BEFORE THE HONORABLE ANDREW R. WHEELER, ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| IN RE: ACCIDENTAL RELEASE PREVENTION REQUIREMENTS: RISK MANAGEMENT PROGRAMS UNDER THE CLEAN AIR ACT 84 FED. REG. 69,834 (Dec. 19, 2019) | ) | Docket No. EPA-HQ-OEM-2015-0725 |

**PETITION FOR RECONSIDERATION OF**
**UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION**

## I. INTRODUCTION

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("United Steelworkers" or the "USW"), hereby petitions the United States Environmental Protection Agency ("EPA") to reconsider and stay its final rule entitled *Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act*, 84 Fed. Reg. 69,834-69,916 (Dec. 19, 2019) ("RMP Rollback Rule") repealing critical provisions of EPA's final rule entitled *Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act*, 82 Fed. Reg. 4,594-4,705 (Jan. 13, 2017) ("Chemical Disaster Rule"); *see Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018) ("*AAH*"). As a basis for the petition for reconsideration, the United Steelworkers states as follows:

The United Steelworkers filed comments with EPA on August 23, 2018, strongly objecting to EPA's proposed rescission of almost all of the Chemical Disaster Rule's important, potentially life-saving improvements to the RMP regulations at 83 Fed. Reg. 24,850-24,883 (May 30, 2018) ("Proposed RMP Rollback Rule"). *See generally* Comments of the United Steelworkers (August 23, 2018), EPA-HQ-OEM-2015-0725-1970 ("USW Comments on Proposed RMP Rollback Rule"). EPA superficially swept aside USW Comments on Proposed RMP Rollback Rule in promulgating the RMP Rollback Rule. *See* Response to Comments on the 2018 Proposed Rule (November 19, 2019), EPA-HQ-OEM-2015-0725-2086, ("2019 RTC"), at 30-31, 94-95, 108-09, 114-15, 123, 129-30, 145-46, 153-54, 178-79, 194-95, 197-99, 264, 265-67, 267-68, 272-75. The United Steelworkers' need for these critical Chemical Disaster Rule accident prevention, emergency response and information availability requirements are more vital than ever as USW members, their families and their communities continue to be

harmed by a number of RMP events since the public comment period for the RMP Rollback Back Rule closed. *See* Section II, *infra,* at 7-12.

As such, the United Steelworkers continue to object to EPA's repealing of the critical Chemical Disaster Rule provisions as now set forth in the RMP Rollback Rule. Pursuant to Clean Air Act ("CAA") § 307(d)(7)(B), the United Steelworkers petition EPA to reconsider the RMP Rollback Rule based on the United Steelworkers' objections to EPA's RMP Rollback Rule raised herein that (i) were impracticable to raise within the public comment period for EPA's RMP Rollback Rule or the grounds for such objections arose after the close of the public comment period but within the time period specified for judicial review, and (ii) are of central relevance to the outcome of the RMP Rollback Rule. 42 U.S.C. § 7607(d)(7)(B).

The United Steelworkers have clear interest in seeking EPA's reconsideration of the RMP Rollback Rule. As set forth in the USW Comments on Proposed RMP Rollback Rule at 1-2, the United Steelworkers is the largest private-sector union in North America, representing approximately 850,000 workers employed in metals, mining, rubber, paper and forestry, energy, chemicals transportation, health care, security, hotels, and municipal governments. As noted by the D.C. Circuit in *AAH* at 1058-59 "[a]pproximately 25,000 of United Steelworkers' members work in 350 covered chemical plants in the United States, and United Steelworkers-represented 'refineries account for almost two-thirds of United States production. No single company, and no other union, either operates, or represents the workers in more plants that are the subject of the [RMP] regulations than [the USW].'" In addition, USW members work at RMP covered facilities such as paper mills, in the rubber industry, and at coke-by product plants and other facilities where catastrophic RMP-incidents may occur. *See also* Declaration of Michael Wright (USW Director of Health Safety and Environment Department) ¶ 2 (USW Comments on

Proposed RMP Rollback Rule – Attachment 2) ("USW Wright Declaration"), and the Declaration of Kim Nibarger (USW Oil Sector Bargaining Chair) ¶ 2 (USW Comments on Proposed RMP Rollback Rule – Attachment 3) ("USW Nibarger Declaration").

As stated in the United Steelworkers' Comments on the Proposed RMP Rollback Rule at 2, on a daily basis, USW members, their families and their communities are confronted by hazards posed by RMP covered facilities including the potential for widespread damage to critical infrastructure and communities where they work and live that are intended to be addressed by CAA § 112(r) RMP requirements and the Chemical Disaster Rule. *See also* USW Wright Declaration ¶¶ 11, 13; USW Nibarger Declaration ¶¶ 7, 13; Declaration of Ben Lilienfeld at ¶ 10 ("USW Lilienfeld Declaration") (USW Comments on Proposed RMP Rollback Rule – Attachment 4). As recognized by the D.C. Circuit in *AAH* at 1059:

> **Such risks are particularized to chemical plant workers such as the United Steelworkers' members, and EPA found that the Chemical Disaster Rule would reduce the kinds of accidents that Lilienfeld and the other United Steelworkers declarants face in their workplace and communities**, and would mitigate such harms by improving coordination between facilities and local first responders. *See* Chemical Disaster Rule, 82 Fed. Reg. at 4597; EPA Activities Under EO 13650: Risk Management Program (RMP) Final Rule Questions & Answers (June 2017) ("EPA's changes to the RMP rule will help protect local first responders, community members and employees from death or injury due to chemical facility accidents."). (Emphasis supplied.).

To the detriment of United Steelworkers' interests, EPA's RMP Rollback Rule removes numerous critical Chemical Disaster Rule program requirements that the United Steelworkers and community stakeholders long championed to reduce (1) the likelihood of catastrophic events (*i.e.*, safer technology and alternatives analysis ("STAA"), incident investigation/root cause analysis, third-party audits, and supervisor training requirements), and (2) the potential harm to community members including workers, first responders, and residents (*i.e.*, enhanced emergency response coordination requirements and public information sharing requirements).

The United Steelworkers have a long history of advocating for the protections contained in the Chemical Disaster Rule that EPA rescinded in the RMP Rollback Rule. *See* USW Comments on Proposed RMP Rollback Rule at 3-9.[1] For example, the United Steelworkers began touting the benefits of STAA in 2010 as part of its public testimony before the CSB. *See* USW Comments on Proposed RMP Rollback Rule at 4, Statement of Michael J. Wright Director of Health, Safety and Environment United Steelworkers before the CSB on Regulatory Approaches to Offshore Oil and Gas Safety (December 15, 2010) (USW Comments on Proposed RMP Rollback Rule – Attachment 5) ("Wright CSB Statement (2010)"). The United Steelworkers was a signatory to the July 25, 2012, petition to EPA advocating for RMP rulemaking to strengthen the protections for USW members, their families, and communities and focusing on the need for new RMP regulations requiring the use of inherently safer technologies ("ISTs") to ensure protection of the public under CAA § 112(r). USW Comments on Proposed RMP Rollback Rule at 4. In addition, the United Steelworkers authored ground-breaking reports on STAA including, "A Risk Too Great, Hydrofluoric Acid in U.S. Refineries" (April 2013) ("A Risk Too Great") (Attachment to USW 2017 RMP Comments) and USW "Beyond Texas City: The State of Process Safety in the Unionized U.S. Oil Refining Industry" (2007) ("Beyond Texas City") (Attachment to USW 2017 RMP Comments). *See* USW Comments on Proposed RMP Rollback Rule at 4.

The United Steelworkers' advocacy led to EPA's promulgation of the Chemical Disaster Rule that incorporated many but not all of the United Steelworkers' recommendations as to

[1] The United Steelworkers also were part of the lobbying effort that resulted in the 1990 CAA Amendments ensuring inclusion of CAA § 112(r), including RMP requirements, the related Occupational Safety and Health Administration's ("OSHA's") Process Safety Management ("PSM") requirements, and the creation of the United States Chemical Safety and Hazard Investigation Board ("CSB").

STAA, incident investigation/root cause analysis, third-party audits, supervisor training requirements, and enhanced coordination with first responders and local community members that provided critical benefits to USW members who work in RMP covered facilities, their families and their communities. As noted by EPA in the preamble to the Chemical Disaster Rule, 82 Fed. Reg. at 4,684-85:

> [T]he benefits of the final rule include reductions in the number of people killed, injured, and evacuated or otherwise inconvenienced by sheltering in place; reductions in the damage caused to property on-site and offsite including product, equipment, and buildings; reductions in damages to the environment and ecosystems; and reductions in resources diverted to extinguish fires and clean up affected areas. The Chemical Disaster Rule also provided other benefits, such as increased public information, which in addition to helping to minimize the impacts of accidents on the offsite public, may also lead to more efficient property markets in areas near RMP facilities.

The D.C. Circuit in *AAH* at 1059, found that the Chemical Disaster Rule had "tangible impacts" to the United Steelworkers members through reduction of RMP accidents at USW workplaces and the mitigation of harms through improved coordination between RMP facilities and first responders. Despite EPA's clear finding of the Chemical Disaster Rule's benefits, including concrete benefits for United Steelworkers members, families, and communities as recognized by the D.C. Circuit in *AAH* at 1058-59, EPA promulgated the RMP Rollback Rule, repealing most of the critical accident prevention, emergency response and information availability requirements established by the Chemical Disaster Rule to the detriment of the United Steelworkers, their members who work in RMP covered facilities, their families and their communities.

## II. USW'S GROUNDS FOR OBJECTION IN SUPPORT OF USW'S ADMINISTRATIVE PETITION FOR RECONSIDERATION OF THE ROLLBACK RULE

### A. Legal Framework for USW's Grounds for Objection

The United Steelworkers hereby petition EPA to reconsider and stay for three months the RMP Rollback Rule based on the new grounds for objection pursuant to CAA § 307(d)(7)(B). EPA must convene a proceeding for reconsideration of the RMP Rollback Rule where (i) objections are raised that were impracticable to raise within the public comment period or the grounds for such objections arose after the close of the public comment period but within the time period specified for judicial review, and (ii) the objections are of central relevance to the outcome of the rule. 42 U.S.C. § 7607(d)(7)(B). As set forth below, the United Steelworkers' petition for reconsideration raises a series of objections that were impracticable to raise within the public comment period for the RMP Rollback Rule or the grounds for which arose after the close of the public comment period, but within the 60-day period for judicial review, and are of central relevance to the RMP Rollback Rule. The United Steelworkers, therefore, respectfully request that EPA reconsider and stay the RMP Rollback Rule pursuant to CAA § 307(d)(7)(B).

First, as discussed below, the United Steelworkers' grounds for objection to the RMP Rollback Rule are based on new information that arose and/or RMP events that occurred after the RMP Rollback Rule's close of comment period on August 23, 2018, thus were impracticable to raise in the USW Comments on Proposed RMP Rollback Rule. Second, the United Steelworkers' objections are "of central relevance" as that term has been interpreted by the D.C. Circuit because the United Steelworkers' objections provide "substantial support for the argument that the regulation should be revised." *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 105 (D.C. Cir. 2012). In addition, per CAA § 307(d)(8), the United Steelworkers'

petition demonstrates that "errors [of EPA] identified were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. § 7607(d)(8); *Union Oil Co. of Calif. v. EPA*, 821 F.2d 678, 683 (D.C. Cir. 1987).

The United Steelworkers also objects to certain aspects of the RMP Rollback Rule because EPA is relying upon new rationales, statements, and studies in the RMP Rollback Rule that were not available for comment prior to the close of the public comment period. As discussed below, pursuant to CAA § 307(d)(3), EPA failed to provide for notice and comment during the rulemaking period all "the factual data on which the proposed rule is based" as well as "major legal interpretations and policy considerations." 42 U.S.C. § 7607(d)(3). In light of EPA's new rationales, statements, and studies that substantially revised certain provisions of the Proposed RMP Rollback Rule, EPA is required to re-notice the Rule for public comment because the RMP Rollback Rule is not a "logical outgrowth" of EPA's Proposed RMP Rollback Rule. *Nat'l Lifeline Ass'n v. F.C.C.*, 921 F.3d 1102, 1116 (D.C. Cir. 2019).

