

Technical Focus Group, Energy &  
Environmental Committee Meetings

**Arent Fox**

## The Legal Requirements in EPA's Draft RMP Rule and Industry's Concerns

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Presented by

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# EPA's RFI and SBREFA Process for the RMP Rule

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- The RFI considered 19 areas of potential RMP revisions
- EPA has started with six issues (first phase of revisions to RMP Rule). All were discussed in SBREFA process.
- The changes are listed in red on the next two slides.

# Draft RMP Rule

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➤ *Six high profile proposed changes:*

1. **Require Third-Party Compliance Audits**
2. **Incident Investigation and Accident History Requirements**
3. **Safer Technology and Alternatives Analysis**
4. **Compliance with Emergency Response Program Requirements in Coordination with Local Responders**
5. **Emergency Drills & Exercises**
6. **Information Sharing**

## Draft RMP Rule

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- *Three other significant proposed changes:*
  - Scope of compliance audits
  - Training for supervisors
  - Scope of PHA's

## Draft RMP Rule: Third-Party Compliance Audits

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- *Proposed revisions require facilities to conduct a third-party compliance audit following an RMP reportable accident:*
  - **Two triggers for Requiring a Third Party Audit**
    - An accidental release meeting the requirements of 68.42(a).
    - The Agency requires it on based on non-compliance with this subpart – a facility may appeal this within the Agency
  - **Accidental Release** is a release of a regulated substance from a covered process that “results in deaths, injuries, significant property damage on site or known offsite deaths, injuries, evacuations, sheltering in place or property damage or environmental damage.

# Draft RMP Rule: Third-Party Compliance Audits

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- **Third Party Audit** — Auditors Qualifications, Competence and Independence
- **Competent auditor**
  - Knowledgeable in RMP
  - Experience with process, facility and relevant RAGAGEP
  - Trained in auditing
  - Licensed P.E. is part of audit team
- **Defines independent auditor**
  - Benefit limited to audit fee
  - No prior work for audited company in last 3 years (except auditing)
  - No subsequent work for or employment with audited company for 3 years after audit
  - Summary – auditors may only audit. – “Audit firms with personnel who, before working for the firm, performed services for the owner or operator as an employee, contractor or consultant, meet the rule’s independence criteria when such personnel do not participate on, manage, or advise the audit teams.”

## **Draft RMP Rule: Third-Party Audit Report**

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- **Summary of the audit teams qualification**
- **Auditor's evaluation of each covered process**
- **Documentation of audit findings and deficiencies**
- **Summary of the owner's comments**
- **Summary of any changes made in any draft of the audit report**
- **Certification of independence, lack of conflicts of interest and accuracy of report**
- **Copy of third party audit submitted to Agency by auditor**

# Draft RMP Rule: Third-Party Audit Findings

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- **Schedule for Completing the Third-Party Audit**
  - **The audit and the audit report must be completed within 12 months of an accidental release or within 3 years of previous audit – which ever is sooner unless Agency grants an extension**



# Draft RMP Rule: Third-Party Audit Findings

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## ➤ Findings Response Report

- Within 90 days of receiving the report, the owner/operator shall determine an appropriate response to each finding and develop a schedule for addressing each deficiency and submit to the Agency a copy of the audit report, the response, the schedule and **a certification by a “senior corporate officer.”**
- The same documents have to be provided to the owner/operator’s audit committee for the Board of Directors or comparable committee.

## Draft RMP Rule: Third-Party Audit Findings

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- Record Retention for the owner/operator
  - Retain the two most recent third-party audit reports, response reports, documentation of corrective actions.
  - Copies of all draft third-party audit reports.
  - The audit report and related records shall not be privileged as attorney client privilege or work product.
  - **Significant Concern — EPA trying to eliminate claims of privilege. Drafts with all sorts of potential errors would be given to regulator and be subject to discovery in litigation.**

# Draft RMP Rule: Third-Party Audit Findings

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- **Record Retention and Submission Requirements for Auditor**
  - **The auditor shall submit the audit report to the agency at the same time as it provides it to the owner/operator.**
  - **Keep copies of audit reports and related records for 5 years.**

# Draft RMP Rule: Incident Investigations & Root Cause Analysis

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- **The owner/operator shall investigate each incident that resulted in a catastrophic release or could reasonably have resulted in a catastrophic release**
  - The investigating team shall consist of at least one person knowledgeable in the process and other persons with appropriate knowledge and experience to thoroughly investigate and analyze the incident.
  - A report will be prepared within 12 months of the incident unless the Agency grants an extension.

