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U.S. Environmental Protection Agency
EPA Docket Center
Mailcode 2822IT
Attn: Docket ID No. EPA-HQ-OLEM-2022-0174
1200 Pennsylvania Avenue, NW
Washington, DC 20460

October 31, 2022

Re: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention, 87 Fed. Reg. 53,556 (Aug. 31, 2022)

Dear Sir or Madam,

GPA Midstream Association ("GPA Midstream") appreciates the opportunity to provide these comments to the U.S. Environmental Protection Agency ("EPA") in response to its proposal rule, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention, 87 Fed. Reg. 53,556 (Aug. 31, 2022) ("Proposed Rule").

GPA Midstream has served the U.S. energy industry since 1921 and has over 60 corporate members that directly employ more than 60,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids ("NGLs"), refined products, and crude oil from production areas to markets across the United States, commonly referred to as "midstream activities." The work of our members indirectly creates or impacts an additional 320,000 jobs across the U.S. economy. GPA Midstream members recover more than 80% of the NGLs such as ethane, propane, butane, and natural gasoline produced in the United States from more than 380 natural gas processing facilities. In the 2018-2020 period, GPA Midstream members spent over $90 billion in capital improvements to serve the country's needs for reliable and affordable energy.

Summary

GPA Midstream opposes significant portions of the Proposed Rule. Through the Proposed Rule EPA seeks to implement several new requirements, some previously repudiated in 2019 and others wholly new. Collectively, the Proposed Rule moves the Risk Management Program ("RMP") scheme away from a performance-based standard that has affected a continual decline in incidents to an overly-prescriptive regimen that will overburden and overwhelm process hazard analysis ("PHA") management systems with additional requirements. The Proposed Rule would impose significant new costs and burdens upon facilities without any apparent benefit to the

reduction in either the number of accidents or their severity. Indeed, based on the Proposed Rule's own administrative record, there is no need for these additional regulations.

Among the issues of most concern to GPA Midstream are the following:

- Most of the proposed revisions lack a rational basis. EPA provides little or no explanation as to why the proposed revisions are needed or why existing rules, last revised at the end of 2019, are deficient in any way.

- New regulations regarding natural hazards are unnecessary as natural hazards are already considered in PHAs or emergency response documents and the proposed requirement is impermissibly vague and expansive.

- The proposed backup power requirements exceed EPA's statutory authority and lack a reasoned basis.

- Several provisions that would increase public distribution of chemical hazard information conflict with various chemical facility safety laws, raising significant security concerns, and lack a reasoned basis. Further, portions of the Proposed Rule preamble state that the purpose behind these measures is to allow members of the public to pressure facilities into changing their process safety management decisions.

- Some provisions would effectively require regulated facilities to assume responsibility for emergency notification and planning from local agencies.

- The proposed facility siting regulations appear to be largely duplicative of existing Occupational Safety and Health Administration ("OSHA") standards and overly vague.

- The Proposed Rule's re-introduction of third party audit requirements, while more limited than their 2017 incarnation, still lack a rational basis.

- The requirement for compliance audits to include every covered process lacks a rational basis and is inconsistent with OSHA requirements.

- EPA lacks the statutory authority to impose the employee participation plan requirements outlined in the Proposed Rule. Even if it had such authority, the proposed requirements lack a rational basis, unnecessarily deviate from OSHA standards, and are more likely to increase safety concerns than decrease them.

GPA Midstream generally supports EPA's decision not to define the term "near miss" and the Proposed Rule's decision to exclude the midstream industry from the Safe Technology and Alternatives Analysis ("STAA") regulations. However, the STAA regulations are deeply flawed and, even if EPA chooses to finalize them for certain industries, it should decline to expand their applicability further.

I. The Proposed Rule Provides No Rational Basis for Revising the Existing Rules

The Proposed Rule states that the existing "regulations have been effective in preventing and mitigating chemical accidents in the United States." 87 Fed. Reg. at 53,560. Nevertheless, it would impose millions of dollars in new costs solely on an unexplained "belie[f] that revisions could further protect human health and the environment…." *Id.* EPA needs more of a justification to impose new legal obligations on RMP-regulated facilities, particularly since the Proposed Rule largely re-introduces significant portions of a 2017 rule, 82 Fed. Reg. 4,594 (Jan. 13, 2017) ("2017 Amendments"), that EPA previously rescinded in large part. 84 Fed. Reg. 69,834 (Dec. 19, 2019) ("2019 Reconsideration Rule"). EPA cites no new relevant information identifying any deficiencies in the 2019 Reconsideration Rule since it became effective. The Proposed Rule offers a single, arguably new incident, a fire and evacuation at a TCP Group facility in Port Neches (although it pre-dates the 2019 Reconsideration Rule's effective date), 87 Fed. Reg. at 53,565,[1] and indirectly attempts to repudiate the 2019 Reconsideration Rule by opining that "a 'compliance-driven' approach that relies heavily on determining if the facility was compliant with accident prevention regulations after an accident occurred would not meet the goal of preventing the initial accident." *Id.* Yet, EPA offers no evidence that any aspect of the Proposed Rule would have stopped or mitigated the TCP Group facility incident. In fact, the Chemical Safety Board ("CSB") has not completed its investigation of the incident and has not yet made any safety recommendations that may prevent a similar incident.[2]

The Proposed Rule also attempts to characterize the 2019 Reconsideration Rule as merely imposing post-accident relief that "entails significant transaction costs, delays, and uncertainty" with the Proposed Rule being "broader based, and rule-driven." 87 Fed. Reg. at 53,565. These characterizations are not supported by either the 2019 Reconsideration Rule or the Proposed Rule and cannot support the weight of new and significant regulatory burdens. Importantly, EPA provides no evidence or explanation that any of the Proposed Rule's provisions would have prevented any accident or would shorten highly complex litigation (such as the multi-facility settlement discussed in the Proposed Rule at page 53,565). In other words, the Proposed Rule's only basis for effectively rescinding the 2019 Reconsideration Rule are vague notions of a "rule-based prevention" philosophy, *id.* at 53,566, that is just as evident in the current regulations as in the Proposed Rule. This cannot justify the Proposed Rule's new obligations.

The Proposed Rule selectively emphasizes certain metrics for accidents from 2016 to 2020, 87 Fed. Reg. at 53,565, while ignoring others. According to EPA's Regulatory Impact Analysis ("RIA"), the number of accidents, employee deaths, employee injuries, and the value of property damage have **declined**. *See* RIA at 27, Exhibit 3-9.

[1] The TPC fire occurred on November 27, 2019, CSB, Fires and Explosions at TPC Group Port Neches Operations Facility, Factual Update (Oct. 29, 2020) at 1, approximately three weeks prior to EPA publishing the 2019 Reconsideration Rule.
[2] *Id.* at 12.

Exhibit 3-9: Onsite Impacts by Year: 2016-2020 (millions, 2020 dollars).

Year	Impact Accidents	Employee Deaths	Employee Injuries	Public Injuries	Public Deaths	Value of Property Damage
2016	127	4	136	0	0	$451.4
2017	109	3	108	20	0	$234.4
2018	92	2	140	0	0	$770.8
2019	100	1	110	0	0	$546.2
2020	60	2	56	0	0	$28.8
Annual Average	97.6	2.4	110	4	0	$406.3
Total Reportable	**488**	**12**	**550**	**20**	**0**	**$2,031.5**

* Property damage values were obtained from the EPA RMP Database of self-reported information from regulated facility owners or operators and adjusted to 2020 dollars.

