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

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THE ADMINISTRATOR

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Dear Mr. Myers and Ms. Kam:

I am responding to your February 18, 2020 petition for reconsideration on behalf of the State of New York, District of Columbia, State of Delaware, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, People of the State of Michigan, State of Minnesota, State of New Jersey, State of New Mexico, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, State of Washington, State of Wisconsin, and City of Philadelphia (collectively, the "States" or "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 The final rule rescinded or modified certain provisions added to the Risk Management Program (RMP) regulations by amendments made in 2017 (2017 RMP Amendments rule, 82 FR 4594, January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 The 2019 RMP final rule rescinded amendments relating to safer technology and alternatives analyses (STAA), third-party audits, incident investigations, information availability, and several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 EPA ignored new information about serious chemical accidents, including the explosion at the Philadelphia Energy Solutions (PES) Refinery in Philadelphia, Pennsylvania; the explosion and fire at the TPC Group chemical plant in Port Neches, Texas; the explosion at Watson Grinding and Manufacturing in Houston, Texas; and others;

(II) that EPA ignored the recommendations of the U.S. Chemical Safety and Hazard Investigation Board (CSB) in an April 2019 letter concerning hydrogen fluoride (HF); and,

(III) that EPA ignored the report from its Office of Inspector General, *EPA Needs to Improve its Emergency Planning to Better Address Air Quality Concerns During Future Disasters*, Report No. 20-P-0062 (Dec. 16, 2019).

The States allege 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 States also allege 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 Clean Air Act (CAA)[1] and stay the 2019 RMP final rule.

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 States have failed 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. Recent Accidents, Accident Severity, and Accidents After Enforcement

The States' first objection is that EPA has ignored new information about chemical accidents that continue to occur, including the explosion at the PES Refinery in Philadelphia, Pennsylvania; the explosion and fire at the TPC Group chemical plant in Port Neches, Texas; the fatal explosion at the Watson Grinding and Manufacturing in Houston, Texas; and other information about accidents that was submitted to EPA in letters from the Attorneys General of New York, Pennsylvania, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington on August 20, 2019 ("States' Supplemental Comments") and October 28, 2019 ("States' Second Supplemental Comments"). State petitioners claim that these chemical accidents undercut EPA's final rule decision to rescind provisions of the 2017 RMP Amendments rule. State petitioners also claim that in the 2019 RMP final rule, EPA focused only on the number of accidents at RMP facilities, rather than the severity of several "high profile" accidents that petitioners claim demonstrate the need for better safeguards. State petitioners also claim that several recent accidents occurred at facilities where EPA or a state agency had already taken enforcement action, and that

[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 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.

these accidents undercut EPA's reliance on enforcement to prevent accidents. EPA addresses each of these claims below.

A) Post-comment period accidents at PES, TPC Group, Watson Grinding, and other facilities

The EPA disagrees that serious accidents that occurred at PES, TPC Group, Watson Grinding, or other facilities after the close of the public comment period satisfy the requirements for reconsideration under CAA section 307(d)(7)(B). This claim is similar to claims made by several commenters on the proposed Reconsideration rule (83 FR 24850, May 30, 2018) – claims that EPA addressed in the preamble to the final rule and in the Response to Comments (RTC) document for the final rule.[2] 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.

In public comments on the 2018 proposed rule, 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." *See* 84 FR at 69869 and RTC at 215.

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." *See* 84 FR at 69870.

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." *See* RTC at 216.

One commenter claimed that the proposed rule was "inherently contradictory" because EPA recognized that the incident data shows 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. *See* 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." *See* RTC at 61.

The observation that accidental releases continued to occur after the close of comments, absent some unique or new fact that a particular incident or set of incidents demonstrates, is not significant new information because the Agency never took the position that there would be no accidents after either the 2017 RMP Amendments or the 2019 RMP final rule. EPA was fully aware that some accidents would continue to occur, with or without the 2017 Amendments rule provisions. That the accidents identified in the Petition were severe, in the Petitioners' view, does not distinguish these incidents from others discussed in comments. The issue of the benefits of preventing accidents was prominently raised in the 2018 proposed rule and commented upon by Petitioners and others. Your petition would set a rulemaking standard – preventing all accidental releases at

[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.