# Draft RMP Rule: Incident Investigations & Root Cause Analysis

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- The root cause incident report must include:
  1. Date, time and location of incident
  2. Date investigation began
  3. Description of incident in chronological order
  4. Name and amount of regulated substance released and duration of event
  5. Consequences of the incident—injuries, evacuations, sheltering place, impact to environment
  6. Emergency response actions
  7. **Factors that contributed-initiating, direct, indirect and root causes**
  8. Any recommendations and a schedule for addressing them

# Draft RMP Rule: Incident Investigations & Root Cause Analysis

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- **(Proposed)** “Root Cause” defined as a fundamental, underlying, system related reason why an incident occurred that identifies a correctible failure in management systems.
- “CCPS defines root causes as management system failures, such as faulty design or inadequate training that led to an unsafe act or condition resulting in an incident; underlying cause. If the root causes were removed, the particular incident would not have occurred.”
- TapRoot, which defines a root cause as “the most basic cause (or causes) that can *reasonably* be identified that management has control to *fix* and, when fixed, will prevent (or significantly reduce the likelihood or consequences of) the problem's recurrence.”

# Draft RMP Rule: Incident Investigations & Root Cause Analysis

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- **(Current)** Catastrophic Release means a major uncontrolled emission, fire, or explosion, involving one or more regulated substances that presents **imminent and substantial endangerment to public health and the environment.**
- **(Proposed)** Catastrophic Release means 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 offsite deaths, injuries, evacuations, sheltering in place, property damage, or environmental damage.

# Draft RMP Rule: Incident Investigations & Root Cause Analysis

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- Near miss will not be defined.
- “Because it is difficult to prescribe the various types of incidents that may occur in RMP-regulated sectors that should be considered near misses, and therefore be investigated, EPA is not proposing a regulatory definition.” (Page 47)
- “Examples of incidents that should be investigated include some process upsets, such as: excursions of process parameters beyond per-established critical control limits; activation of layers of protection such as relief valves, interlocks, rupture discs, blowdown systems, halon systems, vapor release alarms, and fixed vapor spray systems; and activation of emergency shutdowns.” (Page 46)



# Draft RMP Rule: Safer Alternatives Analysis

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- *Proposed Revisions require P3 facilities in NAICS codes 322 (pulp and paper), 324 (petroleum refineries), and 325 (chemical manufacturers) to:*
  - Applies to three industries
  - As part of PHA, analyze potential safer technologies and alternatives and the feasibility of implementation of any inherently safer technologies considered.
  - Owner would not be required to implement any prescribed technology.
  - “EPA is not proposing to require sources affected by this provisions to implement an evaluated IST or ISD.” (Page 98)

# Draft RMP Rule: Safer Alternatives Analysis

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- The PHA shall address ...“safer technology and alternative risk management measures applicable to eliminating or reducing risk for the process hazards in the following order of preference, inherently safer technology or design, passive measures, active measures, and procedural measures... a combination of risk management measures may be used to achieve the desired risk reduction.”
- Consider
  - Inherently safer design or technology
  - Passive measures
  - Active measures
  - Procedural measures

# SBREFA Process: Safer Alternatives

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- **Many Questions Raised:**
  - Risk v. Hazard
  - For whom
  - How to measure
- **Only one of these questions answered: risk**

# Draft RMP Rule: Safer Alternatives Analysis

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- ***Proposed Revisions require P3 facilities in NAICS codes 322 (pulp and paper), 324 (petroleum refineries), and 325 (chemical manufacturers) to:***
  - Inherently safer technology or design means risk management measures that minimize the use of regulated substances, substitute less hazardous substances, moderate the use of regulated substances, or simplify covered processes in order to make accidental releases less likely, or the impacts of such releases less severe.
    - Minimization
    - Substitution
    - Moderation
    - Simplification

## Draft RMP Rule: Safer Alternatives Analysis

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- Passive Measures means risk management measures that use design features that reduce the hazard without human, mechanical, or other energy input. Examples of passive measures include pressure vessel designs, dikes, berms, and blast walls.