It is difficult for the Proposed Rule to justify significant new burdens on facilities based on new information showing that accidents are down by more than half; employee injuries are down by 59%, and property damage is down by 93.8%. Further, these are relatively consistent trends, as shown in the RIA. The Proposed Rule instead selects other metrics, calculated at an "average annual rate," purportedly showing significant increases in certain impacts, such as a 230% average annual increase in persons seeking medical attention and a 75% average annual increase in evacuations. 87 Fed. Reg. at 53,565. Examining the RIA data, however, shows that the Proposed Rule is not presenting this information in a candid manner. *See* RIA at 28, Exhibit 3-10.

Exhibit 3-10: Offsite Impacts by Year: 2016-2020 (millions, 2020 dollars).

Year	Impact Accidents with Offsite Impacts	Number of Deaths	Hospital Visits	People Undergoing other Medical Treatment	Number of People Evacuated	Number of People Sheltered in Place	Value of Property Damage
2016	27	0	11	3	1,668	13,430	$4.2
2017	31	0	6	94	7,866	32,011	$.05
2018	30	0	4	19	3,942	469	$.3
2019	27	0	6	15	51,002	38,284	$155.0
2020	18	0	4	3	261	1,614	$.1
Annual Average	26.6	0	6.2	26.8	12,948	17,162	$32.0
Total Reportable	**133**	**0**	**31**	**134**	**64,739**	**85,808**	**$191.5**

Even a cursory review of the RIA data shows that the Proposed Rule uses a five year annual average because it allows for a single year of potential extreme outlying data to dramatically inflate the average. For instance, of all those undergoing medical treatment (a metric that the Proposed

Rule claimed to increase by 230% over five years), 70% of treatments took place in 2017.[3] The Proposed Rule also notes increases in evacuations (75%) and those sheltering in place (18%) but these are also largely driven by potential outliers. Year 2019 accounted for nearly 79% of the number evacuees over the five year period. And 2017 and 2019 together account for nearly 82% of those people who sheltered in place.

The Proposed Rule's use of a five year average, while ignoring potential outliers, contradicts EPA's own statistical guidance. "Potential outliers are measurements that are extremely large or small relative to the rest of the data and, therefore, are suspected of misrepresenting the population from which they were collected." EPA Office of Information, Data Quality Assessment: Statistical Methods for Practitioners (Feb. 2006) at 115 (emphasis added). "Failure to remove true outliers or the removal of false outliers both lead to a distortion of estimates of population parameters…." *Id.* Yet, despite the serious impact of potentially outlying data, EPA performed no statistical outlier testing or data analysis as required by its own guidance. *Id.* at 115-116. Further, EPA has done nothing to examine the cause of such data anomalies. Should potential outliers, such as the number of evacuees, persons sheltering in place, and the value of property damage in 2019, all be attributed to a single event, this should be considered by EPA in deciding whether or not to impose significant new burdens on all regulated facilities. The same would be true if this data showed that, as has been historically true, a very small number of facilities are responsible for the majority of measured impacts. It is arbitrary and capricious for EPA to treat this data in such a cursory and overly simplistic manner.

Even if there were no outliers, the data EPA cites still fails to provide a rational basis for deviating from the 2019 Reconsideration Rule. That rule did not take effect until December 19, 2019, 84 Fed. Reg. at 69,834, meaning it is impossible to attribute any of the large numbers from the years 2016 to 2019 to the 2019 Reconsideration Rule. The RIA presents a single year of data after the effective date: 2020. The 2020 data show:

- The lowest year of accidents with offsite impacts (18);
- Zero deaths;
- Four hospital visits, tied with 2018 for the lowest year;
- Three persons undergoing medical treatment, tied with 2016 for the lowest year;
- The lowest year for evacuations (261);
- The second lowest year for those sheltering in place (1,614); and
- The second lowest year for the value of property damage ($100,000).

This is consistent with Exhibit 3-9 of the RIA, showing that 2020 had the lowest numbers of onsite impact accidents, employee injuries, and property damage, as well as a near low for employee

[3] There are some discrepancies in the Proposed Rule's presentation of this data and the data in the RIA itself. For instance, the Proposed Rule states that the number of persons undergoing medical treatment rose to an average of 33 per year, the RIA itself puts that average at 26.8.

deaths. GPA Midstream understands that COVID-19 made 2020 an unusual year and could play a role in these smaller numbers (or it may not); however, EPA has performed no statistical analysis to understand any potential impact. Instead, the Proposed Rule claims that "[t]he more current data since the 2019 analysis shows" the need for EPA to dramatically alter the RMP Program's philosophy and corresponding regulatory burden. 87 Fed. Reg. at 53,565. The data presented in the RIA demonstrate that this is untrue and that EPA cannot meet even the modest burden of showing that the Proposed Rule's requirements are "reasonable" under Section 112(r)(7)(B)(i). Nor can this data provide a reasoned basis for EPA's dramatic changes to the RMP regulations. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983). GPA Midstream strongly recommends that EPA decline to finalize the Proposed Rule or, at the very least, issue a supplemental proposed rulemaking with adequate and defensible data.

II. The Proposed Natural Hazards Requirements Lack a Rational Basis

GPA Midstream agrees that, for any regulation governing consideration of natural hazards, the definition provided by the Center for Chemical Process Safety ("CCPS") in its *Guidelines for Hazard Evaluation Procedures* (3d ed. 2008) is suitable. However, that is the only thing with respect to the Proposed Rule's Natural Hazards regulations that we can agree upon. Overall, the Proposed Rule provides no rational basis for its new requirements, admitting that "many facilities with RMP processes are generally managing natural hazards well; however, some RMP accidents are still being reported as linked to natural hazards." 87 Fed. Reg. at 53,567. Simply declaring that some undisclosed number of accidents still exist does not provide a justification for new regulatory requirements. This is especially true with respect to natural hazards, which can only be mitigated, not avoided entirely. Thus, the basis for the rule – that "some RMP accidents are still being reported as linked to natural hazards" – will always be true regardless of what regulations EPA imposes or rescinds. An ever-present possibility of natural hazards cannot support new regulations.

As EPA admits, natural hazards are already considered in process hazard analyses and emergency response documents, regardless of whether or not they are correlated with climate change. 87 Fed. Reg. at 53,567 (Proposed Rule makes "more explicit this already-existing accident prevention program requirement"). Thus, the Proposed Rule only offers a duplicative and confusing additional burden with no stated benefit. According to EPA's own data in Appendix A to the Technical Support Document, natural hazards have consistently contributed to a negligible number of incidents, with only eight in the past five years. The Proposed Rule glosses over this data and provides a generalized discussion of natural disasters in counties and states (but not those affecting regulated facilities), unexplained third party studies of "risk," and an anecdotal discussion of the Arkema Inc. fire (pre-dating the 2019 Reconsideration Rule) that did not even include an RMP-covered process. 87 Fed. Reg. at 53,568. The Proposed Rule's claim that the new language "will ensure the threats of natural hazards are properly evaluated and managed to prevent or mitigate releases of RMP-regulated substances," *id.*, is never explained or substantiated by record evidence. EPA provides no information demonstrating that process safety analyses are not currently "properly evaluated and managed" or that the proposed new requirements would reduce the number of natural hazard incidences, or their consequences, in any way. *See*, *e.g.*, *AEP Texas North Co. v. Surface Transp. Bd.*, 609 F.3d 432, 442 (D.C. Cir. 2010) (remanding where agency fails to provide "information about how it arrived at [its] conclusion.").

