U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

October 28, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan
Administrator
Environmental Protection Agency
Washington, DC 20460

Re: **Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention, (Docket ID No.EPA-HQ-OLEM-2022-0174)**

Dear Administrator Regan:

The Office of Advocacy (Advocacy) submits the following comments in response to the Environmental Protection Agency's (EPA) proposed rule, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention.*[1] Accident prevention and safety precautions remain a priority for small entities that use and distribute hazardous chemicals to protect both the public and their employees. Advocacy, however, is concerned that EPA is unjustifiably adding burdensome requirements to the Risk Management Program (RMP) regulations, especially since the long-term trend demonstrates a decrease in RMP-related accidents.

Advocacy recommends that the agency withdraw its proposal. Instead, EPA should expend its resources to increase compliance assistance under existing regulations and address violations through timely enforcement. If the agency intends to finalize the proposed requirements, EPA must improve its analysis to provide an adequate factual basis to support the certification that the rule will not have a significant economic impact on a substantial number of small entities. The agency must also ensure that the final rule is not inconsistent with, duplicative of, or overlapping with other existing federal regulations.

[1] 87 Fed. Reg. 53556 (Aug. 31, 2022).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), [2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[4] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.[5]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[6]

B. The Proposed Rule

On August 31, 2022, EPA published proposed revisions to its RMP regulations under the Clean Air Act (CAA).[7] EPA is proposing to reestablish the requirements for a safer technologies and alternatives analysis, root cause analysis incident investigations, third-party compliance audits, emergency response exercises, and information availability finalized in its 2017 final rule.[8] These provisions were rescinded by the agency in its 2019 final rule.[9] In addition, EPA is proposing new requirements for employee participation and emergency response notification procedures. The agency is also proposing to amend its existing requirements that natural hazards, loss of power, and facility siting be included in hazard evaluations, among other changes.

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[2] 5 U.S.C. § 601 et seq.

[3] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

[4] Small Business Jobs Act of 2010 (PL. 111-240) §1601.

[5] *Id*.

[6] *Id.*

[7] 87 Fed. Reg. 53556 (Aug. 31, 2022).

[8] 82 Fed. Reg. 4594 (Jan. 13, 2017).

[9] 84 Fed. Reg. 69834, (Dec. 19, 2019).

In 2015, before EPA originally proposed some of the revisions in this rule, the agency convened a Small Business Advocacy Review Panel (SBREFA panel) because the agency could not certify that the rule did not have significant economic burden on a substantial number of small entities.[10] However, in this proposed rule, the agency proposes to certify that the rule will not have a significant economic impact on a substantial number of small entities.[11]

II. Advocacy's Small Business Concerns

Advocacy strongly supports improving safety at facilities that use and distribute hazardous chemicals. However, Advocacy is concerned that the agency is unjustifiably adding burdensome requirements to the RMP regulations, especially since the long-term trend demonstrates a decrease in RMP-related accidents. Advocacy has three chief concerns. First, Advocacy is concerned with EPA's proposal to add costly requirements to its existing regulations without providing any quantitative benefits. Advocacy is also concerned that the agency's small business impact analysis does not provide an adequate factual basis to support its certification that the rule will not have a significant economic impact on a substantial number of small entities, under the RFA. Finally, Advocacy is concerned that EPA's proposed requirements may be inconsistent, duplicative of, and overlap with other existing federal requirements.

A. EPA Should Not Reinsert Previously Removed or Add New Burdensome Requirements.

1. EPA's Proposed Requirements Are Not Justified Under the Existing Circumstances.

In the proposed rule, EPA recognizes that there has been a long-term trend of reduction in accidents, including a reduction in the gravity of those accidents. EPA further admits that the existing RMP rule has been effective in preventing and mitigating chemical accidents and protecting human health and the environment from chemical hazards. As a justification for this proposed requirement, the agency explains that stricter RMP rules can improve outcomes. As a result, the agency issued this proposal, imposing about $42 million in costs for 2,911 small private entities. There does not seem to be an estimate for the total costs for the 630 small government entities affected by the rule, which is a concern discussed further below.

