UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

August 21, 2020

THE ADMINISTRATOR

Mr. Gordon Sommers
Ms. Emma C. Cheuse
Earthjustice
1001 G. St., NW Suite 1000
Washington, DC 20001

Dear Mr. Sommers and Ms. Cheuse:

I am responding to your February 18, 2020 petition for reconsideration on behalf of Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, and Utah Physicians for a Healthy Environment (collectively, "petitioners") regarding the U.S. Environmental Protection Agency's final rule titled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act" (2019 RMP final rule, 84 FR 69834, December 19, 2019). The final rule rescinded or modified certain provisions added to the Risk Management Program (RMP) regulations by amendments made in 2017 (2017 RMP Amendments rule, 82 FR 4594, January 13, 2017). The 2019 RMP final rule rescinded amendments relating to safer technology and alternatives analyses (STAA), third-party audits, incident investigations, information availability, and several other minor regulatory changes. EPA also modified regulations relating to local emergency coordination, emergency response exercises, and public meetings. In addition, the Agency changed compliance dates for some of these provisions.

Your petition contained three primary objections to the 2019 RMP final rule:

(I) that new evidence undermines EPA's rationales for rescinding the accident prevention measures and other changes made in the 2019 RMP final rule;
(II) that EPA violated notice and comment procedures by adding and relying on new documents and significantly changing the basis for its rulemaking in the final rule; and
(III) that the D.C. Circuit's opinion in Air Alliance Houston v. EPA, 906 F.3d 1049 (2018) demonstrates that the 2019 RMP final rule is unlawful and arbitrary.

The petition alleges that each objection either arose after the period for public comment on the 2019 RMP final rule or were impracticable to raise during that comment period. The petition also alleges that these objections are of central relevance to the outcome of the rule. The petition concludes that EPA must grant reconsideration pursuant to section 307(d)(7)(B) of the CAA[1] and stay the 2019 RMP final rule.

[1] Section 307(d)(7)(B) of the CAA, 42 U.S.C. § 7606(d)(7)(B), provides:
Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the

After careful review of the objections raised in the petition for reconsideration, EPA denies the petition, as well as the request that the 2019 RMP final rule be stayed. The petition fails to establish that the objections meet the criteria for reconsideration under section 307(d)(7)(B) of the CAA. Section 307(d)(7)(B) of the CAA requires the EPA to convene a proceeding for reconsideration of a rule if a party raising an objection to the rule

> "can demonstrate to the Administrator that it was impracticable to raise such objection within [the public comment period] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule."

The requirement to convene a proceeding to reconsider a rule is, thus, based on the petitioner demonstrating to the EPA both: (1) that it was impracticable to raise the objection during the comment period, or that the grounds for such objection arose after the comment period but within the time specified for judicial review (i.e. within 60 days after publication of the final rulemaking notice in the Federal Register, see CAA section 307(b)(l)); and (2) that the objection is of central relevance to the outcome of the rule.

The discussion below addresses each of the objections raised in the petition.

I. Petitioners Allege that New Evidence Undermines EPA's Rationales for Rescissions and Modifications

Petitioners' first objection is that significant new evidence that could not be provided during the public comment period for the proposed rule (83 FR 24850, May 30, 2018) undermined one of EPA's core rationales for the 2019 RMP final rule. Petitioners allege that recent incidents show that the prior Risk Management Program regulations are failing to prevent accidents and new data undermine EPA's argument that accident rates are declining. Petitioners provide four arguments to support this objection, including petitioners' claim that:

1. recent RMP incidents demonstrate the need for the rescinded accident prevention and information availability measures and delayed emergency response measures,
2. new reports and studies by governmental bodies and environmental justice and safety experts demonstrate the "unlawfulness and arbitrariness of EPA's action and rationales,"
3. EPA relied on outdated accident data, undercounted accidents, and made other analytical errors causing the annual decline in accidents to be less than EPA stated, and
4. new evidence demonstrates EPA's bias toward repeal of regulations.

EPA addresses each of these arguments below.

A) Recent RMP incidents

Petitioners argue that recent incidents at RMP facilities demonstrate the need for the rescinded accident prevention and information availability measures and delayed emergency response measures. Petitioners state "Even if there were a slight decline in yearly average accident rates, this does not mean pre-existing regulations are "working" when so many accidents continue to occur and major incidents that cause harm continue to

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Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

occur." (Petition at 11). As support for this claim, petitioners cite eight incidents that occurred at RMP facilities between August 2018 and February 2020. These incidents occurred following the August 23, 2018 close of the public comment period for the proposed RMP Reconsideration rule (83 FR 24850, May 30, 2018).

The EPA finds that this claim does not satisfy the requirements of reconsideration under CAA section 307(d)(7)(B). The issue of the significance of continuing accidents on our view that the pre-Amendments RMP rule was effective at preventing accidental releases had been plainly raised for comment. This claim is similar to claims made by several commenters on the proposed Reconsideration rule (83 FR 24850, May 30, 2018) – claims that EPA already addressed in the preamble to the final rule and in the Response to Comments (RTC) document for the final rule.[2] Several commenters claimed that the costs of repealing the Amendments rule would greatly exceed its benefits. For example, one commenter stated,

> "EPA's estimate of $88 million per year savings from rescinding Amendments rule provisions was more than offset by potential losses of Amendments rule benefits of up to $270 million per year, which did not include additional costs such as contamination, lost productivity, emergency response, property value impacts, and health problems from chemical exposures." 84 FR at 69869.

In the final rule preamble, EPA responded, in part, "The Agency did not claim that the prevention program provisions of the Amendments rule would prevent all future accidents, and there is no reason to expect that this would have occurred." EPA further elaborated on this response in the RTC by stating,

> "the Agency did not expect that [the Amendments Rule] would prevent all future accidents. This would have been impossible, since the [STAA] provision applied to only three industry sectors responsible for only 12.4% of RMP facilities and less than half of RMP-reportable accidents over the 10-year period of study." (RTC at 216).

In their comments on the proposed rule, Petitioners claimed that the proposed rule was "inherently contradictory" because EPA recognized that the incident data show a need for certain emergency response coordination and public meeting requirements while also arguing that the same need does not exist for the prevention program requirements. (RTC at 59). EPA disagreed with this comment, stating "At no point in the record for the RMP Amendments rule or the Reconsideration rule do we represent that either the pre-Amendments prevention program or the addition of STAA, third-party audits, or root cause analyses to the prevention programs will prevent all accidental releases. There will still be accidents that will need responses with or without the prevention program amendments rescinded today." (RTC at 61). Petitioners would set a rulemaking standard – preventing all accidental releases at RMP facilities nationwide – that would be impossible for EPA to meet with the provisions affected by the 2019 RMP final rule. Further, petitioners have provided no evidence, new or otherwise, that the specific rule provisions rescinded or changed in the 2019 RMP final rule would have prevented or mitigated the accidents listed in the petition.

In the proposed rule, EPA identified the significance of accident history in the rulemaking, including but not limited to identifying subclasses of sources that were more prone to accidental releases, 83 FR at 24872, "the small numbers of problematic facilities," *id.* at 24873, and, as the quoted portion of the petition notes, the overall low and declining accident rate. *Id.* Our view that an "enforcement-led" (called "compliance-driven" in the 2019 RMP final rule) approach would be more reasonable and practicable than preserving the prevention provisions of the 2017 Amendments rule was based in part on continuing accidents being an indicator we could use in implementing our 2018 proposed changes. In the RIA for the proposed rule, EPA noted how the trend in accidents would affect EPA's estimates of accident costs[3] as well as estimates of the benefits of Amendments

[2] EPA. Response to Comments on the 2018 Proposed Rule (May 30, 2018; 83 FR 24850) Reconsidering EPA's Risk Management Program 2017 Amendments Rule (January 13, 2017; 82 FR 4594). The RTC is available in the rulemaking docket at www.regulations.gov as item EPA-HQ-OEM-2015-0725-2086.

[3] See Regulatory Impact Analysis Reconsideration of the 2017 Amendments to the Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7), EPA-HQ-OEM-2015-0725-0037 (proposed rule RIA), pp 32-35, available at www.regulations.gov.

rule prevention provisions (as represented by baseline accident damages).[4] In response to the prominence of accident history in our proposed revisions to the 2017 Amendments rule, Petitioners stated that EPA cannot base its decision to weaken the RMP Amendments rule solely on cost, and that EPA was ignoring the non-monetized benefits discussed in the Amendments rule (RTC at 232). In response to these comments, EPA disagreed with commenters' assertions that EPA's only justification for the rescission of Amendments rule provisions is declining accident rates at chemical facilities (*Id.* at 232) and the Agency reiterated EPA's other reasons for rescinding Amendments rule provisions.

Therefore, as the issues of accidents, accident rates and costs were raised in the proposed rule, subject to extensive public comment, and addressed by EPA in the RTC and preamble to the final rule, the EPA finds that petitioners' claim does not satisfy the requirements for reconsideration under CAA section 307(d)(7)(B). Petitioners have not demonstrated "that it was impracticable to raise such objection within such time or [that] the grounds for such objection arose after the period for public comment."

Also, when it discusses additional individual accidents that occurred after the close of comments, the petition does not provide an explanation of how these individual incidents establish that the accident history EPA relied upon is invalid. The petition does not argue that we learn anything other than accidents continued after the close of comments. In fact, for much of that time at least some of the rescinded prevention provisions were in effect. While accident prevention is clearly a core concern of the risk management program, neither the 2017 Amendments nor the 2019 RMP final rule claimed there would be no accidental releases once the rules were in effect, so the mere fact that accidental releases continued cannot be of central relevance to EPA's final rule decision.

B) New reports and studies by governmental bodies and environmental justice and safety experts

Petitioners argue that new reports and studies by governmental bodies and environmental justice and safety experts demonstrate the "unlawfulness and arbitrariness" of EPA's action and rationales. Petitioners refer to a new Chemical Safety Board (CSB) accident reporting rule; two recent CSB accident investigation reports; a letter from the National Environmental Justice Advisory Council (NEJAC) urging EPA not to finalize its proposed Reconsideration rule; an EPA Office of Inspector General (OIG) Report relating to air quality concerns after Hurricane Harvey; and a 2019 book and 2019 report on the effectiveness of inherently safer technology (IST). EPA addresses each of these below.

<u>CSB accident reporting rule</u>

Petitioners make a number of claims regarding CSB's new accident reporting rule, including:

- That the CSB rule "calls into question EPA's conclusion that accident rates are decreasing because CSB's reporting shows increasing accident rates across similar sectors."
- "CSB reported that the total "number of annual incidents ranged from a low of 113 in 2017 to a high of 291 in 2012….Over approximately 10 years, "the average annual number of accidents was approximately 183," the "median number of accidents per year was 169."
- The numbers peaked in 2012, rebutting any notion of a consistent decline, and showed considerable variance from year to year rebutting the existence of any reliable trend."
- "Many of the incidents CSB investigates are at RMP facilities and EPA must consider these data. *See* CSB Incidents 2009-7.2019 (including numerous accidents in NAICS sectors 322, 324, and 325, which are likely to be covered by Risk Management Program."

[4] *Id.*, pp 66-67.

- "The CSB numbers of incidents also show that EPA needs to better account for releases of non-RMP chemicals at RMP facilities and to expand incident reporting and prevention requirements."

EPA finds that these claims do not satisfy the requirements of reconsideration under CAA section 307(d)(7)(B) because they are not of central relevance to the final rule. The CSB's accident data do not closely overlap with accidents reported by RMP facilities, and petitioners have made a number of errors in improperly conflating CSB's accident data with accident data reported to EPA within Risk Management Plans. RMP-regulated facilities are required to report accidents within the facility's five year accident history only if the accident involves the release of a regulated substance from an RMP-covered process and causes one of the consequences specified in § 68.42 of the regulation (i.e., deaths, injuries, property damage, evacuations, sheltering, etc.). Such accidents do not necessarily include all accidents or incidents that occur at an RMP-regulated facility, and they do not include accidents that occur at non-RMP facilities.

In contrast, in estimating the number of accident reports that would be required under the CSB's proposed rule, the CSB included numerous accidents that occurred at non-RMP facilities. Unlike the RMP accident data, CSB's proposed rule dataset is not based on any defined universe of facilities obligated to report accidents.[5] The accident dataset included in the CSB's proposed accident reporting rule (84 FR 67899, December 12, 2019) included accidents from facilities in 441 different North American Industrial Classification System (NAICS) codes. 84 FR at 67901. The September 2019 RMP database[6] includes facilities in only 325 NAICS codes, and accidents from facilities in only 252 NAICS codes. Therefore, the CSB dataset includes accidents from facilities in at least 189 industry sectors that have never reported an accident for any RMP-regulated process.[7] Even in the CSB's list of 19 industry sectors with the most frequent accidents, several of these sectors have no RMP facilities. For example, the CSB's proposed rule included accidental releases from facilities in NAICS 213111 (Drilling Oil and Gas), 423930 (Recyclable Material Merchant Wholesalers), 238910 (Site Preparation Contractors), 237120 (Oil and Gas Pipeline and Related Structures Construction), and 811111 (General Automotive Repair). There are no RMP-regulated processes in any of these NAICS codes.