RMP facilities nationwide – that would be impossible for EPA to meet with the provisions affected by the 2019 RMP final rule. The petition provides 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. Furthermore, it would be impossible to complete a rulemaking if the mere occurrence of an accident after the close of comments was sufficient to require EPA to reopen its record.

The petition also claims that accidents listed in States' Supplemental Comments and referred to in States' Second Supplemental Comments represent new grounds for objection of central relevance to the 2019 RMP final rule. States' Supplemental Comments claim that a series of accidents between August 23, 2018 (the end of the period for public comment of the proposed Reconsideration rule) and August 15, 2019, including accidents in states that co-signed the supplemental comment letter, as well as other states, represent new information that is centrally relevant to the proposed rule.

EPA's response to the information on the 60 incidents listed in the appendix to States' Supplemental Comments is the same as discussed above, where EPA showed how the Agency had addressed the issue of accidents, accident rates, and incident costs and impacts during the public comment period. In fact, several of the accidents listed in States' Supplemental Comments are the same accidents submitted by another commenter.[3] EPA responded to these comments in sections 3.1 and 10.6 of the RTC.[4] Therefore, as this issue was raised in the proposal, received public comment and was 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."

We do not assert that an accident or set of accidents that occur after the close of comments cannot provide significant new information of central relevance. However, it would be observations or lessons learned from the incident that could provide such information (something not previously observed prior to the close of comments), or perhaps such information could be provided by a number of accidents that indicated a reversal of the accident rate at issue. When the petition discusses additional individual accidents that occurred after the close of comments, it 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.

States' Supplemental Comments also discuss CSB investigations of recent accidents and include claims about alleged lessons learned from these accidents, which the comments attempt to link to rescinded or modified rule provisions. For example, States' Supplemental Comments cite the PES, MarkWest Energy, and Enterprise accidents as "demonstrating the importance of safety training for facility employees and effective coordination and exercises with local emergency responders and the public." As an initial matter, we note that this claim is made by petitioner with little underlying support. The CSB's PES accident investigation report has not yet been published, and the CSB's factual update[5] for the

[3] *See* EPA-HQ-OEM-2015-0725-1969, p. 10. This commenter maintained a running compilation of accidents on their website from 73 incident reports 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.

[4] *See* 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.

[5] *See* PES Factual Update available at the CSB website for Philadelphia Energy Solutions (PES) Refinery Fire and Explosions.

accident contains no mention that the accident highlighted lessons learned concerning safety training, exercises, or coordination with local responders. Petitioners did not submit, and EPA is not aware of, any investigation report for the MarkWest Energy incident that draws such conclusions. The CSB report for the Enterprise Products Midstream Gas Plant[6] accident does not mention safety training. The report discusses coordination between facility personnel and local responders, and the facility's use of tabletop exercises for emergency response training, but it contains no recommendations to EPA and draws no connection to the rescinded provisions of the 2017 Amendments rule. To the extent the report promotes coordination with local responders and emergency exercises, this is entirely consistent with the 2019 RMP final rule, which retained the 2017 Amendments rule provisions on these areas with modifications. Therefore, this claim does not meet the criteria for reconsideration, as it does not present new information of central relevance to EPA's final rule action.

