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

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THE ADMINISTRATOR

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Dear Mr. Santarella and Ms. Eckert:

I am responding to your February 18, 2020 petition for reconsideration on behalf of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW or "petitioner") 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 The final rule rescinded or modified certain provisions added to the Risk Management Program (RMP) regulations by amendments made in 2017 (2017 RMP Amendments rule, 82 FR 4594, January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 The 2019 RMP final rule rescinded amendments relating to safer technology and alternatives analyses (STAA), third-party audits, incident investigations, information availability, and several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 information of central relevance to EPA's final rule action, including information on accidents; U.S. Chemical Safety and Hazard Investigation Board (CSB) reports; insurance rates; and state implementation of Emergency Planning and Community Right-to-Know Act (EPCRA) requirements; EPA's budget; and letters from state officials became available after the period for public comment;

(II) that in the 2019 RMP final rule EPA relied on new rationale, statements, and studies that were not discussed in the proposed rule or other documents made available to the public before the close of the public comment period; and,

(III) that EPA's 2019 final rule action was arbitrary and capricious because the Agency presented new rationale and new and unreasonable statutory interpretations, ignored the findings of experts, contradicted prior EPA findings, and rescinded or modified accident prevention, emergency response, and information availability measures that are important to USW members.

USW alleges that each objection either arose after the period for public comment on the 2019 RMP final rule or was impracticable to raise during that comment period. The USW also alleges that these objections are

of central relevance to the outcome of the rule. The petition concludes by requesting that EPA convene a proceeding for reconsideration pursuant to section 307(d)(7)(B) of the 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 USW has 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. Alleged New Information Concerning EPA's Final Rule Action

In its petition, USW makes several claims concerning alleged "new grounds" for objection to the 2019 RMP final rule relating to recent accidents at RMP-regulated facilities, post-comment period CSB investigation reports and expert opinions about those reports, information about insurance rates at petroleum refineries and chemical companies, claims about state implementation of EPCRA requirements, information about EPA's budget, and post-comment period letters from state officials. EPA addresses each of these arguments below.

A) Recent Accidents & Accident Costs

USW alleges that recent accidents at RMP facilities that occurred after the close of the public comment period "demonstrate the need for the protections" of the 2019 RMP final rule. The petition specifically cites the Philadelphia Energy Solutions (PES) Refinery in Philadelphia, Pennsylvania, the explosion and fire at the TPC Group chemical plant in Port Neches, Texas, and the fatal explosion at the Watson Grinding and Manufacturing in Houston, Texas. The petition claims that these events reinforce the benefits to workers and community members in reducing the frequency and severity of accidents at RMP facilities from the final rule's accident prevention, emergency response, and information availability requirements.

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

[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.

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 already 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 petitioner's 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 the petitioner and others. Your petition 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. 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.

Additionally, EPA notes that one accident that USW claims as support for reconsideration of the 2019 RMP final rule – the accident at Watson Grinding and Manufacturing in Houston, Texas – occurred at a facility

[2] The RTC is available in the rulemaking docket as item EPA-HQ-OEM-2015-0725-2086, available at www.regulations.gov.

that was never regulated under the RMP rule.[3] This accident has no relevance to CAA 112(r)(7), the RMP rule, or USW's reconsideration claim.

We do not assert that an accident or set of accidents 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 and the accident trends we derived from that data 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 and emergency response 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.

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 the petitioner's claim does not satisfy the requirements for reconsideration under CAA section 307(d)(7)(B). The petitioner has 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." Additionally, the identification of additional accidents as discussed in the petition does not present information of central relevance to the rule.

B) Post-Comment Period CSB Reports; Declaration of Donald Holmstrom

USW submitted a declaration by Mr. Donald Holmstrom that refers to five CSB accident investigations as grounds for reconsideration. These include two incidents for which the CSB has published final reports - the November 15, 2014 chemical release that occurred at the DuPont La Porte Facility in La Porte, Texas, and the June 27, 2016 incident at the Enterprise Products Gas Plant in Pascagoula, Mississippi, and three other incidents for which the CSB has not yet finalized reports. These include the April 26, 2018 explosion and fire at the Husky Superior refinery in Superior, Wisconsin, the May 19, 2018 incident at the Kuraray American ethylene and vinyl alcohol copolymer (EVAL) plant, and the June 21, 2019 incident at the Philadelphia Energy Solutions (PES) refinery in Philadelphia, Pennsylvania.

EPA discusses the specifics of statements made by Mr. Holmstrom concerning each of these incidents below. However, as a general matter, we note that as above, to the extent that the petitioner is arguing that some of these incidents represent "new grounds for objection" simply because they represent incidents at RMP facilities that occurred after the close of the public comment period, EPA disagrees with this conclusion for the same reasons stated in section I.A of this letter.

<u>DuPont La Porte incident</u>

Regarding the DuPont incident, based on findings in the CSB's Interim Recommendations Report,[4] Mr. Holmstrom claims that

[3] The petitioner's claim that Watson Grinding lacked a required risk management plan (petition at 25) is incorrect – 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.

> "Proper application of the rescinded STAA provisions from the [2017 Amendments rule] likely would have identified the need to apply the inherent safety provisions of the use of an open building structure that was applied to DuPont's MIC process to prevent the accumulation of toxic vapors that killed four workers."

Mr. Holmstrom also makes a number of other claims about this incident that are not supported by any of CSB's public reports. For example, he claims that

> "The … third-party audit accident prevention requirement rescinded by the [2019 final rule] could have identified the issues concerning the ventilation system, and the methyl mercaptan gas detectors and alarms, and assessed the process' location inside an enclosed manufacturing building," and
>
> "The final CSB DuPont LaPorte Report underscores the [Amendment's rule's] accident prevention benefits from STAA and the third party audit requirements and emergency response benefits of the internal first responder coordination and field/tabletop exercise requirements that the RMP Rollback Rule rescinded or delayed to the detriment of plant workers."

As an initial matter, we note that any material or claims that USW raises in the petition based on the CSB's Interim Recommendations Report could have been included in their timely comments, as the Interim Recommendations report was published September 30, 2015, nearly three years prior to the public comment period for the 2018 proposed rule. Therefore, these claims were not impracticable to raise during the period for public comment and do not meet the reconsideration criteria of CAA 307(d)(7)(B). Additionally, the statements made in Mr. Holmstrom's declaration regarding the relevance of the Amendments rule's STAA and third-party audit provisions to this incident are not supported by CSB's two published reports on the incident. Neither the CSB's 2015 Interim Recommendations Report or its June 25, 2019 Final Investigation Report on this incident make any recommendations to EPA relating to the STAA or third-party audit provisions of the proposed Reconsideration rule. Mr. Holmstrom's declaration to the contrary notwithstanding, neither report contains any conclusion supporting his claim about the likelihood that the 2017 Amendments rule STAA provision would have prevented this accident, nor does either report contain any recommendation to EPA or any other party concerning third-party audits.[5] The final 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. But 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. In fact, Mr. Holmstrom's 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…".[6] Therefore, these claims are not centrally relevant to EPA's final rule decision.

Kuraray America EVAL incident

Regarding the Kuraray incident, EPA notes that the CSB has not yet released its final investigation report concerning this incident, which involved a flammable material discharged from a relief valve in the direction of an occupied area of the plant, causing injuries to workers. Concerning CSB's investigation of this incident, Mr. Holmstrom's declaration states,

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[4] *See* the CSB website for the DuPont La Porte facility incident.

[5] The timing of the accident itself makes impossible Holmstrom's claims that the STAA or third-party audit provisions of the 2017 Amendments rule would have prevented this accident. 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 dates for the STAA and third-party audit requirements of the 2017 Amendments rule (i.e., the compliance date for those provisions were by March 15, 2021. *See* 82 FR at 4678).

[6] *See* CSB, June 2019, Toxic Chemical Release at the DuPont La Porte Chemical Facility, Investigation Report No. 2015-01--I-TX, p 67.

> "The issue of safe discharge from a relief valve is something a robust third-party audit referencing industry standards would identify before an incident could occur," and,
>
> "these events and findings are yet another example of a CSB investigation supporting the importance of the 2017 [Amendments rule's] STAA and third party audit requirements for preventing catastrophic incidents rescinded by the [2019 final rule]."

This accident occurred more than 18-months after the end of Mr. Holmstrom's employment with the CSB. As Mr. Holmstrom is not privy to the details of ongoing CSB investigations that began after his departure from the CSB, any information in Mr. Holmstrom's declaration concerning this incident appears to be based on published reports rather than personal observations. But nothing in the CSB's factual update[7] for this investigation supports the statements made in Mr. Holmstrom's declaration concerning the relevance of this incident to the 2019 RMP final rule. The declaration notes that the 2014 edition of the American Petroleum Institute (API) standard 521, *Pressure-relieving and Depressuring Systems*, recommends vertical discharge of flammable vapors from pressure relief valves, but this information was available for several years prior to the public comment period, and could have been provided timely during the public comment period. Also, it is not centrally relevant to EPA's final rule decision, because the process at Kuraray was already subject to requirements to comply with recognized and generally accepted good engineering practices under the pre-Amendments rule, and those requirements were not modified by the 2019 RMP final rule. Mr. Holmstrom's statement that a third-party audit would have identified this issue appears to be speculative and is not based on information in the CSB factual update.

