



May 19, 2017

Mr. James Belke
U.S. Environmental Protection Agency
Office of Land and Emergency Management
1200 Pennsylvania Avenue, N.W.
(Mail Code 5104A)
Washington D.C. 20460

Submitted electronically via www.regulations.gov

Re: Comments of the American Chemistry Council on EPA Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date; Proposed Rule; EPA Docket ID: EPA-HQ-OEM-2015-0725, RIN: 2050-AG91

Dear Mr. Belke:

The American Chemistry Council (ACC)¹ welcomes the opportunity to submit these comments in response to the U.S. Environmental Protection Agency's (EPA or the "Agency") *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date; Proposed Rule*, 82 Fed. Reg. 16,146 (April 3, 2017). With this action, EPA is proposing to further delay the effective date of the January 13, 2017 final rule amending 40 C.F.R. Part 68, the Risk Management Program (RMP) regulations, under section 112(r)(7) of the Clean Air Act (CAA). *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Rule*, 82 Fed. Reg. 4594 (Jan. 13, 2017) (hereinafter "Final Rule"). ACC strongly supports this action for the reasons discussed below.

Background to the April 3, 2017 Proposed Rule

The effective date of the Final Rule is presently delayed until June 19, 2017. The EPA Administrator took that final action, pursuant to CAA section 307(d)(7)(B), on March 16, 2017 after announcing on March 13, 2017 by letter that EPA would convene a proceeding for

¹ The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$797 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.

reconsideration of the Final Rule. *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date; Final Rule*, 82 Fed. Reg. 13,968 (Mar. 16, 2017). Section 307(d)(7)(B) of the CAA authorizes the Administrator to stay the effectiveness of a final rule pending reconsideration for up to three months. 42 U.S.C. § 7607(d)(7)(B). In this administrative action, EPA is proposing to further delay the effective date of the Final Rule to February 19, 2019 to allow the Agency to complete the necessary steps involved in the reconsideration process. As discussed below, ACC strongly supports the proposed extension of the effective date of the Final Rule until Feb. 19, 2019, or until the reconsideration process is complete.

Rationale for Delaying the Effective Date

EPA received three petitions for reconsideration of the Final Rule. On February 28, 2017, an administrative petition for reconsideration and request for an agency stay of the Final Rule was submitted to EPA by a group of trade associations consisting of ACC, the American Forest & Paper Association, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the Utility Air Regulatory Group. Petition for Reconsideration and Request for Agency Stay Pending Reconsideration and Judicial Review of Final Rule entitled *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act* (hereinafter “RMP Coalition Petition for Reconsideration”). On March 13, 2017, the Chemical Safety Advocacy Group (CSAG) submitted a petition for reconsideration and a stay, and on March 14, 2017, eleven states submitted a petition for reconsideration and request that EPA delay the compliance dates in the Final Rule.

EPA granted reconsideration of the Final Rule. Now, while the Agency considers and addresses the numerous flaws in the Final Rule, a continued administrative stay of the effective date is both appropriate and necessary. Staying the effective date of the Final Rule will prevent irreparable harm to ACC member companies and others in the regulated community and will serve the public interest. Specifically, the Final Rule is flawed and reconsideration is necessary to address several unlawful key provisions of the rule, as well as the shortcomings of the rulemaking process:

- The Final Rule requires facilities to make available sensitive information about covered processes that could expose vulnerabilities to terrorists and others who may target refineries, chemical plants, and other facilities.
- The Final Rule raises significant security concerns and compliance issues that will cause irreparable harm to ACC members and others in the regulated community. Certain provisions, such as the requirement to audit “each covered process” in a facility’s compliance audit, impose costly and burdensome obligations on facilities immediately upon the Final Rule becoming effective.
- The Final Rule potentially undermines safety, creates significant security risks, and does nothing to prevent criminal acts that threaten facilities, such as the arson that

caused the tragic explosion in West, Texas that served (wrongly) as the impetus for the Final Rule.

- Some of the more significant defects of the RMP rulemaking process include: (1) procedural deficiencies that deprived commenters of effective notice and comment; (2) a change of circumstances from proposal to final that undermined the factual predicate for the rulemaking; and (3) the introduction of new provisions or rationales in the Final Rule for which commenters had no notice and which were not a logical outgrowth from what was proposed.