The lack of a record basis for the new requirement is only emphasized by the proposed regulatory language. Contrary to the preamble's claim that EPA is merely concerned with applying existing requirements to climate-related weather events, the Proposed Rule would significantly (and ambiguously) expand PHA requirements to consider all "external events such as natural hazards, including," but apparently not limited to, "those caused by climate change or other triggering events that could lead to an accidental release." 87 Fed. Reg. at 53,610 (proposed 40 C.F.R. § 68.50(a)(5)) (emphases added); *id.* at 53,612 (proposed § 68.67(c)(8)) (same). The language, as written, is overbroad and ambiguous, going well beyond climate-related weather events to conceivably include consideration of terrorist attacks, riots, lightning strikes, or air plane crashes. It is simply unreasonable to demand that facilities imagine every conceivable "external event[ ]" or "triggering event[ ]" that may impact a facility, regardless of where it is located or the actual weather-related risks presented by the individual geography.[4] It is hard to see any benefit from, for example, a natural gas processing plan in North Dakota including hurricane scenarios in its PHAs.

Without removing the underlined language, the draft regulation will likely be invalidated upon review as a significant expansion of regulatory burdens without a rational, factual basis and beyond EPA's authority. The preamble's justification of the rule denies that EPA is seeking to expand the scope of analyses, 87 Fed. Reg. at 53,567, and therefore provides no rationale or record basis for that expansion. This failure to acknowledge the proposed expansion of these requirements is a ground for vacatur. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (an agency must "display awareness that it is changing position" and cannot "depart from a prior policy *sub silentio*"). Further, EPA appears to be misusing a statute authorizing regulations to prevent accidental releases of certain regulated chemicals in order to, in some vague way, regulate climate change risks.

Even setting aside all of those difficulties with the proposal, it is still impermissibly vague and confusing. Should EPA insist on continuing with this proposed language, it should issue a supplemental proposed rule that deletes the term "external events" as it goes well beyond mere natural hazards. It should also strike the terms "including" and "other triggering events," as well. Unless EPA wishes to dramatically expand its purported rationale for this regulatory change in a supplemental proposed rule, it is limited to "natural hazards" only. Even here, however, the Proposed Rule provides no explanation as to how a regulated facility can distinguish (or even whether it must distinguish) between weather events and "those caused by climate change."

III. The Proposed Rule's Backup Power Requirements Exceed EPA's Authority and Lack a Reasoned Basis

The Proposed Rule's requirement to install backup power for air pollution control and monitoring equipment is unlawful under the statute. Although the statute authorizes EPA "to promulgate release prevention [and] detection … requirements which may include monitoring," those regulations are limited to "regulated substances." 42 U.S.C. § 7412(r)(7)(A). The Proposed

[4] The Proposed Rule tries to reduce the breadth of the regulatory language by citing to a guidance document that requires only analyses of "reasonably anticipated external events" that depend on whether the facility is "in an area subject to earthquakes, hurricanes, or floods…." 87 Fed. Reg. at 53,567. None of this limiting language, however, is in the legally binding regulation. Should EPA finalize the Proposed Rule, the quoted guidance document would be effectively rescinded as inconsistent with the regulation's text.

Rule makes no distinction between equipment monitoring "regulated substances" and unregulated substances under the RMP program (*e.g.*, particulate matter or regulated substances below a threshold quantity). Nor does the RMP statute provide EPA with any authority over pollution controls, regardless of what type of substance they control. This is likely why the Proposed Rule never attempts to identify any statutory authority supporting its proposal. To the extent that EPA wishes to mandate backup power for emission controls and monitoring equipment, these issues should be addressed under the appropriate Clean Air Act program, whether it be Title V or New Source Review.

The Proposed Rule also fails to provide a reasoned basis for imposing the backup power requirements. The Proposed Rule never attempts to provide any data supporting these requirements and Appendix A to the Technical Support Document does not appear to identify any accidents caused by a loss of power. EPA instead attempts to justify the proposal on unsubstantiated concerns "that air monitoring and control equipment is often removed from service" at unidentified facilities "before natural disasters" or that owners and operators may "conceivably in some cases" use a loss of power to intentionally "evade monitoring requirements." 87 Fed. Reg. at 53,571. Further, EPA discusses various anecdotes and relies on National Response Center reporting to argue that power loss may lead to releases of regulated substances. *Id.* at 53,569. The Proposed Rule's rationale, however, falls apart with its admission that "most of these incidents" used to justify the new requirements "did not involve RMP chemicals, processes, or accidental releases." *Id.* To support the proposed requirements, EPA must provide relevant data, which it apparently lacks.

IV. EPA Should Not Increase the Public Availability of Sensitive Facility Information

The Proposed Rule's overall mission to "enhance information sharing" by regulated facilities lacks a rational basis, ignores laws protecting sensitive facility information, and improperly subjects safety decisions to "community pressure and oversight." 87 Fed. Reg. at 53,574. Among these new public disclosure provisions, the Proposed Rule would require facilities to make public "the recommendations from their natural hazard, loss of power, and siting evaluations that were not adopted and the justification for those decisions," *id.*, and to disclose chemical hazard and emergency preparedness information upon request by any person living within six miles of a facility. *Id.* at 53,599. The Proposed Rule never explains how these provisions could reduce the number or severity of accidents but openly admits that EPA intends for these disclosures to improperly compel regulated facilities to change their process safety decisions based on public pressure. Because the proposals lack any legal or rational basis, and overlook significant security concerns, EPA should decline to finalize them.

A. Increased Public Disclosure Raises Significant Security Concerns

The Proposed Rule adopts a philosophy that public disclosure is an unalloyed good without any corresponding detractions. Even ignoring the additional burdens imposed upon regulated facilities (as the Proposed Rule did), increasing the circulation of information regarding potential safety hazards, chemical handling and storage, and facility layout presents significant security concerns. Public information has traditionally been limited to the names of regulated substances above threshold quantities and contact information for the relevant local authorities. The public also receives additional facility information, such as the through RMP plan executive summaries and the Emergency Planning and Community Right-to-Know Act. The Proposed Rule states that EPA is creating "solutions that balance community right-to-know with security concerns," 87 Fed.

Reg. at 53,603. However, the balance between public disclosure of sensitive information and security risks is a question for Congress and the Department of Homeland Security ("DHS"), not EPA, which lacks the necessary expertise.

Congress has addressed facility security on several occasions, including the Critical Infrastructure Information Act; Chemical Facilities Anti-Terrorism Standards Act ("CFATS"); and the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 ("CFATS 2014"). Most recently, Congress reauthorized CFATS in 2020. Together, these impose numerous restrictions on what information may be released to the public in order to reduce security risks. Yet, the Proposed Rule would compel regulated facilities to publicize information that these laws may protect. Further, it would do so without a clear statutory requirement in the RMP. *See generally* 42 U.S.C. § 7412(r)(7)(H).

EPA dismisses these concerns entirely, claiming that the DHS did not intend for RMP-related information to be covered by CFATS, 87 Fed. Reg. at 53,603, but this is incredibly misleading. DHS stated that, "[a]t this time," being April 2007, "we do not intend to displace or otherwise affect any provisions of Federal statutes, including … section 112(r)." 72 Fed. Reg. 17,688, 17,714 (Apr. 9, 2007). None of the Proposed Rule's new requirements are contemplated by Section 112(r), and therefore, could not have been contemplated by DHS in 2007. Further, the Proposed Rule does not reflect any consideration as to how these new public disclosure requirements would serve the overall purpose of the RMP statute – reducing accidents or mitigating their effects. On the contrary, increasing the circulation of sensitive information needlessly increases risks to the very communities that the Proposed Rule wishes to protect.

