What’s On The Horizon: Possible Changes to OSHA’s PSM and EPA’s RMP Requirements

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What Brought About Potential Changes To PSM/RMP Regulations?

- Ongoing Chemical Facility NEP
- April 2013 West, Texas explosion
- President Obama’s August 1, 2013 Executive Order 13650: Improving Chemical Facility Safety and Security
- January 2014 West Virginia Spill at Freedom Industries
What Did The President’s Executive Order Require?

- Coordination among OSHA, EPA, DHS (Working Group)
- Improve coordination among state and local partners
- Enhance federal agency and information sharing
- Modernize policies, regulations and standards
- Work with shareholders to identify best practices
What Regulatory Changes Did The Executive Order Request?

- Regulatory and legislative proposal for safe storage and handling of ammonia nitrate
- Plan to expand OSHA PSM and EPA RMP regulations to cover more chemicals
- Changes to the PSM and RMP regulations
- Requests for information to modernize PSM and RMP regulations
Timeline for Changes to PSM and RMP – How Did We Get Here?

- January 2014 – OSHA issues RFI on PSM changes
- March 2014 – Comments due on OSHA’s RFI
- May 2014 – Working Group issues interim report
- July 2014 – EPA issues RFI on PSM changes
- October 2014 – Comments due on EPA’s RFI
- June 2015 – Working Group issues fact sheet
- June 2015 – Present - Small Business Regulatory Flexible Review (SBRFR) reviews proposed changes to PSM and RMP
June 2015 – OSHA and EPA issue safety alert on safer technology (IST) and alternatives

June 2015 – OSHA issues RAGAGEP enforcement memo for equipment and MI

June 2015 – OSHA issues Appendix A Chemical Enforcement memo

February 2016 – Chemical Facility OSHA NEP continues
February 2016 – EPA announces two new enforcement priorities for FY 2017-2019 to reduce the risk of accidental chemical releases from industrial and chemical facilities through

- “innovative accident prevention measures”
- pending RMP revision

February 25, 2016 – EPA’s proposed RMP Rule issued

March 14, 2016 – EPA’s proposed RMP Rule Published in Federal Register

Rulemaking begins on EPA’s proposed new RMP Rule
The New RMP Rule – EPA’s Revisions to RMP Program

- February 25, 2016 – EPA proposes revisions to RMP program
  - To improve chemical process safety – prevention programs
  - To assist local authorities in planning for and responding to accidents – coordination with first responders
  - To improve public awareness of chemical hazards at regulated sources - communication

- March 14, 2016 – EPA’s proposed rule published in Federal Register

- March 29, 2016 – EPA to hold public hearing

- March 14 – May 13, 2016 – Stakeholder comments

- May 2016 – Onward - Rulemaking process
What Are The Regulatory Changes EPA is Proposing in its New RMP Rule?
1. New RMP Rule - Enhanced Investigation Requirements (40 CFR § 68.60 and 68.81)

Currently:

- Must investigate each incident which resulted in, or could have resulted in, a “catastrophic release”

- Catastrophic release is “a major uncontrolled emission, fire or explosion, involving one or more regulated substances that presents an imminent and substantial endangerment to public health and environment”

- Incident investigation only needs to consider factors that contributed to the incident

- There is no set time period to complete incident investigation
New RMP Rule - Enhanced Investigation Requirements (40 CFR § 68.60) (cont.)

Proposed Rule:

- “Catastrophic release” is now defined as a major uncontrolled emission, fire or explosion involving one or more regulated substances “that results in deaths, injuries, or significant property damage on-site, or known off site deaths, injuries, evacuations, sheltering in place, property damage, or environmental damage.” . . . does not define, but calls out “near misses” specifically

- Investigation must include a root cause analysis under a recognized method and a schedule to address recommendations

- Root cause is defined as a “fundamental, underlying system related to the reason why an incident occurred that identifies a correctible failure(s) in management systems.”

- Investigation report must be completed within 12 months

- Results of root cause analysis must be included in 5-year RMP accident history report
2. New RMP Rule - Third-Party Compliance Audits Required Under Certain Circumstances (40 CFR §§ 68.59, 68.79, and 68.80)

- Currently: Not required (just compliance audit every 3 years/PHA every 5 years)

- Proposed rule: Third-party audits are required:
  - When there has been an accidental release meeting the 5-year accident history criteria (resulted in death, injury or significant property damage on site . . .)
  - When implementing agency (Ohio EPA) determines an audit is needed based on non-compliance or a high risk of incident

- Third-party auditor must be “competent, independent, and impartial”