Petitioners also claimed that the CSB proposal included accidents in NAICS sectors 322, 324, and 325 that "are likely to be covered by the Risk Management Program." This claim is presented without any underlying support and is incorrect. There are numerous facilities and processes within these NAICS codes that are not subject to the RMP regulation, and not all accidents at RMP facilities in these sectors meet RMP reporting criteria. For example, according to the Bureau of Labor Statistics, in the 4th quarter of 2019, there were 19,732 private establishments[8] in the United States within the chemical manufacturing sector (i.e., NAICS sector 325).[9] However, there are just 1,506 facilities in this NAICS sector that are regulated under the RMP rule.[10] Therefore, less than 8% of U.S. chemical manufacturing sector establishments are regulated under the RMP regulation. Similarly, only about 1% of establishments in NAICS 322 and 7% of establishments in

[5] See 84 FR at 67902, footnote 8: "Because of the CSB's limited resources and lack of available information, there are certain limitations to the information contained in the CSB database. The database was not designed to comprehensively collect statistically valid data concerning all accidental releases. Much of the information in the database comes from the first day of incident media reports. The CSB could only follow-up on a limited number of events per year to verify information contained in the media reports."
[6] This version of the RMP database was submitted as an attachment to petitioners' reconsideration petition.
[7] EPA sees no reason to confirm whether all 252 NAICS codes that reported at least one accident to EPA were represented in CSB's dataset, but to the extent that the CSB's data missed RMP-reported accidents, it further reinforces the Agency's point.
[8] "Establishment" is the term used by the U.S. Bureau of Labor Statistics to describe a single physical location where one predominant activity occurs. OSHA defines establishment as "a single physical location where business is conducted or where services or industrial operations are performed." 29 CFR 1904.46. A single facility normally comprises a single establishment. Under limited conditions, an employer may consider two or more separate businesses that share a single location to be separate establishments or may consider a single establishment to consist of more than one physical location. See 29 CFR 1904.46(1) and (2).
[9] See https:/www.bls.gov/iag/tgs/iag325.htm
[10] See September 2019 RMP database.

NAICS 324 are subject to the RMP regulation.[11,12] While EPA does not track chemical accidents at facilities not regulated under the RMP rule, these ratios make it very likely that many accidents in these sectors occur at facilities *not* subject to the RMP regulation. Without more information to support their conclusions, Petitioners have not shown their assertion is centrally relevant.

The CSB accident reporting rule aims to collect information about a wider range of accidents than those subject to RMP accident history reporting for important reason – the Board investigates many accidents that do not occur at RMP-regulated facilities or processes. A review of the CSB's website confirms many examples of accidents investigated by the CSB that did not involve RMP-regulated facilities or processes. For example, the CSB has recently investigated accidents at Midland Resource Recovery (Report No. 2017-06-I-WV), Pryor Trust Well 1H-9 (Report No. 2018-01-I-OK), Packaging Corporation of America DeRidder Paper Mill (Report Number 2017-03-I-LA), Arkema, Inc. (Report Number 2017-08-I-TX-1), and MGPI Processing, Inc. (Report Number 2017-01-I-KS), none of which involved RMP-regulated processes.

These errors invalidate petitioners' claims concerning the relevance of CSB's accident reporting rule to the 2019 RMP final rule – if many accidents within CSB's data set are not at RMP-regulated processes, the trend among these accidents tells us nothing conclusive about the effectiveness of the RMP regulation.

Lastly, petitioners' claim that EPA needs to better account for releases of non-RMP chemicals at RMP facilities is not relevant to the 2019 RMP final rule, as EPA did not adopt any such requirement for reporting such releases in the 2017 Amendments rule nor did we propose or finalize any requirement for reporting of non-RMP chemical incidents.

Recent CSB accident investigation reports

Petitioners refer to two recent CSB accident investigation reports as grounds for reconsideration. These include the final report for the November 15, 2014 chemical release that occurred at the DuPont La Porte Facility in La Porte, Texas, and the final case study for the June 27, 2016 explosion at the Enterprise Products Midstream Gas Plant in Moss Point, Mississippi.

Neither report contains any recommendation to the EPA. Regarding the DuPont incident, the CSB report contains a recommendation for DuPont to update the facility's emergency response plan, including, among other things:

> "Clearly detailing in plant emergency procedures the alerting and notification protocols for different types of plant emergencies. Provide initial training to new plant personnel and periodic training to all plant personnel on these emergency communication procedures. These procedures should also include guidance for emergency responders when there is insufficient initial information to effectively assess the nature of the problem and the level of ERT resources required."[13]

[11] According to BLS, in the 4th quarter of 2019, there were 5,370 establishments in the Paper Manufacturing sector (NAICS 322), and 2,342 establishments in the Petroleum and Coal Products Manufacturing sector (NAICS 324). See https:/www.bls.gov/iag/tgs/iag322.htm and https:/www.bls.gov/iag/tgs/iag324.htm. According to the September 2019 RMP database, there are 63 RMP-regulated facilities in NAICS 322, and 160 RMP-regulated facilities in NAICS 324. Therefore, almost 99% of Paper Manufacturing establishments, and over 93% of Petroleum and Coal Products Manufacturing establishments are not covered under the RMP regulation. However, we acknowledge that for all three sectors, the establishments covered under the RMP rule are often larger than average in terms of the number of full time equivalents employed at the establishment.

[12] While the RMP rule covers most petroleum refineries classified under NAICS 32411, most establishments in NAICS 324 are in NAICS 32412 (Asphalt Paving, Roofing, and Saturated Materials Manufacturing) or NAICS 32419 (Other Petroleum and Coal Products Manufacturing). Few establishments in NAICS 32412 or 32419 are covered under the RMP regulation.

[13] CSB, Toxic Chemical Release at the DuPont La Porte Chemical Facility, Report No. 2015-01-I-TX, June 2019, p. 125.

Petitioners point to this recommendation as new information supporting reconsideration of the 2019 RMP final rule, stating "the 2019 Rule rescinds a similar requirement to provide training to all personnel "involved in" operating a process. 84 Fed. Reg. at 69836."

However, the rescinded training provision would not provide any enhancement to facility emergency response training requirements for at least three reasons. First, the rescinded provision related to process operating procedures, not emergency response procedures.[14] Second, the pre-Amendments RMP rule already contained a requirement for RMP facilities that conduct emergency response to provide training to all employees in relevant procedures under their emergency response plan and to update their plan to reflect changes at the source and to ensure that employees are informed of changes to the emergency response plan.[15] Finally, the 2019 RMP final rule retained an enhancement to emergency response plan update requirements added by the 2017 Amendments rule, which requires plan updates to include new information obtained from coordination activities, emergency response exercises, incident investigations, or other available information.

Regarding the CSB case study of the 2016 explosion at the Enterprise Products Midstream Gas Plant, this report also did not contain any recommendation to EPA. The report contained a recommendation to the Jackson County Local Emergency Planning Committee:

> "Work with members (industry, emergency response, community) to explicitly define the communication methods for community notification and incident updates (e.g., social media, local news outlets, passive phone system), and the expectations for their use, so that members of the public can efficiently and effectively obtain current safety information. Publish these defined community notification methods and expectations for use on the most appropriate mediums available, such as the Jackson County Emergency Management website, the Jackson County LEPC website, and the social media outlets Jackson County utilizes to disseminate safety information to the community."

Petitioners point to this recommendation as new information in support of their argument that EPA should not have rescinded the public information availability provisions or delayed the notification and field exercises required by the 2017 Amendments rule.

EPA disagrees that this information is either new or centrally relevant to the 2019 RMP final rule. First, we note that this CSB recommendation was to the Jackson County LEPC, not to EPA. EPA does not have authority under CAA Section 112(r) to regulate the activities of LEPCs. LEPCs are not owners or operators of stationary sources. The information availability provisions rescinded by the 2019 RMP final rule did not attempt to subject LEPCs to regulation under 40 CFR part 68. There would be no such need, since LEPC activities are already subject to the requirements of the Emergency Planning and Community Right-to-Know Act (EPCRA), which contains provisions similar to those contained in the CSB's recommendation.[16] Regarding petitioners' claim concerning the relevance of this case study to the delayed emergency response exercise requirements, EPA notes that the case study contains no recommendations to any party relating to emergency response exercises.

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[14] Also, its rescission did not affect the scope of the existing operator training requirement as EPA already interpreted the training provisions of §§ 68.54 and 68.71 to apply to any worker that is involved in operating a process, including supervisors. *See* 84 FR at 69884.

[15] *See* 40 CFR § 68.95(a)(3) and (4).

[16] EPCRA section 301 requires establishment of LEPCs, to include representatives from industry (i.e., owners and operators of facilities subject to its requirements), community groups, civil defense, firefighting, first aid, and local environmental organizations, among others. EPCRA section 303 requires LEPCs to develop community emergency response plans. EPCRA section 303(c)(4) requires these plans to include "Procedures providing reliable, effective, and timely notification by the facility emergency coordinators and the community emergency coordinator to persons designated in the emergency plan, and to the public, that a release has occurred (consistent with the emergency notification requirements of section 304)."

Therefore, as the information raised by petitioners regarding these two CSB reports is not of central relevance to the outcome of the final rule, EPA finds that petitioners' claim does not satisfy the requirements for reconsideration under CAA section 307(d)(7)(B). Regarding petitioners' claim that within its DuPont report, the CSB reiterated its support for fully implementing the 2017 Amendments rule, we note that this is not new information – the CSB had already provided similar comments during the public comment period for the proposed rule, to which EPA responded within the final rule and RTC.[17] Therefore, this claim also fails to satisfy the reconsideration requirements, as it reiterates comments submitted during the public comment period.

NEJAC letter

Petitioners claim that a letter sent to EPA by the National Environmental Justice Advisory Council (NEJAC) on May 3, 2019, represents new and centrally relevant information that warrants reconsideration of the 2019 RMP final rule. In the letter, the NEJAC refers to public comments they received from residents concerned about the impacts of chemical disasters on their communities, including "Frontline groups like Texas Environmental Justice Advocacy Services (TEJAS) and the Environmental Justice Health Alliance for Chemical Policy Reform." NEJAC also refers to an August 2018 meeting where NEJAC heard similar concerns from fence line communities, workers, first-responders, and others, and urges EPA not to finalize the 2018 proposed Reconsideration rule. While the NEJAC did not provide this letter until after the period for public comment, other commenters, including those named in the NEJAC letter, as well as petitioners, raised identical concerns in their comments submitted to EPA during the period for public comment, and EPA responded to those comments within the preamble to the final rule and the RTC.[18] Therefore, the Petitioners have not shown that the information contained in the NEJAC letter provides new information that could not have been raised during the comment period, nor have they shown the information is significant new information of central relevance to EPA's final rule decision. This claim fails to satisfy the reconsideration requirements.

EPA OIG Report

Petitioners claim that the EPA's OIG report issued on December 16, 2019, *EPA Needs to Improve its Emergency Planning to Better Address Air Quality Concerns During Future Disasters* (Report No. 20-P-0062), represents new information "illustrating EPA cannot prove its newly presented conclusion that there were not serious § 7412(r)(7) releases after Hurricane Harvey, just huge releases of other hazardous air pollutants."

The EPA disagrees with petitioners' claim that the OIG report satisfies the requirements for reconsideration under CAA section 307(d)(7)(B). The OIG report is not at all relevant to EPA's final rule decision. The OIG report does not mention the RMP regulation or CAA Section 112(r), let alone EPA's final rule decision. The subject of the OIG audit was air toxics pollution during and after Hurricane Harvey, not accidental releases from RMP facilities. The report at page 2 equates "air toxics" to "hazardous air pollutants" (HAPs), which is the term commonly used for pollutants listed under CAA section 112(b) and regulated under the National Emission Standards for Hazardous Air Pollutants (NESHAP) program under subsections (d), (f), and (h) of section 112 and not the separate list of pollutants under CAA 112(r)(3)-(5). Of the nine specific chemicals mentioned on page 24 in Figure 7, five are not listed under the RMP rule, two (acetaldehyde, 1,3-butadiene) are listed for their flammable properties and not their toxicity, and only two (formaldehyde, methyl chloride) are listed for their toxicity in 40 CFR 68.130, tables 1 & 2. In contrast, eight of the pollutants are listed as HAPs in section 112(b), while the ninth is listed under a different isomer (1,1,2-trichlorethane is a HAP, 1,1,1- trichloroethane is in Figure 7 of the report).

[17] *See*, e.g., 84 FR at 69865, RTC pp 89, 122, 136, and 194.
[18] *See* 84 FR at 69853-56 and RTC pp 252-255.

Of the specific examples of air toxics releases provided in the OIG report, none involved accidental releases of RMP-regulated substances from RMP-regulated processes. The emission events cited in the report for the most part would be startup, shutdown, or malfunction (SSM) events under the NESHAPs. It mentions a "gasoline spill releasing 282 tons of air toxics, including 6 tons of benzene (page 3)," a storage tank roof collapse at a Valero refinery that released benzene, hexane, and toluene (page 17), which are all HAPs not listed under the RMP rule, and a three-hour exposure to benzene, hexane, and heptane, which are two HAPS and a volatile organic compound not listed under the RMP rule (page 25). The explosion at the Arkema plant in Crosby, TX, is mentioned, but the explosion did not involve an RMP chemical (page 17).

Finally, much of the discussion in the OIG report is about cumulative impacts and chronic exposures, especially to fence line communities (see chapter 3). These are common concerns of NESHAPs. While these are serious effects, the Senate Report on the Clean Air Act Amendments of 1990 specifically says that an accidental release under this program is an event that causes short-term, serious impacts and not "releases, even when accidental," that result in an increase in the probability of a chronic impact. Senate Report at 210-11. The OIG report contains no recommendations relating to the RMP regulation or CAA section 112(r).

