

Client Alert

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Proposed Changes to EPA's Risk Management Program Will Significantly Impact Regulated Facilities

The United States Environmental Protection Agency ("EPA") has proposed major changes to the accident prevention, emergency response and public availability of chemical hazard information requirements under its Risk Management Program ("RMP") regulations. The RMP is implemented by EPA under Section 112(r) of the Clean Air Act. EPA's proposals are in response to recent incidents at chemical facilities, including the explosion of the West Fertilizer facility in West, Texas, on April 17, 2013, and as a result of Executive Order 13650 — *Improving Chemical Facility Safety and Security* — which created an intra-agency work group to recommend improvements to existing risk management practices.

Comments are due on the proposed rule on or before **May 13, 2016**.

Proposed Changes Applicable to "Responding Facilities"

If finalized, the proposed rule would impact the approximately 12,500 facilities that have current RMPs on file with EPA and are either required or have elected to develop an emergency response program. Among other things, the proposed rule would impose the following new requirements:

- Facilities must conduct a root cause analysis as part of an incident investigation of a catastrophic release or a "near-miss" (i.e., an incident that could have reasonably resulted in a catastrophic release);
- Facilities must contract with an independent third party to perform a compliance audit after the facility: (i) has a reportable release; or (ii) if an implementing agency finds significant non-compliance in implementation of RMP requirements. Facilities must respond to any deficiencies identified by the audit within 90 days and provide a schedule to resolve all deficiencies;
- 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 and evaluate the feasibility of any inherently safer technology identified, as part of their process hazard analysis;
- Facilities must coordinate with local emergency response agencies at least once a year to ensure that resources and capabilities are in place to respond to an accidental release of a regulated substance;
- Facilities must conduct notification exercises annually to ensure that their emergency contact information is accurate and complete;
- All "responding facilities" under the RMP emergency response program must conduct a full field exercise at least once every five years and one tabletop exercise annually in the other years;

- All “responding facilities” with an RMP reportable accident must conduct a full field exercise within a year of any accident;
- All facilities must provide certain basic information to the public through a facility website or, if no website exists, at public libraries, government offices or other appropriate means for the particular location and facility;
- Upon request, certain facilities must provide the Local Emergency Planning Committee (“LEPC”) or other local emergency response agencies with summaries related to:
 - activities on compliance audits;
 - emergency response exercises;
 - accident history and investigation reports (all facilities that have had RMP reportable accidents); and
 - any inherently safer technologies implemented at facilities under NAICS Codes 322, 324 and 325.
- All facilities must hold a public meeting for the local community within 30 days after any RMP-reportable accident.

Proposed Changes to the Regulation of “Non-Responding” Facilities

Under existing EPA regulations, “non-responding” facilities are those where the facility relies upon local agencies to respond to an accidental release. A facility-specific response plan is not required where the relevant stationary source has been included in the community emergency response plan developed under Section 303 of EPCRA (for sources with regulated toxic substances) or has coordinated response actions with the local fire department (for sources with only regulated flammable substances, and without regulated toxic substances).

Under EPA’s proposal, current “non-responding” facilities would face new requirements, including:

- Additional coordination with local responders to confirm that resources and capabilities are available to respond to an accidental release;
- Development of an emergency response program if:
 - Capabilities of local responders are deemed inadequate; and/or
 - Otherwise requested by the LEPC.

Proposed Compliance Dates

EPA proposes different compliance dates for the various provisions of the proposed rule. Unless otherwise specified, facilities would have four years after the effective date of the final rule to comply with the new requirements. For emergency response coordination activities, however, facilities would be required to comply within one year of the effective date of the rule. Facilities would have five years after the effective date of the final rule to correct or resubmit RMPs to reflect new and revised data elements.

Current “non-responding” facilities that must develop emergency response programs would have up to three years following an LEPC written request.

Implications

EPA's proposals have broad implications. Facilities, and their RMPs, are likely to face increased public scrutiny and involvement. Demands on facility staff are likely to increase as well, with additional training programs and an increase in information and documentation requests. Furthermore, EPA estimates that the costs of complying with the proposed rule may be up to \$161.0 million for regulated entities.

EPA's assessment is that the majority of RMP-regulated facilities currently claim to be non-responding facilities (i.e., do not have an emergency response program and instead rely upon local responders). Many existing "non-responding" facilities are expected to become "responding" facilities by virtue of the proposed local coordination requirements or receiving a written request from their LEPC. EPA estimates that compliance costs for the new "responding" facilities will be approximately \$35.6 million.

Given the broad implications of EPA's proposals, including significant costs, regulated facilities are encouraged to review the proposed amendments and remain abreast of any developments.

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