U.S. Environmental Protection Agency

Public Listening Session on Review of EPA Risk Management Program (RMP) Regulation Revisions Completed Since 2017

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Testimony of New York State Office of the Attorney General
Regarding Improvements to the EPA Risk Management Program Regulations[1]

I. Introduction

Last year, the New York State Office of Attorney General Letitia James partnered with 13 other states, the District of Columbia, the City of Philadelphia, and Harris County (TX) in filing a petition for review challenging the Environmental Protection Agency's rollback of its 2017 Accident Prevention Amendments. The 2017 rule amended the Risk Management Program (RMP) to improve safeguards to avoid and mitigate chemical accidents. Our office also has extensive experience in enforcing state and federal environmental laws to protect New Yorkers and their health, safety, and natural resources.

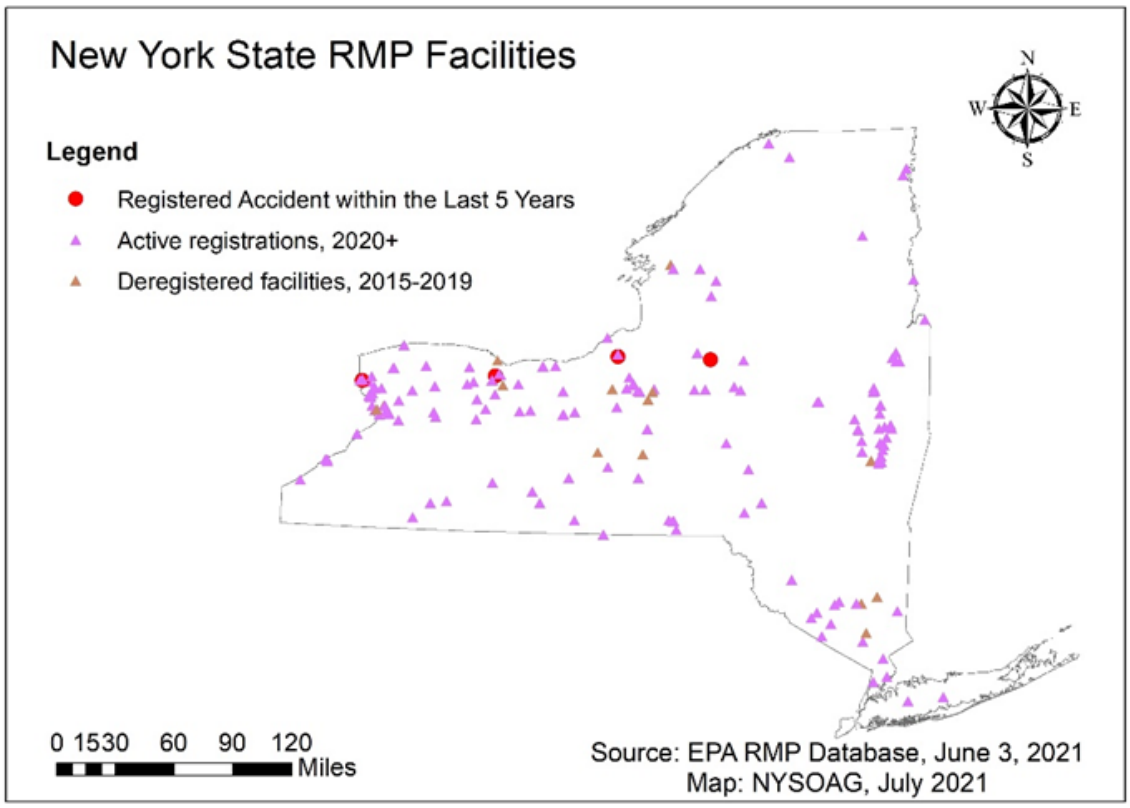
Attorney General James was very concerned about the direction of the agency's Risk Management Program under the previous Administration. The 2019 rollback rule eviscerated the 2017 rule's improvements to the accident prevention requirements and delayed the provisions of that rule that EPA did not cut. Attorney General James strongly opposed the rollback and is encouraged that EPA is now addressing both restoring the 2017 rule and improving it, particularly with respect to better responding to the increasing impacts of climate change on facility safety and the substantial risk that RMP facilities pose to environmental justice communities.