# Draft RMP Rule: Safer Alternatives Analysis

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- Active Measures means risk management measures or engineering controls that rely on mechanical, or other energy input to detect and respond to process deviations. Examples of active measures include alarms, safety instrumented systems, and detection hardware (such as hydrocarbon sensors)
- Procedural Measures means risk management measures such as policies, operating procedures, training, administrative controls, and emergency response actions to prevent or minimize incidents.

# Draft RMP Rule: Safer Alternatives Analysis

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- The owner/operator shall determine the feasibility of the inherently safer technologies and designs considered.
- “Feasible” is defined as “capable of being successfully accomplished within a reasonable time, accounting for economic, environmental, legal, social, and technological factors. Environmental factors would include consideration of potential transferred risks for new risk reduction measures.”
- Feasibility defined
  - Reasonable time
  - Economic
  - Environmental
  - Social
  - Technological

# Draft RMP Rule: Emergency Response

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## ➤ Non-responding stationary source

- Coordination with local public responder to ensure adequate response
- Mechanisms for notification of emergency
- LEPC has not requested development of an emergency response plan

## ➤ Responding stationary source must develop an emergency response plan if

- The coordination with LEPC shows its response capabilities are inadequate or
- LEPC requests that the stationary source develop an emergency response plan



# Draft RMP Rule: Emergency Response-Local Coordination

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- **Owner/operator shall coordinate response needs with the emergency response organizations to ensure adequate resources and capabilities are in place**
- **Coordination must be done at least annual or frequently to address changes**
- **Owner/operator must document the coordination activities including names and contact info of participants, dates of activities**
- **With toxics, owner/operator must coordinate with LEPC and ensure stationary source is in community emergency response plan**
- **With flammables, owner/operator must coordinate with local fire department**
- **Owner/operator must review and update the emergency response plan annually**

# Draft RMP Rule: Emergency Response Exercises

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- **Notification-** annually, the owner/operator shall conduct an exercise making the appropriate notifications
- **Emergency response exercise program**
  - Field drill
  - Table Top Exercises
- **Owner/operator shall coordinate with the LEPC and invite them to participate in the exercises**

# Draft RMP Rule: Emergency Response Exercises

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- Full field drill of a simulated release every five years and within one year of any accidental release per 68.42(a).
- Notifications of agencies, responders, employees and public of accidental release.
- Evacuation, medical treatment, communications, response procedures and plans, personnel mobilization and equipment deployment.

# Draft RMP Rule: Emergency Response Exercises

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- **Tabletop exercise of a simulated release of a regulated substance shall include emergency response personnel, response contractors, and LEPC if appropriate**
- **Done every year except when a full field exercise is done**
- **Notifications of agencies, responders, employees and public**
- **Evacuation, medical treatment, communications, response procedures and plans, mobilization of personnel and deployment of equipment.**

# Draft RMP Rule: Summary of Emergency Response

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- **Notification — annually**
- **Emergency Response Exercise Program**
  - Field drill — every 5 years and within one year of an accidental release.
  - Table top exercises — years 1-4 unless field drill.

# Documentation of Emergency Response Exercises

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- **Within 90 days of each exercise, the owner/operator shall prepare an evaluation report.**
- **Report must include the exercise scenario, lessons learned, recommendations for improvement and revisions to program, and a schedule to address recommendations**

# Availability of Information to LEPC or Emergency Response Officials

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## ➤ Chemical hazard information

- Owner/operator shall develop summaries of chemical hazard information for all regulated processes and provide the information **upon request** to the LEPC or the response officials
- Summaries must be updated each year and CBI may be withheld from summaries

## Draft RMP Rule: Information Sharing

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- ***LEPCs and responders with summaries of:***
  - Chemical hazard information – names and quantities of Regulated Substances.
  - Incident investigation reports (with root cause findings)
  - Compliance audits with findings, responses, schedule
  - Five year accident history
  - Inherently safer technologies implemented or planned and the expected risk reduction
  - Emergency response exercises



# Availability of Information to the Public

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## ➤ Chemical Hazard information

- Owner/operator shall distribute chemical hazard information for all regulated processes to the public in an easily accessible manner such as a company website
- The required information includes the names of the regulated substances, SDS's, accident history info, summary of the emergency response program, summary of the emergency response exercises and contact info for LEPC
- Owner/operator shall submit and update annually

