



EPA's New Risk Management Rule under Scrutiny Due to Increased Regulatory Burden on Businesses

This article provides an overview of EPA's Risk Management Program (RMP) regulations and discusses recent efforts to block implementation of the rule.

On January 13, 2017, the U.S. Environmental Protection Agency (EPA) enhanced its Risk Management Program (RMP) regulations by publishing the “Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act” during the closing days of the Obama Administration. Whether the new rules survive the Administration change remains to be seen. As discussed below, the Trump Administration placed on hold a large group of EPA rules issued near the end of the Obama Administration, including the new RMP regulations. In February, a resolution was introduced in Congress designed to revoke the rule prior to final implementation.

Background to the Proposed Rule

The final rule follows the August 1, 2013 Executive Order 13650 signed by President Obama “Improving Chemical Facility Safety and Security.” The Executive Order established the Chemical Facility Safety and Security Working Group, which consisted of senior management from the U.S. Department of Homeland Security, EPA, and the Department of Labor. One of the tasks of the Working Group was to consider possible improvements to EPA’s RMP regulations (40 CFR part 68).

In the Preamble to the proposed rule, EPA highlights recent significant chemical release incidents which led to the issuance of the Executive Order, including:

- **March 23, 2005:** Explosion at the BP Refinery in Texas City, Texas, which killed 15 people and injured more than 170 more;
- **April 2, 2010:** Explosion and fire at the Tesoro Refinery in Anacortes, Washington, which killed seven people;
- **August 6, 2012:** Fire at the Chevron Refinery in Richmond, California, which endangered 19 Chevron employees. The fire resulted in the release of a plume of hazardous chemicals which resulted in 15,000 people seeking medical attention;
- **April 17, 2013:** Explosion at the West Fertilizer facility in West, Texas, which killed 15 people; and
- **June 13, 2013:** Fire and explosion at the Williams Olefins in Geismar, Louisiana, which killed two people and injured others.

The Working Group was charged with determining enhancements that would help prevent chemical releases, fires, and explosions, as well as improve coordination with local emergency coordinators.

What Is the Purpose of the Risk Management Program?

The authority of the RMP program stems from Section 112(r)(7) of the U.S. Clean Air Act. The main objectives of the RMP program are as follows:

- Prevent chemical accidents at facilities;
- Assist local fire, police, and emergency response personnel prepare and respond to chemical release emergencies; and
- Provide to the public information regarding chemical storage at facilities to raise awareness and improve communication.

Which Facilities Are Covered and What Must Covered Facilities Do?

EPA estimates that around 12,542 facilities store chemicals above regulatory thresholds, which triggers applicability of the RMP. Facilities covered by the rule include petroleum and chemical manufacturers/wholesalers, refineries, utilities, and oil and gas extraction facilities.

Any facility that stores more than the established threshold quantities of regulated substances must comply with the requirements of the RMP. Covered facilities must prepare a risk management plan that is consistent with the rule and submit it to EPA.

The existing RMP regulations categorize covered facilities into three program levels: Program 1 through 3. The greater the risk presented by a release from a facility, the higher the Program level and the more stringent the requirements for the facility. Each facility’s risk management plan must be updated and resubmitted to EPA every five years.

What Information Is Required in a Facility’s Risk Management Plan under Current Regulations?

A facility’s risk management plan must cover three things:

1. **Hazard Assessment:** Each facility is supposed to review the regulated chemical substances stored and utilized at its facility. The facility is required to provide an assessment of the potential ramifications of an accidental release, including a worst-case scenario. The assessment should also review the facility’s accident history over the last five years.
2. **Prevention Program:** Each facility is to develop a program that includes safety precautions, maintenance, monitoring, and employee training designed to prevent accidents from occurring.
3. **Emergency Response Program:** Each facility must specify the procedures that will be utilized to notify the public and local emergency responders in the event of a release.

What Does the New RMP Rule Require?

The new rule requires enhancements in three areas: the accident prevention program, emergency response enhancements, and public access to information.

