CHEMISTRY COUNCIL OF NEW JERSEY

March 31, 2014

Via Electronic Submission: http://www.regulations.gov

The Honorable David Michaels
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Docket No. OSHA-2013-0020
Request for Information for Modernization of PSM Standard (RIN 1218-AC82)

Dear Assistant Secretary Michaels:

The Chemistry Council of New Jersey (CCNJ) is pleased to respond to the U.S. Department of Labor's (DOL's) Occupational Safety and Health Administration (OSHA) notice of Request for Information (RFI), Docket No. OSHA-2013-0020, published in the *Federal Register* on December 9, 2013 at 78 Federal Register 73756-73768. The CCNJ represents over 70 New Jersey companies involved in the business of chemistry (pharmaceuticals, chemicals, flavors and fragrances, petroleum refining, etc.). The business of chemistry directly employs more than 50,000 persons in New Jersey and is responsible for over $25 billion dollars in revenues in New Jersey each year. CCNJ members place high value and priority on safety and security for their employees, their workplaces, and the communities that host them. The CCNJ member companies are committed to continually improving environmental, health, safety, and security performance through common sense advocacy designed to address major public policy issues, health and environmental research, and product testing.

More specifically, the chemical industry is committed to improving safety and security at our manufacturing facilities. Our owners and operators focus very closely on the regulatory programs and requirements of OSHA's PSM standard, the Environmental Protection Agency's (EPA) Risk Management Plan (RMP) rule, Department of Transportation's (DOT) Haz Mat regulations, and Department of Homeland Security's (DHS) Chemical Facility Anti-Terrorism Standards (CFATS) program. These federal programs and regulations, as well as industry's voluntary commitment through the American Chemistry Council's Responsible Care Program®, CHEMTREC®, and TRANSCAER®, have resulted in lower recordable occupational injury and incidence rates (lost time, restricted duty, and fatalities). Finally, we have also reduced TRI emissions in NJ by 92% since 1988.

Therefore, CCNJ supports the efforts of the Working Group to improve communication and coordination among all regulators and first responders at all levels of government. CCNJ has also included comments on: 1.) using the current regulations and identifying outliers; 2.) joint chemical safety and security rules; 3.) EPA RMP. Furthermore, the CCNJ strongly opposes the potential adoption of a federal approach that includes Inherently Safer Technology (IST) Assessment requirements that are already part of the New Jersey's Toxic Catastrophe Prevention Act program (TCPA). We believe that nationalizing the IST program would provide little practicable benefit for reducing risk beyond what is already required through existing regulations and could be potentially detrimental. Finally, we have attached a supplemental spreadsheet with general comments on the OSHA identified potential candidates for rulemaking or enforcement policy changes in the future.

Improved Information Sharing and Community Outreach

The CCNJ and its membership agrees directionally with improving communication and coordination of chemical information, facility information, and emergency response plans with local emergency responders, government officials and citizens. In NJ, many CCNJ members have utilized Community Advisory Panels (CAPS) that are sponsored by companies in their host communities. CAPs typically include of industry representatives, local community leaders, elected officials, emergency responders, and a range of citizens. CAPs hold regular meetings and share firsthand information and updates about the local facilities with the members, who bring the information back to their community groups.

The CAPS are utilized to build trust for meaningful and sustainable relationship between businesses and their stakeholders by providing face-to-face, candid discussions about mutual interests and concerns. During CAP meetings, plant manager(s) share information about safety, emergency preparedness and response, site security, environmental performance and their stewardship role within the community to emergency responders, local leaders, and citizens. Local Emergency Planning Committees (LEPCs) are another example of a means of sharing emergency response information between facilities and the community.

Use of Current Regulations and Identification of "those facilities off the radar"

The West Texas incident is a case in which: 1.) the company failed to comply with DHS requirements and 2.) the ammonium nitrate threshold was high.

Therefore, OSHA needs more letters to query employers on their activities and require a response. In addition, they should use responses as a basis for site visits. PSM and RMP are solid, viable programs. CCNJ recommends ratcheting down on facilities that are not in compliance rather than those that comply with the appropriate regulations. Additional regulations will make compliant businesses even more burdened, cumbersome and costly than they are today versus targeting those that fail to comply. The regulators should coordinate information gathering and sharing and utilize this information to determine those sites to visit and inspection rather than add more regulatory burdens to those that comply.