Enterprise Products Midstream Gas Plant incident

The June 27, 2016 incident at the Enterprise Products Gas Plant in Pascagoula, Mississippi, involved a series of fires and explosions probably resulting from the failure of a brazed aluminum heat exchanger (BAHX) due to thermal fatigue.[8] Regarding this incident, Mr. Holmstrom's declaration states,

> "The hierarchy of controls is the larger safety system framework for an STAA analysis –approaches such as eliminating the hazard or selecting an inherently safer design rank higher in safety effectiveness than administrative controls. Enterprise failed to apply safer alternatives to prevent an exchanger failure resulting in catastrophic failure."

The declaration also states:

> "A third-party audit prior to the incident could have examined the Enterprise ineffective "run to failure" approach - using exchanger leaks as a trigger for corrective action for cracking that is not predictive," and,
>
> "The failure of using an effective investigation methodology is highlighted by the multiple similar failures that went uncorrected. The nine previous exchanger leaks were small but the incident investigation requirements of the [2017 Amendments rule] would compel a root cause investigation as they "could reasonably have resulted in a catastrophic release (i.e., was a near miss)…The [Amendments rule], if in effect, would have required Enterprise to investigate all nine previous leak incidents using a root cause methodology that examines multiple management system failures with more effective recommended actions beyond procedures and added equipment that failed at Enterprise to prevent the incident. As regulatory requirements, these increased preventative measures backed by compliance and enforcement programs would likely have prevented the Enterprise incident. The [2019 RMP final rule] rescinds these provisions without consideration of the CSB Enterprise Report which was issued after the close of the RMP Rollback Rule's comment period."

[7] *See* the CSB website for the Kuraray America facility incident.
[8] *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.

With these statements, Mr. Holmstrom implies that the CSB case study on the Enterprise accident supports retaining the Amendments rule's STAA, third-party audit, and incident investigation provisions. But the CSB report contains no such recommendations - it contains no recommendations relating to inherent safety, third-party audits, or root cause investigations of near miss events. The recommendations in the CSB case study are to the API, GPA Midstream Association, and the Jackson County Local Emergency Planning Committee, not EPA, and to the extent those recommendations relate to process safety, they relate to safe operation, maintenance, and repair of BAHX. The report does not recommend replacing BAHX with any "inherently safer design" heat exchanger, nor does it recommend more extensive root cause analysis of BAHX near miss failures. The CSB report never even mentions auditing, let alone third-party audits.

The incident causal factors actually identified by the CSB in its case study were already addressed in the pre-Amendments RMP rule:

- The process hazard analysis (PHA) provisions of the pre-Amendments RMP rule (all of which are retained by the 2019 RMP final rule) require owners or operators of processes subject to Program 3 requirements to perform a PHA that includes, among other things, addressing the hazards of the process, identifying previous incidents with a likely potential for catastrophic consequences, and addressing engineering and administrative controls applicable to those hazards and their interrelationships. *See* 40 CFR 68.67(c).

- The mechanical integrity provisions of the rule require owners and operators to, among other things, ensure that:

    - Equipment is fabricated from the proper materials of construction and is properly installed, maintained, and replaced to prevent failures and accidental releases. *See* 40 CFR 68.3.

    - Equipment is inspected, tested and deficiencies are corrected. *See* 40 CFR 68.73.

- The incident investigation provisions of the rule require owners and operators to investigate incidents which "resulted in, or could reasonably have resulted in, a catastrophic release" of a regulated substance. *See* 40 CFR 68.81(a).

Therefore, this CSB case study has little relevance to the 2019 RMP final rule.

<u>Husky Superior Refinery incident</u>

With respect to the April 26, 2018 incident at the Husky refinery in Superior, Wisconsin, Mr. Holmstrom also makes a number of incorrect assertions. For example, Mr. Holmstrom declares:

> "The CSB stated that both ExxonMobil and Husky involved issues of safe siting of plant and equipment to avoid fire and explosion impacts from surrounding process [sic].";
>
> "Safe siting can be viewed as an alternative risk management measure applicable to reducing risk as defined in the rescinded STAA provisions.";
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> "In the case of both ExxonMobil and Husky third-party audits with an independent perspective and the benefits of "fresh eyes" would have likely identified the issue of safe siting and the need to locate highly hazardous processes such as HF alkylation away from fire and explosion hazards that can threaten loss of HF containment."; and,
>
> (referring to the CSB's April 23, 2019 letter to EPA where the CSB recommended repeating EPA's 1993 hydrogen fluoride (HF) study), "There is no evidence that EPA has responded to the CSB or announced that EPA

has agreed to undertake such a study. The CSB communication to EPA and recent reports related to HF Alkylation unit hazards are important new process safety findings for EPA to reconsider centrally relevant to the [2019 RMP final rule]."

All of these statements are incorrect. No CSB final report or factual update concludes that "both ExxonMobil and Husky involved issues of safe siting." Mr. Holmstrom's declaration states that the CSB's April 26, 2019 letter to the EPA Administrator contains such a statement, but it does not – that letter makes no references to safe siting. The issue of safe siting was raised as a question to the CSB lead investigator of the Husky investigation during a December 2018 public meeting,[9] but the public transcript of that meeting makes clear that the CSB had not drawn any conclusions about plant siting as a causal factor in the incident.[10] Contrary to Mr. Holmstrom's declaration, even if the CSB were to conclude that safe siting was a causal factor in the Husky refinery incident, the STAA provision of the Amendments rule would not be necessary to impose a requirement on RMP-regulated facilities to consider safe siting, because this requirement already existed in the pre-Amendments RMP rule, and the CSB was well aware of this. In fact, the CSB's final report on the 2015 ExxonMobil refinery incident specifically indicated that the RMP rule already requires RMP-regulated facilities to address facility siting.[11]

Further, Mr. Holmstrom's statement that "There is no evidence that EPA has responded" to the CSB's April 2019 letter is simply false. EPA responded to the CSB letter on October 8, 2019, several months prior to Mr. Holmstrom's declaration.[12] The CSB letter recommends that EPA update its 1993 HF study and to "broadly disseminate the results of its updated study to provide information on potential alternatives and to make recommendations to incorporate these technologies at U.S. petroleum refineries, if appropriate." The CSB letter does not recommend that EPA make any regulatory changes.

The CSB released its initial factual update for the Husky accident on August 2, 2018, three weeks prior to the end of the period for public comment of the proposed rule. Several public comments on the proposed rule addressed the Husky incident,[13] and some of these claimed that it was a near-miss HF release. Despite the fact that the CSB December factual update for this incident was not complete at the time of the public comment period, it was clear that members of the public were well aware of the circumstances of the accident and that some commenters believed it had relevance to the 2019 final rule. EPA addressed these public comments in the RTC at pp 238-239 and 272-275. Mr. Holmstrom's declaration presents no new information concerning this accident that is centrally relevant to EPA's final rule decision.

PES incident

Regarding the PES incident, Mr. Holmstrom groups this incident with other previous incidents at petroleum refineries with HF alkylation units. The declaration states: "Previous HF acid incidents or near misses also involved the disabling or impairment of mitigation systems, typically from the initiating event such as an explosion or equipment failure. The findings of the failures of HF mitigation systems underscore the

[9] *See* the CSB Husky public meeting transcript available at the CSB website for the Husky Energy Refinery Explosion and Fire.
[10] Board Member Kulinowski: "So, are we looking more generally at what is known as facility siting issues?" Investigator Mark Wingard: "Yeah, I think facility siting in general is something we're looking at. And again, it was something we looked at in Torrance. It was a little different. The ESP there that ultimately failed was…was constructed in 2009, 2010, so it was relatively new construction in the world of refining. A difficulty that exists, in a lot of these places…Like I said, this has been in place since 1961. A lot of these units…some of these units have been there since 1950. So, actually moving existing units is…is very difficult if you're not doing…doing a rebuild." CSB Husky public meeting transcript, pp 45-46.
[11] CSB, ExxonMobil Torrance Refinery: Electrostatic Precipitator Explosion: Torrance, California; Report No. 2015-02-I-CA, published May 3, 2017, p 51: "Regulatory oversight of unit siting is addressed by Cal/OSHA through its PSM standard and also by the Environmental Protection Agency through its RMP standard." (footnotes omitted).
[12] October 8, 2019 letter from Peter C. Wright to The Honorable Kristin M. Kulinowski, PhD.
[13] See, e.g., EPA-HQ-OEM-2015-0725-0985, -1969, -1958, -1480, etc., available at www.regulations.gov.

importance of the considering inherent safer alternatives to HF alkylation and the [Amendments rule's] STAA provisions." In the list of previous HF incidents or near-misses, the declaration includes the ExxonMobil and Husky incidents discussed above, along with the 2009 incident at the Citgo refinery in Corpus Christi, Texas, and a 1987 incident at the Marathon Texas City Refinery. Of these incidents, the only one that resulted in injuries due to exposure to HF was the Marathon Texas City incident, which occurred more than 30 years ago. Of the other four U.S. refinery incidents raised in the declaration, two did not involve any release of HF, and for the two that did result in a release of HF, neither resulted in injuries due to HF exposure, even when very large quantities were released (42,000 lbs at Citgo Corpus, 5,239 lbs at PES). The declaration provides no evidence that this incident has revealed centrally relevant information about EPA's 2019 RMP final rule action that previous incidents did not reveal, or that the incident would have been prevented by rescinded provisions of the 2017 Amendments rule.