Finally, the United Steelworkers objects to EPA's new rationales contained in the RMP Rollback Rule as arbitrary and capricious that disregard and contradict EPA's prior findings in the Chemical Disaster Rule. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). As the D.C. Circuit stated in *AAH* at 1066, *citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), in holding that EPA's Delay Rule arbitrary and capricious, EPA "must examine the relevant data and articulate a satisfactory explanation for its action including a rational explanation of the facts found and the choice made." Importantly, "when an agency reverses itself, it 'must show that there are good reasons for the new policy,'" *citing Fox*, 556 U.S. at 515, and "provide 'a reasoned explanation . . . for

disregarding facts and circumstances that underlay or were engendered by the prior policy.'" *Id.* at 515-16. As set forth below, EPA's RMP Rollback Rule is arbitrary and capricious as EPA repeatedly fails to provide rational explanations for its reversals of policy from the well-reasoned and well-documented EPA findings in support of the Chemical Disaster Rule.

### B. Summary of United Steelworkers' New Grounds for Objection Under CAA §§ 307(d)(7)(B) and (d)(8)

The United Steelworkers' petition raises the following new grounds for objection that meet the criteria of CAA §§ 307(d)(7)(B) and (d)(8), requiring EPA's mandatory reconsideration of the RMP Rollback Rule as set forth in detail below:

1. Recent RMP events with catastrophic impacts on workers and local community members that occurred after the close of the public comment period including the Philadelphia Energy Solutions ("PES") Refinery Explosion and Fire in Philadelphia, PA, a USW-organized facility, explosions at the TPC Group ("TPC") Port Neches, TX, facility, another USW-organized facility, and the Watson Grinding and Manufacturing Facilities ("Watson Grinding") explosion in Houston, TX, demonstrate the need for the protections of the Chemical Disaster Rule. *See* Declaration of Donald Holmstrom ("Holmstrom Declaration") ¶¶ 13, 52-58. These events reinforce the benefits to workers and community members in reducing the frequency and severity of RMP Events from (i) Chemical Disaster Rule accident prevention programs including, *inter alia*, STAA, Third-Party Audits, root cause analysis, and the requirement to conduct incident investigations for near misses, and destroyed or decommissioned equipment, (ii) emergency response program requirements including emergency response coordination efforts with first responders such as notification requirements, information sharing, and field and tabletop

exercises, and (iii) public information availability requirements. Moreover, documentation of damages to workers and communities resulting from the accident and subsequent closure of PES facility and company bankruptcy claim and lay-off of USW members employed at PES,[2] and the explosions at the TPC plant resulting in injuries and property damage in to members of the Port Neches community, establish that the harm to USW members, their families and their communities, is real and quantifiable. *See also* Holmstrom Declaration ¶¶ 13, 52-58.

2. Post-comment period CSB reports identified and discussed in Holmstrom Declaration § V.
3. New information about insurance rates and declining coverage for United States Refineries and Chemical Companies from NASDAQ presented in Sanicola, "U.S. Refiners, Chemical Makes Pare Insurance Coverage as Accidents Boost Costs," *Reuters* (Jan. 30, 2020) ("NASDAQ Article") available at https://www.nasdaq.com/articles/u.s.-refiners-chemical-makers-pare-insurance-coverage-as-accidents-boost-costs-2020-01-0, which rebuts EPA's findings about declining RMP event impacts and reinforces damages to workers and communities from RMP events and the RMP Rollback Rule.
4. New information that identifies a number of States that are refusing to provide EPCRA chemical information to the public in response to information requests as recently documented by the Center for Public Integrity. J. Wertz, "A Common

[2] "Six Months After a Fire, Both the Pa. Refinery and its Workers Struggle to Find New Lives," Pennsylvania Real-Time News, (Dec. 28, 2019), available at https://www.pennlive.com/news/2019/12/six-months-after-a-fire-both-the-pa-refinery-and-its-workers-struggle-to-find-new-lives.html.

Fertilizer Can Cause Explosions. Uneven Regulation Puts People At Risk," (Jan. 29, 2020) ("Public Integrity Article") available at https://publicintegrity.org/environment/growing-food-sowing-trouble/fertilizers-explosive-potential-west-texas/, which rebuts EPA's redundancy/information availability arguments advanced to rescind Chemical Disaster Rule public information availability regulations.

5. New rationale, statements, and studies relied upon heavily by EPA in support of the RMP Rollback Rule that were not discussed in the proposed rule or other documents made available to the public before the close of the public comment period including, *inter alia*, EPA's "compliance-driven approach" and the "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) ("DOJ 2000 Security Report").
6. New information derived from government reports and other studies and comments made available to the public after the close of the public comment period including, *inter alia*, Budget of the United States Government, Fiscal Year 2021 ("FY21 Budget"),[3] which "contains the Budget Message of the President, and information on the President's priorities," and the accompanying Major Savings and Reforms, Fiscal Year 2021 ("FY21 Major Savings and Reforms")[4], the Letter from Attorneys General of New York, Pennsylvania, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, Oregon,

[3] *https://www.whitehouse.gov › wp-content › uploads › 2020/02 › budget_fy21*.
[4] *https://www.whitehouse.gov › wp-content › uploads › 2020/02 › msar_fy21*.

Rhode Island, Vermont, and Washington to EPA Docket Center (Aug. 20, 2019); available at https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-1998 ("State's Supplemental Comments"); the Letter from Attorneys General of New York, Pennsylvania, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington to EPA Docket Center (Oct. 28, 2019); posted Nov. 29, 2019 at https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-2001 ("States' Second Supplemental Comments"), and the Letter from Commissioner Catherine R. McCabe (New Jersey Department of Environmental Protection) (December 17, 2019) (Exhibit B to Holmstrom Declaration) ("McCabe Letter"). These post-comment period documents provide new grounds for objection that rebut EPA findings relied upon to support the RMP Rollback Rule. For example, the McCabe Letter rebuts EPA's attacks on the New Jersey's Inherently Safer Technology ("IST") provisions of the New Jersey Toxic Catastrophe Act Program rules as it relates to EPA's rescission of the STAA provision of the Chemical Disaster Rule.

Based on the United Steelworkers' objections discussed in detail below, EPA must grant reconsideration and stay of the RMP Rollback Rule and conduct a new notice-and-comment rulemaking on the agency's decision to rescind Chemical Disaster Rule regulations. *See Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 647 (D.C. Cir. 2019).

## III. NEW GROUNDS FOR OBJECTION ESTABLISH THAT THE RMP ROLLBACK RULE IS ARBITRARY AND CAPRICIOUS

EPA offers a host of intertwining rationale to support the rescission of Chemical Disaster Rule accident prevention, emergency response, and information availability regulations via the RMP Rollback Rule. *See, e.g.*, 84 Fed. Reg. at 69,851:

> The Agency has provided a detailed rationale for rescission of each of the Amendments rule provisions removed by the final rule. Regulatory costs are an important consideration in the rescission of some provisions, but EPA's decision also considered other factors, including the potential lack of effectiveness of some provisions, EPA's ability to obtain the benefits of certain provisions without imposing regulatory mandates, the desire for regulatory consistency with the OSHA PSM standard, and security risks.

In support of the agency's rationale to rescind critical Chemical Disaster Rule requirements, EPA advances new and cramped interpretations that undermine clear statutory mandates set forth in section 112(r)(7) of the CAA including, *inter alia*, requirements that EPA (1) promulgate RMP regulations with effective dates that assure compliance as expeditiously as practicable (CAA § 112(r)(7)(A)), but no later than 3 years after the date of promulgation of the regulation (CAA § 112(r)(7)(B)(i)),[5] and (2) "promulgate reasonable regulations … to provide, to the greatest extent practicable for the prevention, and detection of accidental releases of regulated substances and for response to such releases by the owners or operators of the sources of such releases." *Id.* USW objects to EPA's new and unreasonable interpretations of section 112(r)(7) of the CAA that harm and have "tangible impacts" on USW members, their families and their communities set forth in the preamble to the RMP Rollback Rule.

[5] *See* Section V, B, *infra*, at 45-48. for USW's specific objections to RMP Rollback Rule compliance dates for field and tabletop exercises in violation of section 112(r)(7)(A) and (B) of the CAA.

For the first time, the agency offers a novel interpretation of section 112(r)(7)(B)(i) of the CAA in the preamble to the RMP Rollback Rule (84 Fed. Reg. at 69,848-49) that emphasizes "reasonableness" or compliance costs over the statute's clear directive to promulgate regulations that prevent, detect and respond to RMP events to the "greatest extent practicable" in applying the administration's "reasonable and practicable" approach, which the agency wields as a cudgel to bludgeon the Chemical Disaster Rule. EPA's new "reasonableness" test inexplicably provides "[w]here a regulation is clearly not reasonable, then we need not assess whether it provides protection to the greatest extent practicable." 2019 RTC at 40.

EPA employs its "reasonable and practicable approach" in an unprecedented manner as a screen to justify the rollback of critical Chemical Disaster Rule regulations and consistently prioritize reducing costs and burdens to industry and emergency response organizations over the benefits these regulations provided to plant workers including USW members, their families and their communities in a way that effectively writes the term "greatest extent" out of the statute.[6]

[6] *See, e.g.*, 84 Fed. Reg. at 69,842 ("Subparagraph (B) [of section 112(r)(7) of the CAA] sets out a series of mandatory subjects to address, interagency consultation requirements, and discretionary provisions that allowed EPA to tailor requirements to make them ***reasonable and practicable***."); 84 Fed. Reg. at 69,843 (Case specific oversight of poorly performing facilities is ***"a more reasonable and practicable approach"*** than regulatory changes that increase compliance costs.); *id.* at 69,853 ("The Agency's choice to use a more surgical approach to accident prevention at these facilities [*i.e.*, "compliance-driven approach" over existing IST/STAA regulation] is ***reasonable and practicable***."); *id.* at 69,861 ("With an overstated baseline of accidental releases, a higher percentage of accidental release would need to be prevented by the measures added in 2017 in order for these provisions to be ***reasonable and practicable*** (*i.e.*, costs not disproportionate to their effectiveness). As noted, there is little evidence that IST-like regulatory programs have resulted in improved accidental release prevention trends or that recent extreme weather events have resulted in more accidental releases."); *id.* at 69,862 ("We retain many of the RMP Amendments emergency response provisions because … improvements in the response program provisions are ***reasonable and practicable***. We have *struck* ***a reasonable balance*** of measures that will provide, to the greatest extent practicable, for preventing accidental releases and minimizing the impacts of such releases."); *id.* at 69,886 ("With the modifications of the public meeting requirement in the final rule, we believe we have struck ***a reasonable and practicable balance*** of the public's need for

In applying the "reasonable and practicable" screen to rescind critical Chemical Disaster Rule requirements, EPA puts its thumb on the scale by relying upon a purported "data-driven approach" that characterizes Chemical Disaster Rule accident prevention benefits as speculative (*see, e.g.,* 84 Fed. Reg. at 69,861 "[a]s noted, there is little evidence that IST-like regulatory programs have resulted in improved accidental release prevention trends; and rejects or gives little to no weight to the recommendations and findings of the CSB, the first-hand observations and expertise of USW officials with substantial emergency response and incident investigation experience, and EPA's prior findings in support of the Chemical Disaster Rule. *See, e.g., id.* ("Our approach to this final rule is more data driven than the 2017 final rule, which relied more on incident information and opinions.").

In contrast, as EPA originally explained when promulgating the Chemical Disaster Rule:

> EPA identified specific incidents that **demonstrated failures and difficulties** 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 **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)**…. 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**. (Emphasis supplied).

