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U.S. Environmental Protection Agency
EPA Docket Center
Mailcode 6207A
Attention: Docket ID No. EPA-HQ-OEM-2015-0725
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act; Proposed Rule (Docket EPA-HQ-OEM-2015-0725)

Dear Docket Clerk:

The GPA Midstream Association appreciates this opportunity to submit comments on the EPA's above-referenced proposed rulemaking.

The GPA Midstream Association has served the U.S. energy industry since 1921 as an incorporated non-profit trade association. The GPA Midstream Association is composed of 130 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products ("NGLs") such as ethane, propane, butane and natural gasoline. GPA Midstream Association members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. Our members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs.

In general, the GPA Midstream Association believes that EPA's proposed rulemaking unnecessarily expands existing RMP rules. EPA's basis for this proposed rulemaking is Section 6(a)(i) of Executive Order 13650, which, in light of the West, Texas incident, requires Federal agencies to develop options for improved chemical facility safety and security that identify "improvements to existing risk management practices through agency programs, private sector initiatives, Government guidance, outreach, standards, and regulations." *See* 81 Fed. Reg. 13,638, 13,640. But adding the proposed new layers of regulations may actually worsen risk management practices by creating confusion and perverse incentives, particularly because the existing regulations are not a problem in need of a regulatory solution. To that point, ATF recently concluded that the West, Texas facility fire was set intentionally, so adding new regulations would not have prevented that incident. It is non-compliance with existing

regulations, not inadequate regulations, which contributes to accidental incidents, and so the GPA Midstream Association respectfully requests that EPA enforce its existing regulations instead of promulgating new ones.

If EPA does move forward with this rulemaking, the GPA Midstream Association specifically recommends the following:

- Amend the proposed definition of a catastrophic release so that RMP incidents that would have no impact on the public's safety or the environment do not trigger undue response and burden on the regulated midstream industry.
- Remove the independence criteria proposed for third party auditors.
- Allow compliance audits to continue as stated under the existing RMP rule and continue with inspections and enforcement instead of layering additional regulation.
- Enforce current EPCRA regulations instead of requiring non-responding facilities to become responding facilities at the cost of industry due to non-participation of local emergency responders.
- Ensure that information sharing with the public is appropriate to what is most useful for local officials and the public at large.

The following pages include more detailed responses to EPA's requests for comments. If you have any questions, please feel free to contact me at jdreyer@GPAglobal.org or 918-645-1272.

Respectfully Submitted,



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GPA Midstream Association

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Section 1: Accident Prevention Program Requirements

I. Source Location¹

A. *At this time, EPA is not proposing any additional requirements either for location of stationary sources (related to their proximity to public receptors) or emergency shutdown systems. However, EPA seeks comment on whether such requirements should be considered for future rulemakings, including the scope of such requirements, or whether the Agency should publish guidance. (See 81 Fed. Reg. at 13640)*

The GPA Midstream Association supports EPA's decision to decline to regulate stationary source location and emergency shutdown systems. Existing OSHA regulations, industry guidelines and state and local zoning authorities adequately address the siting of stationary sources (i.e., The locating of facilities is already regulated by zoning ordinances, permitting, fire codes, and other restrictions put in place by state, county, and local authorities).

The GPA Midstream Association is in support of the following comment concerning buffer zones from the American Fuel & Petrochemical Manufacturers (AFPM):

"In addition, EPA discusses in the preamble that it may be desirable to require buffer zones between facilities and neighboring properties. As the Supreme Court has recognized, "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities."² As land use remains a quintessential local issue, the Supreme Court requires a "clear statement from Congress" before conferring zoning authority on federal regulators.³ Thus, in SWANCC, the Court rejected the U.S. Army Corps of Engineers assertion of Clean Water Act jurisdiction over an abandoned sand and gravel pit because it found no "clear statement" in that statute that would allow such a "significant impingement of the States' traditional and primary power over land and water use."⁴

There is no authority in Clean Air Act Section 112(r)(7), much less a clear statement, that would authorize the creation of so-called buffer zones. Congress makes no mention of granting EPA authority to compel facilities to buy third-party properties

¹ Note: EPA request for comment is in italicized font, and the GPA Midstream Association comment is stated below.

² *Warth v. Seldin*, 422 U.S. 490 n.18 (1975); *see also Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.").

³ *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) [hereinafter "SWANCC"].

⁴ *Id.* at 174.

“beyond the fence-line”; nor does the agency have the authority to condemn such properties if a neighboring landowner refuses to sell voluntarily.

In any case, mandating buffer zones would be impermissibly arbitrary. EPA cites only two examples in support of this notion: Bhopal and West, Texas. The Bhopal incident occurred in India, which lacks the state and local zoning protections and fire codes found in the United States. And West does not prove the need for buffer zones either, as that facility violated numerous fundamental safety regulations—a problem that buffer zones would not address.

At a minimum, to the extent that EPA attempts to address stationary source location issues, any future actions on stationary source location should be addressed through legislation, as we see no statutory basis for regulating stationary source location. To the extent EPA does attempt to regulate source location, it should be done through rulemaking, not guidance documents. AFPM has significant legal, technical, and practical concerns about EPA assuming jurisdiction over stationary source location. Consistent with the Due Process Clause and APA, those concerns about EPA invoking a novel authority deserve a full airing in the regulatory process, including notice and an opportunity to comment.”

The GPA Midstream Association contends the existing requirements for emergency shutdown systems (ESD) are sufficient and should not be revised. Operating procedures, training, and mechanical integrity programs based on safety system criteria provide assurance that a facility’s ESD system will function properly as needed. The typical midstream stationary source is equipped with ESD valves on the inlet and outlet of the entire facility, and is often equipped with additional shutdown valves for specific process equipment to provide additional protection if a loss of primary containment (LOPC) occurs, or for any other emergency situation.

II. Catastrophic Release Definition

- A. *EPA seeks comment on the proposed revision to the **catastrophic release** definition, whether it expands the scope of the current definition instead of clarifying it, and whether the definition should be limited to loss of life; serious injury; significant damage; or loss of offsite property. (See 81 Fed. Reg. at 13647)*

GPA recommends that the EPA definition of catastrophic release harmonize with the definition of catastrophic release in the PSM regulation. According to the PSM regulation 1910.119(b), “catastrophic release means a major uncontrolled emission, fire, or explosion, involving one or more highly hazardous chemicals, that presents serious danger to employees in the workplace”. Currently, OSHA’s PSM regulation requires that an incident investigation begin within 48 hours of a catastrophic release, or LOPC. Therefore, EPA’s proposed catastrophic release definition with the inclusion of “significant property damage on-site” would also initiate an incident investigation, which would be a redundant exercise. The GPA Midstream Association recommends the EPA remove “significant property damage on-site” from the proposed catastrophic release definition and continues to allow OSHA’s PSM regulation to address LOPC inside a facility’s process areas.

The GPA Midstream Association contends the proposed revision does expand the scope of coverage rather than clarifying the definition and proposes that the EPA harmonize with the definition of catastrophic release in the PSM regulation. The GPA Midstream Association believes that harmonizing with the PSM definition will (*i.e.*, imminent and substantial endangerment to public health and environment) account for loss of life; serious injury; significant damage; or loss of offsite property. Not all releases that would meet the same language used to define a five year reportable accidental release would necessarily meet a common sense definition of “catastrophic release”. Also, an incident that occurs within the boundaries of a facility may have no impact to potential public receptors. By including an overly broad definition, EPA may cause unnecessary third party audits, unnecessary community concern, unnecessary media coverage and distortion of facility risks.

III. Current Use of Root Cause Analysis

- A. *EPA seeks comment on the proposed amendments of the incident investigation requirements to require root cause investigations for each incident which resulted in, or could reasonably have resulted in, a catastrophic release and on the proposed definition for root cause. (See 81 Fed. Reg. at 13650)*

The GPA Midstream Association supports performing a root cause analysis (RCA) on any incident which resulted in a catastrophic release. However, requiring a RCA on any incident that “*could reasonably have resulted in a catastrophic release (near miss)*” may have the negative impact of owners and operators becoming reluctant to report such near misses to avoid having to perform an RCA. The GPA Midstream Association recommends that EPA allow owner/operators of stationary sources the flexibility in determining if an RCA would be beneficial with regards to near miss events.