B. The Six-Mile Radius for Information Disclosure is Arbitrary

EPA's selection of a six-mile radius to dictate who may receive information is unjustified and arbitrary; using a three mile or ten mile radius as an alternative would be equally arbitrary. According to the Proposed Rule, six miles is the worst-case distance for an accidental release of a toxic substance. 87 Fed. Reg. 53,601. Midstream facilities, however, are typically only covered by the RMP program due to flammable substances. The Proposed Rule admits that worst-case distances for flammable substances are less than a mile. *Id*. Given that the proffered purpose of the new rule is to disclose more information to those that may be affected by a release, *id.* at 53,600, a six-mile radius created for different types of facilities should not be applied to midstream facilities. With a six-mile radius, the vast majority of persons that could obtain sensitive facility information would never be impacted by an accidental release. The Proposed Rule's application of an overly-broad, one-size-fits-all radius to midstream facilities is never explained and has no record basis. The alternative radii, three miles and ten miles would also be overly broad. If EPA insists on finalizing this requirement, it should use a much smaller radius, such as one mile.

Further, EPA believes that establishing a six-mile radius "ensures that even if community members obtain information related to offsite consequences analysis (OCA) data, it would require a difficult nationwide-coordinated effort among people within 6 miles of each facility to create the type of online database described" in a Department of Justice report on how bad actors can benefit from assembling publicly available information. 87 Fed. Reg. at 53,600. In an age where industrial facilities are under constant cyber-attack by well-funded foreign actors thousands of miles away, the Proposed Rule's faith that a six mile geographic limit will constrain the transmission of information is inexplicable. Once a facility releases information to anyone – regardless of where

they live – it loses control of that information. Documents can be photographed with any common phone and transmitted around the world in seconds. The Proposed Rule's reliance on a six mile radius (or the alternative three mile or ten mile radii), on the apparent belief that this can limit who receives information, is arbitrary and capricious.

C. "Community Pressure and Oversight" is not a Legitimate Statutory Goal

EPA is proposing that facilities must make public "the recommendations from their natural hazard, loss of power, and siting evaluations that were not adopted and the justification for those decisions." 87 Fed. Reg. at 53,574. EPA's rationale is that disclosing such sensitive information "will enable the public to ensure facilities have conducted appropriate evaluations to address potential hazards." *Id.* (emphasis added). Emphasizing its point even more, the Proposed Rule declares that facilities' process safety decisions will be "motivated" by "community pressure and oversight." *Id.* This is an obviously invalid rationale for the Proposed Rule's requirements.

Although the public has the right to certain, basic information, it has no right to weigh in on, much less apply "pressure" with respect to, process safety decisions. EPA is not proposing an anodyne public notice and comment process (although that would still involve concerns about the release of sensitive facility information). Instead, EPA intends for the general public to exert "pressure" on the facility while "overseeing" its process safety responsibilities. Indeed, it is hard to view EPA's reference to "community pressure and oversight" as anything less than process safety regulation by mob rule, or at least rule by a small band of vocal protestors. Far from facilitating any type of cooperation between a facility and the general public, encouraging "community pressure and oversight" is a recipe for agitators, regardless of where they live, to misrepresent complex information and stoke a community's worst fears. The result will be unnecessary conflict that inevitably strains relationships between facilities and their LEPCs and first responders. And, since the general public lacks an understanding of, much less expertise in, process safety and regulated substances, throwing these issues open for the public to decide through "community pressure" will not provide better outcomes than a facility's team of subject matter experts. Importantly, EPA cannot demand deference from courts based on its technical expertise while simultaneously encouraging regulation of complex processes through "community pressure." Process safety management is not something that anybody can do without proper education, training, and experience. EPA should disavow the notion that public pressure should play any role in highly technical process safety decisions.

V. Requirements to Effectively Take Over Local Emergency Notification and Planning Functions are Illegal and Lack a Rational Basis

The Proposed Rule would illegally shift basic responsibility for community notification and emergency response from local government agencies to regulated facilities. *See* 87 Fed. Reg. at 53,614 (proposed 40 C.F.R. 68.90(b)(1) would dictate the content of numerous emergency response plan components); *id.* at 53,615 (proposed Section 68.95(a)(1)(i) would make facilities responsible for community notification systems); *id.* (proposed Section 68.95(c) would dictate information included in emergency response plans); *see also id.* at 53,596 (proposal requires the facility to "ensure that a community notification system is in place to warn the public"). The Proposed Rule provides no legal basis for mandating that regulated private entities assume public functions – which would presumably be done without the consent of local government agencies. Further, the Proposed Rule provides no rational basis for these provisions.

Current regulations require only coordination with emergency planning and response authorities. 40 C.F.R. § 68.90. By keeping these authorities informed, local governments can provide emergency notifications in the case of a facility release and plan for emergency responses. Yet, without any legal or factual explanation, EPA would require regulated facilities to assume control over notification systems that are not only owned and operated by local government agencies, but are also used for purposes other than accidental chemical releases (*e.g.*, tornados, flooding), as the Proposed Rule recognizes. 87 Fed. Reg. at 53,597. The Proposed Rule also specifies various new issues that must be included in emergency response plans. 87 Fed. Reg. at 53,597-98. Although the Proposed Rule acknowledges that these plans are "prepared by LEPCs/TEPCs, *id.* at 53,597, it states that regulated facilities can ultimately be held responsible for their content: "Only if the LEPC plan was clearly deficient would EPA consider any action against the facility for relying on it for response." *Id.* at 53,598. Regulated facilities cooperate with LEPCs and provide necessary information. These facilities, however, neither write LEPCs' emergency response plans nor have any ability to compel LEPCs to alter those plans.[5]

The effect of the Proposed Rule would be to preempt local law without an express statement of Congress. Reviewing courts adopt "the familiar presumption against preemption. But this presumption may be overcome if … the court finds that the preemptive purpose of Congress was 'clear and manifest.'" *Albany Engr'r Corp. v. FERC*, 548 F.3d 1071, 1075 (D.C. Cir. 2008) (quoting *Geier v. Amer. Honda Motor Corp. Inc.* 166 F.3d 1236, 1237 (D.C. Cir. 1999)) (internal citations omitted). Here, not only has the Proposed Rule failed to identify a "clear and manifest" statement of Congress, but Congress expressly vested emergency notification and response planning in local agencies, not EPA or regulated facilities. *See* 42 U.S.C. §§ 11003 (emergency planning), 11004 (emergency notification), 11005(b) (review of emergency systems). Because Congress already vested these responsibilities in local agencies, and EPA has no legal authority to alter this framework, it should withdraw these proposed requirements.

VI. GPA Midstream Generally Supports EPA's Exclusion of Midstream Stationary Sources from the Safe Technology and Alternatives Analysis

GPA Midstream generally supports limiting the Safer Technology and Alternatives Analysis ("STAA") requirements to NAICS codes 324 and 325, 87 Fed. Reg. at 53,575, and thus excluding midstream sources under NAICS code 211112. EPA may, however, believe that STAA requirements should be expanded to other industries in the future. Although the proposed STAA requirements would not affect the midstream industry in the immediate future, GPA Midstream remains concerned that EPA lacks the statutory authority and a rational basis to impose STAA requirements on any industry.

