Revisions to EPA’s RMP Rule
So Things Don’t Go ‘Boom’ in the Night

A detailed look at the revisions to the Risk Management Plan (RMP) regulations.
On January 20, 2017, the Trump Administration issued a Presidential Directive temporarily delaying the effective date of several U.S. Environmental Protection Agency (EPA) regulations finalized during the last days of the outgoing Obama Administration. The revisions to EPA’s Risk Management Plan (RMP) regulations were among the regulations temporarily delayed pending review by the new administration. The revised effective date for the revisions to the RMP regulations was to be March 21, 2017. On March 13, 2017, EPA Administrator Scott Pruitt signed an administrative stay further delaying the effective date of the revised RMP regulations until June 19, 2017. As of this writing, it is unclear whether the effective date will be further extended beyond that date, or whether EPA (or Congress) might take separate action to rescind or otherwise modify the RMP revisions.

The History of the RMP Rule

EPA’s RMP regulations were born out of the U.S. Clean Air Act Amendments of 1990. RMP and its “fraternal twin”—in the form of the Occupational Safety and Health Administration’s (OSHA) Process Safety Management (PSM) regulations of 1992—were the federal government’s response to a multitude of chemical facility disasters that had catastrophically impacted employees and people in surrounding communities alike. The most notable driver, perhaps, was the December 1984 gas leak from the Union Carbide facility located in Bhopal, India. More than 30 years after the incident, accurate death tolls remain hard to come by with estimates ranging from just over 3,500 to more than 15,000 fatalities.

Actual data concerning the efficacy of the RMP program over its 25-plus-year history is not readily available. During the period 2004 through 2013, EPA annually recorded (on average) 152 “RMP reportable” incidents, 6 employee fatalities, 195 employee injuries, and 15 “public” injuries. The agency offers no estimate of how its RMP program or OSHA’s PSM program may have impacted these numbers—beyond the fact that these data may not have been available but for the reporting obligations established by the RMP program.

Basic Elements of the RMP Program

The RMP regulations establish three different levels of program applicability based on the risk profile of an individual facility and its possible impacts on “public receptors”. Broadly, sites eligible for Program Level 1 (the tier subject to the least regulation) are those sites with no public receptors within the impact zone of a hypothetical “worst-case release”. Program Level 3 sites are those sites that are also subject to OSHA’s PSM regulations, or sites that fall within any one of 10 higher risk North American Industry Classification System (NAICS) codes. By default, Program Level 2 sites are those sites which do not fall into either Program Level 1 or Program Level 3’s definitions.

Actual RMP requirements vary depending upon a site’s program designation. Sites subject to Program Level 1 need only conduct and document a worst-case release analysis, prepare a five-year accident history, prepare an RMP plan for all covered processes, and coordinate with local emergency
first responders. In addition to Program Level 1 requirements, Program Level 2 and 3 sites must also document alternative release analyses, implement management systems and prevention programs, and implement an emergency response program (if required).  

**RMP and PSM: Separated at Birth**

Because of their shared “origin story,” many people in the regulated community incorrectly believe that RMP and PSM are basically duplicative and identical programs administered by separate agencies of the federal government. While RMP and PSM were both created by the Clean Air Act Amendments of 1990 and share many similarities, the overall aim and requirements of the two regulatory schemes do ultimately differ.

At the highest level, the most critical difference between RMP and PSM is that OSHA’s PSM program is primarily concerned with preventing injuries to workers at the affected facility. EPA’s RMP program, on the other hand, is designed to prevent and/or mitigate the risk of chemical releases and related incidents that could have an adverse impact on the community beyond the affected facility’s fenceline. As a result of these related but divergent goals, both programs have distinctly different applicability thresholds for regulated substances—with PSM thresholds being markedly lower, given that the exposures and incidents that PSM hopes to guard against are actually located within the confines of the facility’s workplace.