The agency does not provide any quantitative benefits associated with the changes proposed in this rule. Instead, the agency provided a breakeven analysis to demonstrate the value of benefits the rule would need to generate or the number of accidents the rule would need to avert to yield zero net benefits. EPA estimates that the rule would need to generate $76 million in annualized benefits, or a reduction of about 15 accidents per year for the rule to break even. Before requiring small entities to pay the costs of implementing this proposed rule, EPA should be able to show how the provisions of the rule will result in benefits. The breakeven analysis provided is

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[10] Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule, Risk Management Modernization Rule, (Feb. 19, 2016), https://www.regulations.gov/document/EPA-HQ-OEM-2015-0725-0032.

[11] 87 Fed. Reg. 53556 at 53607, (Aug. 31, 2022).

insufficient to support the selection of optimal provisions or sectors to target with those provisions. It seems possible based on the information EPA has provided that the implementation costs paid by small entities would yield little or no benefits.

Advocacy recognizes that EPA is rightfully concerned about accidents, especially major ones, that do still occur. For instance, EPA repeatedly refers to an explosion at the TPC Group facility in Port Neches, Texas to support the need for additional regulations proposed in this rule. The TPC facility was, however, out of compliance or in violation of existing requirements at the time of the accident.[12] Given this information, it is unclear what incentive these types of facilities will have or whether it is realistic to assume that compliance with additional, potentially more burdensome and costly requirements will be accomplished. The additional costs imposed by the proposed provisions will constrain the already limited resources of small entities. Instead, small entities could allocate their resources to directly improve compliance with existing requirements, which based on EPA's own data, are effective in reducing RMP-accidents. Therefore, Advocacy recommends EPA withdraw this proposal and expend its resources on compliance assistance for regulated entities and enforcement against the types of entities that are responsible for such accidents.

2. EPA Made the Correct Decision in Rescinding the 2017 Rule Requirements to Reduce Regulatory Burden and Provide Flexibility to Regulated Entities in the 2019 Final Rule.

Advocacy is concerned with the agency's reproposed provisions based on the 2017 final rule. These proposed provisions include requirements for a safer technology and alternatives analysis (STAA), third-party compliance audits, and emergency response exercises. The agency rescinded most of these provisions in the 2019 final rule, mostly to reduce regulatory burden and to provide regulatory flexibility for impacted entities.

In 2016, Advocacy wrote a comment letter to express these concerns based on the feedback obtained from small entity representatives during the SBREFA panel and from additional outreach with small business stakeholders during the public comment period. Advocacy incorporates by reference its own public comments submitted to the docket on May 13, 2016, included here as an attachment. Advocacy urges the agency not to add these requirements to the RMP regulations. Advocacy believes the agency's rationales for removing these requirements in the 2019 final rule continue to be applicable and appropriately addressed valid concerns raised by the regulated entities.

STAA

For the STAA requirement, EPA is reproposing the 2017 rule requirement to consider and document feasibility of applying STAA. However, in this reiteration, the agency is limiting the STAA to petroleum and coal products manufacturing processes (NAICS code 324) and chemical manufacturing processes (NAICS code 325) located within 1 mile of another RMP-regulated

[12] The Texas Tribune, Kiah Collier, "Ahead of explosion, Port Neches plant reported an increase of rogue emissions of explosive gas", (Jan. 30, 2020), Texas plant reported an increase of rogue emissions before explosion | The Texas Tribune.

facility with these same processes. The agency is also proposing to require STAA for facilities using hydrofluoric acid (HF) classified in NAICS code 324.

In the 2019 final rule, the agency removed the STAA requirement based on its analysis that accident rates in jurisdictions that adopted STAA-like programs were not any lower than national accident rates. Based on this assessment, EPA stated that STAA regulations would likely not be effective at reducing accidents if applied on a national scale. Instead, the agency finalized a source-specific, compliance-driven approach, using oversight and enforcement tools to identify sources that would benefit from STAA and seek its adoption at those sources. Advocacy supports this approach, especially since in this proposal the agency specifically identifies the facilities that might be of concern, such as those in NAICS code 324 and 325 within one mile of one another. Advocacy recommends EPA focus its oversight and enforcement to identify and evaluate, on a case-by-case basis, facilities that would benefit from STAA, instead of requiring every facility in those sectors to conduct a costly analysis that may not result in safety improvement and accident prevention at the facility.