These written comments will focus on two areas in which the 2017 rule should be improved. First, EPA should amend the RMP regulations to mandate risk analysis and mitigation of hazards posed by natural hazards for RMP facilities. Second, EPA should address environmental justice by taking steps to better protect host and surrounding communities by reducing risks and improving communication.

[1] This document, along with accompanying exhibits, is a longer version of the testimony I presented orally at the EPA listening session on July 8, 2021.

II. New Yorkers are at Risk from Chemical Plant Accidents

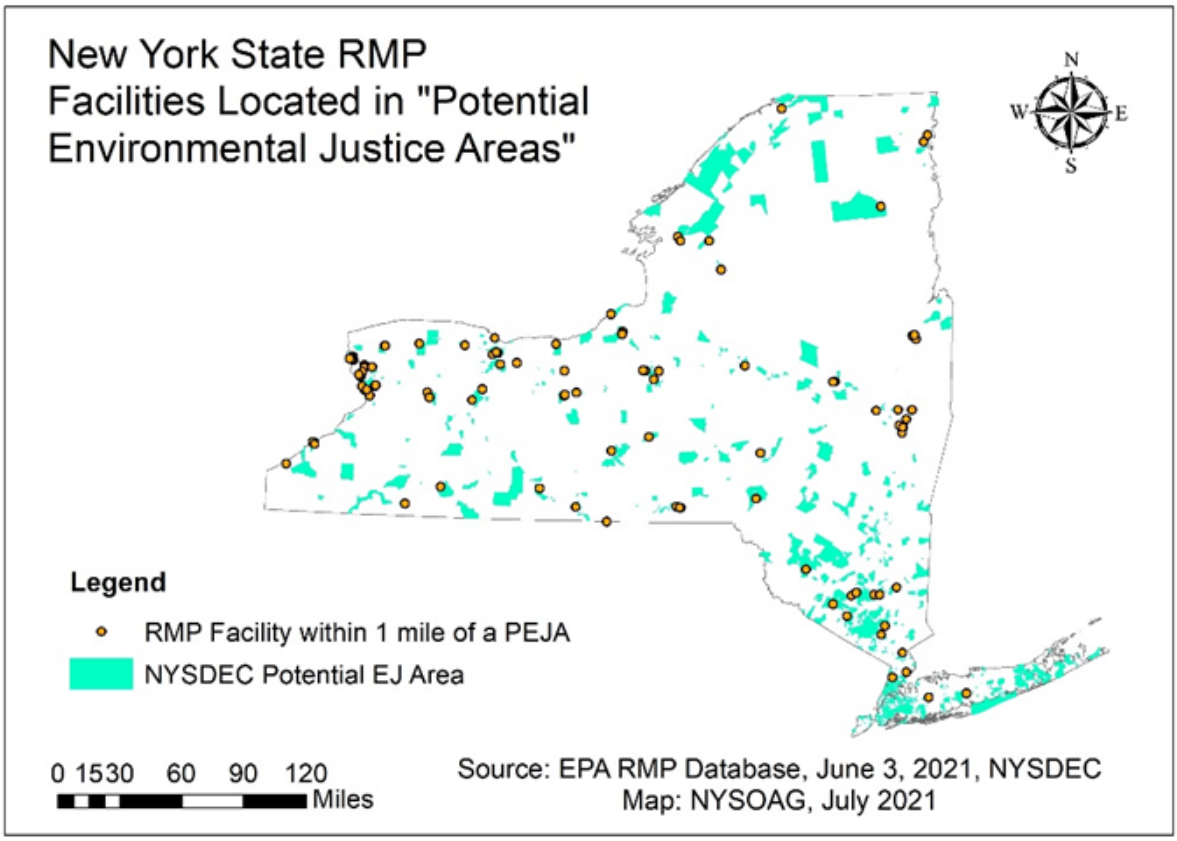
As of June 2021, New York is home to 182 facilities regulated under the Risk Management Program. There are approximately 601,000 people that live within one mile of an RMP facility in New York.[2]



Between 2015 and 2019, there were eight reported accidents in New York, releasing 786 pounds of chemicals into the surrounding communities. These accidents resulted in seven injuries, one hospitalization, and property damage totaling $9,600,000.