Joint Chemical Safety and Security Rules

The sharing and coordination of inspections and site visits ties directly to the topic of joint chemical safety and security rules. Today many chemical plants and refineries can be inspected by OSHA under PSM, the EPA under RMP, and DHS under chemical security.

In a presentation to the American Chemistry Council in 2012, Jim Belke of EPA's Office of Emergency Management noted that the agency has conducted approximately 500 RMP inspections per year. Meanwhile, OSHA's National Emphasis Program that began with refineries and has expanded to chemical plants, and DHS chemical security inspectors work in all 50 states to help ensure facilities have security measures in place to meet Chemical Facility Anti-Terrorism Standards (CFATS) requirements.

CCNJ recommends that chemical plant inspections should be coordinated under one agency. Because the vast majority of chemical plant accidents affect workers at the site, we recommend that OSHA be the lead federal agency for such inspections. After all, OSHA already inspects chemical plants and refineries for personnel safety and process safety; this would be a logical extension. Plus, the NEP program is already extensively developed. Other agencies could provide supplemental inspection checklists that OSHA could cover during a site visit. If other agencies have regulatory requirements beyond OSHA PSM, their regulations should be written with OSHA PSM as a basis, only publishing additional requirements. This would allow companies to focus on OSHA PSM and any additions/exceptions added by other agencies.

With a coordinated effort by OSHA, particular facilities would receive one inspection instead of the potential for multiple inspections. This would allow for regulators to streamline inspections and visit more facilities as opposed to visiting the same facility multiple times as well as focus on personnel and process safety. By streamlining and efficiency improvements from combing efforts, more inspections of outlier facilities would be possible. Joint Chemical Safety and Security Rules would be beneficial for all involved from a business and EHS perspective.

With this perspective of combining inspections under OSHA, CCNJ opposes the need for those facilities covered under PSM but not RMP be required to register under the EPA RMP reporting system. This statement is in response to the Solicitation of Public Input..., Paragraph 9.a:

> *9. Identifying Facilities Covered under Existing Process Safety and Security Regulations Options:*
>
> *a. Should facilities covered under PSM but not RMP be required to register under the RMP reporting system?*
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> We oppose this requirement, which would be confusing to the regulated community. We are regulated under OSHA, not EPA. Safety and security issues are regulated under OSHA, rather than EPA which has a statutorily required environmental mission. Having PSM-covered facilities register under RMP when there is no outright connection would be an unnecessary and time-consuming intrusion by EPA. Registration is unnecessary because there are existing regulatory reporting requirements, such as SARA Title III, where EPA already has access to PSM-regulated facilities.
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> However, if registration of PSM-regulated facilities makes sense to OSHA, then OSHA should include RMP registration as part of any PSM regulatory changes OSHA drafts for review and comment. Then, if necessary to ensure that information is available between OSHA and EPA, the two agencies can coordinate between each other via the sharing of information.

EPA RMP and Worst Case Scenario

The worst case scenario (WCS) required by the EPA RMP is illogical and misleading, and should be eliminated. The original purpose of publicizing the WCS was to promote dialogue between facilities and stakeholders, such as Local Emergency Planning Committees (LEPCs). To comply, they modeled theoretical impact areas and estimated casualties of a WCS occurring at certain sites, with zero constraints or mitigation. Instead of being a communication tool, the media, activists, and others have purposefully portrayed WCS data in negative ways, including showing "Rings of Death" and estimated casualty count as a means of scaring communities and intimidating facility management. In addition, one activist organization published a map with skull and crossbones for each RMP chemical plant in the United States. The WCS is being used by opponents to characterize chemical plants and refineries as threats to communities and the source of potentially catastrophic accidents.

Another important question is: Why are chemical plants and refineries singled out for reporting WCS? Other industries whose safety records are closely followed are not required to publicize their worst case scenarios. What if the FAA referred to every airline flight as potentially catastrophic? What would happen if a worst case scenario was handed to every passenger before boarding a plane, railroad car, or cruise ship? Should airport authorities be required to inform residents living near airports of the worst case scenario of a plane crashing in their neighborhood, as occurred with American Airlines flight 587 in 2001 in Queens, New York. Why do we only require WCS for chemical plants and refineries? The worst case scenario is a theoretical consequence assessment, rather than a risk assessment that would recognize the WCS as being a practical impossibility, which they are.

In summary, the WCS is a 15-year old failed experiment that is still being used to try and spark outrage, rather than a dialogue between manufacturing facilities and their host communities. The WCS should be eliminated in the new regulations.

