EARTHJUSTICE

Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, and Utah Physicians for a Healthy Environment

Submitted by Earthjustice

February 18, 2020

VIA ELECTRONIC AND U.S. MAIL

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Ave., NW
Washington, D.C. 20460
wheeler.andrew@epa.gov

RE: Petition for Reconsideration of Final Rule Entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act," 84 Fed. Reg. 69,834 (Dec. 19, 2019), EPA-HQ-OEM-2015-0725

Dear Administrator Wheeler,

Enclosed is a petition for reconsideration under Clean Air Act § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B). The parties submitting this petition (collectively "Community Petitioners") are the following:

- Air Alliance Houston (2520 Caroline St. #100, Houston, TX 77004);
- California Communities Against Toxics (P.O. Box 845, Rosamond, CA 93560);
- Clean Air Council (135 S. 19th St., Suite 300, Philadelphia, PA 19103);
- Coalition For A Safe Environment (1601 North Wilmington Blvd., Wilmington, CA 90744);
- Community In-Power & Development Association (1301 Kansas Ave., Port Arthur, TX 77640);
- Del Amo Action Committee (4542 Irone Ave., Rosamond, CA 93560);

- Environmental Integrity Project (1000 Vermont Ave. NW, Washington, D.C. 20005);
- Louisiana Bucket Brigade (4226 Canal St., New Orleans, LA 70119);
- Ohio Valley Environmental Coalition, P.O. Box 6753, Huntington, WV 25773.
- Sierra Club (2101 Webster Street, Oakland, California 94612);
- Texas Environmental Justice Advocacy Services (TEJAS, 900 North Wayside Drive, Houston, TX 77011);
- Union of Concerned Scientists, 1825 K St. NW, Ste. 800, Washington, DC 20006;
- Utah Physicians for a Healthy Environment (423 W. 800 S. Suite A108, Salt Lake City, UT 84101).

Community Petitioners respectfully request that EPA reconsider certain aspects of the final action taken at 84 Fed. Reg. 69,834 (Dec. 19, 2019), and entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act" ("2019 Rule"). EPA changed important elements of the 2019 Rule from the proposal to final stage and provided new explanations, alleged support, and rationales for some of its central conclusions. Community Petitioners submit this petition to raise objections to certain substantive rule changes and to EPA's new rationales. These objections were impracticable or impossible to raise during the public comment period and are of central relevance to the final rule. Community Petitioners urge EPA to take action on reconsideration that strengthens, instead of weakening, protection for the people most exposed to and most affected by chemical disasters.

Community Petitioners also request that EPA stay the 2019 Rule in view of the requirement for administrative reconsideration. Leaving the 2019 Rule in effect will derail life-saving measures of the Chemical Disaster Rule, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4594 (Jan. 13, 2017), contrary to the Clean Air Act's directive to prevent accidental releases. The 2019 Rule rescinds, weakens, and further delays these protections based on unlawful and irrational grounds, causing irreparable harm to communities and workers.

Thank you for your time and consideration of this petition. Please contact us with any questions you may have.

Sincerely,

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Attachments
cc: James Belke, EPA, Office of Land and Emergency Management
William Noggle, EPA, Office of Land and Emergency Management
Jonathan Averback, EPA, Office of the General Counsel

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Final Rule, 84 Fed. Reg. 69,834 (Dec. 19, 2019)	Docket No. EPA-HQ-OEM-2015-0725

PETITION FOR RECONSIDERATION OF *ACCIDENTAL RELEASE PREVENTION REQUIREMENTS: RISK MANAGEMENT PROGRAMS UNDER THE CLEAN AIR ACT, FINAL RULE*, 84 FED. REG. 69,834 (DEC. 19, 2019), DKT. ID NO. EPA-HQ-OEM-2015-0725

Submitted by Earthjustice on Behalf of Community Petitioners Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union Of Concerned Scientists, And Utah Physicians For A Healthy Environment

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EXECUTIVE SUMMARY

Community Petitioners ask EPA to reconsider its final rule entitled Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 84 Fed. Reg. 69,834 (Dec. 19, 2019) ("2019 Rule"). The 2019 Rule "rescinds almost all the requirements added in 2017 to the accident prevention program provisions" of EPA's Risk Management Program, while delaying and weakening the few protective provisions it retains. 84 Fed. Reg. at 69,836. EPA's 2017 updates to the Risk Management Program, known as the "Chemical Disaster Rule," provided some of the first major updates to EPA's disaster-prevention regulations since the program's creation in 1996. Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Final Rule, 82 Fed. Reg. 4594 (Jan. 13, 2017); *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1062-63 (D.C. Cir. 2018).

Community Petitioners filed comments on EPA's proposal for the 2019 Rule, explaining that EPA's proposed rule violated the Clean Air Act, lacked a sound basis, exposed communities to increased threat of chemical disaster, and failed the Supreme Court's tests for reasoned decision-making. *See generally* Comments of Community Pet'rs *et al.*, (Aug. 23, 2018), EPA-HQ-OEM-2015-0725-1969. Determined to follow through on promises to repeal EPA's 2017 updates, however, EPA rushed out a final rule by the end of 2019

that relies on a smorgasbord of new and previously unpublished rationales and data.[1] Worse still, EPA cherry picks this new data, pointedly ignoring a wealth of recent evidence showing that the Chemical Disaster Rule's "life-saving protections" are more necessary than ever, and would be reducing and preventing chemical incidents and the grave harm they cause if EPA had not issued the 2019 Rule. *Air Alliance Houston*, 906 F.3d at 1063.

The objections raised in this petition either "arose after the period for public comment" on the 2019 Rule or were "impracticable to raise" during that comment period. 42 U.S.C. § 7607(d)(7)(B). Section 307(d)(7)(B) of the Clean Air Act therefore requires EPA to "convene a proceeding for reconsideration of the rule" and provide the same procedural rights that "would have been afforded had the information been available at the time the rule was proposed." *Id.*

First, significant new evidence, which could not be provided with comments during the period for public participation, undermines one of EPA's core rationales that the prior Risk Management Program regulations are "working" and there is "no need" for improvement. EPA, Response to Comments on 2019 Rule (May 2018), EPA-HQ-OEM-2015-0725-2086 ("2019 RTC"). Recent incidents show the prior Risk Management Program regulations are still failing to prevent serious harm to communities from accidental releases, and new data undermine EPA's argument that accident rates are declining significantly. This new evidence demonstrates why the rollback is unlawful and arbitrary, and supports retaining the Chemical Disaster Rule's prevention provisions rather than delaying, weakening, or rescinding any of its provisions. EPA must grant reconsideration to consider this new evidence, and afford the public, including Community Petitioners, a meaningful opportunity to comment on how it affects the agency's justifications for the 2019 Rule. 42 U.S.C. § 7607(d)(7)(B).

Second, EPA relied on new documents and rationales that EPA presented for the first time with its final rule. Each of these constitutes a significant notice and comment violation that goes to the heart of the rule, prejudices Community Petitioners, and requires EPA to grant reconsideration. 42 U.S.C. § 7607(d)(7)(B). The errors EPA makes in reliance on these documents and rationales are "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. § 7607(d)(8). As this petition outlines below, Community Petitioners "ha[ve] something useful to say" regarding the new documents and rationales. *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237-38 (D.C. Cir. 2008). EPA's new rationales violate the statute and are arbitrary and

[1] *See, e.g.*, InsideEPA, *Top EPA Waste Official Commits To Final RMP Rollback Rule Before 2020* (Aug. 5, 2019), https://insideepa.com/daily-news/top-epa-waste-official-commits-final-rmp-rollback-rule-2020.

capricious; and the new evidence EPA offers to support them lacks merit or is mischaracterized.

Third, a new, binding D.C. Circuit decision of central relevance to the 2019 Rule was released just days before the close of public comment. *Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018). Then, after the close of the comment period, the Court expedited issuance of its mandate for that case in September 2018. Order of Sept. 21, 2018, *Air Alliance Houston v. EPA*, D.C. Cir. No. 17-1155. The Court held EPA had unlawfully delayed the Chemical Disaster Rule's "life-saving protections" and "made a mockery of the statute." 906 F.3d at 1065, 1064. The decision and expedited mandate are of central relevance to the 2019 Rule.

One of the Court's holdings on the constraints of EPA's legal authority under § 7607(d)(7)(B) forecloses EPA's attempt to rescind prevention measures "pending further action by OSHA." Proposed Rule, 83 Fed. Reg. 24,850, 24,864 (May 30, 2018); 2019 RTC at 38. The decision also reiterates Congress's requirement that regulations under § 7412(r)(7)(A) must "assur[e] compliance as expeditiously as practicable," and those under § 7412(r)(7)(B) shall "be applicable to a stationary source 3 years after the date of promulgation." *Air Alliance Houston*, 906 F.3d at 1053-54. Yet EPA has delayed emergency response measures in violation of these firm statutory requirements.

The *Air Alliance Houston* decision renders several of EPA's legal arguments in support of the 2019 Rule unlawful, yet the public was unable to meaningfully comment on this precedent in the few days between its release and the close of public comment. It was impossible to comment on the effect that expedition of the mandate should have on this rulemaking. EPA must grant reconsideration and take comment on how the decision affects the final rule. 42 U.S.C. § 7607(d)(7)(B). EPA previously granted reconsideration of the Chemical Disaster Rule for a similar reason, when a new report about the West, Texas explosion came out just a few days before the end of the comment period. Letter from Adm'r Pruitt to RMP Coalition (Mar. 13, 2017), EPA-HQ-OEM-2015-0725-0763.

* * *

Based on all of these new objections demonstrating violations of the Clean Air Act, 42 U.S.C. § 7412(r), 7607(d), EPA must grant reconsideration under 42 U.S.C. § 7607(d)(7)(B). Refusing to do so would highly prejudice Community Petitioners, whose members live, work, and raise families near the facilities for which EPA's 2019 Rule weakens health and safety protections. Community Petitioners' members, along with millions of people in this country, are exposed daily to toxic releases, fires, and explosions; are subject to the evacuation and shelter-in-place orders; and regularly face the threat of

chemical disasters. EPA's pre-existing rules have failed to prevent such disasters day after day, year after year, for decades. Community Petitioners must be given an opportunity to comment on EPA's rationales and new data, and to present arguments on these, as discussed below, before the agency can move forward with its harmful new action rescinding, weakening, and further delaying chemical disaster protections. Failure to provide this opportunity would deny Community Petitioners their statutory right to be heard under § 7607(d)(3)-(6), (h), and to create a complete record allowing for meaningful judicial review under § 7607(d) of EPA's final action.

Community Petitioners also request that EPA stay the 2019 Rule. A stay pursuant to 42 U.S.C. § 7607(d)(7)(B) will ensure there is not further delay of compliance with key protections of the Chemical Disaster Rule while EPA reconsiders the 2019 Rule. Leaving the 2019 Rule in effect will derail compliance efforts under the Chemical Disaster Rule and further delay protections based on unlawful and irrational grounds, causing irreparable harm to communities and workers.

BACKGROUND

I. THE CHEMICAL DISASTER RULE AND THE 2019 RULE

In 2017, EPA promulgated the "Chemical Disaster Rule." Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Final Rule, 82 Fed. Reg. 4594 (Jan. 13, 2017). The Chemical Disaster Rule "is the most recent outgrowth of Congress's effort in the 1990 Amendments to ensure adequate protections against highly dangerous accidental releases of chemicals" in the wake of continued disasters during the approximately two decades that EPA's Risk Management Program had been in place. *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1062 (D.C. Cir. 2018); *see* 82 Fed. Reg. at 4599 (describing "[e]vents [l]eading to [t]his [a]ction," including fires, explosions, and other catastrophic releases in preceding two decades under the 1996 Risk Management Program).

Unfortunately, as soon as the current Administration took office in January 2017, it began efforts to suspend and then rescind the rule. EPA's latest action, the "2019 Rule," Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Final Rule, 84 Fed. Reg. 69,834 (Dec. 19, 2019), is the result of those efforts. Indeed, the 2019 Rule rescinds virtually all of the accident-prevention measures that EPA previously found necessary to save lives when it promulgated the Chemical Disaster Rule in January 2017. 84 Fed. Reg. at 69,836. The 2019 Rule also weakens and further delays most of the handful of protections it retains from the Chemical Disaster Rule. 84 Fed. Reg. at 69,837.

The 2019 Rule "rescinds almost all the requirements added in 2017 to the accident prevention program provisions," including the Safer Technology and Alternatives Assessment ("STAA"), third party auditing, root cause analyses, and other requirements for incident investigations. 84 Fed. Reg. at 69,836. It also rescinds requirements for facilities to share information with communities. 84 Fed. Reg. at 69,837.

The 2019 Rule retains a few pieces of the Chemical Disaster Rule but weakens and delays them. Facilities must still coordinate annually with first responders and must hold public meetings 90 days after a catastrophic incident (although only those with reportable, off-site impacts are now covered). 84 Fed. Reg. at 69,837, 69,890. But the 2019 Rule changes the scope of information that must be shared with first responders, 84 Fed. Reg. at 69,837, and significantly delays emergency preparation exercises, *id.* Under the Chemical Disaster Rule, facilities had until 2021 to conduct a notification exercise, consult with local emergency response officials to establish a schedule for conducting tabletop and field exercises, and complete at least one tabletop or field exercise. 82 Fed. Reg. at 4677. Now, under the 2019 Rule, they will have five years from Dec. 19, 2019, to complete their first notification exercise, eight years from that date for the first tabletop exercies, and no deadline for the first field exercise, or for any future field exercises. 84 Fed. Reg. at 69,837, 69,900. Thus, as a result of the 2019 Rule, measures EPA continues to admit are necessary for public safety will not be fully implemented until 2024 and 2027, at the earliest.

II. EPA'S RATIONALES FOR THE FINAL 2019 RULE

A central issue in this petition for reconsideration is the fact that EPA significantly changed its rationales for the 2019 Rule between proposal and final. When proposing the 2019 Rule, EPA offered six potential rationales for its proposed cuts to the Chemical Disaster Rule. With some exceptions, EPA did not tie these rationales to the specific regulatory changes it was proposing, presenting them instead as cross-cutting motivations for all of the proposed changes. *See* 83 Fed. Reg. at 24,857 ("Because many of the changes are being proposed for the same reason, presenting the rationale separately eliminates redundant discussion and allows rationale discussion to be organized by topic (*i.e.* OSHA coordination, security risks, cost reduction) [instead of by change]."). EPA's six proposed rationales were:

- "Maintain consistency in accident prevention requirements" with the Occupational Health and Safety Administration's (OSHA) Process Safety Management (PSM) program;
- "Address security concerns;"
- "Address BATF finding on West Fertilizer incident;"
- "Reduce unnecessary regulations and regulatory costs;"

- "Revise compliance dates to provide necessary time for program changes;" and
- "Other issues raised by petitioners."[2]

Id. at 24,862-77; *see also id.* at 24,851 (listing all rationale categories in table of contents).

Commenters challenged EPA's rationales and explained that many of EPA's proposed rationales were unlawful, irrational, or lacked factual support. EPA now attempts to come up with new or revised rationales to try to justify the final 2019 Rule. In the final 2019 Rule, EPA abandons several prior rationales, relying on only three of those it proposed when describing "EPA's [p]rincipal [r]ationale for [f]inal [r]ule [a]ctions." 84 Fed. Reg. at 69,843. For these three, EPA makes significant changes and attempts to provide new evidentiary support.

For the rescission of prevention measures, EPA now relies on "maintaining consistency in accident prevention requirements with the OSHA PSM standard," 84 Fed. Reg. at 69,847, and "reducing unnecessary regulations and regulatory costs," *id.* Describing what it newly labels its "principal rationale" for the 2019 Rule, EPA says "a more reasonable and practicable approach to accident prevention is to emphasize case-specific oversight of those facilities that are performing poorly," as opposed to "regulatory changes that increase compliance costs for the entire regulated community." 84 Fed. Reg. at 69,843. Importantly, EPA now purports to suggest its prevention repeal – particularly its OSHA coordination and cost-over-safety rationales – are justified because of its new unsupported conclusions that it could not demonstrate benefits from some of the specific prevention measures. This is discussed more fully below.

For EPA's changes to information sharing provisions (with first responders and with the public), EPA says it is "addressing security concerns with the Amendments." 84 Fed. Reg. at 69,847. EPA mostly refers to security concerns when justifying these changes. 84 Fed. Reg. at 69,839, 69,841, 69,844. Elsewhere, EPA mentions in passing a concern about "burden" as well. 84 Fed. Reg. at 69,847 (EPA "carefully considered security and burden concerns prior to rescinding the information availability provisions."). But EPA does not support this argument, says "security" is the "primary basis" for limiting information availability, and does not discuss it in its "Overview of

[2] These included offering a chance to comment on: new documents released during the Chemical Disaster Rule's comment period; alleged changes to the Chemical Disaster Rule's trigger for third-party auditing; allegedly new rationales for third-party audits and the Safer Technology and Alternative Assessment; and allegations that coordination and emergency response provisions were unfunded mandates. 83 Fed. Reg. 24,876-77.

Basis for Final Rule Provisions" related to information availability. 84 Fed. Reg. 69,885-86.

The final 2019 Rule also introduces a new statutory interpretation and attempt to provide a legal rationale for rescinding the Chemical Disaster Rule's protections. In the Response to Comments document and elsewhere, EPA explains that, based on the above-described rationales and findings (cost over safety, security, and OSHA coordination), EPA now believes the Chemical Disaster Rule was not a "reasonable" regulation under § 7412(r)(7). 2019 RTC at 30 (arguing rescinded provisions "are not 'reasonable regulations.'"). EPA further states:

> Where a regulation is clearly not reasonable, then we need not assess whether it provides protection to the greatest extent practicable. However, among those regulatory options that are reasonable, the statute directs that EPA provide the greatest level of practicable protection in its regulations. We consider the workability, effectiveness, and reasonableness of demands on impacted entities when assessing if an option is practicable.