- Audit and report must be completed within 12 months of triggering incident, or within 3 years of the previous compliance audit, whichever is sooner

- Within 90 days of report, there must be company certification of appropriate response to audit findings and submittal of corrective action document to facility company’s Board

- Audit reports must be submitted to implementing agency (Ohio EPA) and available to the public
3. Change to new RMP Rule - Safer Technology and Alternatives Analysis for Certain Industries (40 CFR § 68.67)

Currently: No specific requirement (just conduct PHA and consider RAGAGEP)

Proposed Rule:

- STAA must be analyzed as part of the PHA process every 5 years
- Only applies to Program 3 facilities in three sectors: petroleum and coal products manufacturing, chemical manufacturing, and paper manufacturing
- Consider in the following order of preference: IST or ISD, passive measures (for process and equipment design), active measures (engineering controls), procedural measures (training, etc.)
- Major inherently safer strategies are: (i) minimization (i.e., using smaller quantities of hazardous substances); (ii) substitution (i.e., replacing a material with a less hazardous substance); (iii) moderation (i.e., using less hazardous conditions or less hazardous form, or designing facilities that minimize the impact of a release of hazardous material or energy); (iv) simplification (designing facilities to eliminate unnecessary complexity and make operating errors less likely)
- Facility must evaluate feasibility of implementing any IST or ISD
- There is no requirement to implement IST or ISD, but IST or ISD must be considered and consideration documented, including feasibility
4. New RMP Rule - Improve Emergency Response Program Coordination With Local Responders (40 CFR §§ 68.90, 68.93, and 68.95)

Currently: Facilities must coordinate with local responders, and in some cases, develop an emergency response program to address how the facility will respond to an accident and release

Except where facility is a non-responding facility (i.e., community plan addresses toxic substances at the facility or the facility has coordinated response action for flammable substances with the local fire department).

Proposed Rule:

Facility must coordinate annually with local responders and document specifying who should respond and what the response should be.

If annual coordination indicates local emergency response capabilities are inadequate or LEPC or fire department request, facility must develop its own emergency response program.
5. New RMP Rule - Conduct Emergency Response Exercises (40 CFR § 68.96)

Currently: No requirements

Proposed Rule:

- Facility must perform emergency notification system exercise annually and document results.
- Facility must conduct field exercises involving a simulated accidental release of a regulated substance at least once every 5 years and within 1 year of any accidental release.
- Field exercise must include notification procedures, mobilization of facility emergency response personnel, coordination with local emergency responders, equipment deployment, and other appropriate actions.
- Facility must conduct “tabletop exercises” annually, except in year when field exercise was conducted: this includes discussion of exercises without deployment of response equipment.
- Facility must prepare a written report within 90 days of exercise and make it available to public.
6. New RMP Rule - Increase Public Disclosure to LEPC or Other Emergency Response Officials (40 CFR § 68.205)

Currently: Facility must provide RMP to the LEPC and emergency responders

Proposed Rule: Facility must develop (and update annually) and provide the following information to LEPC and emergency responders on request:

- Information on regulated substances
- Accident history information
- Compliance audit report
- Incident investigation reports
- IST and ISD considerations as per PHA
- Emergency response exercises
7. Changes to RMP Rule - Increase Public Access to Information (40 CFR § 68.210)

- Now: Facility must make RMP available to the public

- Proposed Rule:
  - Give public greater access to additional information regarding chemical hazards, including:
    - Names of regulated substance held above TQs
    - SDSs
    - Accident history
    - Facility’s emergency response compliance
    - Facility’s emergency response exercises
    - LEPC contact information

- Any facility with an accidental release meeting 5-year accident criteria must hold public meeting within 30 days
What Are The Regulatory Changes OSHA Is Contemplating for PSM?
1. Possible PSM Change - Clarify the Exemption for Atmospheric Storage Tanks

- Now: Under the *Meer* case, there is no PSM coverage for flammables stored in atmospheric tanks or even if tanks connected to a process.

- OSHA Position: Apply the PSM standard to all stored flammables when connected to, or in close proximity to, a process.