**EPA’s 2016/2017 Revisions to the RMP Rule**

On August 1, 2013, President Obama issued Executive Order 13650 focused on “Improving Chemical Facility Safety and Security.” As is often the case (especially where loss of life is involved), EO13650 sprang from the West Fertilizer Company ammonium nitrate explosion that occurred on April 17, 2013. That incident resulted in 15 fatalities, more than 150 injuries, and the destruction of more than 100 structures in the surrounding community. President Obama’s Order directed federal agencies (including EPA) to improve chemical facility safety and security by: (1) improving coordination with state and local partners; (2) enhancing information sharing; (3) modernizing policies and regulations; and (4) identifying (and implementing) industry best practices.

Nearly one year later, on July 31, 2014, EPA published a request for information pertaining to the RMP regulations seeking comment on possible revisions to RMP. Following receipt and review of public comments, EPA published proposed revisions to the RMP regulations on March 14, 2016. The revised regulations went final on January 13, 2017, with an effective date of March 14, 2017. As noted above, the regulations are currently undergoing review by the Trump Administration, and the effective date has been delayed until June 19, 2017. It seems likely that the regulations may be either further delayed or pulled-back for revision by EPA (including an additional round of notice and comment).

In their current “final” incarnation, the RMP revisions include the following changes and/or enhancements:

1. Increased coordination between local emergency planning committees (LEPCs) and regulated facilities, including additional communication, drills, and exercises.

2. Increased information sharing concerning emergency planning, chemical hazards, accident history, and emergency response program information. Notably, the new regulations require a facility to hold a public meeting within 90 days following a reportable accident.

3. New requirements aimed at preventing catastrophic accidents, including required investigations of “near-miss incidents” and root cause analysis for incidents that results in or could have resulted in a catastrophic release.
New requirements that requires a facility to conduct a third-party audit following a reportable accident (or otherwise at the request of an implementing agency based upon that agency’s finding that the regulated facility is non-compliant with other RMP requirements).

Each of the above-listed regulatory changes was the subject of a significant number of public comments during the two-plus-year regulatory promulgation process undertaken by EPA. It is anticipated that industry groups and other interested parties alike will use the Trump Administration’s delayed implementation of the revised rule to seek another bite at the apple in the form of additional changes to the regulation that the Obama Administration’s EPA failed to make in response to comments.

**The Future of RMP under President Trump’s EPA**

The biggest growth industry in the United States in early 2017 is boldly predicting the unpredictable—especially in terms of what the Trump Administration might do with perceived “anti-business” regulations proposed in the twilight months of the Obama Administration. Given that the planned effective date for the RMP revisions has already been delayed twice within the first three months of 2017, there is an increased likelihood that the RMP changes envisioned by the Obama Administration will never see the light of day.

What changes might we now expect (assuming the current EPA stops short of completely rescinding the revisions)? During the 2016 notice and comment period for the revised RMP regulations, the proposed rules were alleged by some stakeholders to pose a national security risk due to the increased chemical hazard information that would be made available to the public. Given the heightened scrutiny that perceived matters of national security have seen in the first months of the Trump Administration, there is a high likelihood that some of the information sharing aspects of the revised RMP regulations could be curtailed. If the Administration goes “under the hood” to change one element, though, all bets are off in terms of where a line might be drawn between “too much” (or “too little”, depending upon your perspective) and “just right”.

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**References**

3. 40 CFR 68.10(b).
4. Covered NAICS Codes include petroleum and petrochemical facilities, inorganic and organic chemical manufacturing, plastic and resin manufacturing, and fertilizer and pesticide manufacturing. 40 CFR 68.10(d)(1).
5. The nature of the prevention program required varies in complexity between Program Level 2 and Program Level 3 (with the requirements of Level 2 being somewhat less onerous). 40 CFR 68.12(c)(3).
6. Unlike the origin story of Batman, for example, the origin stories of the RMP and PSM programs have remained static over the past 27 years. We could, of course, see darker more brooding RMP rules if the Trump Administration enlists Christopher Nolan to rewrite the currently pending revisions to the rules.
10. EPA reports that it received more than 61,000 public comments on the proposed rule. Reflecting the fact that we now live in the age of the online petition, EPA also notes that “several” comments were obviously the result of “various mass mail campaigns”. EPA Risk Management Program (RMP) Final Rule Questions & Answers.