EPA EXPANDS RISK MANAGEMENT REQUIREMENTS

January 19, 2017

The U.S. Environmental Protection Agency (EPA) has substantially revised its Risk Management Program (RMP) rule aimed at preventing chemical facility accidents, a move that will affect industrial facilities that handle threshold amounts of regulated chemicals. The rule takes effect on March 14, 2017; however, the compliance date for many of the rule's key provisions is not until March 15, 2021. The final rule reflects important changes from EPA's proposed rule that was the subject of substantial comment by industry, but still has problematic provisions. *See* March 18, 2016 V&E E-communication. The Federal Register notice for the revisions to the RMP rule can be accessed here.

The revised RMP rule — which includes new requirements for hazard analysis, third-party auditing, incident investigations and root cause analysis, emergency response exercises, and public sharing of chemical and process information — has been the subject of substantial criticism throughout the rulemaking process. This article highlights key points from the revised rule that affect chemical and other RMP-regulated industrial facilities.

1. PROCESS HAZARD ANALYSIS ADDITIONS – SAFER TECHNOLOGY AND ALTERNATIVES ANALYSIS AND INHERENTLY SAFER TECHNOLOGY

Facilities in NAICS codes 322 (paper manufacturing), 324 (petroleum and coal products manufacturing), and 325 (chemical manufacturing) must conduct a safer technology and alternatives analysis (STAA) and identify the practicability of inherently safer technology (IST) as part of process hazard analysis assessments. EPA limited applicability of the STAA and IST requirements to facilities in these NAICS codes based on data that EPA characterized as indicating a disproportionate share of reportable releases from such facilities. In contrast to numerous comments made by industry, EPA predicts a reduction in the frequency and magnitude of damages from accidents and releases from RMP facilities attributable to the implementation of STAA and IST requirements.

The STAA and IST requirements do not come without considerable expense and controversy. Indeed, more than half of EPA's estimated $131.2 million in annualized costs for industry to comply with the final RMP rule are attributable to the STAA and IST analysis requirements. The rule allows consideration of economic factors when evaluating STAA and does not require installation of IST. However, companies subject to the requirements may need to exercise care in preparing the record of the STAA and IST analysis to ensure that the analysis is sufficiently documented to manage potential liabilities arising from the analysis.

Compliance with the STAA and IST provisions is not required until 2021.

2. THIRD-PARTY AUDITS

Third-party compliance auditing is one of the more problematic features of the final rule. Under existing rules, owners and operators are required to conduct an RMP compliance audit every three years. *See* 40 C.F.R. 68.79. These audits must be conducted "by at least one person knowledgeable in the process," usually a company employee or an oft-used consultant. But under the final rule, owners and operators will be required to commission an independent third party to conduct an RMP audit within 12 months of an accidental release or within 12 months of the EPA otherwise determining that an independent audit is necessary. *See* New 40 C.F.R. 68.80. Further, within 90 days of receiving the final audit report, the owner and operator must determine a response to each finding and provide the audit report and list of response actions for each audit finding to the audit committee of the company's Board of Directors. *See* New 40 C.F.R. 68.80(f).

Third-party compliance auditing has appeared with increasing frequency in consent decrees resolving alleged violations. Here, EPA is requiring third party auditing by rule and in the absence of any alleged non-compliance. Owners and operators must maintain third-party auditing records onsite, and EPA can request those records at any

time. *See* New 40 C.F.R. 68.80(f). Although EPA pledges that "audit teams' findings are not, in and of themselves, determinations of regulatory violations," its pledge offers little comfort to industry because courts have said the same about deviations listed in Clean Air Act Title V deviation reports, and regulatory agencies routinely rely on these types of reports to initiate enforcement actions.

Traditionally, RMP compliance auditing has been conducted by an employee or consultant "knowledgeable in the process." As part of the final rule revisions, EPA established "independence criteria" for future RMP audits—specifically, that the auditor must not have provided business consulting services to the owner or operator during the two-year period preceding the audit and must not provide services for the two-year period following the audit. *See* New 40 C.F.R. 68.80(c)(2). In comments to the proposed rule, industry expressed concern that EPA's "independence criteria" may result in audit teams being managed by someone relatively less "knowledgeable in the process," will shrink the pool of qualified auditors, and substantially increase auditing costs.

The compliance auditing provision is problematic, but it is improved from what EPA proposed. For example, EPA in the final rule clarified that facility staff can participate on audit teams, but the teams are to be led by an independent third party. Also, under the proposed rule, the independent auditor was required to submit the audit report to the EPA at the same time or before providing it to the owner and operator with EPA being entitled to drafts of the audit report upon request. The final rule only requires the auditor to provide the final report to the owner and operator, and the owner and operator to maintain records of the two most recent audit reports. *See* New 40 C.F.R. 68.80(g).