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information about local incidents, the security of the source and the community, and other protected interests of the source."); *id.* at 69,894 (" [W]e believe the less open-ended provision adopted today that mirrors language that has not led to known security breaches is ***a more reasonable and practicable approach*** to emergency coordination than the provision we adopted in 2017."); *id.* at 69,904 ("Lastly, while the final rule requires the owner or operator to coordinate with local response officials on exercise schedules and plans, this does not mean that the owner or operator must accede to every recommendation made by local response officials. In most case, EPA expects that owners and operators and local response officials will be able to reach agreement on ***reasonable and practicable*** schedules and plans for field and tabletop exercises. However, in the event of a disagreement, it is the owner or operator that must comply with the exercise requirement and who therefore must have the final say on exercise schedules and plans"). (Emphasis supplied in above quotations.).

Amendments RTC at 246, EPA-HQ-OEM-2015-0725-0729; *see also* EPA Activities Under EO 13650, Risk Management Program (RMP) Final Rule, Questions & Answers at 1 (Aug. 2017) (summarizing why updates are "necessary").

Now, EPA repeatedly leans on other intertwining rationales in an attempt to support its "reasonable and practicable" approach and tip the scale in favor of the administration's anti-regulatory agenda including (1) reliance on a "compliance-driven approach", (2) regulatory consistency with the OSHA PSM standard, and (3) security risks.[7] EPA's approach, however, is rife with inconsistencies that expose the agency's bias and fails to comport with the legal precepts of *State Farm*, 463 U.S. at 43 and *Fox*, 556 U.S. at 515-16. USW's objections to the RMP Rollback Rule, based on grounds that were impracticable to raise during the public comment period and are centrally relevant to the final rule, as set forth below establish that promulgation of the RMP Rollback Rule is arbitrary and capricious.

### A. New Grounds for Objection Establish that EPA's Dismissal of CSB Findings and Recommendations, the First-Hand Observations and Expertise of USW Officials, and EPA Prior Findings Regarding the Benefits of Chemical Disaster Rule Accident Prevention, Emergency Response and Information Availability Provisions in Favor of a Purported "Data-Driven" Approach Relied Upon by EPA to Rescind Chemical Disaster Rule Regulations Via the RMP Rollback Rule is Arbitrary and Capricious

The foundation of EPA's anti-regulatory agenda behind the RMP Rollback Rule is the so-called "data-driven" approach relied upon by the agency as justification to give little to no weight to the recommendations and findings of recognized accident prevention and incident investigation experts, *inter alia*, including the CSB, USW officials and even EPA's own staff.

[7] *See, e.g,* Section VI, *infra*, at 51-53 for USW's specific objections to EPA's misplaced reliance on security concerns to rescind critical Chemical Disaster Rule regulations in the RMP Rollback Rule.

EPA explains its new "data-driven approach" in Section II.D. of the preamble to the RMP Rollback Rule as follows: "we [EPA] believe it is better not to impose substantial new regulatory requirements on all facilities in the RMP program on the basis of information about individual incidents and opinions where available, more comprehensive data does not demonstrate the efficacy of such a requirement across the board." 84 Fed. Reg at 69,843.

USW objects to EPA's use of its purported "data driven" approach as inconsistent with the mandate at CAA § 112(r)(7)(B)(i) that EPA promulgate reasonable RMP regulations that shall provide, to the greatest extent practicable, for the prevention, detection, and response to RMP events. Rigid adherence to such statistical analysis in a vacuum without due consideration to expert opinions and first-hand experience is particularly inappropriate when attempting to apply lessons learned from low frequency, high consequence events. *See, e.g.,* Holmstrom Declaration ¶ 12, and § VIII.

USW also cites as new grounds for objection centrally relevant to the RMP Rollback Rule recent RMP events that resulted in catastrophic impacts to plant workers and local communities such as at PES, TPC, and Exxon/Mobil Baytown that reinforce that EPA's data-driven approach relied upon in promulgating the RMP Rollback Rule underestimated harm including quantifiable economic losses and other tangible impacts to USW plant workers, their families and their communities from RMP events resulting from the rescission of critical Chemical Disaster Rule requirements. *See* EPA's Cost/Benefit Analysis/Cost Savings as set forth in the preamble, 84 Fed. Reg. at 69,838 (Table 3) and 69,854 describing "most of the annual cost savings under this action are due to the repeal of the STAA provision (annual savings of $70 million), followed by third-party audits (annual savings of $9.8 million), information availability (annual savings of $3.1 million), rule familiarization (annual net savings of $2.8

million), root-cause incident investigation (annual savings of $1.8 million), and public meetings (annual savings of $0.28 million)." Compare these relatively small cost savings on an industry–wide basis to the cost impacts of just one RMP event as discussed in the Holmstrom Declaration § V. The PES Refinery incident had significant human and economic impacts. The incident and its aftermath led to a reported $1.25 billion insurance loss, the closure of the plant, and over 1,000 jobs lost; *see also,* NASDAQ Article, which rebuts EPA's findings about declining RMP event impacts and reinforces damages to workers including USW members, their families, and their communities.

### 1. EPA's Dismissal of CSB Findings and Recommendations Regarding the Benefits of Chemical Disaster Rule Accident Prevention, Emergency Response and Information Sharing Regulations is Arbitrary and Capricious

EPA's dismissal of CSB findings and recommendations relating to the benefits of Chemical Disaster Rule regulations including CSB findings and recommendations previously embraced and relied upon by EPA in support of the Chemical Disaster Rule is arbitrary and capricious. The CSB was established by section 112(r)(6)(C) of the CAA to work closely with EPA, OSHA and other federal agencies "to prevent or minimize the consequences of any release of substances that may cause death, injury or other serious adverse effects on human health or substantial property damage as the result of an accidental release" including through the issuance of periodic reports to EPA with recommendations to reduce the likelihood or the consequences of accidental releases to EPA through rulemaking. *See also* Holmstrom Declaration § IV for additional discussion of CSB responsibilities, expertise, and past recommendations to EPA and OSHA to reduce the likelihood or consequences of accidental releases from RMP facilities. While section 112(r)(6)(C) of the CAA does not require EPA to adopt every CSB recommendation, EPA's wholesale rejection of CSB findings and recommendations previously

embraced by EPA to advance the administration's anti-regulatory agenda without a well-reasoned explanation is arbitrary and capricious. *Fox,* 556 U.S. at 515-16.

Moreover, USW asserts that the FY21 Budget, which "contains the Budget Message of the President, and information on the President's priorities," and the accompanying FY21 Major Savings and Reforms provide new grounds for objection by USW that EPA's rescission of Chemical Disaster Rule accident prevention, emergency response and information availability regulations is arbitrary and capricious that are centrally relevant to the promulgation of the RMP Rollback Rule. Remarkably, the FY 21 Budget and the FY21 Major Savings and Reforms call for the complete elimination of the CSB in contravention of section 112(r)(6)(C) of the CAA. *See* FY21 Major Savings and Reforms at 98 ("The Budget proposes to eliminate the U.S. Chemical Safety and Hazard Investigation Board (CSB), consistent with the Administration's efforts to eliminate agencies and programs that are largely duplicative of efforts carried out by other agencies."). [8] Bias against the CSB and its finding and recommendations relating to the RMP Rollback Rule by the current administration is further evidenced in the FY21 Major Savings and Reforms at 98:

> While CSB has done some useful work on its investigations, its overlap with other agency investigative authorities has often generated friction. Previous management sought to focus CSB's recommendations on the need for greater regulation of industry, which frustrated both regulators and industry.

[8] The United Steelworkers reject the Administration's premise that the CSB's work is largely duplicative of the work of other agencies such as OSHA and EPA. The CSB is the only federal agency (except specialized investigations conducted by the Federal Mine Safety and Health Administration ("MSHA") after a mining accident and the National Safety Transportation Board ("NSTB"), upon which the CSB is modeled, after a transportation accident) that conducts the type of root cause, multi-factor investigation into a chemical accident. *See* Holmstrom Declaration §§ IV, VII; and a description of CSB core functions including CSB's detailed root cause investigation process available at https://www.csb.gov/about-the-csb/mission/.

Apparently, CSB is being punished by the current administration for adhering to its mandate under section 112(r)(6) of the CAA. USW submits the FY21 Budget and the FY21 Major Savings and Reforms as evidence of the administration's (and EPA's) bias against the CSB due to CSB's adherence to its statutorily mandated agenda, CSB's refusal to recant its recommendations that EPA retain Chemical Disaster Rule accident prevention regulations, and the CSB's opposition to the RMP Rollback Rule that are new grounds for objection centrally relevant to the final rule. USW also raises new objections to EPA's reliance on a data-driven approach based on the Holmstrom Declaration § V, which identifies post-CSB reports, findings and recommendations and new findings relating to past RMP events that are centrally relevant to the RMP Rollback Rule.

### 2. EPA's Short Shrift of USW Reports and Expert Opinions Regarding the Benefits of Chemical Disaster Rule Accident Prevention, Emergency Response, and Information Sharing Regulations is Arbitrary and Capricious

USW also objects to the short shrift EPA gave to similar findings and recommendations regarding the benefits of Chemical Disaster Rule accident prevention and emergency response regulations set forth in USW reports like "A Risk Too Great," and provided by USW experts that were attached to USW Comments on Proposed RMP Rollback Rule at EPA-HQ-OEM-2015-0725-1970 in favor of the agency's purported "data-driven" approach in violation of section 307(d)(6) of the CAA and the Administrative Procedure Act. *See* Holmstrom Declaration § V. EPA's apparent disregard for USW technical reports and expert opinions are new grounds for objection that were impracticable to raise until the promulgation of the RMP Rollback Rule and are centrally relevant to EPA's rulemaking decisions. USW asserts that EPA acted arbitrarily and capriciously by failing to give due consideration to the data in USW's reports documenting, *inter alia*, the risks posed by HF and other regulated substances in major metropolitan areas and

the benefits of IST/STAA as well as the USW expert opinions set forth in the USW Nibarger Declaration and the USW Wright Declaration regarding, *inter alia*, the benefits of IST/STAA, third-party audits, root cause analysis, incident investigations on near misses and destroyed/decommissioned equipment, supervisor training, coordination with first responders, field and tabletop exercises, and public availability of facility and chemical hazard information.

### 3. EPA's Repudiation and Contradiction of Prior EPA Findings Regarding the Benefits of Chemical Disaster Rule Accident Prevention and Emergency Response Regulations is Arbitrary and Capricious

In reversing course and rescinding Chemical Disaster Rule accident prevention and emergency response regulations in the RMP Rollback Rule, EPA's repudiation and contradiction of EPA's prior findings relied upon to promulgate the Chemical Disaster Rule are not supported by the record and lack reasoned decision-making necessary to survive judicial scrutiny under the Administrative Procedure Act, 5 U.S.C. §§ 551-559. *See State Farm*, 463 U.S. at 43 and *Fox*, 556 U.S. at 515-16. Indeed, the RMP Rollback Rule rescinds virtually all of the accident-prevention measures that EPA previously found necessary to save lives when it promulgated the Chemical Disaster Rule. 84 Fed. Reg. 69,836. The RMP Rolback Rule "rescinds almost all the requirements added in 2017 to the accident prevention program provisions," including STAA, third party auditing, root cause analyses, and other requirements for incident investigations. 84 Fed. Reg. 69,836.

A noted in the Holmstrom Declaration §§ V, VI, USW raises new grounds for objection EPA's failure to adequately justify the agency's repudiation of its own findings regarding the benefits of Chemical Disaster Rule accident prevention and emergency response regulations that were impracticable to raise during the public comment period and are centrally relevant to the promulgation of the RMP Rollback Rule.