- B. *EPA seeks comment on whether a root cause analysis is appropriate for every RMP reportable accident and near miss. Should EPA eliminate the root cause analysis, or revise to limit or increase the scope or applicability of the root cause analysis requirement? If so, how should EPA revise the scope or applicability of this proposed requirement? (See 81 Fed. Reg. at 13650)*

The GPA Midstream Association recommends that a root cause analysis is only required when there was an actual catastrophic release that resulted in deaths, offsite injuries, or significant environmental damage. Requiring an RCA for near-misses may discourage companies from categorizing potential releases as near-misses in order to avoid having to conduct an RCA.

The GPA Midstream Association agrees that root cause analysis is a useful method for investigating incidents; but, there are numerous useful methods other than a root cause analysis (fault tree analysis, 5 whys, fishbone diagram, etc.) for investigating incidents. The existing regulations provide owners/operators the discretion to determine the particular method of investigation appropriate for the circumstances. There is variability among processes and differences between companies and facilities within the midstream industry; therefore, companies must have the flexibility to determine which investigation method is best suited for their individual needs.

EPA should clarify that use of the term “root cause analysis” does not require use of a specific methodology.

- C. *EPA also seeks comment on proposed amendments to require consideration of incident investigation findings, in the hazard review (§ 68.50) and PHA (§ 68.67) requirements. (See 81 Fed. Reg. at 13650)*

OSHA’s PSM regulation 1910.119(e)(3)(ii) requires PHAs address any previous incidents which resulted in or could have resulted in a catastrophic release in the workplace; therefore, the GPA Midstream Association does not see any reason to revise the RMP rules to require consideration of incident investigation findings in the hazard review and PHA.

- D. *EPA seeks comment on the proposed additional requirement in §68.60 to require personnel with appropriate knowledge of the facility process and knowledge and experience in incident investigation techniques to participate on an incident investigation team. (See 81 Fed. Reg. at 13650)*

The GPA Midstream Association member companies agree that incident investigation team members should have knowledge of the facility and processes involved in the incident, with at least one team member knowledgeable in incident investigation techniques.

IV. Decommissioned Processes

- A. *EPA seeks comment on the proposed revisions to require an owner or operator to meet applicable reporting and incident investigation requirements prior to de-registering a process. (See 81 Fed. Reg. at 13651)*

The GPA Midstream Association disagrees that an owner/operator should be required to perform reporting and incident investigation requirements prior to de-registering a process, unless a recordable incident has occurred. Often, the GPA Midstream Association member companies de-register stationary sources due to regulated substances decreasing below the EPA’s regulated threshold quantities, or because a stationary source is taken out of service due to marketing conditions. In these situations, and in many others, there would be no benefit added by performing reporting or incident investigation requirements.

V. Near Misses

- A. *EPA seeks comment on the guidance and examples provided of a “near miss”. Is further clarification needed in this instance? Should EPA consider limiting root cause analyses only for incidents that resulted in a catastrophic release? (See 81 Fed. Reg. at 13652)*

EPA’s examples of near misses which include excursions of process parameters and activation of layers of protection devices (*i.e.*, relief valves, detection devices, and interlocks) should not qualify as near misses. The examples listed were implemented into the design to mitigate potential hazards which could lead to potential catastrophic releases.

Regarding further clarification, the GPA Midstream Association agrees that EPA should not propose a regulatory definition for a near miss.

The GPA Midstream Association recommends EPA limit RCAs only for incidents resulting in an actual catastrophic release. Requiring RCAs for all near misses could discourage employees and contractors from reporting near misses because of the burden of conducting a rigorous investigation. Lastly, small businesses would be especially burdened by this requirement because of the cost of formal RCA training, minimal internal staffing, or use of third-party investigators.

VI. Investigation Timeframe

- A. *EPA seeks comment on the appropriateness of establishing a specific timeframe for incident investigations to be completed and what that timeframe should be. (See 81 Fed. Reg. at 13653)*

The GPA Midstream Association does not support the use of a specific timeframe for the completion of incident investigations. While the GPA Midstream Association does believe that most incident investigations can be completed within the 12 month timeframe, there may be instances when it cannot. EPA states that you can obtain written approval to extend the time line, however, there is no guarantee that an extension will be granted and no clear indication that it can be reviewed and approved in a timely manner. The GPA Midstream Association would also like to comment that an incident investigation may lead to testing of equipment or materials by a third party, which is outside the owner/operator control regarding completion timeframe.

- B. *As an alternative, EPA considered whether the incident investigation should be completed prior to restart of the affected process, if the incident resulted in a process shutdown, to ensure that the causes of an incident have been addressed. EPA seeks comment on whether to add this condition to the incident investigation requirements or whether there are other options to ensure that unsafe conditions that led to the incident are addressed before a process is re-started. (See 81 Fed. Reg. at 13653)*

The GPA Midstream Association does not agree with the additional requirement that an incident investigation be completed prior to restarting an affected process. Owners/operators should be allowed the opportunity to evaluate the circumstance pertaining to a specific incident, or LOPC, and be allowed to use their judgment in restarting a process based on knowledge and expertise. In addition, other RMP requirements are required before placing a process back into service (*i.e.*, MOC, PHA, PSSR, operating procedures, training, and mechanical integrity) ensure the process has undergone due diligence in addressing safety concerns. Therefore, the EPA should not prescribe an incident investigation be complete before placing a process back into service after a catastrophic incident.

Furthermore, EPA acknowledges an incident investigation could take several months to complete; therefore, delaying the restart of a process for such an extended period could have significant adverse effects on upstream and downstream customers.

- C. *EPA also seeks comment on whether the different root cause analysis timeframes specified under the MACT and NSPS and proposed herein will cause any difficulties for sources covered under both rules, and if so, what approach EPA should take to resolve this issue. (See 81 Fed. Reg. at 13653)*

The GPA Midstream Association chooses to not comment on this as the specified MACT and NSPS regulations are for Petroleum Refineries.

VII. Accident History Reporting

- A. *EPA seeks comment on the appropriateness of requiring root cause reporting as part of the accident history requirements of § 68.42, as well as the categories that should be considered and the timeframe within which the root cause information must be submitted. (See 81 Fed. Reg. at 13653)*

The GPA Midstream Association agrees that requiring root-cause reporting as part of the accident history requirements of §68.42 are appropriate. In the preamble, EPA justifies adding this requirement because, “Local communities are interested in whether facilities are investigating incidents and taking steps to prevent future accidents.” Depending on the severity of the incident or near miss, the root cause is required to be investigated via this rule. The existence of this rule will provide local communities the reassurance that facilities are investigating incidents and taking steps to prevent further accidents. However, submitting this information does not improve the LEPC’s ability to respond in an emergency.

However, the GPA Midstream Association would ask that EPA consider extending the current 6-month deadline for submitting accident history after a stationary source has a catastrophic event, per (§68.195(a)(1)) to be consistent with the proposed 12-month deadline (68.195(a)(2)) for including the incident’s root-cause.

In addition to root cause reporting, lessons learned from root cause investigation techniques are often completed and disseminated internally. However, the GPA Midstream Association believes providing this information to other industries and the community is an unnecessary step. Many lessons learned are not transferable to other companies and processes, much less transferable to other industry segments. This additional requirement could also run the risk of providing confidential business and process and security information to a broad audience. EPA does not provide compelling justification for expanding the accident history requirements in §68.42 as the current requirements are adequate.

The GPA Midstream Association would agree that the categories that EPA lists are expansive, but these set categories may lead to problems in reporting if a root cause does not fit into one of the set categories.

VIII. Alternative Options

- B. *EPA seeks comment on the alternative approach and whether there are any other alternative options that EPA should consider prior to issuing a final action. (See 81 Fed. Reg. at 13654)*

Based on the EPA’s language regarding waste-water facilities, the GPA Midstream Association recommends maintaining the current exemption for program 2 stationary sources covered under NAICS 211.

IX. Applicability of Third-Party Audit Requirements

- A. *The proposed rule provides for an opportunity for the owner or operator to provide information and data to the implementing agency and to consult with the*

implementing agency about the need to perform a third party audit at the facility source before implementing agency representatives make a final determination. EPA seeks comment on these proposed third party audit applicability requirements. (See 81 Fed. Reg. at 13658)

The GPA Midstream Association agrees with the opportunity for the owner/operator to provide information and data to the implementing agency and to consult with the implementing agency about the need to perform a third party audit before the implementing agency representatives make a final determination. . In addition, if the third-party audit provisions are included in a final rule, an appeal process for disputing third-party audit findings needs to be included.