Section 112(r) does not authorize EPA to impose facility design requirements at any stage of a regulated facility's lifespan, much less for existing facilities. Further, EPA previously acknowledged that the STAA requirements were based on mistaken assumptions, imposed

[5] Should EPA choose to take an enforcement action against such a facility, it would face numerous legal obstacles. The Proposed Rule does not defin "clearly deficient," depriving any potential defendants of fair notice and would create an entirely new form of vicarious liability far beyond that endorsed in *United States v. Park*, 421 U.S. 658, 671 (1975). There, a corporate executive was found liable merely because he "had the power to prevent the act complained of" but did not. Here, EPA threatens regulated facilities with vicarious liability even though they have no "power to prevent" LEPCs from creating deficient emergency response plans.

significant known costs on regulated facilities, as well as indirect costs that were not previously considered, and conveyed virtually no benefits to the public. 83 Fed. Reg. at 24871-72; 84 Fed. Reg. at 69,863. The Proposed Rule not only misrepresents the actual reasons EPA previously rescinded the STAA requirements but still fails to identify any record-based rationale for imposing the STAA requirements on any industry. 87 Fed. Reg. at 53,578-79. The Proposed Rule openly dismisses hard accident rate data and declares that STAA may be justified on only the purported "expert views of CSB and other" unidentified "researchers," unidentified "case studies, and EPA's technical judgment." *Id.* at 53,579. This is not a permissible approach to rulemaking. *See*, *e.g.*, *Illinois Public Telecomms. Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997) ("The FCC's *ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking.").

Much more could be said on the Proposed Rule's dubious rationale for imposing STAA requirements and, should EPA attempt to expand its applicability to the midstream industry in the future, GPA Midstream reserves its right to provide a much fuller explanation of why the STAA requirements are arbitrary, capricious, and contrary to law.

VII. The Proposed Facility Siting Requirements are Vague and Lack a Rational Basis

The Proposed Rule's amendments of 40 C.F.R. §§ 68.50(a)(6) and 68.67(c)(5) are confusing and poorly explained. The proposed language itself is vague and its potential meaning is only obscured by the preamble language. The preamble asserts that the amendments merely explain existing regulations but it raises a host of new and unexplained requirements for the consideration of "stationary source siting" in hazard reviews and PHAs that are, at best, unnecessarily duplicative of existing OSHA PHA requirements.

Under the proposed rule, both hazard reviews and PHAs would have to include:

> Stationary source siting, including the placement of processes, equipment, buildings within the facility, and hazards posed by proximate facilities, and accidental release consequences posed by proximity to the public and public receptors.

87 Fed. Reg. at 53,610, 53,612. The Proposed Rule acknowledges that OSHA regulations already require facility siting considerations. 87 Fed. Reg. 53,572 (citing 29 C.F.R. § 1910.119(e)(3)(v)). The Proposed Rule, however, would go beyond current language in both the RMP regulations and OSHA regulations, by stating that "facility siting" considerations are "including," but apparently not limited to, "the placement of processes, equipment, buildings within the facility, and hazards posed by proximate facilities, and accidental release consequences posed by proximity to the public and public receptors." 87 Fed. Reg. 53,610.

The preamble not only fails to explain the meaning and intent of the proposed new language, but implies that new mandatory duties are involved, requiring consideration "not only [the] siting of buildings and unit operations within a facility, but also siting of facilities within a community." 87 Fed. Reg. at 53,572. In fact, the Proposed Rule raises examples of accidents with no obvious relationship to the proposal (many being outside of the United States or otherwise non-RMP accidents and all but one pre-dating the 2019 Reconsideration Rule), summarizes existing industry guidance documents on new facility siting, and attempts to rebut industry objections to a

2014 proposal that considered regulating where new facilities may be located. *Id.* at 53,572-73. Referencing these comments, the Proposed Rule states that EPA declined to impose new "stationary source location requirements" in 2014 but that a wide array of "matters outlined in comments about the current stationary source siting provision, while not explicitly addressed within the current regulatory text, are implicit and mandatory." *Id.* Indeed, these "matters outlined in comments" range from urging EPA to make no changes to compelling process changes or "in unique cases where the risk cannot be abated … relocation of part or all facility operations." *Id.* The Proposed Rule offers no insight as to which of these issues are "implicit and mandatory."

After reading the Proposed Rule, a reasonable reader is left unable to determine whether the amendments to 40 C.F.R. §§ 68.50(a)(6) and 68.67(c)(5) impose new legal duties upon regulated facilities and, if so, what those duties are. If the Proposed Rule is not actually imposing new duties, then EPA should say so explicitly and strike the proposed regulatory language. If the Proposed Rule is imposing new duties, it provides no justification for them and never addresses why EPA is deviating from OSHA's PSM regulations – something it never acknowledges. For instance, one could read the proposed regulatory language, "hazards posed by proximate facilities … to nearby public and environmental receptors," 87 Fed. Reg. 53,612, as requiring process hazard analyses of off-site, non-RMP facilities that may be owned and operated by third-parties. If that is what EPA intends, then the Proposed Rule should make that clear and provide an explanation of how EPA could possibly impose such a requirement.[6] If EPA intends to pursue such a requirement, it should issue a supplemental proposed rule clearly explaining the rationale – particularly why the existing regulatory language is deficient and how the new proposed requirement could actually reduce accidents – and EPA's legal authority for doing so.

VIII. GPA Midstream Supports Declining to Define "Near Miss" and Declining to Require Root Cause Analyses for "Near Miss" Incidents

GPA Midstream supports EPA's proposal to not define "near miss" or require root cause analyses of "near miss" incidents. 87 Fed. Reg. at 53,584. EPA has requested comment on a definition for "near miss" several times over the past decade and comments have continually demonstrated that the term is virtually impossible to define with any precision. Because most proffered definitions have been vague and very broad, requiring a root cause analysis of every (or even most) "near miss" incident would impose significant burdens without any benefits.

The Proposed Rule requested comment on two proffered definitions. The first, by the CCPS, is "an incident in which an adverse consequence could potentially have resulted if circumstances (weather conditions, process safeguard response, adherence to procedure, *etc.*) had been slightly different." 87 Fed. Reg. at 53,584 (quoting Guidelines for Investigating Process Safety Incidents (3d ed. 2019)). This is too vague to be useful due to terms like "had been slightly different" and "*etc.*" The result would be a nearly endless set of root cause analyses limited only by one's imagination. If a tornado touches down two counties away then a root cause analysis could be required as the "weather conditions" could have "been slightly different" (*i.e.*, the tornado

[6] Further, if this is the Proposed Rule's intent, then the term "proximate" is too vague to provide any direction to regulated facility owners and operators. A "proximate" facility could share a fence line or be miles away. Even if a facility is obviously "proximate," EPA never considers how a regulated facility could undertake an analysis of another facility that it does not own or operate. In general, the Proposed Rule provides no discussion of what EPA expects of regulated facilities.

could have hit the facility). The same would be true any time that mechanical or procedural safeguards are applied. The company would have to generate a root cause analysis that assumed such safeguards were absent. This approach would only lead to endless root cause analyses with no benefit to the facility or surrounding community.

The paragraph long New Jersey Department of Environmental Protection definition raises even more difficulties. It defines a near miss as any

> unplanned, unforeseen, or unintended incident, situation, condition, or set of circumstances which does not directly or indirectly result in a regulated substance release. Examples of a near miss include, but are not limited to, process upsets such as excursions of process parameters beyond pre-established critical control limits; activation of layers of protection such as relief valves, interlocks, rupture discs, blowdown systems, halon systems, vapor release alarms, and fixed vapor spray systems; and activation of emergency shutdowns. A near miss also includes an incident at a nearby process or equipment outside of a regulated process if the incident had the potential to cause an unplanned, unforeseen, or unintended incident, situation, condition, or set of circumstances at the regulated process.