In addition to the OIG report not being relevant to the 2019 RMP final rule, EPA notes that the issue of air toxics pollution during and after Hurricane Harvey was raised in several public comments on the proposed rule, including public comments submitted by Petitioners, and the Agency provided extensive responses to those comments in the preamble to the final rule,[19] in the RTC,[20] and in a Technical Background Document.[21] In short, commenters submitted various reports and data that they claimed were evidence that Hurricane Harvey caused an increase in accidental releases from RMP-covered processes. Some of these commenters' data sources were among the data sources reviewed by the OIG during its audit (e.g., Texas Commission on Environmental Quality (TCEQ) emissions reports and EPA monitoring data). EPA reviewed commenters' data and found no examples in those data of reportable RMP accidental releases from RMP-covered processes caused by extreme weather events. *See* 84 FR at 69868. As stated above, the OIG report also provides no such examples.

New book and report on IST

Petitioners claim that a book and a report published in 2019 are new information that undermines EPA's rationale for the 2019 RMP final rule that STAA may be ineffective. The book petitioners refer to is: Kletz, T. and Amyotte, P., *What Went Wrong? Case Histories of Process Plant Disasters and How They Could Have Been Avoided* (6th edition, 2019*)* and the report is Athar, M., Shariff, A.M., and Buan, A., *A review of inherent assessment for sustainable process design*, Journal of Cleaner Production, 233 (2019) 242-63 (2019).

EPA disagrees that the book represents new or centrally relevant information relating to the 2019 RMP final rule. The book petitioners refer to is the sixth edition of the accident causation book of the same title originally authored by Trevor Kletz and first published in 1985. The book has periodically been updated to add new information from accidents that occurred subsequent to the publication of prior editions. The previous (5th) edition was published in 2009. Trevor Kletz died in 2013, and the book was updated and republished in 2019 by coauthor Paul Amyotte. EPA reviewed the 2019 edition of the book and could not locate information on RMP facility accidents that occurred after the comment period for the proposed rule, or references to the proposed rule itself. All of the incidents profiled in the book that occurred at RMP-regulated processes occurred prior to the close of the public comment period and were represented in the RMP databases that EPA

[19] *See* 84 FR at 69868-69.
[20] *See* RTC, pp 57, 61, 254-256, 277-279.
[21] *See* Technical Background Document for Final RMP Reconsideration Rule, Risk Management Programs Under the Clean Air Act, Section 112(r)(7), July 18, 2019, pp 41-50. The Technical Background Document is available in the rulemaking docket at www.regulations.gov as item EPA-HQ-OEM-2015-0725-2063.

provided in the rulemaking docket. Some were discussed in detail in the proposed RMP Amendments rule (*See* 81 FR 13638, March 14, 2016). Furthermore, even if the book had contained information on more recent accidents, EPA does not believe the book would be centrally relevant to the 2019 RMP final rule, for the reasons stated in section I.A of this letter.

Like prior editions, the 6th edition of *What Went Wrong?* also contains a chapter on inherently safer design (ISD), and petitioners argue that the book's information on inherent safety undermines EPA's final rule decision. EPA disagrees. The ISD chapter of the book reviews the application of the four principles of inherently safer design (i.e., minimization, substitution, moderation, and simplification), and profiles five incidents, discussing how one or more of the inherent safety principles may have applied to preventing these incidents or others like them. The five incidents profiled are the 1976 dioxin release in Seveso, Italy, the 2005 fuel depot explosion in Buncefield, UK, the 2005 BP Texas City accident, the 2010 Deepwater Horizon/Macondo incident, and the 2013 West Fertilizer explosion.

EPA discussed these same inherent safety principles, as well as information about the 2005 BP Texas City accident and 2013 West Fertilizer explosion, in the proposed RMP Amendments rule (*See* 81 FR 13638, March 14, 2016). EPA did not discuss the Seveso, Buncefield, and Deepwater Horizon accidents because they did not occur at RMP-regulated facilities. The 6th edition of *What Went Wrong?* contains no discussion of EPA's STAA regulatory provision (or indeed any recommendations to add ISD principles to regulations), and EPA finds no significant new information in the book that would have had any bearing on the Agency's 2019 RMP final rule decision if the book had been published prior to the comment period for the proposed rule.

EPA also disagrees that the report by Athar, Shariff, and Buan contains any new or centrally relevant information pertaining to EPA's final rule decision. Like *What Went Wrong?* the study contains a review of inherent safety methods as an approach to hazard control. The report further discusses the use of these methods in "sustainable process design" and identifies potential future
research in these areas. The report contains no mention of EPA regulations, let alone the specific regulatory provisions affected by the 2019 RMP final rule. To the extent the information presented in the report relates to the benefits of inherently safer design, EPA finds no conflict between its information and similar information presented in EPA's rulemaking record.

C) Accident data

Petitioners argue that EPA relied on outdated accident data, and that more recent data show many more accidents have occurred in recent years than EPA understood when promulgating the 2019 RMP final rule. Petitioners claim more recent data show that EPA "severely undercounted" accidents for more recent years, and that EPA cannot rely on an alleged decline in the number of incidents as the basis for the final rule. Petitioners argue that when the latest data is considered, accident rates exhibit significant variance and appear more random than as a "reliably decreasing series." Petitioners also argue that EPA should have modeled accident severity, that a single accident (the 2012 Chevron Richmond Refinery fire), accounts for the lower average injuries in 2004-13 than 2014-16, and that off-site property damage actually increased in the latter period. Petitioners conclude that "new data undermines EPA's central thesis in the 2019 RMP final rule that there is no cost to rescinding or delaying protections." (Petition at 24) EPA addresses each of these claims below.

Outdated accident data

Petitioners claim that EPA incorrectly relied on outdated accident data, and that when data from a more recent version of the RMP database are accounted for, additional late-reported accidents that mainly affect the last several years of data invalidate EPA's results. Petitioners argue that given these late-reported accidents, EPA may not rely on the apparent downward trend in accident frequency because it is less than EPA stated in

the final rule. Petitioners claim that when the additional late-reported accidents are considered, the downward trend is only 2.8% annually, whereas EPA had stated accidents were declining at an average of 3.5% per year. Moreover, petitioners state that this downward trend is not "statistically significant." Petitioners claim that since the significance level (p-value) for the annual trend in impact accidents from 2004-2013 is greater than 0.05, "it is unlikely that the small apparent decline occurred for any reason other than chance."

While EPA does not dispute that some late reported accidents occurred that were not present in the docketed versions of the database, EPA disagrees with petitioners' conclusions. Firstly, in the proposal, EPA acknowledged the likelihood of late-reported accidents affecting the last few years of data. In the regulatory impact analyses for the proposed and final RMP Reconsideration rules, the Agency predicted this would occur.[22] Based on its prior experience, EPA judged that there would be a slight increase in the number of accidents in the last few years of data.[23] After reviewing petitioners' data, which confirms EPA's judgement that accident totals would increase slightly due to late reporting, EPA does not believe that this increase is enough to be of central relevance to its final rule decision. EPA would not have made a different choice in rescinding the prevention measures of the 2017 Amendments rule if the Agency had known in advance that accidents were declining at an annual rate of 2.8% instead of 3.5%, whether or not that decline was statistically significant to the 95% confidence level.

Statistical significance is a technical term with a precise mathematical definition, namely, the probability under a given statistical model of a test statistic being more extreme than the observed test statistic. Historically, many scientists have called an experimental result statistically significant if this probability was lower than 5% (i.e., p-value less than 0.05). But statistical significance is a continuous spectrum rather than a binary yes/no choice, and there is no magic significance level that distinguishes results that are true (in this case, indicating a real decline in accidents) from those that aren't.[24] While EPA does not agree that the Agency must meet a specified statistical significance level in order to take account of accident trend data, we note that petitioners' result – that the 2004-2013 accident trend has a p-value of 0.104 – was only possible because they excluded accident information from 2014-2016. If petitioners had included accident data for those three years, even with the additional late-reported accidents petitioners identified using the September 2019 database, they would have found that the 2004-2016 accident trend has a p-value of 0.0134, meaning the decline was statistically significant to the 95% confidence level. Petitioners dismiss using the 2014-2016 accident data as "unscientific" because they claim that it would not be complete until five years after the end of the last reporting year (i.e., 2016 data would not be complete until the end of 2021) even though their own analysis shows this to be uncertain.[25]

But the important question is not whether EPA can show that the rate of decline in RMP facility accidents is at the 95% confidence level – a statistical measure that goes to the weight of the trend. Given the importance of the underlying effect – whether or not severe chemical accidents are declining – the appropriate question to ask is whether or not the observed trend has practical policy significance. With the relatively small sample size and high variability associated with RMP facility accidents, which ultimately depend on complex and often unpredictable interactions between human behaviors, management systems, and chemical processes, it is unsurprising that the accident trend does not conform to a tight statistical confidence level. But EPA sees no need to be held to a particular statistical metric, and purposefully did not attempt to bind itself to such in the

[22] *See* Regulatory Impact Analysis Reconsideration of the 2017 Amendments to the Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7), EPA-HQ-OEM-2015-0725-0037 (proposed rule RIA), pp 33-34 and EPA-HQ-OEM-2015-0725-2089 (final rule RIA), pp 38-39, available at www.regulations.gov.
[23] *Id*.
[24] *See* Ziliak, S.T., and McCloskey, D.N., "The Cult of Statistical Significance", pp 2302-2303. Paper presented at 2009 Joint Statistical Meetings (JSM 2009), Washington, D.C., available at: https://www.deirdremccloskey.com/docs/jsm.pdf.
[25] *See* Sivin report, Table I on page 4, indicating that the September 2019 database contained additional accidents for years as early as 2004.

proposed rule. If, in the Agency's judgement, the available data suggest that accidents are declining,[26] and, just as important, *no data exist to show that the rescinded prevention provisions would improve that trend*, then EPA stands by the policy decision in the 2019 RMP final rule to not require facilities to spend money implementing expensive regulatory provisions without clear evidence of their effectiveness.

Petitioners also draw an analogy between the stock market and EPA's accident trend analysis, stating, "In such datasets, apparent trends are really due to randomness and variability. For example, many people believe the stock market behaves this way since even where a stock appears to be moving in a given direction, its value on a subsequent day cannot be predicted, undermining the existence of any meaningful trend." Petitioners' analogy demonstrates they have lost sight of the forest for all of the trees. The day to day fluctuations in the stock market may appear random, but over the long term, the direction of the U.S. stock market has been biased in one direction – and that is *up*. On June 21, 1999, the date by which the initial RMPs needed to have been submitted, the closing value of the S&P 500 Index was 1,315.31. On December 19, 2019, just over 20 years later and on the date of publication of the 2019 RMP final rule, the closing value of the S&P 500 Index was 3,205.37, an increase of over 140%.[27] Similarly, the big-picture trend in RMP facility accidents during the last two decades is definitely *down*. RMP-regulated facilities reported 476 accidents in 1998, the year before the RMP regulation went into effect. In 2018, RMP facilities reported 103 accidents[28] - a decline of over 78%.

Of importance to note in the Petitioner's argument for retaining STAA, or third-party audits, or any other accident prevention requirement, they provide no analytical proof or statistical rigor to demonstrate that these requirements have a significant effect on the rate of RMP accidents. Throughout this petition, Petitioners' only evidence in favor of retaining the rescinded accident prevention measures is through discussions of individual incidents and is opinion-based. Moreover, petitioners do not dispute a central use of accident data, which was to support our view that accidents are highly concentrated among RMP sources. This observation we argue supports our position that a compliance-driven approach could obtain much of the benefit of the various rescinded prevention provisions in a reasonable, more practicable manner. In any event, EPA finds that petitioners' claims regarding outdated accident data are not of central relevance to the 2019 RMP final rule, as EPA would not have changed its decision based on the information provided by petitioners.

Additionally, even though EPA does not view petitioners' claim about the 2004-2013 accident trend not being statistically significant to the 95% confidence level as centrally relevant to the final rule, we also note that petitioners could have made this claim during the public comment period using the data available in the public docket. If petitioners had performed the same type of analysis[29] on the data available in the docket at the time of the proposal, they would have found that the Pearson's r value for the resulting trend is -0.599 and the two-tailed significance value (p) is 0.067, indicating that the decline in accident rate developed using the docketed 2004-2013 data alone is not statistically significant to the 95% confidence level. There is no reason petitioners

[26] Petitioners' accident analysis does not refute EPA's claim. In the proposed rule RIA, EPA stated that RMP accident data for 2004 through 2013 showed that there was an average of approximately 150 accidents with reportable impacts over the ten-year period (specifically, 152 accidents per year – see proposed RIA p. 34). EPA also noted that the lower accident totals in 2014-2016 may result in a lower 10-year average accident rates but cautioned that late-reported accidents could affect accident totals in later years. Petitioners' updated accident totals merely confirm what EPA previously stated. Petitioners' data show that while the average accident rate for the most recent 10-year period (2007-2016) is higher than EPA had estimated using an earlier database version, it is still below 152 accidents per year (Petition at p. 22 – most recent 10-year accident totals average to 147 accidents per year.)

[27] Source: Yahoo!finance historical charts; does not include the value of corporate dividends paid during this interval. *See*: finance.yahoo.com.

[28] Source: September 2019 RMP database. Includes all RMP accidents reported to EPA, including "no impact" accidents. 2018 accident total may increase slightly due to late reporting – see final rule RIA pp 37-39 for an explanation.