Except for the PES refinery explosion, all of the HF incidents or alleged near-misses addressed in Mr. Holmstrom's declaration occurred before the beginning of the public comment period for the proposed rule, and in several cases (Citgo, ExxonMobil, Husky), the CSB had released investigation reports and/or factual updates to these investigations well prior to the end of the public comment period. 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 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 hydrogen fluoride. *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 hydrogen fluoride, the STAA requirement would not have required them to eliminate its use. Mr. Holmstrom and USW do not demonstrate that any of the information that was unavailable or impracticable to raise before the end of the comment period identified a centrally-relevant issue that was different from what could have been raised during the comment period.

To the extent information in Mr. Holmstrom's declaration concerning recent accidents that is relevant to EPA's 2019 final rule is consistent with the CSB's available public record, that record existed prior to the end of the public comment period. To the extent Mr. Holmstrom's declaration is based on his personal knowledge of these incidents as an employee of the CSB (and noting that the CSB's own public record does not support some of his statements), Mr. Holmstrom would have obtained that knowledge during his employment with the CSB, which ended in late 2016, well prior to the public comment period for the 2018 proposed Reconsideration rule. Therefore, except for the information relating to the PES incident, which EPA does not view as centrally relevant to EPA's final rule decision, the incident information in Mr. Holmstrom's declaration could have been submitted to EPA during the public comment period.[14]

Other Statements in Holmstrom Declaration

In addition to discussing specific incidents, Mr. Holmstrom raises other objections to the provisions of the 2019 RMP final rule. None of these are based on new grounds for objection that were impracticable to raise during the public comment period, and almost all of them were raised by other commenters (for some objections including the CSB) during the public comment period and responded to by EPA in the RTC. Others are unrelated to the 2019 RMP final rule because they address matters not at issue in the final rule (e.g., listing of ammonium nitrate, regulation of reactive substances). The list below enumerates Mr. Holmstrom's other objections, where the issue was identified in the 2018 proposed rule, where the same objections (if related to the final rule) were raised by other commenters during the public comment period, and where EPA addressed them in the RTC.

[14] We note that the CSB did submit public comments, to which EPA responded, but those public comments did not contain the statements in Mr. Holmstrom's declaration that are in dispute.

- Objections to EPA's reliance on the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATF) investigation of West Fertilizer incident (paragraphs 17-21 of declaration): Similar objections were raised during the comment period in comments EPA-HQ-OEM-2015-0725-1393 (from the CSB) and 1626[15] and responded to by EPA. *See* RTC pp 267-269. EPA notes that the BATF investigation was clearly stated as one of the bases for its reconsideration of the 2017 Amendments rule (*see* 83 FR at 24869-70), and was a matter on which EPA specifically requested public comment, so there is no reason that Mr. Holmstrom could not have raised his objections during the period for public comment.

- Objections to rescinding STAA and third-party audits based on their application to the ammonium nitrate (AN) storage at West Fertilizer (paragraphs 22-23): The AN process at West Fertilizer was never covered under the RMP regulations because AN is not a substance listed under 40 CFR 68.130, and therefore the rescinded STAA and third-party audit provisions would not have applied to the AN process. Adding AN to the list of RMP-regulated substances was not at issue in the 2019 final rule. These comments are irrelevant to the petitioner's request for reconsideration.

- Objection to removing minimum frequency for field exercises based on CSB West Fertilizer report[16] (paragraph 24). EPA specifically requested comment in the proposed rule on whether exercises were necessary to address the emergency response planning and coordination gaps highlighted by the West Fertilizer incident and other incidents noted by EPA. *See* 83 FR at 24870. EPA received various comments on this issue during the comment period (e.g., comments 1969, 1622, 1492, 0985, etc.) and responded to those comments in the RTC. *See* RTC pp 197-199.

- Objections to rescinding 2017 Amendments rule provisions allegedly based on CSB recommendations or otherwise rejecting CSB advice (paragraphs 25-32). A commenter raised the same objections during the public comment period (*see* comment 1969) and EPA responded to those comments in the RTC. *See* RTC pp 52-55 and 59-62.

- Other objections to the 2019 RMP final rule provisions based on recognized and generally accepted good engineering practices, CSB incident reports and expert opinions, Contra Costa County regulations, CCPS guidelines, an EPA paper, a pilot third-party audit program in Delaware and Pennsylvania, etc. (paragraphs 63-85).

With the exception of the existence of the December 2019 letter from New Jersey Department of Environmental Protection Commissioner Catherine McCabe, all of the objections raised in these paragraphs are based on information that was available prior to the period for public comment. Objections similar or identical to all of the objections raised in these paragraphs were raised in public comments and responded to by EPA. The issue of good engineering practices applying to rescinded regulatory provisions was raised by commenters 1924, 0971, 0985-012, 1933, 1940, and others (and EPA notes that several commenters referred to the connection between good engineering practices and the pre-Amendments RMP regulations as a reason to rescind the 2017 Amendments rule requirements rather than retain them). EPA addressed such comments in the RTC at pp 73-74, 81-83, and 281-282. EPA addressed comments relating to root cause investigation practices and methods, including addressing CCPS Guidelines for Investigating Chemical Process Incidents, in section

[15] All public comment references in this section are of the form "EPA-HQ-OEM-2015-0725-xxxx" where EPA identifies the unique comment in the text using only the last four digits (i.e., to replace "xxxx"). All public comments can be viewed at www.regulations.gov.

[16] CSB, West Fertilizer Company Fire and Explosion; No. 2013-02-I-TX, published January 28, 2016.

3.2.2 of the RTC. Objections to the final rule based on CSB incident reports and expert opinions were raised by various commenters, including commenters 1969, 0966, 0973, 1925, 1940, 1393, 1481, etc. EPA addressed these comments in the RTC at pp 52-55, 59-62, 94-96, 127-128, etc. The Contra Costa County Industrial Safety Ordinance was raised in public comments by commenters 1413, 1969, 1924, 1865, and others. EPA addressed these comments in section 3.4.2 of the RTC. EPA addressed the relevance of CCPS guidelines in responses to public comments in various locations throughout the RTC, including pp 84, 86, 101-104, 108, 112, and 152. EPA addressed comments relating to the 2001 EPA auditing paper and the Delaware/Pennsylvania third-party audit pilot program in the RTC document for the 2017 Amendments rule.[17]

Regarding the December 2019 letter from New Jersey Department of Environmental Protection Commissioner Catherine McCabe, which is attached to Mr. Holmstrom's declaration, EPA finds that this letter also does not meet the reconsideration criteria, because it raises matters that were raised in public comments and responded to by EPA and provides no new information of central relevance to EPA's final rule decision. In her letter, Commissioner McCabe criticizes EPA's decision to base its rescission of the Amendments rule STAA provision in part on the lack of any statistical evidence that the IST provision of the New Jersey Toxic Catastrophe Prevention Act has reduced the accident rate at RMP facilities in New Jersey. However, in support of her position, her letter reiterates, almost verbatim, public comments submitted to EPA by state elected officials during the period for public comment,[18] and provides no new analysis of New Jersey accident data to dispute EPA's analysis. EPA responded to the identical comments from state elected officials in section 3.4.2 of the RTC.

Lastly, Mr. Holmstrom is no longer employed by the CSB and at the time of his declaration had not been employed by the CSB for over three years. 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 regarding CSB investigations do not represent recommendations from the Chemical Safety Board. EPA has responded to all CSB recommendations in accordance with the requirements of CAA Section 112(r)(6)(I).[19] Mr. Holmstrom may not agree with some of those responses, but the CAA does not require EPA to implement every recommendation from the CSB. If and when the CSB makes any new recommendations to EPA regarding the rescinded regulatory provisions raised in Mr. Holmstrom's declaration, and we note that it has not, then EPA will evaluate those recommendations and provide a response to the Board as required under the CAA. Further, EPA has shown where several of Mr. Holmstrom's statements regarding CSB investigations are either not supported by the CSB's public reports or are incorrect. Such statements clearly cannot be viewed as centrally relevant to the 2019 RMP final rule. Where Mr. Holmstrom's statements are true but based on information available prior to the period for public comment, they do not represent new grounds for reconsideration of the 2019 final rule. Even if the EPA viewed Mr. Holmstrom's statements to be centrally relevant to the rule, which the Agency does not, the EPA has shown that they generally provide the same information submitted in public comments during the period for public comment. Therefore, EPA finds that the information provided in Mr. Holmstrom's declaration does not meet the criteria for reconsideration.