### B. New Grounds for Objection Establish that EPA's Reliance on a "Compliance-Driven Approach" to Rescind Critical Chemical Disaster Rule Accident Prevention and Emergency Response Regulations Via the RMP Rollback Rule is Arbitrary and Capricious

EPA heavily relies on what the agency disingenuously characterizes as a "compliance-driven approach" to support the RMP Rollback Rule's rescission of critical Chemical Disaster Rule accident prevention and emergency response regulations. *See, e.g.*, 84 Fed. Reg. at 69,855 ("EPA believes that some benefits[9] of the Amendments rule can be obtained through a "compliance-driven approach" without imposing broad regulatory mandates that may unnecessarily burden many facilities"); *id.* at 69,863 and 69,870. EPA discussed in the preamble to the RMP Rollback Rule its new vision of a "compliance-driven approach": "the RMP accident data … tend to support the reasonableness of an approach to strengthening accident prevention that focuses on achieving compliance at problematic facilities rather than broader regulatory mandates." *Id.* at 69,867. New grounds for objection raised by USW below, which are centrally relevant to the RMP Rollback Rule, as well as comments previously submitted by USW and other commenters establish that EPA's reliance on the so-called "compliance-driven approach" – which is reactive rather than preventative – is arbitrary and capricious.

As a threshold matter, USW objects to EPA new characterization of the agency's proposed enforcement-led approach in the proposed rule (*see, e.g.*, 83 Fed. Reg. at 24,872-73) as rationale in support of the rescission of critical Chemical Disaster Rule accident prevention and emergency response regulations. The re-characterization the agency's rationale as "compliance-

[9] USW also raises as a new grounds for objection to EPA's reliance on its "compliance-driven approach," EPA's failure to identify what benefits from the Chemical Disaster Rule accident prevention regulations EPA believes can and cannot be obtained by the "compliance-driven approach," and what are the implications to workers, first responders, and local community members resulting from the loss of these unidentified benefits. *See, e.g.*, 84 Fed. Reg. at 69,855, 69,856, 69,862, and 69,871.

driven" is more than a change in nomenclature as evidenced by EPA responses in the preamble to the RMP Rollback Rule, other post-comment period statements by the administration, and data that calls into question the administration's commitment to environmental enforcement all of which USW raises as new grounds for objection centrally relevant to the RMP Rollback Rule that were impracticable to raise during the public comment period.

Recent RMP events with catastrophic impacts on workers and community members referenced in the States' Supplemental Comments, the States' Second Supplemental Comments, and the Holmstrom Declaration § V, including the PES explosion in Philadelphia, Pennsylvania, and the TPC explosion in Port Neches, Texas – both RMP covered facilities with plant workers represented by USW who suffered harmed – expose fundamental flaws in EPA's ill-conceived "compliance-driven approach" to prevent, detect and respond to high consequence, low frequency RMP events.

First of all, post-comment period RMP events at covered facilities that recently were subject to EPA inspections and enforcement actions underscore that EPA's compliance efforts have failed to prevent subsequent RMP events at these poor performing facilities.[10] Moreover, the potential effectiveness of a "compliance-driven approach" is further compromised by EPA's

[10] *See, e.g.,* EPA had previously taken enforcement action against TPC in Port Neches, TX, but that enforcement failed, alone, to prevent the catastrophic release. Port Neches - TPC - EPA Consent Agreement on Enforcement (July 17, 2017) https://yosemite.epa.gov/OA/rhc/EPAAdmin.nsf/Filings/D91D47509AC159638525817F001BC516/$File/tpc.pdf.

dwindling enforcement resources[11] and the administration's FY2021 Proposed Budget[12] that undercut the administration's commitment to environmental enforcement efforts and contradict EPA's rather modest claim that EPA will continue to conduct the same number of RMP inspections (*i.e.*, 300 per year) going forward. [13]

Data presented by EPA in the preamble to the RMP Rollback Rule regarding the number of RMP covered facilities *(i.e.,* 12,542 RMP covered facilities as of February 2015) (84 Fed. Reg. at 69,838, Table 2) and the number of EPA RMP inspections conducted annually further reinforces the futility of a "compliance-driven approach" to prevent high consequence, low frequency RMP events. Such data are new grounds for USW objection that EPA's rescission of Chemical Disaster Rule accident prevention and emergency response provisions lacks reasoned decision-making since the "compliance-driven approach" is reactive rather than preventative.

Based on EPA's own data (*e.g.,* 12,542 facilities subject to 300 inspections a year), an RMP facility will be inspected on average approximately once every 41.8 years (likely less since

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[11] The administration's proposed a 31% decrease in EPA's budget for fiscal year 2020 (https://www.environmentalprotectionnetwork.org/category/budget/fy2020-budget-cuts/), and while that did not occur due to congressional pushback, the budget that finally passed for air enforcement remained flat for fiscal year 2020 (0% increase) as signed into law (https://www.esa.org/esablog/federal-budget-tracker/#epa). Meanwhile, overall EPA has experienced record losses to agency staff (https://www.ecowatch.com/epa-workers-trump-administration-2603730765.html; https://www.hsph.harvard.edu/news/hsph-in-the-news/epa-losing-employees-not-replacing-them/; https://www.wgbh.org/news/local-news/2019/02/15/bostons-epa-office-is-shrinking-and-employees-are-speaking-out). As a result, the agency reported that EPA conducted roughly half as many annual inspections under this administration than was undertaken by the agency in 2010 while environmental crime cases opened in FY 2018 were down by nearly two-thirds from 2008 according to Fiscal Year 2018 EPA Enforcement and Compliance Annual Results (February 8, 2019) (https://www.epa.gov/sites/production/files/2019-02/documents/fy18-enforcement-annual-results-data-graphs.pdf).

[12] FY2021 Proposed Budget at 97 states "[t]he President's 2021 Budget requests … a $2.4 billion or 26-percent decrease from the 2020 enacted level [from EPA's budget]."

[13] 84 Fed. Reg. at 69,853.

at least some EPA RMP inspections will be initiated in response to RMP events, or at facilities that experienced catastrophic explosions but lacked a Risk Management Plan to determine whether RMP violations occurred at the facility (*e.g.*, the recent explosion at Watson Grinding & Manufacturing)).[14] The paucity of EPA inspections compared to the number of RMP facilities reflected in the reactive "compliance-driven approach" championed by EPA coupled with the rescission of critical Chemical Disaster Rule accident prevention and emergency response regulations can only be characterized as misplaced reliance on a culture of industry self-regulation as discussed in "Spate of Texas Chemical Accidents Leads to Investigations, Suits" (February 6, 2020) that recently documented Houston-area fires and explosions that occurred during 2019-2020 available at https://news.bloombergenvironment.com/safety/spate-of-texas-chemical-accidents-leads-to-investigations-suits.

The lack of reasoned decision-making to support EPA's reliance on the ill-conceived "compliance-driven approach" in lieu of "broad-based" industry regulations is further underscored by EPA's failure to acknowledge that the agency lacks the authority to order a covered source to implement Chemical Disaster Rule accident prevention provisions stripped from the RMP regulations by the RMP Rollback Rule under CAA § 113 orders[15] or judicial and administrative judgments. While it is true that EPA settlements may include requirements for completion of supplemental environmental projects ("SEPs") or injunctive relief that go beyond

[14] Watson Grinding lacked a Risk Management Plan; *see* https://www.click2houston.com/news/local/2020/01/27/family-of-man-killed-in-watson-grinding-explosion-sues-business/ https://www.houstonchronicle.com/news/houston-texas/houston/article/What-we-know-about-company-west-explosion-gessner-15000960.php.

[15] USW also objects to EPA referencing potential use of CAA § 113(a) orders to require covered facilities to implement rescinded Chemical Disaster Rule accident prevention requirements including, *inter alia*, STAA and third-party audits for the first time in the preamble to the RMP Rollback Rule. *See* Section II, *supra*, at 8.

regulatory requirements as memorialized in administrative orders on consent ("AOCs") or judicial consent decrees ("CDs"), incorporation of the Chemical Disaster Rule accident prevention programs into an consensual agreement involves inspection, negotiation and oversight efforts on the part of EPA and DOJ that require (1) a significant expenditure of government resources, and (2) the cooperation and willingness on the part of the Respondent RMP covered facility to adopt the now voluntary accident prevention programs. The record for the RMP Rollback Rule does not reflect that EPA has fully discussed or considered these obstacles to successful implementation of the agency's "compliance-driven approach" as rationale to rescind critical Chemical Disaster Rule accident prevention program regulations. *See, e.g.,* 84 Fed. Reg. at 69,863 and 69,868.

Finally, EPA's rescission of numerous Chemical Disaster Rule accident prevention provisions that clarified RMP requirements (*e.g.*, scope of incident investigation reports, schedules for completion of incident investigation reports, deadline for conducting field exercise programs, and supervisor training requirements) and addressed omissions and gaps in the Pre-Chemical Disaster Rule RMP rules complicates EPA's enforcement efforts and belies EPA's purported commitment to and reliance upon the agency's "compliance-driven approach" and provides additional new grounds to USW's objection that the RMP Rollback Rule is arbitrary and capricious. *See* Section IV, B, *infra,* 22-26.

### C. New Grounds for Objection Establish that EPA's Reliance on PSM Consistency as Rationale to Rescind Critical Chemical Disaster Rule Accident Prevention and Emergency Response Regulations Via the RMP Rollback Rule is Arbitrary and Capricious

EPA also heavily relies on PSM consistency arguments to support the RMP Rollback Rule's rescission of critical Chemical Disaster Rule accident prevention and emergency response

regulations[16] although EPA admits "that there is no legal requirement for EPA and OSHA to proceed on identical timelines in making changes to the RMP rule and PSM standard, and that some divergence between the RMP rule and PSM standard may at times be necessary given the agencies' separate missions." *Id.* at 69,862. New grounds for objection raised by USW below, which are centrally relevant to the RMP Rollback Rule, as well as comments previously submitted by USW and other commenters establish that EPA's reliance on PSM consistency rationale citing to industry compliance burdens[17] and potential confusion resulting from such program differences[18] is a red herring used by EPA to stall RMP modernization, lacks reasoned decision-making and is arbitrary and capricious. Moreover, to date, the Administration has not filled the position of the Assistant Secretary of the Department of Labor for OSHA and that position is unlikely to be filled by the end of this term,[19] making coordination between EPA and OSHA on RMP and PSM standards highly unlikely and impracticable, causing unnecessary delay in PSM rulemaking efforts.

As noted in the Holmstrom Declaration § IX, inconsistencies between RMP and PSM regulations have always existed, and are endemic to a rulemaking process being implemented by EPA and OSHA, two distinct regulatory agencies with different mandates. EPA RMP and OSHA PSM regulations are promulgated separately under distinct regulatory programs that

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[16] *See, e.g.*, 84 Fed. Reg. at 69,847, 69,849, 69,851, 69,852, 69,861, 69,862, 69,871, 69,872, 69,874, 69,875, 69,877, 69,882, and 69,884).
[17] *Id.*
[18] *See id.* at 69,852 ("Rescinding these provisions will also bring the RMP prevention program provisions back into alignment with the OSHA PSM standard, which will avoid confusion among facilities subject to both regulations due to divergent regulatory requirements.")
[19] "Trump Labor Safety Secretary Withdraws on the Cusp of Confirmation," Bloomberg, (May 15, 2019) available at https://news.bloomberglaw.com/daily-labor-report/trump-labor-safety-nominee-withdraws-on-cusp-of-confirmation; Loren Sweatt remains as the Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health. https://www.osha.gov/aboutosha/biography/sweatt.

make simultaneous promulgation of new RMP and PSM regulations impossible. EPA RMP and OSHA PSM inconsistencies already existed in the Pre-Chemical Disaster Rule RMP rules; the Chemical Disaster Rule accident prevention provisions are not the first time that RMP and PSM regulations have diverged. Thus, EPA's assertion in the preamble to the RMP Rollback Rule that RMP/PSM consistency is the traditional approach (*id.* at 69,862) is factually inaccurate, and is mere pretense offered by EPA to rollback RMP modernization since OSHA PSM improvements have been stalled under the administration's deregulatory agenda. Similarly, EPA's assertion that the Chemical Disaster Rule accident prevention regulations "diverge substantially" from the OSHA PSM standard by conflating the complexity of Chemical Disaster Rule STAA and auditing provisions based on OSHA PSM inconsistencies as rationale to rescind critical Chemical Disaster Rule accident prevention regulations is unsupported by the administrative record.

