



U.S. Environmental Protection Agency

**Public Hearing on the Proposed Changes to the
Risk Management Program (RMP) Rule**

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**Testimony of Laura Mirman-Heslin
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**Written Testimony of Laura Mirman-Heslin on
EPA's Proposed Changes to the Risk Management Program Rule**

I. Introduction

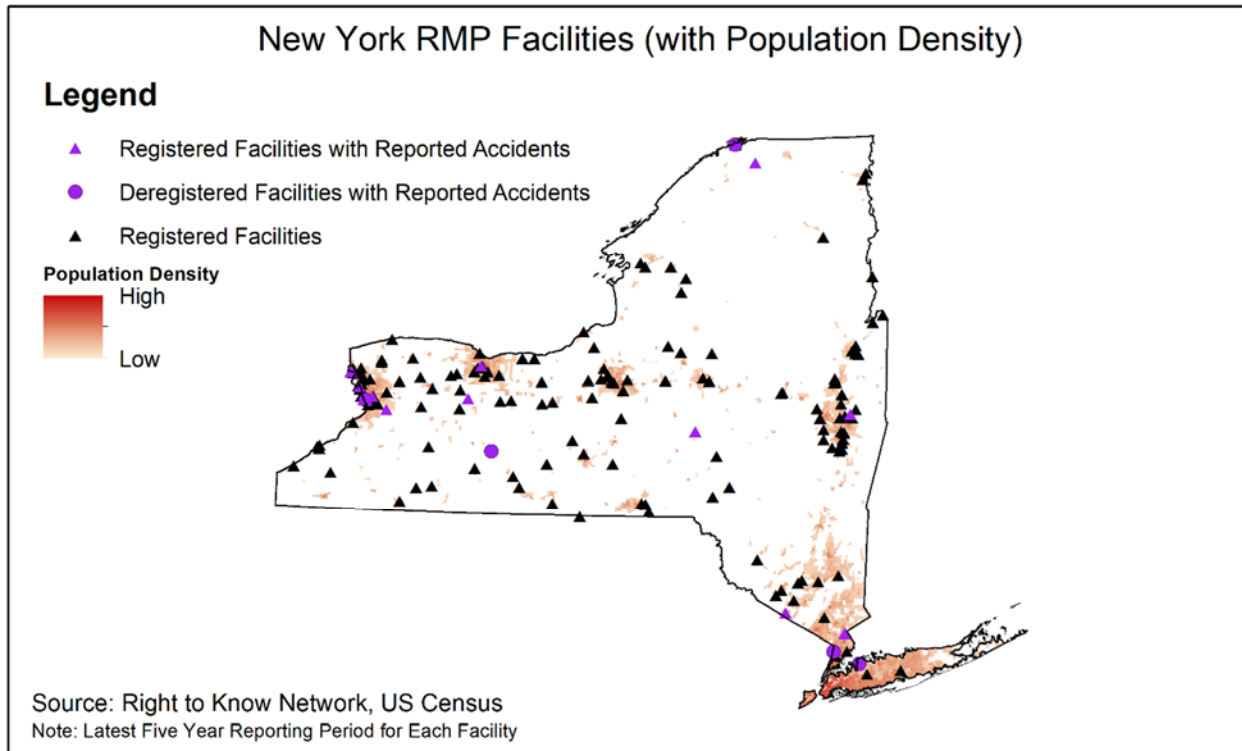
Good morning. My name is Laura Mirman-Heslin, and I am an Assistant Attorney General in the Environmental Protection Bureau of New York State Attorney General Barbara Underwood. The New York Attorney General's Office has partnered with ten other states in opposing the Environmental Protection Agency's unlawful delay of its Accident Prevention Amendments, which amended the Risk Management Program to improve safeguards to avoid and mitigate chemical accidents. Our office also has extensive experience in enforcing state and federal environmental laws to protect New Yorkers and their health, safety, and natural resources.