C) Insurance Rates

USW claims that a NASDAQ article[20] discussing declining insurance coverage at U.S. refineries and chemical plants "rebuts EPA's findings about declining RMP event impacts and reinforces damages to workers and communities from RMP events and the [2019 RMP final rule]." EPA disagrees that the NASDAQ article

[17] The 2017 Amendments rule RTC is available in the public rulemaking docket as item EPA-HQ-OEM-2015-0725-0729 at www.regulations.gov.
[18] See EPA-HQ-OEM-2015-0725-1925, available at www.regulations.gov.
[19] CAA section 112(r)(6)(I) requires, among other things, that the Administrator respond to CSB recommendations "formally and in writing not later than 180 days after receipt thereof."
[20] *See* www.nasdaq.com/articles/u.s.-refiners-chemical-makers-pare-insurance-coverage-as-accidents-boost-costs-2020-01-0.

rebuts EPA's findings concerning RMP event impacts and that the article is of central relevance to EPA's final rule action. The NASDAQ article contains no references to the 2017 RMP Amendments rule or 2019 RMP final rule. It contains general statements about rising worldwide insurance costs for refining and petrochemical manufacturing companies, but little specific information that can be linked to RMP facility accidents, let alone specific provisions of the 2019 RMP final rule. For example, the article states:

> "The overall liability to insurers for global refining and petrochemical incidents over the last three years comes to more than $12.5 billion, according to global insurance broker Marsh/JLT. That is more than double the gross premiums paid to insurers, the broker said in a January report. Annual insurance premiums are costly. A refiner worth $1 billion will likely pay $2.5 million or more, according to loss adjusters.
>
> Losses are mounting for what is known as business interruption policies, which provide coverage for companies that lose income after operational problems, according to Michael Buckle, managing director of downstream natural resources at rival broker Willis Towers Watson.
>
> Last year's fire that shut the Philadelphia Energy Solutions refinery could cost $1.25 billion in insured losses alone, though industry sources say PES will likely receive less than that amount from its insurers. Husky Energy is counting on insurers to fund the $400 million rebuild of its refinery in Superior, Wisconsin after a 2018 explosion."

The global insurance costs provided in this article do not represent, and are not comparable to, the costs of accidents that are reported in RMP facility accident history reports, for two reasons. First, the costs provided in the article do not specify what types of damages they represent. RMP facility accident history reports include information on deaths, injuries, and significant property damage on-site, or known offsite deaths, injuries, evacuations, sheltering in place, property damage, and environmental damage. The NASDAQ article is not transparent about how the cost estimates for the two incidents are derived or what they contain. One number mentioned one incident may cost (i.e., "Last year's fire [at PES] could cost $1.25 billion") is put in doubt by "industry sources," while the other simply says the company, Husky, is "counting on" a certain amount. There is no information about whether those costs are total costs or what specific cost categories are represented by them. The NASDAQ article even suggests that the cited insurance costs for the two refinery accidents include the costs of business interruption by discussing their cost right after noting business interruption insurance is a source of losses. Business interruption costs were not included in the monetized costs of accidents presented in the 2019 RMP final rule Regulatory Impact Analysis (RIA). The petitioner provided no basis to compare these costs to the overall accident impact costs provided in RIA, which represent the monetized costs of the accident consequence categories contained in RMP reports.

Second, the trend in global insurance coverage and costs for refining and petrochemical facilities stated in this article are not comparable to the trend of accidents or accident damages for RMP-covered facilities because RMP-covered petroleum refineries and petrochemical manufacturing facilities represent only a small subset of global facilities in the petroleum refining and petrochemical manufacturing sectors.[21] Additionally, even among RMP-covered facilities, not all accident damages are covered by insurance (e.g., some facilities are self-insured), and the cost of insurance is based on numerous factors,[22] some of which are unrelated to an insured firm's loss history. Therefore, even if a trend in rising insurance costs could be established at RMP-regulated facilities, which the petitioner has not done, it would not be of central relevance to EPA's final rule decision.

Lastly, the petitioner's general claim that rising trends in insurance costs are relevant to the 2019 RMP final rule could have been made during the public comment period, as other articles have made similar claims in

[21] For example, according to the Bureau of Labor Statistics, there are over 19,000 establishments in the U.S. chemical manufacturing sector (NAICS 325, which represents only a subset of worldwide chemical manufacturing). According to the September 2019 RMP database, only 1,506 facilities in this sector are regulated under the RMP regulation.

[22] *See*, e.g., Market Conditions: Cycles And Costs.

the past.[23] Economic impacts of the 2017 RMP Amendments, the 2019 RMP final rule, and accidents generally were clearly raised for comment by the 2018 proposed rule. Therefore, the petitioner has provided no new grounds for objection that were impracticable to raise during the period for public comment.

D) State Implementation of EPCRA Requirements

USW claims that new data presented in an article by the Center for Public Integrity present new grounds for objection that were impracticable to raise during the public comment period and are centrally relevant to the 2019 RMP final rule. The Center for Public Integrity article claims that document requests for EPCRA information on AN handling, sales and storage made to certain states have been denied, and that this undermines EPA's rationale for rescinding the information availability provisions of the 2017 Amendments rule, as it "contradicts EPA's underlying rationale that the public already has ready access to comparable facility and chemical hazard information elsewhere."

EPA disagrees that the Center for Public Integrity article meets the criteria for reconsideration, for several reasons. First, we note that the article's claims concerning certain states denying document requests for EPCRA information all relate to requests for information on AN, which is not a substance regulated under the RMP regulation. The article presents no evidence that requests for information on RMP-regulated substances have been denied. Second, in developing the article, the Center for Public Integrity appears to have requested EPCRA chemical inventory (i.e., "tier II") information from 12 states for all facilities storing AN within a state ("Public Integrity and its partners sought lists of facilities where ammonium nitrate is handled, sold, or stored"), rather than information from a single facility. EPCRA section 312(e)(3) requires a State emergency response commission or local emergency planning committee to make tier II information available to requests from members of the public with respect to "a specific facility,"[24] not simultaneously for all facilities within a state. The article notes that some states denied the request for "lists of facilities" but were apparently willing to provide requested information for specific facilities (Public Integrity article at 13), and it is not clear that the remaining states that denied requests for "lists of facilities" were unwilling to provide single-facility information. The article does not establish whether a community near an RMP facility can get information about that facility, which is what EPA emphasized in balancing public access and security risks. *See* 83 FR at 24868; 84 FR at 69888.

Even though the article contains no evidence that any states denied requests for EPCRA information about RMP-regulated substances, even if it had related to RMP-regulated substances, States' unwillingness to provide such information for "lists of facilities" would not be centrally relevant to and would not undermine EPA's final rule action to rescind the 2017 Amendments rule's information availability provisions. On the contrary, this approach would be entirely consistent with EPA's rationale in the 2019 RMP final rule, which was to enable members of a *local community* to obtain information about specific facilities in that community without creating security vulnerabilities associated with anonymous access to consolidated information that could be used by criminals to target facilities. In the preamble to the final rule, EPA stated:

> "The final rule retains the information availability provisions of the pre-Amendments RMP rule, retains a modified form of the Amendments rule's public meeting requirement and retains the enhanced local coordination requirements of the Amendments rule with minor modifications. All of these provisions increased information access relative to the pre-Amendments rule, to specific categories of chemical hazard information under controlled circumstances. These requirements should help ensure that local community members and local responders have access to appropriate information about regulated facilities without increasing the risk that such information will be used for criminal purposes." *See* 84 FR at 69888.

[23] *See*, e.g., Balcombe, J., May, 2015, *Trends in Energy Insurance and the Impact of Falling Oil Prices*, International Risk Management Institute, Inc.
[24] *See* 42 U.S.C. § 11022(e)(3)(A).

Lastly, we note that the article makes clear that information concerning at least one state's (Texas') restrictions on access to EPCRA information concerning AN facilities was available by the fall of 2016 (Public Integrity article at 15).

Therefore, since the Center for Public Integrity article contains no evidence that EPCRA chemical inventory information for RMP-regulated substances at specific RMP-regulated facilities are being withheld from local members of the public, it is not of central relevance to EPA's 2019 RMP final rule decision. Also, since at least Texas' restrictions on distribution of EPCRA tier II database information related to AN could have been raised during the period for public comment, the article does not represent new grounds for objection that were impracticable to raise during the public comment period.

E) President's FY 21 Budget Proposal Calls for Elimination of CSB Funding

USW claims that the President's Fiscal Year 2021 Budget, which calls for elimination of funding for the CSB, is new grounds for objection that are centrally relevant to the 2019 RMP final rule. The petition states: "Remarkably, the FY 21 Budget and the FY21 Major Savings and Reforms call for the complete elimination of the CSB in contravention of section 112(r)(6)(C) of the CAA." The petitioner further claims that the FY21 Budget and the FY21 Major Savings and Reforms are "evidence of the administration's (and EPA's) bias against the CSB due to CSB's adherence to its statutorily mandated agenda, CSB's refusal to recant its recommendations that EPA retain [2017 Amendments rule] accident prevention regulations, and the CSB's opposition to the [2019 RMP final rule] that are new grounds for objection centrally relevant to the final rule." Petition at 19-20.

EPA disagrees that the Administration's proposal to eliminate funding for the CSB in the FY21 President's Budget represents new grounds for objection or is centrally relevant to the 2019 RMP final rule. EPA did not base or make contingent any provision of the proposed or final rules on the Administration's budget proposal for the CSB. Whether or not the provisions of the President's FY21 Budget relating to the CSB are enacted could have no bearing on EPA's final rule action, so this issue raised by the petitioner has no relevance to EPA's 2019 RMP final rule action. EPA has no authority over the CSB's budget, so the President's budget proposal could not possibly demonstrate any bias by EPA against the CSB, or against the rescinded provisions of the 2017 Amendments rule.