## IV. NEW GROUNDS FOR OBJECTION ESTABLISH THAT EPA'S ROLLBACK OF THE CHEMICAL DISASTER RULE ACCIDENT PREVENTION REQUIREMENTS IS ARBITRARY AND CAPRICIOUS

The RMP Rollback Rule "rescinds almost all the requirements added in the [Chemical Disaster Rule] to the accident prevention program provisions" (84 Fed. Reg. at 69,836) including the following requirements:

> **[A]ll requirements for third-party compliance audits** (§§ 68.58, 68.59, 68.79 and 68.80), **safer technology and alternatives analysis (STAA)** (§ 68.67(c)(8)) for facilities with Program 3 regulated processes in NAICS codes 322 (paper manufacturing), 324 (petroleum and coal products manufacturing), and 325 (chemical manufacturing) and **removing the words ''for each covered process'' from the compliance audit provisions** in §§ 68.58 and 68.79. This action also rescinds **the requirement in § 68.50(a)(2) for the hazard review to include findings from incident investigations**. For incident investigations (§§ 68.60 and 68.81), this action rescinds the following requirements added in 2017:

1. **Conducting root cause analysis**;
2. **Added data elements for incident investigation reports, including a schedule to address recommendations and a 12-month completion deadline**, and
3. **Investigating any incident resulting in a catastrophic release that also results in the affected process being decommissioned or destroyed**.

In §§ 68.60 and 68.81, EPA is also **removing text ''(*i.e.*, was a near miss)''** that EPA added in 2017 **to describe an incident that could reasonably have resulted in a catastrophic release**.

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This action **removes the language added to the Program 2 (§ 68.54) and Program 3 (§ 68.71) training requirements, which more explicitly included supervisors and others involved in operating a process**. This action also rescinds minor wording changes in § 68.54 describing employees involved in operating a process. EPA is also rescinding **the requirement in § 68.65 for the owner or operator to keep process safety information up-to-date** and the requirement in § 68.67(c)(2) for the process hazard analysis to address the findings from all incident investigations required under § 68.81, as well as any other potential failure scenarios.

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This action rescinds the following definitions in § 68.3: Active measures, inherently safer technology or design, passive measures, practicability, and procedural measures related to amendments to requirements in § 68.67; root cause related to amendments to requirements in § 68.60 and § 68.81; and third-party audit related to amendments to requirements in §§ 68.58 and 68.79 and added in §§ 68.59 and 68.80.

*Id.* at 69,836-37 (Emphasis supplied.).

EPA's promulgation of the RMP Rollback Rule rescinded critical Chemical Disaster Rule accident prevention requirements that provided important benefits to United Steelworkers' members who work at RMP covered facilities by addressing potential harm to these United Steelworkers plant workers, their families, and their communities from the catastrophic

consequences of RMP events. New grounds for objection raised by USW below, which are centrally relevant to the RMP Rollback Rule, as well as comments previously submitted by USW and other parties establish that EPA's rescission of the Chemical Disaster Rule accident prevention regulations lacks reasoned decision-making, and is arbitrary and capricious.

### A. Third-Party Audits

The RMP Rollback Rule rescinded the Chemical Disaster Rule third-party audit requirements at 40 CFR §§ 68.58, 68.59, 68.79 and 68.80 that provided important accident prevention benefits to United Steelworkers members who work at RMP covered facilities by addressing potential harm to these United Steelworkers plant workers, their families, and their communities from the catastrophic consequences of RMP events. New grounds for objection raised by USW below, which are centrally relevant to the RMP Rollback Rule, as well as comments previously submitted by USW and other parties establish that EPA's rescission of Chemical Disaster Rule third-party audit requirements is arbitrary and capricious.

Despite acknowledging the clear and undeniable benefits to accident prevention provided by third-party audits (84 Fed. Reg. at 69,875), EPA rescinded the Chemical Disaster Rule third-party audit provisions citing as rationale (1) the need for continued coordination with OSHA on process safety requirements to avoid potential divergence between the OSHA PSM standard and the RMP rule,[20] (2) reduction of costs and burdens to industry, and (3) reliance on a case-by-case approach under the agency's disingenuous "compliance-driven approach" rather than impose

[20] *See* Section III, C. *supra*, at 26-28 for USW objections to EPA's arbitrary and capricious reliance of OSHA PSM consistency as pretense to halt RMP/PSM modernization and advance the administration's deregulatory agenda.

"unnecessary regulatory costs and burdens of a broad-based rule.[21] *See id.* Thus, EPA has rescinded a Chemical Disaster Rule provision that would require RMP covered facilities to implement an accident prevention strategy with widely-accepted benefits to reduce the frequency and severity RMP events (*i.e.*, explosions fires and other events with catastrophic consequences to workers, their families and communities) to save industry approximately $9.8 million annually according to EPA. *Id.* at 69,838, Table 3.[22]

USW objects to the rescission of third-party audit provisions based on the rationale cited in the preamble to the RMP Rollback Rule. The details of recent RMP events[23] and CSB findings[24] discussed in the Holmstrom Declaration provide new grounds for objection that EPA failed to engage in reasonable decision-making in rescinding the Chemical Disaster Rule STAA provision that are centrally relevant to the promulgation of the RMP Rollback Rule. These new grounds for objection further reinforce the findings and recommendations set forth in USW expert opinions[25] regarding the benefits of third-party audits set forth in USW Comments on the Proposed RMP Rollback Rule at 11-13. As discussed at Section III, C, *supra*, at 26-28, the OSHA PSM consistency argument and EPA's disingenuous "compliance-driven approach"

[21] *See* Section III, B, *supra*, at 22-26 for USW objections to EPA's arbitrary and capricious reliance of its disingenuous "compliance-driven approach" to advance the administration's deregulatory agenda.

[22] USW objects to the calculation of annualized cost savings resulting from the rescission of the third-party audit requirements by RMP Rollback Rule because EPA apparently lacks the data to determine how many facilities already are implementing root cause analysis and by analogy third-party audits voluntarily, and, therefore, cannot calculate cost savings since an undetermined number of facilities will not incur increased costs. *See, e.g. id*. at 69,872 where EPA admits that "it is difficult to estimate how much benefit is to be gained from facilities who are not already conducting root cause analysis [since many facilities may already employ root cause analysis techniques]."

[23] Holmstrom Declaration § V.

[24] Holmstrom Declaration § VI.

[25] *See, e.g.,* Wright Declaration ¶¶ 31-32.

offered by EPA to rescind third-party audits and other Chemical Disaster Rule accident prevention regulations is driven by the administration's anti-regulatory agenda that prioritizes industry costs and burdens – which EPA fails to accurately quantify[26] – to the detriment of the health and safety of USW members who work at RMP covered facilities, their families, and their communities. EPA's rescission of the Chemical Disaster Rule third-party audit provision in the RMP Rollback Rule, therefore, lacks reasoned decision-making, and is arbitrary and capricious.

**B. STAA**

The RMP Rollback Rule rescinded Chemical Disaster Rule STAA requirements at 40 CFR § 68.67(c) that provided important accident prevention benefits to United Steelworker members who work at RMP covered facilities by addressing potential harm to these United Steelworker plant workers, their families, and their communities from the catastrophic consequences of RMP events. New grounds for objection raised by USW below, which are centrally relevant to the RMP Rollback Rule, as well as comments previously submitted by USW and other parties establish that EPA's rescission of Chemical Disaster Rule STAA requirements is arbitrary and capricious.

EPA rescinded the STAA provision at 40 CFR § 68. 67(c)(8)) for facilities with Program 3 regulated processes in NAICS codes 322 (paper manufacturing), 324 (petroleum and coal products manufacturing), and 325 (chemical manufacturing)" based on the lack of apparent

[26] EPA's calculation of third-party audit and other rescinded Chemical Disaster Rule accident prevention requirement costs to industry is rife with inconsistencies. As previously noted at *supra*, fn. 22, EPA appears to assume that no facilities are implementing third-party audits when calculating compliance costs for the third-party audit provisions (84 Fed. Reg. at 69,838, Table 3) but discounts the accident prevention benefits and deems them to be unquantifiable based on the assumption that some RMP covered facilities may already be implementing third-party audits, hence, no benefits would result from the Chemical Disaster Rule third-party audit provisions at those facilities.

benefits of the provision. 84 Fed. Reg. at 69,882. *See also id.* at 69,868 ( "EPA's review of available data on IST/STAA provides no clear evidence that the Amendments rule STAA requirement would result in further accident reduction, but the costs of the requirement are calculable and substantial."). In its zeal to achieve the administration's deregulatory agenda, EPA even goes as far to say: "If a regulatory provision is of minimal or no effectiveness (*e.g.*, IST/STAA), virtually any cost imposed for its implementation would be unjustified." *Id.* at 69,852. EPA calculated the cost of implementing STAA to be approximately $70 million annually split according to EPA (*Id.* at 69,838, Table 3),[27] which is a miniscule fraction of annual industry revenue and profits for RMP covered facilities.

USW objects to the rescission of STAA provisions based on the rationale cited in the preamble to the RMP Rollback Rule. Details of recent RMP events,[28] CSB findings,[29] and the McCabe Letter discussed in the Holmstrom Declaration that provide new grounds for objection that EPA failed to engage in reasonable decision-making in rescinding the Chemical Disaster Rule STAA provision that are centrally relevant to the promulgation of the RMP Rollback Rule. Moreover, these new grounds for objection further reinforce the findings and recommendations set forth in USW reports[30] and expert opinions[31] regarding the benefits of STAA provision set

[27] *See supra*, fn. 22.
[28] Holmstrom Declaration § V.
[29] Holmstrom Declaration § VI.
[30] As noted in the USW Comments on the Proposed RMP Rollback Rule at 10: "[t]he United Steelworkers have authored and released several safety and health studies – that cite to surveys and hard data – advocating for the application of STAA and ISTs inherently safer technologies and reinforcing the benefits of STAA particularly for these industries with the highest accident rates." *See, e.g.*, Beyond Texas City; Papered Over at 7, and, A Risk Too Great.
[31] As noted in the USW Comments on the Proposed RMP Rollback Rule at 11: "[t]he Wright Declaration ¶¶ 33-47 provides extensive discussion of the benefits derived from the STAA requirements within the Chemical Disaster Rule that EPA now proposes to rescind. USW asserts that the STAA IST provisions within the Chemical Disaster Rule are clearly beneficial in preventing explosions and fires at RMP facilities and notes that application of STAA IST

forth in USW Comments on the Proposed RMP Rollback Rule at 9-11. USW has been advocating on behalf of the benefits of STAA to the CSB, the United States Congress, and EPA since 2010.[32] As discussed at Section III, *supra*, at 13-28, the rationales offered by EPA's to support rescission of STAA and other Chemical Disaster Rule accident prevention regulations are nothing more than pretense to justify an anti-regulatory agenda that prioritizes industry costs and burdens – which EPA fails to accurately quantify[33] – to the detriment of the health and safety of USW members at RMP covered facilities, their families, and their communities. EPA's rescission of the Chemical Disaster Rule STAA provision in the RMP Rollback Rule, therefore, lacks reasoned decision-making and is arbitrary and capricious.

### C. Root Cause Analysis

The RMP Rollback Rule rescinded Chemical Disaster Rule root cause analysis incident investigation requirements at 40 CFR §§ 68.60 and 68.81 that provided important accident prevention benefits to United Steelworkers members who work at RMP covered facilities by addressing potential harm to these USW plant workers, their families, and their communities from the catastrophic consequences of RMP events. New grounds for objection raised by USW below, which are centrally relevant to the RMP Rollback Rule, as well as comments previously

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requirements in the Chemical Disaster Rule would provide real world benefits for literally millions of people who live within the worst case scenarios of these refineries."

[32] *See* USW Comments on the Proposed RMP Rollback Rule at 10; and Section I, *supra*, at 5-6.

