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EPA Finalizes Major Changes to RMP Rule

The U.S. Environmental Protection Agency (EPA) finalized major amendments to its Risk Management Plan regulation (RMP Rule) on February 27, 2024 (published in the Federal Register on March 11). As background, the RMP Rule applies to stationary sources (i.e., facilities) that hold specific regulated substances in excess of threshold quantities. These facilities are required to assess their potential release impacts, take steps to prevent releases, plan for emergency response to releases, and summarize this information in a risk management plan (RMP) submitted to EPA. The release prevention steps vary depending on the type of process, progressively gaining rigor over three program levels (i.e., Programs 1, 2, and 3). Facilities potentially subject to the RMP Rule include chemical manufacturers; water and wastewater treatment systems; chemical and petroleum wholesalers and terminals; food manufacturers, packing plants, and other cold storage facilities with ammonia refrigeration systems; agricultural chemical distributors; and a limited number of other sources.

Significant elements of the recent amendments include the following:

Hazard Evaluation Amplifications

The amendments require facilities to address and plan for natural hazards, including those caused or exacerbated by climate change, in their hazard reviews and process hazard analyses (PHAs). The amendments add a definition of "natural hazard," and EPA provides the following examples: avalanche, coastal flooding, cold wave, drought, earthquake, hail, heat wave, hurricane, ice storm, landslide, lightning, riverine flooding, strong wind, tornado, tsunami, volcanic activity, wildfire, and winter weather. EPA calls this development an amplification, saying EPA is merely making explicit what is already required in the RMP Rule and EPA guidance. This suggests EPA may be unforgiving with facility delays in implementing this provision. Also, climate change preparedness is a likely subject of EPA attention during inspections,

considering EPA's current National Enforcement and Compliance Initiative on climate change.

Hazard evaluations now must explicitly address the risk of power failure, and standby or emergency power systems. Control or monitoring equipment used to prevent and detect accidental releases of RMP chemicals must *be equipped* with standby or backup power. If facilities remove such monitoring equipment in anticipation of imminent natural hazards, they must document this (showing a legitimate reason for doing so).

Hazard evaluations now must explicitly address the following considerations as part of facility siting: the placement of processes, equipment, buildings within the facility, and hazards posed by proximate facilities, and accidental release consequences posed by proximity to the public and public receptors. EPA calls this an amplification, and notes, "when conducting siting evaluations, EPA would reasonably expect sources to consult publicly accessible information on nearby sources, such as RMPs and information available through LEPCs."

Submitted RMPs now must identify and justify (by choosing from four pre-selected categories) rejected hazard evaluation recommendations on subjects of natural hazards, power loss, and siting hazards. Inspectors may ask about the underlying reasons for a facility's selection of a justification, and if facilities do not have a reasonable response, this may hurt the overall tone of an inspection.

Safer Technologies and Alternatives Analysis, and Practicability Assessments

A subset of facilities now must conduct Safer Technologies and Alternatives Analysis (STAA) in their PHAs, examining and documenting the availability of "inherently safer technology or design" (IST / ISD), as well as passive measures, active measures, and procedural measures. This STAA requirement applies to Program 3 processes in the petroleum refining (NAICS 324) and chemical manufacturing (NAICS 325) sectors.

An even narrower subset of facilities must also document the practicability of the IST / ISD considered. This subset consists of: facilities in the above two sectors, that are co-located within one mile of another facility in those sectors; or petroleum refineries with hydrofluoric acid alkylation processes; or facilities in either of the above sectors with a reportable accident since the last PHA. Further, this subset *must*

implement at least one practicable passive control measure, or an inherently safer technology or design, or a combination of active and procedural control measures equivalent to or greater than the risk reduction of a passive control measure, after each STAA.

As part of a communal technology transfer effort, facilities subject to STAA must provide, in their RMPs, basic information on IST considered, facility information, categories of safer design identified and implemented, and causal factors for initiating safer design implementation. Facilities should craft these submissions to be compliant and to foster communal corporate safety, while not ceding competitive advantage from novel process design.

An important subject for the regulated community to track is how the toxic tort plaintiffs' bar may use these STAA and practicability assessments (particularly, rejected safer alternatives) in litigation following accidental releases.

Root Cause Analysis

The amendments require Program 2 or 3 processes to conduct a Root Cause Analysis (RCA) as part of each incident investigation for accidents that meet the five-year accident history eligibility criteria. Root cause is now defined as "a fundamental, underlying, system-related reason why an incident occurred that identifies a correctable failure(s) in management systems and, if applicable, in process design." Facilities will need to be careful with the "correctable failure" concept, which may be the subject of attention by the toxic tort plaintiffs' bar following accidents. EPA did not finalize a definition of "near miss."

The amendments require RCAs to include specific elements; use a recognized investigation method; and include root cause information in incident investigation reports, which must be completed as soon as reasonably practicable and no more than 12 months after the accident (except for complex investigations approved in writing).