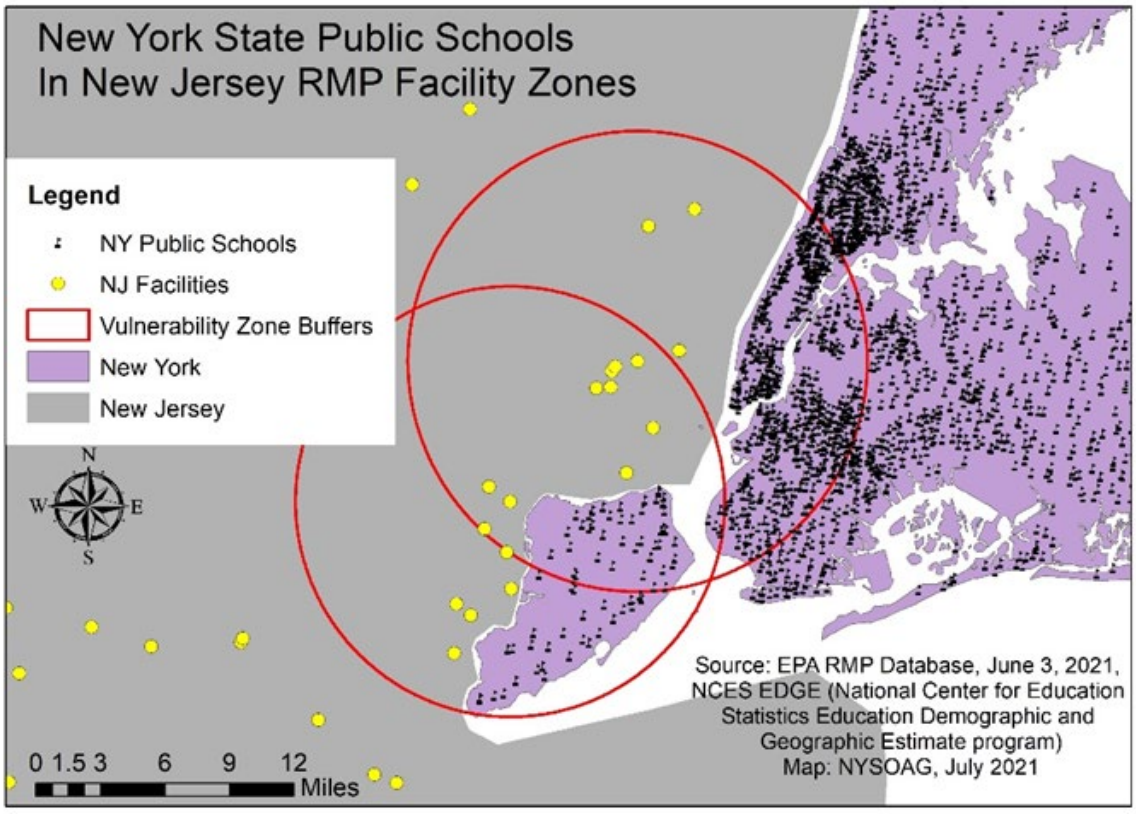
[2] This number was obtained using EPA EJSCREEN 2020 (ACS 2014-2018), Census Block Group, https://gaftp.epa.gov/EJSCREEN/2020/.

RMP facilities pose a direct and substantial risk to New York's environmental justice communities. In New York, 104 RMP facilities are located within one mile of a potential environmental justice area designated by the New York State Department of Environmental Conservation.[3]



[3] Data came from KMZ file from NYS DEC; available from NYS GIS Clearinghouse, https://gis.ny.gov/gisdata/inventories/details.cfm?DSID=1273.

In addition, there are a number of other chemical facilities located across the border in Northern New Jersey, in close proximity to New York City. Between 2018 and 2019, there were approximately 467,000 children within New York K-12 public schools that are located within the vulnerability zone for RMP facilities in New Jersey. Of these children, 67.7% receive free or reduced lunch and 61.3% are students of color.[4]



III. EPA Should Amend the RMP Regulations to Mandate Risk Analysis and Mitigation of Natural Hazards for RMP Facilities

RMP facilities are becoming increasingly vulnerable to "natech incidents," in which technological failures or accidents are caused or worsened by natural hazards such as extreme weather. A recent example of a natech incident is the August 2017 disaster at the Arkema Crosby chemical facility in Texas. After the facility was flooded during Hurricane Harvey, its refrigeration of organic peroxide, an unstable chemical produced onsite, failed. As the temperature rose, the organic peroxide decomposed and ignited, causing large fires and releases of the chemical.

