November 14, 2022

Lisa Long
Director, Office of Engineering Safety
Directorate of Standards and Guidance, Room N-3621
Occupational Safety & Health Administration
U.S. Department of Labor
Washington, DC 20210

Submitted via Regulations.gov

Re: Process Safety Management; Stakeholder Meeting;
OSHA Docket No. 2013-0020

Dear Ms. Long:

The Society of Chemical Manufacturers and Affiliates (SOCMA) is pleased to offer the following comments in connection with the Occupational Safety & Health Administration (OSHA)'s October 12, 2022 stakeholder meeting on its Process Safety Management (PSM) rule.[1]

SOCMA is the national trade association dedicated to the specialty and fine chemical industry. Founded in 1921, SOCMA represents a diverse membership of chemical companies who batch manufacture new and innovative chemistries used in a wide range of commercial, industrial, and consumer products. SOCMA maintains a strong record of member service through programs that maximize commercial opportunities, enhance regulatory and legal compliance, and promote industry stewardship. SOCMA's members also implement ChemStewards®, an EHS&S performance improvement program that is a mandatory component of membership.

[1] 87 Fed. Reg. 57520 (Sept. 20, 2022).

Many manufacturing facilities operated by SOCMA members are subject to the current PSM rule. The changes that OSHA is considering, if adopted, could significantly impact the processes, productivity and growth of those member companies. Some SOCMA member facilities are subject only to EPA's Risk Management Program (RMP) Rule but could still be affected by changes to the PSM Rule because the RMP rule effectively incorporates many elements of the PSM rule. For both of these reasons, SOCMA has a significant interest in the outcome of this rulemaking.

SOCMA begins with five overall comments. We then address each of the issues listed in OSHA's September 20 Federal Register notice.

I. Overall Comments

A. SOCMA's Top Four Issues

For OSHA's convenience, these comments address the issues raised in the September 20 Federal Register notice according to the outline by which they are listed there.[2] However, the issues of greatest importance to SOCMA are:

1. The atmospheric storage tank exemption (see Part II.A.1 below);
2. Adding chemicals to Appendix A, especially sodium hydroxide (see Part II.A.5 below);
3. Updating and defining RAGAGEP (see Parts II.B.1 and II.B.4 below); and
4. Safer Technology & Alternatives Analysis (see Part II.B.7 below).

B. OSHA Has Not Updated Its "Proposal" After Six Years, Despite Receiving Extensive Feedback in 2016

The Federal Register notice announcing the rescheduled date of the stakeholder meeting said that "OSHA has continued to work on the PSM standard rulemaking and PSM was placed back on the Unified Agenda in the spring of 2021."[3] But the docket offers little indication of that work, or indeed of any evidence that OSHA's thinking on PSM topics has advanced at all in the past six-plus years. The list of changes that OSHA is considering is virtually identical to the list presented to the small entity representatives in 2016 (SERs), albeit reorganized and reclassified in confusing ways. The explanations for these issues appear simply to be the 2016 SER materials, since the docket contains nothing new besides the two recent Federal Register notices. This is highly disappointing, especially in light of the extensive and detailed comments that the SERSs

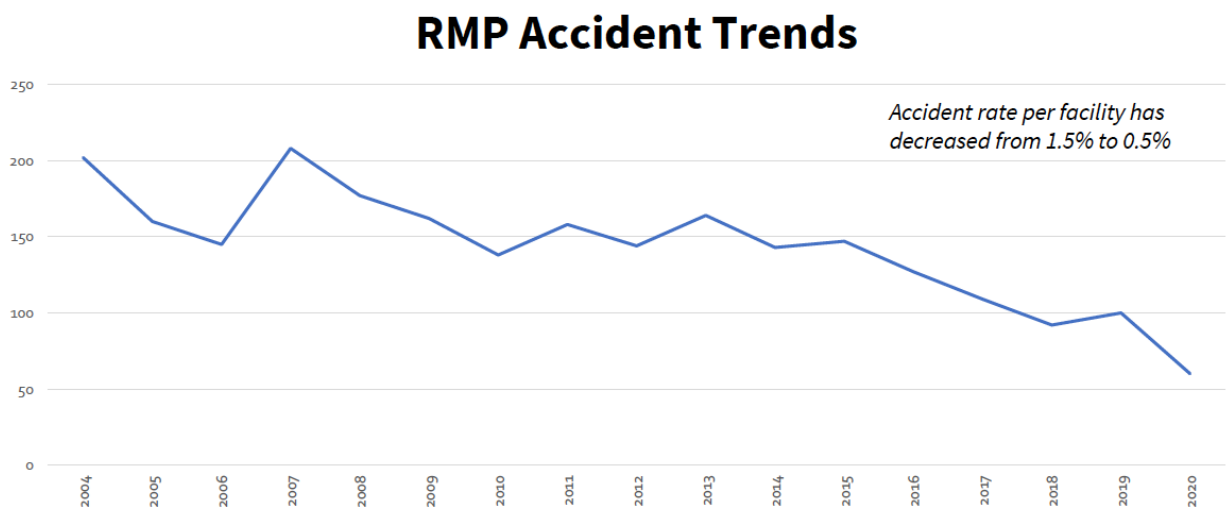
[2] *See id.* at 57521-57522.
[3] *Id*. at 57521.

provided to EPA in August 2016. (For example, SOCMA's comments were 26 pages long.) OSHA seems not to have even read these comments. As a result, stakeholders are left responding to the same, often rudimentary, issue discussions contained in the 2016 documents. OSHA provides no explanation of the handful of issues that appear to be genuinely new since 2016 ("defining the limits of a PSM-covered process"; "clarifying paragraph (e) to require consideration of natural disasters and extreme temperatures"). SOCMA would have expected OSHA to provide *some* further support for its ideas, based on OSHA's experience since 2016.

While most of these comments are, not surprisingly, an updated reiteration of our 2016 SER comments, SOCMA *does* offer some additional perspective based on the history of the past six years, which only further undermines the case for any major revisions to a standard that continues to work effectively.

C. What Is the Need for the Rulemaking?

In its 2016 comments, SOCMA argued that OSHA had not demonstrated any need for the PSM changes it is considering. The Background Document (at 8-13) showed the number of injuries and fatalities from process safety incidents to be small and growing smaller. Information published by EPA in support of its pending proposed rule to update its RMP rule shows that this trend has continued on the EPA side as well. The graph below – cut and pasted from slide 4 of EPA's October 17, 2022, presentation to the Small Business Administration's Environmental Roundtable – illustrates how the number of RMP reportable accidents has dropped by two-thirds over 17 years – from 2004 to 2020:



- **97% of all RMP facilities had no RMP reportable accidents.**
- **Most RMP reportable accidents occurred at facilities with complex processes.**

EPA has also documented this downward trend in tabular fashion in the Regulatory Impact Analyses (RIAs) it prepared in support of the 2019 final RMP rule and its current RMP proposal:[4]

Year	Impact Accidents
2004	197
2005	152
2006	140
2007	204
2008	168
2009	149
2010	128
2011	138
2012	118
2013	123
2014	128*

[4] Source: 2019 RIA (at 33) and 2022 RIA (at 52). The asterisks represent years for which not all 5-year accident histories had yet been reported to EPA, and the values for those years may ultimately have been higher. EPA's graph above indicates that reportable accidents dropped from 2013 to 2014, and rose only slightly from 2014 to 2015.