[29] In other words, petitioners could have performed a Pearson correlation on the unadjusted 2004-2013 accident data that EPA had provided in the public docket prior to the public comment period (without adjusting the data to account for late reported accidents only identified using a later database version), normalized using petitioners' facility-year analysis (*See* Sivin report, pages 5-7).

could not have submitted a comment on statistical significance of the accident trend data during the public comment period. Therefore, this claim also fails to meet the criteria for mandatory reconsideration, because it fails to provide information that was impracticable to raise during the period for public comment.

Accident severity

Petitioners claim that EPA was wrong to conclude that accident severity is decreasing, because "just one, single incident like the 2012 Chevron refinery explosion in Richmond, CA that affected thousands of people completely shifted annual injury averages and obliterated any supposed trends." Petitioners further state that it was

> "wholly arbitrary for EPA to split up the data in this way when considering severity, because it allowed single incidents like this to have an outsize impact on the average of earlier years. And EPA admits off-site property damage actually went up in the latter period of time." (Petition at 24)

Petitioners have presented no new data in their discussion of accident severity. They simply select one accident – the 2012 Chevron refinery accident – and imply that if EPA discounts this accident, then any declining accident severity trend is "obliterated." Petitioners also singled out the only consequence category – off-site property damage – that did not decline over the two periods compared by EPA to substantiate their claim that accident severity is not decreasing. Both of petitioners claims are incorrect.

Regarding the 2012 Chevron accident, if for the sake of argument, EPA were to neglect this accident in determining whether average accident severity is declining, the results would still show that for almost all accident impact categories, accident severity would have declined when comparing the two periods of 2004-2013 and 2014-2016.[30,31] Petitioners submitted no analysis to substantiate their opposite claim. Further, EPA notes that petitioners included this accident in their own comments on the proposed rule, where they cited it numerous times to support their opposition to the rule.[32] For example, in their public comments on the proposed rule, petitioners cited the 2012 Chevron accident as:

- "an illustration of the impact and potential harm that a chemical disaster can have on local communities." (Petitioners' comments at p. 25);
- an example of how chemical accidents harm and endanger workers: "Workers are often the first to be exposed during chemical disasters and are the most likely to die as a result of a severe incident…

[30] According to information submitted in the facility's risk management plan, the 2012 Chevron Richmond accident resulted in $5,300,000 in onsite property damage, 3 hospitalizations, 14,000 persons to seek other medical treatment, 55,000 people to shelter-in-place, $12,500 in offsite property damage, and no other impacts in any accident impact category required to be reported in a facility's risk management plan. *See* EPA-HQ-OEM-2015-0725-0002, available at www.regulations.gov. Of the nine categories of accident impacts evaluated by EPA in the RIA, the only category where removing the Chevron accident would have had a large effect on the annual average is "other medical treatment," where this single accident resulted in 14,000 of 14,807 other medical treatments during the 2004-2013 period. However, even removing the other medical treatments associated with this accident from the total, the remaining 807 other medical treatments would result in an annual average of approximately 81 other medical treatments per year over the ten year period, which is still more than eight times higher than the average of 10 other medical treatments per year that occurred during 2014-2016. See Exhibit 6-2 in the RIA for the final rule, EPA-HQ-OEM-2015-0725-2089, available at www.regulations.gov.

[31] Although not clearly presented in the petition, we note that petitioners' statement regarding the impact of the Chevron accident could be understood as a slightly different claim, which is that rather than ignoring the accident, EPA should have divided the accident data such that the Chevron accident was included in the second (later) tranche of data. This would also have had a minimal effect on the overall trend in accident severity. For example, if EPA had split the data such that a first tranche covering accident impacts from 2004 through 2010 was compared to a second tranche covering accident impacts from 2011 through 2016, the only additional accident impact category (other than offsite property damage) that would show an increase would be "other medical treatment." But as this category has a relatively small effect on the total costs associated with accidents, both onsite and offsite average accident costs would still decline over the two periods.

[32] See EPA-HQ-OEM-2015-0725-1969, available at www.regulations.gov.

For example, flames engulfed 19 refinery workers during the disaster at the Chevron Refinery in Richmond, California in 2012." (Petitioners' comments at p. 27);
- an example of the importance of inherently safer technology regulations (Petitioners' comments at pp 41-42, 47);
- an example demonstrating the importance of incident investigation root cause analysis (Petitioners' comments at p. 47); and,
- an example of an incident that "injured or required dozens of people to seek medical treatment, exposed thousands of people to toxic chemicals in smoke, and required the evacuation of large urban and residential areas." (Petitioners' comments at pp 112-113).

EPA can see no reason why it should ignore the 2012 Chevron refinery accident. If, before analyzing accident data, EPA ignores the most serious accidents at RMP facilities – the exact sort of accidents that the regulation is intended to address – then any resulting analysis would be meaningless.

Regarding Petitioners' statement that for one accident impact category – off-site property damage – EPA's data show that average annual accident impacts increased, as petitioners noted, EPA already acknowledged this in the RIA. But this stands in contrast to every other category of accident impacts for which EPA had available data, where average annual consequences declined across the two periods evaluated. Petitioners submitted no new information bearing on this analysis and there is no reason why petitioners could not have raised these concerns during the public comment period, so EPA finds that these claims fail to satisfy the reconsideration requirements.

Lastly, as discussed above, nothing in petitioners' claim regarding EPA's analysis of the trend in accident severity is derived from new information that was unavailable during the public comment period. The CSB report on the 2012 Chevron refinery incident was published on January 28, 2015, more than three years before the beginning of the public comment period for the proposed rule. The accident impact information from the facility's risk management plan was included in the accident history information provided in the rulemaking docket prior to the public comment period for the proposed rule. Therefore, this claim also fails to meet the mandatory criteria for reconsideration because it was not impracticable to raise during the public comment period.

D) EPA's alleged bias toward repeal of regulations

Petitioners allege that "major new evidence came to light" after the close of the public comment period, that further demonstrates EPA's bias against the safety measures in the 2017 Amendments rule and the unlawfulness of EPA's 2019 RMP final rule action. To support this claim, petitioners point to a June 25, 2019 meeting between Peter Wright and some petitioners, where Mr. Wright was "sitting at the head of the table and serving as the primary speaker for EPA." Petitioners indicate that this meeting occurred before Mr. Wright was confirmed as Assistant Administrator for EPA's Office of Land and Emergency Management, and that Mr. Wright "ultimately signed the 2019 rule." Petitioners also point to a July 23, 2018 letter from U.S. Senators to Mr. Wright, and Mr. Wright's recusal statements which members of the public did not have a chance to review or provide comment on. Petitioners claim that Mr. Wright should not have advised the EPA Administrator on the 2019 RMP final rule where his former employer, Dow-Dupont, has a financial interest. Petitioners conclude that reconsideration is required to provide opportunity to comment on Mr. Wright's "improper and arbitrary involvement now that it is clear that he was involved."

EPA finds that this claim does not satisfy the requirements of reconsideration under CAA section 307(d)(7)(B) because it was raised by petitioners during the public comment period, and EPA provided responses to it in the RTC. *See* RTC at 77-79. Petitioners' claim of "major new evidence" of bias amounts to

the claim that Mr. Wright's recusal statements were not available in the docket for the proposed rule. However, petitioners were well aware of Mr. Wright's involvement in the rulemaking during the public comment period, as demonstrated by their own public comments to this effect. The July 23, 2018 letter from U.S. Senators to Mr. Wright was even raised by petitioners in their public comments. Petitioners are simply repeating an argument they made during the public comment period, to which EPA already responded. EPA disagrees that Mr. Wright's recusal statements, or his presence at a meeting with petitioners, even in a leadership role, represent new information of central relevance to the rulemaking[33]. Also, petitioners are incorrect that Mr. Wright signed the final rule – it was signed by the EPA Administrator, Andrew Wheeler.

II. Petitioners Allege Various Notice and Comment Violations

Petitioners' second primary objection is that EPA significantly changed the basis for its rulemaking in the 2019 RMP final rule and relied on new documents added to the rulemaking record after the close of the comment period. Petitioners argue that members of the public did not have an opportunity to review and provide comment on these documents. Petitioners provide several arguments to support this objection, including that: EPA adopted a new legal interpretation of CAA section 112(r)(7)(B) on which it failed to take notice and comment; presumptively favored rescission of 2017 rule provisions; justified rescission of prevention measures by relying on new rationales and data, on which it failed to provide public notice and an opportunity for public comment; and made errors in its analysis of new data added after the public comment period including relying on data that it did not provide in the docket. Petitioners also claim that several specific provisions contained in the final rule, including provisions relating to: representative sampling of processes during compliance audits; addressing incident investigations in hazard reviews and process hazard analyses (PHAs); delayed and modified exercise requirements; and near-misses and non-RMP accidents, were not subject to comment, and were either erroneous or based on a new claim of legal authority. Lastly, petitioners claim that a Department of Justice report that EPA relied on to justify rescinding public information availability provisions was not subject to public comment and does not justify the rescission. EPA addresses each of these arguments below.

A) EPA's interpretation of CAA section 112(r)(7)(B)

Petitioners claim that they lacked notice of a revised purpose for the 2019 RMP final rule and EPA's construction of the regulatory authorization in CAA section 112(r)(7(B), "reasonable regulations . . . to provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances and for the response to such releases." (Petition at 26-27). According to petitioners, EPA changed the purpose of its rulemaking between proposal and final, from proposing changes to address issues raised in the three petitions for reconsideration of the 2017 Amendments (citing 83 FR at 24852) to a final rule

> "to make changes to the Risk Management Program regulations (40 CFR part 68) to reduce chemical facility accidents without disproportionately increasing compliance costs or otherwise imposing requirements that are not reasonable or practicable. *See* 84 Fed. Reg. at 69836." *Id.* at 9.

Petitioners claim lack of notice that EPA interprets "reasonable regulations … to provide, to the greatest extent practicable" to allow it to reject regulations that are not reasonable "even before considering practicability." *Id.* at 26. Petitioners further argue that EPA's legal interpretation fails under either a plain meaning of the statute (Chevron 1) analysis. *Id.* at 27-31, or, if the phrase is ambiguous, EPA's interpretation is not a permissible understanding of the statute (Chevron 2). *Id.* at 31-36.

[33] As petitioners noted, at the time of the June 25, 2019 meeting with petitioners, Mr. Wright had been nominated to serve as the Assistant Administrator for the Office of Land and Emergency Management and was serving as a Special Advisor to the Administrator. However, as stated in the RTC (pp 77-79), EPA disagrees that Mr. Wright's involvement in this rulemaking was improper.

In the 2018 RMP proposed rule, EPA provided extensive discussion of what it considered when determining whether a rule provision was "reasonable" or "practicable," noting multiple factors beyond merely an assessment of costs. *See, e.g.,* 83 FR at 24856 (discussing EPA's substantive authority under CAA 112(r)(7)(B)); *id*. at 24864 (discussing reasonableness of 1996 & 2019 approach of placing great weight on consistency with the Process Safety Management (PSM) standard[34] to improve compliance and effectiveness and to carefully justify discretionary departures); *id.* at 24871 (discussing relevance of economic burdens on practicability and reasonableness of 2017 Amendments Rule); *id*. at 24872-73 (reasonableness of the balance of burdens and benefits under an "enforcement-led" approach vs. the 2017 Amendments rule sector-wide approach to STAA). When discussing the proposal to rescind or modify public information provisions added by the 2017 Amendments Rule, EPA posed the issue as one of trade-offs between security risks and right-to-know interests. *See* 83 FR at 24863-69. Such rebalancing was justified in part by the Bureau of Alcohol, Tobacco, Firearms and Explosives West Fertilizer finding. *Id*. at 24870. Such balancing of interests can be seen as an assessment of the reasonableness of the prior rule. EPA also discussed how the 1996 RMP Rule reflected an approach of attempting to capture much of the potential accidental release-reduction benefit while minimizing burdens on not only industry but also on local and state emergency response entities. *See* 83 FR at 24870-71. The proposal provided ample notice of EPA's interpretation of multiple factors that EPA considered in assessing whether the regulations were reasonable and practicable, including: the importance of avoiding unduly burdensome inconsistency with PSM without justifiable additional benefits associated with that inconsistency, the preference for capturing demonstrable accident prevention benefits while minimizing costs, the consideration of ease of implementation for state and local response entities, and the balance of security and information availability in a manner that reduced the risk of criminally-caused releases.

Many comments addressed how EPA struck its balancing of factors in assessing whether provisions were reasonable and practicable. Many of the criticisms argued we did not properly address "greatest extent practicable." The final rule responded to these comments by expanding on how EPA would assess reasonable and practicable by being more concrete about the relationship between "reasonable regulations" and "to the greatest extent practicable." We supported our prior interpretations of "reasonable" and "practicable" by a discussion of dictionary definitions, case law, the statute's structure, and legislative history. *See* 84 FR at 69848-49. EPA associated not only regulated source burdens with "practicability," but also burdens on implementing agencies, workability, and effectiveness with the term. *Id*. at 69849. We then noted that regulations must be reasonable, and that we would look at whether a regulatory approach was reasonable before considering practicability. We further observed that "among those regulatory options that are reasonable, the statute directs that EPA provide the greatest level of practicable protection in its regulations," *Id.* Our approach gives meaning to the entire regulatory authorization because we simply required rules to be both reasonable and practicable.