New York Attorney General Underwood is very concerned about the direction of the agency's Risk Management Program under Administrator Pruitt. EPA's delay of the effective date of the Accident Prevention Amendments, which we have challenged in the D.C. Circuit as being unlawful, has now been followed with the proposed rule that is the subject of today's hearing. That proposal would eviscerate the improvements to the accident prevention requirements and delay for even longer the provisions of the Amendments that EPA has not proposed to cut. Attorney General Barbara Underwood strongly opposes these proposed rollbacks, and will be submitting comments with other states detailing our numerous legal and factual objections.

For today's testimony, I will focus my remarks on two areas: (1) EPA's failure to adequately consider the impacts of the proposed rollbacks on public health and the environment, and (2) the agency's erroneous contention that enforcement against a few "bad apples" effectively can replace the requirement that facilities improve their accident prevention practices across the board.

II. New Yorkers are at Risk from Chemical Plant Accidents

New York is home to more than 150 facilities regulated under the Risk Management Program.



According to these facilities' most recent 5-year accident histories, there were sixteen reported accidents in New York, releasing over 21,000 pounds of toxic chemicals into the surrounding communities. These accidents resulted in fourteen injuries, the evacuation of more than a thousand people, and property damage totaling more than \$200,000.

New York RMP Facilities: Most Recent 5-Year Accident History

# of RMP Facilities	# of Accidents	lbs of chemicals released	# of Injuries	# of People Evacuated	Property Damage
169	16	21,117	14	1,075	\$203,153

Source: April 30, 2018 EPA Risk Management System database (RMP).

In addition, there are a number of other chemical facilities located across the border in Northern New Jersey, in close proximity to New York City. According to a September 2014 report by the Center for Effective Government entitled “Kids in Danger Zones,” New York had the fifth-most number of schools and number of students located in vulnerability zones.¹

III. EPA’s Failure to Adequately Consider the Impacts of the Proposed Rollbacks on Public Health and the Environment

EPA has proposed—with virtually no consideration of the threat to workers and host communities—to repeal the improved safeguards to prevent or mitigate accidents the agency spent years working with communities, first responders, states, and industry to develop. The agency has ignored or largely discounted information concerning recent accidents, recommendations from the Chemical Safety Board (CSB), and the impacts of its rollback on environmental justice communities.

In August 2013, after a series of catastrophic chemical incidents underscored the pressing need for improved safeguards, President Obama issued an executive order directing federal agencies, including EPA, to improve chemical safety regulations.² In response, EPA issued the Accident Prevention Amendments in January 2017.³ Based on a robust record and multiyear stakeholder process, the agency concluded that it needed to do more under the Clean Air Act to “further protect human health and the environment from chemical hazards,”⁴ and that specific regulatory improvements could reduce the probability and severity of chemical accidents.⁵ EPA’s proposed rollback rule largely rescinds these critical protections, prioritizing the interests of industry over protecting public health.

And while the agency has focused on delaying and rolling back these added safeguards, accidents continue to occur at chemical facilities on a regular basis. In the one year and several months that the protections from the Accident Prevention Amendments have been delayed, at least 45 publicly-known accidents have occurred at facilities in 20 states. Seven employees have been killed. Fifty-eight others have been hospitalized. Nearby residents have been forced to shelter-in-place. Schools and hospitals have been evacuated.⁶

¹ Center for Effective Government, “Kids in Danger Zones,” (Sept. 2014), App. 2, Tbl. A, available at: <https://www.foreffectivegov.org/sites/default/files/kids-in-danger-zones-report.pdf>.

² Exec. Order No. 13,650 (Aug. 1, 2013).

³ See 81 Fed. Reg. 13,638, 13,644 (Mar. 14, 2016).

⁴ 82 Fed. Reg. 4,594, 4,595 (Jan. 13, 2017).

⁵ 81 Fed. Reg. at 13,643.

⁶ Earthjustice, “A Disaster in the Making,” (April 3, 2018), available at: <https://earthjustice.org/features/toxic-catastrophes-texas-national-chemical-disaster-rule>.