2019 RTC at 40.

EPA also states in the 2019 Rule for the first time that: "The purpose of this action is to make changes to the Risk Management Program regulations (40 CFR part 68) to reduce chemical facility accidents without disproportionately increasing compliance costs or otherwise imposing regulatory requirements that are not reasonable or practicable." 84 Fed. Reg. at 69,836 (emphasis added). In its proposal, EPA stated that the purpose was simply to "propose changes to the [Chemical Disaster Rule's amendments] in order to address issues raised in three petitions for reconsideration received by EPA, as well as other issues that EPA believes warrant reconsideration." 83 Fed. Reg. at 24,852. EPA does not provide a reasoned explanation for how this purpose could comport with § 7412(r)(7), which directs EPA to regulate to prevent chemical disasters – not repeal such protections in favor of "regulatory burden reduction." 84 Fed. Reg. at 24,872.

NEW GROUNDS FOR OBJECTION TO 2019 RULE

I. NEW EVIDENCE UNDERMINES EPA'S RATIONALES FOR RESCINDING THE ACCIDENT-PREVENTION MEASURES AND OTHER CHANGES IN THE 2019 RULE

A. Background on Accident Rates and Data

EPA promulgated the final Chemical Disaster Rule based on its conclusion that pre-existing RMP regulations failed to prevent "major

incidents," which have continued to occur under those regulations and "highlight the importance of reviewing and evaluating current practices and regulatory requirements, and applying lessons learned from other incident investigations to advance process safety." 82 Fed. Reg. at 4600. EPA highlighted a number of examples of chemical releases and disasters at oil refineries and chemical manufacturing facilities, among others, as evidence supporting the need for its action:

> In addition to the tragedy at the West Fertilizer facility in West, Texas, on April 17, 2013, a number of other incidents have demonstrated a significant risk to the safety of American workers and communities. On March 23, 2005, explosions at the BP Refinery in Texas City, Texas, killed 15 people and injured more than 170 people. On April 2, 2010, an explosion and fire at the Tesoro Refinery in Anacortes, Washington, killed seven people. On August 6, 2012, at the Chevron Refinery in Richmond, California, a fire involving flammable fluids endangered 19 Chevron employees and created a large plume of highly hazardous chemicals that traveled across the Richmond, California, area. Nearly 15,000 residents sought medical treatment due to the release. On June 13, 2013, a fire and explosion at Williams Olefins in Geismar, Louisiana, killed two people and injured many more.

Id. at 4599 (footnotes omitted).

EPA looked at both specific case studies of major incidents and at national accident data in developing the Chemical Disaster Rule. EPA collected extensive data on hazardous releases and their consequences, finding that during the most recent 10-year period for which the agency has complete data (2004-2013), there were 2,291 incidents at covered facilities, including 1,517 where facilities reported on or off-site harm. 2016 Chemical Disaster Rule RIA, at 79-80 (Dec. 16, 2016), EPA-HQ-OEM-2015-0725-0734 ("Chemical Disaster Rule RIA"); *see also* EPA, RMP Facility Accident Data, 2004-2013 (Feb. 2016), EPA-HQ-OEM-2015-0725-0002 ("2004-13 Accident Data Spreadsheet").

In justifying its decision to rescind prevention measures in the 2019 Rule and to weaken or eliminate information-sharing provisions and disaster preparation requirements, EPA gave great weight to its proposed conclusion that accident rates were (slowly) declining under the pre-existing regulatory framework. New data and analysis demonstrate that, even if accurate, the alleged small decline does not justify the prevention repeal, because serious and harmful catastrophes continue to occur. When it promulgated the Chemical Disaster Rule, EPA recognized and sought to implement the statute's

goal of preventing harm from "major incidents," irrespective of frequency. 82 Fed. Reg. at 4600; *see also* 82 Fed. Reg. at 4683 (rule will reduce not just "frequency" but also "magnitude" of disasters). Now, EPA baldly asserts "[t]he RMP accident record does not show a need for the Amendments rule prevention provisions." 2019 RTC at 60. This stands in direct opposition to EPA's statement in its Regulatory Impact Analysis for the 2019 Rule that "looking across the United States and universe of regulated facilities, these accidents occur with sufficient frequency to warrant regulation." Regulatory Impact Analysis for 2019 Rule, at 18 (Apr. 27, 2018), EPA-HQ-OEM-2015-0725-0907. EPA's conclusion also stands in stark contrast to the agency's prior findings that updates were "needed." 82 Fed. Reg. at 4600, 4604, 4607, 4616, 4656, 4665; Response to Comments on 2016 Proposed Rule Amendments, at 246 (Dec. 19, 2016), EPA-HQ-OEM-2015-0725-0729 ("Chemical Disaster Rule RTC").

B. Grounds for Objection – Evidence Regarding Specific Recent RMP Incidents Demonstrates the Strong Need for the Repealed Prevention and Informational Access Provisions, and the Delayed Emergency Response Measures.

The point of the Risk Management Program, and the Chemical Disaster Rule, as EPA explained in finalizing it, is to prevent harm – through incident prevention, preparedness, *and* mitigation. As long as major disasters at RMP-covered facilities continue to cause harm, EPA cannot say its regulations "are working and that the cost of additional prevention requirements may not be necessary." 84 Fed. Reg. at 69,863. Yet EPA now states it "is illogical to argue that the ongoing decline in accident frequency to unprecedently [*sic*] low levels highlights a need for substantial changes to such a successful program." 2019 RTC at 60. This ignores the record of ongoing, serious accidents, and new evidence overwhelmingly belies EPA's assertion. While accidents continue to kill and injure people, force people to flee from their homes and evacuate, or require people to shelter in place, EPA cannot say it has met Congress's goal of preventing disasters. EPA has failed to support its conclusion regarding any accident decline, and the latest data demonstrates EPA is mistaken about accident rates and overestimates any potential decrease significantly.

Evidence regarding new disasters and the harm they are causing requires EPA to grant reconsideration because it undermines EPA's central assertions that the 2017 updates are "not necessary" and that prior regulations are "working." 84 Fed. Reg. at 69,863. EPA ignores data and reports related to recent, major incidents that highlight the need for the Chemical Disaster Rule's provisions. Even if there were a slight decline in yearly average accident rates, this does not mean pre-existing regulations are "working" when so many accidents continue to occur and major incidents that cause harm continue to occur. A central goal of the Chemical Disaster Rule, and one of Congress's central goals in the 1990 Amendments to the Clean Air Act, was to prevent

"major releases."[3] Major incidents have continued to occur in recent years and continue to "highlight the importance" of the Chemical Disaster Rule's updates. 82 Fed. Reg. at 4600.

Recent major incidents demonstrate the urgency of improving protections rather than weakening them, and directly rebut EPA's central conclusion that existing regulations "are working." 84 Fed. Reg. at 69,863. Recent disasters also show that without regulatory updates, catastrophes can occur even after EPA has engaged in enforcement due to the inadequacy of the regulations EPA has been enforcing.

Since the close of comments, the following high-profile incidents occurred which received significant news coverage, prompted further calls to EPA to improve – not weaken – disaster prevention, and further highlighted the need for the Chemical Disaster Rule's prevention and mitigation provisions. Many of these were cited by a coalition of States, Letter from Attorneys General (Aug. 20, 2019), EPA-HQ-OEM-2015-0725-1998. EPA arbitrarily declined to consider the information, probably because it seeks to avoid the import of these facts. Jim Belke, Office of Emergency Management, EPA, "Late Comments Included in the Docket" (Nov. 19, 2019), EPA-HQ-OEM-2015-0725-2085 ("Belke Docket Note").

These incidents occurred while facilities were supposed to be preparing for compliance with major parts of the Chemical Disaster Rule, but had not yet been required to attain compliance. *See* 82 Fed. Reg. at 4676-78 & tbl.6. EPA also now says it was intentionally signaling to companies not to even prepare for compliance during this time period; EPA was in essence authorizing non-compliance even though the Chemical Disaster Rule was in full effect under court order. 84 Fed. Reg. at 69,850-51; 2019 RTC at 221-22. In some of these examples, such as Port Neches TPC, the incident occurred where EPA had recently done enforcement, demonstrating that EPA's enforcement-only, or

[3] 82 Fed. Reg. at 4598 (describing "prevention of major catastrophes" as key benefit); *id.* at 4600 ("[M]ajor incidents … highlight the importance of reviewing and evaluating current practices and regulatory requirements, and applying lessons learned from other incident investigations to advance process safety where needed."); S. Rep. No. 101-228, at 115 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3594, EPA-HQ-OEM-2015-0725-0645 ("Systems and measures which are effective in preventing accidents are preferable to those which are intended to minimize the consequences of a release. Measures which entirely eliminate the presence of potential hazards (through substitution of less harmful substances or by minimizing the quantity of an extremely hazardous substance present at any one time), as opposed to those which merely provide additional containment, are the most preferred."); 136 Cong. Rec. S16,985, S16,926-27 (Oct. 27, 1990), 1990 WL 164490; see also S. Rep. No. 101-228, at 134, 1990 U.S.C.C.A.N. at 3528.

"compliance-driven," approach is insufficient alone to prevent harm from chemical disasters.

- On August 28, 2018, at the ATI Millersburg Complex, an RMP facility (RMP ID 100000102925), in Albany, Oregon, an explosion occurred which resulted in a large fire that ended up burning three woodland acres nearby, causing ash to fall over much of the surrounding area, and injuring one firefighter.[4] Nearby areas were evacuated as a result.[5] Prior to the 2018 incident, the ATI facility had been accident-free since November 1999.

- An ammonia leak at the Tyson Fresh Meats Plant, an RMP facility (RMP ID 100000006593), in Lexington, Nebraska, on September 4, 2018, caused a total of 25 people to seek medical treatment, one of whom was in critical condition.[6] Contrary to this news story, EPA's 2019 Database lists this incident as having no medical treatment. Anhydrous ammonia is an RMP chemical with a threshold quantity of 10,000 lbs.[7] Prior to the 2018 incident, this facility had been accident-free since November 1995.

- Another ammonia leak at the Koch Foods poultry plant (RMP ID 100000050044) in Gadsden, Alabama on November 30, 2018 hospitalized 22 people.[8] The Gadsden plant contains the threshold quantity of anhydrous ammonia, 10,000 lbs., to be regulated under the RMP program.[9] Prior to the leak, in August 2018, it was

[4] Kyle Odegard, "Report: Metals fire, moisture create explosion, ATI Millersburg brush fire," Gazette-Times (Sept. 3, 2018), https://www.gazettetimes.com/news/local/report-metals-fire-moisture-create-explosion-ati-millersburg-brush-fire/article_93620989-1bfd-578f-a400-3f96009ea9fe.html.
[5] Kyle Odegard, "ATI Wah Chang fined for August fire," Albany Democrat-Herald (Jan. 23, 2019), https://democratherald.com/news/local/ati-wah-chang-fined-for-august-fire/article_1b2da13b-4731-51ed-a09a-d792ee460a99.html.
[6] Dave Schroeder, "OSHA opens investigation into anhydrous ammonia release," 104.9 Max Country (Sept. 10, 2018), https://1049maxcountry.com/regional-news/osha-opens-investigation-into-anhydrous-ammonia-release/.
[7] 40 C.F.R. 68.130 tbl.1.
[8] WATTAgNet, "Koch Foods ammonia leak hospitalizes 22 people" (Dec. 3, 2018), https://www.wattagnet.com/articles/36304-koch-foods-ammonia-leak-hospitalizes-22-people.
[9] Executive Summary for EPA Facility 100000050044.

announced that the facility would be expanding, increasing its production capacity by about 30 percent.[10]

- On November 25, 2018, the RMP-registered, chemical production facility Croda Atlas Point in New Castle, Delaware (RMP ID: 100000109606), experienced a leak of over one ton of ethylene oxide (an RMP chemical) that resulted in the shutdown of the Delaware Memorial Bridge on one of the busiest travel days of the year. [11] (Croda uses ethylene oxide and propylene oxide, both of which are RMP chemicals).[12] Five workers received medical attention as a result of the incident.[13] While the release fortunately did not encounter an ignition source, if it had, the results would have been "catastrophic" with bridge traffic taken into account.[14] This was the Croda facility's first RMP incident since 2002.

- On June 21, 2019, at the Philadelphia Energy Solutions refinery ("PES") (RMP ID: 100000028105) in Philadelphia, Pennsylvania, an explosion and fire released over 5,000 pounds of hydrofluoric acid ("HF"). According to the Chemical Safety Board ("CSB"), the incident occurred after a pipe elbow in the refinery's alkylation unit corroded to about half the thickness of a credit card, and finally ruptured. CSB Interim Animation of PES Incident (released Oct. 19, 2019), https://www.youtube.com/watch?v=J4wKjGHvs_4.[15] As a result of this incident and others that occurred after the close of comments on

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[10] WATTAgNet, "Koch Foods ammonia leak hospitalizes 22 people," (Dec. 3, 2018), https://www.wattagnet.com/articles/36304-koch-foods-ammonia-leak-hospitalizes-22-people.

[11] Joseph N. DiStefano, "2,700 pounds of explosive material leaked in Nov. 25 accident that shut Delaware Memorial Bridge" (Dec. 21, 2018), https://www.inquirer.com/business/croda-toxic-gas-ton-delaware-memorial-bridge-public-meeting-ethylene-oxide-20181221.html.

[12] Executive Summary for EPA Facility 100000109606.

[13] Joseph N. DiStefano, "2,700 pounds of explosive material leaked in Nov. 25 accident that shut Delaware Memorial Bridge" (Dec. 21, 2018), https://www.inquirer.com/business/croda-toxic-gas-ton-delaware-memorial-bridge-public-meeting-ethylene-oxide-20181221.html.

[14] CBS, "Highly flammable gas leak shuts down major East Coast bridge on busy travel night" (Nov. 25, 2018), https://www.cbsnews.com/news/delaware-memorial-bridge-highly-flammable-gas-leak-croda-atlas-point-facility-today-2018-11-25/.

[15] CSB, "Chemical Safety Board Releases Factual Update and New Animation Detailing the Events of the Massive Explosion and Fire at the PES Refinery in Philadelphia, PA" (Oct. 16, 2019), https://www.csb.gov/chemical-safety-board-releases-factual-update-and-new-animation-detailing-the-events-of-the-massive-explosion-and-fire-at-the-pes-refinery-in-philadelphia-pa/; CSB Factual Update (Oct. 2019), https://www.csb.gov/assets/1/6/pes_factual_update_-_final.pdf (attached).

the RMP Amendments Reconsideration Rule, Pennsylvania and several other states submitted joint comments that EPA, to date, has refused to consider or address. *See* Jim Belke Docket Note, Office of Emergency Management, EPA, "Late Comments Included in the Docket" (Nov. 19, 2019), EPA-HQ-OEM-2015-0725-2085; Letter from Attorneys General, EPA-HQ-OEM-2015-0725-19982085. In November, the City of Philadelphia also released a report on this refinery.[16] Shuttered as a result of the June 2019 incident, PES was an RMP facility. The RMP threshold quantity for HF is 1,000 lbs., which amounts to a mere one-fifth of the total HF released in the explosion.[17] Before the June 2019 fire, data the facility reported to EPA show that the facility was also violating other Clean Air Act § 7412(d) requirements, illustrating that facilities with problems releasing air pollutants like benzene also often have similar problems leading to severe accidental releases under § 7412(r)(7).[18]

- On November 27, 2019, at the TPC Group chemical plant in Port Neches, Texas (RMP ID: 100000115314), an explosion of butadiene which this facility produces (and which is an RMP chemical[19]) injured three employees, necessitated a mandatory evacuation order within a half-mile of the facility, and caused extensive damage across the city.[20] As many as 60,000 people were forced from their homes for two days, and fires associated with the explosion took five days to completely burn out.[21] The CSB is currently investigating the

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[16] https://www.phila.gov/media/20191125145209/refineryreport-002.pdf (attached).
[17] 40 C.F.R. § 68.130 tbl.1.
[18] C. Hiar & L. Riordan Seville, Massive oil refinery leaks toxic chemical in the middle of Philadelphia, NBCNews.com (Jan. 16, 2020), https://www.nbcnews.com/science/environment/massive-oil-refinery-leaks-toxic-chemical-middle-philadelphia-n1115336; EIP Report: Monitoring for Benzene at Refinery Fencelines: 10 Oil Refineries Across U.S. Emitted Cancer-Causing Benzene Above EPA Action Level (Feb. 6, 2020), https://environmentalintegrity.org/wp-content/uploads/2020/02/Benzene-Report-Final-2.7.20.pdf.
[19] *Id.*
[20] KFOR, "Texas chemical plant explosion causes extensive damage to city" (Dec. 1, 2019), https://kfor.com/2019/12/01/texas-chemical-plant-explosion-causes-extensive-damage-to-city/; J. Ray, Staff photos show scenes from chemical plant explosion near Houston, Houston Chron. (Nov. 27, 2019), https://www.chron.com/news/houston-texas/houston/article/staff-photos-chemical-plant-explosion-Port-Neches-14866631.php#photo-18676397.
[21] Reuters, "TPC to rebuild Texas chemical plant shut by explosion, fire: spokeswoman" (Dec. 4, 2019), https://www.reuters.com/article/us-chemicals-fire-tpc-portneches/tpc-to-rebuild-texas-chemical-plant-shut-by-explosions-fire-spokeswoman-idUSKBN1Y82ZD.

incident.[22] EPA had previously taken enforcement action against this facility, but it failed, alone, to prevent this catastrophe.[23]

- On December 11, 2019, a release of catalyst triggered an alarm at Suncor Energy oil refinery north of Denver (RMP ID: 100000051971). Nearby residents and children at two neighboring schools were instructed to shelter in place as a clay-like substance rained down.[24] The incident, described as an "operational upset" by company officials, was preceded by a similarly-described event on November 27, 2019.[25] While officials claim the material is not hazardous, they have not informed the public about what chemical was released.[26] The public information provisions of the 2017 RMP Rule would require the company to either confirm it was not an RMP chemical, or release vital information about the incident to the community so they can protect their families' health.