The petition repeats the argument made in Petitioners' comments about how reasonable and practicable must be read in the statutory context where "to the greatest extent practicable" "puts a thumb on the scale in favor of prevention," and how only "a true finding of impracticability" can support rescission." Comments at 81; *cf.* Petition at 29 ("Congress put a thumb on the scale in favor of prevention when it used the words 'to the greatest extent practicable' . . . EPA cannot consider cost except to the extent that costs render a requirement impracticable). In construing how to give meaning to the regulatory authorization in CAA 112(r)(7)(B), the Petition suggests a meaning not dissimilar to EPA's construction of the statute. *Compare* Petition at 28 ("EPA must consider all reasonable regulatory options, and then choose the one that promotes accident prevention, detection, and mitigation 'to the greatest extent practicable'") *with* 84 FR at 69849 ("among those regulatory options that are reasonable, the statute directs EPA to provide the greatest level of practicable protection in its

[34] U.S. Department of Labor, Occupational Safety and Health Administration, Process safety management of highly hazardous chemicals, 29 CFR 1910.119.

regulations"). While there is a dispute over the meaning of what is "reasonable" and "practicable," EPA's interpretation of those terms was discussed in the proposal, as noted above. Similarly, our key rationales (OSHA coordination, security concerns, questionable accident prevention benefits, concerns about the cost of various provisions, viability of an enforcement-led / compliance-driven option in light of data not previously discussed by EPA) were also raised in the proposal. EPA's 2018 proposed rule gave adequate notice of its interpretation of the key legal terms and how they would be weighed to meet the requirements of CAA section 307(d)(3). Our ultimate clarification of how mechanically we would assess the statutory terms was a logical outgrowth of the issue highlighted in our proposal.

B) Alleged presumption in favor of rescission

When evidence discussed in the 2019 RMP final rule showed that the benefits of the 2017 Amendments were uncertain or otherwise not demonstrated, the Petition alleges that EPA improperly relied on those uncertainties regarding whether that rule would prevent accidents in rescinding or modifying various provisions. (Petition at 34-36). "Relying on data that 'does not demonstrate' something is not the same as having data that does demonstrate the [2017 Amendments] do not work." (Petition at 34). The Petition further argues that resolving uncertainties against retaining a rule does not meet the standard of *FCC v. Fox Televisions Stations, Inc*., 556 U.S. 502, 515 (2009), which requires an Agency to have "good reasons" to change the *status quo* of an adopted rule that the Agency has concluded is beneficial. *Id*. The Petition also claims that, at the time of preparing the response to comment document for the 2017 Amendments, EPA noted that it is difficult to provide a quantitative assessment that a certain requirement would reduce a certain number of accidents, which was mentioned in Petitioners' comments but purportedly not responded to. *Id*. at 35. Moreover, the Petition claims that EPA was "happy to speculate" about potential disbenefits of retaining the 2017 Amendment provisions and industry conduct that may be already be taking place that would diminish the benefit of the 2017 Amendments.

As an initial matter, the Petition does not attempt to demonstrate that these issues were not raised for comment in the May 30, 2018 notice of proposed rulemaking, therefore EPA finds that these claims do not satisfy the criteria for mandatory reconsideration. Regardless of how difficult we may have thought demonstrating the quantitative benefits of accident prevention provisions was at the time of the 2017 Amendments, in the 2018 proposal, we cited specific data that we had not discussed in 2017 that, in fact, accidents tend to be concentrated among few problematic facilities, which made feasible an enforcement-led/compliance-driven approach to accident prevention. *See* 83 FR at 24872-73. Furthermore, the NPRM sought data on STAA and STAA-like state and local programs to show the effect of those programs on accident reduction at the bulk of sources that have not had recent accidental releases. *See* 83 FR at 24875. This information, not noted or discussed in the 2017 Amendments rulemaking, forms part of the "good reasons" that *Fox* suggests an Agency should discuss when it changes positions on the need for a rule. Rather than not responding to the 2017 assertion that it was difficult to undertake a quantitative assessment of the benefits of the various prevention provisions and policy choices, the 2019 RMP final rule directly addresses the issue.

The petition is correct when it says, at various points, the Agency notes the absence of accident data supporting the potential benefit of retaining the 2017 Amendments provisions. However, the allegation that this indicates an impermissible bias against retaining the prior rule has no merit. The Agency identified multiple reasons for rescinding or modifying the 2017 Amendments, and we would have been remiss not to look at whether the Amendment provisions could be supported by data. Had there been data to support these provisions' accident prevention and mitigation effects, that would have weighed into the reasonableness of the provisions.

Finally, in the 1996 RMP Rule, in the 2017 Amendments, and in the 2019 RMP final rule, EPA has consistently identified incentives in its rule structure for accident prevention measures. For example, in the

proposal for the 2017 Amendments, EPA discussed the incentives under the RMP rule for sources to undertake IST. *See* 81 FR at 13663. *See also* 61 FR at 31700 (discussing how good PHA techniques reveal opportunities to improve processes and encouraging sources to examine and adopt measures to make processes inherently safer). The fact that we take account of the probability that some sources already have taken advantage of IST measures or that sources may be following guidance on root cause analyses is consistent with trying to account for behavior in response to incentives even when data are not perfect.

C) Alleged new rationales for rescission of prevention measures

Petitioners claim that in the final rule, for the first time EPA calls into question whether benefits it had claimed for the 2017 Amendments rule accident prevention measures would occur. Petitioners also claim that EPA justifies repealing the prevention program regulations by asserting, but failing to demonstrate, "that it has shown no benefits from the prevention regulations." Petitioners also assert that EPA's "compliance-driven" approach to prevention will not assure any actual enforcement to ensure compliance, citing an EPA enforcement action at the TPC facility in Port Neches, Texas, as not having prevented the 2019 accident at the same facility. Lastly, petitioners claim that communications between EPA and the White House Office of Management and Budget (OMB) show that OMB and the EPA Administrator exerted significant influence on EPA's proposed rule, and that EPA did not want to argue against the merits of prevention provisions in the proposal.

EPA finds that these claims do not satisfy the criteria for mandatory reconsideration because they either could have been or in fact were raised by public commenters during the period for public comment and because they are not of central relevance to EPA's final rule decision. As an initial matter, Petitioners are incorrect in stating that EPA first questioned the benefits of the 2017 Amendments rule prevention measures in the 2019 RMP final rule. EPA specifically raised questions and concerns about the benefits of the 2017 Amendments rule's prevention provisions in the 2018 proposed rule. *See* 83 FR at 24872-73.[35] Since EPA had raised this issue in the proposed rule, the issue of questionable benefits implicitly or explicitly claimed in the 2017 Amendments rule is not one that arose after the comment period on which petitioners can base their reconsideration claim.

Petitioners are also incorrect that EPA justified repealing prevention program regulations by asserting that they have no benefits. In the proposed rule, EPA acknowledged that the Amendments prevention program provisions had benefits but questioned whether those benefits were significant enough to justify their costs. *See* 83 FR at 24871. In the final rule, EPA did not conclude that the 2017 Amendments rule provisions had no benefits, but rather that the burdens of those provisions were disproportionate to their benefits. *See* 84 FR at 69847. As EPA clearly signaled in the proposed rule that it was examining the benefits of the Amendments rule prevention provisions, and petitioners were aware of this because they submitted comments on it during the period for public comment,[36] to which EPA responded in the preamble to the final rule[37] and RTC,[38] petitioners' claim does not meet the reconsideration criteria.

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[35] For example: "Lastly, given the application of the current requirements, the Agency now questions the implicit assumption that a sufficient number of sources would implement STAA improvements to offset the costs of the provision." (*See* 83 FR at 24872), and "It is also possible that the existing rule's prevention program measures already encompass many of the benefits of the Amendments rule prevention provisions—some facilities may already be considering safer technologies in conjunction with their process hazard analysis, using root cause analysis for incident investigations, and/or hiring independent third parties to conduct audits. Considering the low and declining accident rate at RMP facilities under the existing RMP rule, the Agency believes it is likely that the costs associated with the prevention program provisions of the RMP Amendments exceed their benefits unless significant non-monetized benefits are assumed." (*See* 83 FR at 24873).

[36] *See* petitioners' comments, EPA-HQ-OEM-2015-0725-1969, pp 77-79.

[37] *See* 84 FR at 69851-69853.

[38] *See* RTC, pp 47-52.

Regarding petitioners' claim that the 2019 accident at the TPC facility in Port Neches, which occurred after the EPA had taken an enforcement action at the facility in 2017, demonstrates that EPA's compliance-driven approach will not prevent accidents, EPA disagrees that this example is of central relevance to the final rule. Petitioners have cited an enforcement action taken under the New Source Performance Standards of CAA Section 111 and 40 CFR part 60.[39] This example is irrelevant to the facility's compliance with CAA Section 112(r) or the RMP regulations at 40 CFR part 68. EPA did not claim that EPA enforcement actions under unrelated portions of the CAA or other statutes would ensure a facility's compliance with RMP requirements. In the examples EPA used in the proposed and final rules, EPA was clearly discussing examples of enforcement actions taken under CAA Section 112(r).[40] Petitioners provided no examples of enforcement actions taken under CAA Section 112(r) that immediately preceded a serious accidental release from an RMP-covered process.

Petitioners' suggestion that OMB and the EPA Administrator improperly influenced the proposed rule are incorrect and incongruous. It is the responsibility of the EPA Administrator to provide leadership, direction, and guidance on the regulations that EPA develops and implements. As part of the Action Development Process, EPA regulations necessarily undergo a deliberative process during their development, where different opinions are heard and discussed, but the Administrator, as signatory authority, is ultimately responsible for the content of those regulations. Likewise, all major EPA regulations undergo OMB review, during which OMB provides input from interagency reviewers as well as its own comments on the regulation under development. Regardless of the content of interagency deliberations,[41] the Administrator makes the ultimate decision to sign a CAA rule. It is incongruous to claim that the Administrator had improper influence over the content of the rule that he is tasked by the CAA with signing. In this case, all final rule provisions were either explicitly proposed by EPA or were a logical outgrowth of EPA's 2018 RMP proposed rule. This claim fails to meet the reconsideration criteria of central relevance.

D) Alleged new data and rationales to justify rescission not subject to notice and comment

Petitioners claim that "EPA's determinations about rescinded provisions lacking benefits are new, previously unpublished rationales for the 2019 Rule's changes to existing policy." Petitioners claim that EPA substantially changed the basis for its rulemaking in the final rule and failed to provide notice and an opportunity for public comment on these alleged new rationales and supporting factual information, and that the final rule was not a logical outgrowth of EPA's proposal. Petitioners make this claim with regard to several aspects of the final rule, which EPA responds to individually below.

Prior findings from incidents

Petitioners allege that EPA ignored its conclusion from the 2017 Amendments rule that the Agency could not simply resort to compliance oversight of the existing rule. Petitioners also allege that EPA ignored prior findings from incident case studies and recommendations and conclusions from CSB investigation reports and that several changes made in the 2017 Amendments rule had responded to CSB recommendations.

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[39] *See*: https://yosemite.epa.gov/OA/rhc/EPAAdmin.nsf/Filings/D91D47509AC1596385258 17F001BC516/$File/tpc.pdf.

[40] *See*, e.g., 83 FR at 24872: "EPA has also used an enforcement-led approach in some past CAA section 112(r) enforcement cases where facility owners or operators have entered into consent agreements involving implementation of safer alternatives as discussed in the proposed RMP Amendments rule," and 84 FR at 69877: "If a regulated facility fails to properly implement existing regulatory provisions, rather than imposing additional regulatory requirements, the appropriate response is for EPA to undertake regulatory enforcement, and EPA regularly does so under CAA section 112(r)."

[41] The Clean Air Act imposes on EPA the duty to docket these discussions. CAA 307(d)(4)(B)(ii). It also unambiguously excludes from judicial review the content of these deliberations. CAA 307(d)(7)(A). Petitioners cannot surreptitiously avoid this exclusion by citing and characterizing this material in a reconsideration petition that may ultimately be brought before the same reviewing court.

EPA finds that these claims do not meet the reconsideration criteria because petitioners made the same claims during the public comment period, and EPA responded to these in the preamble to the final rule and RTC:

- Regarding petitioners' claims that EPA ignored its conclusion from the 2017 Amendments rule that the Agency could not simply resort to compliance oversight of the existing rule, *See* petitioners' public comments at pp 91, 111, 120, etc. EPA's response to these comments appears in the preamble to the final rule at 84 FR at 69851-53, and in the RTC at pp 46-51.

- Regarding petitioners' claims that EPA ignored conclusions from CSB reports and made changes to rule provisions that had responded to CSB recommendations, see petitioners' public comments at pp 93, 102, 111, etc. EPA's response to these comments appears in the preamble to the final rule at 84 FR at 69849-50, and in the RTC at pp 52-55.

Declining accident rates

Petitioners allege that EPA's conclusion that accident rates are declining was not subject to notice and comment, that EPA supported this conclusion with a data spreadsheet that was added to the rulemaking docket in October 2018, after the close of the period for public comment, and that EPA has not put the database from which this spreadsheet was generated into the docket. Petitioners claim that this new version of the database was of central relevance to the rulemaking because it undermines EPA's "purported trend" of declining accidents.