2015	113*
2016	127
2017	109
2018	92
2019	100
2020	60

As the table shows, the number of reportable RMP accidents in 2020 was less than half the number in 2016.

Imposing greater requirements in the face of a declining problem is the essence of diminishing returns. Yet OSHA is still contemplating greatly increasing the current cost of PSM compliance. As interpreted by the courts, the OSH Act requires OSHA to find that a workplace hazard presents a significant risk to safety and that OSHA's proposed standard would substantially reduce that risk. OSHA can probably document, for example, that requiring fall protection will reduce the incidence of falls. SOCMA questions, however, whether OSHA can make any sort of reliable connection between, for example, new emergency coordination requirements and reduced impacts from process incidents. The Background Document states: "It is often very difficult to identify in hindsight the causes of individual incidents and the interventions that could have prevented them . . . ."[5] If it is difficult to determine the relevance of potential precautions to actual incidents, it is necessarily even more difficult to predict that any of the current proposals would prevent future incidents. The amount of time and resources required to document the many requirements discussed below may actually increase risks by distracting process engineers and safety professionals from other potential hazards.

The SERs in 2016 consistently raised this same question, and the SBREFA Panel recommended that OSHA "review each of the potential scope expansions to establish the extent of the hazard involved, and whether PSM is the most appropriate and cost effective mechanism for addressing those hazards and is necessary and justified."[6] OSHA should apply this recommendation to any PSM changes that it is considering, and as the Panel recommended, "individually justify any practice changes it proposes."[7] Indeed, SOCMA recommends a more minimal approach: that OSHA make the minimum changes to its PSM standard necessary to ensure that does not conflict with EPA's RMP rule.

[5] OSHA, Process Safety Management SER Background Document (2016) at 20.
[6] Report of the Small Business Advocacy Review Panel on OSHA's Potential Revisions to the Process Safety Management Standard (SBREFA Panel Report), OSHA-2013-0020-0116, at 26.
[7] *Id*. at 29.

D. How Is OSHA Going to Coordinate with EPA?

1. Compliance With PSM Must Constitute Compliance with RMP (and Vice Versa)

As OSHA well knows, the PSM rule applies to many of the same processes as the RMP rule, and that rule, at least for Program 2 and 3 facilities, effectively incorporates many elements of PSM either expressly[8] or as a result of very conscious parallelism. As was the case in 2016, both PSM and RMP are undergoing review, and OSHA is considering expanding PSM to cover additional topics also being considered for addition by EPA. But EPA plans to issue its final RMP revision rule in August 2023, likely before OSHA has even issued its proposed PSM revision rule. If EPA finalizes a change that affects PSM (e.g., to the process hazard analysis (PHA) requirements), will OSHA automatically incorporate that change in its proposal? If EPA does *not* make a change, will OSHA feel bound to restrain itself similarly?

SOCMA was encouraged that the SERs also raised the concern that, as a result of this disconnect in timing, the RMP and PSM rules may diverge, so that compliance with the relevant portion of one will not satisfy the requirements of the other.[9] This would be a completely unjustifiable outcome, and intolerable from the perspective of the regulated community. Both EPA and OSHA are part of the same administration, and there is no policy basis for making one program more stringent than the other. Nor is there any statutory requirement for them to differ, since the two have functioned consistently under their current authorities for over 25 years. What's more, the Clean Air Act declares that EPA and OSHA "shall coordinate any requirements under [Clean Air Act Section 112(r)(7)] with any requirements established for comparable purposes by [OSHA]."[10] Regulated businesses should not be placed in a situation where they cannot readily comply with both rules. They also should not be required to spend time and resources preparing duplicative documents or conducing duplicative activities. SOCMA members should be able to dedicate their compliance resources to minimizing risks – and to competing in a global marketplace.

This is not just a problem for facilities that are subject to both rules. A significant number of facilities are subject to RMP but not PSM. However, because RMP effectively incorporates many PSM elements – a point recognized in the SBREFA Panel Report[11] – a

[8] *See* 40 C.F.R. § 68.67(a), (f) (initial and revalidated process hazard analyses done in compliance with PSM "are acceptable" under RMP).
[9] *See* SBREFA Panel Report at 25.
[10] 42 U.S.C. § 7412(r)(7)(D).
[11] *See* SBREFA Panel Report at 15.

change to the PSM rule will, as a practical matter, affect the compliance obligations and burdens of those RMP-only facilities.

On a June 21, 2016 SER call, OSHA's Lisa Long said that OSHA's "primary goal" in the PSM rulemaking was to avoid creating conflicting requirements with RMP, and that compliance with one rule would constitute compliance with relevant portions of the other. SOCMA urges OSHA to remain focused on this goal.

2. Accounting for Costs and Benefits

Another question that arises from the timing discrepancies between the PSM and RMP rulemakings is how EPA and OSHA will agree on the extent to which the two rules respectively account for the collective benefits they produce and costs they impose. While the RMP rule imposes more costs than PSM (because it has additional requirements, such as preparing a Risk Management Plan), there is no question that the two rules overlap substantially. SOCMA suspects that PSM probably accounts for the majority of the benefits produced by the operation of both rules, but again, there is clearly overlap. The result is indisputably the potential for double-counting.

The Background Document at 6-7 says that because currently "fulfilling requirements for one standard automatically fulfills the requirements for the other . . . allocating costs and benefits between the two rules is a minor issue . . . Parcelling out the shares of costs and benefits of each to the two rules is simply a matter of accounting." That would be true if both rules were being reissued at the same time, but they are not. EPA is going to finish first, and at that time, it is going to have to claim some portion of the total benefits and costs attributable to both rules. OSHA will necessarily be left with the rest.

Finally, OSHA needs to include in its cost analysis not just PSM facilities but also RMP-only facilities because of the effective incorporation of PSM by RMP, as discussed above.

E. OSHA Cannot Rely on Decades-Old Cost Estimates

SOCMA was stunned to read, in 2016, that OSHA was estimating the costs of its potential proposal by updating for inflation its original 1992 estimates and EPA's original 1996 estimates. As noted earlier, OSHA has released no new information in connection with this year's stakeholder meeting, including no newer cost information. The values presented by OSHA and EPA in the 1990s were predictions then, and now they are 30 years old. OSHA appears to have made no attempt to learn from the experience of the past two decades plus. That cannot possibly be adequate.