States' Supplemental Comments also claim that EPA's proposal to exclude findings from other incident investigations from required hazard reviews "undercuts facilities' ability to benefit from the lessons learned from other accidents." States use the Enterprise incident as an example of the potential harm of rescinding this provision by claiming that "a known equipment weakness would not have to be included in hazard reviews of similarly situated industries." This claim is similar to a claim made by petitioners in their comments on the proposed rule.[7] EPA responded to those comments in the final rule and RTC. *See* 84 FR at 69883 and RTC at 152-153. We note that the Enterprise incident does not support petitioners' claim because the process involved in the incident was subject to RMP program level 3, which requires a process hazard analysis (PHA). The pre-Amendments rule already required PHAs to address previous incidents with the likely potential for catastrophic consequences, and the 2019 RMP final rule did not remove that requirement. *See* 40 CFR § 68.67(c)(2).

States' Supplemental Comments also claim:

> "The CSB's admonition about the failures of the emergency response at DuPont's LaPorte facility is a reminder that the 2017 Accident Prevention Amendments ensure that the benefits of better and more frequent training, coordination with local responders, and effective dissemination of information to the public will be available to all Americans, regardless of where they live or the type of relationship the facility happens to have with its employees and local government."

Nothing in the final rule contradicts these benefits – the final rule still requires responder training, coordination with local responders, and availability of information to the public. Nevertheless, we note that this sweeping statement by petitioners goes well beyond the actual recommendations contained in the CSB report of this incident. For example, the report contains no recommendations for "effective dissemination of information to the public." The report's main recommendation is for DuPont to work with neighboring companies and labor unions to update the facility's emergency response plan, to include procedures for specific types of emergencies, regular maintenance for emergency equipment, responder training, update of emergency plan documents, and conducting drills. All of these measures were either already encompassed in the pre-Amendments RMP requirements or were added in the 2017 Amendments rule and retained by EPA in the 2019 RMP final rule. To the extent the petition is obliquely suggesting that the schedules for training and coordination and the methods for information dissemination are inappropriate, these issues were raised for comment in the proposal, States had the opportunity to comment on these issues, and the CSB report provides no information that was impracticable to raise in petitioner's comments on these issues.

States' Supplemental Comments also claim that the provisions of the 2017 Amendments rule that were rescinded by the 2019 RMP final rule would have prevented the DuPont La Porte incident, had they been in

[6] *See* CSB, February 13, 2019, Case Study: Loss of Containment, Fires, and Explosions at Enterprise Products Midstream Gas Plant, Report No. 2016-02-I-MS available on the CSB website for the Enterprise Pascagoula Gas Plant.
[7] *See* EPA-HQ-OEM-2015-0725-1925, available at www.regulations.gov.

effect. States' Supplemental Comments at 12. This claim is not supported by CSB's two published reports on this incident.[8] Neither CSB's 2015 Interim Recommendations Report or its June 25, 2019 Final Investigation Report on this incident contain any conclusion supporting the claim that the Amendments rule would have prevented this accident, nor does either report contain any recommendation to EPA concerning provisions of the 2017 Amendments rule or the 2018 proposed Reconsideration rule. The report includes a section describing recent developments affecting the RMP rule, which includes a discussion of the 2018 proposed Reconsideration rule and mention (in a footnote) of the CSB's concerns over the proposed rule as conveyed in their public comments submitted to EPA. Despite its discussion of these matters, the report stops short of drawing any connections between the 2018 proposed rule and the causes of the incident.

The DuPont incident occurred in November 2014, over two years before EPA finalized the Amendments rule (January 13, 2017), and over six years prior to the compliance date for the major accident prevention requirements of the Amendments rule (i.e., the 2017 final Amendments rule required compliance with major accident prevention provisions by March 15, 2021. *See* 82 FR at 4678). EPA notes that the CSB Interim Recommendations report that addresses inherently safer design issues at DuPont was issued on September 30, 2015, well prior to the period for public comment of the 2018 proposed Reconsideration rule. Therefore, there is no reason that petitioners could not have raised relevant information from that report during the period for public comment. Additionally, even if the 2017 Amendments rule provisions had been in effect prior to the accident, petitioners' claim regarding third-party audits is implausible, as the CSB final report indicates that DuPont had already undergone both first- and third-party audits prior to the incident, and that neither audit "identified, prevented, or mitigated deficiencies in DuPont La Porte's implementation of its management system…".[9] The CSB final report contains no recommendations related to incident investigation root cause analysis.[10] Therefore, EPA does not view this accident or the CSB's investigation report as centrally relevant to the final rule, as the final rule is consistent with the lessons from this accident as reflected in the CSB final report recommendations.