Consideration of Inherently Safer Technology as part of PSM modernization

Lately, the Working Group has been focusing attention toward adopting a federal approach to the New Jersey's TCPA program, in particular the Inherently Safer Technology Assessment requirement. Under Executive Order 13650, the EPA is considering nationalizing the NJ IST program through its authority under section 112 (r) of the Clean Air Act, Risk Management Program (RMP) Rule. The CCNJ and its membership want to be clear that nationalizing the New Jersey IST Program would provide little practical benefit for reducing risk beyond what is already required through existing federal regulations and could be potentially detrimental as well as extremely costly and cumbersome. Within NJ, it is worth noting that we only have approximately 100 covered facilities within TCPA that also have complied with the IST assessment requirement so it is a huge leap to move this program nationally to cover over 12,000 RMP regulated businesses.

NJ's current TCPA regulations were promulgated by the state's NJDEP in 2009 without accepting any industry input or suggestion for changes. The TCPA regulations first included Reactive Hazardous Substances in 2005 following a series of discussions with industry and public stakeholders. In the 2009 re-authorization, the regulations were amended with no industry input prior to publishing the proposed revisions in the legislative record. Once published, none of the industry comments for changes were accepted.

The Inherently Safer (IS) regulation has two requirements that are overly burdensome or simply incorrect. First, IS requires a complete, quantitative economic analysis for every inherent safety idea that was determined infeasible. Following the New Jersey regulation could lead to an agency requiring quantitative economic analysis of many add-on safety features, which would be an endless, useless, costly exercise driven by subjective interpretation.

> The Inherently Safer requirements, NJ 7:31-4.12 (f) 7 include, "A written explanation justifying the infeasibility determination for each inherently safer technology determined to be infeasible. The owner or operator shall substantiate the infeasibility determination using a qualitative and quantitative evaluation of environmental, public health and safety, legal, technological, and economic factors."

How is one able to quantify the environmental, public health, and safety impact of a safety improvement? The inherent safety principles espoused by Trevor Kletz and others note that inherent safety is most effectively applied during the chemical development and design stage and not once the process unit is built and operating safely. Once built and operating, a chemical unit will almost always require additional cost to implement inherent safety.

Second, we believe that the last of the four principles listed in the NJ TCPA regulation is incorrect. The NJ TCPA regulations list the four principles of Inherent Safety:

1. Reducing the amount of EHS material that potentially may be released;
2. Substituting less hazardous materials;
3. Using EHSs in the least hazardous process conditions or form; and (Attenuate)
4. Designing equipment and processes to minimize the potential for equipment failure and human error.

The Center for Chemical Process Safety (CCPS) book on Inherently Safer Chemical Processes, as well as other numerous texts, lists "Simplify" as their fourth principle. The DEP uses their interpretation to suggest that added safety instrumentation is part of inherent safety because it reduces the potential for failure and error. The CCPS book makes it clear that additional safety instrumentation is not part of inherent safety.

IST is a complex concept. Applying these principles in an operating process unit can also result in the potential of risk shifting, unintended consequences, feasibility, and economic impact that must be a part of a holistic risk

assessment approach. No one regulatory program or government agency can adequately address the broad range of factors that must be considered when choosing an effective risk management strategy. Especially when considering all the potential site and unit specific scenarios for the approximately 12,000 facilities nationwide that could be impacted by an IST requirement under the RMP rule. In addition, unilateral decisions by government officials to require alternative chemicals or processes could impose new environmental and safety risks by narrowly focusing on IST.

Finally, the NJDEP IST Program Report Summary published on January 15, 2010 made no recommendations for IST mandates based on their experience of their program evaluation.

Conclusion on IST

There should be recognition that inherent safety is best applied in the research and development and design stages of a project rather than to operating units as pointed out in the CCPS Inherently Safer Processes text. Inherent Safety is often viewed as a panacea for chemical plant accidents, but it takes ingenuity and insight to apply it to operating units. You cannot legislate ingenuity and should not legislate IST. The IST requirements in NJ sound good on paper, but do not bring much real value. If a given customer wants product A, it will be produced or the sale will go to an off-shore producer. There are not always less toxic alternates. The more requirements imposed on U.S. facilities that are not imposed globally, the more business will shift off-shore. There is always a balance between regulations and cost-benefit. There is no one method to measure the effectiveness of a specific technology in the context of IST and, therefore, no objective approach to create prescriptive rules that could be widely applicable to the complex and various processes used at chemical facilities.