SOCMA appreciates that OSHA asked the SERs what they thought of OSHA's estimates, and understands that the SERs provided OSHA with better information based on their experiences. But the SERs are a limited population, and OSHA needs to do more. OSHA should do a comprehensive data collection from PSM-regulated facilities, or at least do some market research, so that it "review[s] all unit cost estimates."[12]

II. Comments on Specific Issues

A. Changes to the Scope of the PSM Rule

1. Atmospheric Storage Tank Exemption

OSHA is concerned that the current exemption, as interpreted by the Occupational Safety & Health Review Commission (OSHRC), is not sufficiently protective, as it exempts atmospheric storage tanks containing flammable liquids even when they are connected to a[nother] process. OSHA has now gone completely in the opposite direction by proposing to get rid of the exemption altogether in our industry – so that even flammables tanks having no connection to any process would be covered, unless they were operated at facilities classified as petroleum or petroleum product merchant wholesalers. This proposal would have a huge impact on many SOCMA members, bringing many more of their sites under the rule and add to the regulatory compliance burdens of others. The SERs expressed the same concern, pointing out that OSHA's estimate of newly covered facilities was "far too low."[13]

SOCMA believes that the current exemption, as interpreted by OSHRC, is appropriate. Flammable liquid storage tanks do not need to be subject to PSM. It makes little sense to conduct process hazard analyses, management of change analyses, etc., for a tank that simply holds liquids. The costs of PSM compliance far exceed what little benefit would flow from doing so:

- Flammable liquid storage tanks are already subject to the OSHA flammable liquids standard (29 CFR § 1910.106).
- Some states regulate flammable aboveground storage tanks (ASTs), and mandate things like overfill protection, proper containment, inspections per the type of tank or the code the tank to which the was manufactured, venting, and proper construction per the material being stored and whether the tank is connected to a process. These state programs may also require (i) facilities to submit information regarding the tank (e.g., process and instrumentation diagrams, as-built drawings) for certification by the state; and (ii) periodic

[12] SBREFA Panel Report at 35.
[13] *Id.* at 4.

inspections by state officials. Complying with PSM would be an additional burden for these tanks and offer less benefit than the state rules. If the AST holds flammable hazardous waste, the tank would then be regulated under state AST rules, state and EPA RCRA authorities, *and* PSM. This is overkill.

- Finally, covering storage tanks will create an incentive for facilities to store flammable materials in drums, an inherently less safe practice, an issue that the SBREFA Panel recommended that OSHA evaluate.[14]

The Motiva explosion does not warrant inclusion of flammable liquid atmospheric storage tanks under PSM. It is abundantly clear from the Chemical Safety Board's investigation of that event that the root causes were inadequate mechanical integrity, management of change and hot work programs – programs which the company had in place, but did not conduct properly – and by management's disregard of recommendations arising from those programs.[15] Requiring facilities to do what they already do, inadequately, will not necessarily lead such companies to do a better job. Better enforcement of existing requirements is more likely to produce OSHA's desired results.

It would be arbitrary and irrational for OSHA to regulate storage tanks, as described above, and yet exempt petroleum or petroleum product merchant wholesalers. Whether or not involved in bulk fuel terminal operations, all companies with tanks containing flammables will perform the same operations: transferring flammables from a tanker truck or rail car into a storage tank, and then transferring them from the tank into a drum, tote, or tanker truck. The only difference is that a bulk fuel terminal will typically have far more material onsite than a non-fuel terminal. (For example, our transfer operations involve tanks with volumes of 25,000 gallons or less.) Fuel terminals can experience major incidents, as evidenced in the CAPECO explosion.[16] It makes no sense to exempt them from PSM but to apply it to much smaller tanks that are not connected to any processes.

2. Oil & Gas Production Activities

We have no comments on this issue, which does not apply to SOCMA or batch & specialty chemical manufacturing.

3. Resuming Enforcement for Oil and Gas Production Facilities

[14] *Id*. at 26.
[15] Motiva Enterprises LLC, Report No. 2010.05.I.DE (Oct. 2002), at 73-74, available at http://www.csb.gov/motiva-enterprises-sulfuric-acid-tank-explosion/
[16] Caribbean Petroleum Tank Terminal, Report No. 2010.02.I.PR (Oct. 2009).

We have no comments on this issue, which does not apply to SOCMA or batch & specialty chemical manufacturing.

4. Adding Reactive Chemical Hazards

OSHA is proposing two possible ways to expand the PSM standard's applicability to reactive hazards. One would be to add a specific list of chemicals with high heats of reaction to Appendix A. The second would be to build on the New Jersey TCPA provisions that address reactivity. If forced to choose one or the other, SOCMA would favor the first approach, although not with respect to sodium hydroxide (see Part II.A.5.a below). SOCMA is concerned that the TCPA approach could bring many facilities into PSM unnecessarily. It would also accomplish little, since SOCMA and many other batch and specialty manufacturers already calculate reaction energy whenever they are considering making a new product or changing an existing product. This occurs prior to the product even being approved for production, because the relief vent sizing needs to be assessed, and the mass and energy balances developed, to determine (i) whether manufacture of the product is even possible, given the operating limits on batch facility equipment; and (ii) if the facility has the proper equipment to safely manufacture the product.

It is not clear whether OSHA intends to adopt the TCPA process exactly, or only parts of it. In particular, under the TCPA rules, when a facility proposes to create a reaction involving a chemical with one of the listed functional groups, the facility has to calculate the resulting heat of reaction and then see what threshold quantity is associated with that heat to see if the process would contain enough of the chemical to trigger TCPA.[17]

OSHA seems to be saying that PSM would apply either:

- *Anytime the reaction would exceed 100 kcal/mol, without regard to any threshold*. This would seem to trigger coverage no matter how much of the listed chemical would be involved in the reaction. This makes very little sense, as reactive threats diminish as the amount of the chemical diminishes. That is why the TCPA threshold quantities are very high (up to 13,100 lbs) for lower-energy-of-reaction chemicals. Some SOCMA members use these thresholds to manage reactives, so OSHA should use them as well to promote voluntary risk reduction – as the SBREFA Panel urged OSHA to consider.[18]

- *If the reaction would produce a toxic product in an amount that would be immediately dangerous to life or health or exceed an OSHA permissible exposure*

[17] The details are set out on p. 44 of this pdf of the TCPA rules (NJAC 7:31-6.2(g)-(h)).
[18] SBREFA Panel Report at 27.

> *limit*. This approach would highly complicate applicability of PSM. If OSHA is concerned about particular toxic chemicals, it should list them in Appendix A, with a threshold quantity. Then the expected generation of that chemical above its threshold quantity would trigger PSM. OSHA should not be setting up two different regimes for applicability based on the presence of toxic chemicals, one based on threshold quantities and another based on IDLH or PEL values. Also, OSHA should clarify how far it would stretch the concept of "potential" for a chemical to be generated. Would any possible combination of events, however improbable, that could give rise to a toxic chemical in a requisite amount trigger coverage?

If OSHA pursues the TCPA idea, it should also include the TCPA provision for obtaining an exemption from coverage under the reactive hazards provisions.[19]

5. Expanding the Appendix A List

As just noted, if OSHA is going to pursue adding greater coverage of reactive hazards, SOCMA recommends the approach of adding the chemicals that OSHA proposes to add, with the following caveats:

a. Sodium hydroxide

The SERs strongly contended that listing sodium hydroxide on Appendix A would be a terrible idea.[20] As they explained, NaOH is not an inhalation toxic or flammable, and it is not unstable, which has been OSHA's historic basis for listing reactives. NaOH is ubiquitous and could dramatically and unnecessarily expand coverage of the rule. To cite one example, wastewater treatment plants commonly used NaOH for adjusting the pH of the waste stream. Listing NaOH could result in literally thousands of operations in multiple industries, including publicly owned treatment works, being brought under PSM.