Also, we note that the President's Budget proposals for Fiscal Year 2018 and Fiscal Year 2019 contained the same proposal to eliminate funding for the CSB.[25] These budget proposals were available well in advance of the period for public comment, so this issue raised by the petitioner is not new and could easily have been raised during the period for public comment. Therefore, as this claim is not new grounds for objection or centrally relevant to the 2019 RMP final rule, it does not meet the criteria for reconsideration.

F) Letters from State Officials

USW claims that letters sent to EPA 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") and from the Commissioner of the New Jersey Department of Environmental Protection on December 17, 2019, represent new grounds for objection of central relevance to the 2019 RMP final rule.

[25] *See* Budget of the United States Government for Fiscal Years 2018 and 2019.

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. States' also claim that lessons learned from recent accidents and CSB investigations underscore the need for specific rule provisions rescinded or modified by the 2019 RMP final rule, and that recent accidents at facilities with previous noncompliance undermine EPA's regulatory enforcement rationale in the 2019 RMP final rule.

As discussed above, USW argues that recent incidents at RMP facilities are centrally relevant to the 2019 RMP final rule and demonstrate the need for the rescinded accident prevention and information availability measures and delayed emergency response measures. As additional support for this claim, the petitioner has submitted States' Supplemental Comments which cite 60 incidents occurring at RMP facilities between August 23, 2018 and August 15, 2019, after the August 23, 2018 close of the public comment period for the proposed RMP Reconsideration rule (83 FR 24850, May 30, 2018). As discussed above in section I.A of this letter, 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 RTC document. In fact, several of the accidents submitted by USW in States' Supplemental Comments are the same accidents submitted by the other commenter.[26] EPA responded to these comments in sections 3.1 and 10.6 of the RTC.[27]

EPA's response to the information on the 60 incidents listed in the appendix to States' Supplemental Comments is the same as discussed above in section I.A of this letter, where EPA showed how the Agency had addressed this issue during the public comment period. Therefore, as this issue was raised in public comment and addressed by EPA in the RTC and preamble to the final rule, the EPA finds that USW's claim does not satisfy the requirements for reconsideration under CAA section 307(d)(7)(B). USW has 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" nor has USW shown how the additional events are of central relevance.

States' Supplemental Comments also discuss CSB investigations of recent accidents and claims about alleged lessons learned from these accidents, which the comments attempt to link to rescinded or modified rule provisions. These claims are similar to those contained in the main body of the USW petition and the Holmstrom declaration, and EPA has responded to them above in section I.A. The only accident raised in this section of States' Supplemental Comments concerning CSB investigations that was not also raised in the main body of the petition or Holmstrom declaration (and discussed above) is the March 2017 incident at the Intercontinental Terminal Company in Deer Park, Texas. However, EPA does not believe this incident involved a process subject to the RMP regulation, and neither the CSB factual update concerning the incident referenced in States' Supplemental Comments or any other information submitted by the petitioner indicates otherwise.

In their discussion of CSB investigations, States' Supplemental Comments also contain statements and opinions of another former employee of the CSB, Dr. Daniel Horowitz made in an op-ed that appeared in the

[26] *See* comment EPA-HQ-OEM-2015-0725-1969, p. 10. In their public comments, among other materials this commenter submitted a link to a website that maintained a running compilation of 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. Even though eight of these incidents occurred after the end of the public comment period (i.e., between August 24, 2018 and September 21, 2018), EPA considered all 75 incidents in the Response to Comments document for the 2019 RMP final rule.

[27] *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.

New York Times. 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 was barred from performing any official business for the CSB during this time.[28] 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 which 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 in section I.B. His statements are also similar to other comments made during the public comment period for the proposed rule[29] and responded to by EPA and were therefore not impracticable to raise during the public comment period. EPA also does not view these comments as centrally relevant to the 2019 final rule, as they provide no new information that would affect EPA's final rule decision. As discussed previously 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,[30] 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 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 by the petitioner were not examples of CAA section 112(r) noncompliance, and only one related to noncompliance with the RMP regulation.

- 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 non-112(r) CAA violations and also for violations of Clean Water Act (CWA) effluent limitations.

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

None of these facilities' prior violations were related to CAA section 112(r). With respect to these facilities, 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

[28] See, e.g., Daniel Horowitz Wants Job Back at Chemical Safety Board, and Former US Chemical Safety Board Chairman Won't be Prosecuted.
[29] *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.
[30] *See* EPA-HQ-OEM-2015-0725-1393, available at www.regulations.gov.

Section 112(r).[31] 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 facilities could obtain release reduction benefits.

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."[32] The petitioner has 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 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.[33] 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 petitioner's examples are of central relevance to EPA's 2019 RMP final rule action, as the petitioner has not provided evidence that these examples of noncompliance relate to the rescinded provisions of the 2017 Amendments rule.

USW also submitted States' Second Supplemental Comments (which forward the CSB's October 16, 2019 factual update for the CSB's PES incident investigation) and the December 2019 letter to EPA from New Jersey Department of Environmental Protection Commissioner Catherine McCabe. EPA addressed both of these matters and their lack of central relevance to the 2019 RMP final rule in section I.B of this letter. We note that the CSB factual update contains no mention of the RMP rule or any recommendations to EPA.

II. Rationale, Studies and Documents not Discussed in Proposed Rule

A) Compliance-Driven Approach

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[31] *See*, e.g., 83 FR 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 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)."

[32] 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*.

[33] *See* 82 FR 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).

The petition claims that EPA's reliance on a compliance-driven approach to enforcement at problematic facilities in lieu of the 2017 Amendments rule's accident prevention provisions is arbitrary and capricious. The petition claims that new grounds for objection to EPA's final rule action include post-comment period events at RMP-covered facilities that recently were subject to EPA inspections and enforcement actions that failed to prevent subsequent accidents at these facilities. The petition also claims that dwindling enforcement resources and the administration's FY2021 proposed budget undercut the administration's commitment to environmental enforcement and contradict EPA claims that the Agency will continue to conduct the same number of RMP inspections going forward. The petition also claims that data presented in the final rule preamble regarding the number of RMP facilities and the annual number of RMP inspections "reinforces [sic] the futility of a "compliance-driven approach" to prevent high-consequence, low-frequency RMP events." The petition also claims that EPA has failed to acknowledge that the agency lacks authority to order a covered source to implement rescinded accident prevention provisions, that EPA must take such measures as part of consensus settlement agreements, and that EPA has not "fully discussed or considered these obstacles to successful implementation of the agency's "compliance-driven approach" as rationale to rescind critical [Amendments rule] accident prevention regulations." Lastly, the petition claims that EPA's rescission of "accident prevention provisions that clarified RMP requirements" has complicated EPA's enforcement efforts.

EPA disagrees that these issues meet the criteria for reconsideration, as they either do not raise new grounds for objection that were impracticable to raise during the period for public comment or are not centrally relevant to EPA's final rule action. Regarding post-comment period incidents at RMP-covered facilities that recently were subject to EPA enforcement actions, EPA explained in the previous section of this letter how almost all of the petitioner's examples involved non-CAA section 112(r) enforcement actions, and the single CAA 112(r) enforcement action occuring prior to an incident was an expedited settlement agreement that would not typically have involved a third-party audit or other injunctive relief. The petitioner's claims concerning EPA's "dwindling enforcement resources," claims about declining inspection numbers, and the alleged futility of a compliance-driven approach that is "reactive rather than proactive" are similar to claims made by the petitioner and other commenters during the period for public comment.[34] EPA responded to those claims in the RTC.[35] Regarding the effect of the Administration's FY2021 proposed budget on EPA funding, that budget proposal is similar to budget proposals in prior fiscal years under the current Administration, which were not enacted, and which were also raised in public comments on the proposed rule.[36] Additionally, the petitioner failed to acknowledge EPA's current National Compliance Initiative for Reducing Accidental Releases at Industrial and Chemical Facilities,[37] which EPA discussed in the RTC and will help ensure that RMP compliance monitoring and enforcement remain priorities for EPA.

Regarding the petitioner's claim that EPA failed to acknowledge that the agency lacks authority to order a covered source to implement rescinded accident prevention provisions, this claim is incorrect. EPA addressed this issue in the RTC. A public commenter stated that EPA lacks the authority to impose STAA as an enforcement tool.[38] The Agency acknowledged that the Agency's discussion of an "enforcement-led approach" did not mean that the Agency would mandate the use or analysis of IST alternatives as a result of an inspection or as part of an enforcement action, that the past adoption of safer technology and alternatives in enforcement involved consent agreements with facilities and that the enforcement process could lead to facilities voluntarily adopting these as risk management measures. *See* RTC at 140-141. In the final rule, EPA made clear that these measures could be imposed as part of settlement agreements. *See* 84 FR at 69852. EPA had provided examples of settlement consent agreements including such measures in the proposed Amendments rule. *See* 81 FR at

[34] *See*, e.g., EPA-HQ-OEM-2015-0725-1940, -1970, and -1874, available at www.regulations.gov.
[35] *See* RTC, pp 94-98, available at www.regulations.gov.
[36] *See* EPA-HQ-OEM-2015-0725-1874, EPA-HQ-OEM-2015-0725-1925, and EPA-HQ-OEM-2015-0725-1969, available at www.regulations.gov.
[37] *See* National Compliance Initiative: Reducing Accidental Releases at Industrial and Chemical Facilities.
[38] *See* EPA-HQ-OEM-2015-0725-1924, available at www.regulations.gov.

