

Robinson+ColeEnvironmental + Utilities

March 2016

EPA Proposes Significant Expansions of Its Risk Management/Accidental Release Prevention Program

On March 14, 2016, The Environmental Protection Agency (EPA) published proposed [revisions](#) to the Risk Management Program (RMP) (also known as Accidental Release Prevention) rule at 40 CFR Part 68, under Section 112(r) of the Clean Air Act. The existing RMP rule requires facilities that hold more than a threshold quantity of certain hazardous substances to develop a risk management plan and to submit the plan to EPA. The proposed revisions stem from several industry incidents with multiple fatalities that in turn led to President Obama's 2013 Executive Order to relevant federal agencies to improve safety at facilities that use and distribute hazardous chemicals.

Significant proposed changes include the following:

- **“Inherently safer technology/inherently safer design” (IST / ISD):** Certain facilities subject to the RMP's most stringent Program 3 tier of regulation—specifically, paper, petroleum and coal products, and chemical manufacturing facilities—would be required to analyze IST/ISD as part of the process hazard analysis (PHA) required under existing regulations. EPA has proposed to define IST/ISD as risk management measures that do any of the following:
 - minimize the use of hazardous substances
 - substitute less hazardous substances
 - moderate the use of regulated substances
 - simplify covered processes to make accidental release less likely or the impacts of such releases less severe

For these facilities, the proposed revisions would also establish the following order of preference for process risk management strategies:

1. IST / ISD
2. passive measures (process and equipment design)
3. active measures (automatic digital or mechanical controls)
4. procedural measures (requiring human action)

Notably, these facilities would be required to evaluate the feasibility of implementing any IST or ISD considered but would not be required to implement any of them. We note that this approach seems likely to result in arguments as to whether a heightened general duty of risk management still exists or was otherwise met, particularly in the context of a post-incident enforcement action or lawsuit involving a situation where the IST/ISD was not implemented.

- **“Root cause” investigation for reportable incidents and near misses:** Program 2 or 3 facilities (that is, those subject to the RMP's intermediate and most stringent tiers) would be required to conduct a “root cause” investigation within 12 months of any reportable incident or near miss. Importantly, EPA said that it is not proposing to define “near miss” because it is highly fact specific. Instead, EPA said it will rely on facility owners and operators to focus on

serious incidents that could have resulted in a catastrophic release. Owners and operators may therefore want to resolve and document their conclusions as to what does or does not constitute a “near miss.”

- **Third-party auditing:** Program 2 or 3 facilities would also be required to hire a third party to conduct the required compliance audit following a reportable release. Self-auditing would no longer suffice to meet this requirement.
- **Increased coordination with local emergency responders:** Certain facilities would be required to provide greater disclosure of information on regulated substances, incident investigation reports, and emergency response exercises.
- **Public availability of facility chemical hazards:** All facilities subject to the RMP would be required to provide certain basic information regarding facility chemical hazards to the public.

While these last two provisions include accommodations for classified or confidential business information, various industry interests have raised security concerns to EPA in the public comment period.

The proposed revisions also look to clarify, streamline, or otherwise revise a number of other features of the existing RMP rule.

Comments on the proposed revisions are due by May 13, 2016.

Robinson+Cole's Environmental + Utilities Group has broad experience in helping clients subject to the Risk Management Program. If you would like us to assist you in better understanding these proposed revisions, please contact one of the following lawyers or any other lawyer in our [Environmental + Utilities Group](#):

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