# Availability of Information to the Public

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## ➤ Public meetings

- Owner/operator shall hold a public meeting to provide information for an accidental release per 68.42(a) within 30 days of the incident
- The required information to be shared at the public meeting is date, time and duration of release, chemical released, estimate of quantity of release, weather conditions, on and off-site impacts, initiating event and contributing factors, and resulting changes
- CBI and security information may be withheld

# Draft RMP Rule: Other Changes Auditing Requirement

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- **(Current)** The owner or operator shall certify that they have evaluated compliance with the provisions of this subpart at least every three years to verify that procedures and practices developed under this subpart are adequate and are being followed.
- **(Proposed)** 68.79 “the owner or operator shall certify that they have evaluated compliance with the provisions of this subpart **for each covered process**, at least every three years to verify that the procedures and practices developed under **the rule** are adequate and are being followed.”

# Draft RMP Rule: Other Changes Auditing Requirement

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- Why add this phrase “for each covered process?”
- Why delete “under this subpart” and substitute “under the rule?”
- Enforcement issues in Region 5 issuing NOV’s for only auditing one process at multi-process facilities.

# DRAFT RMP Rule: Other Changes Training

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- **(Current Rule)** Operators of process receive initial training, refresher training, verification and documentation.
- **(Proposed)** The term employee also includes supervisors with process operational responsibilities.

# DRAFT RMP Rule: Other Changes PHA's

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- **(Current Rule)** “The PHA analysis shall address [7 factors]. . . .
  - 2) “The identification of any previous incident which had a likely potential for catastrophic consequences.”
- **(Proposed)** The findings from all incident investigations required under section 68.81, as well as any other potential failure scenarios.

# Provisions of Concern

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- **Audit Language — “each process”**
- **Training of supervisors with process operational responsibilities**
- **PHA’s examine findings from incidents and potential failure scenarios.**

# Provisions of Concern

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## ➤ Third Party Audits

- Trigger — Accidental Release
  - Too board
  - Duplicative of OSHA's reporting process
- Competence — Licensed PE
- Independence — alternatives
- Submissions to Agency and Board of Directors' Audit Committee
- No privilege for all drafts of third party audit
  - Denial of a Constitutional right of counsel
  - Preserves Errors/Confusion
  - Comparison/analysis of potential changes
  - Real Goal — EPA Enforcement



## Provisions of Concern (cont.)

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### ➤ EPA's Enforcement and Civil Litigation

- Auditor reports owner's comments and changes
- Auditor submits the report to EPA which includes: owner's comments and proposed changes
- Owner submits response report to EPA and Board
- Owner keeps all drafts
- Summary:
  - Auditor becomes the testifying expert
  - Records preserved all statements, errors, and drafts
  - Corporate knowledge; Board and certifications
  - Yates memo and individual accountability

## Provisions of Concern (cont.)

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### ➤ Incident/Root Cause Analysis

- Trigger — Accidental Release (death/injuries)
- Root Cause — is it defined correctly?
- Litigation with root cause as a management failure
- Near miss — can we define?

# Summary of Potential Regulatory Requirement for an Accidental Release

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## (Hypothetical: 1 Fatality)

### OSHA Requirements

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- Report within 8 hours
- Inspection occurs
- Prepare a PSM Incident Report

### EPA Proposed Requirements

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- **Third Party Audit**
  - **Root Cause Incident Report**
  - **Field Drill**
  - **Public Meeting**
  - **PHA Review of Findings**
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- **Plus EPA's Current Notifications and Inspection Requirements**

## Provisions of Concern (cont.)

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### ➤ Safer Alternative Analysis

- Limited to NAICS 322, 324, 325
- Does EPA's methodology suggest a problem?
  - Limited to risk.
  - Limited to process operation – not life cycle or project.
  - No discussion of method to measure risk or to whom.
  - Feasibility factors – vague and overly broad.

# Provisions of Concern (cont.)

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## ➤ Information Sharing

- Summary for LEPC and Emergency Responders
- General Public — information on website
- Public meetings within 30 days of accidental release

## Path Forward and Timeline

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- **Draft RMP Rule was published in Federal Register.**
- **Comments were due by Friday, May 13, 2016.**
- **Requests for a 30 day extension have been denied.**