13664. On this issue, as with others, the petitioner has provided no new information that is of central relevance to EPA's final rule decision, nor has the petitioner demonstrated that the issue of what remedies we could obtain as part of an "enforcement-led" (compliance-driven in the final rule) approach was not raised for comment in the proposed rule. *See* 83 FR at 24872-73.

Lastly, EPA disagrees with the petitioner's claim that EPA's rescission of accident provisions has complicated EPA's enforcement efforts because those provisions had clarified RMP requirements. As EPA discussed in the preamble to the proposed rule, EPA believed that to the extent the Amendments rule accident prevention provisions diverged from the OSHA Process Safety Management (PSM) standard, those provisions may have confused, rather than clarified the associated requirements. *See* 83 FR at 24864. Accordingly, maintaining consistency between RMP and PSM accident prevention requirements was one of EPA's bases for its 2018 proposed rule (*See* 83 FR at 24862-63) and 2019 final rule actions (*See*, e.g., 84 FR at 69851). In public comments that addressed this issue, commenters contended that EPA's changes to the incident investigation requirements had confused, rather than clarified, associated requirements. *See* RTC at 106 and 116. Similar comments were received relating to EPA's changes to the training requirements. *See* RTC at 153. EPA indicated that rescinding the Amendments rule prevention requirements would bring the RMP prevention program provisions back into alignment with the OSHA PSM standard, avoiding confusion among facilities subject to both regulations due to divergent regulatory requirements. *See* RTC at 50 and 235. While USW apparently disagrees with EPA's statements and related public comments, they demonstrate that this issue was raised in the proposal and that other commenters addressed it in their public comments, so there is no reason why USW could not also have addressed it during the public comment period.

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

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 on-line forms new grounds for objection to the 2019 RMP final rule that are centrally relevant to EPA's determination to rescind certain public information sharing provisions of the 2017 RMP Amendments rule. The petitioner also claims that EPA's reliance on the DOJ report is arbitrary and capricious. Petition at 52-53.

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. *See* 83 FR at 24867-68. 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 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. *See* 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 24867-88. As discussed below in section III(B)(c) of this response, the petition fails to identify a significant prejudice arising out of EPA's failure to include the DOJ Report in the docket at the time of proposal or the lack of a cite to it during the comment period.

> *See* 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."

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 between accessibility and the risk of terrorism; the substance of the usefulness of response plans in targeting is not disputed in the petition. Therefore, this claim does not meet the criteria for reconsideration.

C) Consistency with Prior EPA Findings

Citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.* (463 U.S. 29, 43, 103 S.Ct. 2856, 77 L. Ed.2d. 443 (1983) and *FCC v. Fox Televisions Stations, Inc.*, 556 U.S. 502, 515 (2009), USW claims that in rescinding Amendments rule's accident prevention and emergency response regulations in the 2019 final RMP rule, EPA's "repudiation and contradiction of EPA's prior findings relied upon to promulgate the [Amendments rule] are not supported by the record and lack reasoned decision-making necessary to survive judicial scrutiny under the Administrative Procedure Act, 5 U.S.C. §§ 551-559."

Contrary to the petitioner's claim, the 2019 RMP final rule modified, but did not rescind any of the emergency response provisions of the 2017 Amendments rule. Moreover, regarding EPA's justification for rescinding those provisions that were in fact rescinded, this issue was already raised in public comments on the proposed rule and responded to by EPA. *See*, e.g., RTC at 33-34, 46-52, 65-66, etc. The Agency provided a detailed rationale for rescission of each of the Amendments rule provisions removed by the 2019 RMP final rule. In the 2018 proposal, we cited specific data that we had not discussed in 2017 that, in fact, accidents tend to be concentrated among a few problematic facilities, which made feasible an enforcement-led / compliance-driven approach to accident prevention. *See* 83 FR at 24872-73. Furthermore, the 2018 proposed rule 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. Therefore, as this issue was already raised in public comments on the proposed rule and responded to by EPA, and the petitioner has not provided any new information of central relevance to EPA's final rule action, it does not satisfy the criteria for reconsideration.

III. Allegations that EPA's Final Rule is Arbitrary and Capricious

A) EPA's Rationale for the 2019 Final Rule

<u>Reasonable and Practicable Regulations</u>

The petitioner maintains that the 2019 RMP final rule set forth a new construction of CAA 112(r)(7)(B)(i) regulatory authorization for "reasonable regulations . . . to provide, to the greatest extent practicable, for the prevention and detection of accidental releases . . . and for the response to such releases." The petition quotes an excerpt from the RTC as summarizing our approach: "'[w]here a regulation is clearly not reasonable, then we need not assess whether it provides protection to the greatest extent practicable' 2019 RTC at 40." Petition at 14. In the petitioner's view, EPA equated reasonableness to compliance costs, and prioritized costs and burdens to industry and emergency response organizations over benefits to workers and communities by "effectively writ[ing] the term 'greatest extent' out of the statute. Petition at 14. The petition cites multiple instances of EPA using the statutory terms, "reasonable" and "practicable," in setting forth our rationale for decisions in the 2019 RMP final rule. *See* petition at 14 – 15 n.6. The petitioner protests that "EPA puts its thumb on the scale" in favor of rescission by relying on accident history data to discount accident prevention benefits from the prevention provisions added by the 2017 RMP Amendments and to support the compliance-driven approach to prevention as reasonable and practicable. Petition at 15-16.

The 2018 proposed rule provided notice of EPA's interpretation of the key statutory terms in CAA 112(r)(7)(B). In EPA's proposed rule for the 2019 RMP final 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 PSM 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 BATF 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. Those who objected argued we did not properly address "greatest extent practicable." The 2019 RMP 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.

Our ultimate clarification of how mechanically we would assess the statutory terms was a logical outgrowth of the issue highlighted in our proposal. We then noted that a rule that was not reasonable could not be a reasonable regulation, and that we would look at whether a regulatory approach was reasonable before considering practicability. To some extent, this is a matter of grammar, as "to the greatest extent practicable" modifies "reasonable regulations." Our approach gives meaning to the entire regulatory authorization because we simply required rules to be both reasonable and practicable. Had the petition quoted the remainder of the paragraph of the 2019 RTC at 40 that it selectively quoted, it would have been clear that we were not "writ[ing] … out of the statute" the term "to the greatest extent practicable":

> "However, among those regulatory options that are reasonable, the statute directs that EPA provide the greatest level of practicable protection in its regulations. We consider the workability, effectiveness, and reasonableness of demands on impacted entities when assessing if an option is practicable." 2019 RTC at 40.

The petitioner had an adequate opportunity to comment on how EPA interpreted "reasonable" and "practicable" and how to construe the language of CAA 112(r)(7)(B) during the comment period. Therefore, this claim does not meet the criteria for reconsideration.

Consistency with OSHA PSM Standard

In the 2018 proposed rule, the lead rationale discussed in the preamble, for nearly three pages, laid out EPA's historic approach to the requirement to coordinate rules under CAA 112(r)(7) with OSHA's comparable rules (primarily PSM), our approach for this requirement when developing the 2017 RMP Amendments, and our proposed interpretation of the requirement for what became the 2019 RMP final rule. *See* 83 FR at 24862-65. The petition acknowledges that USW filed timely comments on EPA's approach. Petition at 27. The petitioner claims new grounds for objection arise from the fact that, as of the date of the petition, the Administration has not filled the position of Assistant Secretary for OSHA, which in the petitioner's view makes coordination "highly unlikely and impracticable, causing unnecessary delay in PSM rulemaking efforts, and Mr. Holmstrom's observations about how there have always been differences between PSM and the RMP rule. Petition at 26-27.

The proposed rule noted that the 1996 RMP rule differed in some ways from PSM, but that these differences were minimized and largely driven by statutory terms. *See* 83 FR at 24863. EPA acknowledged that there would continue to be differences between the two rules with respect to accident prevention,[39] but that we would seek to minimize confusion and burden on the regulated community by minimizing divergence without carefully justifying our departure, especially in this case where we were promulgating our most costly amendments to the RMP rule since 1996. *See* 83 FR at 24864. The 2019 RMP final rule concluded that a departure from PSM was not justified where EPA lacked a record showing significant benefits for the added prevention provisions. *See* 84 FR at 69862. To the extent that differences between the RMP rule and PSM are relevant to this rulemaking, the petition has not demonstrated why these could not have been pointed out during the comment period. Therefore, this claim does not meet the criteria for reconsideration.

With respect to the lack of an Assistant Secretary for OSHA at the Department of Labor, we do not see this issue as being of central relevance to this rulemaking. Coordination can occur between acting officials and EPA, as well as career-level officials. As the petition notes, we do not claim the two agencies must proceed on

[39] PSM lacks a counterpart to EPA's hazard assessment provisions and does not contain comparable requirements on response to releases.

identical timelines. Petition at 27 (quoting 84 FR at 69862). We simply, as a matter of policy, believe that departures from PSM should have significant benefit to avoid undue burden. *See* 83 FR at 69862.