- B. *EPA seeks comments and suggestions on the proposed third-party audit applicability requirements and whether to eliminate or further limit applicability of this provision. For example, EPA could consider limiting the provision to only Program 3 facilities that have had accidents or to only facilities that have had major accidents with offsite impacts. EPA seeks comments on this alternative approach and to define and characterize “major accidents with offsite impacts.” Alternatively, EPA could revise this provision to reduce its impact on small businesses. When providing suggested alternatives, please include suggestions for how to improve compliance with auditing provisions. (See 81 Fed. Reg. at 13658)*

The EPA states the purpose of the third party audits “...is to help reduce the risk of future accidents by requiring an objective auditing process to determine whether the owner or operator of the facility is effectively complying with the prevention program requirements of part 68.” The GPA Midstream Association contends the purpose of compliance audits is to ensure stationary sources are effectively implementing the existing regulations and to identify any deficiencies.

The GPA Midstream Association understands the benefits and agrees with performing RCAs and incident investigations after an actual catastrophic release occurs. The GPA Midstream Association does not agree that third party compliance audits after a catastrophic release will help to reduce the risk of future accidents. Furthermore, the GPA Midstream Association does not see any value in a third party compliance audit requirement after such a catastrophic release based on the following reasons:

- An RCA would identify the root cause of a catastrophic release and help reduce the risk of future accidents.
- The EPA’s proposed root cause categories such as Administrative/Management System, Personnel Performance, Human Factors Engineering, etc., would identify deficiencies in the RMP program that may have led to a catastrophic release;
- If a catastrophic release does occur, an implementing agency will likely conduct an investigation which would identify deficiencies in the stationary source’s RMP program.
- An implementing agency is authorized to review a stationary source’s two (2) most recent compliance audits and associated ‘Findings’ to evaluate a facility’s compliance with the RMP program.

- Third party auditors may not be readily available due to ‘the 3-year business dealings prior to the audit’ criteria set forth by this proposal, as well as the expertise and experience knowledge requirements of the third party audit team.
- A third party audit could be cost prohibitive and inflict a financial burden on an owner or operator. GPA Midstream Association member companies, which represents both small and large operators, estimates that a third party audit could cost between \$30,000 and \$70,000 for a typical stationary source facility.
- Otherwise, the EPA should limit the requirements for third-party audits for only those catastrophic releases that have major actual public or environmental receptor impacts. A catastrophic release with major offsite impacts is more indicative of a need for a review of a stationary source’s program than requiring one for all LOPC with an actual or potential threshold quantity release or major on-site impact.

C. *EPA seeks comments and suggestions on the proposed third-party audit applicability requirements and whether to eliminate or further limit applicability of this provision. For example, EPA could consider limiting the provision to only Program 3 facilities that have had accidents or to only facilities that have had major accidents with offsite impacts. EPA seeks comments on this alternative approach and to **define and characterize “major accidents with offsite impacts.”** Alternatively, EPA could revise this provision to reduce its impact on small businesses. When providing suggested alternatives, please include suggestions for how to improve compliance with auditing provisions. (See 81 Fed. Reg. at 13659)*

The GPA Midstream Association agrees EPA should limit the requirements for third-party audits for only Program 3 stationary sources which have had a ‘major accident with offsite impacts’ or significant non-compliance.

The GPA Midstream Association characterizes “major accidents with offsite impacts” as any catastrophic release that impacts a public or environmental receptor as has been identified in the stationary source’s offsite consequence analysis (OCA). Therefore, if a LOPC does not result in impacting offsite public or environmental receptors, EPA should not mandate the proposed third-party audit requirement.

D. *EPA also seeks comment on whether there are other criteria that could require RMP facilities to perform third-party compliance audits. For example, a third-party audit could be required if an owner or operator of a facility were to learn or know of a condition or conditions at its facility suggesting a concern for, or potential risk of, future accidents. Such conditions would need to be objective and reasonably ascertainable by the facility owners or operators, the implementing agency, and the public. (See 81 Fed. Reg. at 13659)*

The GPA Midstream Association contends that a compliance audit, whether performed by a third party or an internal audit team, is not the correct regulatory tool to identify “a condition or conditions at a facility suggesting a concern for”, also known as potential hazards. Existing regulations, including the MOC process, PHA process, Pre-Startup Safety Review (PSSR) process, as well as other practices are better suited to identify potential hazards and any associated risks.

- E. *EPA also seeks comment on the benefits and costs of proposing additional requirements for third-party compliance audits and recommendations for appropriate conditions suggesting a concern for, or potential risk of, future accidents.* (See 81 Fed. Reg. at 13659)

The GPA Midstream Association does not recognize any benefit from a third-party audit with regard to identifying “concern for, or potential risk of, future accidents”. A third-party audit would only identify a facility’s compliance with the RMP program and is not designed to identify concerns for, or potential risk of, future accidents.

The GPA Midstream Association estimates a third party audit could cost between \$30,000 and \$70,000 for a typical stationary source in the midstream industry. A third party audit could be cost prohibitive and inflict a financial burden on an owner or operator.

X. Proposed Third-Party Audit Requirements

- A. *EPA seeks comment as to whether the requirement that owners and operators of RMP facilities be responsible for determining and documenting the competency, independence, and impartiality of their auditors is appropriate.* (See 81 Fed. Reg. at 13659)

The GPA Midstream Association agrees owners/operators should have the ability to determine the competency and independence of its auditors, including the use of internal auditors, and to identify training and experience levels for these auditors. The Operator should maintain this information and provide documentation when requested. This allows for an audit staff to be developed that understands the stationary source’s process, as well as the audit process, which, in turn, has the potential for resulting in a more directly applicable audit and not just one that superficially reviews the elements and may miss critical program needs.

The GPA Midstream Association is concerned there will not be a sufficient pool of auditors which meet the very stringent proposed qualifications outlined by the EPA.

- B. *Therefore, while EPA is not proposing that the Agency itself will accredit third-party auditors, EPA seeks comment on whether to require additional accreditation criteria and how to best establish and structure an accreditation program within the context of the RMP rule.* (See 81 Fed. Reg. at 13659)

The GPA Midstream Association contends that an accreditation program is not necessary. It is difficult to identify how accreditation criteria could be established or how an accreditation program could be managed by owners/operators. However, the GPA Midstream Association agrees a compliance auditor should be properly trained and certified in auditing techniques through various industry organizations or process safety programs.

Further, such a requirement for a certification process similar to that currently required by the Bureau of Safety and Environmental Enforcement (BSEE) would prove more limiting and disruptive than is currently the case with the more limited audience under the BSEE program.

- C. *EPA is proposing to require a PE as part of the audit team in an attempt to identify competent auditors that also have an ethical obligation to perform unbiased work. EPA seeks comment on whether these criteria are appropriate and sufficient to ensure third-party auditors are competent to perform high-quality compliance audits. (See 81 Fed. Reg. at 13660)*

The GPA Midstream Association contends that a licensed professional engineer (PE) is not necessary as part of an audit team to solely provide the ethical obligation to perform unbiased work. First, there will be an insufficient number of qualified and willing PEs to meet EPA's proposed third party auditor requirement. Second, EPA's concern about bias is misplaced. The GPA Midstream Association member companies implement Code of Business Conduct and Ethics standards to assist its employees in daily conduct in an ethical and honest manner. These standards describes ethical risks, provides guidance to help recognize and deal with ethical issues, and explains how to report unethical conduct and help foster a culture of integrity and accountability. Therefore, it should be the owner/operators responsibility to identify competent auditors, whether internal or third party, that possess the ethical obligation to perform unbiased work. Also, the GPA Midstream Association asserts it is more important that a member of the compliance audit team have been trained through one of the programs recognized by midstream industry organizations or process safety programs, than be a licensed PE. Other professional certifications in safety or environmental compliance programs, such as a Certified Safety Professional, come with similar professional ethics standards and criteria. A recognized certification program should include a standard of ethics that the board issuing the certificate of training applies to its members.

- D. *EPA also seeks comment on whether the proposal to require that a third-party auditor, or a member of the audit team, be a licensed PE is appropriate and whether there is enough licensed PEs to conduct third-party audits for the universe of facilities that may become subject to these requirements. Are there other qualifications that might be appropriate for RMP auditors in lieu of a PE? (See 81 Fed. Reg. at 13660)*

Licensed PE rules of conduct specify PEs shall perform services only in the areas of their competence. Therefore, even though the number of PE's may be large, the GPA Midstream Association contends there is an insufficient number of PEs that have third party audits as an area of competency. This proposed requirement for a PE on a compliance audit team could result in PEs with different engineering discipline backgrounds (e.g., civil, electrical, aerospace, agricultural, etc.) performing a compliance audit in an unfamiliar industry, which violates their code of ethics.