Third-Party Compliance Auditing

The amendments require Program 2 or 3 processes to hold a third-party compliance audit after a qualifying release, or when the implementing agency

determines conditions exist that “could lead” to an accidental release. This “could lead” standard is not defined, but the amendments prescribe a process for appealing “could lead” determinations. A qualifying release is merely one accidental release from a covered process, that meets the five-year accident history eligibility criteria. Regarding timing, if an agency makes a “could lead” final determination or a qualifying release occurs, then the next required compliance audit, which are required at least every three years, must be a third-party audit. Facilities must justify any decision to reject third-party audit recommendations, in their RMPs, by choosing from EPA-provided categories.

Third-party auditors must meet competency and independence requirements, including not accepting employment by the facility owner / operator for at least two years after submission of the audit report.

Employee Participation

Program 3 processes now must consult with knowledgeable employees when making decisions on recommendations and findings from PHAs, compliance audits, or incident investigations. Program 3 processes must also provide employees that are knowledgeable in a process the authority to recommend that an operation or process be shut down based on potential for a catastrophic release; and qualified and knowledgeable operators must have authority to actually shut down an operation or process due to that same potential. These authorities must be documented in the employee participation plan.

Program 2 and 3 processes must develop and implement a process to allow employees and their representatives to anonymously report to the owner / operator or EPA unaddressed hazards that could lead to a catastrophic release, unreported RMP-reportable accidents, or other RMP noncompliance. The facility must provide clear instructions for how to report to both entities, and keep a record of reports of non-compliance. EPA will likely take very seriously any facility actions to impede these new employee reporting rights. Facilities must also provide employees and their representatives access to hazard reviews and all other information required to be developed under the RMP Rule. Facilities must also conduct training on their employee participation plan as often as necessary to ensure employees are informed.

Emergency Response

Non-responding facilities now must maintain and implement, as necessary, procedures for informing the public and the appropriate federal, state, and local emergency response agencies about accidental releases of RMP-regulated substances. Both responding and non-responding facilities must partner with local response agencies to ensure that a community notification system is in place to warn the public within the area potentially threatened by a release. Further, they must provide to local first responders timely data and information detailing the current understanding and best estimates of the nature of a release, whenever a release occurs that necessitates a response. Also, for responding facilities, the amendments revise the required frequency of field exercises to at least every 10 years, and bolster the required documentation elements for field and tabletop exercises.

Public Information Availability

The amendments require facilities to provide their chemical hazard information to a subset of the public, upon request, in the language requested (at least two major languages used locally, and English). The subset consists of those persons residing, working, or spending significant time within a six-mile radius of the facility. The information required includes names of chemicals in a process; Safety Data Sheets; five-year accident history; emergency response program info; list of scheduled exercises (except those within one year of the request); and LEPC contact information.

The amendments include a verification process to ensure members of the public meet the six-mile requirement. EPA notes: "*EPA also expects verification of the population within the 6-mile radius to be carried out through many methods, such as asking a member of the public to provide a utility bill for verification of residence, pay stub for verification of employment, or specific documentation to verify significant time spent within the 6-mile radius.*" This will present compliance challenges. Facilities may face EPA scrutiny if they do not vet a requester's verification close enough (as shown by EPA discussion of the security risks involved with providing data to the public at large, outside of the six-mile radius), but if facilities are instead over-protective when reviewing a verification and deny a

request for information, they will likely receive EPA scrutiny for that, too.

Facilities must provide ongoing notice on a company website, social media, or through other public means that this information is available, and how to request it. They must also identify where to access information on community preparedness.

Other Areas of Clarification

- **Process Safety Information**: The amendments clarify that the requirement to keep PSI up to date applies to Program 3 processes (in addition to Program 2 processes).
- **Retail facility exemption**: The amendments clarify that the relevant period for defining a "retail facility" is the previous calendar or fiscal year.
- **Recognized And Generally Accepted Good Engineering Practices (RAGAGEP)**: The amendments harmonize RAGAGEP compliance language for Program 2 and 3 processes, so that both programs must both ensure and document compliance with RAGAEP. The amendments clarify that PHAs must include analysis of the most recently promulgated RAGAGEP, to identify gaps between the facility's design, maintenance, and operation, and the most current RAGAGEP. Also, facilities must specify in RMPs why PHA recommendations associated with adopting practices from the most recent RAGAGEP were not implemented.
- **Hot work permits**: The amendments require retention of hot work permits for three years.
- **No finalization of "storage incident to transportation**": EPA declined to finalize material on this subject, instead opting to further evaluate the feedback it received before taking action. EPA encourages facilities to continue relying on guidance in the meantime.

Compliance Dates

- New STAA, root cause analysis, third-party compliance audit, employee participation, emergency response public notification and exercise evaluation reports, and information availability provisions: Unless otherwise stated, three years after the May 10, 2024, effective date of the final rule.
- Revised emergency response field exercise frequency: by March 15, 2027, or within 10 years of the date of an emergency response field exercise conducted between

March 15, 2017, and August 31, 2022, in accordance with 40 CFR 68.96(b)(1)(ii).
- Update and resubmit RMPs to reflect new and revised data elements: four years after the May 10, 2024, effective date.
- Standby or backup power for air monitoring and control equipment: three years after the May 10, 2024, effective date.

Conclusion

Chemical accident risk reduction remains an EPA enforcement initiative. Numerous aspects of the recent amendments will require significant planning in order to implement effectively and defensibly.

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