[4] This data came from: (1) National Center for Education Statistics Education Demographic and Geographic Estimate Program, Public School Characteristics, 2018-2019 shapefile, https://data-nces.opendata.arcgis.com/search?groupIds=455147561fd3416daa180395fb4e9237; and (2) Center for Effective Government, *America's Five Largest Cities and Their Vulnerability Zones* (Sept. 2014), https://www.foreffectivegov.org/kids-in-danger-zones-largest-cities.

Approximately a dozen first responders on the scene became sick and were treated at a nearby hospital.

In its report on the Arkema fire, the U.S. Chemical Safety and Hazard Investigation Board, or CSB, noted the increasing risk severe weather poses for chemical facilities. The CSB found that the Arkema personnel that performed the process hazard analysis for the low temperature warehouses did not document any flooding risk. CSB noted that in recent years, flooding from extreme rainfall events has increased, and that a 2015 EPA report found that this trend is projected to continue as a result of climate change, increasing the flood risk in many parts of the country.[5] CSB recommended that chemical manufacturing, handling or storage facilities perform analyses to determine their susceptibility to these extreme weather events and evaluate the adequacy of relevant safeguards.

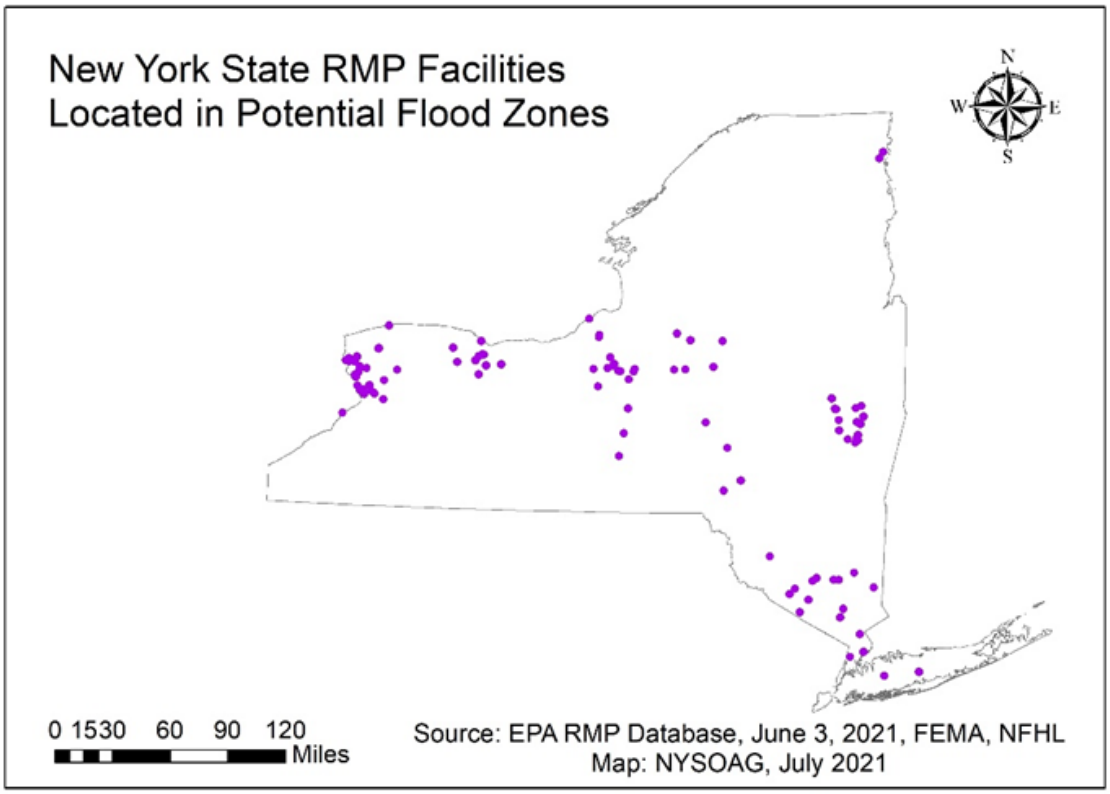
This issue is especially important to New York as it is experiencing threats from flooding worsened by sea level rise and from more extreme storms. For example, the twelve inches of sea level rise New York City has experienced in the past century exacerbated the flooding caused by Hurricane Sandy by about twenty-five square miles.[6] That flooding led to numerous oil spills in New York and New Jersey, and devastated areas of New York City, which in some areas lost power and other critical services for extended periods of time. New York State has also experienced dramatic increases in the frequency and intensity of extreme rain storms, consistent with scientists' predictions of the alteration of historical weather patterns resulting from climate change.[7] In New York, 112 RMP facilities are located in potential flood zones, which includes Federal Emergency Management Agency (FEMA) Special Flood Hazard Areas and Moderate Flood Areas.[8]