- On February 12, 2020, a "large fireball erupted within the Exxon refinery in north Baton Rouge." WBRZ News, "Flaring expected at ExxonMobil Thursday as BR refinery gets back to normal following inferno" (Feb. 13, 2020), https://www.wbrz.com/news/crews-on-scene-of-large-chemical-plant-fire-in-north-baton-rouge/. Exxon's Baton Rouge refinery (RMP ID: 100000091768) has had multiple previous RMP releases, making it a prime example of why third-party audits and improved incident investigation requirements are necessary. The frequency of accidents at this facility also shows why safer technology and alternatives are important, as they reduce the risk of such incidents leading to a Bhopal-level catastrophe.

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[22] https://www.csb.gov/tpc-group-explosion-and-fire/.
[23] Port Neches - TPC - EPA Consent Agreement on Enforcement (July 17, 2017) https://yosemite.epa.gov/OA/rhc/EPAAdmin.nsf/Filings/D91D47509AC159638525817F001BC516/$File/tpc.pdf (attached); *see also* J. Blum, Houston company TPC Group has long history, spotty environmental record, Houston Chron. (Nov. 28, 2019), https://www.chron.com/business/article/Houston-company-TPC-Group-has-long-history-14867950.php.
[24] Bruce Finley, "Suncor oil refinery's release of clay-like 'catalyst' triggers alarm, prompts air tests north of Denver," Denver Post (Dec. 11, 2019), https://www.denverpost.com/2019/12/11/suncor-refinery-emissions-alarm/.
[25] Bruce Finley, "Suncor oil refinery's release of clay-like 'catalyst' triggers alarm, prompts air tests north of Denver," Denver Post (Dec. 11, 2019), https://www.denverpost.com/2019/12/11/suncor-refinery-emissions-alarm/.
[26] Joe St. George, "Colorado lawmakers ask for investigation into Suncor plant following ash incident," KDVR (Dec. 13, 2019), https://kdvr.com/2019/12/13/colorado-lawmakers-ask-for-investigation-into-suncor-plant-following-ash-incident/.

Given that the Chemical Disaster Rule's provisions were adopted specifically to prevent and reduce harm from such "major disasters," it was arbitrary and capricious for EPA not to specifically consider these new disasters and other relevant pieces of evidence in choosing to rescind the Chemical Disaster Rule's prevention and informational access provisions, and to delay the emergency exercise requirements. EPA may not ignore this information of post-comment period incidents and suggest that, for its rationale in 2019, it can consider only a snapshot in time that ended in 2016. *See Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1222 (D.C. Cir. 2004) ("willful" lack of knowledge was arbitrary and capricious).

EPA took this action in November 2019. Ignoring the facts today and refusing to recognize severe harm from recent incidents is ignoring an "important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where, as there, the statute requires EPA to focus on "prevention" as its overarching and core objective, it is even more arbitrary for EPA to ignore the most recent incidents that occurred while it had delayed the prior Administration's "life-saving protections." *Air Alliance Houston*, 906 F.3d at 1053, 1062, 1065 (citing statute and legislative history).

It was also arbitrary and capricious for EPA to ignore these in deciding pre-existing RMP regulations were "working." 84 Fed. Reg. at 69,863. Concluding that the pre-Chemical Disaster Rule Risk Management Program was "working" and "that the cost of additional prevention requirements may not be necessary," 84 Fed. Reg. at 69,863, while such disasters are occurring flouts the statutory purpose and requirements of § 7412(r), as well. Finally, because these events occurred after the comment period and it was impracticable to comment on these recent disasters and because they rebut conclusions of central relevance to EPA's decisions in the 2019 Rule, EPA must grant reconsideration to take comment on this new evidence. 42 U.S.C. § 7607(d)(7)(B).

C. <u>Grounds for Objection – New Reports and Studies by Authoritative Governmental Bodies and Environmental Justice and Safety Experts Demonstrate the Unlawfulness and Arbitrariness of EPA's Action and Rationales</u>

In addition to these recent incidents, significant new reports and information have been released about other major disasters from the last few years.

- On February 3, 2020, the CSB's Interim Executive signed a new reporting rule for chemical disasters "to ensure that the CSB receives rapid, accurate reports of any accidental release that meets established statutory criteria." CSB, Accidental Release Reporting, CSB-2019-0004,

https://www.csb.gov/assets/1/6/prepublicationcopy2-3-20.pdf; CSB Docket, https://www.regulations.gov/docket?D=CSB-2019-0004 (finalizing CSB, Proposed Rule, Accidental Release Reporting, 84 Fed. Reg. 67,899 (Dec. 12, 2019)). The rule is awaiting publication in the *Federal Register*. Among other things, the CSB final rule calls into question EPA's conclusion that accident rates are decreasing because CSB's reporting shows increasing accident rates across similar sectors. CSB's data covers a different, though overlapping, set of facilities relative to the Risk Management Program. But CSB reported that the total "number of annual incidents ranged from a low of 113 in 2017 to a high of 291 in 2012." CSB Final Reporting Rule (Pre-release) at 13-14. Over approximately 10 years, "the average annual number of accidents was approximately 183," the "median number of accidents per year was 169." The numbers peaked in 2012, rebutting any notion of a consistent decline, and showed considerable variance from year to year rebutting the existence of any reliable trend. *Id.* The CSB "screened 1,923 incidents from 2010 to July 15, 2019 which resulted in an injury or fatality," exceeding EPA's count. *Id.* at 25; *see also* CSB, Year by Year Summary of CSB Accidental Release Information (Dec. 12, 2019), https://www.regulations.gov/document?D=CSB-2019-0004-0024; CSB, CSB Incidents 2009-7.2019 (Dec. 12, 2019), https://www.regulations.gov/document?D=CSB-2019-0004-0023. Many of the incidents CSB investigates *are* at RMP facilities and EPA must consider these data. *See* CSB Incidents 2009-7.2019 (including numerous accidents in NAICS sectors 322, 324, and 325, which are likely to be covered by Risk Management Program). The CSB numbers of incidents also show that EPA needs to better account for releases of non-RMP chemicals at RMP facilities and to expand incident reporting and prevention requirements. The CSB Rule improves accident reporting to the CSB but unfortunately the CSB did not expand public availability of information with its action. Pre-Publication Final Rule at 78 (stating that "CSB recognizes the public interest in learning from initial accidental release information" but issuing only "a reporting rule not a disclosure rule").

- The CSB final report for a November 15, 2014 chemical release that occurred at the DuPont La Porte Facility in La Porte, Texas was published on June 25, 2019.[27] Recommendations in the wake of the incident included, among other things, "[p]rovid[ing] initial training to new plant personnel and periodic training to all plant personnel on … emergency communication procedures." DuPont LaPorte Report at

[27] CSB, "DuPont La Porte Facility Toxic Chemical Release," https://www.csb.gov/dupont-la-porte-facility-toxic-chemical-release-/ (releasing Report available at https://www.csb.gov/file.aspx?DocumentId=6124 (attached).

125. The 2019 Rule rescinds a similar requirement to provide training to all personnel "involved in" operating a process. 84 Fed. Reg. at 69,836. The CSB also reiterated its support for fully implementing the Chemical Disaster Rule stating that these are "needed improvements contained in [the] new regulations intended to prevent chemical incidents," that would "help advance chemical safety and the prevention of accidental releases, including improving communication between facilities and emergency responders, requiring root cause analyses of incidents and near misses, and requiring chemical facilities to consider 'inherently safer' chemicals and production processes." DuPont LaPorte Report at 66 note d.

- The CSB final report for a June 27, 2016 explosion at the Enterprise Products Midstream Gas Plant in Moss Point, Mississippi was published on February 13, 2019.[28] The CSB specifically recommended to the Jackson County Local Emergency Planning Committee that it "[w]ork with members (industry, emergency response, community) to explicitly define the communication methods for community notification and incident updates (*e.g.*, social media, local news outlets, passive phone system), and the expectations for their use, so that members of the public can efficiently and effectively obtain current safety information."[29] The 2019 Rule unfortunately rescinds public information provisions and delays the required notification exercises by years, and field exercises indefinitely.

- On May 3, 2019, the National Environmental Justice Advisory Council to EPA urged the agency to abandon and not finalize its 2018 rollback proposal. EPA-HQ-OEM-2015-0725-1993. In this letter, NEJAC found that: "The safety improvements this rule contains are essential to protect the lives and well-being of fenceline communities, workers, and first responders." *Id.* at 1. NEJAC highlighted EPA's own recognition that environmental justice, and the disparity in exposure to chemical disasters and the threat of such disasters, was one of the relevant factors and important considerations EPA considered in issuing the Chemical Disaster Rule. *Id.* at 3 (citing Chemical Disaster Rule RIA at 122-27, EPA-HQ-OEM-2015-0725-0734). NEJAC submitted this advice to EPA pursuant to the Federal Advisory Committee Act. Yet EPA has completely refused to consider it, describing it as a "late comment," instead of a submission by its own advisory council composed of experts on environmental justice. Belke

[28] CSB, "Enterprise Pascagoula Gas Plant Explosion and Fire," https://www.csb.gov/enterprise-pascagoula-gas-plant-explosion-and-fire-/.
[29] CSB, Loss of Containment, Fires, and Explosions at Enterprise Products Midstream Gas Plant; Case Study No. 2016-02-I-MS at 55 (Feb. 13, 2019), *available at* https://www.csb.gov/enterprise-pascagoula-gas-plant-explosion-and-fire-/.

Docket Note, EPA-HQ-OEM-2015-0725-2085. EPA continues to admit its 2019 Rule will have a disproportionate impact on communities of color, low-income people, and linguistically isolated groups. EPA, Regulatory Impact Analysis for 2019 Rule, at 90 (Nov. 2019), EPA-HQ-OEM-2015-0725-2089 ("2019 RIA"). Yet EPA has refused to consider or even address its own advisory committee's advice not to take this action.

- The EPA's Office of Inspector General ("OIG") issued a report on December 16, 2019, in response to the impacts of Hurricane Harvey in 2017, detailing improvements EPA needs to make to its emergency planning in order to better address air quality concerns during future disasters.[30] Among other things, this report highlighted the lack of air monitoring data, in part due to the failure of EPA to collect or require this – illustrating EPA cannot prove its newly presented conclusion that there were not serious § 7412(r)(7) releases after Hurricane Harvey, just huge releases of other hazardous air pollutants. Rather, the OIG report and data like that from the PES refinery, show that releases of § 7412(a)(1) and (r) chemicals often go hand in hand, and demonstrate the need for EPA to fully implement, not repeal, delay, or weaken, the Chemical Disaster Rule.

These studies and reports illustrating the harm caused by the disasters that continue to occur at RMP facilities undermine EPA's conclusions that the Chemical Disaster Rule's provisions are "not necessary" and that the prior set of regulations alone was "working." 84 Fed. Reg. at 69,876. Other new studies also contradict EPA's new finding that the STAA provision may lack benefit. 84 Fed. Reg. at 69,876.

- A new book was published in 2019 that EPA must consider here. Trevor Kletz and Paul Amyotte, WHAT WENT WRONG? CASE HISTORIES OF PROCESS PLANT DISASTERS AND HOW THEY COULD HAVE BEEN AVOIDED (6th ed. 2019).[31] The book provides extensive information on the effectiveness of inherently safer technology (IST) and reviews scientific and federal agency reports on this topic. *Id.* at 565-580. The book explains that IST works to prevent disasters and also to reduce harm from disasters that do occur, directly undermining EPA's tentatively-supported rationale for the 2019 Rule that STAA "may" be ineffective. 84 Fed. Reg. at 69,849.

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[30] EPA OIG, EPA Needs to Improve Its Emergency Planning to Better Address Air Quality Concerns During Future Disasters (Dec. 16, 2019), *available at* https://www.epa.gov/sites/production/files/2019-12/documents/_epaoig_20191216-20-p-0062.pdf.

[31] https://www.sciencedirect.com/book/9780128105399/what-went-wrong.

- Other new studies on IST have also come out in recent years, and in particular a new report was released in June 2019 that summarizes more evidence of IST's effectiveness. Muhammad Athar, Azmi Mohd Shariff, & Azizul Buan, *A review of inherent assessment for sustainable process design*, JOURNAL OF CLEANER PRODUCTION 233 (2019) 242-63 (2019).[32] This article explains "controlling or minimizing of risks is possible up to a certain extent through various process safety strategies." *Id.*

Because all of these reports and data arose after the comment period and it was impracticable to comment on them, and because they rebut conclusions of central relevance to EPA's decisions in the 2019 Rule, EPA must grant reconsideration to take comment on this new evidence. 42 U.S.C. § 7607(d)(7)(B).

D. Grounds for Objection Related to New RMP Database Data

EPA's reliance on outdated accident data is also erroneous because the latest data show many more accidents have occurred in recent years than EPA understood when promulgating the 2019 Rule. The 2019 RMP database shows EPA's data for the rulemaking omitted a significant number of accidents and demonstrates that EPA cannot lawfully or rationally rely on any alleged decline in the number of incidents as a basis for the prevention repeal. The 2019 reporting wave appears to have increased accident numbers for 2014-16 significantly, as well as other years, but EPA missed these incidents because it cut off its dataset before recent incidents were included. 2019 RIA at 28-38 & n.30; 2019 RTC at 56-57. It was arbitrary and capricious for EPA to ignore this new data in promulgating the 2019 Rule, particularly where it attempts to cite and rely on an alleged decline in incidents as a central basis for the rule. *E.g.,* 84 Fed. Reg. 69,852, 69,856-57, 69,861.

The below table, which appears in the attached report by health scientist Darius D. Sivin, PhD, illustrates that EPA's data severely undercounted accidents for recent years.[33] This new report details many flaws in EPA's analysis of the data, and EPA must consider it and take comment on how it affects the agency's final decisions in the 2019 Rule.

[32] https://www.sciencedirect.com/science/article/pii/S095965261932013X.
[33] Darius D. Sivin, PhD, An Evaluation of the U.S. Environmental Protection Agency's Justification for its Final Reconsideration Rule: Risk Management Programs Under the Clean Air Act, Section 112(r)(7) (Feb. 2020) ("Sivin Report") (attached).

Comparison of Number of Impact Accidents Reported in EPA's Regulatory Impact Analysis with the Number Identified from the September 2019 Database[34]

Year	*Number of Accidents Reported in the Amendments RIA Dataset*	*Number of Accidents According to September 2019 Database*	*Difference Between EPA's Numbers and 2019 Numbers*[35]
2004	197	199	-1.01%
2005	152	151	0.66%[a]
2006	140	137	2.19%[a]
2007	204	203	0.49%[a]
2008	168	168	0.00%
2009	149	149	0.00%
2010	128	130	-1.54%
2011	138	147	**-6.12%**
2012	118	131	**-9.92%**
2013	123	150	**-18.00%**
2014	128	137	**6.57%**
2015	113	138	**-18.12%**
2016	99	116	**-14.66%**

[a] See note in Sivin Report at 4 n.1 regarding positive values.

These new data from the late-2019 database undermine EPA's rationale in several ways.

First, the 2019 data confirms it was arbitrary for EPA to rely on an alleged downward trend when its data for more recent years underestimate the number of accidents – creating the appearance of a downward trend regardless of actual accident rates. While accident numbers for the years before 2010 were mostly accurate when recounted with the 2019 database, the data from later years show significant increases in accidents relative to the numbers EPA relied on from earlier databases. Sivin Report at 2-5. The 2019 database, which is still not yet complete for accidents in recent years, shows a lower average annual decline than EPA reported (only 2.8%), and shows higher average accident rates (150/year).

EPA's rationale based on these data is even more problematic because EPA knows its data are not complete enough to reliably demonstrate anything about accident rates. In promulgating the 2019 Rule, EPA acknowledged its accident data could be an underestimate. 2019 RIA at 39 n.30 ("Some sources still update their accident history information only when their next full five-

[34] Sivin Report tbl. I at 4.
[35] Calculated as (EPA Number – 2019 Number) / (2019 Number)

year RMP update occurs, which for most sources occurs in one of the 'wave' years."). EPA further acknowledged that, in fact, data for the most recent five years could be an underestimate and that "actual accident numbers for 2014-2016 may increase slightly above those shown here after the 2019 reporting wave occurs." *Id.*

At the time of EPA's proposed 2019 Rule, the next reporting cycle would end in 2019, but EPA arbitrarily and capriciously rushed its rule to finality before considering these new data. EPA sent the final rule to the Office of Management and Budget ("OMB") in mid-March 2019, 2019 RTC at 90, and Administrator Wheeler signed the final 2019 Rule on November 20, 2019, 84 Fed. Reg. at 69,913.

Yet, even in the face of all of these problems with the data it chose, EPA limits its consideration of data to 2004-16, and refused to wait for even the current "wave" of data to arrive. 2019 RIA at 28-41. EPA is well aware of serious incidents that have occurred since that time, as described above, and EPA's latest RMP database contains information on many of these. EPA acknowledged that the data it was using to assess the decline was likely incomplete – stating that "accident numbers for 2014-2016 [and beyond] may increase slightly above those shown here after the 2019 reporting wave occurs." 2019 RIA at 38 n.30.

The data show they have increased significantly, and that even some earlier years (2010-13) saw notable increases as late reports trickled in. Sivin Report at 2-5. EPA states "[o]riginally there was no requirement to update RMP accident information until the next RMP submission was due, which normally occurs every five years." 2019 RTC at 92. EPA "changed this requirement in 2004 to require owners and operators to update their RMP accident history information within 6 months of any reportable accident," but EPA admits not all sources consistently comply with this requirement. 2019 RTC at 92. The 2019 data shows that if a facility submitted its last report in 2012, for instance, it would not have another report due until 2017, regardless of the fact that 2014 was a "wave" year and the facility may be neglecting to report accidents until that point despite changes to the reporting requirements. Whatever the cause, the data show accident reports increasing significantly for all years after 2010. The absence of these reports in EPA's incomplete dataset explain a large portion of the alleged "decline" that EPA relied on.

