GUIDA SLAVICH & FLORES, P.C.
The Environmental Law Firm℠

Not for the Squeamish or Faint of Heart!
Clean Air Act Section 112(r)
Chemical Accident Prevention

Presented at:

State Bar of Texas
31st Annual Texas Environmental Superconference
August 1-2, 2019
Austin, Texas

Jean M. Flores
Guida, Slavich & Flores, P.C.
5956 Sherry Lane, Suite 1000
Dallas, Texas 75225
(214) 692-0009
flores@gsfpc.com

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I.
Introduction

Over thirty years ago, in the wake of devastating chemical accidents in the United States and worldwide, Congress amended the federal Clean Air Act ("CAA") to create Section 112(r) - a chemical accident provision entitled "Prevention of Accidental Releases." In 1999, under Section 112(r)(7)[1] of that authority, the U.S. Environmental Protection Agency ("EPA") published a Risk Management Program ("RMP") Rule[2] and guidance for facilities that produce, handle, process, distribute, or store over a threshold quantity of a listed extremely hazardous substance. Significant amendments to the RMP Rule were promulgated by the Obama-era EPA. However, with the change in administrations, an odyssey of legal strategies began that affect the implementation of the new, more stringent RMP Rule requirements. This paper will:

1. First, bring the reader up to speed on the strange journey of the Section 112(r) RMP Rule before and during the current White House administration;

2. Second, discuss the challenge presented to regulated industries by the fluctuating reality of the RMP Rule; and

3. Third, for those still reading and interested, provide substantive discussion of the statutory and regulatory background of Section 112(r), including the "General Duty Clause," and EPA's guidance, including the applicable penalty policy.

As the title of this paper suggests, you might not be able to look away!

II.

[1] CAA Section 112(r)(3), 42 USC §7212(r)(7).

[2] 40 C.F.R. Part 68.

News

An explosion; an Obama Executive Order; EPA rulemaking activity; a new President; a White House memo; an EPA delay; a lawsuit and a pointed D.C. Circuit opinion and mandate; more EPA rulemaking activity. After plodding along, virtually unchanged for much of its existence, the last several years have seen a flurry of activity impacting, and relating to, the RMP Rule. Why?

A fascinating chronology of events sets the stage:

April 2013 In the small Texas town of West, an explosion, caused by a fire that ignited ammonium nitrate, killed fifteen (15) people, eleven (11) of them firefighters, and wounded two-hundred and twenty-six (226). The reported monetary damage, including homes that literally were flattened, exceeded $100 million. In the weeks and months that followed, the federal U.S. Chemical Safety Board concluded that the explosion was preventable and placed blame on, among others, government regulators.

August 1, 2013 President Obama signed Executive Order 13650 (the "EO") entitled "Improving Chemical Facility Safety and Security" as a direct result of the West, Texas explosion. This EO took direct aim at EPA's RMP Rule and required EPA to determine if additional chemicals should be covered. [3]

June 6, 2014 A consortium of federal agencies, including among others EPA, the Department of Homeland Security, and the Department of Labor (a/k/a the "Working Group"), issued a report to President Obama under the EO. The report, "Actions to Improve Chemical Facility Safety and Security – A Shared Commitment," provided a status report to the President on the actions that had been implemented under the EO. These actions included meetings with first responders, launching a regional pilot project to coordinate preparedness planning and response activities, updating EPA online substance registries, and a request for public input from the Occupational Safety and Health Administration ("OSHA") on its update of the agency's Process Safety Management ("PSM") standard.[4]

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[3] The EO also directed the federal government to (i) improve operational coordination with state and local partners, (ii) enhance federal agency coordination and information sharing, (iii) "modernize" policies, regulations and standards, and (iv) work with stakeholders to identify best practices. The EO is available at https://obamawhitehouse.archives.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security.

[4] Note that OSHA's PSM standard is the worker-safety analogue to EPA's RMP Rule. In the wake of the explosion, OSHA found 24 violations of its regulations and assessed a fine of $118,300.

July 31, 2014 EPA published a Request for Information ("RFI") seeking public comment on updating the RMP regulations.[5] EPA received over 100,000 public comments to the RFI. As a provocative footnote to the West, Texas incident, two days before the public comment period on the proposed rules closed, federal investigators from the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") announced that the West, Texas fires that sparked the explosion had been deliberately set in a criminal act. The rule-evaluation exercise undertaken by EPA under the EO was not premised upon trying to thwart intentional, criminal acts.

March 14, 2016 The Obama era EPA proposed significant revisions to the RMP regulations.[6]

January 13, 2017 The Final Rule revising the RMP Rule (the "Final Rule") was published with an effective date in March 2017. The Final Rule, which contained a series of staggered implementation deadlines, included some significant changes to the chemical accident prevention program requirements in several areas, including: (i) 3rd party compliance audits; (ii) incident investigations and root cause investigations for incidents and near misses; (iii) safer technology alternatives analysis for Program 3 facilities; (iv) increased coordination with local emergency response organizations; (v) emergency response exercises; and (vi) increased information sharing with LEPCs and the public.

