

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2014

PHILADELPHIA, THURSDAY, SEPTEMBER 11, 2014

VOL 250 • NO. 51

An **ALM** Publication

## ENVIRONMENTAL LAW

# Federal Agencies Shine Spotlight on Chemical Facilities

BY CAROL F. MCCABE

*Special to the Legal*

President Obama's August 2013 Executive Order 13650, "Improving Chemical Facility Safety and Security," set in motion a series of events that has the potential to greatly impact the management of chemicals at a broad range of facilities. The executive order, issued in response to recent tragic and deadly chemical accidents such as the April 2013 explosion at a West, Texas, fertilizer facility, directs federal agencies to evaluate changes to existing chemical safety and security regulations. The executive order established the Chemical Facility Safety and Security Working Group, which is co-chaired by the secretary of the Department of Homeland Security (DHS), the secretary of the Department of Labor, and the administrator of the Environmental Protection Agency (EPA) or their delegates. The working group has been hard at work over the past year, and is offering opportunities for input at all levels of government, communities and industrial facilities as it reevaluates all aspects of chemical management practices and response activities.

In a May 2014 status report titled "Actions to Improve Chemical Facility Safety and Security: A Shared Commitment," the working group discusses its progress, which has been organized around five thematic areas: (1) strengthening community planning and preparedness; (2) enhancing federal operational coordination; (3) improving data



**CAROL F. MCCABE** is a partner at the environmental, energy and land use law and litigation firm of Manko, Gold, Katcher & Fox in Bala Cynwyd, Pa. She can be reached at 484-430-2304 or [cmccabe@mankogold.com](mailto:cmccabe@mankogold.com).

management; (4) modernizing policies and regulations; and (5) incorporating stakeholder feedback and developing best practices. While acknowledging that the U.S. chemical industry manufactures more than 70,000 unique products, employs nearly one million people and generates \$700 billion in revenue per year, the status report signals a very firm commitment to addressing risks that have become all too apparent through industrial accidents involving a range of chemicals. The efforts of the working group will create a new landscape for managing chemical safety. Most telling perhaps is the manner in which the working group has gone about its work, with a high level of coordination among federal agencies, including the Department of Labor, EPA, DHS, the Department of Justice, the Department of Agriculture, the Bureau of Alcohol, Tobacco, Firearms and Explosives and the Department of Transportation. Likewise, the working group has fostered a high level of engagement among stakeholders, including state and local regulators, chemical manufacturers, industrial facilities, first responders, environmental

and community groups, and citizens. According to the status report, nearly 1,800 people have participated in listening sessions and webinars to date. Through this coordination and outreach, the working group aims to strengthen state and local capabilities, develop tools and resources for emergency responders, enhance community awareness, and foster information sharing related to chemical accident preparedness and response.

From a substantive standpoint, the working group is contemplating regulatory changes to the Occupational Safety and Health Administration's process safety management regulations, DHS's Chemical Facility Anti-Terrorism Standards and the EPA's Clean Air Act Chemical Accident Prevention requirements. Potential regulatory changes being explored as a result of the working group's efforts under the executive order promise to expand the reach of both agency and community influence over chemical decisions that were once made primarily at the facility level. This is apparent in the EPA's recent request for information (RFI) under the Chemical Accident Prevention Program requirements promulgated at 40 C.F.R. Part 68, commonly known as the Risk Management Program (RMP) requirements. The RMP requirements direct stationary source facilities that use or handle certain listed flammable and toxic substances to develop a risk management program that includes, among other requirements, process hazard analyses (PHAs) that consider worst-case release scenarios, prevention measures,

and emergency response measures. RMP requirements are closely related to Process Safety Management requirements, which were subject to a separate but similar RFI issued in December 2013. The RMP RFI, which was published in the Federal Register on July 31 (79 Fed. Reg. 44604), is intended to gather the information needed to “modernize” the RMP regulations. As noted by the working group, chemical accidents at RMP-covered facilities have been reduced significantly since implementation of the RMP program; however, deadly chemical accidents continue to occur at facilities both regulated and not regulated by RMP. Thus, while the RFI is not a commitment to rulemaking, it signals the working group’s determination that improvement is needed.

As an initial matter, the EPA’s RFI seeks input on whether the list of chemicals covered by the RMP program should be expanded and whether the threshold quantities for applicability should be lowered. Ammonium nitrate figures prominently in the EPA’s discussion of chemicals that may be newly subject to regulation, along with high and low explosives and reactive chemicals. The EPA is also considering additional RMP program elements that would expand facilities’ obligations and accountability for chemical safety. The EPA seeks comments on the establishment of measures and metrics that would serve as indicators of effectiveness and performance of risk management efforts, ongoing “due diligence” programs, and organizational learning via process safety competency requirements. Additional elements being considered are stop work authority, which would authorize any personnel who witness imminent risk or dangerous activity to stop work, and ultimate work authority, which would identify a person with ultimate authority for facility operational safety and decision-making at any given time. The EPA is considering whether to require the use of third-party

contractors to conduct periodic RMP audits, and whether facilities should be required to address auditors’ findings pursuant to specified timeframes.

---

*The EPA is considering whether to require the use of third-party contractors to conduct periodic RMP audits, and whether facilities should be required to address auditors’ findings pursuant to specified timeframes.*

---

While current RMP requirements are based on procedures for self-examination and site-specific risk identification and planning, the EPA is now considering RMP elements that would prescribe certain types of equipment and safety measures for all covered facilities. For example, the EPA seeks comment on whether RMP facilities should be required to install automatic detection and monitoring systems. Another consideration is a requirement to install emergency shutdown systems, which the EPA defines as including redundant power supplies and/or emergency controls such as flares, vents or scrubbers. In some ways, the RFI may signal a significant departure from existing RMP procedures, instead exploring the implementation of safety philosophies like inherently safer technology—which would require the elimination or reduction of identified hazards based on the principles of minimization, substitution, moderation and simplification. Another model discussed in the RFI is the “safety case” model, pursuant to which industrial facilities would be required to demonstrate that risks have been reduced to a level that is “as low as reasonably practicable.”

The RFI also reflects the working

group’s effort to ensure that community stakeholders have access to information and opportunity for input into chemical safety considerations. One notable discussion in the RFI relates to facility siting; the EPA explains that siting of both the facility itself and equipment within the facility may affect the potential impact of an accidental release. The EPA requests comments on whether facility siting requirements may be established under the RMP regulations, including stationary source buffer and setback zones for the location of facilities within the community, and safety criteria for siting of occupancies (such as offices, control room, cafeteria) within a facility. Environmentally over-burdened communities will be considered in this context, with the EPA soliciting comment on whether chronic burdens should be considered, or only these burdens related to accidental releases. Beyond siting criteria, the RFI asks for comments on how communities might play a greater role in risk management determinations at the facility level, such as through required disclosure to the public of safer technologies analyses or PHA processes. The EPA requests comment on all of these issues, and more, by Oct. 29.

In all, the efforts of the working group, including the EPA’s RFI for the RMP program, offers an opportunity for local responders, regulators and community members to achieve greater coordination and input into facility risk-management planning. For affected facilities, the RFI is a call to attention, and advance notice that chemical accident prevention and safety planning activities continue to be in the spotlight, and may be subject to substantial change in the coming months. •

---

Reprinted with permission from the September 11, 2014 edition of THE LEGAL INTELLIGENCER © 2014 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 212-457-9411, reprints@alm.com or visit [www.almreprints.com](http://www.almreprints.com). # 201-09-14-05