Further, the latest data show that accident rates continue to exhibit significant variance and appear more like a "random walk" than a reliably decreasing series. Random walk is a term of art from statistics, meaning subsequent values cannot be predicted from prior values. *See* Britannica Online, *Random Walk*, https://www.britannica.com/science/random-walk, last updated June 24, 2008). In such datasets, apparent trends are really due to randomness and variability. For example, many people believe the stock

market behaves this way since even where a stock appears to be moving in a given direction, its value on a subsequent day cannot be predicted, undermining the existence of any meaningful trend. *See id.* This term is applicable here because there is so much variance and so many ups and downs in the data EPA reviewed, that it is not clear how EPA can reliably conclude a real, statistically meaningful trend exists. EPA has not shown the trend it identifies has any statistical significance, and indeed when the latest accident numbers are reviewed the trend appears statistically insignificant because the changes are so much smaller compared to variance. The attached Sivin Report concludes that any apparent decline is not statistically significant, and that EPA also based its analysis on inaccurate numbers. Sivin Report at 7-8, 2-5. EPA cannot conclude the data shows a reliable downward trend, where the single biggest change year-over-year was an increase of over 60 incidents in 2007, and years 2007, 2011, 2013, and 2015 all showed net increases in accidents from the prior year. Sivin Report at 4 tbl.1.

It also appears more appropriate to model accident severity changes as a random walk, because of the highly variable nature of catastrophic incidents and of injury reporting. For example, just one, single incident like the 2012 Chevron refinery explosion in Richmond, CA that affected thousands of people completely shifted annual injury averages and obliterated any supposed trends. 2019 RIA at 77 Ex. 6-3 (showing averages and total injuries way higher for periods of time including that incident, than in 2014-16 which excludes it). Indeed, this one event seems to be the only reason that average injuries are lower in the 2014-16 period than the 2004-13 period that EPA compares in its RIA. 2019 RIA at 77-78. It was wholly arbitrary for EPA to split up the data in this way when considering severity, because it allowed single incidents like this to have an outsize impact on the average of earlier years. And EPA admits off-site property damage actually went up in the latter period of time. 2019 RIA at 78.

The fact is, consequences of chemical disasters vary tremendously and the data clearly shows that the risk of a catastrophic incident is no less today than it was two decades ago. The recent PES Refinery explosion shows this risk. Only the quick action of a single, brave worker prevented an enormous catastrophe from occurring in the City of Philadelphia. That this disaster was avoided by such a narrow margin hardly shows the RMP framework was working – it shows the contrary is true and the regulatory framework needs urgent improvement.[36]

The new data undermines EPA's central thesis in the 2019 Rule that there is no cost to rescinding or delaying protections because pre-existing

[36] CSB, Factual Update: Fire and Explosions at Philadelphia Energy Solutions Refinery Hydrofluoric Acid Alkylation Unit at 3 (Oct. 16, 2019), https://www.csb.gov/assets/1/6/pes_factual_update_-_final.pdf.

regulations "are working." 84 Fed. Reg. at 69,863, 69,876. The new data show any decline is far less than EPA believed, and may not be statistically significant at all given the high variance in the dataset. Because this new data undermines a central basis for the 2019 Rule and was not practicable to comment on during the rulemaking, the Clean Air Act requires EPA to convene a proceeding for reconsideration of the 2019 Rule. 42 U.S.C. § 7607(d)(7)(B).

E. New Evidence Further Demonstrates EPA's Bias Toward Repeal and Weakening

Commenters previously commented on EPA's "closed mind" and the fact that the key decisionmakers here had previously opposed the very rule that EPA's 2019 Rule repealed and rolled back. Comments of Community Pet'rs at 73-76, 84. Since the comment period closed, major new evidence came to light further demonstrating the bias against these safety measures and the unlawfulness of EPA's action.

Senators had exposed and expressed concern that Peter Wright, who then had been nominated to lead the Office of Land and Emergency Management, had begun improperly working in the agency in a decisionmaking role before receiving Senate confirmation.[37] After the comment period it became clear that he was working on this very rule. On June 25, 2019, Mr. Wright led a meeting with some Community Petitioners on 2019, before he was confirmed, sitting at the head of the table and serving as the primary speaker for EPA.[38] On July 11, 2019, he was confirmed and officially began serving as Assistant Administrator for OLEM, and ultimately signed the 2019 Rule.

In addition, in concert with the 2019 Rule, EPA has now released a recusal statement, and an "updated recusal statement" for Mr. Wright, neither of which the public has had a chance to review or comment on.[39] EPA has also provided a response to Community Petitioners' Comment regarding the improper involvement of Mr. Wright, and Mr. Pruitt before him, in this rulemaking. 2019 RTC at 77-79.

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[37] U.S. Senator Whitehouse Letter (July 23, 2018), https://www.whitehouse.senate.gov/imo/media/doc/2018-07-20%20Signed%20Letter%20to%20Wright.pdf (attached).

[38] Record of Meeting with Environmental Justice Groups, June 25, 2019, https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-1996 (listing Peter Wright, Senior Advisor to the Administrator first and as the most senior staff person).

[39] Peter Wright Updated Recusal Statement (July 2019), https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-2064; Peter Wright Recusal Statement (July 2018), https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-2056.

EPA has failed to respond to Community Petitioners' argument that, even if there is no conflict of interest or due process violation, the involvement of these officials in this rulemaking is arbitrary and capricious because it has made clear to the public, including Community Petitioners, that the people leading this have industry's interests in mind, not those of the public, and violate ethics norms. Comments of Community Pet'rs at 75-76, 84. The action taken by EPA that puts industry compliance cost above all else is the result of biased decisionmakers who placed a "thumb on the scale" toward compliance cost, rather than fulfill the statutory goal of disaster prevention.

Reconsideration is required to provide an opportunity to comment on Mr. Wright's improper and arbitrary involvement now that it is clear that he was involved. Mr. Wright should not have advised Administrator Wheeler on this rule where his former employer and primary client for years, Dow-Dupont, a for-profit chemical corporation, has a financial interest. His involvement in EPA's decisionmaking process only further illustrates the bias against safety and toward industry preferences regarding regulatory costs that has driven this rulemaking, to the detriment of public safety and the statutory objectives.

II. NOTICE & COMMENT VIOLATIONS: EPA ADDED DOCUMENTS ON WHICH IT HAS RELIED AND SIGNIFICANTLY CHANGED THE BASIS FOR ITS RULEMAKING IN THE FINAL RULE

A. EPA's New Legal Rationale and Regulatory Purpose Are Unlawful and Impermissible

1. *EPA's Adopted a New Legal Interpretation of § 7412 to Justify its Final Action*

In the final 2019 Rule, EPA for the first time describes the statutory framework as a two-step analysis where the term "reasonable" in § 7412(r)(7)(B) supposedly gives it discretion to reject regulatory approaches "even before considering practicability," and thus without considering whether they further the statutory directive to provide protections "to the greatest extent practicable" at all. 2019 RTC at 40-41. EPA also offers a new statement of purpose, saying the action is intended to "make changes to the Risk Management Program regulations (40 CFR part 68) to reduce chemical facility accidents without disproportionately increasing compliance costs or otherwise imposing regulatory requirements that are not reasonable or practicable." 84 Fed. Reg. at 69,836; *compare* 83 Fed. Reg. at 24,852 (purpose was to address issues in three petitions for reconsideration). EPA's new regulatory purpose and its interpretation of the statute to let EPA place cost as the paramount consideration under the statutory text fails at *Chevron* step one and two. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

EPA does not deny that it is relying on § 7412(r)(7)(B) which requires EPA to "promote the prevention, detection, and response to accidents to the greatest extent practicable." 2019 RTC at 35. But EPA contends it may ignore the need for its regulations to do so to the "greatest extent" under its new two-step approach. As EPA avers, "[w]here a regulation is clearly not reasonable, then we need not assess whether it provides protection to the greatest extent practicable." 2019 RTC 40.

Having set up this two-step approach, EPA defines "reasonable" such that the agency can use it as a filter to exclude any regulatory options it dislikes from consideration entirely – but EPA fails to justify how it can repeal one the agency itself found was indeed reasonable *and* satisfied the statute's test and objectives. Under its new two-step framework, EPA uses cost to limit what regulatory options it considers at all, rather than first looking for the actions that provide "to the greatest extent" for prevention and mitigation of disasters, and *then* choosing whichever are "practicable."

EPA attempts to justify the rollbacks in the 2019 Rule under this novel interpretation of the statute. Specifically, EPA "conclude[s] that some of the provisions adopted in 2017 are not 'reasonable' regulations" on one or more of the following grounds," 84 Fed. Reg. at 69,849:

- "The requirement has burdens that are disproportionate to the accident prevention benefits that can be established";
- "the requirement increases the potential for chemical disasters through the creation of heightened security risks";
- "the regulation diverges from OSHA's PSM requirements without demonstrably improving prevention performance."

In each instance, EPA does <u>not</u> inquire whether the provisions provide for prevention or mitigation "to the greatest extent practicable" because it uses "reasonable" to exclude the options *a priori* based on EPA's new policy preferences. EPA does not ask (1) if the provision it repeals or weakens would provide stronger accident prevention benefits than pre-existing regulations; or (2) whether that provision is "practicable" or impracticable for sources.

2. <u>EPA's New Legal Interpretation Fails under Chevron Step One</u>

EPA's new reading of the statute conflicts with its plain language, which directs EPA to provide for "prevention of accidental releases" and for "the prevention and detection of accidental releases … and response" to such releases "to the <u>greatest extent</u> practicable." 42 U.S.C. § 7412(r)(7)(B) (emphasis added). That statute thus requires EPA's regulatory actions under § 7412(r)(7) to emphasize accident prevention and mitigation above all else. The only statutory carve-out is where EPA can show a protective measure is fundamentally not practicable, or impossible, for sources to implement. *See Air*

Alliance Houston, 906 F.3d at 1064 (holding "practicable" means what is practicable for "regulated sources," not what EPA's policy preferences are).

In "ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991). To "take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940); *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 781-82 (D.C. Cir. 2012). The "ultimate objective when interpreting a statute is to give effect to the intent of Congress." *Gordon v. Gouline*, 81 F.3d 235, 238 (D.C. Cir. 1996) (quoting *Spencer v. Brown*, 17 F.3d 368, 372 (Fed. Cir. 1994)); A*m. Trucking Ass'ns*, 310 U.S. at 542-43.

In § 7412(r)(7), as the D.C. Circuit held, "[r]eading the plain text makes clear that Congress is seeking meaningful, prompt *action* by EPA to promote accident prevention." *Air Alliance Houston*, 906 F.3d at 1064. The question of whether regulations are "reasonable" under the statute cannot be separated from this context. That the statute uses the term "reasonable" in regulating does not authorize EPA to put industry cost above the goal of public health. If anything, "reasonable" simply incorporates administrative law principles that regulations must be the product of reasoned decisionmaking and not arbitrary or capricious. *See, e.g.*, *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43. EPA must consider all reasonable regulatory options, and then choose the one that promotes accident prevention, detection, and mitigation "to the greatest extent practicable."

It is unlawful for EPA to rescind regulations it admits have accident prevention benefits (like third-party auditing or root cause analyses), based only on concerns about OSHA coordination or speculation that the same benefits can be achieved through enforcement, *see* 2019 RTC at 103, 108, 110, 119, 123 (admitting these practices have benefits and explaining rationale for rescission). These determinations by EPA do not show the provision is impracticable or unreasonable. But EPA considers these rationales sufficient under its "reasonable[ness]" inquiry, without consideration of whether the regulations "provide, to the greatest extent practicable, for the prevention and detection of accidental releases …." 42 U.S.C. 7412(r) (emphasis added). Reading "reasonable" to give EPA such broad policy discretion would swallow the rest of the statutory language in § 7412(r)(7), especially the requirement to provide for protections "to the greatest extent practicable." The text, context, structure, and legislative history of the statute foreclose this approach.

Contrary to the plain statutory objective it must implement, the 2019 Rule will neither prevent nor mitigate disasters. It repeals all of the 2017 rule's

prevention measures that were designed to do so, based on distinct considerations of cost and interagency reconsideration. Even assuming *arguendo* that EPA could consider those factors to some limited extent, the statute does not let the agency elevate them above Congress's plain desire to assure protection from chemical disasters. Congress placed a thumb on the scale in favor of disaster "prevent[ion" when it used the words "to the greatest extent practicable." 42 U.S.C. 7412(r)(7)(B) (emphasis added); *see also* § 7412(r)(1), (r)(7)(A). EPA ignores the policy preference Congress expressed with these words, defining "reasonable" and "practicable" in ways that let cost considerations overshadow all else.

Whatever "reasonable" means it does not allow EPA to ignore the core statutory test in § 7412(r)(7)(B): which requires EPA to regulate to prevent accidental hazardous chemical releases and the harm they cause "to the greatest extent practicable." *Id.* EPA attempts to read "to the greatest extent" completely out of the statute. EPA gives this language no meaning at all, much less a reading that is consistent with the provision. EPA's statutory interpretation directly contradicts the statute because it ignores essential statutory text. Attempting to make it secondary only to what is "reasonable" is equivalent to cutting off part of the very sentence in which both provisions occur.

Even if "practicable" is read to allow EPA to consider cost or compliance "burden," 2019 RTC at 38; *but see* Community Pet'rs' Comments at 79-82, EPA disregards that the statute says "to the greatest extent practicable." This language shows that Congress believed there may well be a range of "practicable" and "reasonable" regulatory options. Recognizing this, it directed EPA not just to choose whichever it wished or the one that causes the least "burden" on the industry – but to choose the one that assured prevention, detection, and response to chemical releases "to the greatest extent." At most, "practicable" lets EPA consider whether an option would be impossible for sources to feasibly implement. *Air Alliance Houston*, 906 F3.d at 1064. Instead, EPA's statutory interpretation would allow it to ignore even considering the range of such options, and choose only the least costly option or the one that lets it coordinate more with another agency. The statute does not authorize this action.

EPA cannot consider cost except to the extent that costs render a particular requirement impracticable for regulated sources. EPA's arguments that it can consider cost as part of a generic, policy-making discretion under § 7412(r)(7) would read "to the greatest extent practicable" out of the statute. EPA tries to give itself broad discretion to consider cost via the term "reasonable" and a legislative history reference to "burdensome," 2019 RTC at 36-37, but these do not show EPA can consider compliance cost beyond the statutory authority to decide if a provision is "practicable." If sources can

feasibly comply with the requirement – which EPA previously found they could and has not since shown they cannot – then it is practicable and cannot be eliminated based on cost. The statute specifically requires EPA to focus on the objective of "prevention" of chemical disasters and the harm they cause. Comments of Community Pet'rs' at 43-45, 93-94. It further directs that EPA consider and consult with safety experts – at the U.S. Chemical Safety Board, the Secretary of Labor including OSHA, and Secretary of Transportation. 42 U.S.C. § 7412(r)(6), (7)(B)(i). Nowhere does the statute mention cost or industry "burden." Nor does it direct EPA to put any economic preferences above safety as EPA now attempts to do.

EPA's derivative argument that "the STAA provision is not reasonable because it targets entire sectors rather than the facilities within those sectors that have problematic prevention programs" is also irrational and contrary to the statute. 84 Fed. Reg. at 69,848 (finding "[b]road regulatory requirements that unnecessarily impose burdens on the vast majority of regulated facilities that are performing well are not reasonable regulations."). The statute directs that EPA "shall promulgate reasonable regulations" to prevent and mitigate disasters. EPA cannot use its ill-defined reasonableness inquiry to elevate its own preference for a compliance-driven approach instead of regulation over the statutory directive to regulate. Statutory provisions "must be read in their context and with a view to their place in the overall statutory scheme." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 320 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

In a similar vein, EPA may not use "reasonable" to elevate concerns about OSHA coordination over retaining regulations such as STAA that the CSB formally recommended and that EPA previously found justified the Chemical Disaster Rule. EPA described the prevention and other strengthening amendments in the Chemical Disaster Rule as regulatory responses to implement the CSB's formal recommendations. *See* Chemical Disaster Rule RTC at 246 ("Several of the amendments respond to CSB's suggested rule changes based on their review of specific incidents, which is consistent with the structure of CAA 112(r)(6)(C)(ii) and EPA's rulemaking authority in CAA 112(r)(7).").

The statute requires EPA to consider CSB's recommendations and explain any refusals to follow them in writing. 42 U.S.C. 7412(r)(6)(I). The Act directs EPA to also consider the expertise of the Secretary of Labor and OSHA, 7412(r)(7)(b), (d), but does not give those recommendations the same weight as CSB or require the same kind of response. While EPA is not required to follow CSB's advice, the statute contemplates a more significant role for this agency

than any other in EPA's rulemakings under § 7412(r).[40] EPA cannot use the word "reasonable" in § 7412(r)(7) to rewrite Congress's preferences to give weight to CSB recommendations or to favor accident prevention over coordination with other agencies like OSHA. The statutory text and legislative history do not allow EPA to choose further coordination with OSHA over following the recommendations of CSB. EPA can decline to follow a CSB recommendation on its merits, but only where EPA demonstrates the recommended approach will not provide for accident prevention to the greatest extent practicable.

3. EPA's New Legal Interpretation Also Fails at Chevron Step Two

For all of these reasons, EPA's approach also fails at *Chevron* step two. *Chevron*, 467 U.S. at 843. It is not permissible to construe "reasonable" in a way that reads Congress's directives out of the statute and lets EPA prioritize arbitrary new policy preferences in their place. Disaster prevention must remain the lodestar of any regulatory action under § 7412(r)(7). Even if there were any ambiguity in this statutory language, EPA's interpretation is impermissible because it allows EPA to regulate without considering much less meeting the core test of this provision: whether EPA's regulations are providing for prevention and other safety protections "to the greatest extent practicable." Regulation under § 7412(r)(7) must seek to maximize accident prevention and mitigation; any other approach reads "to the greatest extent practicable" out of the statute.

