAA Requirements

The 2017 RMP Amendments imposed a burdensome and costly regulatory mandate for certain NAICS-code industries[2] - specific to all P3 facilities and processes - requiring safer technology alternatives analysis (STAA) as part of a process hazard analysis (PHA). The STAA mandate further required facilities to evaluate the feasibility of any inherently safer technologies to assess the cost and reasonableness of their implementation.

SOCMA strongly opposed the STAA mandate in the final Amendments rule and supports its removal in the proposed rule. Specialty chemical manufacturers already search for opportunities for continuous improvement of their existing processes and operations. Regulatory and customer specifications further direct companies to seek viable designs that mitigate hazard, and such specifications are not readily alterable. Many SOCMA members manufacture specialty chemicals under designs specified by the U.S. Food and Drug Administration's Good Manufacturing Practice (GMP) regulations and individual Drug Master Files (DMFs), as well as EPA's Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) rules.

[2] North American Industrial Classification System (NAICS) codes 322 (paper manufacturing), 324 (petroleum and coal products manufacturing), and 325 (chemical manufacturing) were subject to STAA requirements in the RMP Amendments rule.

Contract and toll manufacturers are additionally subject to the design specifications of their customers, who typically specify the manufacturing processes for a given product.

As such, SOCMA believes that it was ill-advised for EPA to require that company resources be directed toward searching for unavailable, nonviable, or unaffordable new process technologies. In the reconsideration rule, the Agency proposes to completely rescind the broad STAA requirement imposed on manufacturers. SOCMA supports this proposed action and agrees with EPA's view that it did not provide an adequate quantifiable estimate of incremental benefits associated with adoption of the mandate. It is unlikely that a sufficient number of RMP facilities would have been capable of implementing their STAA findings to offset the costs of conducting the assessment. Ultimately, the primary result of any STAA mandate would be represented in the additional unrecoverable costs – estimated at $70 million annually – to conduct and document the analysis.

IV. Third-Party Audit Requirements

The 2017 RMP Amendments required that facilities conduct third-party compliance audits following an RMP reportable accident or if the implementing agency concluded that "conditions at the stationary source . . . could lead to an accidental release." SOCMA has strongly opposed the Agency's mandate for third-party audits. EPA previously failed to demonstrate why increasing the stringency of its audit requirements would make facilities that are not correcting issues identified in their existing audits more likely to make corrections identified by third parties. EPA did not effectively establish that a third-party audit requirement would have substantially changed the behavior of bad actors and prevented an accidental release.

EPA also did not weigh the comparative advantages of using in-house auditors at RMP facilities. In-house auditors have a greater understanding of the specific operations and compliance regimens of an individual facility, and their ongoing association with those management systems ensures that auditors' knowledge steadily increases. Specialty chemical manufacturers are subject to unique batch-processing conditions of production, meaning that for every specialty chemical produced the raw materials, chemical processes, operating conditions, and equipment may each be altered from the previous product to respond to the specific needs of customers. Most third-party auditors would have no immediate understanding of these unique operating specifications and processes at batch-manufacturing facilities and would be less able to provide insightful and constructive input. While independent audits can sometimes provide value when they provide specific expertise not available in-house, facilities should ultimately be left free to evaluate their unique management systems and determine when such additional services are warranted.

SOCMA particularly expressed concern regarding the availability and cost of third-party auditors. The number of firms that are specifically knowledgeable about the unique process safety requirements for each RMP-regulated industry is limited. EPA's estimate of 150 annualized third-party audits suggests that such a new requirement would not present a substantial enough commercial opportunity for auditing firms to expand their range or availability of services. The limited supply of independent firms with batch processing expertise, coupled with the third-party audit requirement, would certainly cause a substantial cost increase for specialty chemical manufacturers to contract such services. EPA recognizes this in its proposed reconsideration rule by projecting the mandate's cost at $9.8 million annually.

Because it is unlikely the third-party compliance audit mandate would materially enhance chemical safety at RMP facilities, SOCMA supports EPA's decision to rescind this requirement in the proposed reconsideration rule. Instead of utilizing third-party auditors, EPA should leverage its existing inspection powers to better enforce existing audit requirements on facilities. In so doing, EPA could better target the

small percentage of facilities that are responsible for multiple accidents, and thus be less disruptive to the vast majority of compliant RMP facilities that have never had a reportable accident.