[33] EPA's calculation of STAA and other rescinded Chemical Disaster Rule accident prevention requirement costs to industry is rife with inconsistencies. EPA appears to assume that no facilities are implementing STAA when calculating compliance costs for the STAA provisions (84 Fed. Reg. at 69,838, Table 3) but discounts the accident prevention benefits of STAA since many covered sources (*i.e.*, an undefined amount supported by unspecified data without citation) already have successful programs, thus, "incorporating STAA into all such programs will not clearly reduce accidents." *Id.* at 69,843. EPA's bold and inconsistent statements lack reasoned decision-making.

submitted by USW and other commenters establish that EPA's rescission of Chemical Disaster Rule root cause analysis for incident investigations is arbitrary and capricious.

Notwithstanding long-time acceptance of the benefits of root cause analysis in reducing the frequency and severity of RMP events in industry guidelines as discussed in the Holmstrom Declaration ¶¶ 65-68, EPA rescinded the requirement to conduct root cause analysis based on the following rationale: (1) a comparison of costs and benefits; [34] (2) an inability to make a direct connection between the presence or absence of [incident investigation root cause analysis] and a number of accidents prevented;"[35] (3) cost and burden reduction for the regulated community; and (4) the desire to maintain consistency with the OSHA PSM standard.[36] *See* 84 Fed. Reg. 69,871. Hence, EPA has chosen to rescind a Chemical Disaster Rule provision that would require RMP covered facilities to implement an accident prevention strategy – conduct of a root cause analysis – with widely-recognized benefits to reduce the frequency and severity RMP events (i.e., explosions fires and other events with catastrophic consequences to workers, their families and communities) to save industry an undefined percentage of approximately $1.8 million annually split between root cause and other incident investigation costs according to EPA. *Id.* at 69,838, Table 3.[37]

[34] Curiously, EPA does not even bother to make the dubious claim advanced for other rescinded accident prevention regulations that any unquantifiable accident prevention benefits from the rescinded root cause incident investigation requirements will be captured by EPA on a case by case basis through application of its misguided "compliance-driven approach."
[35] *See* Section III, B. *supra*, at 22-26 for USW objections to EPA's arbitrary and capricious dismissal of expert opinions and EPA prior findings regarding the benefits of Chemical Disaster Rule accident prevention and emergency response requirements.
[36] *See* Section III, C. *supra*, at 26-28 for USW objections to EPA's arbitrary and capricious reliance of OSHA PSM consistency as pretense to stymie RMP/PSM modernization and advance the administration's deregulatory agenda.
[37] USW objects to the calculation of annualized cost savings resulting from the rescission of the root cause analysis requirements by RMP Rollback Rule because EPA apparently lacks the data to determine how many facilities already are conducting accident prevention strategies including

USW objects to the rescission of root cause analysis incident investigation requirement based on the rationale cited in the preamble to the RMP Rollback Rule including EPA's arbitrary and capricious claim that "EPA has no data or empirical estimates of the precise impact of each rule provision on the probability and magnitude of an accident." *Id.* at 69,872. The details of recent RMP events[38] and CSB findings[39] discussed in the Holmstrom Declaration provide new grounds for objection that EPA failed to engage in reasonable decision-making in rescinding the Chemical Disaster Rule root cause analysis incident investigation provision that are centrally relevant to the promulgation of the RMP Rollback Rule. These new grounds for objection reinforce findings and recommendations set forth in USW reports[40] and expert opinions[41] regarding the benefits of root cause analysis incident investigation requirements in USW Comments on the Proposed RMP Rollback Rule at 13-15.

As discussed at Section III, C *supra,* at 26-28, the OSHA PSM consistency argument and EPA's disingenuous "compliance-driven approach" offered up by EPA to rescind third-party audits and other Chemical Disaster Rule accident prevention regulations is driven by the

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root cause analysis incident investigations voluntarily, and, therefore, EPA cannot calculate cost savings since an undetermined number of facilities will not incur increased costs. *See, e.g. id*. at 69,872 where EPA admits that "it is difficult to estimate how much benefit is to be gained from facilities who are not already conducting root cause analysis [since many facilities may already employ root cause analysis techniques]." Such rationale is not only duplicitous, it is arbitrary and capricious.

[38] Holmstrom Declaration § V.

[39] Holmstrom Declaration § VI.

[40] *See, e.g.,* USW Comments on Proposed RMP Rollback Rule – Attachment 10, USW, "Looking for Trouble: A Comprehensive Union-Management Safety and Health Program" (2015)" (hereinafter "USW Report, Looking for Trouble") at 2, 6; and USW Comments on Proposed RMP Rollback Rule – Attachment 9, USW, "Papered Over: Safety and Health In U.S. Paper Mills (2010) (hereinafter "USW Report, Papered Over") at x, 3, 19.

[41] *See, e.g.,* Nibarger Declaration ¶¶ 3, 5, 14-18, 32-33, 36-42 (The Nibarger Declaration provides specific examples of past catastrophic events at USW facilities where the conduct of a root cause analysis could have resulted in lessons learned that prevented future accidents at the facility and similar facilities throughout the United States.).

administration's anti-regulatory agenda that prioritizes industry costs and burdens – which EPA fails to accurately quantify[42] – to the detriment of the health and safety of USW members who work at RMP covered facilities, their families, and their communities. EPA's rescission of the Chemical Disaster Rule requirement to conduct root cause analysis during incident investigations in the RMP Rollback Rule, therefore, lacks reasoned decision-making, and is arbitrary and capricious.

### D. Incident Investigation Requirements for Near Misses, and Destroyed or Decommissioned Equipment

The RMP Rollback Rule rescinded Chemical Disaster Rule incident investigation requirements for near misses and destroyed or decommissioned equipment and other incident investigation requirements at 40 CFR §§ 68.60 and 68.81 (*i.e.,* 12 month completion deadline, scope of report and findings, follow-up documentation on implementation of recommendations) that provided important accident prevention benefits to United Steelworkers members who work at RMP covered facilities by addressing potential harm to these United Steelworkers plant workers, their families, and their communities from the catastrophic consequences of RMP events. New grounds for objection raised by USW below, which are centrally relevant to the RMP Rollback Rule, as well as comments previously submitted by USW and other commenters establish that EPA's rescission of these Chemical Disaster Rule incident investigation requirements is arbitrary and capricious.

Despite acknowledging the clear and undeniable benefits in reducing the frequency and severity of RMP events provided by incident investigation requirements for near misses and destroyed or decommissioned equipment and other incident report requirements, EPA rescinded

[42] *See supra*, fn. 22.

these regulatory requirements based on rationale that is premised on a result-driven approach rather than reasoned decision-making. EPA erroneously argues that the agency's near miss analysis should be based on a cramped interpretation of the term "RMP near-miss events" while, once again, claiming that EPA is unable to make a direct connection between these incident investigation requirements and a reduction in RMP event frequency that establishes a record of benefits, and invoking the mantra of cost and burden reduction for industry and OSHA PSM consistency rationale to rescind these incident investigation requirements. *See* 84 Fed. Reg. at 69874. Once again, EPA has rescinded important Chemical Disaster Rule provision that would require RMP covered facilities to implement reasonable, common sense accident prevention strategies with little cost or burden to industry that are likely to reduce the frequency and severity RMP events (i.e., explosions fires and other events with catastrophic consequences to workers, their families and communities) to save industry an undefined percentage of approximately $1.8 million annually split between root cause and other incident investigation costs according to EPA. *Id.* at 69,838, Table 3.[43]

USW objects to the rescission of these incident investigation report requirements provisions based on the rationale cited in the preamble to the RMP Rollback Rule. *Id.* at 69,874. The details of recent RMP events[44] and CSB findings[45] discussed in the Holmstrom Declaration provide new grounds for objection that EPA failed to engage in reasonable decision-making in rescinding these incident investigation regulatory requirements that are centrally relevant to the promulgation of the RMP Rollback Rule. These new grounds for objection reinforce findings

[43] *See supra*, fn. 22.
[44] Holmstrom Declaration § V.
[45] Holmstrom Declaration § VI.

and recommendations in USW reports[46] and expert opinions [47]regarding the benefits these incident investigation regulatory requirements in USW Comments on the Proposed RMP Rollback Rule at 13, 15. As discussed at Section III, C *supra*, at 26-28, the OSHA PSM consistency argument is pretense offered solely to advance the administration's anti-regulatory agenda that prioritizes industry costs and burdens – which EPA fails to accurately quantify[48] – to the detriment of the health and safety of USW members who work at RMP covered facilities, their families, and their communities. EPA's rescission of the Chemical Disaster Rule incident investigation regulatory requirements in the RMP Rollback Rule, therefore, lacks reasoned decision-making, and is arbitrary and capricious.

## V. NEW GROUNDS FOR OBJECTION ESTABLISH THAT EPA'S ROLLBACK OF THE CHEMICAL DISASTER RULE EMERGENCY RESPONSE PROGRAM REQUIREMENTS IS ARBITRARY AND CAPRICIOUS

The RMP Rollback Rule rescinds or delays the schedule for implementing critical Chemical Disaster Rule emergency response program regulations that provided important benefits to United Steelworkers' members who work at RMP covered facilities by addressing potential harm to these United Steelworkers' plant workers, their families, and their communities recognized in *AAH* at 1059 (The D.C. Circuit identified the delay in Chemical Disaster Rule first responder provisions under the Delay Rule as a "tangible impact" that potentially harms United Steelworkers' members.).

[46] *See, e.g.,* Looking for Trouble at 1, 5, 6; and Papered Over at x, 19, citing the importance of investigating near miss events in protecting worker health and safety.
[47] *See, e.g.,* Nibarger Declaration ¶¶ 39-41 that discuss at the accident prevention benefits of near miss and destroyed/decommissioned equipment incident investigations.
[48] *See supra*, fn. 22.

Notwithstanding the *AAH* Court's findings, the RMP Rollback Rule diminishes benefits to USW members and their families from the Chemical Disaster Rule emergency response program amendments:

(1) The RMP Rollback Rule reduces the "class of information – information that local response organizations deem 'relevant' but which is not necessary for the emergency plan [as determined by the RMP Facility]" – that RMP facilities are required to provide to first responders as acknowledged by EPA (84 Fed. Reg. at 69,895), that effectively strips local response organizations of the authority to identify "information relevant to local emergency response planning" provided by the Chemical Disaster Rule at 40 CFR § 68.93(b);

(2) The RMP Rollback Rule removes the "frequency requirement" for conduct of field exercises at 40 CFR § 68.96(b)(1)(i), which delays and compromises if not makes impossible the enforcement of the requirement that RMP Facility conduct field exercises;

(3) The RMP Rollback Rule removes field exercise scope requirements from the Chemical Disaster Rule at 40 CFR § 68.96(b)(1)(ii) that established enforceable standards for conduct of field exercises;

(4) The RMP Rollback Rule effectively postpones the deadline for conduct of the first tabletop exercise at a RMP Facility until December 21, 2026, under 40 CFR § 68.96(b)(2)(i) by extending the effective date in the Chemical Disaster Rule triggering the 3-year deadline to conduct tabletop exercises from March 15, 2021, to four years from the effective date of the RMP Rollback Rule or December 19, 2023; and

(5) The RMP Rollback Rule removes tabletop exercise scope requirements from the Chemical Disaster Rule at 40 CFR § 68.96(b)(2)(ii) that established enforceable standards for conduct of tabletop exercises.

EPA characterizes the rescinded Chemical Disaster Rule requirement that RMP covered facilities provide to local emergency response organizations authority to request "information relevant to local emergency response planning" as an "open ended provision" that presents security risks to support this rollback. *See* 84 Fed. Reg. at 69,887 and 69,896. Conversely, in support of the rollbacks to Chemical Disaster Rules emergency response field and tabletop exercise frequency and scope requirements, EPA cites to reduced cost and staffing burden for facilities and local emergency response organizations, and more flexibility to regulated facilities and local responders. *See* 84 Fed. Reg. at 69,900.