States' Supplemental Comments also refer to the CSB's factual update on the April 2018 explosion and fire at the Husky Energy Refinery incident in Superior, Wisconsin. States' comments claim

> "the update … detailed how specialized training, joint exercises, and close coordination with the local responders allowed the response crew to use innovative methods to contain an asphalt fire that could have burned exponentially longer and in so doing, avoided potentially greater catastrophic losses and chemical releases from tanks surrounded by the fire." States' Supplemental Comments at 13.

EPA notes that the CSB has not released a final report for this incident, and neither of the two factual updates released by the CSB,[11] or the CSB's film reconstruction of the incident contain any recommendations to EPA or any mention of the 2018 proposed rule. To the extent the incident highlights the benefits of responder training, joint exercises, and coordination with local responders, it is consistent with the provisions of the 2019 RMP final rule, which retained the coordination and exercise provisions of the 2017 Amendments rule

[8] *See* the CSB website for the DuPont La Porte facility incident.
[9] *See* CSB, June 2019, Toxic Chemical Release at the DuPont La Porte Chemical Facility, Investigation Report No. 2015-01--I-TX, p 67.
[10] The CSB final report's recommendations to DuPont include a recommendation for "Developing and implementing written policy and procedures to update emergency response plan documents when hazards are identified. For example, personnel can identify these types of hazards in process hazard analyses, facility siting studies, management of change reviews, and incident investigations." *Id.* at 125. While this statement refers to updating emergency response plan documents to reflect findings from incident investigations, it does not specifically refer to root cause analysis. Also, the 2017 Amendments rule added a similar requirement for emergency response plan updates to be based on, among other things, new information obtained from incident investigations, and this requirement was retained in the 2019 RMP final rule.
[11] The CSB released factual updates in August 2018 and December 2018. *See* the CSB website for Husky Energy Refinery Explosion and Fire.

with modifications. Therefore, EPA does not view this incident or the CSB factual updates as identifying significant new information that is centrally relevant to EPA's 2019 RMP final rule action.

In their discussion of CSB investigations, States' Supplemental Comments also contain statements and opinions of a former employee of the CSB, Dr. Daniel Horowitz made in an op-ed that appeared in the New York Times. States' Supplemental Comments at 15, 17. We note that Dr. Horowitz' employment with the CSB was terminated in June 2018, and he was placed on paid administrative leave from the CSB for three years prior to his termination and had been barred from performing any official business for the CSB during this time.[12] He was never one of the Presidentially-appointed and Senate-confirmed members of the Board. Therefore, he does not speak for the CSB, and his statements referred to in States' Supplemental Comments regarding CSB investigations, the dangers of HF alkylation, and the proposed Reconsideration rule, statements that occurred after his termination and in some cases years after his last official CSB duties occurred, do not represent recommendations from the Chemical Safety Board. The Horowitz op-ed is cited for his views on the significance of three refinery incidents (ExxonMobil Torrance, Husky, and PES), two of which occurred prior to the close of comments and the third (PES) that we discussed above. His statements are also similar to other comments made during the public comment period for the proposed rule[13] and responded to by EPA and were therefore not impracticable to raise during the public comment period. EPA also does not view these comments discussing Mr. Horowitz's op-ed as centrally relevant to the 2019 final rule, as they provide no significant new information that would have affected EPA's final rule decision. The CSB's most recent (April 2019) correspondence to EPA on the issue of HF alkylation does not recommend that EPA undertake regulatory action to ban HF alkylation, nor do CSB's own comments submitted during the public comment period,[14] so the issue of whether EPA should compel the elimination of HF alkylation through regulation is not centrally relevant to the 2019 RMP final rule.

