Managing the Uncertain Future of RMP Amendments

While the future of the Risk Management Plan (RMP) regulations is in doubt, it would be prudent for facilities to closely examine the new requirements and evaluate whether there is benefit in implementing any of the changes.
Often overlooked compared to other environmental programs, the Risk Management Plan (RMP) received increased focus and attention under the Obama Administration’s Environmental Protection Agency (EPA). Following a catastrophic explosion at a fertilizer plant in West Texas in 2013, President Obama issued Executive Order 13650, “Improving Chemical Facility Safety and Security,” to expressly identify improvements to existing risk management practices through agency programs. In response to EO 13650, EPA developed and finalized a number of important amendments to the RMP regulations. Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act, 82 Fed. Reg. 4594 (January 13, 2017; RMP Amendments). The change in administration has at least temporarily put the brakes on these changes, creating uncertainty for regulated facilities.

The RMP regulations apply to facilities that hold more than a threshold quantity of a regulated substance in a process, regulating 140 hazardous substances, including common chemicals such as anhydrous ammonia (10,000-lb threshold), chlorine (2,500-lb threshold), and flammable mixtures (10,000-lb threshold). Even facilities that do not have chemicals in excess of the threshold quantities in a process may be subject to RMP General Duty Clause in Section 112(r)(1) of the U.S. Clean Air Act. The RMP regulations have existed since 1996, but the increase in the number of RMP inspections and ensuing enforcement and fines for RMP violations have caused concern for many owners or operators of regulated facilities.

Immediately following President Trump’s inauguration, the RMP Amendments were among 30 environmental regulations that were temporarily postponed to be reviewed by EPA pursuant to a Presidential Directive, Regulatory Freeze Pending Review, from the Assistant to the President and Chief of Staff (Jan. 20, 2017). On March 13, 2017, EPA announced that it would further postpone the effective date of the RMP Amendments until June 19, 2017, via an administrative stay and that it will convene a proceeding for reconsideration of the RMP Amendments, as requested by the RMP Coalition, Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 13698 (March 16, 2017). On the same day, EPA Administrator Scott Pruitt issued a letter to the RMP Coalition stating that EPA agrees “that at least some final rule provisions may have lacked notice and would benefit from additional comment and response.” Specifically, the letter notes that there was not a meaningful opportunity for the public to comment on the significance of the determination by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATF) that the West Texas explosion was not accidental as originally believed, but caused by an intentional, criminal act.

The March 16, 2017, Federal Register notice states that EPA intends to issue a notice of proposed rulemaking in the near future, which will provide an opportunity to comment on the issues raised by the RMP Coalition’s petition for reconsideration. Prior to his appointment as EPA Administrator, Pruitt was the Oklahoma Attorney General and submitted comments raising concerns related to the public availability of potentially sensitive information that could be obtained by terrorists and expressing support of the comment letter filed by Louisiana and Texas, which opposed the proposed definition of “catastrophic release” and the proposal to require third-party compliance audits. In light of Administrator Pruitt’s criticism of the proposed RMP Amendments, strong industry opposition to the RMP Amendments, and as well as recent proposals to nullify the RMP Amendments through a Congressional Review Act resolution, speculation continues to swirl regarding the ultimate future of the RMP Amendments and whether the administrative stay and proceeding for rehearing is the first step in paring back the RMP Amendments.

The RMP Amendments

While the future of the RMP Amendments is in doubt, a summary of the significant provisions is provided below.

- **Root Cause Analysis.** Program 2 and 3 processes must conduct and document the results of a root cause analysis as part of the incident investigation of a catastrophic release or an incident that could have resulted in a catastrophic release.
- **Third-Party Compliance Audit.** Program 2 and 3 processes are required to perform a third-party compliance audit after a facility has a reportable accident under the RMP or if EPA or the state implementing agency has determined that there are conditions at the facility that could lead to an accidental release or if there are problems with a third-party audit.
- **Findings Response Report.** The facility must develop a findings response report within 90 days of receiving the final compliance audit report.
- **Certification by Senior Corporate Official.** The findings response report must be signed by a senior corporate official, who must certify the following: (1) he or she engaged a third-party to perform or lead an audit team to conduct a third-party audit in accordance with the requirements of 40 CFR 68.59 or 68.80; (2) the attached RMP compliance audit report was received, reviewed, and responded to under the senior official’s direction or supervision by qualified personnel; and (3) appropriate responses to the findings have been identified and deficiencies were corrected, or are being corrected, consistent with the requirements of subparts C or D of 40 CFR part 68. The findings response report and any implementation schedule must be provided.
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References
1. Owners and operators of stationary sources holding RMP-regulated hazardous substances have a general duty to “identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental release which do occur.” 42 U.S.C. § 7412(r)(1).
2. The RMP Coalition consists of the American Chemistry Council, the American Forest & Paper Association, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States, the National Association of Manufacturers, and the Utility Air Regulatory Group.
3. Program 1 is limited to processes where there are no public receptors in worst-case scenario zone and no accidents with a specified off-site consequence in the last five years. 40 C.F.R. 68.10(b). Program 3 processes are those that are ineligible for Program 1 and either subject to OSHA Process Safety Management Regulations or are in specified NAICS Codes (examples include, pulp mills, petroleum refineries, pesticide and other agricultural chemical manufacturing, inorganic and organic chemical manufacturing). 40 C.F.R. 68.10(d). Program 2 processes are those that are ineligible for Program 1 and not covered by Program 3. 40 C.F.R. 68.10(c).