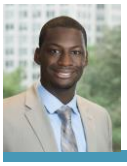
BEVERIDGE & DIAMOND PC
bdlaw.com

News Alert
March 14, 2016

Authors

Stephen M. Richmond
Principal
(781) 416-5710
srichmond@bdlaw.com

Madeleine B. Kadas
Principal
(512) 391-8010
mkadas@bdlaw.com



Julius M. Redd
Associate
(202) 789-6069
jredd@bdlaw.com

ABOUT B&D

Beveridge & Diamond's 100 lawyers in seven U.S. offices focus on environmental and natural resource law, litigation and dispute resolution. We help clients around the world resolve critical environmental and sustainability issues, relating to their products and facilities.

Learn more at www.bdlaw.com.

EPA Issues Proposal to Amend RMP Rule

The U.S. Environmental Protection Agency (EPA) has released a long awaited proposal to update the Accidental Release Prevention rules at 40 C.F.R. Part 68, which implement the Clean Air Act Section 112(r)(7) risk management planning (RMP) program. the draft rule can be accessed here. There are currently 12,500 facilities in the United States that are subject to the RMP program, and a substantial number of those will be affected by this proposed amendment package.

Simultaneously, EPA has also updated its National Enforcement Initiatives by adding a new three year initiative focused on reducing the risks of accidental releases at industrial and chemical facilities. EPA uses the National Enforcement Initiatives list to identify areas of priority enforcement for the agency. A brief EPA statement on the new initiative can be accessed here.

The combination of the rule amendment proposal, which seeks in many places to tighten requirements and add more enforcement triggers, and the addition of an RMP focus to EPA's national enforcement priorities list, signals that EPA expects to exert a much more aggressive regulatory and enforcement footprint in this area in the years to come.

Background on Rulemaking

The proposed amendments, many of which were previewed in a July 31, 2014 Request for Information (RFI), are subject to a 60 day public comment period which expires on May 13, 2016.[1] EPA has scheduled a public hearing on March 29, 2016, to hear oral comments. Approximately 100,00 people submitted expressions of interest and comments on the prior EPA RFI on this topic, and we anticipate that there will also be high interest in this proposed rule package, especially given the several controversial proposals it contains.

The genesis of this rulemaking effort was the West, Texas ammonium nitrate warehouse explosion and fire in April 2013. Shortly after that incident, which involved a warehouse facility that existed in large part outside of the Part 68 framework, President Obama issued Executive Order 13650 which provided that "the Administrator of EPA and the Secretary of Labor shall review the chemical

[1] EPA has also indicated that, pursuant to the Paperwork Reduction Act, comments on the information collection provisions in the proposed rule are best assured of consideration if the Office of Management and Budget receives comments by April 13, 2016

hazards covered by the Risk Management Program (RMP) and the Process Safety Management Standard (PSM) and determine if the RMP or PSM can and should be expanded to address additional regulated substances and types of hazards."

The President's Executive Order recognized a need for close coordination between EPA and the Department of Labor (DOL) in the conduct of this review, due to the nearly identical provisions of large sections of the RMP rule and the OSHA process safety management rule. The order required the Administrator of EPA and the Secretary of Labor to coordinate their activities by developing a plan to expand, implement, and enforce the RMP and PSM in a manner that addresses the additional regulated substances and hazards that resulted from their review.

Coordination between the two agencies has been a little difficult to discern. DOL responded rapidly to the Executive Order, issuing its own Request for Information in December 2013. EPA followed more than eight months later with its separate RFI (linked above), asking for information on many of the same topics that DOL had inquired about, plus several others. With this new proposal to amend the RMP rule, EPA has now stepped out in front of DOL.

The RMP rule currently divides affected sources into three program categories (Programs 1, 2 and 3), and the most highly regulated category is Program 3, which includes facilities subject to the OSHA process safety management rule and specific types of facilities by NAICS code (but not including warehouse facilities). Given that the genesis of this rulemaking was the West, Texas warehouse explosion, it is particularly noteworthy that EPA is not proposing at this time to add ammonium nitrate to the list of chemicals regulated under the RMP program, nor does the agency seek to increase the stringency of the RMP requirements that apply to warehouses, which are not generally covered by the Program 3 rules. In fact, EPA's RMP guidance for warehouse facilities still contains the following statement:

> If you can qualify a process for Program 1, it is in your best interests to do so, even if the process is already subject to OSHA PSM. For Program 1 processes, the implementing agency will inspect and enforce only on compliance with the minimal Program 1 requirements.