OSHA's stated basis in the SER materials for expanding coverage of reactives is their heat of reaction or their potential to generate toxic reaction products. NaOH's heat of reaction is 102 kcal/mol, which just barely makes it across the lowest TCPA threshold. Its reaction products are primarily harmless: generally, water and salt.

OSHA says only 79 entities would be newly added to PSM from adding the listed chemicals to Appendix A. Since OSHA has not yet proposed any threshold quantities for these substances, how can it make that estimate? In any event, SOCMA believes that

[19] *See* pp. 44-45 of the pdf referenced in footnote 17 (NJAC 7:31-6.2(i)).
[20] *See* the SBREFA Panel Report at 10-11.

adding NaOH alone could, by itself, bring orders of magnitude more facilities into PSM. As the SBREFA Panel recommended,[21] OSHA should reconsider this idea.

b. Perchloric acid

OSHA seems to be saying that aqueous solutions of perchloric acid would trigger PSM in concentrations ranging from 50-72% perchloric acid – but not, apparently, in higher or lower concentrations. In SOCMA's experience, perchloric acid solutions are not a reactive hazard at 50%, and do not become so until they reach 72% -- the point at which, according to the proposal, they would not be covered. This makes no sense. SOCMA has previously submitted an analysis explaining why OSHA should set the concentration threshold at 72%.[22]

c. Excluding aqueous solutions of hydrochloric and hydrofluoric acid

On July 18, 2016, OSHA issued a new interpretive memorandum regarding the applicability of PSM to highly hazardous chemicals listed on Appendix A without any percentage concentration.[23] The memorandum confirmed prior interpretations that PSM does not apply to aqueous solutions of hydrochloric acid, hydrofluoric acid and four other substances, and that these substances are covered only in their anhydrous form. SOCMA supports this interpretation and urges OSHA to codify it in the PSM rule itself.

d. Deleting anhydrous forms

If, despite the 2016 memorandum, OSHA proceeds to delete the "anhydrous" qualifier where it appears on App. A, OSHA must specify chemical-appropriate concentrations. The 1% rule that OSHA has adopted as a matter of interpretation for chemicals listed without any associated concentration (other than the six just referenced above) is not a good guide to the hazardousness of many water-soluble substances and is inconsistent with several RMP thresholds.

6. Covering Dismantling and Disposal of Explosives

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[21] *Id*. at 28.

[22] *See* SOCMA, Recommendation for Standards Improvement Project--Phase IV – Docket No. OSHA-2012-0007: Updating the Concentration for Perchloric Acid Under the PSM Rule (Feb. 4, 2013).

[23] OSHA, "Process Safety Management of Highly Hazardous Chemicals and Covered Concentrations of Listed Appendix A Chemicals" (July 18, 2016), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=30848.

SOCMA has no problem with OSHA expanding the scope of the Explosives and Blasting Agents Standard (§ 1910.109(k)) so that the dismantling and disposal of explosives, as well as their manufacture, has to comply with PSM. The only qualifier is that OSHA must retain, under that standard, its current definition of "explosive": "any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion . . . ."[24] SOCMA would be strongly opposed to OSHA seeking to apply this standard to materials that *could* be explosive, but do not have explosiveness as their primary or common purpose.

OSHA should not develop a different definition of "explosive" for PSM purposes or seek to broaden that standard's applicability on the basis of "explosivity," since a wide universe of substances and an infinite variety of mixtures can explode under the right circumstances. PSM already addresses detonation potential (i.e., instability) by its inclusion of NFPA 3 and 4 reactive substances on Appendix A.

7. Change to Retail Exemption

SOCMA has no comments on this issue, which does not affect the batch or specialty chemical industries.

8. Defining the Limits of a PSM-Covered Process

We are unable to locate any discussion of this issue in the 2016 materials or elsewhere in the docket, so we cannot comment on it in any informed fashion. SOCMA members report that they have not experienced significant or particular difficulties in determining the boundaries of their PSM-covered processes.

B. Changes to Particular Provisions of the PSM Rule

1. Definition of RAGAGEP

SOCMA believes that OSHA's May 11, 2016, enforcement policy memorandum on RAGAGEP in Process Safety[25] is well-done and SOCMA would support its incorporation into the PSM rules. SOCMA specifically appreciates the following aspects of the memorandum:

- When it finalized the PSM rule, OSHA said it "did not intend to incorporate by reference into the standard all of the codes and standards published by . . .

[24] 29 C.F.R. § 1910.109(a)(3).
[25] *See* footnote 38 *infra*.

consensus groups," but only "appropriate" ones.[26] Consistent with that statement, the memorandum says:

- "If an employer selects and follows widely adopted codes or consensus documents or widely adopted non-consensus documents for RAGAGEP, OSHA will accept such materials as RAGAGEP where applicable and appropriate"; and
- "Employers do not need to consider or comply with a RAGAGEP provision that is not applicable to their specific worksite conditions, situations, or applications."

- The preamble to the PSM rule also states that OSHA "believes that this recommended phrase would include appropriate internal standards of a facility, as well as codes and standards published by [consensus groups]."[27] The memorandum contains helpful statements regarding when a facility might choose to follow internal standards, including: "(c)ontrolling hazards more effectively than the available codes and consensus and/or non-consensus documents when deemed necessary by the employer's PSM program." We particularly appreciate that OSHA has not repeated its earlier statements that:
  - "Employers' internal standards must either meet or exceed the protective requirements of published RAGAGEP if such RAGAGEP exists"[28]; or
  - "[I]t was clear from the context of [the change from proposed to final rule] that it intended 'appropriate internal standards' to be those employers developed when published codes or standards were unavailable or outdated, or that were more stringent than published standards."[29]
- Finally, we agree with the new memorandum's statements that OSHA will not presume a violation when a facility does not follow a "should" statement or does follow a "should not" statement.

2. Definition of "Critical" Equipment

It appears that OSHA is proposing to add the following definition of "critical equipment" to paragraph (b): "equipment where failure can lead directly to a release of [a highly hazardous chemical] or equipment that is relied upon as a safeguard in the PHA." SOCMA does not object to this definition, so long as OSHA inspectors are fair and reasonable in sticking to the definition while giving deference to experts on staff of the specialty/batch manufacturing facility. SOCMA would prefer this general statement to

[26] 57 Fed. Reg. 6456, 6390 (Feb. 24, 1992).
[27] *Id.*
[28] *See* June 5, 2015 interpretative memo.
[29] 78 Fed. Reg. 73761 (PSM RFI).

the Alternative 7 list presented on page 87 of the Background Document. In SOCMA's view, any list will be too long for some processes (and will create a risk of inspectors trying to cite facilities for not including listed equipment that is not safety-critical) and too short for others, potentially lulling facilities into a false sense of security (for example, agitators, which are not listed, could be safety-critical). The list could be useful as illustrative guidance of potentially critical equipment, if clearly described as such.

3. Employee Participation & Stop Work Authority

a. Employee participation

SOCMA member companies already include employee participation in PHAs. Nonetheless, SOCMA opposes requiring employee participation, as there is inevitable subjectivity as to specific employee expertise, knowledge and ability to contribute. Establishing employee qualifications and appropriate participation in the development of a PHA is best left to the company itself, as it has the best working knowledge of the facility and role that employees play in the company. Any third party, including OSHA, is not likely to have a deep enough understanding of the facility or processes in the facility to assess the appropriate level of employee participation.

b. Stop work authority

SOCMA members generally give process operators stop work authority and have no objection to that proposal. SOCMA also has no problem with letting other employees make stop work recommendations, or with seeking employee input on employee participation plans.