A company is not required to implement a third-party auditor's recommendations but must document the reasons why the company rejected any recommendations. The care with which the response is prepared could affect future enforcement actions and future liabilities should any rejected recommendation appear to play a role in a future incident. Compliance with the third-party compliance auditing provision is not required until 2021.

3. INCIDENT INVESTIGATIONS AND ROOT CAUSE ANALYSIS

The rule requires identification of the fundamental reason, or the "root cause," when facility owners and operators investigate catastrophic releases and near misses. Owners and operators must prepare a report on root cause(s) within 12 months of the incident that includes information on consequences of the accident, emergency response actions taken, recommendations resulting from the investigation, and a schedule for addressing findings and recommendations. *See* New 40 C.F.R. 68.81(d). In practice, EPA regularly requests information on the root cause of RMP incidents, but the requirement to investigate root causes has not been an RMP requirement until now.

EPA's proposed rule revisions would have required every root cause investigation to identify "a correctable failure in management systems." *See* Proposed 40 C.F.R. 68.3 at 81 Fed. Reg. 13,703 (Mar. 14, 2016). In response to industry comment, EPA conceded that not all incidents have a correctable failure in management system and removed the phrase "that identifies a correctable failure(s) in management systems" from the definition of root cause.

In response to comments, EPA also retracted a proposed rule change that could have dramatically expanded the number of incidents triggering RMP investigations. Under the prior rule, facility owners and operators were required to investigate catastrophic releases and "near miss" incidents that "could reasonably have resulted in a catastrophic release of a regulated substance." *See* 40 C.F.R. 68.81(a). Traditionally, EPA has treated catastrophic releases and near misses (investigation required) differently than accidental releases (no investigation required, but must be listed on five-year accident history). But in the proposed rule, EPA sought to align the two by revising the definition of catastrophic release to include accidental releases. *See* Proposed 40 C.F.R. 68.3 at 81 Fed. Reg. 13,702 (Mar. 14, 2016). Some commenters objected, arguing that such a change would unnecessarily expand the number of releases requiring time- and resource-consuming investigation. EPA elected to not finalize the proposed revision, explaining that "our view that having a common definition of reportable accidental release and catastrophic release would simplify and clarify compliance was outweighed by the potential burden of inadvertently expanding the number of investigated accidental releases," and acknowledging that "some reportable incidents under the accident history provision may not pose an imminent and substantial threat to public health and the environment."

Although compliance with the final rule's root cause investigation provision is not required until 2021, many companies already conduct root cause investigations. Owners and operators may want to be thoughtful about the

composition of investigation teams and the capabilities and training of team members to effectively identify root causes. Misidentification of root causes can create ongoing issues.

4. EMERGENCY RESPONSE EXERCISES AND LOCAL COORDINATION OF EMERGENCY RESPONSE

The rule changes how facilities coordinate emergency response with local responders. Facilities with employees who do not respond to accidental releases ("non-responding facilities") will need to annually coordinate with local emergency response officials to ensure the facility's emergency response notification mechanisms work and to ensure the facility is considered in the community's emergency response plan. *See* New 40 C.F.R. 68.93 & 68.96(a). Facilities with employees who respond to accidental releases of regulated substances ("responding facilities") will need to do the same, and also will need to coordinate with local emergency response officials to conduct tabletop exercises simulating accidental releases every three years and full field exercises simulating accidental releases every 10 years. *See* New 40 C.F.R. 68.96(b).

The final rule's local coordination provisions are better than what EPA proposed. For example, commenters raised concern over mandatory coordination requirements because some local emergency response organizations are not receptive to coordination. In the final rule, EPA clarified that, if emergency response organizations decline to coordinate or if the appropriate organization cannot be identified, owners and operators can demonstrate compliance by "document[ing] their coordination efforts, and continu[ing] to attempt to perform coordination activities at least annually."

Because emergency response planning requirements are most onerous for responding facilities, commenters objected to proposed rule provisions that could have caused a number of non-responding facilities to become responding facilities. For example, under the proposed rule, non-responding facilities remained non-responding only when facility owners and operators could confirm that adequate local public emergency response capabilities were available to appropriately respond to any accidental release. EPA responded to comments by removing this requirement from the final rule.

Further, the proposed rule required owners and operators of non-responding facilities to develop a "responding facility" emergency response program upon the written request of a local emergency planning committee. Commenters argued that the requirement would allow local governments to shift emergency response program obligations, including firefighting capabilities, to owners and operators of non-responding facilities. EPA dropped the provision from the final rule.

Compliance with the local coordination provisions is not required until 2018, and compliance with the "responding facility" exercise requirements is not required until 2021.