January 20, 2017 12:00 pm EST, a new President took office. That same day, the administration issued a memorandum we'll call the "White House Memo."[7] The White House Memo temporarily postponed by 60 days the effective date of regulations – such as the Final Rule - published in the Federal Register that had not yet reached their effective date. The White House Memo based its authority on the obscure "Congressional Review Act" – used only 1 other time since 2001 – which allows Congress to pass disapproval resolutions, with simple majority votes in the House and Senate, to reverse discretionary rules promulgated within 60 legislative days of their actions. Using this authority, the White House stayed all rules enacted in the last days of the Obama administration.

January 26, 2017 EPA published notice of its intention to delay the effective date of the Final Rule.

March 16, 2017 EPA published a final rule delaying the effective date of the Final Rule to June 19, 2019.[8]

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[5] 79 Fed. Reg. 44,601 (July 31, 2014).
[6] 81 Fed. Reg. 13,638 (Mar. 14, 2016).

[7] https://www.whitehouse.gov/presidential-actions/memorandum-heads-executive-departments-agencies/.

[8] 82 Fed. Reg. 13,968 (Mar. 16, 2017).

June 14, 2017 EPA publishes notice that it will further delay the Final Rule by 20 more months to February 19, 2019.[9]

June 15, 2017 A coalition of community and environmental groups challenged the delay of the Final Rule in the D.C. Circuit.

May 30, 2018 EPA proposed rescinding significant portions of the Final Rule, and subsequently extended the comment period to August 23, 2018 (the "RMP Reconsideration Rule").[10] In this action, EPA proposed to rescind the Final Rule's amendments relating to, among other things: (i) safer technology and alternatives analyses; (ii) 3rd-party audits; (iii) incident investigations; and (iv) information availability. EPA also proposed modifying amendments in the Final Rule relating to local emergency coordination, emergency exercises, public meetings, and to change the compliance dates for these provisions. EPA stated that these changes to the Final Rule were needed to address, among other things: (i) potential security risks associated with new information disclosure requirements introduced in the Final Rule; (ii) the reasonableness of regulatory costs compared to benefits of the Final Rule; (iii) concerns about maintaining consistency with the OSHA PSM standard; (iv) any impacts of the finding by the ATF that the West, Texas incident was caused by arson.

August 17, 2018 The D.C. Circuit issued a blistering opinion vacating the 20-month delay on the effectiveness of the Final Rule.[11] Although the CAA allows for short delay of a rule when a reconsideration petition is received by EPA, the D.C. Circuit found that EPA's delay "makes a mockery of the statute" with a rule "calculated to enable non-compliance."

September 21, 2018 The D.C. Circuit issued a mandate placing its order eliminating the delay of the Final Rule into effect immediately.

December 3, 2018 EPA announced that the 2017 Final Rule – including its staggered implementation dates - was in effect (the "Effectiveness Notice")[12] as mandated by the D.C. Circuit.

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[9] 82 Fed. Reg. 27,133 (June 14, 2017).

[10] 83 Fed. Reg. 24,850 (May 30, 2018). *See also* EPA's *RMP Reconsideration Proposed Rule Fact Sheet* at: https://www.epa.gov/sites/production/files/2018-06/documents/revised_rmp_reconsideration_rule_factsheet_6-13-18.pdf.

[11] *Air Alliance Houston, et al. v EPA*, No. 17-1155 (D.C. Cir. 2018).

[12] 83 Fed. Reg. 62268 (Dec. 3, 2018).

III.
The Challenge for Regulated Entities

What does EPA's Effectiveness Notice action mean for the regulated community in the face of the phased-in implementation deadlines in the Final Rule? What is EPA's stance?

A. National Compliance Initiative

Every three years, EPA sets national compliance initiatives (formerly called national enforcement initiatives) ("NCIs") as a method of focusing, among other things, its enforcement priorities and resources. On July 7, 2019, EPA issued its NCIs for FY 2020-2023.[13] NCI number 6, "Reducing Risks of Accidental Releases at Industrial and Chemical Facilities," was continued from the prior NCI cycle. The FY 2020-2023 update provides the following explanation:

> OECA is selecting Reducing Risks of Accidental Releases at Industrial and Chemical Facilities as an NCI to continue in the next cycle. This NCI was introduced in the last cycle and the NCI Federal Register notice proposed to extend this NCI. We found that many regulated facilities are neither managing adequately the risks they pose nor ensuring the safety of their facilities to protect surrounding communities as required under CAA Section l l 2(r). This NCI will continue in FY 2020-2023. The EPA has found that many regulated facilities are neither managing adequately the risks they pose nor ensuring the safety of their facilities to protect surrounding communities as required under CAA § 112(r).