The Holmstrom Declaration ¶¶ 33-46 discusses the CSB's Final DuPont LaPorte Report, and CSB's Factual Update with new findings on the Kuraray American EVAL incident showing the benefit of the Chemical Disaster Rule's enhanced local emergency coordination requirements, provide new grounds for objection that are centrally relevant to the rescission or delay in implementing the above referenced emergency response program provisions in the RMP Rollback Rule. The United Steelworkers also raises objections to the rollback of these emergency response program provisions in response to new findings and rationale in the RMP Rollback Rule regarding security concerns that were not discussed in the Proposed RMP Rollback Rule or included in the record thereby precluding public comment. This new information discussed below has been presented to the public by EPA for the first time in the RMP Rollback Rule, and are grounds for objection that arose after the close of the public comment period that lay the foundation for the USW objections set forth below that were

impracticable to raise during the public comment period and are centrally relevant to the RMP Rollback Rule. *See* Section II, *supra*, at 7-12.

### A. EPA Acted Arbitrarily and Capriciously In Stripping Local Emergency Response Organizations of the Authority to Identify and Request" Information Relevant to Local Emergency Response Planning" from RMP Facility Owners or Operators that Addressed Potential Risks From RMP Events and Provided Tangible Impacts and Benefits to USW Workers, Their Families and Their Communities Identified in *AAH*

EPA's reliance on security concerns to rescind what EPA characterizes as an "open ended provision" granting local emergency response organizations the authority to identify and request "information relevant to local emergency response planning" as provided by the Chemical Disaster Rule at 40 CFR § 68.93(b) is contradicted by new grounds for objection presented in the preamble to the RMP Rollback Rule that no risks have resulted from sharing sensitive facility information with LEPCs to date, and that local emergency response organizations present even less security risks than LEPCs.

As a threshold matter, the record for the RMP Rollback Rule fails to establish that sharing sensitive facility information with local emergency response organizations presents any security risk. EPA states in the preamble to the RMP Rollback Rule that there is no record that sharing sensitive facility information with local emergency response organizations has presented a security risk in the past. *See, e.g.*, 84 Fed. Reg. at 69,896 ("[D]isclosure of other information related to development of the local emergency plan to LEPCs has not resulted in security risks to date…."); and *id*. at 69,894 ("While local emergency response organizations that may use this authority [i.e., the authority to request facility information] "would include entities other than LEPCs, LEPCs would have broader membership than fire and other public safety authorities that would be allowed to use the information gathering authority and therefore these additional entities present even less of a security risk."). Moreover, the Administration's purported

rationale for eliminating the LEPC provision in the RMP Rollback Rule – increased security risks at chemical plants – is belied by its recent announcement to completely eliminate the Chemical Facilities Anti-Terrorism Standards ("CFATS") program potentially exposing the public to increase risk of chemical contamination and attack.[49]

Thus, despite the fact that EPA admits that no evidence exists that release of sensitive facility information to local emergency response organizations has ever resulted in a security breach or risk and that release of sensitive facility information to local emergency response organizations poses "even less of a security risk" than releasing such information to LEPCs, EPA strips local emergency response organizations of the authority to request information relevant to local emergency response planning based on security risks that have never been documented in apparent and complete disregard to EPA's purported "data driven" approach that EPA heavily relies upon in support of the rescission of critical components of the Chemical Disaster Rule. *See* 84 Fed. Reg. at 69,862.

Moreover, contrary to EPA's assertion in the preamble to the RMP Rollback Rule (*id.* at 69,887), the language at 40 CFR § 68.93(b) is not open ended; the information that a local emergency response organizations may request is expressly limited to "information relevant to local emergency response planning." Once again, the record for the RMP Rollback Rule is devoid of evidence that local emergency response organizations have ever abused the authority the Chemical Disaster Rule grants to local emergency response organizations under 40 CFR

[49] *See* the announcement from the Honorable Frank Pallone Jr., Chairman of the House Committee on Energy and Commerce, "Pallone on Trump's Fiscal Year 2021 Budget" (Feb. 10, 2020) https://energycommerce.house.gov/newsroom/press-releases/pallone-on-trump-s-fiscal-year-2021-budget; and the United States Department of Homeland Security, "FY 2021 Budget in Brief" at 53, (released Feb. 10, 2020) https://www.dhs.gov/sites/default/files/publications/fy_2021_dhs_bib_web_version.pdf.

68.93(b) by requesting information that is not relevant to local emergency response planning or that such information has not been properly maintained since these Chemical Disaster Rule provisions became effective on September 21, 2018, per the *AAH's* expedited Court mandate. *AAH,* D.C. Cir. No. 17-1155, Order of Sept. 21, 2018.

Nor has EPA cited any reason to believe that any disputes over what constitutes "information relevant to local emergency response planning" between local responders and the owners or operators of RMP Facilities could not be resolved through reasonable agreement as EPA expects these parties to achieve in resolving "unreasonable information requests" from local responders under the RMP Rollback Rule regulations at the 40 CFR § 68.93. *See* 84 Fed. Reg. at 69,896. EPA's bias toward industry and voluntary compliance based on the above-referenced findings and rationale, which was presented to the public for the first time in the preamble to the RMP Rollback Rule, becomes obvious where EPA defers to industry comments to strip local emergency response organizations from requesting "information relevant to local emergency response planning" without evidence in the record showing that providing comparable sensitive facility information to local emergency response organizations has resulted in security risks or that local emergency response organizations have ever made an unreasonable request under the rescinded Chemical Disaster Rule requirement at 40 CFR § 68.95(b).

In sum, the health and safety of USW members and their families is better served when discretion in determining what constitutes "information relevant to local emergency response planning" resides with first responders rather than RMP Facilities owners and operators deciding what "information is necessary for developing and implementing the local emergency response plan" that will be provided to local emergency response personnel. After all, first responders – which often include USW members at RMP Facilities – are the ones running toward the RMP

event risking their lives to reduce its severity and impact on workers, their families and their communities. EPA's rescission of 40 CFR § 68.95(b) that granted local emergency response organizations the authority to identify and request information relevant to local emergency response planning" promulgated pursuant to the Chemical Disaster Rule is arbitrary and capricious.

### B. EPA Acted Arbitrarily and Capriciously In Rescinding Chemical Disaster Rule Field Exercise Frequency Requirements and Effectively Extending the Deadline for Conduct of Tabletop Exercises that Addressed Potential Risks From RMP Events and Provided Tangible Benefits to USW Workers, Their Families and Their Communities

USW objects to EPA's removal of the field exercise frequency requirement and effectively extending the deadline for conduct of tabletop exercises set forth in the Chemical Disaster Rule that were intended to address potential risks from the on-site and off-site consequences to RMP Events that provided tangible benefits to USW workers, their families and their communities. New information presented in CSB reports that are referenced in the Holmstrom Declaration § V provide the United Steelworkers with grounds for objection that were impracticable to raise during the public comment period and are centrally relevant to EPA's determination to remove the field exercise frequency requirement and effectively extending the deadline for conduct of tabletop exercises set forth in the Chemical Disaster Rule. In addition, EPA has for the first time in the preamble to the RMP Rollback Rule raised concerns regarding the cost and burden of field exercises on counties with numerous RMP Facilities, and concerns that the timeframe for conduct of tabletop exercises in the Chemical Disaster Rule was insufficient for responding facilities to consult with local response officials to plan and schedule exercises. EPA's assertions regarding burdens posed by field exercises on counties with multiple

RMP Facilities, therefore, are new grounds for USW objections that are centrally relevant to the outcome of the RMP Rollback Rule. *See* Section II, *supra,* at 7-12.

Post-comment period CSB reports, recommendations and findings highlight the benefits of field and tabletop exercises in reducing the frequency and severity of RMP events described in the Holmstrom Declaration ¶¶ 24, 43, 83-84 reinforce the first-hand observations of USW experts including Kim Nibarger, an expert on responding to and investigating RMP events at covered refineries,[50] regarding the benefits of field and tabletop exercises in reducing the frequency and severity of RMP events. *See* Nibarger Declaration ¶ 62 ("I agree with EPA's finding that exercises [are] an important component of an emergency response program for responding stationary sources, because it allows these sources to implement their emergency response plans, test their actual response procedures and capabilities, identify potential shortfalls, and take corrective action." I further agree with EPA's determination that "both field and tabletop exercises will provide essential training for facility personnel and local responders in responding to accidental releases, and will ultimately mitigate the effects of such releases at RMP facilities;") and Nibarger Declaration ¶ 63:

> I have personally been involved in several emergency responses as well as tabletops and drills, during my time employed as an operator at the Shell refinery in Anacortes, Washington. **There is a sense of confidence going into an actual event if one has gone through exercises or practiced it as compared to 'reading' a plan. Practice gives one the chance to test equipment and theories to discover shortcomings or incorrect assumptions. Having gone through the tabletop and exercise drills, one has had the opportunity to make mistakes and learn from them in a practice scenario. Then, when one is confronted with an actual emergency event with life and death consequences, one can move with confidence implementing the emergency plans and procedures**. (Emphasis supplied).

[50] *See* Nibarger Declaration ¶¶ 14-18.

EPA's removal of the field exercise frequency requirement and effectively extending the deadline for conduct of tabletop exercises set forth in the Chemical Disaster Rule not only harms USW members, their families and their communities, extending the effective date and implementation of these vital exercise requirements beyond 3 years is arbitrary and capricious and contravenes section 112(r)(7)(B)(i) of the CAA, ("The regulations shall be applicable to a stationary source 3 years after the date of promulgation….") and CAA § 112(r)(7)(A) ("Regulations promulgated pursuant to this subparagraph shall have an effective date… assuring compliance as expeditiously as possible"). The lack of a scheduling deadline for field exercises does not meet the 3-year deadline set forth at CAA § 112(r)(7)(B)(1) or the requirement that compliance is assured as expeditiously as possible per CAA § 112(r)(7)(A). Similarly, the effective date and compliance schedule for tabletop exercises violates both CAA § 112(r)(7)(B)(1) and CAA § 112(r)(7)(A) as the RMP Rollback Rule extends the effective date for tabletop exercises requirements out 4 years (December 21, 2023) and does not require conduct of tabletop exercises until December 21, 2027 (*i.e.*, 7 years from the promulgation of the RMP Rollback Rule).

Finally, the removal of field exercise frequency requirements complicates EPA's ability to enforce the requirement to conduct field exercise requirements and undermines EPA's commitment to the "compliance-driven approach" championed throughout the preamble to the RMP Rollback Rule (84 Fed. Reg. at 69,885, 69,863, and 69,870).[51] Stated simply, removal of the clear enforceable standard from the Chemical Disaster Rule set forth at 40 CFR § 68.96(b)(1)(i) establishing a deadline for conduct of field exercises, at a minimum, delays EPA's

[51] A detailed discussion of the shortcomings of EPA's "compliance-driven approach" is set forth at Section III, B, *supra*, at 22-26.

ability to enforce the requirement that an RMP Facility conduct field exercises well into the future beyond the 10-year deadline set forth in the Chemical Disaster Rule via a CAA § 113 order or a judicial or administrative enforcement action. Without a clear, enforceable deadline for conduct of field exercises, EPA is likely to be confronted with difficult challenges from Respondents that EPA lacks the authority to dictate and enforce a schedule for conduct of field exercises.

EPA's dismissal of CSB and USW expert opinions regarding the importance and urgency of field and tabletop exercises at RMP Facilities in favor of anecdotal concerns raised by owners and operators of RMP Facilities, trade associations, and certain state and local officials[52] regarding the need for flexibility due to the costs and burdens of the Chemical Disaster Rule exercise requirements on RMP Facilities and local emergency response organizations is arbitrary and capricious. After all, EPA (1) "agrees with commenters that exercise provisions are important to enhance sources' and communities' ability to effectively respond to emergencies (84 Fed. Reg. at 69,900), (2) expressly acknowledges that EPA has "not dollarized the cost savings of these changes" to field exercise frequency and scope requirements for RMP Facilities and local emergency planning organizations (*id.*), and (3) expects that the removal of the deadline for conduct of field exercises will reduce the total number of field exercises held for compliance with RMP regulations. *Id.* at 69,901.