The GPA Midstream Association contends the current auditing process, without a third party licensed PE, already includes owner/operator employees with qualifications, knowledge, and experience needed to conduct quality compliance audits. Typically these employees are not associated with the facility being audited and can contribute to an unbiased audit.

- E. *EPA also seeks comment regarding potentially relevant and applicable consensus standards and protocols that might apply to the audits and be built and/or incorporated by reference into the rules. (See 81 Fed. Reg. at 13660)*

Existing guidelines are currently available, such as the CCPS "Guidelines for Auditing Process Safety Management Systems" and others can be used as references for auditing and auditing protocols, with some additional criteria that address the differences between PSM and RMP requirements.

- F. *EPA agrees that chemical facility security is a priority and seeks comments on the impacts a third- party auditor may have on a facility's security and whether there is a need to specify security protections or whether existing non-disclosure and contractual agreements should handle this independently. (See 81 Fed. Reg. at 13660)*

With regards to the midstream industry, there should not be a need for additional EPA regulations for security concerns under most corporate non-disclosure requirements for professional consultants. However, due to the detailed process safety information an auditor will review, the GPA Midstream Association recommends all third party auditors undergo a thorough background check, similar to the existing Transportation Worker Identification Credentials (TWIC), required by the Transportation Security Administration, before they could enter a regulated facility and participate in a compliance audit.

- G. *EPA seeks comment on whether the proposed auditor independence criteria are appropriate and sufficient. If not, we seek comment on how best to adjust the criteria for maximum auditing effectiveness and efficiency, including comments or suggestions on how to provide more flexibility in the auditor independence criteria, or whether to eliminate the requirement for independence. (See 81 Fed. Reg. at 13660)*

The requirements for independence of third-party auditors should be removed, as the current proposal would severely limit the pool of potential auditors. The auditors do not need to be independent, but they do need to be competent and impartial to conduct the audit. The current proposal would only allow an auditor to preform 1 audit every 3 years, as well as not permit the auditor to conduct any other work for the same company at other locations in the interim. This would severely and adversely impact the availability of qualified personnel to perform the auditing that is being proposed.

- H. *EPA also seeks comments on whether the proposed 3-year timeframe to separate the audit from other business arrangements with the owner or operator is appropriate. (See 81 Fed. Reg. at 13660)*

The GPA Midstream Association does not agree with the proposed auditor independence criteria. If implemented, the proposed 3-year limit on other professional work will limit the availability of competent auditors and would have a significant negative impact on the pool of auditors available to conduct an audit.

- I. *Furthermore, EPA is requesting comment on whether the proposed auditor independence criteria should be modified so as to not exclude a retired employee*

from auditing a former employer's facility if the employee's sole continuing financial attachment to the owner or operator is an employer-financed or employer-managed retirement plan. While EPA is concerned such attachments could provide the auditor with incentives to ensure the facilities they audit are not financially negatively impacted by their audits, it could also, as a practical matter, limit the available pool of otherwise qualified and competent auditors. EPA seeks comment on the potential magnitude of such incentives and how to address this concern in the rule. (See 81 Fed. Reg. at 13660)

The GPA Midstream Association does not agree with the proposed auditor independence criteria. If implemented, the proposed auditor independence criteria should be modified so retired employees may conduct compliance audits. A pensioner's independence should be manageable under the terms of most pension or retirement plans, and should not result in a conflict of interest in and of them. EPA's proposal would further limit the pool of competent auditors available to the midstream industry. Retired employees can bring a wealth of knowledge about the processes that is beneficial to conducting a high-quality audit.

- J. *EPA requests comment on whether to propose streamlined independence criteria for small facilities (i.e., based on the size of the facility) including comments or suggestions on how to streamline the requirements. (See 81 Fed. Reg. at 13660)*

The GPA Midstream Association contends the independence criteria should be removed for all facilities, including small facilities.

- K. *Proposed §§ 68.59(b)(3) and 68.80(b)(3), if finalized, would require that owner or operators of RMP regulated facilities ensure that third-party auditors have written policies and procedures to ensure that all personnel comply with the competency, independence, and impartiality requirements of these sections. EPA seeks comment on these proposed provisions. (See 81 Fed. Reg. at 13660)*

The GPA Midstream Association does not agree with the proposed auditor independence criteria. Therefore, these requirements are unnecessary.

- L. *EPA considered but did not propose other third-party auditor independence safeguards than those included in proposed § 68.59(b)(2) or § 68.80(b)(2). Examples include mandating the random assignment of auditors, paying them from a central pool of auditing funds, or requiring mandatory periodic auditor rotation after a specified period of time. Nor has EPA proposed provisions requiring owners and operators to provide advance notice to the implementing agency of third-party auditor site visits to enable the implementing agency to accompany and observe the third-party auditors on such visits.¹⁰² EPA seek comment on these alternative approaches. (See 81 Fed. Reg. at 13661)*

The GPA Midstream Association contends the proposed alternative approaches considered by the EPA are not necessary.

- M. *EPA further seeks comment on whether there are any other alternative approaches to third-party auditor qualifications EPA should consider prior to issuing a final action. (See 81 Fed. Reg. at 13661)*

The GPA Midstream Association does not agree with the proposed auditor independence criteria. However, if EPA proceeds, then third-party auditors should be required to provide to the owner and operator credentials demonstrating they meet all auditing criteria listed in this proposed rule.

- N. *EPA also specifically requests commenters to identify any supportive literature or data as EPA is presently not aware of literature or data showing that such provisions are effective in counteracting biases due to lack of impartiality or independence. (See 81 Fed. Reg. at 13661)*

Industry associations requested a modest extension to the comment deadline, in part to facilitate fully and accurately responding to time consuming and resource intensive questions like these. Since the GPA Midstream Association members were only given a 60 day comment period, and not granted an extension, compiling detailed information to respond to this question was impossible.

- O. *There may be other options, in addition to the approaches taken in the proposed third-party compliance auditing program or identified above, that can also increase owner or operator flexibility without compromising audit accuracy. EPA seeks comment on such alternative auditor/auditing approaches. (See 81 Fed. Reg. at 13661)*

The GPA Midstream Association recommends EPA allow owners/operators to perform compliance audits after a catastrophic release with internal resources that are not affiliated with the Facility where the incident occurred. Examples include corporate regulatory and safety groups and or individuals from other facility locations educated in the 40 CFR Part 68 requirements.

- P. *If non-independent or limited independence third-party auditing, second-party auditing, or enhanced self-auditing is authorized, EPA seeks comment on how best to structure such auditing to maximize auditor independence and accurate auditing outcomes given the lack of complete independence. (See 81 Fed. Reg. at 13662)*

The GPA Midstream recommends that internal auditing staffs, with sufficient training and experience in auditing principles and are independent of the local operations management within an organization, should be able to competently perform auditing functions while maintaining the independence proposed by EPA.

- Q. *EPA also seeks suggestions for what steps a facility should be required to take if third-party auditors who meet the proposed independence and competence criteria are not available. (See 81 Fed. Reg. at 13662)*

The GPA Midstream Association does not agree with the proposed third-party auditor proposed requirements. As previously stated, the GPA Midstream recommends that internal auditing staffs, with sufficient training and experience in auditing principles and are independent of the local operations management within an organization, should be able to competently perform auditing functions while maintaining the independence proposed by EPA.

- R. *EPA seeks comment, however, on whether we should also require draft third-party compliance audit reports to be submitted to the implementing agency at the same time, or before, such reports are provided to the owners and operators and whether*

such a requirement would be further effective in minimizing potential third-party compliance audit bias. (See 81 Fed. Reg. at 13662)

The GPA Midstream Association does not agree with the proposed third-party auditor proposed requirements. The GPA Midstream Association contends that draft third-party audit reports should not be issued to the agency until after they have been reviewed in order to address potential discrepancies in data, inaccurate assumptions, and incorrect interpretations. Draft reports are working documents which may contain various discrepancies or misunderstandings that need to be corrected in order to provide an accurate report on the state of the RMP program. Releasing an audit report in its draft form may result in misinformation. This requirement would result in more problems and issues than it may reduce in eliminating concerns regarding bias.