States' Supplemental Comments and the petition also include discussion of two accidents that did not involve RMP-covered processes. These include the March 2017 incident at the Intercontinental Terminal Company (ITC) in Deer Park, Texas, and the January 2020 accident at Watson Grinding and Manufacturing in Houston, Texas (petition at 16-19). EPA does not believe the ITC incident involved a process subject to the RMP regulation, and neither the CSB factual update[15] concerning the ITC incident referenced in States' Supplemental Comments or any other information submitted by the petitioner indicates otherwise. States' Supplemental Comments at 10. The accident at Watson Grinding and Manufacturing in Houston, Texas occurred at a facility that was never regulated under the RMP rule.[16] Therefore, these accidents have no relevance to CAA section 112(r)(7), the 2019 RMP final rule, or the States' reconsideration claim.

B) Accident frequency and severity

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[12] See, e.g., Daniel Horowitz Wants Job Back at Chemical Safety Board, and Former US Chemical Safety Board Chairman Won't be Prosecuted.

[13] *See*, e.g., EPA-HQ-OEM-2015-0725-0985, EPA-HQ-OEM-2015-0725-1480, EPA-HQ-OEM-2015-0725-1939, etc. available at www.regulations.gov.

[14] *See* EPA-HQ-OEM-2015-0725-1393, available at www.regulations.gov.

[15] *See* the Factual Update available on the CSB website for the ITC Tank Fire.

[16] The Watson Grinding facility does not appear in the RMP database. *See* https:/www.epa.gov/frs/frs-query (a Facility Selection search for facility names containing "Watson" with National Systems Search "Risk Management Plan" box checked yields no results). *See* also November 2017 RMP database, which is available in the rulemaking docket as item EPA-HQ-OEM-2015-0725-0989. The States' petition appears to assume that the facility was covered based on news reports. However, our analysis indicates that the facility was not subject to the RMP regulations at the time of its accident. It did not hold a threshold quantity of any regulated substance. The amount of propylene held at the facility did not exceed the 10,000-pound RMP threshold quantity, and even if it had exceeded the threshold, the process would not have been subject to the RMP rule because of the exclusion for flammable substances used as fuel at 40 CFR § 68.126. Therefore, in the absence of a filing by Watson Grinding stating they were subject to the RMP rule, and in the absence of a showing that they were covered but simply did not file, the States have not shown this incident was an RMP incident.

The petition contends that EPA focused solely on accident frequency in the 2019 RMP final rule, that the potential for high consequence events should be accounted for under the statutory scheme, and that "serious accidents highlighted in the States' supplemental comments" undermine the rationale for the final rule. Petition at 19. The EPA disagrees that the Agency solely focused on accident frequency to justify the rescission and changes in the 2019 RMP final rule. Accidents required to be reported in RMP facility accident histories are, by definition, serious accidents. Section 68.42 of the RMP regulation requires the owner or operator to report all accidental releases from covered processes that resulted in deaths, injuries, or significant property damage on-site, or known offsite deaths, injuries, evacuations, sheltering in place, property damage, or environmental damage. In analyzing the national accident rate trend for purposes of the 2019 RMP final rule, EPA excluded accident reports that did not include one of these consequences. Additionally, EPA reviewed the trend in accident severity by comparing the average accident severity for RMP accidents occuring from 2004 to 2013, and RMP accidents occurring from 2014 to 2016, and found that by almost all consequence measures, accident severity had declined. *See* 84 FR at 69856.