For example, in May 2017, combustible dust explosions at the Didion Milling facility in Wisconsin killed five employees and injured 14 others. In June 2017, an ammonia leak at the Fresh Express food processing plant in Illinois sent five employees and two firefighters to the hospital. And in April 2018, a set of explosions ripped through the Husky Energy Oil Refinery in Wisconsin. Those explosions developed into a large fire, injuring at least 20 people and spreading noxious black smoke, which caused local officials to evacuate nearly 27,000 people living around the plant. These accidents reinforce the determinations that underpinned the urgent need for the Accident Prevention Amendments.

EPA's proposal to gut the Accident Prevention Amendments did not consider relevant information from any of these recent accidents. EPA did not examine whether the third-party compliance audits or the safer technology and alternatives analysis that it proposes to eliminate could have prevented or mitigated recent accidents. Nor did EPA study whether its repeal of requirements for conducting root cause analysis and hazard review of accidents would make it harder to prevent similar incidents in the future. In short, EPA has not taken a hard look at the consequences of its proposed rollback on public safety and health, or the environment.

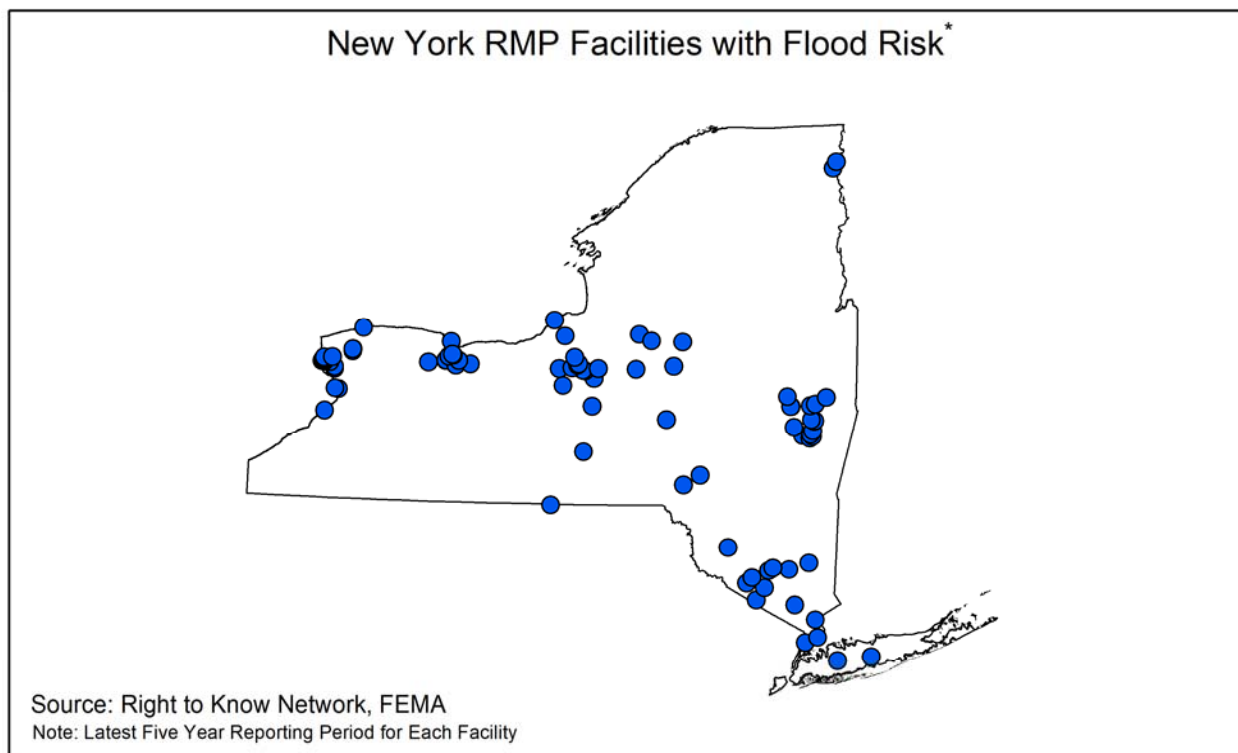
EPA's proposal also inexplicably fails to heed lessons learned from the August 2017 disaster at the Arkema Crosby chemical facility in Texas. After the facility was flooded during Hurricane Harvey, its refrigeration of organic peroxide, an unstable chemical produced onsite, failed. As the temperature rose, the organic peroxide decomposed and ignited, causing large fires and releases of the chemical. Approximately a dozen first responders on the scene became sick and were treated at a nearby hospital. Had the improved coordination requirements under the Accident Prevention Amendments been in effect, those injuries may have been avoided.

