Chemical Industry Update

October 2014

Potential Changes to OSHA’s PSM Standard & EPA’s RMP Regulation

In January 2014, we reported on OSHA’s request for information (RFI) seeking comments from stakeholders on several regulatory changes the agency seemed poised to adopt. In its May 2014 progress report, the Working Group appointed under Executive Order 13650 identified several priorities to modernize OSHA’s process safety management (PSM) standard and EPA’s risk management plan (RMP) regulations. On July 31, 2014, EPA went one step further by issuing its own RFI seeking comments on proposed changes to its RMP regulation, which in many respects parallels OSHA’s PSM standard. Although EPA is considering many of the same regulatory changes as OSHA, EPA proposes several other changes that are unique to its own regulations. Now that the Working Group and EPA have spoken, several themes have emerged since our last report that signal what a proposed rule eventually may look like.

Common Topics Addressed by OSHA & EPA

1. **Update the list of regulated substances.** OSHA and EPA propose updating the list of covered substances and threshold quantities and addressing reactivity hazards. The Working Group concurred with this approach in its May 2014 progress report by establishing a one-year timeline to propose changes.

2. **Define and require evaluations of updates to RAGAGEP.** OSHA and EPA intend to provide a definition for Recognized and Generally Accepted Good Engineering Practices (RAGAGEP). They want to specify how companies can ensure and document compliance with RAGAGEP. Proposed changes seem imminent.

3. **Extend mechanical integrity requirements to cover safety critical equipment.** Both agencies seem to favor adopting mechanical integrity procedures for safety critical equipment. If this proposal is adopted, safety critical equipment no longer will be subject to arbitrary, subjective and inconsistent citations under the general duty clause. This proposed change seems likely.

4. **Require owners and operators to manage organizational change.** OSHA and EPA seem inclined to extend management of change requirements to modifications in management structure due to budget cuts or key personnel changes. However, procedures for managing organizational change are not suitable for all types and sizes of businesses. Those procedures also may not provide additional benefits and may unduly burden smaller businesses. Because it is difficult to reach a consensus on an issue where one size may not fit all, this proposed change seems unlikely.

5. **Require third-party compliance audits.** Both OSHA and EPA requested comment on whether to require compliance audits be conducted by third parties in lieu of internal auditors. This proposed change does not seem to have gained much support. No evidence has been presented to show that internal compliance audits are inadequate, and requiring third-party audits also could have a disparate impact on small businesses.

6. **Promote inherently safer technology and alternatives/consider a safety case regulatory model.** EPA requested information on approaches to promote risk reduction through inherently safer technology and alternatives. It also is seeking comment on whether it should adopt a safety case approach requiring companies to demonstrate that they have reduced risks to a level “as low as reasonably practicable.” EPA stops short of suggesting that it will mandate safer technology and alternatives. In its May 2014 progress report,
the Working Group indicated that it is not ready to adopt an inherently safer technology standard, instead proposing that over the next year it will issue alerts on safer technology and alternatives and best practices. The Working Group also plans to develop voluntary guidance through the end of 2016 to make companies aware of safer technology, processes and alternative solutions to reduce overall risk at their facilities. EPA’s proposal is inherently subjective, economically burdensome and at odds with how risk is typically assessed under the law. The proposal also would require a complete overhaul of how OSHA and EPA have addressed process safety historically. It probably will be a few years before there is any mandate adopting inherently safer technology and alternatives or a safety case approach.

7. **Coordinate with local responders on emergency drills and compliance with emergency response programs.** OSHA requested information on whether it should revise the PSM standard to require that facilities coordinate their emergency plans with local response authorities. EPA, whose regulations already require coordination of emergency plans with authorities, goes a step further in its RFI by requesting information on whether companies should conduct emergency drills and exercises with local authorities as part of their emergency response programs. EPA also wants to learn what steps are necessary to better coordinate emergency response plans with local authorities. Because improved coordination with local authorities on emergency response is a critical goal of the Executive Order, extensive and specific changes are likely to be implemented.

**Unique Topics Addressed by EPA**

In its RFI, EPA also proposed other changes that are unique to its own RMP regulation. Whether these proposed changes gain traction remains to be seen.

1. **Automated detection and monitoring for releases of regulated substances.** EPA requested comment on whether automated detection and monitoring systems should be required and whether performance measures should be mandated for facilities already using these systems. Although facilities are currently required to address engineering controls in their process hazard analyses (PHAs), there is no requirement for any specific controls to be used. Because most facilities already use relief devices and other controls, this proposed change may not be adopted.

2. **Additional stationary source location requirements.** Although PHAs must consider facility siting, EPA requested comment specifically on whether buffers or setback zone requirements should be imposed outside facilities. EPA also is seeking comment on criteria for siting of occupants inside facilities. This proposed change likely will be met with criticism. Facility siting is already covered in OSHA’s PSM standard and there is little evidence to suggest that the PHA process is inadequate. Specific buffer or setback zone requirements also would have a tremendous economic impact on most facilities.

3. **Expanded incident investigation/accident history requirements to include near misses, root cause analyses and specific deadlines.** Companies are required under PSM and RMP to investigate incidents that resulted in, or “could reasonably have resulted in, a catastrophic release of a hazardous chemical.” Although OSHA’s RFI did not raise this issue, EPA asked in its RFI whether the RMP regulation should be amended to require companies to report near misses in addition to reporting their five-year history of accidents from covered processes resulting in death, injury or significant property damage. EPA also asked whether companies should be required to conduct a root cause investigation, complete their investigations by certain deadlines and share information with the public about incidents and near misses. This proposed change undoubtedly will be resisted. Stakeholders probably will disagree on what qualifies as a “near miss incident” and how to define the term. They also will point out that the PSM standard and RMP regulation already require near misses to be investigated (i.e., incidents that “could reasonably have resulted in a catastrophic release”). Further, there is no evidence that current incident investigation procedures are inadequate, or that the public will benefit if near misses at specific sites with unique operations are reported.

4. **Worst-case release scenario to consider small vessels stored together.** EPA requires companies to determine and report their worst-case release quantity based upon the greatest quantity held in a single vessel or pipe. EPA requested comment on whether the RMP regulation should be revised to aggregate the quantity of covered chemicals in all vessels, pipes or containers in a process, facility or
warehouse that are stored together or adjacent to one another, because it views this as more representative of a true worst-case scenario. Expanding the definition of worst-case scenario would significantly impact companies that deliberately keep quantities of covered chemicals below threshold levels to avoid falling within RMP requirements.

5. **Public disclosure of information to promote regulatory compliance and improved community understanding of chemical risks.** EPA also is seeking comment on whether it can improve regulatory compliance and community understanding of chemical risks by requiring companies to disclose to the public certain information about the hazards posed by their operations. For example, should a company be required to disclose on its website its chemical hazard information, compliance audits, PHAs and incident investigations? This proposal risks disclosing confidential business information about each company’s processes and risk tolerance. Disclosure also may be of limited value because the public may not fully understand the technical issues addressed and the context under which risks were evaluated.

EPA has given stakeholders until October 29, 2014 to provide comments on these and several other proposed regulatory changes. Rulemaking likely would not commence until the summer of 2015, and new regulations would not become effective until 2016 at the earliest. Nevertheless, with potential regulatory changes on the horizon and heightened scrutiny by OSHA and EPA, now more than ever, companies must renew their commitment to PSM and RMP compliance.

**FOR MORE INFORMATION**

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