In the 2018 proposed rule, EPA discussed the benefits of the accident prevention measures adopted in the 2017 RMP Amendments. *See, e.g.,* 83 FR at 24871 (questioning whether environmental benefits of new prevention provisions justified their added costs); *id.* at 24872 (questioning whether a sufficient number of sources would have their performance improved to justify the cost of STAA); *id.*at 24879 (identifying avoided catastrophic releases as a potential benefit that might result from a rescission of the prevention program provisions). In our benefits discussions throughout the rulemaking, we grouped catastrophic release reduction benefits in the non-monetized benefits, and in the 2018 proposed rule noted that we viewed it likely that costs of the 2017 RMP Amendments prevention provisions likely exceeded their benefits "unless significant non-monetized benefits are assumed." *Id*. at 24873. While individual incidents highlighted in the supplemental comments that occurred after comments closed in 2018 of course could not have been discussed in the comment period, as the petition points out and as discussed above, various large incidents had occurred. *See* Petition at 19. The issue of the importance not only of frequency but also magnitude of prevented incidents was raised for comment in the 2018 proposed rule. The 2019 RMP final rule identifies "disproportionate" costs relative to accident prevention benefits as part of the rationale for finding some provisions of the 2017 RMP Amendments rule were not "reasonable regulations." *See* 84 FR at 69849 and 69852. Evaluating proportionality rather than using a strictly monetized cost-benefit test allows for non-monetized costs and benefits to be considered in determining whether a rule is reasonable.

In sum, the petition is simply incorrect that EPA only looked at frequency of accidents and not severity in developing the 2019 RMP final rule. The issue of the importance of non-monetized benefits such as catastrophic releases prevented was raised for comment by the proposal. The types of events that petitioners claim were impracticable to raise during the comment period could have been identified and raised in comments. Additionally, the petition has not identified significant new information that makes the severity of the post-comment period accidents centrally relevant to the rulemaking.

C) Accidents occurring after EPA enforcement

States' Supplemental Comments also discuss recent accidents at RMP facilities with previous noncompliance and claim that these examples "should have been a red-flag to EPA about RMP compliance" and highlight the need for the accident prevention provisions contained in the 2017 Amendments rule, particularly the third-party audit provisions. EPA disagrees that these examples are of central relevance to the Agency's 2019 RMP final rule decision. Almost all of the noncompliance examples provided in the States' Supplemental Comments were not examples of CAA section 112(r) noncompliance – in fact, only one related to noncompliance with the RMP regulation. EPA discusses each incident raised in this portion of States' Supplemental Comments below.

- EPA's 2017 enforcement action at TPC Group in Port Neches, Texas, was not related to that facility's compliance with CAA Section 112(r) or the RMP regulation. The enforcement action at TPC was taken under the New Source Performance Standards of CAA Section 111 and 40 CFR part 60.[17]

- The ATI facility in Oregon and Arch Chemicals facility in New York were cited by state regulators for violations of the Resource Conservation and Recovery Act (RCRA).

- The Phillips 66 refinery in Illinois had been cited by EPA for excess benzene emissions under the CAA National Emission Standards for Hazardous Air Pollutants (NESHAP) program and also by the state regulator for RCRA violations.

- PES had been cited for RCRA and CAA non-112(r) violations and also for violations of Clean Water Act (CWA) effluent limitations.

- The U.S. Steel Clairton coke plant had been cited for CAA non-112(r), RCRA, and CWA violations.

None of these facilities' prior violations were related to CAA section 112(r). In the RMP Reconsideration rule, 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).[18] Neither in our proposed rule nor in the 2019 RMP final rule did we assert that our enforcement-led / compliance-driven approach was based on any correlation between non-RMP violations and future accidental releases. Our approach was built on a correlation between a history of accidental releases and the likelihood of future releases, and how focused compliance oversight on a narrow set of accidental release-prone could obtain release reduction benefits. Therefore, these examples are irrelevant to each facility's compliance with CAA Section 112(r) or the RMP regulations.