We do have concerns about how these provisions could be applied to contractor employees:

- PSM already extensively addresses contractor employees in Paragraph (h) ("Contractors"). OSHA should add any changes there, not to Paragraph (c) ("Employee participation").
- OSHA should confirm, as it explained in its 2016 Recommended Practices for Safety & Health Programs, that host employers and contractors are free to "determine which among them will implement and maintain the various parts of the safety and health program."[30]

[30] OSHA, Recommended Practices for Safety & Health Programs (Oct. 2016), at 32, available at https://www.osha.gov/safety-management.

- OSHA should also confirm that contractor employees need only be involved in employee participation under PSM when they are "on or near a process covered by PSM."[31]
- We agree that contractor employees should be trained regarding process hazards and be given access to relevant documentation.[32] However, PHAs can contain confidential business information (CBI), and it is not always feasible to sanitize the PHA to protect that CBI. Thus, SOCMA does not support the idea of requiring facilities to give contractors access to PHAs. SOCMA believes the appropriate standard should be that contractors are given sufficient information to understand the nature of the hazards to which they may be exposed and how to assure safety and protect themselves.
- SOCMA does not believe that contractor employees should automatically be involved in "the conduct and development of process hazards analyses and on the development of the other elements of process safety management in this standard."[33] Such a requirement may seem sensible for a continuous operation, to the extent contractors are going to be engaged for an extended period of time. With batch operations, however, a multitude of chemicals and products may be run at any point in time. Contractors would likely only be able to provide a measurable amount of benefit to a PHA in such cases if they were going to be essentially embedded at the facility. And, as just noted, PHAs may contain CBI that a contractor does not need to see in order to understand the nature of the part of the process in which the contractor is involved.

4. RAGAGEP Updates

PSM Paragraph (d)(3)(ii) already requires facilities to compile applicable RAGAGEP before they conduct a process hazard analysis, and paragraph (e)(6) already requires facilities to update their PHAs at least every five years. So, facilities are already required to "periodically" update their determination of what constitutes RAGAGEP – on the same frequency as the more relaxed alternative presented on p. 84 of the Background Document. Hence, there is no need for OSHA to make any change here.

SOCMA is concerned that, by requiring that a facility's RAGAGEP be "current,"[34] OSHA would essentially require facilities to update their understanding of applicable RAGAGEP on a continuing basis. Specialty batch plants in multiple sectors are potentially subject to a myriad of varying codes and sections of codes that may be considered RAGAGEP. Many of these plants are small businesses and do not have corporate staff who can

[31] *See* OSHA Process Safety Management Guidelines for Compliance (OSHA 3133) (1994).
[32] 29 C.F.R. § 1910.119(c)(3).
[33] *Id*. § 1910.119(c)(2).
[34] Background Document at 60.

spend much of their time identifying and tracking changes to codes, standards or practices. Monitoring such changes on an ongoing basis is beyond the resources of SOCMA and many other batch and specialty companies. In 2016, OSHA said it expects small companies to have "one or two employees spending one to four months" for every PSM review cycle updating RAGAGEP.[35] That level of undertaking is beyond the capability of any small chemical manufacturing facility. Nor is SOCMA aware of any commercially available notification system that could automatically alert companies to relevant updates. Given the heterogeneity of batch and specialty manufacturing facilities, and the significant amount of judgment inherent in determining what constitutes relevant RAGAGEP, it is unlikely that a reliable system could be developed, even on a customized basis.

Alternative 4 discusses updating RAGAGEP once every three years.[36] While that would be better than "continuously," it would result in RAGAGEP updates being out of sync with PHA revalidations. So, OSHA should retain the linkage of RAGAGEP updates to revalidation of PHAs, as the SBREFA Panel recommended.[37]

With respect to what constitutes "updating," in its most recent interpretive memorandum regarding RAGAGEP, OSHA stated:

> Organizations that develop codes and consensus and/or non-consensus documents may update them based on newly identified or recognized hazards; improved understanding of existing hazards; industry operating experience; and/or incidents indicating that more stringent hazard control is needed. If the updated document explicitly provides that new clauses or requirements are retroactive, those updates are relevant to determining whether the employer's practice continues to conform to RAGAGEP. Where RAGAGEP are updated to be more protective but are not explicitly retroactive, PSM does not mandate that employers upgrade their equipment, facilities, or practices to meet current versions of their selected RAGAGEP. However, under 1910.119(d)(3)(iii), employers must determine and document that their equipment is designed, maintained, inspected, tested, and operating in a safe manner.[38]

SOCMA supports this interpretation and urges OSHA to incorporate it into the final PSM rule. An updated standard does not necessarily equate to a better standard. Any

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[35] *Id.* 61.
[36] *Id.* at 84.
[37] SBREFA Panel Report at 30.
[38] OSHA, "RAGAGEP in Process Safety Management Enforcement" (May 11, 2016), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=30785.

rulemaking on RAGAGEP should retain the ability of employers to explain why they have chosen not to adopt a newer standard but have instead concluded that a prior published standard or an internal standard remains safe. A requirement that processes be redesigned and reconstructed with every change in RAGAGEP would be as economically infeasible as requiring all Americans to buy a new car every time a safer model became available.

Finally, OSHA should also clarify that it plans to retain paragraph (d)(3)(iii), which allows employers to continue to use processes that are designed according to codes, standards or practices that are no longer in general use so long as the processes are still safe.

5. Process Safety Information to Be "Continuously Updated"

SOCMA does not understand this proposal, since the PSM rule already requires facilities to update their PSI (i) whenever they conduct a PHA[39] and (ii) as result of any changes that change the PSI.[40] This seems completely sufficient to us.

6. Formal Resolution of PHA Team Recommendations Not Utilized

The Background Document stated that "OSHA is considering adding requirements to § 1910.119(e)(5) specifying that if management decides *not* to implement or make modifications based on PHA team findings and recommendations, management will ensure that the hazard identified by the PHA team has been adequately addressed." But then, ambiguously, it added: "This could take the form of a formal document with management signature(s), approving *the actions taken* (or lack thereof) in order to resolve PHA team recommendations."[41]

The latest Federal Register notice is more one-sided, saying that OSHA is considering "[a]mending paragraph (e) to require formal resolution of Process Hazard Analysis team recommendations that are not utilized."[42]

As SOCMA explained in its 2016 comments, SOCMA has no objection, in principle, to a requirement that management sign off on *all* PHAs, as it is a common practice in the specialty chemical industry for management to do so. SOCMA would oppose, however, a signoff requirement that applies only when management determines *not* to implement one or more PHA recommendations. SOCMA is concerned that, in the rare

[39] 29 C.F.R. § 1910.119(d).
[40] *Id.* § 1910.119(l)(4).
[41] Background Document at 26 (emphasis added).
[42] 87 Fed. Reg. 57522.

event where that occurred, being required to document management's decision would only be drawing inspectors' attention to an idea that was not well-founded.

Any signoff requirement should allow the employer to determine who the appropriate signatory should be; e.g., facility-level or corporate level. In either case, it should be an individual with responsibility for operations or process safety.