V. Information Disclosure Requirements

The 2017 RMP Amendments Rule required additional disclosure to LEPCs, first responders and the public, requiring facilities to coordinate annually with their LEPCs and document their emergency planning activities. Facilities were required to provide relevant emergency coordinating organizations with a copy of their emergency response plan, emergency action plan, and updated emergency contact information. Of most concern was the provision that such organizations could request "any" other information that they deemed relevant to local emergency response planning, irrespective of potential security or competitive risks generated through the public disclosure of site-specific information. Facility personnel were not provided clear recourse to refuse such requests if the release of such information exposed security vulnerabilities or compromised trade secrets. Apparently by accident, the RMP Amendments arguably eliminated facility business confidentiality protections altogether from the LEPC disclosure provisions by locating those requirements within § 68.93, while the CBI protection provision is located in § 68.210 (regarding public information) and refers only to "this section."

EPA now proposes to rescind the LEPC disclosure requirement by deleting the phrase: "and any other information that local emergency planning and response organizations identify as relevant to local emergency response planning."[3] SOCMA supports this action, and would also support just eliminating the word "any," recognizing that the resulting change would track the existing RMP (and EPCRA) rules.[4]

EPA also proposes to incorporate confidential business information (CBI) and classified-information protections into the current LEPC disclosure requirements. SOCMA supports these revisions. EPA should go further, however. As EPA proposes to revise the 2017 Amendments, the RMP rules would contain two matching provisions intended to protect security-sensitive information, § 68.93(d) and § 68.210(c). Both provisions (and the current rules (§ 68.210(b)) refer to "classified information" – but classified information is actually a small subset of the universe of information that is protected from release by federal law.[5] The NPRM refers to Chemical-Terrorism Vulnerability Information (CVI), protected by 6 C.F.R. § 27.400, but it fails to also reference Sensitive Security Information (SSI), protected under 49 C.F.R. Parts 15 and 1520. EPA should revise the two provisions noted above to make them more generic; e.g.:

(x) *Security-sensitive information*. The disclosure of information which is protected from disclosure by federal law for homeland or national security reasons, including CVI, SSI, and information classified by the Department of Defense or other Federal agencies or contractors of such agencies, shall be controlled by applicable laws, regulations, or executive orders concerning the release of such information.[6]

SOCMA's recommendations regarding information protection would not jeopardize LEPCs, first responders or the public, since existing RMP, EPCRA, and Haz Com requirements provide adequate information regarding the hazards, accident prevention activities, and emergency response programs at individual facilities. EPA should evaluate the various resources provided by these regulations and develop

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[3] 83 FR 24853.

[4] *Id*. at 24866.

[5] *See* James W. Conrad, Jr., *Information Protection*, chapter 6 in HOMELAND SECURITY--LEGAL AND POLICY ISSUES (Joe D. Whitley & Lynne K. Zusman eds. 2009).

[6] The final rule would also need to add a definition of "SSI". For simplicity, EPA should also consolidate these two references into one and make clear that it applies to any disclosure requirement contained in Part 68.

public guidance that can better inform LEPCs, emergency responders, and the public how they can access chemical hazard information.

VI. Incident Root Cause Analysis Requirements

The proposed version of the 2017 RMP Amendments required that facilities conduct incident root cause analyses whenever a near miss or accident occurs. SOCMA expressed concern regarding this requirement and its broad applicability to all RMP facilities, rather than to those facilities that have regularly demonstrated noncompliance with existing RMP requirements. SOCMA also requested that the Agency not incorporate the term "near miss" into the rule, since the on-site threshold for defining such an event was unclear.

While EPA ultimately defined "near miss" to mean the original incident investigation trigger (an incident that did result, or could reasonably have resulted, in a catastrophic release), EPA did not adequately explain what specific set of conditions must take place for a safety process to be considered sufficiently compromised to warrant root cause analysis. The existence of process safety parameters such as pre-established critical control limits and system-activated protection layers already raises the question of when activation of one of these controls would trigger an incident investigation; characterizing them as "near miss" complicates rather than simplifies the decision. EPA inaccurately identified several examples involving "process upsets" as near misses even though safeguards designed to prevent a hazardous scenario performed effectively in those cases.