In addition, EPA's proposed rollback ignores a major finding from the Chemical Safety Board, or CSB, in its report on the Arkema fire, about the increasing risk severe weather poses for chemical facilities. The CSB found that the Arkema team that performed the process hazard analysis for the low temperature warehouses did not document any flooding risk. CSB noted that in recent years, flooding from extreme rainfall events has increased, and that a 2015 EPA report found that this trend is projected to continue as a result of climate change, increasing the flood risk in many parts of the country.⁷ CSB recommended that chemical manufacturing, handling or storage facilities perform analyses to determine their susceptibility to these extreme weather events and evaluate the adequacy of relevant safeguards.

Not only should EPA retain the Accident Prevention Amendments, but it should also expand those regulations to include CSB's recommendation that facilities consider increased accident risks from severe weather. The CSB report shows that more regulation—not less—is necessary and EPA must take account of this new, proven concern in its reconsideration proceeding. This issue is especially important to New York as it is experiencing threats from flooding worsened by sea level rise and from more extreme storms.

⁷ U.S. EPA, "Climate Action Benefits Report," (2015), available at: <https://www.epa.gov/cira/climate-action-benefits-inland-flooding>.

For example, the twelve inches of sea level rise New York City has experienced in the past century exacerbated the flooding caused by Hurricane Sandy by about twenty-five square miles.⁸ That flooding devastated areas of New York City, which in some areas lost power and other critical services for extended periods of time. New York State has also experienced dramatic increases in the frequency and intensity of extreme rain storms, consistent with scientists' predictions of the alteration of historical weather patterns resulting from climate change.⁹ As shown below, 85 facilities in New York regulated under the Risk Management Program (over 50 percent of all RMP facilities) are located in flood zones defined by the Federal Emergency Management Agency.



* Facilities with “flood risk” are defined as those located in one of the following FEMA flood zones: 1) FEMA Zone A, areas with a 1 in 100 chance of flooding each year (12 facilities or 7% of registered RMP facilities in New York); 2) FEMA Zones B or X, areas with an estimated 1 in 500 chance of flooding each year (3 facilities or 2% of registered RMP facilities in New York); and 3) FEMA Zones C or X, areas with flood risk but higher than the elevation of areas with a 1 in 500 chance of annual flooding (70 facilities or 41% of registered RMP facilities in New York).

⁸ New York City Panel on Climate Change 2015 Report, Chapter 2: Sea Level Rise and Coastal Storms. Ann. N.Y. Acad. Sci. ISSN 0077-8923, available at: <http://onlinelibrary.wiley.com/doi/10.1111/nyas.12593/full>.

⁹ *Current & Future Trends in Extreme Rainfall Across New York State, A Report from the Environmental Protection Bureau of New York State Attorney General Eric T. Schneiderman* (Sept. 2014) (based on data from the 2014 National Climate Assessment and the National Oceanographic and Atmospheric Administration’s Northeast Regional Climate Center), available at: https://ag.ny.gov/pdfs/Extreme_Precipitation_Report%209%202%2014.pdf.

Consideration of extreme weather events is further warranted because of the disproportionate impact on vulnerable communities. In total, approximately 15 percent of the facilities in New York regulated under the Risk Management Program are located in environmental justice areas designated by the New York State Department of Environmental Conservation.

In EPA's proposal, the agency explicitly stated that its planned rollback "may have disproportionately high and adverse human health or environmental effects on minority populations, low income populations and/or indigenous peoples."¹⁰ But despite that acknowledgement, the agency failed to consider the consequences of its action on those communities and populations. The agency's failure to do so is unjust and unlawful.

