
Risky Business: EPA Plans Enhanced Enforcement Focus on Chemical Safety

By Matthew W. Morrison and Brendan J. Hennessey*

EPA has made reducing the risk of accidental releases of hazardous chemicals at industrial and chemical facilities one of its top enforcement priorities for 2017 to 2019. This increased enforcement focus on industrial accidents and releases comes as part of EPA's larger effort to implement more aggressive risk management requirements at industrial facilities handling hazardous chemicals. Also included in this effort are proposed regulations that will expand upon current risk management requirements. These new initiatives signal EPA's increased willingness to use Clean Air Act authority broadly to find companies liable when accidental releases occur, and to impose stronger requirements that companies will have to implement before any incident ever occurs.

EPA is well along in its efforts to issue a new Risk Management Modernization Rule that will require industrial facilities handling hazardous chemicals to maintain more robust chemical accident prevention plans, provide an assessment of the potential consequences of an accidental release, develop and implement accident prevention protocols, and share additional information with local emergency response personnel. The Risk Management Modernization Rule is designed to build on EPA's current Risk Management Program (RMP), which utilizes EPA's authority under [Section 112\(r\) of the Clean Air Act](#) to require facilities possessing a threshold level of certain hazardous chemicals to implement risk reduction measures designed to prevent accidental releases and dangerous events.

The proposed Risk Management Modernization Rule warrants heightened attention now that EPA has announced its intention to step up enforcement of existing risk management requirements, which force companies to plan for accidents and implement measures to prevent them. This announcement follows EPA's September 2015 [request for comments](#) on its proposal to add "reducing the risks and impacts of industrial accidents and releases" to its National Enforcement Initiatives for 2017-2019. Now that this issue has been added to the list of National Enforcement Initiatives, EPA will be devoting increased enforcement resources to pursue risk management noncompliance at industrial facilities across the country.

These priorities are likely to receive special attention from EPA throughout at least the end of the current Administration, given that they were prompted by presidential action. Executive Order 13650, entitled Improving Chemical Facility Safety and Security, signed by President Obama, is aimed at preventing chemical accidents, such as the explosion at a fertilizer plant in West, Texas on April 17, 2013. EPA and other federal agencies are required under this executive order to consider how to enhance safety and security through the modernization of policies and regulations.

The Risk Management Modernization Rule

In July 2014, EPA announced its intent to pursue revisions to the current RMP rule and began collecting information related to its proposed Risk Management Modernization Rule. Among the proposals for which EPA sought information was changing the current requirement that facilities audit their RMP compliance to a requirement that third parties perform the audit.

Additionally, EPA has proposed broadening the scope of the investigations that facilities are required to conduct following a “catastrophic release” or an event that “could reasonably have resulted in a catastrophic release.” In a recent presentation to a Small Business Advocacy Review Panel Outreach Meeting, EPA indicated that the revised rule may loosen the definition of “catastrophic release” to mean any reportable accident (as defined in 40 CFR § 68.42(a)) under the RMP rule. Incident investigations would need to include a root cause investigation—meaning that the facility would have to identify the fundamental reasons why an incident occurred and the correctable failures in its management systems. This investigation would need to be completed within 12 months and be memorialized in a report that is retained for at least five years. Obviously, such a requirement would have implications beyond safety, potentially affecting insurance eligibility and tort exposure.

While most facilities already must conduct a process hazard analysis (PHA) every five years, EPA has indicated that under the new proposed regulations, paper, chemical, petroleum, and coal product manufacturing facilities will be required to produce PHAs that are more comprehensive and include consideration of:

- inherently safer technology or design (risk management measures that minimize the use of regulated substances, substitute less hazardous substances, moderate the use of regulated substances, or simplify covered processes in order to make accidental releases less likely, or the impacts of such releases less severe);
- passive measures (risk management measures that use design features that reduce the hazard without human, mechanical, or other energy input);
- active measures (risk management measures or engineering controls that rely on mechanical or other energy input to detect and respond to process deviations); and
- procedural measures (risk management measures such as policies, operating procedures, training, administrative controls, and emergency response actions to prevent or minimize incidents).

Although each facility’s PHA will be required to analyze the feasibility of inherently safer technologies and designs that it considers, EPA has indicated that it also is considering whether facilities should be required to implement certain prescribed technologies.

The proposed rule also will require additional steps to further mitigate the risks posted by chemical management, including:

- documentation of annual coordination with local emergency responders, as well as disclosure of hazardous substances maintained at the facility;
- periodic meetings with the general public;
- public distribution of their RMP (notwithstanding any security concerns from such distribution); and
- annual emergency response exercises, as well as full field exercises every five years.

A Look Ahead

Risk management and accident prevention likely will continue to take up a significant part of EPA's agenda in 2016 and beyond. The proposed rule detailing EPA's changes to the Risk Management Program is expected as early as next month, coming on the heels of its new enforcement priorities for 2017-2019. Regardless of the specific provisions in EPA's proposed rule, there is little doubt that the Agency will subject companies handling chemicals to significantly increased enforcement scrutiny, and it will look to significantly broaden the already expansive exercise of its authority under Clean Air Act Section 112(r). EPA's actions could also have a multiplier effect in state enforcement programs implementing 112(r)'s requirements. The results for many regulated facilities could range from enhanced risk management planning requirements, to required implementation of expensive technologies that EPA believes necessary to reduce risk, to more severe penalties for accidental releases that EPA claims could have been mitigated or prevented through risk management planning. This type of "Monday-morning quarterbacking" mentality in the regulations could make it ever more challenging for companies to document the accidental nature of releases. To be in the best possible position to prevent and respond to such releases under the proposed regulations, and to mitigate enforcement risk, companies would be wise to promptly engage technical staff and counsel to evaluate and update the chemical safety programs at each of their facilities.

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If you have any questions about the content of this alert please contact the Pillsbury attorney with whom you regularly work, or the author below.

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