EPA has indicated that it is waiting to see if DOL decides to add ammonium nitrate to the chemicals regulated under the OSHA PSM rule before making a decision on whether to seek to regulate this substance under RMP.

Given the substantial number of comments on several issues that were raised in the EPA RFI and that are now proposed for rulemaking, it seems apparent that some of EPA's proposed changes will encounter significant opposition. It will also be necessary to wait until DOL acts on its PSM evaluation to determine whether the agencies coordinate their responses as contemplated by Executive Order 13650, or if they instead choose to pursue separate paths.

Proposed Amendments

1. Prevention Program Requirements

EPA proposes significant programmatic changes intended to strengthen incident prevention measures in four key areas: (1) incident investigation and accident history requirements; (2) third party compliance audits; (3) safer technology and alternatives analyses; and (4) stationary source location and emergency shutdown procedures.

A. Incident Investigation and Accident History Requirements

Under existing RMP rules, owners or operators of facilities with processes subject to Programs 2 and 3 must investigate all incidents that result in, or could reasonably have resulted in, a "catastrophic release." 40 C.F.R. §§ 68.60; 68.81. The current rules define a "catastrophic release" as "a major uncontrolled emission, fire, or explosion, involving one or more regulated substances, that presents an imminent and substantial endangerment to public health and the environment." *Id.* § 68.3.

Definition of Catastrophic Release. Citing to the vagueness of the definition of "catastrophic release," EPA proposes to substitute the term "imminent and substantial endangerment" with the phrase "impacts that resulted in deaths, injuries or significant property damage on-site, or known offsite deaths, injuries, evacuations, sheltering in place, property damage, or environmental damage. 40 C.F.R. § 68 (proposed rule July 31, 2014) (to be codified at 40 C.F.R. § 68.3), Preamble at

13647. The new definition is also intended to clarify that incident investigations must be conducted for catastrophic releases that could have offsite consequences and is not limited to onsite incidents. *Id.* at 13646. The new definition would be identical to the definition for reportable "accidental releases" under 40 C.F.R. § 68.42.

Root Cause Analysis. EPA proposes to significantly expand the scope of incident investigations to include a required root cause analysis. Current rules only require "factors that contributed to the incident" be determined. 40 C.F.R. §§ 68.60; 68.81. Pointing to a number of widely publicized release incidents that have occurred since 1997, EPA posits that if root cause analyses had been conducted and response actions undertaken, those incidents might have been prevented (*see* Preamble, at 13648-49). This would constitute a substantial change to the RMP requirements that exist today.

To address these issues, EPA proposes to require all incident investigations at Program 2 and 3 facilities to include an analysis of "immediate and contributory causes, either direct or indirect, and root causes." In turn, "root cause" would be defined as "a fundamental, underlying, system-related reason why an incident occurred that identifies a correctable failure(s) in management systems." Under the proposed rules, incident investigation reports would be required to include both a root cause analysis determined through a "recognized method" and a schedule for addressing recommendations resulting from the investigation. EPA specifically requests comments on: the proposed amendments of the incident investigation to require root cause analyses, the proposed definitions of root cause and catastrophic release, and whether a root cause analysis is appropriate for every RMP reportable accident and near miss (*see* Preamble at 13650).[2]

Near Misses. EPA declines to define the term "near misses." Although the Agency suggests that the lack of a "near miss" definition may contribute to confusion regarding what potential incidents will need to be investigated, EPA ultimately concludes that it is too difficult to prescribe the various types of near misses that may occur in the broad range of RMP-regulated sectors (*see* Preamble at 13652). EPA states that it will instead "rely on facility owners or operators to decide which [potential] incidents to investigate, based on the seriousness of the incident, the process(es) involved, and the specific conditions and circumstances involved." *Id.* EPA seeks specific comments regarding whether the guidance provided on near misses is sufficient or additional clarification is appropriate.