B) Petitioner's Provision-by-Provision Claims of Arbitrary and Capricious Rulemaking

In Sections IV through VI of the petition, USW claims that most provisions of the 2019 RMP final rule are arbitrary and capricious. Section IV of the petition contains the petitioner's claims that prevention program provisions are arbitrary and capricious, Section V of the petition contains claims that emergency response program provisions are arbitrary and capricious, and Section VI contains claims that the information availability provisions are arbitrary and capricious. EPA responds to these claims below in the order they appear.

Allegations that prevention program provisions are arbitrary and capricious

In Section IV (i.e., the portion of the petition from pages 28 – 39), USW claims that the 2019 RMP final rule STAA, third-party audit, and incident investigation root cause analysis rescissions, as well as the rescission of the requirement to investigate incidents that result in decommissioned or destroyed processes, are arbitrary and capricious. USW repeatedly claims that "details of recent RMP events," and "CSB findings" discussed in the Holmstrom declaration provide new grounds for objection to the 2019 RMP final rule. The petition also refers to the December 2019 letter from New Jersey Department of Environmental Protection Commissioner Catherine McCabe as new grounds for objection to the final rule. USW claims that these events, findings, and the McCabe letter "reinforce findings and recommendations set forth in USW reports and expert opinions" that were submitted in USW's public comments on the proposed Reconsideration rule.

EPA finds that these claims do not meet the criteria for reconsideration. USW is simply recycling previous comments submitted by USW and others during the period for public comment, under the guise of "new information" contained in recent CSB reports and expert opinions. EPA has discussed each of the specific claims made by USW concerning recent incidents, CSB reports, expert opinions, and the McCabe letter above, and explained that EPA does not believe that these claims present new objections that are centrally relevant to EPA's final rule decision. In short, while the information may appear in a new report, declaration or letter, the issue it addresses isn't new, nor has USW provided any explanation of why particular information relating to recent events is somehow substantively new rather than a reiteration of prior points made in public comments.[40] The final rule preamble and the RTC contain extensive refutation of claims made by various commenters on similar grounds that the third-party audit, STAA, incident investigation, and other provisions of the 2019 RMP final rule are arbitrary and capricious. *See*, e.g., RTC at 46-52 (for all rule provisions), 59-63 (for prevention provisions), 63-64 (for third-party audits), 137-139 (for STAA).

Allegations that emergency response program provisions are arbitrary and capricious

In Section V (i.e., the portion of the petition from pages 39 – 50), USW claims that the emergency response program provisions of the 2019 final rule are arbitrary and capricious. USW claims that statements in the Holmstrom declaration regarding the CSB report of the DuPont La Porte investigation, and CSB factual update of the Kuraray America EVAL incident provide new grounds for objection to the "rescission or delay in implementing" emergency response provisions of the 2017Amendments rule. USW also claims that EPA presented new findings and rationale in the final rule that were not subject to public comment, and that these also present new grounds for objection to the final rule. USW presents both the statements in the Holmstrom declaration and the "new findings and rationale" claim as overarching objections to all of the final rule's

[40] In one case (McCabe letter), information submitted in the petition is an almost verbatim reiteration of a portion of a comment submitted during the period for public comment. *See* comment EPA-HQ-OEM-2015-0725-1925, pp 35-36, available at www.regulations.gov.

emergency response provisions, but further delineates specific objections to particular provisions. EPA addresses the more specific provision-by-provision claims below. However, the Agency disagrees that anything in the Holmstrom declaration constitutes new grounds for objection to the emergency response provisions of the final rule, or that the Agency presented any new findings or rationale to justify rescissions or changes to 2017 Amendments rule provisions in the final rule. Regarding information in the Holmstrom declaration concerning the Kuraray America incident, contrary to the petitioner's claim, neither the Holmstrom declaration nor the referenced CSB factual update for the incident make any connection between the incident and the emergency response provisions of the 2017 Amendments rule.

Regarding the DuPont incident, EPA agrees that the CSB report on this incident recommends that DuPont and neighboring companies conduct periodic exercises or drills. Although these recommendations are not aimed at EPA or the 2019 RMP final rule, EPA believes they are consistent with the final rule, which retains the exercise requirements of the 2017 Amendments rule in modified form. It is important to note that this incident occurred in late 2014, years prior to the publication of the 2017 Amendments rule and the proposed and final Reconsideration rules. The incident provides an example demonstrating the need for exercise provisions to be added to the RMP rule, but EPA already had provided other such examples in proposing to add those provisions to the RMP rule in the Amendments proposal. *See* 81 FR at 13674-75. Nothing in the CSB DuPont final report provides new information of central relevance to EPA's final rule action to delay compliance with the exercise requirements. Mr. Holmstrom's declaration indicates that he believes the incident

> "underscores the [Amendments rule's] …emergency response benefits of the internal first responder coordination and field/tabletop exercise requirements that the [2019 final rule] rescinded or delayed to the detriment of plant workers,"

but EPA did not rescind those requirements – it retained them in the final rule, and Mr. Holmstrom does not explain how the incident reveals centrally relevant information concerning EPA's decision to delay compliance with the exercise requirements. While the CSB report contains recommendations to DuPont and neighboring facilities to conduct exercises, it does not recommend any specific timeline or frequency for those exercises. The CSB final report was published in June 2019, more than four and one-half years after the incident. Presumably, if the CSB believed its exercise recommendations to DuPont were of great urgency, the CSB would have specified a timeline for their implementation, or even published these recommendations in its interim recommendations report, which has been the CSB's practice in other investigations where it saw the need for urgent recommendations.[41] Even without such interim recommendations, we note that the CSB interim recommendations report for the incident, which described many of the emergency response team deficiencies later addressed in the final report, was available in late 2015, more than two years prior to the comment period for the proposed rule. EPA believes USW could have raised this issue during the public comment period based on the information in that interim report. Therefore, this claim does not meet the criteria for reconsideration.

Objections to limits on information available to local responders during annual coordination

USW also claims that EPA presented new findings and rationale in the final rule regarding security concerns that were not discussed in the proposed rule, and that this precluded public comment on the new information. Specifically, USW claims that in the final rule, for the first time EPA claimed that "no risks have resulted from sharing sensitive facility information with LEPCs to date, and that local emergency response organizations present even less security risks than LEPCs." The petitioner also claims that EPA's explanation that LEPCs have broader membership than fire and other public safety authorities and therefore these other

[41] *See*, e.g., CSB Interim Investigation Report – Chevron Richmond Refinery Fire, April 2013, p. 53 specifying an "Urgent" recommendation to Chevron U.S.A.

authorities would present less of a security risk than LEPCs constitutes "new information" that the petitioner and other members of the public could not provide comment. USW also claims that EPA's final rule rationale for limiting information available to local responders during annual coordination meetings was not presented in the 2018 proposed rule.

EPA disagrees with these claims and that they represent new information of central relevance to EPA's final rule decision. EPA did not present "new findings and rationale" regarding security concerns with regard to the local coordination requirements in the final rule. In the proposed rule, EPA described security concerns that had been raised by reconsideration petitioners regarding the final Amendments rule requirement to provide to local emergency planning and response organizations ''…any other information that local emergency planning and response organizations identify as relevant to local emergency response planning.'' As EPA explained in the 2018 proposed rule, EPA had incorporated this language in order to address concerns, including security concerns, raised by various commenters over EPA's proposed RMP Amendments rule (81 FR 13638, March 14, 2016), which among other things proposed to add new § 68.205 to require owners and operators of all RMP regulated facilities to provide certain information to LEPCs or local emergency response officials upon request. As EPA explained in the final Amendments rule,

> "Multiple commenters raised concerns regarding the security of sensitive chemical and facility information that would be shared with LEPCs under the proposed requirements. These commenters indicated that LEPCs would be unable to keep the information secure because they lack procedures and resources to properly vet those who would have access to the information, and that the information would be considered ''public information'' once it is provided to the LEPC. These commenters indicated that there are multiple ways for the public to access sensitive information from LEPCs through information requests from the public." *See* 82 FR at 4666.

EPA attempted to address these concerns in the final Amendments rule by not finalizing the proposed new § 68.205 and substituting new language in § 68.93 to allow local emergency planning and response organizations to request ''… any other information that local emergency planning and response organizations identify as relevant to local emergency response planning.'' All Amendments rule reconsideration petitioners subsequently claimed that this language had not solved the original problem, and in fact had made it worse, as in addition to providing an open-ended grant of information, § 68.93 contained no protections for classified information or confidential business information. *See* 83 FR at 24865.

USW's claim that in the final rule, EPA claimed for the first time that "no risks have resulted from sharing sensitive facility information with LEPCs to date, and that local emergency response organizations present even less security risks than LEPCs" misquotes the final rule and misstates EPA's rationale. EPA did *not* make the statements that the petitioner attributes to EPA. EPA did not state either "no risks have resulted from sharing sensitive facility information with LEPCs" or "there is no record that sharing sensitive facility information with local emergency response organizations has presented a security risk in the past." Petition at 42. EPA's exact statements in the final rule were:

> "As commenters pointed out, the EPCRA provision has been successfully implemented for many years with no known security breaches. While local emergency response organizations that may use this authority would include entities other than LEPCs, LEPCs would have broader membership than fire and other public safety authorities that would be allowed to use the information gathering authority and therefore these additional entities present even less of a security risk" *See* 84 FR at 69894; and
>
> "EPA is aware of no security vulnerabilities associated with language that tracks EPCRA in the past, and no commenters provided any such examples." *See* 84 FR at 69896.