- S. *Therefore, neither the audit report nor the records related to the audit report provided to the third-party auditor are attorney-client privileged (including documents originally prepared with assistance or under the direction of the audited source's attorney). EPA seeks comment on these proposed requirements including any legal concerns that may result from the provision that limits attorney-related privileges. (See 81 Fed. Reg. at 13662)*

EPA cannot and should not limit any attorney related privileges related to the preparation of the proposed third-party audits and related documents due to significant implications on fundamental principles associated with adequate representation by counsel of regulated owners and operators. Given the circumstances under which EPA proposes to require preparation of a third-party audit report, and the scope of the documents, materials and information to which EPA proposes to limit the attorney-related privileges, EPA would compromise and limit the fair and necessary access by an owner or operator to counsel and all related protections following events or associated with regulatory determinations.

EPA proposes to require a third-party audit by an owner or operator of a Program 2 or 3 source under the following two conditions. The first condition follows an event which gets reported in the five (5) year accident history described in 40 CFR § 68.42(a), which under current rule involves “accidental releases from covered processes that resulted in deaths, injuries, or significant property damage on site, or known offsite deaths, injuries, evacuations, sheltering in place, property damage, or environmental damage or following a determination by the EPA of significant noncompliance.” See 81 FR 13638, 13658. The second condition is if an implementing agency has made a determination that a third-party audit is necessary based on information it may obtain from an inspection and/or other relevant information which may include “evidence of significant noncompliance with the prevention requirements of subpart C or D of Part 68.” *Id.* Under EPA’s proposal, if a third-party audit is required, the proposed rules require “the retention of reports and records by the third-party auditors...the report to be submitted to the agency at the same time, or before, it is provided to the owner or operator... [and] that the audit report and related records cannot be claimed as attorney-client communications or as attorney-work product even if the auditors are themselves, or are managed by or report to attorneys.” *Id.* at 13662.

EPA has no grounds to limit the attorney-work product (AWP) doctrine under the above-circumstances, because each proposed condition following which the third-party audit is required constitutes circumstances in anticipation of litigation. EPA proposes that any information, materials or documents that the third-party audit is based on or is included in the report itself are not properly subject to the AWP, because the report is designed to “document compliance rather than anticipation of litigation.” *Id.* EPA justifies this contention by comparing the reports to a “monitoring report required by an air emission rule.” *Id.* Such an absurd corollary could not be farther from the circumstances under which EPA proposes that the report is required. As a threshold matter, by the standard included in § 68.42(a), litigation can, and in fact, most likely will ensue following such events. Examples of litigation include actions from parties who sustain damage or injuries, property damages, citizen suits and/or significant agency enforcement or actions.

In circumstances of anticipated litigation, and documents and things prepared by counsel or employees or agents of a regulated entity are frequently and properly subject to AWP protection. See, e.g., Hickman v. Taylor, 329 U.S. 495 (1947); In re Grand Jury Subpoena (Mark Torf/Torf Environmental Managent), 357 F.3d 900 (9th Cir. 2004); Bituminous Casualty Corporation v. Tonka Corporation, 140 F.R.D. 381 (D.Minn. 1992); Briggs and Stratton Corporation v. Concrete Sales and Services, et al., 174 F.R.D. 506 (M.D. Georgia 1997); Martin v. Bally’s Park Hotel and Casino, 983 F.2d 1252, 1260 (3rd Cir. 1993); Atlantic Richfield Company v. Current Controls, Inc. 1997 WL 538876 *3 (W.D.N.Y. 1997). Further, courts have long recognized that actual litigation need not be imminent to have AWP apply. This has included the protection from disclosure documents which were generated by an owner/operator’s personnel, consultants and attorney’s during the course of responding to an EPA order, Briggs and Stratton Corporation v. Concrete Sales and Services, et al., 174 F.R.D. at 508-511, or in response to a notification by the EPA that a party was under investigation, In re Grand Jury Subpoena (Mark Torf/Torf Environmental Managent), 357 F.3d. at 908-911. Clearly, the events surrounding a five year accident implicate AWP protections.

The AWP doctrine constitutes a qualified immunity that extends beyond counsel to materials prepared by other representatives of a party or its agents as long as in anticipation of litigation. See Fed.R.Civ.P. 26(b)(3); Hickman v. Taylor, *supra*. This includes, without limitation, attorneys, consultants, employees or agents of a party. However, given it’s a qualified immunity, a party (such as EPA or an implementing agency), may still gain discovery of the documents if it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. See Fed.R.Civ.P. 26(b)(3). Thus, EPA may still gain access to a document protected under AWP, should it establish sufficient need and hardship without it.

EPA also lacks any basis or grounds to predetermine the application (or lack thereof) of the Attorney-Client Privilege (ACP), which once established, constitutes as near an absolute privilege as the law allows. The ACP protects confidential communications and legal advice to and from a client and their attorney. The ACP’s purpose is to encourage full and frank communication between attorneys and their clients and

thereby promote broader public interests in the observance of law and administration of justice. Upjohn Company v. United States, 449 U.S. 383, 389 (1981). The privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. *Id.* at 390; Hickman v. Taylor, 329 U.S. at 511 (1947). EPA's proposal attempts to limit such reports and records from ACP because the proposed auditor is "arms-length, and independent." 81 FR at 13662. From this, EPA asserts neither "the audit report nor the records related to the audit report provided to the third-party auditor are attorney-client privileged (including documents originally prepared with assistance or under the direction of the audited source's attorney)." *Id.* . EPA's proposal seeks to abrogate a fundamental privilege in circumstances of significant regulatory oversight, enforcement, and complex legal implications related to a source, which require the fair and necessary protection of ACP communications, materials and discussions between an owner or operator and its counsel. To predetermine a communication or information does not satisfy ACP in response to a circumstance of a significant release condition would frustrate and discourage the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. Such a needed protection cannot become more magnified than the issues following the conditions under which EPA proposes to necessitate a third-party audit.

Further, the ACP absolutely prohibits the disclosure of protected communications in any setting without express authorization from a client. EPA has no grounds to predetermine that the ACP does not apply in the above scenarios, nor does EPA have any right to make such a determination in the first instance. The right of protection lies with the client (the owner or operator of a regulated source), and thus, only the client can typically waive such protections. Given the likely complexities of the legal issues implicated in the events requiring the audits, EPA cannot and should not seek to limit such protections by administrative fiat.

- T. *The requirement to determine appropriate responses to findings is similar to existing compliance audit requirements that require the owner or operator to "promptly determine and document an appropriate response to each of the findings of the compliance audit." EPA seeks comment on these proposed requirements and whether we should provide flexibility on the timeframe for developing the findings response report. (See 81 Fed. Reg. at 13662)*

The GPA Midstream Association does not agree with the proposed time limit of 90 days to provide an appropriate response to each of the findings in the audit report. For more complex situations, ninety days does not provide sufficient time to evaluate possible alternatives and arrive at a reasonable and well-considered proposal. The GPA Midstream Association does not agree with submitting a finding response report to the EPA.

A stationary source's audit report is already available for inspection by EPA per 40 CFR 68.58(e) and 68.79(e), which requires the two most recent audit reports be maintained at the stationary source for review. Furthermore, EPA prescribes per 40 CFR 68.220 that supporting documentation such as a final audit report be accessible to the implementing agency for review during an agency audit of a stationary source.

- U. *EPA was unable to identify an appropriate timeframe given the variety of possible site-specific actions that an owner or operator may take to address audit findings. EPA seeks comment on whether to keep this approach or substitute a specific number of days and, if the latter, what is a reasonable time period to specify and why. (See 81 Fed. Reg. at 13662)*

The GPA Midstream Association agrees with not prescribing a timeframe within which deficiencies must be corrected given the variety of possible site-specific actions that an owner/operator may take to address audit findings.

The GPA Midstream Association proposes that stationary sources be allowed to develop a reasonable schedule for correcting third party audit findings without EPA prescribing a timeframe for correcting audit findings. The time frame may be different depending on the types of audit findings and the resulting efforts to implement them appropriately, rather than at a pace that may impede sound and sustainable implementation processes. It is highly possible that a “finding” resolution could require significant process modifications that would require engineering design, financial budgeting, a plant turnaround to implement, etc.

- V. *Proposed §§ 68.59(d)(2) and 68.80(d)(2), if finalized, would require the owner or operator to implement the schedule and address deficiencies identified in the audit findings response report, and document the action taken to address each deficiency, along with the date completed. Proposed §§ 68.59(d)(3) and 68.80(d)(3), if finalized, would require the owner or operator to provide a copy of documents required under paragraphs (d)(1) and (d)(2) to the owner or operator’s audit committee of the Board of Directors, or other comparable committee, if one exists. EPA seeks comment on these proposed requirements. (See 81 Fed. Reg. at 13662)*

The GPA Midstream Association agrees with the proposed requirements in §§68.59(d)(2) and 68.80(d)(2).