5. PUBLIC ACCESS TO INFORMATION

The final rule reflects EPA's broader goal of increasing community risk awareness through expanded public access to facility information, such as chemical hazard information, accident history information, and emergency response program and exercise information. *See* New 40 C.F.R. 68.210(b). Owners and operators will be required to provide the public with an ongoing notification that such information is available by posting the notice on the company website or in other publicly accessible locations, and owners and operators must respond to a request for such information within 45 days. *See* New 40 C.F.R. 68.210(c)-(d). Further, within 90 days of a reportable accident, owners and operators of a facility must hold a public meeting. *See* New 40 C.F.R. 68.210(e).

EPA was moderately receptive to comments raising security and other concerns related to providing the public with easy access to this information. For example, the proposed rule required companies to post chemical hazard information on the company website, but the final rule requires only an online notification that such information is available. The proposed rule also required owners and operators to hold a public meeting within 30 days of a reportable accident; the final rule provides a 90-day deadline. However, EPA disagreed with industry that public meetings should not be required when a reportable accident only has on-site impacts, explaining that "those accidents are often serious enough to raise safety concerns within the surrounding community."

In addition to national security concerns expressed by Scott Pruitt and other government officials regarding the publishing of chemical storage information, there is concern among industry that the public sharing of information will expose facility owners and operators to greater risk of citizen suits. Under its 2015 coal combustion residuals rule, for example, EPA requires facility owners and operators to post compliance information on "a publicly accessible Internet site," and EPA's explanation there was that this would not only increase transparency, but also "facilitat[e] the citizen suit enforcement provisions…." *See* 80 Fed. Reg. 21,426-27 (April 17, 2015). Environmental NGOs are fundraising off of pledges to increase the use of citizen suits during the Trump Administration, so the impacts of this new rule provision will be worthy of attention.

Compliance with the public access to information provisions is not required until 2021.

6. OTHER OBSERVATIONS

Definition of "Near Miss"

The proposed and final rule revisions add the term "near miss" to the category of events triggering investigation requirements. EPA did not define the term in the proposed rule but asserted that the term could include a broad range of some relatively common occurrences, including "process upsets such as activation of relief valves, interlocks, blowdown systems, or rupture disks" and "a transformer explosion that could have impacted nearby regulated process equipment causing it to lose containment of a regulated substance." Many of those circumstances would not generally be seen as reasonably resulting in a catastrophic release of a regulated substance.

In the preamble to the final RMP rule, EPA clarified that "[n]ot all excursions of process parameters outside control levels or all instances of protective device activation should necessarily be considered to be near misses." And EPA further said that "catastrophic release near miss events are infrequent events" and owners and operators should "use reasonable judgment to decide which incidents, if they had occurred under slightly different circumstances, could reasonably have resulted in a catastrophic release, and investigate those incidents." EPA also asserted that the term carries a clear meaning in the industry and described some of the factors used to determine whether an incident is a near miss. EPA also stated that it would update existing RMP guidance to identify the types of incidents that could be considered near misses.

The final rule preamble reduces the scope of incidents subject to the investigation requirements but still expands investigations from the prior rule.

RMP Regulation of Incidents With Only "Inside the Fence" Impacts

EPA's RMP rule is derived from the Occupational Safety and Health Administration's (OSHA) Process Safety Management (PSM) standard. The purpose for the EPA RMP rule was to extend the PSM requirements to incidents with offsite consequences. As such, some have argued that the EPA RMP rule is limited to incidents with offsite consequences and that OSHA has exclusive jurisdiction over incidents impacting only onsite facility personnel.

OSHA and EPA have collaborated in recent years to extend the Clean Air Act's more onerous penalties to workplace incidents by expanding RMP to more fully overlap the PSM onsite coverage. EPA justified this approach in the preamble to the final rule, stating that "incidents that primarily or even exclusively impact on-site receptors are potentially relevant to protection of the public and the environment from the risks of an accidental release." And as such, "certain on-site accident impacts are relevant because they may reflect safety practices at the source and because accidental releases from covered processes which resulted in deaths, injuries, or significant property damage on-site, involve failures of sufficient magnitude that they have the potential to affect offsite areas."

The expansion of the original scope of RMP allows the government to bring the Clean Air Act's much greater enforcement provisions to bear on matters that were previously subject to only OSHA PSM enforcement.

7. COMPLIANCE DATES

Although the final RMP rule becomes effective on March 14, 2017, compliance with many of the rule's provisions is not required until much later.

Rule	Compliance Year
Third-Party Audits	2021
Safer Technology and Alternatives Analysis and Inherently Safer Technology	2021
Root Cause Analysis	2021
Local Coordination of Emergency Response	2018
Emergency Response Exercises	2021
Public Access to Information	2021

Many of the rule provisions have been the subject of substantial criticism by Scott Pruitt, the Oklahoma attorney general who President-elect Donald Trump picked to lead his EPA, and so it will be worth monitoring whether EPA revisits the rule following his confirmation.

For additional information regarding the RMP rule, please contact V&E lawyers George Wilkinson, Taylor Pullins, or Taylor Holcomb. Visit our website to learn more about V&E's Emergency Response and Crisis Management practice.