EPA was not making a general finding about LEPCs handling "sensitive facility information." EPA was clearly referring to past experience with the information provisions of EPCRA – making a specific point about the difference between the final Amendments rule language, about which Amendments rule petitioners had

raised specific concerns that echoed the concerns of multiple public commenters on the proposed Amendments rule, and the EPCRA language, about which no specific security concerns had been raised.

USW cannot reasonably argue (petition at 44) that EPA must have evidence of a specific incident relating to the Amendments rule language requiring "…any other information that local emergency planning and response organizations identify as relevant to local emergency response planning" prior to amending it. At the time of EPA's publication of the proposed Reconsideration rule, owners and operators were not yet required to comply with the new Amendments rule local coordination provisions, and in any event it would be irresponsible for EPA to wait until a specific incident had occurred prior to addressing what the Agency believes were legitimate security concerns with that provision that could be easily addressed without detriment to regulated facilities or local responders.

USW also cannot claim to be surprised that EPA was considering substituting a form of the EPCRA provision in § 68.93, because EPA had specifically proposed to incorporate this language as an alternative to rescinding the "other information" language contained in the final Amendments rule, and EPA's rationale for that proposal was clearly based on the aforementioned security concerns. *See* 83 FR at 24866-67. Likewise, it is disingenuous for USW to claim that EPA's explanation that LEPCs have broader membership than fire and other public safety authorities and therefore these other authorities would present less of a security risk than LEPCs constitutes centrally relevant "new information" that USW and other members of the public could not provide comment on. The required membership of LEPCs is clearly articulated in EPCRA section 301, and with the wide breadth of that membership, which includes firefighting, law enforcement, civil defense, broadcast and print media, community groups, and others, it is trivial to note that particular local government entities that form part of an LEPC present less of a security risk than the entire LEPC, which consists of representatives of many organizations in addition to fire and public safety authorities. It is implausible for USW to claim this statement as "new information," when the membership of LEPCs has been specified in EPCRA since its enactment in 1986. Therefore, this claim does not meet the criteria for reconsideration.

USW's claim concerning the effect of the Administration's Fiscal Year 2021 budget proposal on the DHS Chemical Facility Anti-Terrorism Standards (CFATS) program is not relevant to the local coordination provisions of the 2019 RMP final rule, as EPA did not justify changes to those provisions based on the existence of the CFATS program. Also, the Administration's proposal is not an enacted budget, and at this time the CFATS program remains fully in effect,[42] so this claim does not represent new information of central relevance to EPA's final rule decision.

Objections to delaying exercise compliance dates, removal of field exercise minimum frequency requirement, and changes to field and tabletop exercise scope requirements

USW also objects to the final rule's provisions to delay compliance dates for exercises, remove the field exercise frequency requirement, and make the Amendments rule's provisions for field and tabletop exercise scope non-mandatory. EPA disagrees that these claims represent new information of central relevance to the final rule, as explained below.

USW's claim that EPA's action to delay and modify the exercise requirements in the final rule was based on new concerns about the burden of field exercises on counties with numerous RMP facilities that were raised for the first time in the final rule, is incorrect. 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 and 83 FR at 24876. The number of counties with more than 50

[42] On July 22, 2020, the President signed into law Public Law 116-150 to extend the expiration date of the legislation for the CFATS program to July 27, 2023. See https://www.cisa.gov/chemical-facility-anti-terrorism-standards.

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. Several public commenters made references to areas with large numbers of RMP facilities in their comments on the proposed rule.[43]

EPA also disagrees that USW has presented any new grounds of central relevance to EPA's final rule decision to delay compliance with exercise requirements or remove the minimum frequency requirement for field exercises. EPA discussed the lack of central relevance of recent incidents and the Holmstrom declaration to the final rule in previous sections of this letter. EPA notes that much of the petitioner's argument in support of retaining the 2017 Amendments rule's exercise requirements (e.g., Nibarger declaration) reiterate information USW submitted in comments on the proposed rule. But the Agency did not rescind any of the exercise requirements of the Amendments rule, and no new information presented in the petition bears specifically on EPA's decision to delay compliance with those requirements or remove the minimum frequency for field exercises. As stated above, the single CSB report (DuPont) raised by USW that contains specific recommendations related to exercises does not address the frequency of exercises or contain any recommended timeline for conducting them. The Holmstrom declaration states that the Amendments rule's exercise requirements were "delayed to the detriment of plant workers" but contains no explanation for this statement. Information in that declaration concerning the annual exercise provision of the National Fire Protection Association Recommended Practice for Responding to Hazardous Materials Incidents (NFPA 471) is sourced from a recommended practice published in 2002, reiterates information provided in a public comment on the proposed rule,[44] and is similar to other public comments recommending shorter exercise frequency requirements,[45] which EPA responded to,[46] so there is no reason USW could not also have provided this information during the period for public comment.

USW's other arguments concerning 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 do not meet the reconsideration criteria because they all could have been made in the petitioner's public comments on the 2018 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 24861), and in both cases EPA's final rule action adopted these changes as proposed (84 FR at 69899-900 and 84 FR at 69908). The petitioner's claim that removal of the field exercise frequency requirement and making the exercise scope provision non-mandatory complicates EPA's ability to enforce these requirements and undermines EPA's compliance-driven approach is not based on any new information of central relevance to EPA's final rule action. The enforcement claim is similar to a comment submitted on the proposed rule, which EPA responded to in the RTC.[47] USW could have made these claims during the period for public comment.

Allegations that information availability provisions are arbitrary and capricious

In Section VI (portion of petition from pages 50-54), USW claims that the information availability provisions of the 2019 RMP final rule are arbitrary and capricious. The petition cites as new grounds for objection to these provisions the post-comment period CSB reports and findings referenced in the Holmstrom declaration, the information in the Public Integrity article concerning some states' restriction on AN facility information, and the fact that EPA did not discuss the April 2000 DOJ report on the increased risk of terrorism or criminal activity associated with posting RMP offsite consequence analysis information in the proposed rule or include it in the rulemaking docket. EPA has already discussed the relevance of the Holmstrom declaration

[43] *See* EPA-HQ-OEM-2015-0725-1869, -1969, -1925, and -1930. Available at www.regulations.gov.
[44] *See* EPA-HQ-OEM-2015-0725-1629, available at www.regulations.gov.
[45] *See* EPA-HQ-OEM-2015-0725-0973, -1896, available at www.regulations.gov.
[46] *See* RTC, pp 198-199, available at www.regulations.gov.
[47] *Id*.

and Public Integrity article in previous sections of this response and does not agree that these contain new information of central relevance to EPA's final rule information availability provisions.

USW also claims that EPA's reliance on the DOJ report ignores "the availability of consolidated sensitive facility information including transcriptions of RMP Facility Risk Management Plans that have been and remain readily available via anonymous access at RTK.net" and later from the Houston Chronicle. EPA disagrees that this claim represents new grounds for objection to the final rule or that it is of central relevance to EPA's final rule decision. The issue of anonymous access to consolidated information was raised in the proposed rule. *See* 83 FR at 24867-68. During the public comment period, multiple commenters identified the availability of RMP information via RTK.net in comments opposing EPA's position on the issue.[48] Therefore USW clearly could have raised this issue during the period for public comment.

Also, risk management plans, by themselves, do not represent a consolidation of all of the chemical hazard items that would have been provided under the 2017 Amendments rule. As EPA indicated in the proposed rule, the Agency was concerned about the combination of the mandatory disclosure elements required under the Amendments being available for anonymous access from a single source. *See* 83 FR at 24867-68. EPA stated,

> "For example, if a facility is required to disclose in synthesis and in one public source that it has experienced frequent accidental releases involving large quantities of highly toxic or flammable chemicals, does not maintain an on-site response capability, and is located a long distance away from the nearest public responders, the synthesis of this information might allow a criminal or terrorist to identify a relatively ''softer'' facility target for attack, or a target that if attacked could cause more damage to the facility and surrounding community due to a less timely response."

These elements exceed the information already available in risk management plans, which do not provide information on whether a facility maintains an on-site response capability, the location of the nearest public responders, or information on scheduled emergency response exercises, as well as other rescinded disclosure elements such as Safety Data Sheets (SDSs) for regulated substances. Lacking these elements, the Houston Chronicle website that currently hosts RMP information is not a source for a consolidation of all of the mandatory chemical hazard disclosure items that would have been available under the rescinded information availability provisions. Therefore, EPA does not believe the existence of the RTK.net/Houston Chronicle information on RMP facilities is of central relevance to EPA's final rule action.

We appreciate your comments and interest in this matter.

Sincerely,

Andrew Wheeler

[48] *See* EPA-HQ-OEM-2015-0725-0949, -1925, and -1818, available at www.regulations.gov.