7. Safer Technology and Alternatives Analysis

OSHA is proposing that, whenever identified process hazards exceed an employer-specified level of risk, facilities must consider the hierarchy of controls:

1. Inherently safer approaches
2. Engineering controls
3. Administrative controls
4. PPE

and document why a higher level cannot be adopted. SOCMA members regularly conduct STAA analyses and consider the hierarchy of controls. OSHA should leave manufacturers free to determine exactly when and how to do these tasks. SOCMA also does not believe it is feasible for small businesses to devote the amount of time and resources that would be required to document their consideration of all these factors to a level that could confidently pass an inspection. That is especially the case given that most of this staff time would be devoted to documenting the conclusions that staff would have reached in any event. The amount of time and resources required to document the many consideration requirements may actually increase risks by distracting process engineers and safety professionals from other potential hazards.

SOCMA is also concerned about the prospect for OSHA's proposal to increase civil liability risks. Even though OSHA would not require a facility to implement an identified safer alternative, courts and juries would be sorely tempted to hold a company liable if there were an accident and some identified alternative had not implemented, no matter how tenuous the case that implementing it would have avoided the accident. Or they might simply argue that the earlier decision was evidence that the facility had a history of not making changes to increase safety. Juries and potentially judges would be evaluating the earlier decision with the luxury of 20/20 hindsight. SOCMA believes they would feel a strong temptation to conclude that such decisions were evidence of negligence. As a result, facilities would feel compelled to make identified changes even if they felt that those changes were infeasible.

In this area, above all, it is crucial that OSHA not require anything beyond or in conflict with what EPA ends up finalizing in the RMP rulemaking. In particular, as discussed below, if OSHA proceeds with its proposed requirement, it should:

1. Limit its applicability to the design stage of processes; and
2. Exclude processes that are governed by specifications established by a government agency or a customer. Such an exclusion is crucial to the continuing vitality of many SOCMA members' businesses.

a. Any STAA mandate should be limited to process design

If OSHA decides to proceed with the STAA requirement, SOCMA agrees with the SERs who recommended that analyses only be required at the design stage of new processes. As the National Research Council has explained:

> It is clear that the best opportunity for implementing ISP into a facility is early in the life cycle of a product or process. At that early stage, process technologies have not been chosen, facilities have not been built, and customers have not yet evaluated product samples or made commitments based on products with particular characteristics. As a product moves through its life cycle, these and other factors may limit options, make changes more difficult, or involve more people and organizations in the change. Development of an ISP, as with the development of any new process, requires extensive resources, including for example, expert personnel, laboratory facilities, pilot plant facilities, and significant financial expenditures, and modifications can become more costly when the process involves modification of an existing facility.[43]

b. OSHA should exclude processes governed by external specifications

Most discussions of chemical process safety are implicitly premised on a dedicated process that manufactures some product continuously, as one would find, for example, at a polypropylene or bleach manufacturing plant. By contrast, many SOCMA members manufacture products in discrete batches, usually in campaigns lasting some short period of time, using equipment that can be configured or reconfigured to make a multiplicity of products. Of particular relevance to this rulemaking, the details of those manufacturing processes are often specified externally and are beyond the ability of the manufacturer to alter at will. This happens in two principal types of cases: (i) in the manufacture of government-regulated products and (ii) in contract manufacturing. Below, it is explained why, in both cases, a requirement that the manufacturer assess

[43] NRC, THE USE AND STORAGE OF METHYL ISOCYANATE (MIC) AT BAYER CROPSCIENCE (2012), at 4-59.

the feasibility of safer alternatives does not make sense – and could destroy the underlying business model.

i. Government-regulated products

Many of the pharmaceuticals in use today start with chemical synthesis of the active pharmaceutical ingredients (APIs) – the molecules that actually provide the bioactive effect (as opposed to binders, coatings, colorants, etc.). Basic chemicals are used and reacted to form intermediates and ultimately the final API. The final APIs often have a highly complicated chemical structure and require specialized chemistries to make. The process or recipe involves many steps and many pieces of equipment much of which needs to be portable and rearranged. Small quantities are often required over years for validation and approval of the drug prior to commercial manufacturing. Manufacturing campaigns therefore vary in both size and duration.

APIs also have to be manufactured under extremely precise and controlled processes so as to assure the purity and consistency of the resulting product. As a result, the API manufacturing sequence is specified, and regulated, under Food and Drug Administration (FDA) Good Manufacturing Practice (GMP) regulations[44] These regulations are clear that "failure to comply with any regulation set forth in [these rules] in the manufacture, processing, packing, or holding of a drug shall render such drug to be adulterated under section 501(a)(2)(B) of the act and such drug, as well as the person who is responsible for the failure to comply, shall be subject to regulatory action."[45] Many API manufacturing processes are additionally specified in "Drug Master Files"(DMFs), which allow an entity (the "holder") to (i) incorporate information by reference when it submits an application, amendment or supplement to the FDA, and (ii) authorize other persons to rely on the information to support a submission to FDA without the holder having to disclose the information to the person.[46] While DMFs are not legally enforceable, they are contractually applicable when a company manufactures an API for the holder of the DMF.

EPA imposes a similar regulatory regime on the manufacture of pesticide products. EPA's rules under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) require pesticide registrants to supply EPA with detailed information on the production process for each pesticide active ingredient and each establishment that will conduct the process.[47] Much of this same detail is also required for the process of formulating a

[44] These are primarily set out at 21 C.F.R. Parts 210 & 211.
[45] *Id*. § 210.1(b).
[46] *Id.* § 314.420.
[47] 40 C.F.R. § 158.330.

pesticide.[48] Following registration of the pesticide, registrants are required to follow these specifications in manufacturing pesticide active ingredients and formulating pesticides – and to contractually ensure that any companies conducting these activities on behalf of the registrant do the same.

Conducting a safer alternatives analysis for any of these pharmaceutical or pesticide activities because the manufacturing process for these chemicals is already specified in the GMPs, DMFs, and registrations. If OSHA proceeds with an STAA mandate, it should provide explicitly that any STAA requirement would not apply to any process that is specified in whole or in part by a government regulation or approval, including FDA Good Manufacturing Practice regulations and EPA pesticide registrations, and any associated contractual obligations, such as a Drug Master File. We further request that this provision be cast as a clear exclusion in the regulation, and not simply listed in the preamble to the final rule as an example of "infeasibility."

ii. Toll and other contract manufacturing

Tolling and other contract manufacturing makes up a great proportion of many SOCMA members' business – and this is typical of the batch and specialty chemical manufacturing industries. In the typical case, a customer comes to a manufacturer and asks it to bid on manufacturing the customer's chemical according to a process that is specified in the contract. The overall practice is referred to as contract manufacture. Toll manufacturing is the subset of contract manufacturing where the customer owns the raw materials or intermediates that the member uses to manufacture the product. The key element in all these cases, to reiterate, is that the customer is the one who specifies the manufacturing process. In many cases, these customers are FDA or EPA regulated, as discussed above. And while *their* suppliers may not be government-regulated, the processes used by those suppliers are often still specified by their regulated customers, who oversee and often inspect those production processes.