SOCMA members regularly perform root cause analyses as part of their incident investigations, and they value the exercise as a mechanism to track leading indicators for continuous process safety improvement. But they should be left free to determine under what circumstances such evaluations should take place. For EPA's purposes, root cause investigations should be reserved as a component of enforcement action taken at facilities that have had a catastrophic release or have conducted an inadequate incident investigation.

VII. Other Comments

A. Benefits of the Reconsideration Rule

Executive Order 12866 requires agencies to adopt a regulation "only upon a reasoned determination that the benefits of the intended regulation justify its costs."[7] The regulatory impact analysis (RIA) underlying the proposed 2017 Amendments Rule was seriously inadequate; it said "promulgation and implementation of this rule would result in a reduction of the frequency and magnitude of damages from releases" -- but then immediately acknowledged that "we are unable to quantify what specific reductions may occur as a result of these proposed revisions."[8] Worse, the RIA failed to assess to what extent the RMP rule, rather than potential changes to OSHA's PSM rule, should take credit for the benefits of any reduction in accidental releases.

SOCMA is confident that the benefits of the RMP 2018 Reconsideration Rule would be significant, as they would include not having to pay for expensive third-party compliance audits and STAAs. As previously discussed, the utility of these requirements is limited when they cannot demonstrate a substantially lower accident rate. SOCMA also believes that the costs of the reconsideration rule will be negligible, as its implementation would not materially influence the incidence of accidental releases, which were already

[7] E.O. 12866 (Sept. 30, 1993), § 1(b)(6).
[8] 81 Fed. Reg. 13642 (March 14, 2016).

trending lower under the existing RMP. In SOCMA's view, the preamble to the Rule should discuss these costs and benefits more fully than it does. The Agency should possess valuable data on industry costs from the SBREFA process that it conducted in connection with the proposed version of the 2017 Amendments. EPA should review those materials, and other information submitted in comments like these, and generate a more detailed discussion of costs and benefits.

B. EPA Was Under No Legal Obligation to Issue the 2017 Amendments Rule and is Free Now to Rescind Aspects of that Rule

SOCMA endorses EPA's legal analysis of Clean Air Act Section 112(r)(7),[9] including its conclusions that:

- EPA satisfied the requirements of Subparagraph (B) when it issued the original RMP rule in 1993.

- Subparagraph (A) is permissive. While it authorizes EPA to issue additional rules regarding release prevention, detection, and correction, it does not actually require it to do so. Thus, the language in Subparagraph A about rules issued under its authority "hav[ing] an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable," only applies if and to the extent that EPA issues rules under that authority. As EPA notes, it is proposing to rescind requirements contained in 2017 Amendments premised on this authority.

- EPA retains inherent authority to update the rules that it has issued under either of these authorities, or not do so, from time to time, as warranted by events, so long as its actions are within its statutory authority and are supported by reasoned decision making.

Conclusion

SOCMA appreciates the opportunity to comment on EPA's proposed revisions to the 2017 Risk Management Program Amendments rule. SOCMA submitted a series of comments in 2016 and 2017 expressing its concerns with various provisions of the final rule. We appreciate EPA's consideration of the issues raised in those comments, its decision to stay implementation of the Amendments, and its reassessment of the prior rule's requirements.

SOCMA members believe the safety of employees, emergency responders, and communities are of the utmost importance, and have supported a balanced and practical approach to advancing chemical accident prevention. Since its inception in 1996, the RMP rule has developed into a mature and well-functioning prevention program that continues to identify and reduce risks, prevent accidental releases, and limit offsite impacts. SOCMA believes that the 2018 RMP reconsideration proposal will enhance an already effective RMP regulation while reducing significant costs, redundancies, and burdens on the regulated community.

Thank you again for your willingness to seek feedback from stakeholders, SOCMA looks forward to continued collaboration with the Agency on these and other matters in the future.

Respectfully submitted,

[9] 83 Fed. Reg. 24856-57.

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