[5] U.S. EPA, *Climate Action Benefits Report* (2015), https://www.epa.gov/cira/climate-action-benefits-inland-flooding.

[6] New York City Panel on Climate Change, *2015 Report, Chapter 2: Sea Level Rise and Coastal Storms* (Feb. 16, 2015), Ann. N.Y. Acad. Sci. ISSN 0077-8923, http://onlinelibrary.wiley.com/doi/10.1111/nyas.12593/full.

[7] New York State Office of the Attorney General, *Current & Future Trends in Extreme Rainfall Across New York State, A Report from the Environmental Protection Bureau of New York State Attorney General Eric T. Schneiderman* (Sept. 2014) (based on data from the 2014 National Climate Assessment and the National Oceanographic and Atmospheric Administration's Northeast Regional Climate Center), https://ag.ny.gov/pdfs/Extreme_Precipitation_Report%209%202%2014.pdf.

[8] FEMA, Flood Zones, https://www.fema.gov/glossary/flood-zones.



Consideration of the resiliency of RMP facilities to extreme weather events is further warranted because of the direct and substantial risk these facilities pose to environmental justice communities. For example, low-income and communities of color are more likely to be located in areas susceptible to flooding.[9]

New York and other states have taken steps to require facilities to consider threats from extreme weather. New York's Climate Leadership and Community Protection Act, enacted in 2019, requires applicants for major permits issued by the Department of Environmental Conservation "to demonstrate that future physical climate risk has been considered."[10] The Department "may require the applicant to mitigate significant risks to public infrastructure and/or services, private property not owned by the applicant, adverse impacts on disadvantaged

[9] Brie Sherwin, After the Storm: The Importance of Acknowledging Environmental Justice in Sustainable Development and Disaster Preparedness (Spring 2019), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1362&context=delpf.

[10] S. 6599, Section 17-b (New York 2019), https://www.nysenate.gov/legislation/bills/2019/s6599.

communities, and/or natural resources in the vicinity of the project."[11] Other states have enacted similar laws or regulations. A summary of those state laws and regulations concerning assessment of natural hazards is attached to this testimony as ***Exhibit A***.

Similarly, EPA should require RMP facilities to evaluate risks from extreme weather and natech incidents, and implement measures as necessary to mitigate those risks. At a minimum, EPA should revise 40 C.F.R. §§ 68.50 and 68.67 to require that natural hazards such as severe weather and flooding be considered and mitigated as part of the process hazard analysis applicable to Program 2 and 3 facilities. Mitigation measures could include backup power supply, leak detection systems, and storm hardening.

IV. EPA Should Take Steps to Better Protect Fenceline Communities by Reducing Risks and Improving Communication

In New York State, approximately 601,000 people live within one mile of an RMP facility. According to a report by the Center for Effective Government: "People of color and people living in poverty, especially poor children of color, are significantly more likely to live in these fenceline zones than whites and people with incomes above the poverty line."[12] EPA's announcement of the recent RMP listening sessions acknowledges that RMP "facilities are often located in communities that have historically borne a disproportionate burden from pollution."[13] Low-income communities and communities of color, which often have the least amount of political and economic power, are the most at risk in the event of an accidental chemical release. Therefore, it is imperative that EPA take further steps to protect fenceline environmental justice communities by reducing risks and improving communication. Two specific steps are particularly warranted.