EPA's attempt to contend that burdens "are disproportionate to the accident prevention benefits that can be established," 2019 RTC at 40, only demonstrates how impermissible EPA's new statutory interpretation is. EPA would have the statute allow it to put a thumb on the scale against regulation – as EPA now admits the 2017 Executive Orders rely on directed it to do – upending *State Farm* and authorizing repeal of prevention measures unless someone can prove beyond a shadow of a doubt that they have measurable benefits. That hardly reflects the plain language's direction for "meaningful, prompt *action* by EPA to promote accident prevention." *Air Alliance Houston*, 906 F.3d at 1064. The statute does not authorize EPA to eliminate protections simply because their benefits are hard to quantify, especially when EPA had good reasons for adopting these requirements in the first place. The lives and well-being of Community Petitioners' members, workers at covered facilities,

[40] S. Rep. 101-228, at 238, 1990 U.S.C.C.A.N at 3622 (describing legislative intent for "timely regulatory response" by EPA to "high priority" problems to "overcome … regulatory inertia"); *id.* at 114, 1990 U.S.C.C.A.N. at 3592 ("If the Board makes recommendations, the Administrator is *to respond by issuing the proposed regulation* or order or stating why implementation of the recommendation would not be appropriate."); *id.* at 115, 1990 U.S.C.C.A.N. at 3593 ("The Board, through its investigations and reports, is to drive the regulatory agenda in this field.").

and community residents should not have to be monetized or otherwise quantified in order for EPA to take them seriously. And EPA's reading of the statute – which allows EPA to ignore the inherent value of their lives without even demonstrating that the prevention rules would definitively not save them – cannot be considered permissible in view of the statute's stated goals and strong Congressional priority for safety and injury prevention.

EPA's rationale that it can find regulation not "reasonable" simply because facility-specific enforcement would be more tailored fails at *Chevron* step two. EPA primarily applies this to rescind STAA, and EPA already tailored STAA to only the three industry sectors with the worst incident records. 82 Fed. Reg. at 4631, 4683; Chemical Disaster Rule RIA at 28-29. EPA's new conclusion that enforcement is preferable and permissible under the statute is unreasonable because it ignores this tailoring and generally ignores the possibility that regulations themselves may be tailored (instead of simply abandoned and replaced with enforcement). EPA's approach is unreasonable also because EPA considers only universe-wide accident rates instead of the rates for these particular sectors when concluding that more tailoring is needed. 2019 RTC at 35.

Further, Congress enacted 7412(r)(7) to prevent a U.S.-based Bhopal-level disaster, not to allow severe incidents to occur and then deal with the deaths, injuries, and other damage after they happen, and make the company pay, if it is still standing. S. Rep. No. 101-228, at 115, 1990 U.S.C.C.A.N., at 3519, EPA-HQ-OEM-2015-0725-0645. Congress specifically directed EPA to "regulat[e]" and emphasized "prevent[ion]," not post-hoc solutions like enforcement. As EPA originally admitted in its brief in the Delay Rule case, even one Bhopal-scale tragedy is worth preventing – and would have "dramatic" benefits. EPA Br. at 50, Air Alliance Houston v. EPA, No. 17-1155 (D.C. Cir. Jan. 31, 2018); Chemical Disaster Rule RIA at 88. Regulation is needed, because as EPA still admits, "market forces may not provide an incentive for any given company to invest in measures to prevent such accidents." 2019 RIA at 20.

EPA has not even attempted to present argument or factual findings that contradict these prior conclusions or the record on this point. While enforcement of the prior regulations is important, that alone has failed to prevent disasters in the past. Moreover, after-the-fact enforcement cannot substitute for prevention of a disaster in the first place. Any family member who has lost a loved one to a chemical fire, explosion, or toxic release knows this all too well. Any child who has ever had to shelter-in-place while wondering if their family member will be able to pick them up before a chemical plume hits their school knows this. Any first responder rushing into an incident without knowing where to go or what the precise location of the hazardous chemical is, due to the failure of the facility to hold a field exercise,

knows this. Congress told EPA to regulate to protect our nation from these incidents – not just clean up what is left after a disaster occurs.

Enforcement cannot possibly prevent harm at every high-risk facility, showing the irrationality of EPA's new statutory interpretation of the word "reasonable" to let it elevate enforcement over regulation. As commenters explained in response to EPA's proposed 2019 Rule, there were 1327 unique facilities in Program 3 alone (comprising 22% of the 5980 facilities in that category) that had accidents between 2004 and 2013. Comments of Community Pet'rs at 121. Program 3 facilities are those with the highest potential for a catastrophic disaster with off-site consequences.

And EPA's enforcement budget has been declining in recent years, at the request of the current President. *Id.* at 121-22; *see also* Office of Mgmt. and Budget, *A Budget for America's Future, Fiscal Year 2021* at 123 tbl.S-8 (showing proposed 26.5% cut in EPA's budget), https://www.whitehouse.gov/wp-content/uploads/2020/02/budget_fy21.pdf. EPA admits it has no intention of increasing enforcement. 84 Fed. Reg. at 69,843. Even if past enforcement has reduced incidents by a small percentage per year, there is no evidence it alone will prevent serious disasters. To the contrary, the Port Neches TPC explosion in November 2019, the Husky and Philadelphia Energy Solutions Refinery disasters in 2017 and 2019 respectively demonstrate how important stronger regulations are, wherever EPA may choose to strategically enforce them.

Finally, for all the reasons described elsewhere in this petition and in the comments, EPA is wrong about the reasonableness of its rollback decision. And, like EPA's new factual rationales and support, EPA's dramatically changed purpose and its new statutory interpretation require reconsideration and an opportunity for public comment so that Petitioners can demonstrate how inconsistent these statutory rationales are with the disaster prevention, and health and safety protection objectives of § 7412(r), on which EPA attempts to rely.

4. EPA Failed to Take Notice and Comment on Its New Interpretation, Causing Prejudicial Error that Requires Reconsideration

Finally, EPA failed to take notice and comment on this new unlawful and impermissible interpretation of the statute. 42 U.S.C. § 7607(d)(3)-(7), (h). For all the reasons described above, this was prejudicial to Petitioners. EPA must grant reconsideration, take comment on its new legal rationale, and should reject this new approach because it directly contradicts the statute's plain meaning, distorts the intention of Congress, undermines the core objectives of the statute, and runs directly counter to the agency's own original interpretation.

B. In Reaching Its New Conclusions, EPA Unlawfully and Arbitrarily Puts a Thumb on the Scale in Favor of Rescission

EPA effectively adopts a presumption against retaining its prior regulation, putting a heavy thumb on the scale in its analysis. This is unlawful. EPA purports to now rely on "available, more comprehensive data" that "does not demonstrate the efficacy of [the rescinded] requirement[s] across the board." 84 Fed. Reg. at 69,843 (emphasis added). The closest EPA gets to a conclusion is to say there is a "potential lack of effectiveness" of certain prevention measures but EPA fails to demonstrate these measures would not be effective. 84 Fed. Reg. at 69,851. Relying on data that "does not demonstrate" something is not the same as having data that does demonstrate the Chemical Disaster Rule's provisions do not work. Administrative law requires EPA have "good reasons" for changing policy, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), and data that fail to show anything is not a good reason for repealing measures EPA found would save lives. As EPA has already shown these prevention measures had merit and adopted them, EPA cannot now lawfully create a presumption against the retention of these existing regulations and rescind them based on EPA's own inability to reach an arbitrarily heightened standard of proof. *E.g.*, 2019 RTC at 50, 61-62.

EPA repeatedly errs on the side of repeal when data is uncertain or "speculative." 84 Fed. Reg. at 69,852. EPA puts the burden on the public to justify keeping the Chemical Disaster Rule's provisions. For example, EPA says it "is aware of no studies of property value impacts in areas surrounding RMP facilities that have had accidents, and no studies quantifying the reduction, if any, in non-RMP accidents at RMP facilities." 84 Fed. Reg. at 69,852. EPA assumes that "[w]ere these benefits sizeable, we think the multiple rounds of comments on the RFI, the 2017 Amendments rule, and the Reconsideration would have highlighted to us relevant studies." *Id.* Where EPA itself already adopted the requirements and concluded they had benefit, it cannot adopt a presumption of repeal and shift the burden of reasoned decisionmaking to the public. *See State Farm*, 463 U.S. at 41 ("the revocation of an extant regulation is substantially different than a failure to act."). EPA, not the public, must have "good reasons" for its action, *Fox*, 556 U.S. at 515, meaning EPA must provide data and evidence to support any change it desires to the *status quo*.

Yet EPA dismisses benefits as non-existent where it says it cannot "demonstrate" their effectiveness. *See, e.g.*, 84 Fed. Reg. at 69,847 ("We have placed greater weight on the lack of demonstrable accident prevention benefits."). This flies in the face of EPA's own prior conclusions. *Fox*, 556 U.S. at 515. EPA itself already concluded such benefits existed (and were needed) and supported those conclusions with significant evidence. *E.g.*, 82 Fed. Reg. at 4598. EPA fails to acknowledge or explain how it can contradict its own prior finding that "[b]ecause the requirements involve prevention of accidents before they occur, it is difficult to provide a quantitative assessment that the

requirement would reduce a certain number of accidents." Chemical Disaster Rule RTC at 131. Commenters noted this for EPA, but EPA did not respond. Comments of Community Pet'rs at 34. That is a violation of notice-and-comment, and a failure to respond to this significant comment, as the Act requires. 42 U.S.C. § 7607(d)(6). Moreover, EPA's own recognition that it is hard to prove a negative further belies its conclusion that the prior regulations are "working" or make any other conclusions based on the agency's inability to quantify certain benefits. EPA has failed to provide the "detailed explanation" needed to contradict its own prior finding that prevention would likely work and remove both incidents and harm.

Because the provisions EPA seeks to rescind have already been adopted by the agency, they are the *status quo* and the burden is now on EPA to disprove the existence of their benefits. Saying the agency does not know is the lack of a "good reason[]" for changing course, and certainly does not provided the "more detailed" explanation needed to rebut the agency's prior factual conclusions. *Fox*, 556 U.S. at 515. EPA cannot evade its burden in rulemaking here, or shift that burden to the public, and it cannot rescind its standing regulations based on the absence of a new finding.[41] *See Air Alliance Houston*, 906 F.3d at 1067 (finding EPA's purported conclusion that benefits were "speculative" was not supported and insufficient to justify change in course).

EPA's treatment of uncertainty is inconsistent, if not plainly biased. Where it favors the Administration's goals of reducing costs for industry, EPA is happy to speculate. For example, EPA hypothesizes with zero evidence that "[w]hen considering scarce resources, there even may be disbenefits from diverting resources towards costly STAA studies at those stationary sources that have successful accident prevention programs as shown by a record of no accidental releases." 84 Fed. Reg. at 69,863. EPA likewise presumes certain incident investigation requirements and STAA lack benefit because some facilities "may" already be doing them. *See, e.g.,* 84 Fed. Reg. at 69,872 ("many facilities may already employ root cause analysis techniques") (emphasis added); 2019 RTC at 49 ("sources … may [already] have even adopted IST measures ….). Again, EPA lacks evidence to support these speculations. And while EPA now rejects any "assum[ption]" of non-monetized benefits, the agency is happy to assume just the opposite – dismissing its own prior conclusions and common sense to determine, with no basis, that there are no significant non-monetized benefits from the prevention measures it rescinds. *E.g.,* 84 Fed. Reg. at 69,863; 2019 RTC at 233-34.

[41] As noted in Comments of Community Petitioners, EPA staff were concerned that without the phrase "unless significant non-monetized benefits are assumed," saying "the Agency believes it is likely that the costs associated with the prevention program provisions of the RMP Amendments exceed their benefits" would "directly conflict with [EPA's] finding in the final rule on page 4598." Comments of Community Pet'rs at 77 (citing email exchange between OMB and EPA).

EPA's approach violates standards of reasoned decisionmaking and is wholly arbitrary. To change policy, EPA must provide evidence and reasons rationally connected to that evidence. *Fox*, 556 U.S. at 515. It violates longstanding case law to require new and better evidence to support retaining existing regulation – retaining these protections is the default. If there is any presumption in a rulemaking, it is "not against safety regulation, but against changes in current policy that are not justified by the rulemaking record." *State Farm*, 463 U.S. at 42.

EPA may not rescind protections based on rampant speculation. *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994) ("speculation is an inadequate replacement for the agency's duty to undertake an examination of the relevant data and reasoned analysis"). EPA "must show that there are good reasons for the new policy." *Fox*, 556 U.S. at 515. Instead, EPA states only that it now "plac[es] greater weight on the lack of demonstrable accident prevention benefits than we had at the time of promulgating the 2017 RMP Amendments." 84 Fed. Reg. at 69,847. That is simply inadequate where EPA already showed these provisions had benefit and already adopted them. EPA is not acting on a blank slate, and so lack of data is not a reason for change – it is the absence of a reason.

C. EPA Added New Rationales to Attempt to Justify Rescission of Many Prevention Measures, Alleging For the First Time that the Chemical Disaster Rule's Prevention Measures Lack Benefits

1. *EPA Newly Questions the Chemical Disaster Rule's Benefits to Justify Repeal of its Provisions*

a. Overview

Though EPA introduced its OSHA coordination and costs rationales in the proposed rule, EPA changed its rationale significantly in the final rule. EPA now attempts to support its decision to rescind the prevention measures in the Chemical Disaster Rule by arguing that EPA has "call[ed] into question whether some of the originally projected accident reduction benefits claimed … would have been likely to occur." 84 Fed. Reg. at 69,839. EPA contends that it is now relying on that "question" about whether specific provisions would provide the benefit EPA originally found. These new suggestions are core parts of EPA's repeal rationale, yet EPA presents them for the first time in the final rule.

EPA attacks for the first time specific provisions of the Chemical Disaster Rule, saying that the agency "has not demonstrated any benefit" or there is a "lack of demonstrable accident prevention benefits," 84 Fed Reg. at 69,862, 69,847. This new rationale is discussed below in the subsequent subsections.

In addition to relying on its OSHA consistency and cost-saving rationales, EPA now also attempts to rely in significant part on these new benefits-related "question[s]." For example, EPA states that "reflecting on the potential burden of the changes adopted in the RMP Amendments as well as the lack of data concerning the benefits of the rule-driven approach adopted in the Amendments, we believe more work with OSHA on the issues being addressed would lead to better accident prevention." 84 Fed. Reg. at 69,844 (emphasis added). Similarly, EPA says it "does not have a record showing significant benefits of the added prevention program provisions." 84 Fed. Reg. at 69,862. Then, assuming what it fails to prove, EPA says "[w]ithout such benefits, EPA believes it is better to take its traditional approach of maintaining consistency with OSHA PSM." *Id.* (emphasis added). EPA explains that the "creation of additional complexity and burden associated with new provisions where EPA has not demonstrated any benefit is evidence of the new prevention provisions' impracticability and that the rule divergence is unreasonable." *Id.* (emphasis added). Treating its own failure to demonstrate anything as though it were proof, EPA says the data "call into question" the provisions' benefit and relies on that "question" to attempt to justify EPA's cost-focused approach. As EPA puts it, "it is better to reduce the costs of compliance with regulatory requirements, when that is reasonable and practicable and has no significant impact on accidental release prevention and response." 84 Fed. Reg. at 69,844 (emphasis added).

EPA asserts – but fails to demonstrate – that it has shown no benefits from the prevention regulations that could justify their repeal, particularly when the agency itself originally found they were necessary and would save lives. Nor has it shown that sufficient benefits can be obtained "at lower cost through implementing and enforcing the pre-2017 RMP prevention program rules." 84 Fed. Reg. at 69,843-44. EPA asserts this approach, which it now calls "compliance-driven" instead of "enforcement-led," 84 Fed. Reg. at 69,843, is therefore a more "appropriate execution of the statutory direction to establish reasonable regulations that promote the prevention, detection, and response to accidents to the greatest extent practicable …." 84 Fed. Reg. 69,843-44. That EPA no longer even calls this approach enforcement-led lays bare that EPA's approach to prevention will not assure any actual enforcement to ensure compliance. EPA notes that the Risk Management Program is part of an EPA National Compliance Initiative and cites its recent settlement with Chevron, but does not provide any numbers or further examples to show this will lead to meaningful improvement. 2019 RTC at 96.

EPA nowhere explains how it plans to better enforce the Risk Management Program compared to in the past. EPA actually abandons the label "enforcement-led" while admitting it will not actually increase enforcement. 84 Fed. Reg. at 69,867 ("EPA does not claim that enforcement will be increased, but that when a facility is not implementing a successful prevention program, the enhanced prevention program measures reflected in

the 2017 RMP Amendments (*e.g.*, implementing a third-party audit, conducting root cause analysis or examining safer technologies) can be applied as part of settlement agreements to the extent appropriate based on the violations alleged"). EPA now calls its preferred approach "compliance-driven." *Id.* While disparaging the measures it wishes to rescind as having speculative benefits, EPA provides no evidence that its compliance-driven approach will achieve any results whatsoever. Overall, EPA gives no indication that its "compliance-driven" approach means anything other than just doing the same thing the agency has done for the last twenty years.

Evidence shows EPA's current and past enforcement approach, alone, is ineffective for preventing disasters. The Port Neches TPC disaster occurred at a facility where EPA had attempted to enforce the pre-existing regulatory framework but still did not prevent thousands of people from being exposed to toxic chemicals, including 1,3-butadiene, and having to shelter-in-place for days, including over the Thanksgiving holiday in 2019, as cited above.[42]

Finally, it is particularly surprising that EPA would now dispute the benefits of its regulatory provisions when the record shows EPA's staff did not want to take this position. As commenters noted, OMB and the Administrator exerted significant influence on EPA's proposed rule. Comments of Community Pet'rs at 64, 74, 88-89, 109.[43] EPA staff responded to OMB's suggestions by emphasizing that "EPA does not support adding additional language regarding the merits of the three prevention provisions in the costs rationale section. EPA already discussed benefits of STAA, TPA and root cause in the proposed Amendments rule at 8[1] FR 13662-13667, 13654-13658 and [136]47-13650, respectively." EPA Response to OMB Comments at 12, para 28 (Apr. 12, 2018), EPA-HQ-OEM-2015-0725-0899. EPA does not acknowledge these comments in the final 2019 Rule.

b. EPA Failed to Take Notice and Comment on Its Determinations that Provisions Lack Demonstrable Benefits and the New Data that Allegedly Supports these Findings.

All of EPA's determinations about rescinded provisions lacking benefits are new, previously unpublished rationales for the 2019 Rule's changes to existing policy. EPA failed to notice these changes and take public comment on them, and their inclusion in the final rule creates new grounds for objection

[42] Consent Agreement under Section 113(d) of the Clean Air Act, (July 12, 2017), https://yosemite.epa.gov/OA/rhc/EPAAdmin.nsf/Filings/D91D47509AC159638525817F001BC516/$File/tpc.pdf.