New Accident Prevention Program Requirements

- **Root Cause Investigations:** Under the prior rules, when a facility was required to investigate an incident, the facility was required to investigate the “factors that contributed to the incident.” Under the new rule, EPA wants facilities falling into Program 2 or 3 (i.e., higher risk facilities) to conduct a more thorough analysis that gets to the “root cause” of the incident. The rule defines “root cause” as “the fundamental, underlying, system-related reason why an incident occurred.”
- **Third-Party Audits:** Facilities that fall into Program 2 or 3 must contract with an independent third-party, or assemble an audit team led by an independent third-party, to perform a compliance audit after the facility has an RMP-reportable accident or when otherwise requested by the implementing agency. Existing rules allowed a self-audit. Therefore, compliance costs may increase for facilities because they must utilize third-parties to conduct compliance audits after a reportable incident.
- **Safer Technology and Alternative Analysis (STAA):** When Program 3 facilities in NAICS Codes 322 (paper manufacturing), 324 (petroleum and coal products manufacturing), and 325 (chemical manufacturing) update their plans every five years, they will now be required to include an STAA. The purpose is to evaluate the practicability of any inherently safer technology (IST). An IST is a careful examination of potentially safer technology and designs that could be implemented in lieu of, or in addition to, their current technology.

Emergency Response Enhancements

- **Annual Coordination with LEPCs:** All facilities with Program 2 or 3 processes are required to conduct annual coordination activities with local emergency planning committees (LEPCs) to help improve the emergency response process. The annual coordination is intended to ensure that local response organizations are aware of the regulated substances at the source, their quantities, and the risks presented by the release. Facilities must document this coordination, including the names of the individuals involved and their contact information, dates, and the nature of the coordination activities.
- **Notification Exercises with the LEPCs:** Program 2 and 3 facilities are required to conduct notification exercises annually to ensure that their emergency contact information is accurate and complete.
- **Consultations with LEPCs:** Facilities are to meet with LEPC officials to determine when tabletop and field exercises should take place. At a minimum, full field exercises will be conducted at least once every 10 years and tabletop exercises conducted at least once every three years.

Enhanced Availability of Information

- **Availability of Information to the Public:** The rule requires all facilities to provide certain specified information upon receiving a request from the public. The information includes: regulated substances, safety data sheets, accident history, compliance with the emergency response program, exercises, and local emergency planning committees. Facilities must



**A&WMA
Buyers Guide**

Tap into the incredible network of the Air & Waste Management Association with the A&WMA Buyers Guide. Powered by MultiView, the Guide is the premier search tool for environmental professionals. Find the suppliers you need, within the network of the association you trust.

Start your search today at awma.org.


AIR & WASTE MANAGEMENT
ASSOCIATION


MULTIVIEW

notify the public on their website or through other social media the availability of this information upon request.

- **Public Meeting within 90 Days of a Reportable Accident:** All facilities must hold a public meeting to discuss the accident and relevant chemical hazard information.

What Impact Will the Change in Administrations Have on the Rule?

The rule is controversial. Industry representatives believe the rule oversteps U.S. EPA's authority. For example, commenters questioned EPA's legal authority to require a safer technology and alternatives analysis (STAA).

Foreshadowing the potential fate of the rules, EPA Administrator Scott Pruitt, when he was Attorney General for Oklahoma cosigned a July 27, 2016 letter with ten other state Attorney Generals opposing the rules.

The RMP rules have already been put on hold by President Trump. On January 20th, Reince Preibus, President Trump's Chief of Staff, issued a broad regulatory freeze memorandum entitled "Regulatory Freeze Pending Review" halting federal rules that had not yet become effective. All rules covered by the memorandum are suspended for 60 days (March 21, 2017). On January 26, 2017, EPA published a list of 30 rules subject to the freeze, including the RMP amendments.

In prior Administration changes, similar steps were taken to put in place a temporary hold on rules enacted at the end of

the prior Administration. In the end, the majority of those rules eventually were made effective.

The RMP amendments haven't only been delayed, the rule faces challenges in both Congress and at U.S. EPA. On February 1, 2017, Congressman Markwayne Mullin (Oklahoma) introduced H.J.Res. 59, a Congressional Review Act (CRA) joint resolution, in order to block the RMP rule. Under the CRA, the Congress can disapprove a specific regulation by passing a resolution. The resolution cannot be filibustered and only needs a simple majority to pass.

Separate from the CRA effort in Congress, a coalition of trade associations representing a wide array of industries subject to the rule filed a petition for reconsideration of the rule package with U.S. EPA. On March 13th, Administrator Pruitt signed an administrative stay of the rule that will delay the effective date until June 19, 2017. On the same day Administrator Pruitt also granted the pending motion for reconsideration of the rule filed by industry groups.

It is too early to tell whether the RMP regulations will be undone as part of the Trump Administration's general effort to reduce the regulatory burden on businesses. However, Administrator Pruitt granting of the petition for reconsideration signals a strongly likelihood the rule will be amended further before becoming effective. **em**

Attorney Joseph P. Koncelik is the former Director of Ohio EPA and is Chair of the Environmental Practice Group at Tucker Ellis LLP. E-mail: joseph.koncelik@tuckerellis.com.