

What To Expect From CAA Risk Management Program Delay

By **Peter Modlin and Courtney Chin**

Law360, New York (June 5, 2017, 11:36 AM EDT) -- On April 3, 2017, the U.S. Environmental Protection Agency published a proposed rule to delay the effective date of the Clean Air Act's risk management program (RMP) rule amendments by 20 months, until Feb. 19, 2019. This proposed rule came after the receipt of three petitions from trade associations, industry and 11 states, requesting reconsideration for a stay of the RMP rule amendments.

These petitions generally argue that the amendments impose significant burdens without any proven safety benefit. The EPA held a public hearing on the proposed delay on April 19, 2017, and solicited written comments by May 19, 2017. In light of the current administration's stated priorities, it seems likely that the EPA will finalize the proposed delay and also seriously entertain revisions to the substance of the amendments.

Brief Overview of the RMP Rule and Amendments

The RMP rule, Section 112(r)(7) of the Clean Air Act, requires that owners and operators of facilities that manufacture, use, store or otherwise handle certain hazardous substances to develop a risk management program that includes hazard assessment, prevention and emergency response measures. The RMP rule creates different classification levels for processes in which regulated substances are used, based on location of the facility, the amount and type of the chemicals used in the process, and other factors. Depending on the classification, a facility may be subject to more stringent requirements similar to the Occupational Safety and Health Administration's process safety management regulations.

On April 17, 2013, a fertilizer plant in West Texas containing significant amounts of regulated substances, including ammonium nitrate, exploded and resulted in widespread property damage and several casualties. This deadly incident, thought to be an accident at the time, prompted then-President Barack Obama to issue Executive Order 13650, "Improving Chemical Safety and Security," signed on Aug. 1, 2013. The order directed the EPA to improve coordination with state, local and tribal partners, as



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well as enhance federal coordination regarding chemical facility safety and security. The order's overall goal was to "enhance safety and security in chemical facilities by modernizing key policies, regulations, and standards" through "improvements to existing risk management practices through agency programs, private sector initiatives, Government guidance, outreach, standards, and regulations."

Pursuant to the order, the EPA published a proposed rule amending the RMP regulations on March 14, 2016, which were issued in their final form during the last week of the Obama administration on Jan. 13, 2017. The amendments changed a number of RMP program elements and made significant additions, including new requirements for compliance audits, the process hazard analysis process, and emergency response coordination. For example, the amendments required a root cause analysis as part of an incident investigation, required certain compliance audits to be conducted by third parties, and required an analysis of safer technologies and alternatives and their practicability as part of a process hazard analysis.

As written, the amendments were to become effective on March 14, 2017, with compliance required within four years. The EPA estimated that the final rule would cost industry at least \$131.2 million annually, and would affect some 12,500 facilities.

Industry Group Petitions

After the change in administrations, various trade associations, industry groups and states petitioned the EPA to reconsider the amendments and stay their effective date. The petitions, submitted on Feb. 28, March 13 and March 14, were submitted by various trade associations, the Chemical Safety Advocacy Group, and a group of several states (Louisiana, Arizona, Arkansas, Florida, Kansas, Texas, Oklahoma, South Carolina, Wisconsin, West Virginia, and Kentucky).

The petitions generally argued that the RMP rule amendments, despite their intent, actually undermined safety and created significant security risks through the new disclosure requirements, as well as imposed serious burdens on industry, all the while doing nothing to prevent incidents like the West Texas explosion. In addition to raising substantive objections to the amendments, the petitions raised several procedural arguments, including that the EPA's cost-benefit analysis relied on inaccurate cost estimates; that the rulemaking precluded effective notice and comment due to an insufficient comment period along with late or nonpublic filing of supporting data and documentation for certain new requirements.

Furthermore, the petitions noted the discovery, just days before the close of the notice and comment period, that the West Texas incident was an intentional criminal act of arson and not an accidental explosion. In light of this new information, the petitions argued that the EPA should reconsider the focus of the amendments and reopen the notice and comment period.

EPA's Delay and Comments

On March 13, EPA Administrator Scott Pruitt announced that the effective date of the amendments

would be delayed for 90 days, to June 19, 2017, and simultaneously granted the requests for reconsideration of the amendments. In a letter responding to the first petition filed, Pruitt noted that the petition raised at least one objection that was impracticable to raise during the comment and was of central relevance to the outcome of the rule, as required by the EPA to stay the effective date. Pruitt specifically noted that the timing of the finding that the West Texas incident was not an accident, just before the close of the comment period, rendered it difficult for comments to meaningfully address how this news affects the amendments. The rule memorializing the delay was published on March 16.

On April 3, the EPA published a proposed rule that would further delay the effective date of the amendments for 20 months, until Feb. 19, 2019. In the proposed rule, the EPA again found that at least one petition had raised an objection to a rule that was impracticable to raise during the comment period and was of central relevance to the outcome of the rule. It announced that it would hold a public hearing on April 19, 2017, and accept written comments until May 19, 2017.

The EPA's docket reflects 44,327 comments submitted, resulting in approximately 329 unique submissions taking into consideration mass mailings and other consolidations. Not surprisingly, the comments represent a wide range of opinions. Many of the same groups that petitioned the EPA for the stay submitted comments raising the same issues presented in their petitions. On the other end of the spectrum, some advocacy groups argued that the amendments do not do enough to prevent chemical accidents and should be revised to include more robust safety measures. But the amendments are not without supporters; a large number of private citizens writing individually or as part of mass mailings have urged the EPA to finalize the new rule, stating that such amendments are necessary for community safety.

Separate from the EPA's rulemaking, Congress also considered rescinding the RMP amendments under the Congressional Review Act. However, although joint resolutions to this effect were introduced in the House and Senate, no further action was taken, and the 60-day deadline under the Congressional Review Act has now passed.

Implications of the Delay and Looking Forward

Given the current administration's focus on relieving regulatory burdens on industry, it seems likely that the EPA will not only finalize the proposed delay, but also consider significant revisions to amendments. Because the executive order leading to the amendments was focused on preventing accidents like the West Texas incident, the finding that it resulted from arson has provided petitioners and the EPA with a rationale for reconsideration of the amendments.

Although it is difficult to predict at this time what specific amendments might be revised, based on the comments to date, the public disclosure requirement is a likely candidate. Perhaps the most controversial aspect of the amendments, this provision requires public disclosure of various information including regulated substances contained at the facility, safety data sheets, any history of accidents, as well as the facility's emergency response measures. Critics claim that such public disclosure creates serious security concerns, as it releases sensitive information to potential terrorists or criminals looking

to create an intentional release of regulated substances, such as the alleged arsonist involved in the West Texas incident; proponents argue that this requirement increases public safety and accountability, and promotes coordination with local emergency response teams. Revised amendments might limit disclosure only to public officials with a need for the information, or eliminate it altogether.

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