Timing of Investigations. EPA proposes to require facility owners and operators to complete incident investigations within 12 months of either a catastrophic release or a near miss and would allow extensions of time for complex incidents, if approved by the Agency in writing (*see* Preamble at 13653). EPA seeks comments on several alternatives, including whether to require the investigation to be completed prior to restart of the affected process. Finally, EPA seeks comments regarding whether the RMP investigation timeframes are appropriate and would conflict with other root cause analyses requirements in NSPS and MACT rules. *Id.*

Accident History Reporting. EPA also proposes to require that the results of root cause analyses be included in RMP accident history reports as a way to disseminate lessons learned to the public and industry. *Id.* (to be codified at 40 C.F.R. § 68.42), Preamble at 13703 and 13653. EPA proposes that root causes be reported as "categories" (e.g., Procedures; Training; Communications; etc.) set forth in the amended proposed Rule Section 68.42 and reflected in revisions to the RMP on-line reporting system. *Id.* The deadline for reporting the root cause component of the accident history report would be twelve months, to coincide with the proposed timing of the incident investigation timeframe. *Id.* at 13711.

Alternatives. EPA considered limiting the proposed expanded incident reporting requirements to Program 3 facilities (and not Program 2 facilities) and seeks comment on this approach. *Id.* Preamble at 13654. EPA notes that accidents happen at a higher frequency in Program 3 facilities, but then points out that OSHA's revisions to the PSM program to eliminate the exclusion for retail facilities shifts most Program 2 facilities into Program 3. *Id.* EPA seeks comments on its decision to apply new incident reporting requirements to both Program 2 and 3 facilities and whether other alternatives should be

[2] Other changes to the incident investigation provisions include proposals to require that: (1) findings be considered during hazardous reviews and PHAs (process hazard analyses); (2) investigations apply to processes that are destroyed or decommissioned as a result of an incident; and (3) investigations must be conducted prior to any deregistration of a process or stationary source that is no longer subject to the RMP. 40 C.F.R. §§ 68.60, 68.81, and 68.190 (*see* Preamble at 13705, 13707, 13711).

considered. *Id.* Preamble at 13654.

B. Third Party Compliance Audits

In what would constitute another major change to the current RMP program, EPA proposes to require that Program 2 and 3 facilities conduct independent third-party compliance audits in two situations: (1) when there has been an accidental release meeting the five-year accident history criteria or (2) when an implementing agency determines an audit is needed based on non-compliance, including when a previous third-party audit fails to meet the competency, independence or impartiality criteria (*see* Preamble at 13658 and 13706). In support of its proposal, EPA suggests that self-auditing and agency inspections can be insufficient to determine full compliance with RMP requirements. *(see* Preamble at 13654). EPA also points to precedent in requiring third-party audits in enforcement settlement agreements.

Third Party Audit. A third-party auditor would be defined to include "an entity that is competent, independent and impartial" based on a host of criteria governing the audit and the auditor qualifications identified in Proposed Rule Sections 68.3, 68.59 and 68.80. EPA seeks comments on the sufficiency of these criteria to ensure auditor independence and impartiality as well as whether the proposed rules should address situations in which an independent third-party auditor meeting all of the criteria could not be identified (*see* Preamble at 13660-62).

Third-Party Audit Process. In what may prove to be among the more controversial proposals in this rulemaking, EPA proposes to require that audit reports and documentation be submitted to the implementing agency and be available to the public, certifications by a senior company official of "appropriate responses" to all audit findings, and submittal of audit and corrective action documentation to the governing board of the owner or operator. These provisions are essentially unparalleled in current environmental regulations and must be read in the context of EPA's simultaneous announcement of its national enforcement initiative to target accidental releases at industrial and chemical facilities.

A third-party audit and audit report would be required to be completed within a year of a triggering incident, or within three years of completing the previous compliance audit, whichever is sooner. Within 90 days of receipt of the final audit report, the owner or operator of the facility would be required to: develop an appropriate response to the audit findings; develop a schedule to address the findings; and provide a certification by a senior corporate officer or official acknowledging the report findings and ensuring implementation. Copies of these documents would be required to be submitted to the Board of the company for which the audit was conducted. New record-keeping requirements are also proposed that would require maintaining copies of all draft third-party reports, in addition to the audit report and attendant documents. The proposed rule seeks to specify that the audit report may not be privileged as attorney-client communication or work product.