The only facility highlighted in this portion of States' Supplemental Comments that had a recent prior violation under CAA Section 112(r) was the MarkWest Energy facility in Chartiers Township, Pennsylvania. In the five years prior to its December 2018 accident, it had been subject to non-CAA section 112(r) enforcement actions by EPA and state regulators, and also to a single enforcement action under CAA section 112(r). However, the petitioner's implication that this violation would have served as a "red flag" for EPA to order a third party audit under the 2017 Amendments rule is without merit. In developing the 2016 enforcement action, EPA conducted an inspection of the source. At that time, EPA did not detect violations that could cause significant health or environmental harm. The 2016 CAA section 112(r) enforcement action taken at MarkWest was a $2,000 fine levied under an Expedited Penalty Action and Consent Agreement, which is a settlement action reserved by EPA for "easily correctible violations that do not cause significant health or environmental harm."[19] Petitioners have provided no evidence that this or any other example of noncompliance in States' Supplemental Comments was indicative of "conditions at the stationary source that could lead to an accidental

[17] *See* the consent agreement in the Matter of TPC Group LLC; CAA 06-2017-3361.

[18] *See*, e.g., 83 FR at 24872-73: "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)."

[19] EPA guidance indicates that the Expedited Settlement Agreement approach "generally is appropriate for easily correctible violations that do not cause significant health or environmental harm, and provides a discounted, non-negotiable settlement offer in lieu of a more formal, traditional administrative enforcement process." *See* EPA, 2014, *Revised Guidance on the Use of Expedited Settlement Agreements*.

release of a regulated substance," which would have been required under the 2017 Amendments rule for EPA to order a third-party audit at an RMP facility.[20] While not a third-party audit, the EPA inspection functioned as an independent external review of the MarkWest operation. We agree the petition has identified one instance where our enforcement response did not prevent a future accident. However, the petition does not explain why the third-party review would have been more effective at identifying safety program weaknesses than an EPA inspection at the source. Therefore, EPA does not believe the petitioners' examples are of central relevance to EPA's 2019 RMP final rule action, as the petitioners have not provided evidence that these examples of noncompliance relate to the rescinded provisions of the 2017 Amendments rule.

Petitioners also submitted States' Second Supplemental Comments, which forward the CSB's October 16, 2019 factual update for the CSB's PES incident investigation. We note that the CSB factual update contains no mention of the RMP rule or any recommendations to EPA. The PES incident was also raised in the April 2019 letter to EPA from the CSB Interim Executive and is discussed further below.

EPA believes that the petitioners' claim does not satisfy the requirements for reconsideration under CAA section 307(d)(7)(B) because petitioners have not provided new information that is centrally relevant to EPA's final rule action that previous incidents did not reveal. Further, States fail to demonstrate how the PES incident would have been prevented by the rescinded provisions of the 2017 Amendments rule.

II. CSB Interim Executive's Letter to EPA Concerning HF Alkylation

Petitioners' claim that EPA failed to consider CSB's recommendations concerning HF alkylation, referring to an April 2019 letter to the EPA Administrator from then CSB Interim Executive Kristin Kulinowski that urged EPA to address the risks of petroleum refinery HF alkylation units. As support for her suggestion, the CSB Interim Executive cited three accidents that occurred at petroleum refineries. Two of the accidents (ExxonMobil and Husky) did not occur in the refineries' alkylation units and involved no releases of HF. The third accident (PES) involved a large release of HF from the refinery's alkylation unit, but according to the CSB, no serious injuries occurred, and the minor injuries that did occur were not due to HF exposure.[21]

The EPA disagrees that the CSB Interim Executive's letter satisfies the requirements of reconsideration under CAA section 307(d)(7)(B) for several reasons. First, the issue of potential releases from refinery HF alkylation units was raised in several public comments on the 2018 proposed rule and responded to by EPA in the preamble to the 2019 RMP final rule and RTC. For example, a tribal government argued that the 2017 Amendments rule STAA provisions should be retained, describing the potential harm threatened by a nearby refinery (i.e., the Husky Refinery) that uses HF. *See* 84 FR at 69876. EPA responded that the Amendments rule STAA provision would not have required any facility to implement safer technologies, and while some refineries still use HF, the STAA requirement would not have required them to eliminate its use.