87 Fed. Reg. at 53,584. The definition itself – any "unplanned, unforeseen, or unintended incident, situation, condition, or set of circumstances" – could extend to numerous minor day-to-day conditions unrelated to a potential accident. Something as simple as a temporary loss of power and use of a backup generator would require a root cause analysis. The examples provided do not narrow the definition in any way. For instance, many process upsets affect product specification requirements but are not indicative of a potential catastrophic release. Other examples include the activation of routine alarms or the proper operation of safeguards. Many incidents that would be captured by the "near miss" definition are minor and could include something as small as improperly torqued flange bolts. Requiring a root cause analysis for all near misses will discourage employees and contractors from reporting them due to the resulting unnecessary and unproductive burdens. And importantly, GPA Midstream cannot see any way that conducting root cause analyses for minor issues or when process protections worked as designed will reduce the number or effect of accidents.

IX. Proposed Third-Party Audit Requirements Lack a Rational Basis

Although GPA Midstream appreciates that EPA has changed the requirement (compared to the 2017 Amendments) to limit third-party audits to those facilities with two accidents within five years, 87 Fed. Reg. 53,586, it remains an unnecessary and wasteful requirement. The Proposed Rule provides no explanation as to why third-party audits would provide any value to either the regulated facility or the public given other existing requirements. Even without a release, regulated facilities are performing compliance audits every three years. 40 C.F.R. §§ 68.58(a); 68.79(a). Under the current rules, if a catastrophic (or potentially catastrophic) release occurs, regulated facilities must perform incident investigations. Further, for catastrophic releases, some combination of federal, state, and local agencies would conduct their own investigations. Any third-party compliance audit would unnecessarily duplicate existing efforts, providing no

additional benefit to reducing the risk of future accidents while imposing significant costs on companies already dealing with an accidental release.[7] The Proposed Rule provides no rationale for assuming that adding third-party audits would help reduce the risk of future accidental releases or limit their impacts.

The Proposed Rule attempts to justify third-party compliance audits by claiming that "incident investigations following an accident often reveal multiple causal factors related to prevention program elements. However, incident investigations generally evaluate only the affected process; they do not necessarily address all covered processes at a facility or even all prevention program elements for the affected process." 87 Fed. Reg. at 53,584. An incident investigation investigates the incident, including all potential causes, contrary to EPA's supposition. The Proposed Rule provides no explanation as to why it believes an incident should prompt an investigation of "all covered processes at a facility or even all prevention program elements for the affected process" when they were not implicated in the incident.

Further, the Proposed Rule puts significant stock in the independence of third-party auditors, *see*, *e.g.*, 87 Fed. Reg. at 53,585-86, implying that facility employees can no longer be trusted with this work. Yet, this conflicts with the Proposed Rule's expansive new demands for employee participation, justified on the grounds that "[e]mployees directly involved in operating and maintaining a process are most exposed to its hazards" and "the most knowledgeable about the daily requirements for safely operating the process and maintaining process equipment." *Id.*at 53,587. Although the employee participation requirements have significant problems (as discussed below), the Proposed Rule cannot simultaneously justify new regulations on the premise that facility employees are highly knowledgeable assets with the most at stake in getting things right while also dismissing them as untrustworthy for performing compliance audits.

The Proposed Rule never grapples with the fact that EPA has traditionally encouraged parties to perform self-directed audits as these effectively discover and correct potential regulatory concerns. *See generally* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000); Interim Approach to Applying the Audit Policy to New Owners, 73 Fed. Reg. 44,991 (Aug. 1, 2008). The Proposed Rule fails to explain why EPA no longer believes this is true or identify instances where a third-party audit (as opposed to a self-audit) would have prevented an accidental release. Indeed, the 2019 Reconsideration Rule stated that "EPA does not believe that the additional prevention requirements (*i.e.*, third party audits …) add environmental benefits beyond those provided by the pre-2017 requirements that are significant enough to justify their added costs …." 84 Fed. Reg. at 69,863. The Proposed Rule never directly rebuts or repudiates this prior finding or otherwise explains the necessity of third-party audits over self-directed audits. Speculating, without reference to any record evidence, that "self-auditing may be insufficient to prevent accidents, determine compliance … and ensure safe operation," 87 Fed. Reg. at 53,585, is not enough. EPA should decline to finalize the Proposed Rule or, in the alternative, publish a supplemental proposed rule that includes an adequate justification for requiring third-party audits.

[7] Significant releases not only involve a root cause analysis and incident investigation, but often include an independent privileged legal analysis, aided by specialized consultants, to scrutinize everything from hiring practices to the adequacy of various databases to equipment design. Even if no enforcement actions or lawsuits are filed, an accidental release involves a very large unbudgeted expense.

X. Requiring Compliance Audits of Each Covered Process Lacks a Rational Basis

The Proposed Rule infers that the 2019 Reconsideration Rule's allowance of representative sampling in compliance audits undermines their effectiveness, 87 Fed. Reg. at 53,584 n. 173 (citing 84 Fed. Reg. at 69,882-83), but provides no data or analysis in support of such a belief. It never identifies any instances where accidents would have been avoided or mitigated if compliance audits included each covered process or otherwise offers any justification for the increased costs and burdens proposed. As explained in the 2019 Reconsideration Rule, EPA removed the reference to "for each covered process" for the sake of consistency with OSHA PSM standards. "[C]ompliance audits must evaluate every process every three years," and representative sampling is a long-standing practice consistent with CCPS Guidelines. 84 Fed. Reg. at 69,882-83.[8] The Proposed Rule ignores EPA's prior reasoning in the 2019 Reconsideration Rule, never explains why its prior explanation was incorrect, or justifies its proposed divergences from PSM requirements. EPA should either decline to finalize the compliance audit requirements or, as an alternative, issue a supplemental proposed rule that provides the legally required explanation.

XI. EPA Lacks Statutory Authority to Impose Employee Participation Plans and the Proposal Lacks a Rational Basis

GPA Midstream agrees that employees play a vital role in facility safety. However, for operations-level employees without designated safety responsibilities, that role is to follow established safety standards and encourage other employees to do the same. The Proposed Rule references various reports and polls showing that "employee participation" – a vague and undefined term with significantly varying degrees of employee involvement – is generally good and then claims that this is justification for an unprecedented expansion of employee participation regulations. Further, just as with the Proposed Rule's appeal to "community pressure and oversight," EPA provides neither any legal authority nor a rational basis supporting the Proposed Rule's "anybody can do it!" approach to risk management and safety at complex industrial facilities. The Proposed Rule assumes, without any basis, that employees lacking specialized training or experience will not only provide valuable insight into process safety functions, but improve them. As discussed in more detail below, such strange speculation cannot legally justify the Proposed Rule.