Inherently safer approaches to chemical manufacturing processes have been and will continue to be considered by manufacturers, as a matter of principle – they want to operate safe facilities that minimize risk. However, the business owners and operators are in the best position to understand the full ramifications of implementing IST, rather than the government or those with anti-business agendas. The CCNJ believes current performance based regulations in place today and the marketplace itself provide strong incentives for companies to consider and adopt IST. These programs allow manufacturers to use all of the risk management tools and options at their disposal, while considering the complexities of their unique operating environment.

Again, thank you for the opportunity to submit comments on the modernization of PSM. If you should have questions about our input, please contact me by phone at (609) 392-4214 or by e-mail at schranowski@chemistrycouncilnj.org.

Best Regards,

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OSHA Request for Information
PSM Modernization: Docket No. OSHA-2013-0020

Submission: Chemistry Council of New Jersey

Supplemental Comments: Docket No. OSHA-2013-0020

START of Comment Period:

END of Comment Period: **Monday, March 31, 2014**

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#	Section	Title	COMMENTS
1	**General**	**N/A**	OSHA has identified 17 potential candidates for rulemaking or enforcement changes. The CCNJ appreciates being able to give feedback on these areas at this time, but the CCNJ emphasizes that any, and all, areas being explored by the Working Group should only be implemented after proper regulatory advance notices and adequate public comment periods for proposed changes.
2	**1**	**Clarifying the PSM exemption for atmospheric storage tanks**	The CCNJ believes that a "risk based" determination would make more sense than all tanks containing flammables. In addition, perhaps a better definition of "connected equipment" would help achieve this intent as well.
3	**4**	**Expanding PSM Coverage and Requirements for Reactivity Hazards**	Within NJ, we have experience with TCPA regulations that touch on the reactivity hazards of materials. In the 2009 re-authorization of TCPA, "credit for dilution was removed despite industry efforts and advocacy to remove it. From a risk assessment and safety perspective, it must be understood that two reactants diluted to 10% with a solvent are not as dangerous as the undiluted reactants because the solvent attenuates the heat given off. Within TCPA regulations, Table I, Part D, Group II(b) 2. … Non-reacting substances such as solvents shall not be included in the determination of the heat of reaction value of the RHS mixture. These requirements for process safety information for reactive substances are overly prescriptive and the credit for dilution as a way of attenuating the reaction has been removed within NJ, but should not be considered as part of the national program.
4	**6**	**Revising the PSM Standard to Require Additional Management System Elements**	The CCNJ believes that several management systems already exist and are in place such as Responsible Care, VPP, etc. We do not believe that regulating these systems will improve compliance for those outliers that are not meeting the current regulations that are in place and more focus should be made in the identification of the outlier that is off the current radar screen as opposed to adding more layers of regulations on those that are in compliance.
5	**7**	**Require Evaluation of Updates to Applicable recognized and generally accepted good engineering practices (RAGAGEP)**	The CCNJ has concerns on regulating RAGAGEP. Who decides (what is the procedure) for determining a RAGAGEP is valid or appropriate and for what operations / equipment / processes? This is really large in scope. It will also be extremely hard for medium sized enterprises to keep up with the changes in this area yet alone the smaller businesses.
6	**8**	**Clarifying the PSM Standard by Adding Definition of RAGAGEP**	This brings up the same concern as above. The CCNJ has concerns on regulating RAGAGEP. Who decides (what is the procedure) for determining a RAGAGEP is valid or appropriate and for what operations / equipment / processes? This is really large in scope. It will also be extremely hard for medium sized enterprises to keep up with the changes in this area yet alone the smaller businesses.
7	9	**PSM Standard to Cover Mechanical Integrity of any Safety Critical Device**	The CCNJ believes that adding safety critical equipment to what needs MI makes sense. If you take credit for a safety device in a Process Hazard Analysis (PHA) then an MI for that device should be needed. This is how safety critical equipment has been managed within our industry. However, the definition of what safety critical equipment is will be important. We would want to be able to comment on this prior to any changes.
8	10	**Explicit Requirement that Employers Manage Organization Changes for PSM**	Again, the regulated community should be able to define which positions and situations impact PSM at their location. Therefore, explicitly stating how it is implemented is an issue. We support the concept of a procedure and process to document specific MOOC items that need documentation, but the facilities should define this process as it will be different for small, medium, and large businesses.
9	12	**Require Third Party Compliance Audits**	CCNJ has a concern with this item. What constitutes and who certifies that someone is a "qualified PSM auditor"?