Alternatives. In addition to comments on the proposed provisions, EPA seeks comments on several potential alternatives, including: (1) whether to require third-party audits for Program 3 facilities every three years, as a matter of course; (2) whether to require third-party audits for both Program 2 and Program 3 facilities every three years, as a matter of course; (3) whether to limit third-party audits only to facilities that have "major accidents" with offsite impacts (*see* Preamble at 13658).

C. Safer Technology and Alternatives Analysis

In what will likely be the most controversial portion of its proposal, EPA seeks to require analysis of safer technology and alternatives ("STAA") as part of the process hazard analysis ("PHA") that is currently conducted every five years under the RMP rule by Program 3 facilities. EPA proposes that this STAA analysis would apply only to a small subset of Program 3 facilities.

An STAA typically refers to an analysis that considers a hierarchy of controls to reduce process hazards, consisting of inherent, passive, active, and procedural controls. It can be applied during initial system design, and then later during the active life of a process. As envisioned by EPA, the analysis would focus on minimization, substitution, moderation, and simplification. The analysis generally has a preference for passive strategies, such as process and equipment design, over

active strategies, such as engineering controls (automatic digital or mechanical system controls). At the bottom of the hierarchy are procedures or administrative options, which are controls requiring human action. STAA can also include layers of protection analysis, which involves the use of multiple controls to reduce process risks.

As EPA notes in its preamble discussion (*see* Preamble at 13663-64), and as several parties pointed out in comments on EPA's RFI, the RMP rules already contain elements of STAA and incorporate the STAA hierarchy of controls concept. Examples include the requirement for Program 3 facilities to conduct PHAs every five years, and to comply with recognized and generally accepted good engineering practices ("RAGAGEP"). EPA further acknowledges that there is no consensus on what role, if any, the government should play in implementing safer technology mandates, and in its comments EPA notes the broad differences in opinion on this issue among the many different parties that commented on the RFI.

Balancing the different comments, EPA proposes a solution that will likely satisfy none of the RFI commenters: an incremental step that would apply a partial STAA mandate to Program 3 facilities in three sectors: petroleum and coal products manufacturing, chemical manufacturing, and paper manufacturing, but with no follow up implementation requirement. EPA suggests changing the current PHA process for these facilities to add an STAA analysis component comprised of a hierarchical examination including consideration of inherently safer technology ("IST") or inherently safer design ("ISD"), passive measures, active measures, and procedural measures, in conjunction with an evaluation of the feasibility of implementing any IST or ISD considered (*see* Preamble at 13667-68). EPA specifically states that it is not now proposing a requirement that any facility actually implement IST or ISD, although EPA does request comment on whether it should revise the rule to require implementation.

D. Stationary Source Location and Emergency Shutdown

EPA examines two unique risk issues associated with stationary sources, location and emergency shutdown capabilities. After reviewing location and concluding generally that the location of a source in relation to the public or environmental receptors can exacerbate an accidental release, the agency decided not to propose rule changes. Instead the EPA proposes to allow industry to refer to best practices guidance on siting considerations (*see* Preamble at 13670). EPA also chose not to address emergency shut-down procedures, noting that these are already addressed within hazard review and PHA requirements. *Id.* at 13671. EPA seeks comments on its decision not to address these issues.

2. Emergency Response Preparedness Requirements

Under Subpart E of the RMP rule, facilities with Program 2 or 3 processes are subject to emergency response provisions. The rules currently require owners or operators of such facilities to coordinate with local response authorities and, in some cases, develop an emergency response program in accordance with § 68.95. During facility inspections, EPA has found that some facilities are not complying with Subpart E, including not properly coordinating response with local authorities (*see* Preamble at 13671-72).

Proposed Revisions to Emergency Response Coordination Requirements. EPA is proposing substantial changes to Subpart E, including substantial increases in facility responsibilities in geographic areas where emergency response capabilities are not sufficiently robust. This will likely be of concern to stakeholders, given the general belief that the current rule already appropriately identifies emergency response obligations.