A. The Clean Air Act Does not Authorize Delegating Regulatory Authority to Workers

Both RMP and OSHA PSM regulations already include employee consultation requirements, however, the Proposed Rule goes much farther than mere participation. It effectively delegates regulatory authority to workers. Nothing in Section 112(r)(7) authorizes EPA to impose such a scheme. In fact, the Clean Air Act affirmatively prohibits it. The Proposed Rule is grounded on worker safety – the assumption that employees "most exposed" to process hazards require "direct participation and involvement in ensuring and enhancing the safety of process operations [that] are often essential to protecting their own welfare." 87 Fed. Reg. at 53,587; *see also id.* (a "premise of the RMP rule is that actions that promote worker safety … generally help protect the public and the environment"); *id.* at 53,590 (proposal would "address safety concerns that threaten the lives of workers and potentially others"). Indeed, nothing in the Proposed Rule claims that

[8] The Proposed Rule references CCPS dozens of times as an authority while rejecting, without any explanation, its recommendations for using a representative unit sampling methodology.

employees have any particular knowledge or insight regarding how to prevent or reduce accidents with effects beyond the facility's fenceline. However, OSHA regulates worker safety, not EPA, as the Clean Air Act explicitly withholds "authority to prescribe or enforce standards affecting occupational safety and health." 42 U.S.C. § 7412(r)(7)(G). The preamble clearly claims that the proposed regulations are to protect worker safety. Occasionally tacking on the words, "and the environment" to those statements does not allow EPA to circumvent the Clean Air Act's prohibition against promulgating occupational safety regulations.

B. Employee Involvement in Recommendation Decisions Lacks a Rational Basis

Even if the Clean Air Act did not explicitly withhold authority for EPA to issue these proposed regulations, EPA failed to articulate any rational basis for why they are needed or how the proposed regulations would solve the purported problem. Indeed, as discussed below, the proposed employee participation requirements are a solution in search of a problem.

To begin, the purported need for increased worker participation consists largely of a misreading of various CSB reports. The Proposed Rule references a CSB digest, 87 Fed. Reg. at 53,587, a nine page, picture-laden summary of four incidents stemming as far back as 1998. Although the Proposed Rule makes various statements about these incidents and why they illustrate the need for increased worker participation, the CSB digest itself does not support the Proposed Rule's claims. For instance, with respect to the 1998 Sierra Chemical Company explosion, CSB attributed the accident to a lack of "sufficient understanding of the process hazards and controls;" employees "did not use and were not aware of written operating procedures and safety information relevant to their work activity;" they were not "aware of any specific hazards associated with the materials at the facility;" and "safety-related materials" were written only in a language that most workers did not understand. CSB, Safety Digest: The Importance of Worker Participation at 3. None of these issues are relevant to the proposed regulations.

The Proposed Rule emphasizes a 2010 Tesoro Anacortes refinery explosion and fire as illustrating "the severe consequences of a lack of an effective employee participation program." 87 Fed. Reg. at 53,589. According to the Proposed Rule, a "PHA team requested a review of experience and training for relevant operators to address their safety concerns" but EPA cryptically states that the "action item was closed without resolution" and claims that this caused an explosion killing seven employees. 87 Fed. Reg. at 53,589 (citing CSB, Investigation Report, Catastrophic Rupture of Heat Exchanger (Seven Fatalities) (May 2014)). This is not correct. The CSB report recounts that a manager closed the PHA item four years before the actual explosion and fire. CSB, Investigation Report, Catastrophic Rupture of Heat Exchanger (Seven Fatalities) (May 2014) at 101. Although CSB found many problems with the company's PHAs, worker training was not listed as a cause of, or contributor to, the accident. *See id.* at 4-7. Thus, the Proposed Rule's claim that the "Tesoro accident highlights what can happen when employees' views are not considered when making comprehensive decisions about process hazards and risks," 87 Fed. Reg. at 53,589, is flatly wrong. The issue highlighted by the Proposed Rule played no role in the accident.

The Proposed Rule's other purported record support for the proposed regulations is a 2017 Dupont Sustainable Solutions poll of industry executives showing that they "felt workforce engagement was important to risk management" 87 Fed. Reg. at 53,588, and a vague summary of OSHA PSM violations for 2018-20. The Proposed Rule acknowledges that only "[s]ome of these violations were associated with RMP-reportable accidents" and claims, without any examples or

explanation, that this "suggests that worker involvement may have been useful in making sure options were appropriately considered." *Id.* at 53,589. The remainder of the proposal's justification is simply supposition; claims without any evidence or explanation such as that "employees … may not be guaranteed 'a seat at the table' when final decisions are made about process operations," or that "practicable recommendations from hazard evaluations, incident investigations, and compliance audits that may reduce hazards at RMP facilities are not always implemented, for various reasons." *Id.* at 53,588. For the latter claim, EPA provides no examples and infers without explaining that these "various reasons" may be illegitimate. *Id.*

Even if the Proposed Rule found evidence of a problem, the Proposed Rule provides nothing to show that the proposed regulations would solve it. The Proposed Rule offers ambiguous requirements to include "affected employees in these discussions and decisions" because EPA supposes those employees "will help ensure that the most effective recommendations for reducing hazards and mitigating risks to employees and the public are given the proper consideration." 53,588. One of the Proposed Rule's major misconceptions is that employees are the ones performing PHA, incident investigation, and compliance audit work and making many of the decisions involved, with some level of decisions reserved for management. The employees performing this work are highly trained specialists, such as engineers, occupational safety technicians, and environmental technicians. In fact, current RMP regulations – ones that the Proposed Rule fails to acknowledge – require the use of such specialized employees: PHAs "shall be performed by a team with expertise in engineering and process operations, and the team shall include at least one employee who has experience and knowledge specific to the process being evaluated. Also, one member of the team must be knowledgeable in the specific process hazard analysis methodology being used." 40 C.F.R. §68.67(d). Thus, non-management employees with necessary expertise, experience, training, and knowledge for this work are already included. To the extent that the Proposed Rule contemplates involving additional non-management employees without such qualifications, it does not explain how this would reduce accidental releases.

Finally, the Proposed Rule would amend 40 C.F.R. § 68.83(c) to require consultation with "employees and their representatives on addressing, correcting, resolving, documenting, and implementing recommendations" from PHAs, compliance audits, and incident investigations. 87 Fed. Reg. at 53,614 (emphases added). The emphasized words demonstrate that this proposal requires further clarification. The Proposed Rule stated that employees would be involved in "discussions and decisions" to "help ensure that the most effective recommendations for reducing hazards and mitigating risks to employees and the public are given the proper consideration." 87 Fed. Reg. at 53,589 (emphasis added). To the extent that EPA is proposing to provide non-management employees veto power over management decisions related to PHAs, incident investigations, and compliance audits – especially employees without any experience or training in the relevant specialized fields – it needs to clearly say so and provide a detailed legal and factual explanation in a supplemental proposed rulemaking. Effectively inverting the relationship between employees and management would have an unpredictable but wide-ranging effect on everything from labor law to environmental law. In essence, management would no longer be responsible for key safety and environmental decisions, complicating any potential subsequent liability. The Proposed Rule does not even begin to address the labyrinthine tangle of legal issues it appears to raise. If, however, EPA did not intend such a veto authority, it should clearly say so.

C. The Proposed Stop Work Authority Lacks a Rational Basis

As with other aspects of EPA's proposed employee requirements, there is no basis demonstrating that stop work authority is needed. Where health and safety are at issue, workers are generally free to ask for the orderly shutdown of equipment provided that the shutdown itself does not raise additional health and safety issues. The Proposed Rule, however, claims there is a need for giving non-management employees a regulatory shut down authority primarily based on a 2012 Richmond, California refinery fire. 87 Fed. Reg. at 53,590. According to the Proposed Rule, the refinery fire prompted CSB to recommend that California adopt a stop work authority in its own PSM regulations. CSB's report, however, states that employees already had stop work authority but declined to invoke it. CSB, Final Investigation Report, Chevron Richmond Refinery Pipe Rupture and Fire (Jan. 2015) at 12-13, 79-80; *see also id.* at 80 (noting that stop work authority had been successfully invoked in the past). Therefore, the absence of stop work authority did not contribute to that accident and CSB noted the process has "significant shortcomings" which "have been identified in previous CSB investigations." *Id.* at 81. CSB reiterated its concerns about stop work authority in the refinery fire report:

> Rather than relying on Stop Work Authority after an emergency process safety situation is identified, a more effective process is to rely upon formal procedures that reduce reliance on the individual, for example, having an established predetermined leak response plan. One should not rely on Stop Work Authority as a safeguard because it is not a formal procedure. Rather, it is a 'residual reduction' technique, falling below 'procedural safeguards' on the hierarchy of controls….