In addition, Advocacy remains concerned about the application of this rule to batch toll processes. Advocacy reiterates its recommendation from its 2016 comments that these entities be exempt from the STAA provision, if finalized. This exemption should apply unless the firm has a contractual relationship with a customer for five or more years, since the requirement is unlikely to yield practical information for shorter contracts. Small business representatives reported that batch toll manufacturers already incorporate STAA-like analysis in their processes. They also expressed concerns that such an analysis will not be feasible for products regulated or specified by a government agency. Therefore, Advocacy recommends EPA exclude processes that are governed by specifications established by a government agency or by a customer through a contractual relationship. Alternatively, Advocacy urges the agency to consider providing flexibility for these entities in demonstrating compliance with a STAA-like analysis.

Third Party Compliance Audits

In 2019, EPA rescinded the third-party audit requirements to allow for coordination of process safety requirements with the Occupational Safety and Health Administration (OSHA) before proposing future regulatory changes and to reduce unnecessary regulatory costs and burdens of a broad rule-based approach to third-party audits. EPA further indicated that the agency prioritizes inspections at facilities with accidental releases. For this reason, EPA can address accident-prone facilities without additional broad regulatory mandates. EPA concluded that this surgical approach to accident prevention was reasonable and practicable, and Advocacy agrees.

EPA is now proposing to require certain facilities, classified in NAICS code 324 and 325 that have had one RMP-reportable accident and are located within a 1-mile radius of another facility with a regulated NAICS code 324 and 325 process, to conduct a third-party audit after one accident. Since the agency has demonstrated its ability to identify sectors with accident-prone facilities, Advocacy recommends that EPA not reinstate this requirement. Instead, EPA should target its enforcement or compliance assistance to facilities within the scope of this proposed provision. EPA already can compel third-party audits as a corrective action and therefore can do so on a case-by-case basis.

EPA adds in this proposal that reliance on inspections may be impractical because of the COVID-19 pandemic and long timeframe for settling enforcement matters as the basis to impose an automatic requirement for third party compliance audits. EPA is thus implying that it is not able to enforce its existing requirements in a timely manner to prevent accidents. Advocacy is unclear how the agency will be able to enforce the additional and new proposed requirements in a timely manner to meet its goal to prevent further accidents at facilities when it cannot enforce the existing regulations in a timely manner.

Emergency Response

For the emergency response provisions, EPA is proposing to add back the 10-year frequency requirement for the currently required field exercises. In the 2019 final rule, the agency removed the 10-year field exercise frequency to reduce the burden on local emergency responders with multiple RMP-covered facilities and on small counties with limited resources including those in rural areas and those who rely on volunteers. As a result, the current rule provides flexibility to consult with local emergency response officials to establish an appropriate frequency. Advocacy recommends that the agency retain this flexibility. Alternatively, the agency should allow compliance based on the demonstration of a good faith effort to plan such a field exercise, especially in communities where there is no identified or responsive local emergency planning committee (LEPC).

EPA is further proposing that the current recommended field and tabletop exercise evaluation report components be mandatory. In 2019, the agency recognized that making the reporting requirements non-mandatory would reduce the regulatory burden and allow emergency response personnel the flexibility to decide which exercise documentation would be most appropriate for the facility and community. Advocacy urges the agency to also retain this flexibility.

EPA is also adding new requirements to the emergency response provisions which include developing procedures for notification. As part of this requirement, EPA expects facilities to work with the local responders to ensure that, during a release, all necessary resources are in place for a community notification system to function and operate as expected. EPA is proposing that the facility, even if it is a non-responding facility, ensure that the public is promptly notified by the method outlined in the facility's emergency response plan in coordination with local responders. This will include many small businesses as many of them tend to be non-responding facilities. Advocacy is concerned that the agency did not take into consideration that such facilities are not in a position to compel the implementation of a notification system. Therefore, it is inappropriate to impose this responsibility on these entities when they do not have control or the authority to require one.