[43] As an example, see the EPA-OMB communication during this rulemaking making clear that "the Administrator directed the proposal" to rescind prevention and weaken other requirements. Interagency Review Communications Between OMB and EPA - Email from Gerain Cogliano of EPA to OMB (attached summary document) (Mar. 15, 2018), EPA-HQ-OEM-2015-0725-0892.

which were not practicable to raise during the public comment period. Each new rationale or piece of data described in the follow subsections gives rise to significant new objections to the 2019 Rule. Because EPA has made these provisions' purported "lack of demonstrable accident prevention benefits," 84 Fed. Reg. at 69,847, a central rationale for its decisions to repeal them, these objections are of central relevance and EPA must grant reconsideration. The prejudice of each violation is discussed in more detail in the subsequent sections that discuss the specific new rationales and data EPA now provides.

The agency may not shield its rationales and factual support from public comment by including them only in its final rule. The Clean Air Act requires the support for a rulemaking, including all "the factual data on which the proposed rule is based" and "major legal interpretations and policy considerations" to be made available for notice and comment during the rulemaking – not after. 42 U.S.C. § 7607(d)(3). When EPA substantially changes the basis for its rulemaking it must republish the proposed changes for comment with the new basis. Here, where EPA substantially revised the support and rationales for its proposed changes, the final rule is not a "logical outgrowth" of EPA's proposal. *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1116 (D.C. Cir. 2019).

c. EPA Fails to Reconcile Its New Benefits Determinations with the Record, Where EPA Previously Found the Provisions It Now Rescinds Had Benefit and Were "Needed."

EPA fails to reconcile its new conclusions and rationales with the record, including its prior findings and determinations from the Chemical Disaster Rule. Without meaningfully addressing them, EPA dismisses all prior conclusions from the Chemical Disaster Rule as being based only on "information about individual incidents and opinions." 84 Fed. Reg. at 69,843. EPA does not actually assess or explain why any of the case studies it looked at or the final recommendations and investigative conclusions of the Chemical Safety Board are not a valid source of data. 84 Fed. Reg. at 69,843. EPA is just choosing to ignore its prior factual findings and the supportive evidence in the record showing a need for the Chemical Disaster Rule's provisions. This is contrary to law and arbitrary. *Fox*, 556 U.S. at 515. As EPA originally explained:

> In the [Chemical Disaster Rule], EPA identified specific incidents that <u>demonstrated failures and difficulties</u> in accident prevention, emergency response, and information availability despite the general effectiveness of Part 68. We have applied lessons learned from those incidents in developing the amendments adopted in the final rule. Several of the amendments in the final rule will <u>respond to CSB's suggested rule changes</u> based on their review of specific incidents, <u>which is consistent with the structure of CAA 112(r)(6)(C)(ii) and EPA's rulemaking authority in CAA 112(r)(7).</u>

> Some of the rule changes, such as new information availability provisions, will improve how existing provisions work (e.g., improving the public's access to existing disclosure). Some of the rule changes also will improve compliance by making compliance easier to verify (e.g., documentation of coordination with responders will simplify verifying compliance with the emergency response requirements of subpart E). In sum, the history of implementation of the RMP rule has given EPA sufficient experience to support modernizing and improving the underlying RMP rule and not simply resort to compliance oversight of the existing rule.

Chemical Disaster Rule RTC at 246 (emphasis added); see also EPA Activities Under EO 13650, Risk Management Program (RMP) Final Rule, Questions & Answers at 1 (Aug. 2017) (summarizing why updates are "necessary"). EPA determined that the Chemical Disaster Rule would prevent and reduce "the frequency and magnitude" of chemical disasters. 82 Fed. Reg. at 4683; 81 Fed. Reg. at 13,643 tbl. 4; Chemical Disaster Rule RIA at 87 ex. 6-5. EPA found there was a "regulatory need," for the improvements in the Chemical Disaster Rule RIA at 17. EPA determined that these improvements were both "reasonable" and "necessary updates to the existing RMP rule to ensure public safety" and to "advance process safety where needed." 82 Fed. Reg. 4597-99, 4600, 4683-85; Chemical Disaster Rule RIA at 73-77; 82 Fed. Reg. 4604, 4607, 4616, 4656, 4665; Chemical Disaster Rule RTC at 247. EPA fails to grapple with or disprove these original determinations or rationales in the 2019 Rule and its novel attempts to do so in a drive-by manner in the final rule require reconsideration.

2. EPA's Conclusion That Accident Rates Are Declining Is Based on Evidence Not Subject to Notice and Comment.

In deciding to rescind and weaken the Chemical Disaster Rule's protections, EPA relied heavily on a new conclusion in the final 2019 Rule that pre-existing regulations "are working and that the cost of additional prevention requirements may not be necessary." 84 Fed. Reg. at 69,863. This is a central and crosscutting rationale for the entire 2019 Rule. *Id.*; *see also* 83 Fed. Reg. 24,871 (proposal). EPA supports this conclusion by identifying a declining rate of accidents per year from 2004 to 2016. 84 Fed. Reg. at 69,852. EPA described this "downward trend" as "evidence that the prevention elements of the pre-Amendments RMP rule are working." 84 Fed. Reg. at 69,863.

The invalidity and irrelevance of EPA's conclusion that accident rates are declining were discussed in comments on the proposed rule, *e.g.*, Comments of Community Pet'rs at 87-89, and above in this petition where new evidence further undermines these claims, *see* Part I, *supra*.

Of relevance to this section, EPA sought to support this conclusion with a spreadsheet added to the docket in October 2018, after the close of comment. *See* EPA–HQ–OEM–2015–0725–1974; 84 Fed. Reg. at 69,846-47. EPA still has not put the database it generated this spreadsheet from into the docket. Petitioners were able to receive a copy of this only after the comment period closed and by special request, and have submitted it here for the docket. Sept. 2018 RMP Database (disc containing databases and other supporting material provided on February 18, 2020, by hand delivery from Earthjustice to Office of Land and Emergency Management staff). EPA admits that if the data showed a change in the trend, "it may have been of central relevance to our rulemaking and we would have considered reopening the comment period." 84 Fed. Reg. at 69,865–66 & n.55. But without exposing it to public comment, EPA knows there is no way for the public to evaluate or identify errors that showed EPA's alleged trend was mistaken. Indeed, the latest accident data from EPA's most recent database version, Sept. 2019 Database (which Petitioner UCS received under FOIA in 2019 (also included on disc submitted to EPA OLEM staff), do undermine EPA's purported trend, as discussed above. Failing to make this data available for comment violates the Clean Air Act's procedural requirements, 42 U.S.C. § 7607, and requires EPA to grant reconsideration to afford the public the procedural rights it should have had to begin with, 42 U.S.C. § 7607(d)(7)(B).

3. *EPA's New Rationale That STAA Might Potentially Be Ineffective Is Based on Data and Rationales Not Subject to Comment and Is Erroneous.*

To justify rescinding STAA, EPA relies on brand new data from two states cherry picked to support its novel assertion that STAA lacks benefit. Out of four states that commenters advised EPA of, all of which have adopted some kind of requirement for safer technologies to prevent disasters, EPA selected two and provided previously-unpublished data narrowly selected to make those states' programs looks unsuccessful. The best EPA can conclude is that "the STAA provision … may not have had a significant impact on accident prevention." 84 Fed. Reg. at 69,853 (emphasis added). Even that is wrong.

EPA has failed to demonstrate STAA would not have benefits, and has failed to even show that data from these states lets it draw a meaningful conclusion about accident rates when the datasets are so small and accident frequency and impact data is so highly variable. EPA's new rationale and data must be subject to public comment, so the public can show why they are arbitrary and misleading, and why they fail to rebut the substantial evidence showing the value of safer technology requirements like STAA to prevent and reduce harm from chemical disasters.

For the first time when releasing the final 2019 Rule, EPA announced it "has now conducted a detailed analysis of RMP-facility accident rates in New

Jersey and Massachusetts—two states with long-established state-level regulations comparable to the [Chemical Disaster Rule's Safer Technology and Alternatives Assessment ("STAA")] provision—and found that accident rates in these states have not improved more than accident rates at RMP facilities nationwide." 84 Fed. Reg. at 69,852. This wholly new rationale was absent from EPA's proposed rule and is now EPA's main reason for concluding STAA lacks benefit in the final rule. EPA presents its new data in a Technical Background Document ("TBD") that was published with EPA's final rule and not presented for public notice and comment. EPA, Technical Background Document (July 18, 2019), EPA-HQ-OEM-2015-0725-2063. EPA also suggests for the first time that "imposing the burden of the new STAA assessments on whole industry sectors when most individual sources have successful accident prevention programs" may be "even counterproductive for safety." 2019 RTC at 40. EPA provides no support at all for this latter statement.

EPA's failure to provide this data and analysis previously, during the period for public comment, violates the Clean Air Act's rulemaking requirements because it is now a key rationale for EPA's final action. As discussed above, because EPA makes accident rates so central to its conclusions, EPA should also have provided (and used) the latest 2019 RMP database, to enable commenters to see a full picture of the data and respond appropriately to EPA's rationale. EPA's failure to include the TBD and this rationale violate the Clean Air Act's procedural requirements for rulemaking in § 7607 and undermine a central rationale for EPA's repeal of STAA. Because these are new rationales and data that were impracticable to comment on during the period for public participation, EPA also must grant reconsideration and provide the public their procedural rights to respond to this new rationale and data under § 7607(d)(7)(B).

To attack the benefit of STAA, EPA relies centrally on its comparison of national accident rates to NJ and MA accident rates. 84 Fed. Reg. at 69,852; 2019 RTC at 145-46. Myriad problems vitiate EPA's analysis.

First, as discussed above, all of EPA's accident-rate analyses are unreliable because EPA failed to use the most recent 2019 database, which includes many more disasters than the 2015 or 2017 databases EPA examined. *See* Part I.C, *supra*; Sivin, *supra*. EPA's national database is not complete for recent years because of reporting delays. When EPA compares state data to national data to conclude the states show less of a decline, this is misleading because EPA's comparator (the national data) is inaccurate and overestimates any national rate of decline, making these states' average decline in accident rates appear relatively lower by comparison. This is especially significant because RMP accident data has such high variance from year to year and EPA's sample of years is so small. The national average rate changes EPA considers are relatively meaningless, because EPA has not shown they are due to anything other than chance.

At the state level, the accident rates are objectively quite low in New Jersey and Massachusetts; however, these two states are home to low numbers of facilities, so even one accident makes the "rate" look a lot higher than any nationally reported numbers. EPA even admits "there is high annual variation in the state-level accident data due to the smaller population of RMP facilities as compared to the national data set, so any trend extrapolated from such data should be interpreted cautiously." TBD at 41. Rate calculations are inflated because the denominator – the total number of facilities in each state – is so small. TBD at 34-40. A single accident among the 71 facilities in New Jersey in 2013 (compared with 12,669 facilities nationwide in the same year) results in an accident rate of 0.0128, for example, because the denominator is so low. TBD at 36 tbl.3 (New Jersey), 34 tbl.2 (national); *see also* TBD at 40 tbl.5 (Massachusetts). That rate is higher than any year's national accident rate, but the comparison is not meaningful. TBD at 34 tbl.2 (national). Having such large rate numbers because of the small sample size will skew calculations of how those rates change, so EPA's reliance on average accident rates is once again misplaced and arbitrary. *See also* Sivin Report at 2, 5, 17.

Second, it appears that for Massachusetts, EPA is comparing the total number of accidents there with only the number of impact accidents nationally. Sivin, *supra*, at 13-15. Table 4 in EPA's Technical Background Document reports impact accident numbers, but the state data EPA compares it to also includes accidents without impacts. *Compare* TBD at 34 tbls. 2 and 4 *with* 2019 RIA at 38 ex.3-8 (reporting same accident totals as "Reportable (Impact) Accidents"). Reviewing EPA's own spreadsheet of incidents from 2004 to 2013, there were only four impact disasters in Massachusetts in this time frame and all the others that EPA now appears to count were not reportable. *See* 2004-13 Accident Data Spreadsheet, EPA-HQ-OEM-2015-0725-0002. This shows not only that EPA's analysis is arbitrary and capricious, but also that IST requirements do work and do reduce harm. EPA also does not show the facilities it identified as having accidents are even covered by the state's Toxic Use Reduction Act.

Third, EPA abjectly fails to grapple with any of the data commenters submitted showing the benefits of New Jersey and Massachusetts' programs. Comments of Community Pet'rs at 31-38; Comment submitted by Barbara D. Underwood, New York Attorney General, *et al.* (Aug. 23, 2018) pp. 36-37, EPA-HQ-OEM-2015-0725-1925. EPA does not respond to the fact that Massachusetts has significantly reduced the quantity of toxic chemicals in use, with recorded improvements in health and safety, for example. Comments of Community Pet'rs 37-38. EPA's rationales for outright ignoring the data submitted from Contra Costa County and California's prevention programs are unpersuasive and show EPA is picking and choosing only the data that suits it.

Both of those programs were developed based on extensive findings that IST is helpful and prevents harm.

Finally, EPA is not looking at the right subset of facilities for these states. In the Chemical Disaster Rule, EPA only applied the STAA requirement to the three sectors it found had the highest accident rates: refineries, chemical plants, and pulp and paper mills. EPA found these "[t]hree sectors have significantly higher accidents rates as compared to other sectors: 1.08 (petroleum and coal products manufacturing), 0.66 (paper manufacturing) and 0.36 (chemical manufacturing)." 81 Fed. Reg. at 13,668; see also Chemical Disaster Rule RIA at 32 ex. 3-9. Together, EPA concludes that the "[a]ccidents from these three sectors accounted for 49% of all RMP reportable accidents." 2019 RIA at 33-34. It is arbitrary and capricious for EPA to base rescission of STAA on state accident levels as a group, without even looking at the accident levels for the specific sectors affected. If EPA collects complete data and resolves other errors to attempt to accurately compare accident rates, then EPA should compare the accident rate at affected facilities (*i.e.*, in these sectors, across Program 3) with the comparable rates nationally. But of course, any such comparison must take account of the fact that denominators would be so small in these states as to make a "rate" calculation meaningless. EPA has failed to conduct something like a time-to-failure analysis that is somewhat less sensitive to the number of facilities in each state and sector.

With regard to EPA's conclusion that STAA may be "counterproductive for safety," 2019 RTC at 40, EPA provides no data or factual support at all. This is also entirely speculative and is an arbitrary and capricious reason for rescinding the requirement.

EPA's decision to write off STAA and other prevention measures due to the agency's change in determination of their likely benefits is also arbitrary because of how EPA ignores CSB's determination that these measures would be effective and reduce harm from chemical disasters. *See, e.g.*, CSB Chevron Regulatory Report; Tesoro Report; DuPont LaPorte Report (all in the docket and attached and cited by Community Petitioners' Aug. 2018 comments). EPA now attempts to walk back the fact that the Chemical Disaster Rule was a regulatory response to important CSB recommendations, by citing letters it sent CSB before issuing that regulation. 2019 RTC at 52. EPA cannot rewrite its own statement that the Chemical Disaster Rule "respond[ed] to CSB's suggested rule changes based on their review of specific incidents." Chemical Disaster Rule RTC at 52. The provisions EPA now rescinds were consistent with CSB's well-informed, expert recommendations, and the 2019 Rule directly contradicts and revokes EPA's prior choice to respond by implementing those recommendations.

Finally, and importantly, EPA's attempt to attack IST using a few years of data from two states is a shocking conclusion out of step with the scientific,

agency expert, and even industry consensus for years regarding the value of inherently safer technologies, practices, and processes. A petition filed by over 100 organizations with EPA and with the President, over 10 years ago, well-demonstrated the value of IST, and is partly what led to this rulemaking in the first place. Petition from Coalition to Prevent Chemical Disasters (July 25, 2012), EPA-HQ-OEM-2015-0725-0249, available at https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0249. EPA, the CSB, and industry's own documents in the record well demonstrate the effectiveness of IST and belie EPA's attempt to write this important safety measure off using the NJ and MA data. *See, e.g.,* CSB, Investigation Report: Catastrophic Rupture Of Heat Exchanger, Tesoro Anacortes Refinery, at 114 (May 2014) (recommending IST); Comments of Community Pet'rs at 29-42; 82 Fed. Reg. at 4631.

As cited above, a new book, titled *What Went Wrong*, has even come out since the comment period closed with case studies that only further demonstrate the need and value for EPA to require the STAA here. Notably, EPA attempts to ignore data from Contra Costa County and California similarly showing its effectiveness – only further demonstrating how irrational EPA's conclusion is. If it has to ignore large bodies of evidence in order to reach its determination, that determination simply cannot stand. *State Farm*, 463 U.S. at 43 (arbitrary and capricious to ignore relevant facts in the record and an important part of the problem).

In sum, in view of the strong record evidence that STAA has benefits, including CSB's recommendations (which the statute requires EPA to consider), EPA's new suggestion that the STAA "may not have had a significant impact on accident prevention" does not justify repeal of this provision, 84 Fed. Reg. 69,853. EPA does not even present this as a conclusion so much as a tentative possibility. EPA's latest attempt to try to justify repealing prevention measures it previously found would save lives is nothing more than the "speculative" exercise that it attempted in the Delay Rule – where the court called out EPA's inability to contradict its strong original findings that the Chemical Disaster Rule was necessary to save lives. *Air Alliance Houston*, 906 F.3d at 1067-68 (finding EPA had done nothing more than find "speculative but likely minimal … foregone benefits").

4. *EPA Relies on its Latest Database to Dispute the Importance of Recent Accidents, But Fails to Provide that Data in the Docket*

EPA's new TBD also responds to specific incidents that petitioners submitted to EPA in their comments to demonstrate the need for improved accident protections. EPA now arbitrarily discards the relevance of all such incidents where commenters were unable to prove the events involved RMP chemicals. EPA cites data from its latest database do so in some cases. *See, e.g.*, TBD at 6, 7 (referencing events in the database through late 2018). EPA's

failure to provide this database so that the public, including Community Petitioners, could also look up these incidents violates the Clean Air Act's requirements to make "the factual data on which the proposed rule is based" available for public comment. 42 U.S.C. § 7607(d)(3).