The GPA Midstream Association does not agree with the proposed requirements in §§68.59(d)(3) and 68.80(d)(3). The GPA Midstream Association does agree with providing documentation required in (d)(1) and (d)(2) to the individuals identified within the existing management system established in accordance with §68.15, rather than the owner or operator’s audit committee of the Board of Directors, or other comparable committee.

- W. *Proposed §§ 68.59(e) and 68.80(e), if finalized, would require the owner or operator to retain records at the stationary source, including: the two most recent third-party audit reports, related findings response reports, documentation of actions taken to address deficiencies, and related records; and copies of all draft third-party audit reports. The owner or operator shall provide draft third-party audit reports, or other documents, to the implementing agency upon request. For proposed § 68.59(e) (Program 2 third-party audit recordkeeping provision), these requirements, if finalized, would not apply to any documents that are more than five years old (for Program 3 third-party audit records, as for the existing Program 3 compliance audits, the owner or operator would be required to retain records to support the two most recent audits). EPA seeks comment on these proposed requirements. (See 81 Fed. Reg. at 13662)*

The GPA Midstream Association agrees that these are appropriate records to maintain, however they do not agree with the proposed requirement to maintain the records at the stationary source. Many midstream stationary sources are unmanned remote facilities that do not have sufficient onsite storage to protect documentation. The GPA Midstream Association would agree to maintaining records electronically or at an alternate location.

The GPA Midstream Association does not agree with the proposed requirement for owner operators to maintain draft third party audit reports for the purpose of providing them to the implementing agency upon request. The deliverable from a third party auditor should be a final RMP Compliance audit report.

The GPA Midstream Association agrees with the other proposed record keeping requirements.

XI. Safer Technology and Alternatives Analysis (STAA)

- A. The GPA Midstream Association supports EPA's exclusion of stationary sources under NAICS code 211112. The GPA Midstream Association contends the new STAA requirements, which include review of measures by preference (IST/ISD as first preference), will not have any usefulness in risk reduction over the current rules already in place today. STAA would be inappropriate for existing covered processes and the most appropriate time for STAA, including identifying IST/ISD, is during the design phase of a new source/process. A stationary source's Process Hazard Analysis (PHA) is an inappropriate time for STAA and determining feasibility of IST/ISD. The PHA is not the appropriate exercise to review alternative technologies because the PHA structure does not facilitate such an analysis. Finally, EPA's estimated costs associated with STAA, including IST/ISD, were inadequate and EPA's estimates do not include any costs for implementing IST/ISD, even though EPA is expecting that some companies will implement IST/ISD.

XII. Stationary Source Location and Emergency Shutdown

- A. *At this time, EPA is not proposing any additional requirements for location of stationary sources. EPA seeks comment on whether such requirements should be considered for future rulemakings, including the scope of such requirements, or whether the Agency should publish guidance. (See 81 Fed. Reg. at 13670)*

As stated previously, the GPA Midstream Association supports EPA's decision to decline to regulate stationary source location because OSHA regulations, industry guidelines and state and local zoning authorities adequately address the siting of stationary sources (i.e., The locating of facilities is already regulated by zoning ordinances, permitting, fire codes, and other restrictions put in place by state, county, and local authorities).

"In addition, EPA discusses in the preamble that it may be desirable to require buffer zones between facilities and neighboring properties. As the Supreme Court has recognized, "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative

authorities.”⁵ As land use remains a quintessential local issue, the Supreme Court requires a “clear statement from Congress” before conferring zoning authority on federal regulators.⁶ Thus, in *SWANCC*, the Court rejected the U.S. Army Corps of Engineers assertion of Clean Water Act jurisdiction over an abandoned sand and gravel pit because it found no “clear statement” in that statute that would allow such a “significant impingement of the States’ traditional and primary power over land and water use.”⁷

There is no authority in Clean Air Act Section 112(r)(7), much less a clear statement, that would authorize the creation of so-called buffer zones. Congress makes no mention of granting EPA authority to compel facilities to buy third-party properties “beyond the fence-line”; nor does the agency have the authority to condemn such properties if a neighboring landowner refuses to enter into a voluntary sale.

In any case, mandating buffer zones would be arbitrary. EPA cites only two examples in support of this notion, Bhopal and West, Texas. Bhopal occurred in India, which lacks the state and local zoning protections and fire codes found in the United States. Nor is West proof of the need for buffer zones, as that facility violated numerous fundamental safety regulations, a problem that buffer zones would do nothing to address.

To the extent that EPA ignores these arguments and decides to address stationary source location issues, then any future actions on stationary source location should be addressed through rulemaking, not guidance documents. AFPM has significant legal, technical and practical concerns about EPA assuming jurisdiction over stationary source location. Those concerns about EPA invoking a novel authority deserve a full airing in the regulatory process, including notice and an opportunity to comment.”

- A. *At this time, EPA is not proposing any additional requirements for emergency shutdown systems. However, EPA seeks comment on whether such requirements should be considered for future rulemakings, including the scope of such requirements, or whether the Agency should publish guidance.* (See 81 Fed. Reg. at 13671)

The GPA Midstream Association contends the existing requirements for emergency shutdown systems are sufficient and should not be revised. Operating procedures, training, and mechanical integrity based on safety system criteria provide assurance that a facility’s ESD system will function properly when needed. The typical midstream stationary source is equipped with ESD valves on the inlet and outlet of the entire facility, and is often equipped with additional shutdown valves for specific process equipment within the stationary source to provide additional protection if a LOPC occurs, or for any other emergency situation.

⁵ *Warth v. Seldin*, 422 U.S. 490 n.18 (1975); see also *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments.”).

⁶ See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) [hereinafter “*SWANCC*”].

⁷ *Id.* at 174.

Section 2: Emergency Response Preparedness Requirements

I. Emergency Response Program Coordination with Local Responders

Proposed Revisions to Emergency Response Coordination Requirements

- A. *EPA seeks comment on this approach. Will the proposed amendments contribute to improvements in emergency response planning and coordination?* (See 81 Fed. Reg. at 13674)

The GPA Midstream Association agrees with the proposal to communicate at least annually with the LEPC. However, this correspondence may not be practical based on the remote location of the stationary source or the LEPC's refusal to participate. Also, the GPA Midstream Association recommends EPA should start by enforcing the EPCRA first, without imposing additional requirements through the RMP regulation.

- B. *Are there additional practices that EPA should consider that significantly improve planning and coordination?* (See 81 Fed. Reg. at 13674)

The GPA Midstream Association recommends EPA needs to provide better support to the LEPCs so that they can more actively participate in planning and coordination. In addition, the EPA should consider the potential for off-site impacts based on the end-point overpressure distance calculated for a stationary source (i.e. no public receptors means no coordination to reduce off-site impacts).

- C. *Should EPA further clarify what is necessary for RMP facility owners or operators to adequately coordinate their emergency response program with local authorities?* (See Fed. Reg. at 13674)

The GPA Midstream Association member companies assert the current RMP elements are effective and have driven process improvements to organizations as they have been implemented and engrained into their operating cultures. Expanding the existing elements with additional, specific requirements would diminish the flexibility of a performance based standard and would deter the ability of organizations to continually modernize and enhance their processes as safety cultures evolve and improve.

- D. *Should coordination activities and emergency plan updates be required annually, or is some other frequency appropriate?* (See 81 Fed. Reg. at 13674)

The GPA Midstream Association does not agree with the proposal to have specific requirements to coordinate annually. However GPA Midstream Association does agree that coordination activities are important and should be done on a regular basis at an appropriate frequency that is decided upon by the facility. . The GPA Midstream Association recommends that EPA propose that coordination activities be required when there is a non-administrative change to a source's emergency plan. Further, the coordination of information may include telephone or email and should not infer a face-to face meeting between the source and the response community as the only means. LEPCs already oppose unnecessary burdens placed upon them and often request to minimize any prescribed responsibilities due to manpower and time issues (e.g., a volunteer fireman

typically will have a full time job and has minimal time to dedicate to administrative duties).

- E. *How should disagreements between local authorities and the source owner or operator concerning which party should provide for an emergency response to releases of regulated substances at the source be resolved?* (See 81 Fed. Reg. at 13674)

The GPA Midstream Association member companies contend the current RMP elements, specifically the applicability of an Emergency Action Plan (1910.38(a)) or an Emergency Response Plan (1910.120), are effective and have driven process improvements to organizations and emergency responders as they have been implemented and engrained into their operating cultures. Expanding the existing elements with additional, specific requirements to comply with §68.95 as the sole means of emergency response would diminish the flexibility of a performance based standard and would deter the ability of organizations to continually modernize and enhance their processes as safety cultures evolve and improve.