Second, the CSB letter was not a recommendation for a regulation change or any particular action on the 2018 proposed rule or the 2019 RMP final rule. Rather, the CSB recommended that EPA update a report on HF issued in the early 1990s and that the Agency specifically consider whether there were viable alternatives to HF alkylation. States' Supplemental Comments at 37. In making a recommendation for more study on EPA's part,

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[20] *See* 82 FR at 4699. The 2017 Amendments rule would have triggered a third-party audit under two criteria: (1) An accidental release meeting the criteria in § 68.42(a) from a covered process at a stationary source has occurred; or (2) An implementing agency requires a third-party audit due to conditions at the stationary source that could lead to an accidental release of a regulate substance, or when a previous third-party audit failed to meet the competency or independence criteria of § 68.80(c).

[21] *See* CSB Factual Update – Fire and Explosions at Philadelphia Energy Solutions Refinery Hydrofluoric Acid Alkylation Unit, Philadelphia, Pennsylvania, No. 2019-06-I-PA, October 16, 2019, p. 7, available at Philadelphia Energy Solutions (PES) Refinery Fire and Explosions.

the letter made no mention of the CAA provision for the CSB to recommend regulations, CAA 112(r)(6)(c)(i). The relevance of the request to study the issues surrounding HF alkylation is attenuated rather than central to a rule affecting multiple sectors, especially prior to undertaking that study and evaluating its results.

Lastly, petitioners mischaracterize the CSB letter as recommending a regulation requiring STAA. Petition at 23. This becomes especially clear when one considers the action requested in the petition: "EPA should have considered the CSB's recommendations prior to finalizing the [2019 RMP final rule]." *Id.* In fact, EPA did consider conducting the requested study, but rejected the CSB's recommendation for new studies on October 8, 2019.[22] However, had we decided to conduct the studies, those studies would be pointed at a specific industry rather than the multiple-sector STAA mandate of the 2017 RMP Amendments. To the extent that this recommends regulatory action by EPA, it is for another rule and not the one being reconsidered.

III. EPA Office of Inspector General Report No. 20-P-0062

Petitioners claim that the EPA Office of the Inspector General (OIG) report, *EPA Needs to Improve its Emergency Planning to Better Address Air Quality Concerns During Future Disasters* (Report No. 20-P-0062) "undermines EPA's conclusion that there is no evidence that Hurricane Harvey caused releases of hazardous chemicals at RMP facilities" and is therefore of central relevance to the 2019 final RMP rule. As support for this claim, petitioners state that the OIG report found that most air toxic emission incidents during Hurricane Harvey occurred within a five-day period after the storm's landfall when industrial facilities shut down and restarted operations in response to the storm and storage tank failures. Petitioners indicate that they raised this same issue in public comments on the proposed rule, but that EPA's "rejection of the States' comments was based solely on its limited evaluation of releases during past severe weather events like Hurricane Harvey, which the OIG report questions."

The EPA disagrees with state 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 never even mentions 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. Of the specific examples of air toxics releases provided in the report, none involved accidental releases of RMP-regulated substances from RMP-regulated processes. The 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 2018 proposed rule, and the Agency provided extensive responses to those comments in the preamble to the final rule,[23] in the RTC,[24] and in a Technical Background Document.[25] 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 the among data sources reviewed by the OIG during its audit (e.g., Texas Commission on Environmental Quality 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.

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[22] October 8, 2019 letter from Peter C. Wright to The Honorable Kristin M. Kulinowski, PhD.
[23] *See* 84 FR at 69868-69.
[24] *See* RTC, pp 57, 61, 254-256, 277-279. The RTC is available in the rulemaking docket at www.regulations.gov as item EPA-HQ-OEM-2015-0725-2086.
[25] *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.

We appreciate your comments and interest in this matter.

Sincerely,

Andrew Wheeler