SOCMA understands and agrees that the basic obligations of process safety management apply to contract manufacturers just like any others. Contract manufacturers still must understand the hazards of their processes. Accordingly, they review the process safety information provided by the customer, and still conduct process hazard analyses themselves, particularly regarding the precise equipment they might use to implement the process. Sometimes they conclude that what their customer wants them to do is too hazardous, given the equipment at their disposal. In some of those cases, they are able to work with the customer to develop a process that would be safer. But sometimes they have to decline to bid on the job.

[48] *Id*. § 158.335.

But it is simply not consistent with commercial reality to extend current process safety requirements to require manufacturers not only have to understand the hazards of the processes they are being contracted to use, but also to assess whether there are inherently safer ways to make the product, and to engage with the customer and try to persuade it to agree to some safer process. For one thing, most customers in such a case simply go look for another manufacturer that does not interpret STAA similarly. That could well include finding a manufacturer located in another country that does not impose an STAA requirement. A further problem is that, typically, customers want a manufacturer to start work in a matter of months. In such circumstances, there may not be enough lead time to allow any sort of detailed analysis. Finally, many contract manufacturing campaigns are quite short -- a month or so. It would not be cost-effective to manufacture on such a basis if you first had to do a safer alternatives analysis.

In the RMP rulemaking, SBA proposed that EPA exclude toll contracts of <5 years duration. But the duration of the contract is not really an appropriate basis for distinguishing. Some contract manufacturing agreements extend five or more years. But typically, such contracts only require actual manufacturing for a few days or weeks out of a year – that is all the time it takes to make the small quantities involved under many batch manufacturing agreements. Even under such long-term agreements, a requirement to conduct STAA could eliminate any profit under such an agreement or make it too economically risky to proceed.

SOCMA member Hydrite raised these concerns, but so did other SERs.[49] For all these reasons, OSHA should provide explicitly that any STAA requirement would not apply to any process to the extent that it is specified in a contract with a customer. As above, SOCMA further requests that this provision be cast as a clear exclusion in the regulation, and not simply listed in the preamble to the final rule as an example of "infeasibility."

8. Consideration of Natural Disasters and Extreme Temperatures in PSM Programs

In principle, SOCMA does not oppose requiring hazard reviews and process hazard analyses (PHAs) to address natural disasters and extreme temperatures. SOCMA members already take both of these phenomena into account when they conduct these activities. Facilities in different locations in the United States assume different potential natural disasters. It is not reasonable to expect a facility in Florida to prepare for an earthquake nor facility in Ohio to prepare for coastal flooding. If a final rule retains this

[49] *See* SBREFA Panel Report at 17-18.

requirement, it should refer to "reasonably foreseeable" or "applicable natural disasters."

9. Expanding Mechanical Integrity to Cover Critical Equipment

SOCMA does not object to OSHA expanding Paragraph (j) to cover "equipment where failure can lead directly to a release of [a highly hazardous chemical] or equipment that is relied upon as a safeguard in the PHA," so long as OSHA inspectors are fair and reasonable in sticking to this definition. SOCMA would prefer this general statement to the Alternative 7 list presented page 87 of the Background Document. In SOCMA's view, any list will be too long for some processes (and will create a risk of inspectors trying to cite facilities for not including listed equipment that is not safety-critical) and too short for others, potentially lulling facilities into a false sense of security (for example, agitators, which are not listed, could be safety-critical). The list could be useful as illustrative guidance of potentially critical equipment, if clearly described as such.

10. Clarifying Mechanical Integrity Coverage of "Equipment Deficiencies"

SOCMA is not opposed to OSHA clarifying Paragraph (j)(5) to specifically require correction when equipment is not:

- operating or functioning as designed by the manufacturer or is outside of acceptable limits; or
- operating as defined by the process safety information.

SOCMA does not support requiring correction when equipment "poses a potential risk of release of a hazardous or toxic chemical." This phrase is far too broad to be useful to facilities and would create too great a risk of arbitrary enforcement.

11. Management of Change to Cover Organizational Changes

SOCMA does not oppose this change so as long as it is limited to organizational changes that have the potential to affect process safety.

12. Requiring Root Cause Analysis

SOCMA members regularly perform root cause analyses as part of their incident investigations, but they should be left free – as they are now – to determine when and how.

If OSHA proceeds with such a requirement, it should be careful not to change the scope of the PSM rule's existing incident investigation requirement; i.e., OSHA should only require root cause investigations of incidents "which resulted in, or could reasonably have resulted in a catastrophic release of highly hazardous chemical in the workplace,"[50] not "all incidents"[51] or those "which either resulted in or could reasonably have resulted in, a release of an HHC."[52] This is an appropriate, risk-based application of resources. In particular, SOCMA urges OSHA to follow EPA's recent example and not propose a definition of "near miss." The "could reasonably have resulted in a catastrophic release" language quoted above is all that is necessary to require facilities to investigate near misses – a point EPA recognizes in connection with the its RMP rule, which uses the identical phrase.[53] Anything more elaborate that OSHA might prescribe can only cause confusion, as EPA recognized in 2017, when it chose not to adopt a definition of "near miss."[54] Indeed, the more detail an agency adds to the concept, the more issues the agency, facilities and stakeholders would need to debate (e.g., how different a circumstance needs to be to be "slightly different" than what occurred). SOCMA particularly opposes the language NJDEP supplied to EPA in 2019 ("an unplanned, unforeseen, or unintended incident, situation, condition, or set of circumstances which does not directly or indirectly result in a regulated substance release)."[55] This language is almost comically overbroad, as it would literally apply to every event at a PSM facility, however trivial, that does not directly or indirectly cause a release. By the same token, it could be underinclusive, as anything that could indirectly cause an accidental release would be *excluded* from the definition of "near miss."

If OSHA proceeds with a root cause requirement, it should also clarify, as EPA has proposed, that facilities can use any "recognized [root cause] method."[56] OSHA should also repeat EPA's statement in 2016 that "some root causes could be events that management systems could not have prevented or protected against."[57]

OSHA should also:

- Address how it would handle situations where the root cause cannot be determined because the relevant evidence was destroyed; and
- Clarify that a facility's obligation is to "resolve" the recommendations of an investigation (and to document that resolution), and not necessarily to implement them.

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[50] 29 C.F.R. § 1910.119(m).
[51] Issues Document at 26.
[52] Background Document at 70.
[53] 40 C.F.R. § 68.81(a); *see* 87 Fed. Reg. at 53584.
[54] *See* 87 Fed. Reg. at 53584.
[55] *Id.*
[56] *Id*. at 53612.
[57] 81 Fed. Reg. 13638, 13648 n.21 (March 14, 2016).

Finally, as with so many other issues under this proposal, OSHA should study what EPA finalizes and not require anything additional or in conflict.

13. Requiring Emergency Response Planning and Coordination

It is difficult to evaluate OSHA's proposal here because it is not as fleshed-out as EPA's. OSHA should not require anything additional to or in conflict with what EPA finalizes.