- F. *When an LEPC makes a written request for the owner or operator to comply with the emergency response program requirements of § 68.95, should the LEPC be required to provide a rationale for the request that meets certain criteria, to ensure that the request is reasonable? If so, what criteria should be established?* (See 81 Fed. Reg. at 13674)

The GPA Midstream Association does not agree with this proposal. A LEPC, or equivalent, should not be empowered by the proposed regulation to prescribe or dictate an owner/operator's applicability to §68.95 or certain provisions thereof.

Alternative Options

- G. *EPA considered an alternative that would require owners and operators of all stationary sources with Program 2 or Program 3 processes to comply with the full emergency response program requirements of § 68.95. EPA seeks comment on this alternative approach and whether there are any other alternative options that EPA should consider prior to issuing a final action.* (See 81 Fed. Reg. at 13674)

The GPA Midstream Association supports EPA's decision to not propose Program 2 or Program 3 processes to comply with the full emergency response program requirements of § 68.95. If required, this would have a significant impact on stationary sources that currently have emergency response procedures that include activating an emergency shutdown system to isolate the stationary source, evacuating the stationary source, and allowing any fire to burn itself out. This procedure is in-place to provide safety for employees and prevent emergency responders and the LEPC from fighting fires inside the stationary source.

In addition, some GPA Midstream Association member company's Program 2 or Program 3 stationary sources are unmanned and remotely operated and have implemented engineered safety systems (e.g. emergency shutdown system). Other GPA Midstream Association member Company's Program 2 or Program 3 stationary sources are manned and have implemented engineered safety systems (e.g. emergency shutdown system). Therefore, the implementation of the alternatives proposed, specifically making program 2 and 3 processes which are currently non-responding facilities to become

responding facilities, would be cost prohibitive and provide little benefit to the employees and public receptors.

GPA Midstream Association member companies in the natural gas processing and/or midstream industry typically do not possess the RMP listed toxic substances or the substances associated with those incidents as described in the Background of the proposed rule. Therefore, the GPA Midstream Association recommends any stationary source that meets the NAICS code 211 be exempt from this requirement.

GPA Midstream Association agrees with EPA's previous determination prior to the final rule that 1) the emergency response program requirements meet the minimum requirements included in CAA 112(r)(7) in order to avoid inconsistency with other emergency response planning regulations; and 2) the proposed requirements are already addresses in other Federal regulations.

II. Facility Exercises

Updates to §68.12 (General Requirements)

- A. *EPA seeks comment on this approach. Are there additional exercise provisions that EPA should consider to improve the ability of RMP facility personnel and local authorities to respond to accidental releases?* (See 81 Fed. Reg. at 13677)

The GPA Midstream Association contends the field exercise provision should remain limited to responding facilities and should not be applicable to non-responding facilities. In addition, the GPA Midstream Association believes that a facility that is currently conducting tabletop or field exercises in accordance with other Federal, state, or local requirements, or exercises conducted in conjunction with a facility's trade association membership of code of practice, etc., should be enough to satisfy the intent.

- B. *Are annual exercises sufficient or should EPA consider alternative frequencies?* (See 81 Fed. Reg. at 13677)

The GPA Midstream Association does not oppose an annual frequency for a notification exercise for non-responding facilities. However, EPA should allow local responders and facilities, especially non-responding facilities, to determine the best frequency of table top drills. EPA should also harmonize these requirements with the existing requirements in 29 CFR 1910.120, subparts p and q (HAZWOPER requirements) instead of creating a new set of drilling and response requirements.

- C. *What information regarding exercises would be most helpful to the public while maintaining a balance for security?* (See 81 Fed. Reg. at 13677)

The GPA Midstream Association contends the public should not be granted access to the field exercise report for business confidential or DHS security reasons. Also, EPA's Right to Know Act (EPCRA) also provides specific hazard information which should satisfy the public. Revealing any other exercise scenario details could compromise facility security as it would highlight potential target areas. Furthermore, providing an after action report will raise unnecessary concerns for the general public, who do not understand the objective(s) of an exercise and subsequent lessons learned.

- D. *Some SERS expressed concern that local emergencies could force a facility to postpone an exercise. EPA seeks comments on how best to address emergency postponement and rescheduling of exercises. (See 81 Fed. Reg. at 13667)*

The GPA Midstream Association recommends that if an exercise must be postponed by the emergency responder due to unforeseen circumstances, it should be rescheduled within 90 days. If a local response agency is unable to participate, they should be required to provide documentation to the facility stating the reason, and the facility should be allowed to conduct an internal field exercise without the LEPC's participation to meet the RMP requirement.

- E. *EPA also seeks comment on whether to eliminate the requirement for tabletop and field exercises. (See 81 Fed. Reg. at 13667)*

The GPA Midstream Association supports the elimination of the proposal to conduct tabletop or field exercises.

GPA Midstream Association contends if a facility is currently conducting tabletop or field exercises in accordance with other Federal, state, or local requirements, or exercises conducted in conjunction with a facility's trade association membership of code of practice, etc., this should be enough to satisfy the intent.

Alternative Options

- F. *EPA's first alternative requires responding and non-responding facilities to conduct an annual emergency notification system exercise. The second alternative option would contain the same provisions for notification exercises as in the first alternative, but would require responding facilities to conduct field exercises annually, instead of tabletop exercises. EPA seeks comment on these alternative approaches and whether there are any other alternative options that EPA should consider prior to issuing a final action. (See 81 Fed. Reg. at 13677)*

The GPA Midstream Association is concerned about the proposed language in that "comprehensive test of all systems under the emergency exercise program for responding facilities" is ambiguous and could be interpreted in numerous different ways by industry. The GPA Midstream Association requests EPA clarify its intent of "comprehensive test of all systems" and what systems or activities should be included in the field exercise.

Section 3: Information Availability Requirements

I. Proposed Public Disclosure Requirements to LEPCs or Emergency Response Officials

- A. *EPA seeks comment on this approach. Will the proposed requirements improve the community emergency planning and preparedness? Is there additional information that should be shared with LEPCs or emergency response officials? For example, should EPA require the full safer technologies and alternatives analysis to be submitted to the LEPC? (See 81 Fed. Reg. at 13680)*
- B. *EPA also seeks comment on whether to require less information to be shared (e.g., limit incident investigation information to incidents with offsite impacts). Some SERs suggested that information be limited to a one page summary of each significant chemical hazard and suggested including only the following elements: the name of the substance, its properties, its location, and recommended firefighting and emergency response measures. EPA seeks comment on this narrowed approach. Should EPA require owners or operators to periodically submit information to the LEPC or local responders, and if so, what timeframe should EPA consider? Is the proposed timeframe for updating information sufficient to ensure information is up-to-date? Should EPA require information to be updated only after the source receives a request from an LEPC or local emergency response official? If so, how much time is sufficient to allow development and submission of summaries following requests for information under this proposed provision? Should EPA specify a standard format for summary information in order to make it easier for local officials to interpret the information (e.g., specify a summary template for information on regulated substances, compliance audits reports, incident investigation reports, IST)? (See 81 Fed. Reg. at 13680)*

The GPA Midstream Association members and EPA agree that ensuring that communities, local planners, local first responders, and the public have appropriate chemical facility hazard-related information is critical to the health and safety of the responders and local community. However, GPA Midstream Association members believe that the information sharing requirements, as proposed, will not accomplish that goal.

LEPCs must have access to basic, relevant information to meet their information sharing responsibilities. But LEPCs have limited time and resources, and so the information required to be shared should, as LEPCs have noted, be in a “user-friendly format” and “presented in a clear and consistent manner.” See 81 Fed. Reg. at 13,677; see also Local Emergency Planning Committees and Risk Management Plans (National Institute for Chemical Studies, 2001) (“LEPC Study”) at page 16 (“Several LEPCs expressed the belief that they are limited in their ability to encourage facilities to reduce hazards because they lack the necessary engineering knowledge or expertise to identify how chemicals or processes in a plant could be changed.”). See LEPC study available at <https://www.nicsinfo.org/docs/LEPCStudyFinalReport.pdf>.