EPA finds that this claim does not meet the criteria for reconsideration because EPA did not rely on the data spreadsheet docketed in October 2018 as significant new information of central relevance to its final rule decision. As EPA explained in the final rule, EPA docketed a spreadsheet of 2017 RMP facility accidents "to corroborate the continued decline in RMP facility accidents in 2017." *See* 84 FR at 69847. EPA did not use the September 2018 database for any purpose other than to extract accident history information, which the spreadsheet mechanically summarizes and presents. As explained in section I.C of this letter, EPA disagrees that later versions of the database undermine the trend of declining accidental releases. EPA also disagrees that the Agency's claim of a declining accident rate was not subject to notice and comment. EPA explicitly highlighted this trend in the proposed rule[42] and RIA. We looked at the spreadsheet to corroborate that the underlying trends continued. Confirmation of the continuation of a prior observed trend on which we solicited comment does not require reopening comment.

Analysis of state accident data regarding benefits of STAA

Petitioners allege that to justify rescinding the STAA provision, EPA relied on "new data" from two states that were "cherry picked" to support rescinding the provision. Petitioners claim that they advised EPA of four states that had adopted some sort of safer technologies requirement, and that EPA selected only two and ignored the others, provided previously-unpublished data "narrowly selected to make those states' programs look unsuccessful," and made errors that invalidate its analysis. Petitioners claim that EPA's conclusion that the STAA provision lacks benefit based on a few years' data conflicts with the "scientific, agency expert, and even industry consensus" regarding the value of inherently safer technology.

EPA disagrees that it relied on new data that was "cherry picked" to support rescission of the STAA provision. Petitioners did not advise EPA of four states with safer technologies requirement – they pointed to

[42] *See* 83 FR at 24873 and proposed rule RIA, Exhibit 3-7.

three states (NJ, MA, CA) and to Contra Costa County and the City of Richmond, CA.[43] EPA considered all four examples and addressed them in the preamble to the final rule and RTC.[44] Also, EPA's data were not "previously unpublished." All of the data EPA used to reach its final rule decision were provided in the rulemaking docket in the RMP databases and were available to petitioners during the public comment period.

Regarding errors in EPA's analysis, EPA agrees with petitioners that the Agency erred in comparing the accident rates in New Jersey and Massachusetts with the nationwide trend without first removing the no-impact accidents from the New Jersey and Massachusetts datasets. Petitioners note that when the Massachusetts RMP accident data are analyzed without counting the no-impact accidents, the accident rate in MA is lower than the national average. However, EPA disagrees with petitioners' conclusion that the corrected data demonstrate that "IST requirements do work and reduce harm," or indeed that EPA's error is of central relevance to its final rule decision.

First, petitioners' claim is overstated because they appear to have made calculation errors of their own. Petitioners' claim that Massachusetts' impact-accident rate is 30 times lower than the nationwide rate is wildly inaccurate. Petitioners appear to have made an order of magnitude math error in calculating the nationwide accident rate.[45] When this error is accounted for, using petitioners' data the Massachusetts rate from 2004-2013 is about three times lower than the nationwide rate, not 30 times lower. But petitioners' analysis of Massachusetts accidents also incorrectly excludes three accidents – one that occurred in 2004[46] and two in 2014,[47] which when accounted for, approximately double the rate of accidents in Massachusetts as calculated by petitioners to about .0075 accidents per facility-year.

Second, when calculated using correct data, the rate of accidents at RMP facilities in Massachusetts is similar to the RMP facility accident rate in other states that, like Massachusetts, have few RMP facilities overall and no or relatively few RMP facilities in the chemical, paper and petroleum refining industries. As petitioners have acknowledged, Massachusetts has a small number of RMP-regulated facilities.[48] Massachusetts also has no petroleum refineries (NAICS 324), no RMP facilities in the paper manufacturing sector (NAICS 322), and only 15 RMP facilities in the chemical manufacturing sector (NAICS 325) (the Amendments rule STAA provision applied only to facilities in these three sectors). Other states with RMP-facility profiles like this have similarly low RMP-facility accident rates. For example, Massachusetts neighboring state Connecticut has only 28 RMP facilities, none of which are in the petroleum refining or pulp and paper industries, and only five of which are in the chemical manufacturing sector and RMP facilities in this state have had only one impact accident from 2004 to 2016. Maryland has 77 RMP facilities, with no petroleum refineries, one facility in the

[43] *See* petitioners' public comments (EPA-HQ-OEM-2015-0725-1969), pp 29-42.
[44] *See*, e.g., 84 FR at 69878-81, 84 FR at 69862 and RTC Section 3.4.2.
[45] *See* Sivin report, page 17: "Nationwide, the rate of injuries and illnesses per facility-year over the ten-year period was 0.13 per facility-year. This was more than 30 times greater than the Massachusetts rate of 0.004 per facility-year." But using Dr. Sivin's own data, the nationwide rate of accidents per facility year over the ten-year period was only 0.012 accidents per facility year, not 0.13. From Sivin report, page 6, the total number of facility-years over the 10-year period from 2004-2013 equals 129937.61 facility-years. From page 4 of the report, the total number of impact accidents over the same period (using Sivin's corrected data) equals 1565 accidents. 1565 divided by 129937.61 equals 0.012 accidents per facility-year.
[46] Petitioners excluded a 2004 accident at North East Refrigerated Terminals, in Middleboro, MA on April 18, 2004, because the accident occurred prior to the facility's submission of its initial RMP on June 14, 2004. However, this facility was subject to the RMP regulations at the time of its accident but had failed to submit an RMP. EPA inspected the facility on June 3, 2004, and later took an enforcement action against the facility for failing to submit a risk management plan, among other violations. EPA's inspection determined that the facility was subject to the RMP rule and prompted the facility to make its initial RMP submission, which occurred 11 days after EPA's inspection. EPA sees no reason why this facility should have been excluded from petitioners' analysis.
[47] Petitioners excluded the April 2014 accident at Preferred Freezer Services in Norton, Massachusetts, and the October 2014 accident at Pharmasol Corporation in South Easton, Massachusetts. Both accidents resulted in community evacuations. EPA can see no reason why these accidents should not be included, and petitioners offered no specific reason for excluding them. EPA had included both of them in its own analysis presented in the Technical Background Document, but petitioners simply ignore them.
[48] According to the September 2019 RMP database that petitioners submitted as an attachment, Massachusetts has 71 RMP facilities.

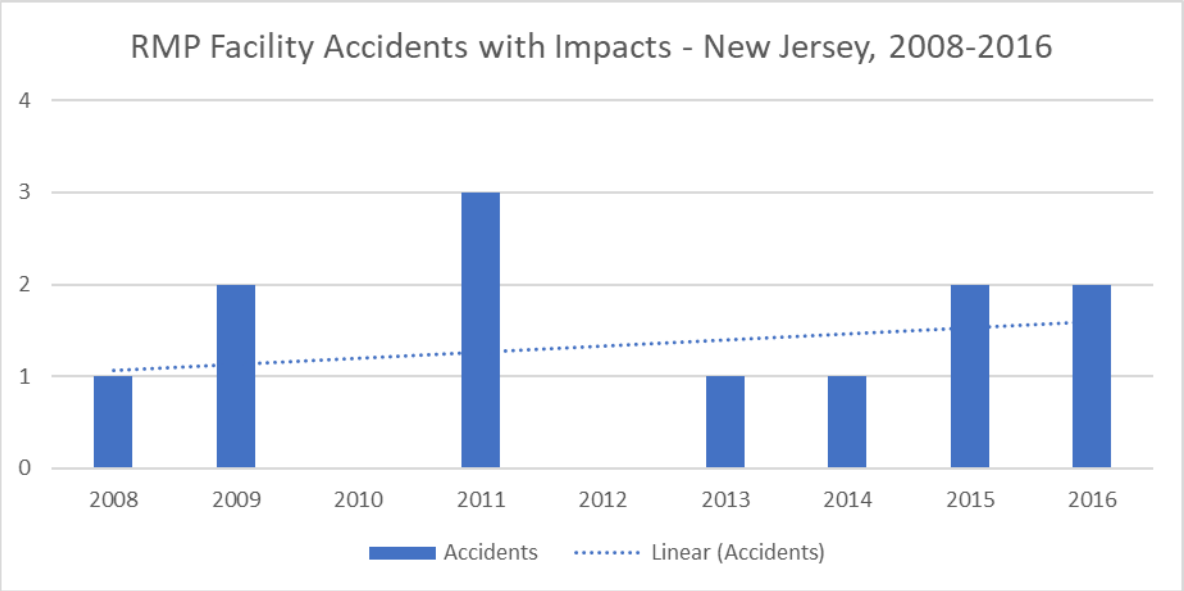
paper manufacturing industry and six facilities in the chemical manufacturing sector and has had only 9 accidents between 2004 and 2016. Arizona has 107 RMP facilities, but no petroleum refineries or paper manufacturing facilities and only eight facilities in the chemical manufacturing sector and has had only nine accidents over the 13-year period of study. New Hampshire has only 14 RMP facilities, with no refineries, paper or chemical manufacturing facilities, and has had only two accidents between 2004 and 2016.

All of these states' accident rates over the period of study are below the national average and comparable to (or better than) the accident rate in Massachusetts over the same period, but none of these states have state-level regulations analogous to the Amendments rule STAA provision. As EPA demonstrated in the Amendments rule, RMP facilities in the paper manufacturing, petroleum and coal products manufacturing, and chemical manufacturing sectors have significantly higher accident rates than RMP facilities in other sectors (*See* 81 FR at 13668) so it is unsurprising that states with no petroleum refineries and little or no chemical and paper manufacturing industry have relatively few accidents. Therefore, one cannot conclude that the Massachusetts Toxic Use Reduction Act (TURA) program is responsible for the relatively low rate of accidents at RMP facilities in the state, when several other states with similar numbers and sector concentrations of RMP-regulated facilities have similarly low (or lower) accident rates without any state-level regulation analogous to the Amendments rule STAA provision.

Third, as EPA indicated in the final rule, while EPA evaluated the Massachusetts TURA program as an analog to the Amendments rule STAA program, EPA was cognizant that the requirements of the TURA program were different than the STAA requirement of the Amendments rule. *See* 84 FR at 69880. On the other hand, the New Jersey Toxic Catastrophe Prevention Act (TCPA) IST provision is a much better analog to the STAA provision of the Amendments rule than the Massachusetts TURA program because the TCPA provision is nearly identical to the Amendments rule STAA provision (*Id.*) and was levied on a set of facilities that are a better comparison to the nationwide dataset. While the Petitioners did not address the consequence of EPA's no-impact accident error on the accident rate and trend in New Jersey, when the no-impact accidents in New Jersey are removed,[49] its accident rate still exceeds the national average,[50] and the trend of accidents in the state actually increases, as shown in the chart below.

[49] There were four no-impact accidents that EPA incorrectly included in its original analysis. See EPA-HQ-OEM-2015-0725-0002 and -0909, available at www.regulations.gov.

[50] EPA used the period from 2008 to 2016 for its evaluation of New Jersey accidents because the New Jersey TCPA IST provision went into effect in 2008. From 2008 to 2016, New Jersey RMP facilities had 12 accidents with impacts. Over this period, an average of 78 RMP facilities operated in New Jersey. Conservatively assuming each facility that operated in any year operated for the entire year, this equates to 702 facility-years over the nine-year period. 12 accidents divided by 702 facility-years equals 0.017 accidents per facility-year, which is about 40% higher than the national average RMP facility accident rate.



Petitioners criticize EPA's use of average accident rates and trends due to the low numbers of RMP-regulated facilities in Massachusetts and New Jersey.[51] In the Technical Background Document, EPA acknowledged that comparisons to states with relatively few facilities should be done cautiously.[52] But these are the only relevant data that appear to exist, and therefore EPA should not ignore them. Notwithstanding their limitations, the available data from New Jersey, while not conclusive, appear much more relevant to the question of the effectiveness of the STAA provision and EPA's final rule decision to rescind it than the data from Massachusetts because not only is the NJ provision a much closer analog to the STAA provision of the Amendments rule, but New Jersey has a larger petroleum refining and chemical manufacturing industry that were already subject to a nearly identical regulatory provision.

At the end of the day, EPA's purpose in comparing the state-level RMP facility accident data to the nationwide accident data was to determine whether these states provide clear evidence of the effectiveness of STAA-like regulatory provisions. *See* 84 FR at 69863 ("EPA does not see sufficient evidence to show that the STAA provision of the Amendments would reduce RMP facility accidents enough for the provision to be a reasonable regulation"); *id*. at 69853 (data suggests STAA had no significant impact on accident prevention). If the STAA provision has the accident prevention benefit that petitioners claim it to have, EPA believes there should have been quantifiable evidence of its effectiveness from these analogous state regulatory programs, but there is not. After accounting for EPA's no-impact accident error in its analysis of RMP facility accident rates in Massachusetts and New Jersey, EPA believes the results are at best equivocal for Massachusetts (i.e., low accident rate, but comparable to other states with similar numbers and types of RMP facilities not subject to any state STAA-analogous provision), and provide even less evidence to support claims of the effectiveness of New Jersey's IST provision than EPA had previously believed (accident rate higher than national average and increasing). Therefore, EPA finds that petitioners' claims regarding EPA's error in analyzing state accident data is not of central relevance to its final rule decision. The discovery of the error is not significant new information that would have materially impacted the analysis of the effectiveness of regulatory provisions like STAA. EPA would have made the same decision if the Agency had not made this error.

[51] *See* petition at p. 43.
[52] *See* EPA, Technical Background Document for Final RMP Reconsideration Rule, Risk Management Programs Under the Clean Air Act, Section 112(r)(7), July 18, 2019, p. 41.