### C. EPA Acted Arbitrarily and Capriciously In Rescinding Chemical Disaster Rule Field and Tabletop Exercise Scope Requirements that Addressed Potential Risks From RMP Events and Provided Tangible to USW Workers, Their Families and Their Communities Identified in *AAH*

[52] While State Petitioners seeking reconsideration of the Chemical Disaster Rule field and tabletop exercise requirements and certain local officials raised issues about costs and burdens to local emergency response organizations, others submitted comments in support of the retention of these exercise requirements. 2019 RTC 203-04.

USW also objects to EPA's removal of the field exercise and tabletop scope requirements from 40 CFR §§ 68.96(b)(1)(ii) and 68.96(b)(2)(ii) set forth in the Chemical Disaster Rule that were intended to address potential risks from the on-site and off-site consequences to RMP Events that provided tangible benefits to USW workers, their families and their communities. New information presented in CSB reports that are referenced in the Holmstrom Declaration §§ 24, 43, 83-84 provide the United Steelworkers with grounds for objection that were impracticable to raise during the public comment period and are centrally relevant to EPA's determination to remove the field and tabletop scope requirements established in the Chemical Disaster Rule. In addition, EPA has for the first time in the preamble to the RMP Rollback Rule raised concerns regarding the cost and burden of field exercises on counties with numerous RMP Facilities. EPA's assertion regarding burdens posed by field exercises on counties with multiple RMP Facilities is new grounds for USW objections that are centrally relevant to the outcome of the RMP Rollback Rule.

As noted above, removal of clear and enforceable requirements regarding the field and tabletop exercise scope requirements complicates enforcement of field and tabletop exercise requirements and undermines the "compliance-driven approach" advocated in the preamble to the RMP Rollback Rule.[53] Axiomatically, replacing "shall" with "should" changes clear standards that define the scope of field and tabletop exercises into mere recommendations rather than enforceable requirements making it difficult, if not impossible, for EPA to ensure that field and tabletop exercise plans and reports are sufficient through administrative or judicial enforcement actions. Accordingly, EPA's rescission of field and tabletop scope requirement

[53] *See also* Section III, B, *infra*, at 22-26 for additional discussion asserting that EPA's reliance on a "compliance-driven approach" relied upon to rescind critical Chemical Disaster Rule provisions is flawed, disingenuous, arbitrary and capricious.

belies the importance of establishing enforceable standards for the scope of field and tabletop exercises at RMP Facilities and is arbitrary and capricious.

## VI. NEW GROUNDS FOR OBJECTION CITED ESTABLISH THAT EPA'S ROLLBACK OF THE CHEMICAL DISASTER RULE PUBLIC INFORMATION AVAILABILITY REQUIREMENTS IS ARBITRARY AND CAPRICIOUS

The RMP Rollback Rule rescinds the following public disclosure requirements established by the Chemical Disaster Rule at 40 CFR § 68.210:

> (1) A requirement for the owner or operator to provide, upon request by any member of the public, specified chemical hazard information for all regulated processes, as applicable, including:
> • Names of regulated substances held in a process, • SDSs for all regulated substances located at the facility,
> • Accident history information required to be reported under § 68.42,
> • Emergency response program information, including whether or not the source responds to releases of regulated substances, name and phone number of local emergency response organizations, and procedures for informing the public and local emergency response agencies about accidental releases,
> • A list of scheduled exercises required under § 68.96 (*i.e.*, new emergency exercise provisions of the RMP Amendments rule), and; Local Emergency Planning Committees (LEPC) contact information;
> (2) A requirement for the owner or operator to provide ongoing notification on a company website, social media platforms, or through other publicly accessible means that the above information is available to the public upon request, along with the information elements that may be requested and instructions for how to request the information, as well as information on where members of the public may access information on community preparedness, including shelter-in-place and evacuation procedures;
> (3) A requirement for the owner or operator to provide the requested chemical hazard information within 45 days of receiving a request from any member of the public….

84 Fed. Reg. at 69,885.

In addition, the RMP Rollback Rule EPA modified the public meeting requirement at 40 CFR § 68.210(e) that the owner/operator of a stationary source hold a public meeting to provide

accident information required under 40 CFR § 68.42(b) by limiting the trigger for the requirement to the occurrence of an RMP reportable accident with offsite impacts specified in 40 CFR § 68.42(a) (*i.e.*, known offsite deaths, injuries, evacuations, sheltering in place, property damage, or environmental damage), which rescinded the Chemical Disaster Rule requirement that a public meeting be held after any accident subject to reporting under 40 CFR § 68.42, including accidents that resulted in on site impacts only. *See* 84 Fed. Reg. at 69,885.

USW objects to EPA's rescission and modification of the above listed Chemical Disaster Rule public availability regulations by RMP Rollback Rule that provided important benefits to United Steelworkers members who work at RMP Facilities and deprives United Steelworkers members workers, their families, and their communities of ready access to reliable information that they can review to prepare and protect themselves from a potential RMP event both on site and off site. For example, the limiting of public meeting requirements for RMP events that "resulted in off site impacts" would deprive USW members and their families of an important avenue to obtain, first-hand, information directly from the company officials, not subject to any confidentiality restrictions, about RMP events with only on site impacts that may have significant implications for USW members and their families (*i.e.*, on site deaths, injuries, evacuations, sheltering in place, and potential exposures).

Post-comment period CSB reports and findings referenced in the Holmstrom Declaration and the recent Public Integrity Article discussed below provide new grounds for objection that are centrally relevant to the rescission of Chemical Disaster Rule public availability requirements in the RMP Rollback Rule. The United Steelworkers also raise grounds for objection to the rollback of these public availability regulations in response to new findings and rationale in the RMP Rollback Rule that were not discussed in the Proposed RMP Rollback Rule or included in

the record thereby precluding public comment. This new information discussed below has been presented to the public by EPA for the first time in the RMP Rollback Rule, and are grounds for objection that arose after the close of the public comment period that lay the foundation for the USW objections set forth below that were impracticable to raise during the public comment period and are centrally relevant to the RMP Rollback Rule.

For example, for the first time in the preamble to the RMP Rollback Rule, EPA cites to and relies upon the pre-9/11 DOJ 2000 Security Report as the rationale for security concerns relating to the availability of sensitive facility information in a consolidated format to anonymous individuals on the internet and at public meeting. *See, e.g.,* 84 Fed. Reg. 69,885 ("We rely on the findings of DOJ in its report required by CSISSFRRA.").

The DOJ 2000 Security Report forms the United Steelworkers' grounds for objection that were impracticable to raise during the public comment period since EPA did not mention the 2000 DOJ Security Report in the proposed rule or include it in EPA's docket prior to publication of the final rule and are centrally relevant to EPA's determination to remove certain Chemical Disaster Rule public information sharing provisions. Moreover, EPA's reliance on the DOJ 2000 Security Report is arbitrary and capricious. The findings in the 2000 DOJ Security Report are stale as this DOJ Report pre-dates 9/11 and is nearly 20 years old. As a result, the 2000 DOJ Security Report includes findings and assumptions that are not based on current information including the fact that consolidated sensitive facility information has been and remains readily available via anonymous access at RTK.net by OMB Watch and now the Houston Chronicle since at least October 29, 2009.[54]

[54] *See* OMB Press Release (October 29, 2009) at https://firstamendmentcoalition.org/2009/10/omb-watch-posts-details-of-risks-posed-by-u-s-chemical-facilities/ ("OMB Watch today posted updated information about the risks of serious

Conspicuously, in evaluating security risks relating to the Chemical Disaster Rule information availability requirements, EPA makes no mention of the availability of consolidated sensitive facility information including transcriptions of RMP Facility Risk Management Plans that have been and remain readily available via anonymous access at RTK.net. As such, EPA's evaluation and findings relating to security concerns are not supported by the record and are arbitrary and capricious.

EPA is quick to embrace security and cost concerns raised by industry, certain states and other commenters that providing facility and chemical hazard information that EPA itself admits is redundant in the sense that the same or similar information may be available elsewhere (*see* 84 Fed. Reg. at 69,844, 69,854 and 69,888) as rationale to rescind the Chemical Disaster Rule public availability regulations. Conversely, EPA summarily discounts concerns raised by the State of New York and other commenters regarding the cost and burden to the public of obtaining RMP facility information from EPA public reading rooms and other sources. *Id.* at 69,888. EPA appears to be blind to the fact that the agency's redundancy findings cut both ways. But, EPA cannot claim that redundant public availability of facility and chemical hazard information poses unacceptable security risks and then cite to the same redundancy as rationale that the public is not harmed by rescinding Chemical Disaster Rule public information

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public harm posed by thousands of chemical facilities nationwide. The risk management plans of approximately 14,000 facilities that handle more than the threshold amounts of 140 dangerous chemicals are publicly available through the website of the Right-to-Know Network (RTK NET), at www.rtknet.org/db/rmp," now available at https://rtk.rjifuture.org/rmp/). While the RTK.net website provides anonymous access to consolidated sensitive facility information, the website does not obviate the need for the Chemical Disaster Rule public availability requirements since the site may not list the latest available information and the information has not been verified by EPA or the RMP Facility owner or operator. *See, e.g.*, https://rtk.rjifuture.org/rmp/, which stated on February 18, 2020, that "RMP was last updated on RTK NET with a set of EPA data made on March 14, 2019."

availability requirements. Again, EPA's inconsistent treatment of the implications of the real world fact that much if not all of the facility and chemical hazard information required to be available under the Chemical Disaster Rule may be already accessed in other forms and places – often in a consolidated format with anonymous access – exposes EPA's bias and the arbitrary and capricious nature of EPA's decision-making.

Furthermore, EPA's disregard for the burdens and costs to the public to obtain comparable facility information is undercut by new data presented in the recent Public Integrity Article reporting that document requests for EPCRA information on ammonium nitrate handling, sales and storage made to certain states have been denied (*i.e.*, Alabama, Kentucky, North Carolina, Tennessee and Texas) or yet to be received (California and Indiana). The Public Integrity Article presents new grounds for objection that were impracticable for USW to raise during the public comment period and are centrally relevant to the EPA Rollback Rule. The data presented in the Public Integrity Article contradicts EPA's underlying rationale that the public already has ready access to comparable facility and chemical hazard information elsewhere (*see* 84 Fed. Reg. at 69,854) relied upon by the agency to rescind Chemical Disaster Rule public information availability requirements and provides further support for USW's assertion that EPA's rescission of Chemical Disaster Rule public information requirements is arbitrary and capricious.

## VII. CONCLUSION

As set forth above, and in the USW Comments on Proposed RMP Rollback Rule, EPA's rescission of the critical provisions of the Chemical Disaster Rule by EPA's RMP Rollback Rule is arbitrary and capricious as EPA repeatedly failed to provide rational explanations for its reversals of policy from the well-reasoned and well-documented provisions of the Chemical

Disaster Rule. *Fox*, 556 U.S. at 515-16. The United Steelworkers' petition raises a series of additional objections that were impracticable to raise within the comment period for the Proposed RMP Rollback Rule, or the grounds for said objections arose after the closing of the comment period, and the objections were of central relevance to the outcome of the RMP Rollback Rule. As such, pursuant to CAA § 307(d)(7)(B), the United Steelworkers respectfully requests, that the Administrator stay the RMP Rollback Rule, convene a proceeding for reconsideration of the RMP Rollback Rule, and provide the same procedural rights to the public as would have been afforded had the information been available before the close of the comment period.

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Respectfully submitted,

FOR THE UNITED STEELWORKERS

*/s/ Joseph M. Santarella Jr.*

Joseph M. Santarella Jr.
Susan J. Eckert
Santarella & Eckert, LLC
7050 Puma Trail
Littleton, CO 80125
(303) 932-7610
jmsantarella.sellc@comcast.net
susaneckert.sellc@comcast.net

Counsel for the United Steelworkers