First, EPA can reduce risks for fenceline communities by restoring and improving the provisions of the 2017 rule that EPA eliminated in 2019. For example, EPA should restore the Safer Technology and Alternatives Analysis requirement and consider expanding it to all Program 2 and 3 facilities. Similar inherently safer technology programs have been successfully implemented in several states including California, Massachusetts, and New Jersey. A summary of these programs and their safety achievements is attached as ***Exhibit B*** to this testimony.

In this regard, EPA should require RMP facilities that utilize hydrogen fluoride or hydrofluoric acid to consider safer alternatives to those chemicals. Recent accidents involving these chemicals at the Philadelphia Energy Solutions refinery, the Husky Energy refinery in Wisconsin, and the Torrance Refinery in California demonstrate the urgent need to address the

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[11] *Id*.

[12] Center for Effective Government, *Living in the Shadow of Danger; Poverty, Race, and Unequal Chemical Facility Hazards* (Jan. 2016), at 4, https://www.foreffectivegov.org/shadow-of-danger.

[13] EPA, *EPA Announces Public Listening Sessions of the Risk Management Plan Rule* (May 26, 2021) https://www.epa.gov/newsreleases/epa-announces-public-listening-sessions-risk-management-plan-rule-0.

risks posed by these specific chemicals. EPA should require refineries to evaluate the replacement of these chemicals and report their findings to EPA within a year. If refineries or other facilities contend it is infeasible to replace these chemicals, EPA should mandate enhanced monitoring and inspection.

Second, EPA should better communicate with fenceline communities on risks and emergency preparedness. Currently, it is too difficult for members of the public that live near RMP facilities to get information about those facilities. EPA should increase information availability by requiring RMP facilities to create or fund community alert systems that provide text alerts in multiple languages to the cell phones of individuals who live in the vulnerability zones of those facilities. The systems could send out text alerts when there are incidents at facilities, to make the public aware and let them know what steps to take, such as sheltering in place. The alert systems could also send an annual notification to such individuals, letting them know that they live near an RMP facility and where they can obtain information about it.

Currently, to obtain information on an RMP facility, an individual must either go to a federal reading room or make a request from a local emergency planning committee. Reading rooms may be located far away, require appointments, or have limited hours. Individuals may not know how to get in touch with local emergency planning committees to obtain information. Rather than relying on this inefficient and antiquated system, EPA should consider creating an online database containing a summary of pertinent information from facilities' Risk Management Plans. This would include the facilities' list of chemicals used, hazard analyses, and emergency response plans. By summarizing the Risk Management Plans, EPA can avoid releasing sensitive information.

Finally, air monitoring can provide fenceline communities with the information they need to better understand the health risks from air toxics in their communities. The current monitoring of air toxics is inadequate and can readily be improved as recognized in a 2020 Government Accountability Office report.[14] Significantly, air monitoring is even worse during natural disasters and a 2019 EPA Office of Inspector General report called for EPA to improve its natural disaster air monitoring.[15] EPA should consider requiring real-time fenceline air monitoring for air toxics at the most dangerous RMP facilities. EPA has the authority to require such monitoring pursuant to Clean Air Act section 112(r)(7)(A) and (B), and section 112(d).

In conclusion, we urge EPA to restore and improve the 2017 Accident Prevention Amendments by mandating risk analysis and mitigation of extreme weather hazards for RMP

[14] Government Accountability Office, *Air Pollution: Opportunities to Better Sustain and Modernize the National Air Quality Monitoring System* (Nov. 12, 2020), https://www.gao.gov/products/gao-21-38.

[15] EPA Office of Inspector General, *EPA Needs to Improve Its Emergency Planning to Better Address Air Quality Concerns During Future Disasters* (Dec. 16, 2019), https://www.epa.gov/office-inspector-general/report-epa-needs-improve-its-emergency-planning-better-address-air-quality.

facilities, and by taking steps to better protect environmental justice communities by reducing risks and improving communication. Thank you for considering this testimony and the accompanying materials in the agency's development of a robust proposed rule to improve the RMP regulations to address these critical hazards.

Exhibits
A – Assessing and Mitigating Risks from "Natech" Incidents
B – State and Local Inherently Safer Technology Regulations