EPA's Authority to Delay the Effective Date

EPA has authority to delay the effective date of the Final Rule. In the proposal, EPA relies on its CAA section 307(d) authority to administratively stay the effectiveness of the Final Rule pending reconsideration for a period of three months. EPA has proposed to extend the stay to allow for the completion of the rulemaking process as consistent with its rulemaking authority under CAA section 307(d), which it states “generally allows the EPA to set effective dates as appropriate unless other provisions of the CAA control.” 82 Fed. Reg. at 16,148. Here, no other provisions of the CAA mandate that EPA set a specific or earlier date by which the standards must be effective. Accordingly, EPA may exercise its discretion under Clean Air Act section 307(d) in delaying the effective date beyond three months.

EPA also has authority under section 112(r)(7)(A) of the CAA to establish the effective date of regulations promulgated under this subsection to address chemical accident prevention. Specifically, CAA section 112(r)(7) provides that “[r]egulations promulgated pursuant to this paragraph [CAA section 112(r)(7)(A), Accident Prevention] shall have an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable.” 42 U.S.C. § 7412(r)(7)(A). Here, EPA has reasonably determined that setting the effective date of the Final Rule as February 19, 2019 is “as expeditiously as practicable,” as EPA must “evaluate the objections raised by the various petitions for reconsideration of the Risk Management Program Amendments, consider other issues that may benefit from additional comment, and take further regulatory action.” 82 Fed. Reg. 16,148-9.

Notably, this language—“as expeditiously as practicable”—appears in other parts of section 112 (such as, for example, section 112(e)(1) (promulgating emission standards for certain sources); section 112(i)(3)(A) (establishing a compliance schedule for existing sources); and section 112(k)(3)(F) (implementing a national strategy to address emissions of hazardous air pollutants from area sources in urban areas)), but in each of those instances, the language is limited by a specified time frame or date certain by which the activity must be completed. For example, under 112(k)(3)(F), Congress provided that EPA shall implement the national strategy for area sources “as expeditiously as practicable *assuring that all sources are in compliance with all requirements not later than 9 years after November 15, 1990.*” 42 U.S.C. § 7412(k)(3)(F)(emphasis added).² Clearly, Congress knew how to constrain EPA’s discretion

² Section 112(e)(1) provides that EPA shall promulgate MACT standards as expeditiously as practicable, but then goes on to require specific dates by which specific numbers of standards must be issued. 42 U.S.C. § 7412(e)(1). Section 112(i)(3)(A) provides that EPA must require compliance by existing sources with emission standards as

when it meant for EPA to comply with a specific schedule, and included those constraints where it saw fit. Congress did not include such restrictions in the RMP accident prevention provisions. Instead, Congress gave the Administrator significant discretion to establish the effective date for RMP regulations as long as compliance is achieved as “expeditiously as practicable.” Here, EPA’s proposal to extend the stay through the rulemaking process comports with the requirement that compliance be achieved as expeditiously as practicable and therefore falls squarely under the discretion afforded the Agency under section 112(r)(7)(A) of the Clean Air Act.

Independently, EPA also has authority to stay the effective date of the Final Rule under section 705 of the Administrative Procedure Act. 5 U.S.C. § 705. Under section 705, an agency may issue a stay while judicial review is pending if “justice so requires.” *Id.* To demonstrate that justice requires a stay, the courts have found that the traditional four-part standard for injunctive relief applies to a request for a stay pending judicial review: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See Sierra Club v. Jackson*, 833 F.Supp.2d 11, 30-32 (2012) (internal citations omitted) (concluding “that the standard for a stay at the agency level is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test...”) and *Nken v. Holder*, 556 U.S. 418 (2009) (setting forth the traditional four-factor standard for a stay).