For all the reasons stated above, Advocacy recommends EPA not add these requirements to the existing RMP rule.

B. EPA Must Improve its Small Entity Impact Analysis to Support the Factual Basis Required for its RFA Certification.

If EPA intends to finalize its proposed regulations, the agency must improve its small entity impact analysis to support the factual basis for its certification that the rule will not have a significant economic impact on a substantial number of small entities. Under the RFA, a certification must include, at a minimum, a description of the affected entities and the impacts that clearly justify the "no impact" certification.[13] The agency's reasoning and assumptions underlying its certification should be explicit in order to obtain meaningful public comment and thus receive information that would be used to evaluate the certification.[14] Agency certifications of final rules are subject to judicial review[15] and courts evaluate them by determining whether the statement of basis and purpose accompanying the rule identifies a "factual basis" to support the certification.[16]

1. EPA Should Provide a More Granular Analysis of Small Entity Impacts

To support a factual basis for certification, EPA should provide a more granular analysis of small entity impacts. Generally, RFA analysis examines impacts at the six-digit NAICS level, and EPA's analysis appears to be at the three-digit level. An assessment of whether a substantial number of small entities will have significant impacts is most appropriately done at the six-digit NAICS, as these groups of entities are more likely to share common characteristics and a common market.

In Exhibit 8-6 of EPA's Regulatory Impact Analysis for this proposal, 89 out of 2,911 entities would have costs exceeding 1% of revenues. However, this analysis is neither transparent nor sufficient factual basis for certification. It is not appropriate to look at impacts averaged across industries, as this may mask significant effects in individual industries. Instead, EPA must show that there is no industry where the rule would have significant impacts on a substantial number of small entities. Advocacy recommends that EPA demonstrate the number of affected entities in each industry relative to the number of significantly affected small entities in each industry.[17]

Advocacy is also concerned about EPA's estimated impacts for small government entities. EPA estimates 77% of small government entities will have costs less than $1,000. It seems that if

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[13] U.S. Small Business Administration, Office of Advocacy, A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act, at 11, (Aug. 2017), How to Comply with the Regulatory Flexibility Act, Updated August 2017 (sba.gov).

[14] *Id*.

[15] 5 U.S.C. § 611(a).

[16] See Northport Health Servs. of Ark., LLC v. United States HHS, 14 F.4th 856 (8th Cir. 2021), [Certification must be published in the Federal Register "along with a statement providing the factual basis for such certification"].

[17] U.S. Small Business Administration, Office of Advocacy, A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act, at 22, (Aug. 2017), How to Comply with the Regulatory Flexibility Act, Updated August 2017 (sba.gov).

small government entities had any cost beyond rule familiarization, they would likely exceed $1,000 in costs. Advocacy recommends that the agency explicitly state which provisions apply to small government entities. More specifically, Advocacy recommends that the agency provide the provisions that are the basis for the cost estimates for each category: 77 percent that incur costs of less than $1,000, 17 percent costs ranging from $1,000 to $2,000, 3 percent costs ranging from $2,000 to $3,000, and one incurring costs of more than $10,000.

2. EPA Must Address Missing and Underestimated Costs for Small Entities

The agency must also account for missing and underestimated costs, discussed below, in its small entity impact analysis. Advocacy is concerned that proposed provisions characterized as amplifications of existing requirements will have costs that are not included. This includes the requirement to provide written justifications for declining relevant recommendations for the natural hazard, power loss, and chemical siting provisions. EPA also proposes to include justifications for declined recommendations and findings for other proposed provisions but does not provide a cost associated with this documentation requirement. Another example of a missing cost includes a gap analysis and documentation associated with EPA's proposal to include an analysis of the most recent recognized and generally accepted good engineering practices related to the facility's design, maintenance, and operation. These missing costs must be included in the small entity impact analysis to support EPA's factual basis.

EPA should also include costs of employee training in the RFA analysis. There is no estimate for the cost to small entities of training employees on employee participation or on implementation of any other provisions of the rule. While the training may be incorporated in existing training programs, time that was devoted to other activities will need to be allocated to developing, administering, and receiving training.