Coordination with local responders. SOCMA could support a requirement that follows the model of the current RCRA generator rules, which require a facility to "attempt to make . . . arrangements" with local and state authorities and hospitals, and to document if any of them decline to enter into such arrangements.[58] If a facility is subject to EPCRA, EPCRA compliance should be sufficient. SOCMA is pleased that the SBREFA Panel urged OSHA to adopt such a limited approach "if it chooses to pursue this option."[59]

Exercises/Drills. OSHA is proposing annual drills with fire fighters. Drills require many hours of work for preparation, the actual drill, and then post-drill cleanup and review. Scheduling and conducting drills will only take longer and cost more at a batch facility because of differing times at which processes occur and the differing amounts of resources the processes require.

Live exercises require a huge amount of planning and are extremely demanding for all concerned. That is especially true in the case of volunteer fire departments. By necessity, firefighters work on different schedules, and so any exercise would need to be repeated at least once and potentially multiple times to include all of the potential responders. During such an exercise, firefighters and equipment would be tied up and a response to an actual emergency could be delayed.

And the cost of such exercises for facilities can also be significant. They also have the potential to cause accidents and damage facilities as emergency equipment is brought on- and offsite in simulated emergency circumstances. The additional benefit of holding live exercises does not, in SOCMA's view, justify the vastly greater costs and disruption.

Annual plant tours with first responders. SOCMA has no objection to this proposal, but the costs for tours are higher for batch facilities, at least, than what is stated in the background document. It can require a day's worth of time for pre-tour coordination and the tour itself.

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[58] *See* 40 C.F.R. § 265.37, which is contained within 40 C.F.R Part 265 Subpart C, which is cross-referenced in 40 C.F.R. §§ 262.34(a)(4) & (d)(4) (establishing standards for generators).
[59] SBREFA Panel Report at 31.

Evaluate local emergency response capabilities. OSHA needs to address what it would propose to require if a facility determined that local response capabilities were inadequate. It would not be economically feasible for most batch or specialty manufacturers to provide for response whenever locals choose not to, as EPA once proposed. Even the National Association of SARA Title III Officials urged EPA to "abandon" that idea, noting that "[t]here are no useful standards or criteria that apply to this determination."[60]

Also, by using the economic analysis for the confined space standard to estimate the time and cost of a full evaluation of a local responder's capabilities, OSHA has seriously understated the actual cost, at least for batch chemical facilities. Evaluating a local responder for confined space capabilities is essentially a one-time thing. But a typical batch tolling facility manufactures different chemicals at differing times, and the facility would need to evaluate if the local responder can respond to the reactions and potential incidents that could occur with each of the different chemicals. Time is of the essence when responding to either scenario, but many more variables are involved in looking at how a responder is going to be able to respond to a chemical incident, as opposed to a confined space emergency. Also, many more company personnel are likely to be involved in a process incident than in a confined space incident

14. Third Party Compliance Audits

It is difficult to evaluate what OSHA may have in mind here, as even the Background Document provides no detail on OSHA's proposal beyond that PSM compliance audits would need to be "conducted by a qualified third-party auditor," with the latter term to be defined. Nonetheless, the SERs uniformly objected to this proposal.[61]

SOCMA questions whether OSHA can really justify a third-party audit requirement. OSHA's burden would be to show that the current Paragraph (o) self-audit requirement leaves a significant risk to safety unaddressed and that a third-party compliance audit requirement would substantially reduce that risk. EPA's SBREFA materials cited several examples to support EPA's claim that "self-auditing *may* be insufficient to prevent accidents,"[62] but close examination of these examples shows that compliance auditing was not even an issue in some cases. Where auditing was a problem, the question would still remain why more rigorous enforcement of the existing audit requirement would be insufficient.

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[60] *See* NASTTPO comments (May 12, 2016) at 4, available at https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0510.
[61] SBREFA Panel Report at 22-23.
[62] 81 Fed. Reg. at 13654 (emphasis added).

Even if OSHA believes a third-party audit requirement can meet the "significant risk" test, OSHA would also have the burden of showing that the requirement was technologically and economically feasible. SOCMA is not confident that OSHA can. In particular, SOCMA believes that OSHA's cost estimates on this topic are critically low. The Background Document estimated in 2016 that a small chemical manufacturer's costs to hire a third-party consultant to conduct and write up an audit would be $5,643.[63] The SBREFA Panel Report quotes Hydrite's account of its 2016-vintage hire of a single individual consultant to audit three covered processes at a facility. Including the time required to write up the report, the cost was $28,000.[64]

If OSHA proceeds to propose something on this topic, SOCMA urges OSHA to follow the Panel's recommendations.[65] In particular:

- OSHA should clarify that "independent" means "independent of the facility." Most companies with more than one facility use personnel from the corporate office, or from other sites, to audit sites. These individuals, being external to the facility, still bring an independent perspective that can be very helpful.
- SOCMA supports the Alternative 9 idea of only requiring one member of an audit team to be independent, rather than all of the auditors.
- SOCMA supports the Alternative 10 idea of making third party audits voluntary, with the Paragraph (o) audit frequency requirement being reduced to every five years for facilities using independent auditors.
- SOCMA supports the Alternative 11 idea, for facilities also covered by RMP, of only requiring third party audits after reportable RMP releases.
- OSHA should not propose what EPA proposed in 2016 regarding auditor qualifications, which was extremely limiting and could have made it impossible for facilities to find qualified auditors.[66]
- OSHA should not propose anything like what EPA proposed in 2016 regarding the ability of lawyers to conduct audits or the applicability of legal privilege to documents provided to auditors. EPA dropped these proposals in the final 2017 RMP rule.
- OSHA should retain its current interpretation that facilities need only audit a representative sample of their covered processes. Requiring audits to cover all elements will increase, by many multiples, the time and cost of the audit requirement.

Finally, as before, OSHA should not propose anything additional to or in conflict with what EPA requires.

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[63] Background Document at 74 ($3,756 to conduct and $1,878 to write up).

[64] SBREFA Panel Report at 23.

[65] *Id.* at 32-33.

[66] EPA has not reproposed these provisions. *See* 87 Fed. Reg. 53586.

15 & 16. Systems for Periodic Review & Necessary Revisions of PSM Management Systems/Written Procedures & Recordkeeping

SOCMA does not oppose these proposals, provided its requirements are compatible with SOCMA's ChemStewards initiative, which is an environmental, health, safety and security management program designed specifically for the batch and specialty chemical industry. SOCMA companies must participate in ChemStewards as a condition of SOCMA membership. SOCMA would be very opposed to anything that required companies to maintain two different process safety management systems, one for ChemStewards and one for PSM.[67]

Once again, moreover, SOCMA notes that OSHA's cost estimate for evaluation and corrective action is way off base. It appears that OSHA based its estimate on one quarter of what it would take to implement and maintain a PSMS for a gas distribution pipeline. In its comments, Hydrite judged that a data acquisition and analysis for a batch toll facility simply to manage corrective actions and management of change would cost at least $30,000.

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SOCMA appreciates the opportunity to comment on OSHA's ideas for revising the PSM rule. We look forward to continued involvement and collaboration with OSHA on this topic. If you have any questions about these comments, please feel free to contact me at rhelminiak@socma.org or 571-348-5107.

Respectfully submitted,

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[67] A 47-slide presentation on ChemStewards is available at http://www.socma.com/Portals/0/Files/ChemStewards/ChemStewards_101_Training.pdf. SOCMA would be pleased to make a presentation to OSHA staff at their convenience to explain the initiative further and to answer OSHA's questions.