Judicial petitions for review have been filed on the Final Rule. As such, EPA may issue a stay under APA section 705 to delay the effective date of the Rule pending judicial review, provided it satisfies the four-factor test outlined above. *Sierra Club v. Jackson*, 833 F.Supp.2d at 26 (stating that “Congress did not intend to prohibit EPA or the federal courts from staying the effective date of emission standards pending judicial review under Section 705 of the APA” and concluding that EPA had the authority to issue a delay notice under this authority). The challenge to the Final Rule by the RMP Coalition, industry petitioners, has a strong likelihood of success. ACC hereby incorporates by reference the arguments in the RMP Coalition’s petition for reconsideration and request for a stay in the section titled “Request for an APA 705 Stay Pending Judicial Review.” RMP Coalition Petition for Reconsideration at 16-21. In sum, petitioners can show that each of the four factors is satisfied: (1) petitioners are likely to succeed on the merits, given the deficiencies in the Final Rule, including that EPA exceeded its authority, or failed to identify its authority, for several key requirements; (2) the regulated community will suffer irreparable harm as a result of the security risks introduced by the rule, as well as the confusion and costs incurred as a result of complying with new requirements; (3) there will be no harm to others were a stay to be granted, given the lack of data on the benefits EPA claims will accrue from the new requirements beyond those produced by the existing (and effective) RMP program; and (4) the public has an overriding interest in the security of facilities. Thus, because EPA can show that “justice so requires” staying the rule for the reasons described here and discussed in more detail in the RMP Coalition’s request for a stay, EPA may exercise its

expeditiously as practicable, but then limits the compliance date to 3 years after the effective date of the standards, with some exceptions. 42 U.S.C. § 7412(i)(3)(A).

authority to delay the effective date of the Final Rule under the independent authority of APA section 705.

Unlike a stay under section 307(d)(7)(B) of the CAA, there is no limitation on the duration of a stay that may be issued under section 705 of the APA by either an agency or a court pending judicial review. Moreover, the fact that EPA has also stayed the rule pending reconsideration pursuant to its authority under CAA section 307(d)(7)(B) in no way limits its ability to use an APA section 705 stay when such a stay also serves to delay the effective date pending judicial review.

Duration of Delay Needed

EPA needs a minimum of eighteen months to ensure adequate time to undertake a full review of the issues under reconsideration and to complete a new rulemaking. EPA's reconsideration of the Final Rule will necessarily involve the following steps:

- Review the three petitions for reconsideration;
- Review the existing administrative record for the Final Rule;
- Review historical RMP data to determine whether changes to the existing regulations are needed;
- Draft proposed revisions to the existing RMP Final Rule;
- Conduct intra-agency review of the proposed revisions;
- Allow for review of the draft proposal by the Office of Management and Budget (OMB) (a process that may take up to 90 days);
- Publish the proposal in the Federal Register;
- Provide a public comment period (preferably 90 days);
- Review and consider comments submitted;
- Draft the new final rule;
- Draft the Response to Comments document;
- Conduct intra-agency review of the new final rule;
- Allow for OMB review of the final rule (which may take up to 90 days).

Therefore, a stay of at least eighteen months, or until February 19, 2019, is necessary to allow EPA to complete a robust review and rulemaking process to support needed revisions to the existing Final Rule.

Conclusion

EPA has already been made aware of the central concerns raised by ACC and other petitioners regarding the Final Rule, but other issues may benefit from additional comment. Any proposed revisions to the existing RMP regulations must be supported by data and a sound rationale, including a showing that the additional cost of any new requirement is outweighed by specific benefits derived from that requirement.

Critically, time is of the essence in finalizing this proposed action. EPA must ensure that it takes final action on *this* proposal before June 19, 2017 to allow for a seamless extension of the

effective date. Failure to do so would create significant confusion in the regulated community as to the immediate applicability of the Final Rule and compliance with its provisions.

ACC looks forward to our continued engagement in RMP rulemakings and to assist EPA, the Occupational Safety and Health Administration (OSHA), and other federal stakeholders in finding ways to improve chemical process safety, support local emergency responders in responding to accident releases, and safeguard the communities living around our member companies' facilities.

Thank you in advance for your consideration of ACC's comments. If you have any questions please feel free to contact me directly at (202) 249-6131 or you may email me at Leslie_Hulse@americanchemistry.com.

Sincerely,

Leslie A. Hulse
Assistant General Counsel