- EPA Position: Expand worst-case release scenarios to aggregate the quantity of covered chemicals in all vessels, pipes or containers in a process, facility, or warehouse (as opposed to just considering the greatest quantity in a single vessel, pipe, etc.)
2. Possible PSM Change - Expand Coverage and Requirements for Reactivity Hazards

- Now: Regs only apply to certain chemicals at certain quantities and certain flammable gases or liquids >10,000 lbs., as per Appendix A list of 137 chemicals and EPA list of 77 toxic substances/63 flammable substances above threshold values

- OSHA/EPA Position: Add reactivity hazards, much like New Jersey Toxic Catastrophe Prevention Act
3. Possible PSM Change - Update the List of Hazardous Chemicals

- Now: List of chemicals – unchanged for over 20 years
- OSHA/EPA Position: Add other chemicals to the list and create a procedure to update the list as necessary
4. Possible PSM Change - Require Evaluation of Updates to RAGAGEP

- Now: Employers must document only that equipment complies with RAGAGEP for purposes of initial compliance and are not required to evaluate updates to RAGAGEP

- OSHA/EPA Position: Require facilities to evaluate and ensure compliance with the most up-to-date RAGAGEP
5. Possible PSM Change - Define RAGAGEP

- Now: RAGAGEP is not defined and is subject to differing interpretations
- OSHA/EPA Position: Provide a more explicit definition of RAGAGEP, perhaps similar to Center for Chemical Process Safety’s definition (i.e., focusing on established codes, standards, published technical reports, recommended practices, etc.)
- See OSHA’s June 2015 RAGAGEP enforcement memo for equipment and MI
6. Possible PSM Change - Cover MI of Safety Critical Equipment

© Now: MI is limited to certain equipment (i.e., pressure vessels, storage tanks, piping systems, relief and vent systems and devices, emergency shutdown system, controls, and pumps), but not safety-critical equipment specifically; citations were under general duty clause

© OSHA/EPA Position: Require an MI program for safety critical equipment
7. Possible PSM Change - Require Employers to Manage Organizational Changes

- Now: MOC is required for equipment, technology, procedures, materials and processing conditions if not replaced in kind, but not for organizational changes.

- OSHA/EPA Position: Require MOC for organizational changes (i.e., changes in management structure, budget cuts, or personnel changes).
8. Possible PSM Change – Require Coordination of Emergency Planning With Local Emergency Response Authorities

- Now: OSHA’s Emergency Action Plan, HAZWOPER, and OSHA standards apply
- OSHA Position: Add a specific standard with specific requirements for facilities to coordinate emergency response plans with authorities
- EPA Position: This is already required, but EPA also wants better coordination of drills and emergency response plans . . . see EPA’s proposed RMP Rule
9. Possible PSM Change - Require Third-Party Compliance Audits

© Now: Employers must audit their PSM program for compliance (self-audits are allowed) every three years by at least one person knowledgeable in the process

© OSHA Position: Require a qualified third-party audit instead and increase frequency of audits and response time for action items

© EPA Position: Its proposed Rule limits third-party audits to incident investigations or when requested by implementing agency (Ohio EPA)
10. Possible PSM Change - Change Enforcement Policy for Highly Hazardous Chemicals in Appendix A Without Specific Concentrations

- Now: Appendix A only lists concentrations for 11 of 137 listed chemicals
- OSHA Position: Spell out specific concentrations for all chemicals
- EPA Position: Concurs
- See OSHA’s June 2015 Appendix A Chemical Enforcement Memo
Industry Criticisms of Proposed Changes

- Nothing wrong with current regulations
- Problem is with uneven or little enforcement and limited resources
- Focus on improving existing programs
- Costly/hurts small businesses
- Requirements in Rules unclear
- Authorities/responders often don’t cooperate
- Public doesn’t understand technical information
- Disclosure of confidential business information
The Big Question is When Will These Changes Be Effective?

5. Can EPA’s new RMP Rule be finalized before end of Obama administration?

5. Will there be a new OSHA PSM rule before end of Obama administration?
Will OSHA Act on Remaining Issues in Common With EPA?

- Exemption for atmospheric storage tanks
- Expand reactivity hazards for chemicals
- Update list of hazardous chemicals
- Require evaluation of updates to RAGAGEP
- Clarify definition of RAGAGEP
- Expand MI to include safety critical equipment
- Require management of organizational change
- Require independent third party audits
- Expand coordination of emergency response plans with authorities
Conclusion: So Get To Work!

- Review lists of available questions and most often cited regulations to ensure compliance
- Get your PSM/RMP-related documents ready

- Verify implementation of PSM/RMP elements (i.e., is actual program consistent with written program?)
- Consider independent gap analysis with special focus on operating procedures, mechanical integrity, process hazard analysis, process safety information, and management of change
  - Perform gap analysis so it is protected by legal privilege
  - Develop plan to close (AND THEN PROMPTLY CLOSE) identified gaps
  - If gap closure will take time – IMPLEMENT INTERIM MEASURES to mitigate hazard
- AT A MINIMUM – Review status of recommendations from previous compliance audits, PHAs, incident investigations
Thank You.