Costs of information availability also do not appear to be fully estimated or supported in the analysis. For instance, it is not clear what EPA's basis is for assuming that 50% of facilities would receive a request in a given year. EPA should address the possibility of a high volume of requests in the analysis given that there is not a limit on the frequency. There should also be an estimate of the cost of translating and providing information in the requested languages and the cost to verify whether the requestor is within the six-mile boundary.

Advocacy strongly urges the agency to include these costs as part of its calculation of the economic impact on small entities as part of its factual basis to support its RFA certification.

C. EPA's Requirements Should Not Be Inconsistent, Duplicative of or Overlap with Other Federal Requirements.

1. EPA Must Ensure That its Requirements are Not Inconsistent, Duplicative of or Overlap with OSHA's Requirements.

Advocacy is concerned that the agency may be adding duplicative or overlapping regulatory burdens on facilities by adding the employee participation provision to the RMP regulations. Small business representatives expressed concerns that these requirements may mimic OSHA's requirements for worker protections and are also included in OSHA's Process Safety

Management (PSM) standard.[18] Advocacy urges the agency to not finalize any requirements that are currently part of OSHA's requirements or those that can be addressed by OSHA in improving worker safety.

2. EPA's Requirements Must Not Be Inconsistent, Duplicative of or Overlap with the Agency's Requirements Under EPCRA.

Advocacy is concerned that the proposed information availability requirements may be inconsistent, duplicative, and overlap with the Emergency Planning and Community Right-to-Know Act (EPCRA) requirements. The agency should not impose multiple duplicative requirements on the same regulated facilities through different programs. For instance, if facilities are required to provide information to the public under EPCRA, the same information should not be required to also be issued under the RMP regulations.

In addition, as part of the emergency response provisions, EPA is proposing to incorporate text from EPCRA[19] regarding required provisions of community response plans into the RMP regulatory text. EPCRA requires LEPCs to develop such community response plans.[20]Advocacy is concerned that EPA's proposal will task non-responding facilities with developing community response plans. EPA makes this obligation explicit by stating that it will consider actions against a facility for relying on an LEPC plan if that plan is determined to be deficient under EPCRA requirements. EPA's incorporation into the RMP regulatory text of EPCRA requirements for a community emergency response program that is meant to be implemented by LEPCs is inconsistent and overlaps with EPCRA. Advocacy strongly recommends that the agency avoid requiring compliance with another statute as part of its RMP program.

3. EPA Must Ensure That Any Finalized Modifications are Consistent with DOT Requirements.

Advocacy is also concerned about the agency's proposal to apply a 48-hour time frame to "storage incident to transportation." This addition will specify the number hours a transportation container may be disconnected from the motive power that delivered it to the site before it can be subject to regulation under RMP. According to EPA, this is based on the Department of Transportation's (DOT) regulations[21] that indicate rail carriers must forward each shipment of hazardous materials promptly within 48 hours after acceptance or receipt. Small businesses are concerned that this amendment to the definition for "storage incident to transportation" in RMP regulations may be inconsistent with DOT regulations. Therefore, Advocacy recommends that the agency consult and coordinate with DOT on any proposed changes to this definition.

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[18] 29 C.F.R. 1910.119.

[19] 42 U.S.C. § 11003.

[20] *Id.*

[21] Pipeline and Hazardous Materials Safety Administration, Carriage by Rail Regulations, 49 CFR 174.14(a).

III. Conclusion

To address the concerns raised above, Advocacy recommends that EPA withdraw this proposal and expend its resources on compliance assistance with and enforcement of the existing RMP regulations instead of imposing additional requirements. If the agency intends to finalize the rule, EPA must improve its small entity impact analysis to support the factual basis for its RFA certification by providing a more granular analysis and address underestimated and missing costs. EPA should also ensure that the proposed regulations do not impose duplicative, overlapping, or inconsistent requirements on regulated entities.

We look forward to working with you to reduce the regulatory burden on the impacted small entities. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Tayyaba Zeb at (202) 798-7405 or by email at tayyaba.zeb@sba.gov.

Sincerely,

/s/
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