EPA proposes creating a new requirement that the owner or operator of a Program 2 or 3 facility must coordinate with local response authorities to ensure that appropriate resources and capabilities are in place to respond to an accidental release of a regulated substance (*see* Preamble at 13673). The coordination would be required annually, would need to be documented, and would specify who would respond should an incident occur and what the response would be. In the event the annual coordination activities indicated that local emergency response capabilities are not adequate, or in the event an LEPC or Fire Department requested it, EPA proposes that the facility would be required to develop its own emergency response program (*see* Preamble at 13672). EPA states in support of this proposal that the ultimate burden of providing for an appropriate response to releases of regulated substances from a source should rest with the owner or

operator, and for the first time that we are aware of, EPA ties this burden to the general duty clause of the Clean Air Act, Section 112(r)(1). The regulated community will likely consider this a very controversial proposal.

Notably, EPA also considers an alternative approach that would require owners and operators of Program 2 and Program 3 facilities to comply with the full emergency response program requirements of § 68.95 (*see* Preamble at 13674). Under this approach, all RMP facilities would still be required to perform the proposed annual local coordination and to document activities described above. EPA is soliciting comments to this alternative approach and its feasibility.

Proposed Emergency Response Exercise Requirements. EPA's proposed § 68.96 would require all Program 2 and Program 3 facilities to perform annual emergency notification system exercises, and to conduct both field and tabletop exercises (*see* Preamble at 13675-76). Under § 68.96(b)(1), the owner or operator would be required to conduct a field exercise involving the simulated accidental release of a regulated substance at least once every five years and within one year of any accidental release, and a tabletop exercise annually except in a year when a field exercise was conducted. The field exercise would include notification procedures, mobilization of facility emergency response personnel, coordination with local emergency responders, equipment deployment, and other appropriate actions. The tabletop exercise would be a discussion-based exercise without the actual deployment of response equipment. EPA is also proposing to require the owner or operator to evaluate each exercise and prepare a written report within 90 days.

3. Information Availability Requirements

Proposed Public Disclosure Requirements to LEPCs or Emergency Response Officials. EPA proposes to add new information reporting requirements to Subpart H that apply to all RMP facilities. Under paragraph § 68.205(b), EPA would require the owner or operator to develop and submit to LEPCs or local emergency response officials a variety of summary information, which must them be updated annually. Some of this information has never been required to be included in public reports, including summaries of accident history information, compliance audit reports, incident investigation reports, information related to inherently safer technologies, and information related to emergency response exercises (*see* Preamble at 13679-81). EPA proposes to offer limited confidential business information (CBI) protection as provided in its CBI rule at 40 CFR Part 2 and in the current RMP rule at § 68.151, and seeks comment on this approach.

Additionally, EPA is proposing for the first time to require a facility that has an accidental release that meets the criteria to qualify for listing on the facility's 5-year accident history to hold a public meeting within 30 days of the incident (*see* Preamble at 13681-82). EPA also suggests that where a facility has not completed its accident investigation by the time of the meeting, it should consider holding a second meeting once the investigation is completed. EPA is requesting comment on whether there should be a public meeting requirement, and there will certainly be a lot of interest in this concept.

Finally, in what will undoubtedly prove to be a controversial idea, EPA is also considering whether to develop a "score card" or a "grade" system for RMP facilities. EPA suggests that the score or grade would be made available to LEPCs and the public to demonstrate a facility's compliance with the RMP rule (*see* Preamble at 13682). EPA seeks comments on this proposal, including how it would be developed.

4. Risk Management Plan Streamlining, Clarifications, and RMP Rule Technical Corrections

EPA also proposes a number of purported streamlining and clarification changes to the existing rule with an expressed intent to improve upon the existing RMP requirements. Among these are proposals to delete certain data elements that must currently be reported in RMP submittals, revise other data elements that are currently reported, and add new data elements corresponding to its proposed new program requirements.

Although EPA characterizes many of these changes as streamlining, where EPA is proposing to eliminate data elements, it is generally doing so in connection with a proposal to replace the deleted information with new broader attestation requirements. Thus, where it is proposing to delete a requirement to report a specific fact (i.e., the date of the last RMP audit), EPA is proposing to replace that data element with a requirement to provide a broad attestation of compliance (i.e.,

an attestation that the facility has complied with all auditing requirements). For Program 3 facilities, EPA is proposing twelve such substitutions. Those in the regulated community know that completing attestations is substantially more time intensive than reporting on specific facts, and therefore it is difficult to understand how EPA has characterized its efforts here as streamlining.

For additional information on the RMP rule proposal, please contact Stephen Richmond, Madeleine Kadas or Julius Redd.