IV. EPA's Erroneous Contention that Enforcement Can Effectively Replace the Requirement that Facilities Improve their Safety Practices Industrywide

I'd like to turn now to my second main point: EPA's assertion that it can "retain much [of the] benefit" of the accident prevention improvements at a fraction of the cost through an "enforcement-led approach."¹¹ This contention is erroneous for multiple reasons.

First, the Clean Air Act charges EPA with issuing regulations that "provide, to the greatest extent practicable, for the *prevention* . . . of accidental releases of regulated substances."¹² That statutory directive reflects common sense: it is better to stop harm before it happens, rather than responding after the fact, when serious damage has already been done to lives and property. Relying only on after-the-fact enforcement at facilities where accidents have already occurred is inconsistent with this statutory directive. Indeed, in our experience, in order to sufficiently protect public health and the environment, a successful regulatory program requires both adequate prevention AND robust enforcement.

Second, the factual predicate is questionable for EPA's new position that chemical accidents are only attributable to a "few bad apples," and that increasing enforcement of those facilities will therefore sufficiently address risks nationwide. The agency appears to have accepted—without any confirming analysis—industry trade association data regarding the percentage of facilities at which accidents occurred. But even if that data is taken at face value, it still shows that accidents occurred at over 1,200 facilities, according to the facilities' most recent 5-year histories. These accidents resulted in 19 deaths, almost 17,000 injuries, the evacuation of over 160,000 people, and over \$1.1 billion in property damage. EPA does not explain how individualized enforcement measures can plausibly address such widespread risks and harms.

¹⁰ 83 Fed. Reg. 24,850, 24,881 (May 30, 2018).

¹¹ 83 Fed. Reg. at 24,873.

¹² 42 U.S.C. § 7412(r)(7)(B)(i) (emphasis supplied).

Third, EPA’s contention in the proposal that requiring regulated facilities to adopt improved safety practices is unduly burdensome as compared to enforcement ignores that it *already* limited applicability of the Safer Technology and Alternatives Analysis to just the three industries—chemical manufacturing, petroleum refining, and paper manufacturing—with the highest accident rates. The agency chose this limitation despite evidence in the record that the same concept of replacing dangerous chemicals with safer ones could readily be applied in other industries regulated under the Risk Management Program, such as water treatment facilities substituting sodium hypochlorite for chlorine, which the rule does not require.

Fourth, in our experience, enforcement only serves a deterrent to violations of the law if it is perceived by the industry as credible. On that front, EPA has low credibility. The President’s Fiscal Year 2019 budget proposes a \$53 million (16 percent) cut to EPA’s enforcement budget (excluding Superfund enforcement), including an 18 percent cut to civil enforcement and a 14 percent reduction in criminal enforcement.¹³ According to a recent analysis by NBC News of federal enforcement data, the past fiscal year marked an historic low for EPA enforcement actions across the board: the number of new civil and criminal cases, defendants charged, federal inspections and evaluations all reached their lowest levels in at least a decade.¹⁴ In addition, the Trump Administration has called for elimination of the CSB, which would make EPA efforts to enforce even more difficult. Furthermore, EPA’s proposal did not identify any concrete plans to actually implement an “enforcement-led approach.” There is no commitment, for example, to use additional federal enforcement resources or any discussion of providing resources to bolster state enforcement.

In short, EPA’s “enforcement-led approach” is a poorly-reasoned and factually unsupported idea. Only by strengthening the Program’s underlying accident prevention requirements and vigorously enforcing them can real progress be made to protect our workers and communities.

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We urge EPA to abandon its dangerously misguided proposal and promptly move forward with implementation of the 2017 rule. Thank you for the opportunity to testify today.

¹³ Environmental Protection Network, “Understanding the Full Impacts of the Proposed FY 2019 EPA Budget,” (Mar. 14, 2018), available at: https://docs.wixstatic.com/ugd/375dc4_b66955a5afac46e98dc6a813f8782c43.pdf.

¹⁴ Suzy Khimm (NBC News), “EPA Enforcement Actions Hit 10-Year Low in 2017,” (Feb. 8, 2018), available at: <https://www.nbcnews.com/politics/white-house/epa-enforcement-actions-hit-10-year-low-2017-n846151>.