Also, EPA believes that petitioners could have submitted analyses of accident data from states with STAA-analogous regulatory provisions during the period for public comment, because EPA had specifically provided notice in the proposed rule that it was seeking data regarding the effectiveness of IST provisions,[53] and the data that EPA used for its own analysis had been provided in the public docket. During the public hearing held on June 14, 2018, EPA specifically discussed the issue of state-level accident data with witnesses,[54] and public commenters subsequently submitted comments on this subject.[55] There is no reason why petitioners could not have performed their own analysis of state-level accident trends and submitted that analysis to EPA during the public comment period. Therefore, this claim also fails to raise new grounds for objection to the final rule.

Use of EPA's "latest database" to refute petitioners' public comments

Petitioners allege that EPA cited information from a newer version of the RMP database that had not been docketed in order to refute incidents about which petitioners had submitted information in their public comments on the proposed rule. Petitioners claim that EPA's failure to provide this database so that the public could look up these incidents violates the Clean Air Act's requirements to make the factual data on which the proposed rule is based available for public comment.

EPA finds that this claim does not satisfy the requirements of reconsideration under CAA section 307(d)(7)(B), because it reiterates comments petitioners and others made in their public comments submitted on the proposed rule and is not of central relevance to the outcome of the rule.

In their public comments on the 2018 proposed Reconsideration rule, petitioners submitted information compiled by Earthjustice from 73 incident reports (covering 75 incidents) that occurred between the Amendments rule original effective date of March 14, 2017 and September 21, 2018 when US Court of Appeals for the D.C. Circuit issued a mandate to make the Amendments effective.[56] Petitioners submitted these incident reports to allege they were evidence that the Amendments rule provisions were still needed[57] (and as EPA has already discussed above, the Agency knew there would still be accidents with or without the 2017 Amendments rule's prevention program provisions). In their public comments, petitioners also alleged, "EPA has released no data at all from the chemical fires, explosions, and other releases at RMP facilities since 2016. This is true even though it now acknowledges that it has used some data through spring 2018 on which it relied; it is unclear why it did not pull any incident data at all from 2017 or 2018 from that database."

As EPA explained in its response (*see* RTC p. 276), the Agency stopped analyzing RMP data and adding information to the docket in order to complete the proposed rulemaking process. It is impossible for EPA to docket a version of the database that contains information for accidents that occur after the database is created. By submitting information in their public comments regarding accidents that occurred later than the date of the docketed database, petitioners are attempting to put EPA in a Catch-22. When EPA responds to

[53] *See* 83 FR at 24875, where EPA specifically requested these data: "Are there any data from chemical accident or toxic use reduction programs that demonstrates a substantially lower accident rate at existing facilities that already had successful accident prevention programs in place and then conducted Inherently Safer Technology or Design (IST/ISD) reviews or otherwise conducted chemical substitution to lower chemical hazards?"

[54] *See* public hearing transcript, EPA-HQ-OEM-2015-0725-0985, available at www.regulations.gov.

[55] *See* EPA-HQ-OEM-2015-0725-1481, -1870, -1865, and -1925, available at www.regulations.gov.

[56] Petitioners' public comments contained a link to the Earthjustice website, where Earthjustice maintained an updated running tally of incidents that occurred after the original effective date of the Amendments rule. Although eight of the 75 incidents occurred after the end of the public comment period (i.e., from August 24, 2018 until September 21, 2018), EPA considered all 75 incidents in the Response to Comments document for the 2019 final RMP rule.

[57] See petitioners' public comments, EPA-HQ-OEM-2015-0725-1969, p. 10. Petitioners maintained a running compilation of accidents on their website, such that information continued to accumulate after the end of the public comment period, until September 21, 2018.

petitioners' allegations about later accidents by using a later version of the RMP database to show that most of petitioners' new accidents were either properly reported or cannot be confirmed as RMP-reportable accidents at all, petitioners subsequently claim EPA has released "new data" that was not available for public comment. But it was petitioners, not EPA, that brought up these later accidents in their public comments, and EPA must be allowed to respond. And, as EPA noted in its response, more recent versions of the database confirmed the continuing decline in accidents and therefore did not impact EPA's decisions in the Reconsideration rule. Therefore the later database versions were not of central relevance to EPA's final rule decision.

Regarding the TCEQ emissions information discussed by petitioners, petitioners' claim that EPA "arbitrarily selected 10 of 92 incidents for which petitioners provided information" and that "EPA gave no explanation for how or why it chose those ten or how reviewing only such a small subset of the incidents could prove that they are not relevant to demonstrate the need for the prevention regulations" are incorrect. Petitioners referred to a Union of Concerned Scientists report that did not provide information on individual emissions incidents – the report only contained the claim that "Out of 186 total air emissions events reported to TCEQ between July 31 and September 7, 2017, 91 (48.9 percent) were Harvey-related, and 134 (72.0 percent) were in RMP facilities."[58] In response, EPA stated,

> "As these commenters did not submit TCEQ data directly to EPA, EPA conducted a search using TCEQ's website for emissions events occuring between August 25, 2017 and September 1, 2017 (i.e., the period encompassing Hurricane/Tropical Storm Harvey's impact on Southeast Texas). That search returned 93 emissions reports from facilities in Texas. EPA did not review all 93 reports but reviewed a sample of 10 emissions reports from facilities regulated under the RMP rule. Of the 10 reports reviewed by EPA, 8 were submitted for excess emissions (i.e., emissions above permitted limits) from flare stacks, one was submitted for excess emissions from an electrostatic precipitator, and one to report volatile compounds emitted from a small oil release to secondary containment…Commenters presented no information or analysis of TCEQ emissions data to demonstrate that the data related to RMP-reportable chemical accidents, nor did commenters show that the RMP rule or the specific provisions of the Amendments rule rescinded or modified by the Reconsideration rule could have prevented these releases. In EPA's judgement, none of the TCEQ emissions reports reviewed by EPA represented RMP-reportable accidental releases, and it is unlikely that the other TCEQ emissions reports discussed by these commenters would represent RMP-reportable accidental releases." *See* RTC at 278-9.

In short, petitioners and other commenters made a claim about the relevance of TCEQ emissions data to accidental releases from RMP-regulated processes without submitting those data to EPA or attempting to present any analysis of their relevance to the proposed rule. While EPA was not obligated to perform that missing analysis for commenters, the Agency reviewed a sample of 10 TCEQ emissions reports and found that none related to RMP-reportable accidental releases, leading EPA to conclude that overall, these data were unlikely to be relevant to EPA's final rule action. EPA notes that petitioners have not submitted any further information or analysis regarding TCEQ emissions reports to dispute EPA's conclusion. Therefore, as this issue was raised in public comments, responded to by EPA and is not of central relevance to EPA's final rule decision, it does not meet the criteria for reconsideration.

E) Final rule provisions allegedly not subject to notice and comment

Petitioners make a number of claims that EPA presented new rationale, new data, and new claims of legal authority regarding final rule provisions that were not subject to notice and comment. EPA disagrees with these claims and responds to each individual claim below.

[58] See EPA-HQ-OEM-2015-0725-1869, p. 21 available at www.regulations.gov. The Union of Concerned Scientists' report referred to in petitioners' comments is: Community Impact: Chemical Safety, Harvey, and the Delay of the Chemical Disaster Rule (Oct. 2017).

Representative sampling of processes during compliance audits

Petitioners claim that in the final rule EPA newly asserted that it was not necessary to add the phrase "each covered process" to the compliance audit provisions because "EPA's view that compliance audits must evaluate every process every three years does not foreclose the use of 'representative sampling.'"

This claim misstates EPA's rationale for removing the words "for each covered process" from the compliance audit provisions. The issue of removing "for each covered process" was raised for comment in the proposed rule. EPA did not justify the removal of this language based on the use of representative sampling. Rather, EPA justified the removal of the phrase because it was not necessary to add the phrase and removing it maintained consistency with the OSHA PSM standard. *See* 84 FR at 69882. EPA addressed the issue of representative sampling only in response to public comments on this topic, not as a new rationale for removing the requirement. *See* RTC at p. 151-152. Therefore, EPA's response to this public comment was not of central relevance to EPA's final rule action, because the comment and response did not constitute the basis for EPA's decision. Therefore, this claim does not meet the criteria for reconsideration.

Considering incident investigations in hazard reviews and PHAs

Petitioners claim that EPA invented a new rationale in the final rule for removing the requirement for facilities to consider incident investigation results in hazard reviews and PHAs. Petitioners state that EPA asserted for the first time in the final rule that the requirement to consider incident investigation results in PHAs is unnecessary because the PHA must already identify any previous incident which had a likely potential for catastrophic consequences' and paragraph (c)(4) requires the PHA to consider the consequences of failure of engineering and administrative controls.

EPA disagrees that it invented any new rationale for removing this requirement in the 2019 RMP final rule. In the proposed rule, EPA was clear that it was proposing to remove requirements that caused the prevention program requirements of the EPA RMP rule and OSHA PSM standard to unnecessarily diverge. *See* 83 FR at 24863. EPA also explained that coordination of Risk Management Program requirements with other agencies helped to minimize burden and avoided requiring unduly duplicative and distinct compliance programs addressing the same matters. EPA's final rule rationale for rescinding this provision explicitly cites both of these bases: "EPA is rescinding the provision so that the Program 3 PHA requirements remain consistent with the OSHA PSM standard, and to prevent unduly burdensome or duplicative requirements." *See* 84 FR at 69884. EPA's additional statement that the Amendments rule requirement was unnecessary because the PHA already required consideration of previous incidents simply explained how the new provision had created an unnecessary divergence from the PSM standard. Therefore, since EPA's final rule rationale for removing the requirement was the same as its rationale in the proposed rule, petitioners have not presented any new grounds for objection, and this claim fails to meet the reconsideration criteria.

Delayed and modified exercise requirements

Petitioners claim that EPA's final rule action to delay and modify exercise requirements was based on new data, where EPA cited the number of counties with more than 50 RMP facilities. Petitioners also claim that removing a minimum frequency for field exercises will not change the level of first responder participation in facility exercises, and that setting a minimum frequency for field exercises will have benefits regardless of whether or not first responders participate in all of the exercises. (Petition at p. 49) Petitioners argue that removing a minimum frequency for field exercises will not change first responder participation in those exercises and claim that "because the likely effect of removing the minimum frequency is to weaken disaster preparation and response, the change violates § 7412(r)(7)." Petitioners also claim that EPA asserts a new legal basis for its changes to the exercise provisions by arguing for the first time in the final rule that the Clean Air

Act contains no requirement that EPA impose an exercise requirement under section 112(r). Further, petitioners claim that it is not reasonable to create a regulatory requirement with no deadline, and that such a requirement does not satisfy the CAA 112(r)(7)(B) requirement to promulgate regulations providing for emergency responses to accidental releases "to the greatest extent practicable." Petitioners also claim that EPA's compliance date schedule for exercises exceeds the CAA Section 112(r)(7)(B) requirement that rules

> "shall be applicable to a stationary source 3 years after the date of promulgation, or 3 years after the date on which a regulated substance present at the source in more than threshold amounts is first listed under paragraph (3), whichever is later."

Lastly, petitioners claim that EPA "newly concludes that extended compliance dates cause no harm at all", which petitioners claim is contrary to the decision in *Air Alliance Houston v. EPA*, 906 F.3d 1049 (2018).

EPA disagrees with petitioners' claim that EPA's action to delay and modify the exercise requirement in the final rule was based on new data. When proposing to modify the exercise provisions, EPA indicated that the Agency was particularly concerned about the burden of exercise requirements in areas with multiple RMP facilities. *See* 83 FR at 24874. The number of counties with more than 50 RMP facilities was obtained from the database that EPA docketed. *See* 84 FR at 69901. These data were available to members of the public during the public comment period. Also, it is well known that some counties have large numbers of RMP facilities. Petitioners themselves made several references to areas with large numbers of RMP facilities in their own comments on the proposed rule:

- "Some communities, like Wilmington and Torrance, California, and the Manchester/Harrisburg neighborhoods of Houston and the nearby city of Galena Park, Texas, are surrounded by refineries and chemical plants." See petitioners' public comments at p. 24.
- In Houston, for example, 65 percent of the city is within one mile of a facility in the toxic release inventory." See petitioners' public comments at pp 15-16.
- In the Manchester community of Houston, 90% of the residents of Manchester live within 1 mile of a chemical facility. See petitioners' public comments at p. 16.

Therefore, petitioners cannot reasonably claim that they or other members of the public were unaware that EPA was considering the potential impacts of the Amendments rule's exercise requirements on local responders in areas with numerous RMP facilities, or that EPA's final rule decision was based on new data. This claim fails to meet the reconsideration criteria.

Regarding petitioners' arguments against removing the required frequency for field exercises, extending compliance dates, creating a regulatory requirement with "no deadline," and their claim that EPA's rationale for delaying and modifying exercise requirements is arbitrary and capricious, these claims do not meet the reconsideration criteria because they all could have been raised in public comments on the proposed rule. EPA explicitly proposed to remove the required frequency for field exercises (83 FR at 24860) and to delay compliance dates for the exercise provisions (83 FR at 24,861), and in both cases EPA's final rule action adopted these changes as proposed (*See* 84 FR at 69899-900 and 84 FR at 69908). Likewise, petitioners' arguments concerning the benefits of exercises without local responder participation, the reasonableness of EPA's regulatory deadline for field exercises, whether EPA's compliance date schedule meets the requirements of CAA Section 112(r)(7)(B) and claims that EPA's actions are arbitrary and capricious could all have been made in petitioners' public comments on the proposed rule. Therefore, these claims do not meet the criteria for reconsideration.