As such, GPA Midstream Association member companies support EPA’s proposal to require owners and operators to develop summaries of specific chemical hazard information and to provide this information, upon request, to LEPCs or local emergency

response officials. However, the specific chemical hazard information should be limited to names and quantities of regulated substances that are present above threshold quantities. Other information that EPA proposes that regulated entities provide, such as accident history information, compliance audit reports, incident investigation reports, inherently safer technology information, and information on emergency response exercises, is information that goes beyond the basic information that LEPCs need to meet their information sharing responsibility and may, in fact, overwhelm the time- and resource-strapped (often volunteer) LEPCs who have said they only want “clear and concise basic information.” See LEPC Study at page 19 (“Some LEPCs said they made a conscious decision not to obtain copies of the plans because of the volume of material it would generate ...”).

Giving LEPCs only the basic information that they actually want and need, and updating that information once every five years as part of re-submitting an RMP, reduces burdens on the regulated community while providing LEPCs with meaningful and understandable planning-type information.

II. Proposed Revisions to Requirements for Information Availability to the Public

- A. *EPA seeks comment on this approach. Is there additional information that should be shared with the public? For example, should EPA require the STAA proposed under § 68.67(c)(8), or a summary of that analysis, be shared with the public? Alternatively, should EPA further limit the information elements proposed? For example, how should EPA limit the disclosure of information in exercise reports that might reveal security vulnerabilities about the facility or emergency responders? Should EPA not require disclosure of names of individuals involved in exercises or facility security vulnerabilities revealed by the exercise? Is there an alternative way to improve community preparedness for safety purposes while balancing the security concerns to limit a terrorist’s ability to use the information for an attack? Is there other information that community residents and operators of community facilities (such as schools, nursing homes, daycares) need in order to participate in emergency preparedness planning, particularly as it relates to effective incident notification, sheltering in place, and evacuation? EPA also seeks comment on the feasibility of these various options for providing information to the public and requests suggestions for other ways that the data could be made available. Lastly, EPA seeks comment on any challenges facility owners or operators would have in providing the information or challenges public stakeholders would have in obtaining the information. In order to inform the public of the location of the information, EPA is proposing to require under § 68.160(b) that the facility report in their RMP the location or means of public access to the information proposed to be disclosed under this subsection. (See 81 Fed. Reg. at 13681)*
- B. *EPA seeks comment on this approach. Will the proposed requirements improve the knowledge sharing between regulated facilities and the public? Is there additional information that should be shared with the public stakeholders? Should EPA only require information to be shared upon request by the public? Alternatively, should EPA further limit the information we are proposing to be required, such as requiring only a one page summary that addresses chemical hazard information and emergency response measures? EPA could alternatively eliminate some of the required information elements or further limit information, such as by limiting accident history information to only those*

with offsite impact. Some SERs asked whether the existing RMP data or the RMP executive summary available to the public through existing sources (FOIA, Federal Reading rooms or other public sources who have compiled the data) are adequate to meet the information needs of the public. (See 81 Fed. Reg. at 13681)

Similarly, the public should only be provided the information necessary to help improve public awareness of community risks. This information should include the names of regulated substances held in a process above threshold quantities, the name and phone numbers of local emergency response organizations, and LEPC contact information. Combined with information already publicly available, such as RMP executive summaries, the public will have access to sufficient information to improve community awareness. Other information EPA proposes to require be provided to the public, such as safety data sheets, the facility's accident history, whether the source is a responding or non-responding facility, and information on emergency response exercises, is information the public will not understand, is not necessary to improve community risk awareness, and will cause—not avoid—unnecessary public alarm. See 81 Fed. Reg. at 13,681.

This information should not be made available through a company website. Instead, it should be made available in response to email request, which would afford the regulated entity an opportunity to explain the information to the public requestor. Further, GPA Midstream Association members would support a requirement that information communicated to the public in this way be coordinated with LEPC or local emergency response officials.

In any event, GPA Midstream Association members strongly recommend that EPA coordinate with the Department of Homeland Security before finalizing public information sharing requirements. EPA has acknowledged terrorism concerns with respect to public information sharing, and the Freedom of Information Act does not apply to matters that are “specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order.” See 5 U.S.C. § 552(b)(1). President Obama's Executive Order 13526 prescribes a uniform system for safeguarding national security information, and Section 1.3(e) provides that when a “licensee” of an agency who does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent with the executive order and its implementing directives. The information shall be transmitted promptly as provided under this order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within 30 days whether to classify this information.” See Executive Order 13526, available at <https://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>. Considering this framework, GPA Midstream Association member companies strongly encourage EPA to coordinate its final public information sharing requirements with the Department of Homeland Security to avoid requiring disclosure of information that could aid terrorists.

- C. *EPA seeks comment on the proposed approach and whether there are other options that EPA should consider for public meetings. For example, should EPA require regular public meetings rather than only after an accident subject to reporting requirements*

under §68.42? Should EPA require public meetings upon request by LEPCs, emergency responders or the public? Alternatively, should the public meeting requirement be restricted to an RMP reportable accident with offsite impacts? Instead of requiring a public meeting after RMP reportable accidents, should EPA require owners and operators to meet only with LEPCs and emergency responders? If EPA finalizes the requirements to hold post-accident public meetings, should EPA extend the required timeframe to hold the meeting beyond 30 days (e.g. to 90 days), in order to give the owner or operator more time to learn about accident causal factors and prepare for a public meeting? if so what extended timeframes should EPA choose and should EPA require the implementing agency to approve any extensions? (See 81 Fed. Reg. at 13682)

See GPA Midstream Association answer below which addresses C and D.

Alternative Options

- D. *EPA is interested in receiving public feedback on whether EPA should consider requiring periodic public meetings and whether the requirement should be limited to Program 2 and Program 3 facilities. (See 81 Fed. Reg. at 13682)*

Although GPA Midstream Association members support public outreach, GPA Midstream Association members agree with the several SERs who questioned the value of having public meetings because public meetings are generally not well attended. See 81 Fed. Reg. at 13,682 (“Several SERs questioned the value of having any public meetings and noted that, when held in the past, public meetings were not well attended.”).

Alternatively, if EPA does require public meetings be held, GPA Midstream Association members believe that less frequent and more substantive public meetings would promote greater public participation. As such, EPA should not require that public meetings be held within 30 days after an incident because incident investigations will not be completed within that timeframe, rendering the public meeting valueless and perhaps promoting public distrust due to lack of information available for sharing. (For incidents that impact the local community, local journalists will report on pertinent topics like when the incident occurred and emergency response notifications, so a within 30 day public meeting will not be required to communicate that basic information.) The earliest a public meeting should be required is within 60 days after completion of an incident investigation. But GPA Midstream Association members believe public meetings would be most impactful if EPA instead required them as a prerequisite to re-certifying an RMP under 40 C.F.R. 68.190(b), which in some cases would result in public meetings being held once every five years.

- E. *EPA is also considering an option for supporting the public disclosure provisions with a “score card” or a “grade” system that could be provided by an independent third-party. The score or grade would be made available to the LEPCs and public to demonstrate the facility’s compliance with the RMP rule. This method could be used either instead of or in addition to what EPA is proposing. EPA requests information and recommendations on how to develop such a program, including the types of scoring criteria that should be used and any other issues that the Agency should consider when developing such a system. (See 81 Fed. Reg. at 13682)*

GPA Midstream Association member companies have significant concerns about funding such a program. In addition, it is not clear how these independent third parties will be deemed qualified to judge compliance with the RMP rule, which is a significant concern considering their judgements will be made publically available. This type of system should be the province of the EPA and the EPA should not delegate judging compliance to unregulated independent third parties.

- F. *EPA seeks comment on these alternative approaches and whether there are any other alternative options that EPA should consider for future actions. (See 81 Fed. Reg. at 13682)*

See GPA Midstream Association answer above in D. which addresses this EPA request for comment.

Summary of Costs

Due to the wide range of outcomes from these proposed provisions and the significant uncertainties associated with their costs, EPA seeks further information on their potential costs, and whether these costs should accrue to this proposal. What types of costs result from independent audits (other than the cost of the audit) that are different from self-audit costs? What types of costs result from root cause investigations as compared to non-root-cause investigations? For the STAA provisions, what information exists to project what changes facilities are likely to voluntarily undertake? EPA particularly requests cost data or studies for implementation of IST changes from any commenters who may prefer the high option for this provision, which would require implementation of feasible IST alternatives. (See 81 Fed. Reg. at 13693-94)

Industry associations requested a modest extension to the comment deadline, in part to facilitate fully and accurately responding to time consuming and resource intensive questions like these. Since GPA members were only given a 60 day comment period, compiling detailed information to respond to this question was impossible. However, suffice it to say the EPA's cost estimates are far lower than GPA members would reasonably anticipate.