For example, EPA arbitrarily selected 10 of 92 incidents for which Community Petitioners provided information for review. 2019 RTC at 278. EPA gave no explanation for how or why it chose those ten or how reviewing only such a small subset of the incidents could prove that they are not relevant to demonstrate the need for the prevention regulations, and in particular for these regulations in hurricane-prone areas. Without the database, the public could not look up these incidents during the period for public comment and submit their own analyses. Further, in view of the Office of Inspector General Report highlighting EPA's own lack of data, EPA cannot rationally justify its newly presented conclusion that Hurricane Harvey does not show the need for the prevention provisions, RTC at 61.

5. *EPA's New Conclusion That Auditing of "Each Covered Process" Is Unnecessary and Did Not Foreclose Representative Sampling Was Not Subject to Comment and Is Erroneous.*

In the 2019 Rule, EPA newly asserts it was "not necessary to add the phrase ['each covered process']" because "EPA's view that compliance audits must evaluate every process every three years does not foreclose the use of 'representative sampling.'" 84 Fed. Reg. at 69,882-83; 2019 RTC at 151-52. This is a new rationale that was not practicable to comment on during the period for public comment and is of central relevance because it is now one of EPA's key rationales for rescinding this protection.

EPA is rewriting history. When EPA added the language "each covered process" in the Chemical Disaster Rule, it did so specifically to ensure that facilities would audit every process – not a representative sample. Chemical Disaster Rule RTC at 54-55. Responding to comments that this was inconsistent with industry guidelines approved by EPA, "EPA disagree[d] that the CCPS guidelines endorse allowing large facilities to audit a representative sample of covered processes." Chemical Disaster Rule RTC at 55; 82 Fed. Reg. at 4614. Responding to industry concerns about the effect of auditing every process (instead of a sample), EPA disagreed that auditing every process would be redundant or punitive. Chemical Disaster Rule RTC at 55; 82 Fed. Reg. at 4614. EPA's new rationale is therefore arbitrary and capricious because it disregards and contradicts the agency's prior statements without even "display[ing] awareness that it is changing position," much less providing the requisite "more detailed" explanation. *Fox*, 556 U.S. at 515. Because this rationale is a central reason EPA concludes it can rescind this provision, it is of central relevance and EPA must grant reconsideration to allow for public comment.

6. *EPA's New Conclusion That Facilities Already Address Incident Investigations in Hazard Reviews and Process Hazard Analyses Was Not Subject to Comment and Is Erroneous.*

EPA also invented new rationales for its decision to remove the requirement for facilities to consider incident investigation results in Hazard Reviews (40 C.F.R. § 68.50) and Process Hazard Analyses ("PHA") (40 C.F.R. § 68.67). For the PHAs, which apply to Program 3 facilities, EPA asserts for the first time in its final rule that the requirement to consider incident investigation results is "unnecessary" because "the PHA must already identify "any previous incident which had a likely potential for catastrophic consequences' and paragraph (c)(4) requires the PHA to consider the '[c]onsequences of failure of engineering and administrative controls.'" 84 Fed. Reg. at 69,884. EPA then says it is "rescinding the provision to keep Program 2 requirements less burdensome than Program 3." 84 Fed. Reg. at 69,883. EPA did propose keeping Program 2 less burdensome than Program 3, but did not propose the underlying rationale for rescinding the Program 3 (PHA) requirement in this case. 83 Fed. Reg. at 24,865. EPA also asserts for the first time that it "expects that Program 2 facilities are already using incident investigations to identify situations that could cause an accidental release" because facilities must "promptly address and resolve investigation findings and recommendations, with resolutions and corrective actions documented." 84 Fed. Reg. at 69,883.

By failing to publish these rationales for notice and comment, EPA violated notice and comment requirements of the Clean Air Act. 42 U.S.C. § 7607(d), (h). Further, EPA's new rationales for rescinding these two requirements conflict with the agency's justifications for them in the Chemical Disaster Rule, where EPA found requiring PHAs and Hazard Reviews to address the findings of incident investigations would be complementary to pre-existing requirements and would be beneficial. *E.g.,* 82 Fed. Reg. at 4604–05. EPA did not find these requirements duplicative or at all redundant. The agency fails to meet its burden to provide a "good reasons" for changing its view of these provisions and EPA's new rationale is therefore arbitrary and capricious because it ignores and indeed contradicts the agency's prior statements without providing the requisite "more detailed" explanation for EPA's change. *Fox*, 556 U.S. at 515.

7. *EPA's Conclusion That Exercise Requirements Should Be Delayed and Weakened Is Based on New Data That Was Not Subject to Comment and New Claim of Legal Authority.*

One of EPA's central rationales for eliminating the minimum frequency for field exercises in the 2019 Rule is EPA's "concern[] about the burden of exercises on communities with numerous RMP facilities." 84 Fed. Reg. at 69,901; 83 Fed. Reg. at 24,876. For the first time in its final rule, EPA attempts to provide evidence – citing nine U.S. counties that contain over 50 RMP

facilities. 84 Fed. Reg. at 69,901 & n.104. EPA does not cite evidence that first responders in these counties lack resources to handle this many facilities, or any other evidence that these provisions, which first responders have supported in the past, would not be valuable to strengthen emergency response. 2019 RTC at 67; *but see* Comment submitted by Harold A. Schaitberger, General President, International Association of Fire Fighters (IAFF) (May 19, 2017), EPA-HQ-OEM-2015-0725-0834 (opposing any delay of 2017 provisions, including emergency exercises). In EPA's proposed rule, this rationale was mere speculation without any evidentiary basis. *See* 83 Fed. Reg. 24,876 ("In [unidentified] communities with multiple RMP facilities, this could result in excessive demands on local responders to participate in notification drills and exercises ...." (emphasis added)). For the first time in its final rule, EPA provides data that purports to support EPA's decision.

EPA may not shield the factual basis for its rulemakings from public comment by including facts only in its final rule – particularly where that basis is weak and needs to be tested by public input. The Clean Air Act requires the support for a rulemaking, including all "the factual data on which the proposed rule is based," be made available for notice and comment during the rulemaking – not after. 42 U.S.C. § 7607(d)(3). By failing to identify any such counties in its proposed rule and offering only speculation that this could become an issue, EPA violated the Clean Air Act's notice and comment requirements. *Id.* § 7607(d), (h).

Had EPA provided the county-specific data it now relies on, commenters could have better understood the agency's concerns. Communities from counties EPA cites, like Harris County, TX, could have weighed in to explain why EPA's rationale did not make sense for their communities. Some of the Petitioner groups have members in Harris County, for example, who have spoken in the past about how important these provisions are for their communities.

EPA explains in the final rule that if it retained a 10-year minimum frequency for field exercises, "local emergency responders in these counties, and others with large numbers of RMP facilities, may have no practical way to effectively participate in all required field exercises conducted ...." But EPA is also clear that "the final rule does not require local responders to participate in facility exercises." 84 Fed. Reg. at 69,901. EPA says "it is in the best interest of regulated facilities and their surrounding communities for local responders to participate in exercises whenever possible." 84 Fed. Reg. at 69,901. Commenters agree. But EPA does not explain why exercises conducted without first responders lack benefit. As EPA acknowledged even in its proposed 2019 Rule, exercises are critically important. 83 Fed. Reg. at 24,861. This includes facility-only field exercises.

Removing a minimum frequency for field exercises will not change first responder participation at all – it will just result in fewer exercises being conducted without them. If first responders in an area are capable of participating in *X* field exercises per year, that number does not change one way or another based on whether EPA sets a minimum frequency for facilities to conduct exercises. If facilities conduct *Y* exercises in a year, then there are two possibilities – setting a minimum frequency has benefits in both cases:

- If *X* is less than *Y*, then first responders can participate in up to *X* of the *Y* exercises. Setting a minimum frequency for facilities to run field exercises does not decrease their participation at all – they still participate in *X* exercises. Other exercises will happen without them, which still have benefit. First responders in such counties can rotate which *X* facilities they conduct exercises with each year to assure coverage of all facilities over time.
- If *X* is greater than or equal to *Y*, then the first responders can participate in all the exercises. EPA does not dispute that this is what would happen in most counties across the United States.

On the other hand, eliminating any minimum frequency for field exercises will likely decrease the number of exercises conducted with first responders. If the overall number of exercises that occurs, *Y*, drops below the number that first responders are capable of handling, *X*, then fewer exercises with responders will be happening. Moreover, EPA does not dispute that most counties in the country do not have "numerous RMP facilities." 2019 RTC at 67. For all of these, removing the minimum frequency will likely reduce the number of exercises occurring below what first responders could otherwise handle.

Because the likely effect of removing the minimum frequency is to weaken disaster preparation and response, the change violates § 7412(r)(7). Because its effect is contrary to EPA's intent and because it is irrational, it is also arbitrary and capricious.

EPA also provides a new legal basis for its changes to the exercise provision. EPA argues in the final rule (also for the first time) that "the Clean Air Act contains no requirement that EPA impose an exercise requirement under section 112(r)." 84 Fed. Reg. at 69,901. For the first time, EPA grounds it analysis of the exercise provisions in § 7412(r)(7)(B), asking "whether regulations are both reasonable and practicable" in light of "costs to regulated entities but also impacts on local emergency response organizations and their ability to carry out coordinated planning for response." 2019 RTC at 40. But if § 7412(r)(7)(B) applies then there are two new legal problems with EPA's rescission of any deadline or minimum frequency to conduct field exercises.

First, it is not "reasonable" to create a regulatory requirement with no deadline, and such a requirement certainly does not provide for responses "to the greatest extent practicable." 42 U.S.C. § 7412(r)(7)(B). EPA has not met its burden to show it would be impracticable for sources – the regulated entities here – to conduct more exercises. *Air Alliance Houston*, 906 F.3d at 1064. EPA previously found "[e]xercising an emergency response plan is critical to ensure that response personnel understand their roles, that local emergency responders are familiar with the hazards at the facility, and that the emergency response plan is appropriate and up-to-date." 81 Fed. Reg. at 13,674. Many of these benefits can be obtained even if first responders are not available for every exercise iteration. EPA specifically found "[p]oor emergency response procedures during some recent accidents have highlighted the need for facilities to conduct periodic emergency response exercises." *Id.* EPA cited a number of concrete examples in support of this finding. *Id.* at 13,674-75. Without showing it would actually be unreasonable or impracticable to conduct field exercises on a periodic timeline, EPA cannot rescind any deadline whatsoever to do them.

Second, if EPA is making changes to the exercise requirements under the authority of § 7412(r)(7)(B), then it must comply with that section's requirements for compliance and effective dates. While subsection (A) gives EPA some discretion to set an effective date "assuring compliance as expeditiously as practicable," 42 U.S.C. § 7412(r)(7)(A), subsection (B) requires that rules "shall be applicable to a stationary source 3 years after the date of promulgation, or 3 years after the date on which a regulated substance present at the source in more than threshold amounts is first listed under paragraph (3), whichever is later," 42 U.S.C. § 7412(r)(7)(B). The new compliance dates for exercise provisions all exceed this three year limit. EPA requires sources to submit a plan for compliance within 4 years, and then gives them additional time to complete their first exercises. 84 Fed. Reg. at 69,907. The first notification exercise is due five years from the effective date of the 2019 Rule, the first tabletop exercise is due in eight years, and there is no deadline for the first, or for any future, field exercise to be completed. 84 Fed. Reg. at 69,907. This violates § 7412(r)(7)(B).

Finally, EPA also newly concludes the extended compliance dates cause no harm at all. 2019 RTC at 69; *compare* 83 Fed. Reg. at 24,875 (saying nothing about costs of delay; proposing delay only based on potential burden). This is entirely illogical. Specifically, EPA says "[t]he extended compliance dates do not endanger the public, emergency responders, or the environment because in every case they relate to provisions which have not yet been implemented, so delaying compliance causes no loss of public or environmental protection relative to the pre-Amendments rule, which remains fully in effect during the phase-in of the new provisions." 2019 RTC at 69. This ignores the opportunity cost from delaying something. If you delay compliance with a protective provision, the benefits of that provision will be delayed, and therefore

lost, for a period of time. *Air Alliance Houston*, 906 F.3d at 1058 (finding harm from delay of emergency coordination provisions). That is a cost, especially where the protective provisions were designed to save lives by preparing facilities and responders for worst-case disaster scenarios. *Id.* If the delay means a facility or first responders are unprepared to deal with a disaster that occurs in the coming years, the consequences could be unimaginable.

All of these are objections of central relevance to EPA's delay and weakening of the emergency exercise provisions. Because it was impracticable to raise them during the period for public comment, EPA must grant reconsideration.

8. *EPA's Decision Not to Consider the Prevention of Non-RMP Disasters, Including So-Called "Near Misses," as a Benefit Was Not Subject to Comment and Is Erroneous.*

When EPA promulgated the Chemical Disaster Rule, EPA considered the "prevention and mitigation of non-RMP accidents at RMP facilities" to be a significant category of benefits. 82 Fed. Reg. 4598 & tbl.4. Indeed, preventing such incidents is critical because it is often just such incidents that end up leading to a major catastrophe when matters escalate. It is for this reason, for example, that EPA sought to clarify that incident investigations should be required for "near miss" events. *See, e.g.*, 82 Fed. Reg. at 4606 ("While most of these events did not result in deaths, injuries, adverse health or environmental effects, or sheltering-in-place, the Agency believes that in some cases, if circumstances had been slightly different, a catastrophic release could reasonably have occurred."). For example, a non-RMP disaster at the Torrance Refinery in 2015 caused shrapnel and debris to nearly collide with an enormous tank of hydrofluoric acid. CSB, ExxonMobil Torrance Refinery, Electrostatic Precipitator Explosion: Final Report at 6 (May 2017), https://www.csb.gov/exxonmobil-refinery-explosion-/. As the CSB described during the investigation: "had the debris struck the tank, a rupture could have been possible, resulting in a potentially catastrophic release of extremely toxic modified [hydrofluoric acid] into the neighboring community" with potential to cause serious harm to the "333,000 residents, 71 schools, and eight hospitals" within a three-mile radius. CSB, U.S. Chemical Safety Board Finds Multiple Safety Deficiencies Led to February 2015 Explosion and Serious Near Miss at the Exxon Mobil Refinery in Torrance, California (Jan. 13, 2016), http://www.csb.gov/us-chemical-safety-board-finds-multiple-safety-deficiencies-led-to-february-2015-explosion-and-serious-near-miss-at-the-exxon-mobil-refinery-in-torrance-california/.

In the final 2019 Rule, EPA made a profound about-face and now states that the agency cannot legally consider "harms not attributable to the release of a regulated substance" under its Clean Air Act § 112(r)(7) authority. 84 Fed. Reg. at 69,858-59. EPA fails to explain why this is so under the statute. Given

that catastrophic incidents most often result from the escalation of smaller incidents, it would be impossible for "regulations … to provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances," 42 U.S.C. § 7412(r)(7)(B)(i) without considering fires, explosions, and other non-RMP releases that could escalate into RMP disasters.

The plain language of the statute requires this, and so EPA's new interpretation of the statute fails at *Chevron* step one. *Chevron*, 467 U.S. at 842. EPA fails to provide any statutory interpretation that would foreclose this. Because prevention of RMP releases inherently requires preventing non-RMP releases, it would be impossible to read the statute as preventing EPA from considering the latter as a benefit to its regulations.

EPA's new interpretation is likewise impermissible at *Chevron* step two, *Chevron*, 467 U.S. 837, 843, because it would unreasonably prevent the agency from solving the problem Congress asked it to solve: preventing catastrophic disasters. 42 U.S.C. § 7412(r)(1), (7). Rather than doing as the statute directs, EPA has adopted an unexplained statutory interpretation that hamstrings its ability to solve this problem by preventing the agency from considering an essential aspect. It would be virtually impossible to prevent RMP disasters without also preventing non-RMP disasters at the same sites, particularly those that "could reasonably have resulted in" release of an RMP chemical. 40 C.F.R. § 68.60(a), 68.81(a); 82 Fed. Reg. at 4606. EPA has for years recognized that it must require facilities to investigate such incidents under the RMP program, 81 Fed. Reg. at 13,646-47, 13,651-52, and considered the prevention of non-RMP incidents a significant benefit of its regulations, 82 Fed. Reg. at 4598 tbl.4.

The agency's new position is unfounded and its change of position unexplained. When developing the Chemical Disaster Rule EPA itself believed there were significant benefits in the form of preventing non-RMP disasters at RMP facilities from these protections and considered these benefits in weighing the rule's costs and benefits. 82 Fed. Reg. at 4598 & tbl.4. Declining to consider them now is arbitrary and capricious. *Fox*, 556 U.S. at 515.

Further, if rescinding accident prevention requirements from the Chemical Disaster Rule will have the effect of increasing non-RMP accidents, it is not rational to ignore that. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (not "rational" to ignore significant costs of a rulemaking action). It is arbitrary for EPA to disregard these accident impacts when the prevention measures it rescinds, like STAA or incident investigation requirements, could have helped prevent such incidents in the future or mitigate their consequences. "[A]ny disadvantage" of repealing the Chemical Disaster Rule's provisions "could be termed a cost," and so to the extent the statute permits cost consideration it is arbitrary for EPA to ignore these significant

consequences of the 2019 Rule. *Michigan*, 135 S.Ct. at 2707 (noting "'cost' includes more than the expense of complying with regulations").

EPA now calls these benefits "speculative," 84 Fed. Reg. at 69,852, and expresses doubt that they are "sizeable." 84 Fed. Reg. 69,852. EPA appears to discount them because they have not been quantified, 84 Fed. Reg. at 69,852, explaining "no studies quantifying the reduction" were submitted in comments, *id.* This ignores several obvious facts: (1) it is extremely hard to measure prevention effects because you are looking at the absence of an effect; and (2) EPA is in the best position to obtain such data, if it is possible at all, and in any case it would be exceedingly difficult for the public to obtain data like that. In promulgating the Chemical Disaster Rule, EPA specifically rejected the argument that these benefits needed to be quantified. Chemical Disaster Rule RTC at 220-21. Further, commenters on the 2019 Rule proposal explained the importance of preventing such incidents and described some of their impacts. Comments of Community Pet'rs at 12-13, 22. Many such events cause evacuations or shelter-in-place orders and release significant air pollution into the community. EPA's choice not to quantify or consider these impacts does not negate its tremendous public health and economic effect on affected communities.