EPA also disagrees that the Agency asserted any "new legal basis" by stating in the final rule that the Clean Air Act contains no requirement for EPA to impose an exercise requirement under section 112(r). EPA's

statement was factual, rather than a new legal theory. Regarding petitioners' claim that EPA's final rule action is contrary to the Air Alliance Houston decision, EPA's response to this claim is addressed in Section III of this letter.

Near-misses and non-RMP accidents

Petitioners claim that EPA made a new decision to not consider the prevention of non-RMP accidents, including near-misses, as a benefit of the 2017 Amendments rule, that this decision was not subject to notice and comment, and is erroneous.

EPA disagrees that the Agency made any new interpretation or decision in the final rule to not consider the prevention of non-RMP accidents as a benefit of the 2017 Amendments rule. In the RIA for the final rule, EPA explicitly listed "Prevention and mitigation of future RMP facility accidents (including RMP and non-RMP accidents at RMP facilities)" as a category of reduced qualitative benefits associated with proposed rule provisions.[59] EPA notes that petitioners' public comments on the proposed rule had already made this claim,[60] so they are well aware that EPA did not invent a new interpretation in the final rule. EPA responded to Petitioners' comments in the RTC.[61] Petitioners now raise the same issue under the guise of calling EPA's response a "new interpretation" in an attempt to meet reconsideration criteria. Notice and comment rulemaking does not require reopening comment on each response to comment or else there would be no finality to any rulemaking. Therefore, this claim does not meet the criteria for reconsideration.

Regarding near-misses, the final rule removed the phrase "i.e., a near-miss" from the incident investigation provisions of § 68.60 and § 68.81, which were added by the 2017 Amendments rule. However, as EPA explained in the final rule, this did not remove the existing requirement for owners or operators to investigate incidents that could reasonably have resulted in a catastrophic release. EPA removed the phrase because it was causing confusion in the regulated community over the scope of the incident investigation requirements. *See* 84 FR at 69873.

Petitioners' own confusion over what types of incidents constitute near misses proves EPA's point. Petitioners never define exactly what they mean by "near-miss," but use the term to describe an actual accidental release within an RMP-regulated process, among others. In order to criticize EPA's purported decision to discount near-miss events, petitioners describe the February 2015 electrostatic precipitator explosion at the ExxonMobil refinery in Torrance, California, as a "non-RMP disaster" and a near-miss which they presumably believe that EPA incorrectly did not view as an accident. But petitioners are wrong – the February 2015 ExxonMobil accident was, in fact, a reportable accidental release within an RMP-regulated process, which caused off-site impacts (sheltering in place), and which has been reported within the facility's risk management plan. EPA also counted this accident in determining the costs of accidental releases during the 2014-2016 period.[62]

Since petitioners' claims in this area are either incorrect or were already raised during the public comment period and responded to by EPA, this claim fails to meet the criteria for reconsideration under CAA Section 307(d)(7)(B).

F) DOJ assessment of risks associated with posting OCA information on the Internet

[59] *See* final rule RIA, EPA-HQ-OEM-2015-0725-2089, p. 72.
[60] *See* EPA-HQ-OEM-2015-0725-1969, p. 147.
[61] *See* RTC, pp 238-240.
[62] *See* EPA-HQ-OEM-2015-0725-0909, available in the rulemaking docket at www.regulations.gov. The accident is listed under the name of the refinery's new owner, Torrance Refining Company, LLC.

The petition claims that EPA's failure to discuss and docket an April 2000 DOJ report on the increased risk of terrorism or criminal activity associated with posting RMP offsite consequence analysis information online denied the public of a meaningful opportunity to comment upon EPA's specific security concern that the assembly of otherwise-public information in an anonymously-accessible public form had value and posed a security risk. (Petition at 53-54).

As the petition notes, EPA specifically raised for comment in the 2018 proposed rule its concern about whether synthesizing in an easily-accessible manner information that is not otherwise available from a single source would increase terrorism risk. 83 FR at 24877-78. In the 2019 RMP final rule, EPA relies on the DOJ report to support our view that consolidating otherwise publicly available information in an anonymously-accessible format has value to terrorists and criminals, and to note that the US Special Operations Command considers the type of information on emergency response to be disclosed under the rescinded 2017 Amendments to be useful in targeting vulnerable assets. *See* 84 FR at 69885-86. EPA believes these considerations undermined the workability ("practicability") of the 2017 Amendments information disclosure provisions. *Id.* In additional responses to comments on the security rationale for the rescission of information provisions and the community interest in access to the information, we rely in part on the DOJ report itself, as well as the fact that communities would have already-existing methods to access the information in RMPs and that the 2019 RMP final rule retained certain modified enhanced information disclosure provisions, to support our view that the 2019 RMP final rule struck a better balance between community access and security than the 2017 Amendments. *Id*. at 69886 – 89.

We recognize that including a citation to the DOJ Report and including a copy in the docket for review would have provided support for an aspect of our rationale for proposing to rescind information disclosure provisions contained in the 2017 Amendments. Nevertheless, while arguably a procedural oversight on our part, we do not consider the failure to provide this information to be of central relevance to the rulemaking. The closest the Petition comes to identifying a prejudice arising from the failure to docket the DOJ Report is to say that EPA lacked evidentiary support in the proposal for our concern about easy, anonymous access to consolidated information. Nothing in the Petition identifies a fault with the study.

> Cf. CAA §307(d)(8) "In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made."

Moreover, the statute itself identifies the issue of the balance of information disclosure in preventing accidental releases and the potential likelihood that such disclosures could increase the risk of terrorist or criminal targeting of RMP facilities. CAA 112(r)(7)(H)(ii). The issue of the risks inherent in consolidating information and making it available in an easily, anonymously accessible format was plainly raised. *See* 83 FR at 24877-78. Therefore, on the issue of the value of consolidating information and its prominence in our thinking about the security / access balance, commenters had ample opportunity to raise their concerns. The specific Special Operations Command targeting information cited from the DOJ report merely confirmed our view stated in the proposal that the information to be disclosed under the 2017 Amendments struck an improper balance of accessibility and the risk of terrorism; the substance of the usefulness in targeting is not disputed in the Petition. Therefore, this claim does not meet the criteria for reconsideration.

III. The Effect of the DC Circuit's Decision in *Air Alliance Houston v. EPA*

Petitioners' last main objection is their claim that the D.C. Circuit's decision in *Air Alliance Houston v. EPA*, 906 F.3d 1049 (2018), prevents EPA from rescinding accident prevention provisions to await their further reconsideration in concert with OSHA. Petitioners argue that the *Air Alliance Houston* (*AAH*) decision

occurred just days before the end of the public comment period and gave rise to new objections to the 2019 RMP final rule, including rescinding accident prevention measures pending further coordination with OSHA, and extending deadlines for emergency response exercises and eliminating the deadline for field exercises. EPA addresses each of these arguments below.

A) Effect of the *AAH* decision on EPA's OSHA coordination rationale

Petitioners' first argument about the impact of the *AAH* decision on one of the rationales supporting the 2019 RMP final rule, the need to better coordinate with OSHA before adopting significant departures from PSM, characterizes EPA's rationale as like EPA's rationale for delaying the 2017 Amendments. In *AAH*, the Court vacated EPA's 20-month extension of the effective date for the 2017 Amendments when EPA said the additional time was needed to conduct a reconsideration of the 2017 Amendments. The *AAH* Court found that CAA 307(d)(7)(B) set a three-month controlling limit on the length of stay to conduct a reconsideration, 906 F.3d at 1063, that EPA had no authority for the extension under CAA 112(r)(7)(A) when it made no substantive finding as to why 20 months was "as expeditiously as practicable," *id.* at 1066, and that EPA's reasoning for a 20-month delay was otherwise arbitrary and capricious. *Id.* at 1069. The Petition characterizes the coordination rationale as an extreme version of the Delay Rule because it permanently repealed the 2017 Amendments pending additional coordination. (Petition at 55-56).

The petition mischaracterizes both the *AAH* decision and EPA's OSHA coordination rationale.[63] While the *AAH* Court was critical of EPA's failure to provide a substantive basis that was consistent with CAA 112(r)(7) in our rationale for the Delay Rule, EPA explained in the 2018 proposed rule that it viewed the coordination requirement as a measure to facilitate compliance and to reduce burden, and to empower the Agency to assess whether any divergence between the programs was reasonable. *See* 83 FR at 24863-64. In the 2019 RMP final rule, we further explain the OSHA coordination rationale as:

> "We do not take the position that neither agency can act without the other moving in synch. Rather, reflecting on the potential burden of changes adopted in the Amendments as well as the lack of data concerning the benefits of the rule-driven approach adopted in the Amendments, we believe more work with OSHA on the issues being addressed would lead to better accident prevention." *See* 84 FR at 69844.

The Petition, in only quoting the last clause of this passage, ignores that we set out substantive reasons (burden of the changes, lack of benefits of a rule driven approach) supporting our belief that the 2017 Amendments divergence from PSM was unreasonable and why further coordination is necessary. *See id.* at 69852 (avoiding confusion from divergent regulatory requirements). We discuss the relevant legislative history supporting our view that the purpose of the coordination provision is to ensure that PSM and RMP are not "unduly burdensome" *Id.* at 69862 (quoting Senate Report at 244). Finally, we conclude that, without a record reflecting significant benefits attributable to the rescinded prevention provisions, we would follow our "traditional approach of maintaining consistency with OSHA PSM;" the 2017 Amendments prevention provisions addition of complexity and burden without demonstrated benefits made those provisions impracticable and unreasonable. *Id.*

By mischaracterizing the record and how we relied on the OSHA coordination rationale, the petition attempts to shoehorn the 2019 RMP final rule into the *AAH* decision's holdings regarding the appropriateness of delaying compliance dates. The petition does not identify how the *AAH* decision provides any reasoning that is of central relevance to our actual discussion of the coordination provisions and our reliance on those provisions in our rationale for the 2019 RMP final rule. Therefore, this claim does not meet the criteria for reconsideration.

[63] It should be noted that no party briefed, argued, or addressed CAA 112(r)(7)(D) or the related legislative history to the *AAH* Court, nor did the Court address its interpretation of the coordination requirements in CAA 112(r)(7)(B)(i) or 112(r)(7)(D).

B) Effect of the *AAH* decision on emergency exercise deadlines

In the 2018 proposed rule for the 2019 RMP final rule, EPA proposed revisions to compliance dates for multiple provisions, including many of the emergency exercise provisions and the emergency coordination. *See* 83 FR at 24875. With respect to the emergency response exercise provisions, we proposed that a source would have to have in place programs and schedules for meeting the emergency exercise requirements within four years of the effective date of the final rule, with the first notification exercise due one year after that date, the first tabletop exercise due seven years after the effective date, and no specified deadline date for field exercises. *Id.* We justified the extended deadlines in part by the rationale provided for the original deadlines in 2017 Amendments (merely tolling them for the period of the reconsideration) and by our intent not to overburden facilities and local responders by having a crush of activities due within four years of the effective date of the final rule. *Id*. at 24875-76. With respect to the emergency response exercise requirements, the 2019 RMP final rule adopted the dates proposed in 2018. *See* 84 FR at 69908. The petition contends that EPA ignored the *AAH* decision that vacated the Delay Rule when we extended the compliance dates for the emergency exercise provisions and failed to explain how the dates for the various exercises (notification, tabletop, and field) were as expeditiously as practicable. (Petition at 57-60).

EPA accounted for the holding in *AAH* in its decisions on compliance dates. For rule provisions that were not rescinded, EPA retained some and modified others. We referred to "the D.C. Circuit Court vacatur of the RMP Delay Rule" as part of basis for requiring these requirements to be immediately effective upon publication of the 2019 RMP final rule. *See* 84 FR at 69909. Those compliance dates that we modified (including the dates for the emergency response exercise provisions) were consistent with the proposed dates. The dates for the emergency response exercise provisions reflected the *AAH* holding that EPA must set dates as expeditiously as practicable under CAA 112(r)(7)(A), and that expeditiously as practicable means as soon as practicable for compliance and not simply the time necessary for regulatory processes such as the completion of a rulemaking. 906 F.3d at 1064. In contrast to the regulatory process rationale in *AAH*, we took account of burdens on local emergency responders when setting emergency response exercise dates and linked it to our view of what is practicable in light of the goals of the exercise provisions. *See* 84 FR at 69909. Because we neither directly fund nor mandate their participation, but believe their participation makes for better exercises, we structured dates to facilitate their voluntary participation. Due to the need for encouraging voluntary participation, we likened the dates selected to the more complex, non-procedural requirements discussed in the legislative history for the compliance date provision. *Id.* (citing Senate Report at 245). We view the dates to be as expeditiously as practicable.

Petitioners were able to comment on why these emergency response exercise dates were or were not as expeditiously as practicable as they mirror what we proposed. The *AAH* case simply affirmed their view of the need for such dates to be as expeditious as practicable based on what is needed substantively for compliance, a view Petitioners were able to express in their comments. The decision in *AAH* simply reinforces their view of how we must set dates. *See* 906 F.3d 1066. We explained how we followed that view in the 2019 RMP final rule. *See* 84 FR at 69908-10. While petitioners may disagree that we set dates that are as expeditious as practicable, petitioners fail to identify how the *AAH* decision provides new information of central relevance rather than information reflected already in the rule. This claim does not meet the criteria for reconsideration.

We appreciate your comments and interest in this matter.

Sincerely,

Andrew Wheeler