Id. at 82. The Proposed Rule cites this report as its primary justification for an RMP stop work authority but never mentions, much less rebuts, CSB's formidable criticism of the practice.[9] Thus, according to the Proposed Rule's own record, an RMP stop work authority – to the extent that it is not already duplicative of company practices and existing regulations – would provide no additional benefit.

In fact, the Proposed Rule forthrightly acknowledges this duplication, stating that existing regulations "already address[ ] many aspects of a stop work authority that provides means to identify and resolve imminent operational risks before they occur." 87 Fed. Reg. at 53,591 (citing 40 C.F.R. §§ 68.69 (operating procedures), 68.73(e) (mechanical integrity)); *See also id.* ("With the current provisions in the RMP rule, EPA believes many facilities with RMP processes already have the appropriate measures to identify reduce, and mitigate the threat of an accidental release before it happens"). The Proposed Rule preamble states that it is declining to "make significant changes to the regulations" and is, instead, ensur[ing] facilities' employees are aware of authorities to manage unsafe work." *Id.* But this is simply untrue. The Proposed Rule would create a new subsection, 40 C.F.R. § 68.83(d), requiring owners and operators to provide formal shut down authority despite acknowledging that such obligations are largely duplicative and failing to explain

[9] Although the Proposed Rule is correct in that CSB recommended that the State of Washington adopt a stop work authority rule, it is incorrect in claiming that this recommendation was made "to address related issues after the fatal explosion and fire at Tesoro Refinery." 87 Fed. Reg. at 53,591. The absence of a stop work authority, or the failure to invoke existing stop work authority, played no role in the Tesoro refinery fire. *See generally*, CSB, Investigation Report, Catastrophic Rupture of Heat Exchanger (Seven Fatalities) (May 2014).

how the rule would provide any benefits at all. Because this new authority lacks any rational basis or support in the record, EPA should decline to finalize it.

D. EPA Lacks the Legal Authority to Establish Its Own Whistleblower Protections

The Proposed Rule forthrightly stated "that OSHA enforces whistleblower protections provided under the CAA, the Occupational Safety and Health Act, and other Federal laws." 87 Fed. Reg. at 53,593. Nevertheless, EPA is proposing, without any explanation at all, to establish its own parallel whistleblower provisions. *See id.* at 53,614 (proposed 40 C.F.R. § 68.83(e)). This not only conflicts with existing law, and lacks any rational basis in the record, but EPA would find itself entangle in areas where it has no delegation of Congressional authority or expertise, such as collective bargaining agreement provisions to resolve issues of whistleblower complaints and employee discipline. EPA should decline to finalize the proposed Section 68.83(e).

XII. Retaining Hot Work Permits for Five Years is Unnecessary

GPA Midstream opposes the Proposed Rule's requirement to retain all hot work permits for five years. Due to the sheer number of hot work permits used at some facilities, retaining all permits for five years would impose a substantial burden. The Proposed Rule states that "it can be difficult for implementing agencies to determine if the facility has been conducting hot work in compliance with 40 CFR 68.85, unless the facility is conducting hot work at the time of the inspection and has hot work permits on file." 87 Fed. Reg. at 53,604. However, the Proposed Rule never identifies any concern with the use of hot work permits leading to RMP incidents or otherwise claims that EPA inspectors have ever been unable to analyze a facility's hot work permitting practices through other means, such as its procedures, training, and guidelines. Nor does EPA acknowledge, much less justify, that a five year requirement would break with OSHA PSM regulations. *See* 29 U.S.C. § 1910.119(k)(2) ("permit shall be kept on file until completion of the hot work operations.").

Nevertheless, if EPA finalizes a requirement to retain hot work permits, GPA Midstream recommends reducing the retention period from five years to three years. The three year period is consistent with the three year audit period under 40 C.F.R. §§ 68.58 and 68.79 for Level 2 and 3 facilities, respectively.

XIII. The Proposed Changes to the RAGAGEP Requirements Lack a Rational Basis

GPA Midstream strongly opposes the proposal to impose whatever is "the latest version of industry codes, standards, and guidelines" as recognized and generally accepted good engineering practices ("RAGAGEP") regardless of a facility's age. 87 Fed. Reg. at 53,605. The Proposed Rule asserts that continually revising RAGAGEP with each new update is permissible as "[n]either the text nor the legislative history of the [general duty clause] mentions locking obsolete industry standards into place," *id.*, but they are, in fact, locked into place once a facility is constructed. Each facility is designed, engineered, and built according to the standards of that time. In some cases it will be impossible to "document that equipment," which may be 20 or 30 years old, "complies with" RAGAGEP, 40 C.F.R. § 68.65(d)(2), when RAGAGEP continually changes.

Current EPA regulations state that, where "existing equipment [is] designed and constructed in accordance with codes, standards, or practices that are no longer in general use, the

employer shall determine and document that the equipment is designed, maintained, inspected, tested, and operating in a safe manner." 40 C.F.R. § 68.65(d)(3). The Proposed Rule, however, does not acknowledge the existence of this subsection, much less explicitly state that it will be deleted or provide an explanation as to why. Further, EPA adopted Section 68.65(d)(3) verbatim from OSHA's regulation. *See* 29 C.F.R. § 1910.119(d)(3); 61 Fed. Reg. 31,688, 31,711 (1996) (explaining adoption). The Proposed Rule fails to acknowledge that it would create a substantial divergence from PSM regulations or explain why EPA is evidently departing from the statutory directive to coordinate RMP regulations with PSM regulations. 42 U.S.C. § 7412(r)(7)(D).

The Proposed Rule would further require various additional paperwork exercises without any obvious legal authority, record support, or safety benefits. For instance, the Proposed Rule frets that a hypothetical facility may be subject to the General Duty Clause but not the RMP program and, instead of identifying any actual legal authority for adding new and wasteful paperwork analyses, declares that EPA can identify "no practical reason" for differing standards. 87 Fed. Reg. at 53,605. "An agency must identify authority for any action it takes." *Nat'l Ass'n of Broadcasters v. FCC*, 39 F.4th 817, 819 (D.C. Cir. 2022). It cannot muse that there is "no practical reason" why an agency cannot arbitrarily create new standards. And the Proposed Rule's RAGAGEP gap analysis requirement and the requirement to "specify … why PHA recommendations associated with adopting practices from the most recent version of RAGAGEP are not implemented," regardless of whether those standards apply or not, 87 Fed. Reg. 53,605, are arbitrary. The Proposed Rule identifies no legal authority permitting these new requirements, no data demonstrating a need for them, or even speak in a vague way as to what benefits could be achieved by them. Due to the Proposed Rule's failure to provide a sufficient rationale for these changes, EPA should decline to finalize this proposed provision.

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GPA Midstream appreciates the opportunity to submit these comments in response to EPA's request and is standing by to answer any questions that the agency may have.

Respectfully submitted,

Matt Hite

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