The agency's failure to acknowledge its changes in position, much less to respond to or rebut its prior analysis, renders EPA's entire rulemaking arbitrary and capricious. *Fox*, 556 U.S. at 515.

D. The DOJ Report That EPA Centrally Relies on To Justify Rescission of Public Information Access Provisions Was Not Subject to Comment and Does Not Justify This Rule Change.

Responding to comments on its lack of support for the security concerns that EPA relies on to repeal informational provisions, EPA's final 2019 Rule relies primarily on a DOJ report to support its concerns. *See, e.g.*, 84 Fed. Reg. at 69,885 ("We rely on the findings of DOJ in its report required by CSISSFRRA."); *see also* 84 Fed. Reg. at 69,887 & n.96 (citing DOJ, Assessment of the Increased Risk of Terrorist or Other Criminal Activity Associated with Posting Off-Site Consequence Analysis Information on the Internet (April 18, 2000), EPA-HQ-OEM-2015-0725-2003). But this report was not mentioned in the proposed rule or included in EPA's docket prior to publication of the final rule.

By relying centrally on this report in the final 2019 Rule to support its theory that "assembly of information that was otherwise public had value" to terrorists and creates a security concern, EPA violated notice and comment requirements. 84 Fed. Reg. at 69,887; 42 U.S.C. § 7607(d), (h). EPA's proposed rule asserted that assembly of otherwise-public information could create a security risk, but the public was unable to meaningfully comment on this

rationale since it lacked any evidentiary support at that time. *See* 83 Fed. Reg. at 24,867 (not citing any basis for EPA's concern that "synthesis of the required information disclosure elements could create an additional security risk for facilities."). Commenters pointed out that EPA had no evidence to support this concern. *E.g.*, Comments of Community Pet'rs *et al.* at 141. EPA cannot shield its minimal evidence from public comment by waiting to disclose it until the final rule.

III. THE D.C. CIRCUIT'S OPINION IN *AIR ALLIANCE HOUSTON V. EPA*, RELEASED JUST DAYS BEFORE THE CLOSE OF COMMENT, DEMONSTRATES THE 2019 RULE IS UNLAWFUL AND ARBITRARY.

A. The *Air Alliance Houston* Decision

On August 17, 2018, just six days (four business days) before the close of comment, the D.C. Circuit released its decision vacating EPA's illegal delay of the Chemical Disaster Rule. *Air Alliance Houston v. EPA*, 906 F.3d 1049 (2018). This decision made clear that EPA's desire to rescind chemical disaster protections to await further reconsideration by EPA in concert with another agency is just as unlawful and arbitrary as EPA delaying these measures for twenty months for its own reconsideration process. Community mentioned the decision briefly, but were not able to analyze or explain in-depth its effect on EPA's central rationale of coordination with OSHA. *E.g.*, Comments of Community Pet'rs at 89.

The *Air Alliance Houston* case is the first D.C. Circuit opinion to construe the requirements of § 7412(r)(7). The Court vacated EPA's delay of the Chemical Disaster Rule's "life-saving protections," 906 F.3d at 1065, and held EPA "ma[de] a mockery of the statute" by promulgating a rule "calculated to enable non-compliance" instead of "assur[ing] compliance" as required by § 7412(r)(7). 906 F.3d at 1064. The Court further held that reconsideration under § 7607(d)(7)(B) "shall not postpone the effectiveness of the rule" and that EPA could not stall the effectiveness of a final rule for longer than three months. *Id.* at 1060 (citing § 7607(d)(7)(B)).

Recognizing the importance of these regulations, on September 21, 2018, the Court expedited issuance of its mandate to ensure that the Chemical Disaster Rule took effect, and would begin to prompt compliance. *Air Alliance Houston*, No. 17-1155, ECF No. 1752053 (D.C. Cir. Sept. 21, 2018); Fed. R. App. P. 41; D.C. Cir. R. 41.

Among other holdings, the D.C. Circuit confirmed § 7412(r) of the Act "makes clear that Congress is seeking meaningful, prompt *action* by EPA to promote accident prevention." 906 F.3d at 1064 (emphasis in original). The Court also found "the record shows … a need for [regulatory] improvements to

protect workers and community safety, and to reduce fatalities, injuries, life disruption, and other harm." 906 F.3d at 1065.

Community Petitioners and others requested extensions to the period for public comment to address the myriad ways that the *Air Alliance Houston* case affected EPA's proposed rule, but EPA refused. EPA-HQ-OEM-2015-0725-1819 (EPA response to Earthjustice *et al.*); EPA-HQ-OEM-2015-0725-1820 (EPA response to New York *et al.*); EPA-HQ-OEM-2015-0725-1723 (EPA response to United Steelworkers). The *Air Alliance* decision still gives rise to several new objections to the final 2019 Rule, making it of central relevance to the rulemaking's outcome. Because these grounds for comment arose after the period for public comment and it was impracticable to raise these objections during the comment period, EPA must grant reconsideration under § 7607(d)(7). The *Air Alliance* case renders unlawful EPA's desire to rescind protections pending further coordination with OSHA, EPA's extension of deadlines for emergency exercise requirements, and EPA's elimination of any deadline for emergency field exercises.

B. Effects of the Decision on EPA's OSHA Rationale

One of EPA's central and crosscutting rationales for its changes in the 2019 Rule is the agency's desire for further coordination with the Occupational Safety and Health Administration ("OSHA"). 84 Fed. Reg. at 69,844. In its final rule EPA says "more work with OSHA on the issues being addressed would lead to better accident prevention." 84 Fed. Reg. at 69,844; *see also* 83 Fed. Reg. at 24,864 ("EPA now proposes to determine that a more sensible approach would be to have a better understanding of what OSHA will be doing in this area before revising the RMP accident prevention program."). EPA's proposal described this as "rescind[ing] the RMP accident prevention amendments pending further action by OSHA." 83 Fed. Reg. at 23,864.[44]

This does exactly what the Court held unlawful and arbitrary in the Delay Rule case – except for much longer. Rather than repeal the prevention measures for twenty months for reconsideration, EPA repeals them permanently for reconsideration. The Court in *Air Alliance Houston* held "EPA cannot escape Congress's clear intent to specifically limit the agency's authority under Section 7607(d)(7)(B)" to delay based on reconsideration "by grasping at its separate, more general authority under Section 7412(r)(7)." *Air Alliance Houston*, 906 F.3d at 1061. That EPA now attempts to rely on consultation with OSHA to occur during some further reconsideration does not save the 2019 Rule. Rescinding protections pending further reconsideration or action with OSHA is simply more delay pending further reconsideration of the

[44] In their comments on EPA's proposed 2019 Rule, Community Petitioners and others noted that EPA had in fact coordinated extensively with OSHA during its rulemaking for the Chemical Disaster Rule. Comments of Community Pet'rs at 95-107.

problem by EPA, as it awaits more information from another agency with whom it already consulted repeatedly when developing the 2017 rule. Comments of Community Pet'rs at 99-101; Chemical Disaster Rule RTC at 250-51. While § 7412(r)(7) allows for "substantive amendment" to rules under that subsection, its rulemaking authority does not extend to delaying rules for reconsideration, such as delay for the purpose of further consultation with OSHA. *Air Alliance Houston,* 906 F.3d at 1064.

EPA's prior delay based on reconsideration "made a mockery of the statute" by flying in the face of the Act's express desire for any rule under § 7412(r)(7)(A) to "assur[e] compliance as expeditiously as practicable." *Air Alliance Houston*, 906 F.3d at 1061. As there, elimination of protections so EPA and OSHA can further consider what changes to make has neither "the purpose [n]or effect of 'assur[ing] compliance.'" *Air Alliance Houston*, 906 F.3d at 1064. Now that EPA is grounding some of its rule changes on § 7412(r)(7)(B), which specifies a maximum 3-year compliance deadline, EPA's indefinite elimination of these requirements "pending further action by OSHA," 83 Fed. Reg. at 24,864, is even more plainly unlawful.

The 2019 Rule is also arbitrary for the same reasons as the Delay Rule vacated in the *Air Alliance Houston* case. As there, EPA fails to explain "how the Chemical Disaster Rule['s provisions] becoming effective on schedule would otherwise impede its ability to reconsider that rule." 906 F.3d at 1067. EPA "nowhere explains how the effectiveness of the rule would prevent EPA from undertaking" the further coordination it desires with OSHA. *Id.* at 1066-67. EPA can await further action by OSHA and adjust its requirements in the future to assure consistency with any changes that agency makes, but it need not eliminate these important protections now. Because the previous regulations for Program 3 were "fundamentally identical to the OSHA PSM standard," 84 Fed. Reg. at 69,840, the 2017 updates in the Chemical Disaster Rule that EPA now rescinds were purely additive. That is, EPA does not explain or show <u>any conflict or mutual inconsistency</u> between the requirements that could even potentially justify immediate repeal. While EPA now emphasizes the cost of inconsistency,[45] this is really just the cost of compliance with new provisions while ignoring the benefits – EPA does not show any additional cost exists.

Also, just like "the mere fact of reconsideration," EPA's desire now for further coordination with OSHA is a non-reason – it does not provide any substantive reason to rescind protections EPA already promulgated. *Air*

[45] *See, e.g.*, 84 Fed. Reg. at 69,862 ("EPA believes it is better to take its traditional approach of maintaining consistency with OSHA PSM. The creation of additional complexity and burden associated with new provisions where EPA has not demonstrated any benefit is evidence of the new prevention provisions' impracticability and that the rule divergence is unreasonable.").

Alliance Houston, 906 F.3d at 1067; *see also Public Citizen v. Steed*, 733 F.2d 93, 102 (D.C. Cir. 1984) ("Without showing that the old policy is unreasonable, for [the agency] to say that no policy is better than the old policy solely because a new policy *might* be put into place in the indefinite future is as silly as it sounds."). This is particularly true where the agency did in fact coordinate extensively with OSHA, *see* Comments of Community Pet'rs at 99-101, and acknowledges it met all legal requirements to do so, 84 Fed. Reg. at 69,862.

The 2019 Rule goes far beyond what the Court vacated in the *Air Alliance Houston* case. While that rule effected a 20-month suspension of these protections so that EPA could further consider those changes, the 2019 Rule rescinds many of those same protections pending further consideration by EPA and another agency of how to address this country's ongoing chemical disaster problem. This kind of indefinite elimination of protections is just what the Court held unlawful and arbitrary. Similarly, as the Second Circuit has pointed out, "a decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration." *NRDC v. NHTSA*, 894 F.3d 95, 111–12 (2d Cir. 2018) (citing *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017)). Like delay for the purposes of reconsideration, rescission of protections for the purpose of further consideration and coordination "has no stopping point" and is unrelated to the substance of the rule. *Air Alliance Houston*, 906 F.3d at 1066.

The unlawfulness of EPA's OSHA rationale is grounds for vacating the entire 2019 Rule because EPA states that reconsideration with OSHA "on the issues being addressed would lead to better accident prevention" is a "principal rationale" for the whole 2019 Rule. 84 Fed. Reg. at 69,843-44; *see also* 2019 RTC at 108, 110, 119 (stating that there are benefits from STAA, root cause analysis and third-party audits).

C. Effects of Decision on EPA's Further Delay of Emergency Exercise Provisions and on EPA's Removal of Minimum Frequency for Field Exercises.

The 2019 Rule also further delays compliance with the emergency exercise provisions EPA added in the Chemical Disaster Rule and then unlawfully delayed. 84 Fed. Reg. at 69,837; *Air Alliance Houston*, 906 F.3d at 1056, 1067. When promulgating the Chemical Disaster Rule, EPA determined compliance with the notification, tabletop, and field exercise requirements was practicable by March 15, 2021. 82 Fed. Reg. 4678 tbl.6; *see also* 82 Fed. Reg. 4677 ("[T]he owner or operator has four years after the effective date of this rule to conduct a notification exercise, consult with local emergency response officials to establish a schedule for conducting tabletop and field exercises, and complete at least one tabletop or field exercise."). Ignoring that its initial delay of these provisions was held unlawful in the *Air Alliance Houston* decision, EPA sets a new four-year timeline from the effective date of the 2019 Rule. 84 Fed.

Reg. at 69,907. But this deadline is only to develop an exercise plan. Unlike in the Chemical Disaster Rule, EPA now gives facilities an additional year to actually conduct their first notification exercise, an additional three years for the first tabletop exercise, and unlimited time for field exercises that may never happen at all (as discussed further below). The due dates for notification exercises is thus five years from the effective date of the 2019 Rule; for tabletop exercises it is eight years away; and there is no longer any deadline at all for field exercises. 84 Fed. Reg. at 69,837.

The *Air Alliance Houston* decision explained that the Clean Air Act requires EPA to "assur[e] compliance" with the Chemical Disaster Rule's provisions "as expeditiously as practicable." 906 F.3d at 1053 (quoting 42 U.S.C. § 7412(r)(7)(A)); *but see* Part II.A.8, *supra* (explaining that EPA newly suggests it is changing its regulations under the authority of § 7412(r)(7)(B), which has an even stricter deadline requirement). Whether under § 7412(r)(7)(A) or (B), having no deadline at all for complying with the field exercise requirement is profoundly unlawful because it plainly does not "assur[e] compliance" at all. Such a requirement is also arbitrary and capricious, because it effectively nullifies the requirement. And, to the extent (A) applies, EPA fails to establish that these requirements, which facilities must already be preparing to comply with because of the *Air Alliance Houston* vacatur, cannot be implemented on their original timeline. EPA already determined facilities could comply with them by March 2021. 82 Fed. Reg. at 4677-78 & tbl.6.

Delaying these requirements now is unlawful and it is arbitrary and capricious because EPA fails to meet the statutory test at all or to grapple with its prior determinations. *See Air Alliance Houston,* 906 F.3d at 1067 (EPA needed to "explain[] [its] departure from its stated reasoning in setting the original effective date and compliance dates."). The agency's purported rationales for extending compliance are:

- that "additional time is necessary for sources to understand the new requirements for notification, field and tabletop exercises, train facility personnel on how to plan and conduct these exercises, coordinate with local responders to plan and schedule exercises, and carry out the exercises;"
- that "[a]dditional time would also provide owners and operators with flexibility to plan, schedule, and conduct exercises in a manner which is least burdensome for facilities and local response agencies";
- that "EPA planned to publish guidance for emergency response exercises and once these materials are complete, owners and operators would need time to familiarize themselves with the materials and use them to plan and develop their exercises."

84 Fed. Reg. at 69,907-08. But EPA does not explain why additional time is needed to meet these objectives or how it is requiring this "expeditiously," as the statute directs, when each of these considerations were incorporated into its rationale for setting the original compliance deadlines in the Chemical Disaster Rule. 82 Fed. Reg. at 4677 ("this timeframe will allow owners and operators to develop an exercise program that is appropriate for their facility, train personnel, and coordinate with local emergency response officials," and "EPA also expects to develop guidance on emergency response exercises and facility owners and operators will require time to familiarize themselves with the guidance."). For example, the actual exercise requirements have not changed – they are just being delayed – so why do facilities need more time than originally anticipated to understand them? EPA does not acknowledge its inconsistency or provide "good reasons" for its new delay. *Air Alliance Houston*, 906 F.3d at 1066 (quoting *Fox*, 556 U.S. at 515).

The *Air Alliance Houston* decision is binding precedent and shows EPA's extension of compliance dates for the Chemical Disaster Rule's emergency exercise provisions to be unlawful and arbitrary. The Court's holding regarding that 20-month delay applies equally to this new over 2-years of additional delay: it "does not have the purpose or effect of 'assur[ing] compliance' with Section 7412(r)(7); it is calculated to enable non-compliance." 906 F.3d at 1064.

Finally, EPA must grapple with the fact that there was an expedited mandate to implement some of the provisions it has now repealed and delayed. Order of Sept. 21, 2018, *Air Alliance Houston v. EPA*, D.C. Cir. No. 17-1155. With this ruling, the Court found good cause to expedite the mandate, recognizing the serious harm from EPA's delay of the Chemical Disaster Rule. Pet'rs' Joint Mot. to Expedite the Mandate (Aug. 24, 2018); Pet'rs' Joint Reply In Support of Expedited Mandate (Sept. 12, 2018)).

EPA has failed to justify its action to repeal all of the 2017 prevention measures, and to substantially delay the emergency response measures – including through removing completely any deadline for field exercises when the court both held the delay was unlawful and arbitrary and issued an expedited mandate to prevent any further delay even before EPA's own appeal deadline had passed. The Court refused to allow EPA to delay these provisions for twenty months, finding the agency could not justify delay that "EPA previously determined would help keep first responders safe and informed about emergency-response planning." *Air Alliance Houston*, 906 F.3d at 1069. The Court also affirmed that the suite of measures in the Chemical Disaster Rule would be "life-saving." *Id.* at 1065. Now EPA again unlawfully and arbitrarily "has delayed compliance, reduced or eliminated the lead-up time to achieve the compliance that EPA had earlier found necessary, and thus has delayed life-saving protections." *Id.* at 1065. This time, though, EPA has done

so in direct defiance of a binding D.C. Circuit decision which is even more unconscionable for public safety, demonstrating that the public can have no confidence in EPA putting its responsibility to follow the law and protect public health above industry preferences. EPA cannot lawfully or rationally justify ignoring the court's holdings or their application to the much longer (multi-year) delay of the emergency response provisions here, and the total removal of any deadline for field exercises. EPA must grant reconsideration and reconsider its action in view of the D.C. Circuit opinion and expedited mandate.

CONCLUSION

Thank you for your time and consideration of this matter. For all of the reasons provided in this petition, EPA must grant reconsideration pursuant to § 7607(d)(7)(B), and stay the 2019 Rule to prevent irreparable harm.

Sincerely,

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