EPA's NCI states that increased compliance with Section 112(r) is a metric for whether this initiative is "successful."

B. The Effectiveness Notice

The Effectiveness Notice officially served as EPA's acknowledgment of the D.C. Circuit vacatur of agency's stay of the Final Rule. In the Effectiveness Notice, EPA called the rulemaking announcement a "ministerial act." As required by the D.C. Circuit, EPA adopted the Final Rule amendments into the RMP Rule regulations in 40 CFR Part 68. Due to the long delay in the effectiveness of the Final Rule, some of the new amendments to the 40 CFR Part 68 rules

[13] https://www.epa.gov/sites/production/files/2019-06/documents/2020-2023ncimemo.pdf. On June 11, 2019, EPA published its response to public comments on the NCIs: https://www.epa.gov/sites/production/files/2019-06/documents/nciresponsetocomment.pdf.

became effective immediately upon the December 3rd publication of the Effectiveness Notice. Other new provisions will become effective as time passes.

However, recall from the chronology above that EPA issued a Proposed Reconsideration Rule in May 2018 *that is still pending*. This pending rule proposed to rescind many of the RMP Rule requirements with future effective dates. This pending rule can still, and is expected to, be adopted. The effect of such adoption would be to remove from 40 CFR Part 68 most or all of the amendments that were made when EPA was forced by the D.C. Circuit to incorporate the Final Rule's amendments into 40 CFR Part 68. For now, this means there is no certainty that many of the Final Rule provision, in fact, will become effective. It is equally uncertain that the amended version of 40 CFR Part 68 – even as to those requirements that became effective on December 3rd - of 40 CFR Part 68 will remain in the current form. This means significant uncertainty for the regulated community when decisions must be made, and resources must be devoted to, 40 CFR Part 68 compliance.

C. EPA Compliance Information

Following the D.C. Circuit decision, EPA issued some compliance information in a document entitled "RMP Amendments Compliance Information" (the "RMP Compliance Information").[14] In this document, EPA notes that the compliance schedule in the Final Rule, now adopted by EPA pursuant to the D.C. Circuit mandate, does create current compliance obligations for some parts of the rule. The RMP Compliance Information then identifies the new amendments to 40 CFR Part 68 that have current compliance obligations, i.e. effective immediately when EPA complied with the D.C. Circuit mandate, and those for which compliance will be due in the future.

The list of requirements that have current compliance obligations is lengthy but, for the most part, underscores that the immediately effective rules primarily beef up existing rules – such as added contents of investigation reports - rather than create entire new obligations.

As to the new amendments with future compliance obligation (most of which are the provisions in the current administration's crosshairs) EPA identifies the following requirements that require compliance by March 15, 2021:

- Third-party audit provisions in in §§ 68.58(f), 68.58(g), 68.58(h), 68.59, 68.79(f), 68.79(g), 68.79(h), and 68.80.
- Incident investigation root cause analysis provisions in §§ 68.60(d)(7) and 68.81(d)(7).

[14] https://www.epa.gov/sites/production/files/2018-09/documents/rmp_emergency_coordination_minor_provisions_compliance_info_9-24-18_final.pdf

• Safer technology and alternatives analysis in § 68.67(c)(8).
• Emergency response exercise provisions in § 68.96.
• Providing chemical hazard information or community preparedness information to the public and conducting a public meeting 90 days after an RMP accident in § 68.210 (b) – (e).

EPA also notes that facilities are required to update their Risk Management Plans to comply with new or revised provisions by March 14, 2022.

EPA does not editorialize, or offer any comfort to facilities that would seek to delay implementation of any portion of the new Part 68 amendments. The RMP Compliance Information seems to be, facially, simply a list of the new Part 68 obligations and their respective compliance dates. However, looking more closely at the introductory paragraph to the document, and perhaps over-reading into EPA's statements, it appears possible that EPA's intended path is to rescind those requirements with future compliance dates, and potentially claw back those that already have become effective. Much of this is a matter of timing, with the potential for a new administration in 2020 creating the possibility for EPA's current path to evaporate.

IV.
Section 112(r): RMP Rule and General Duty Clause Applicability

Now that we have set the stage for the current regulatory status of the RMP Rule, we will look at the legal context for the CAA's Chemical Accident Prevent program arising from Section 112(r). Section 112(r) contains separate and distinct regulatory and statutory chemical accident programs.

1. Regulatory Program: Section 112(r)(7) directs EPA to develop a program designed to prevent accidental releases of substances that may cause death, injury, or serious adverse effects to human health or the environment. EPA's implementing regulations are the RMP Rule in 40 CFR Part 68 that is the subject of the preceding discussions.

2. Statutory Program. The statutory program appears in Section 112(r)(1)'s purpose statement and establishes a prescribed general duty for certain owners and operators of stationary sources (commonly referred to as the "General Duty Clause").

The applicability of these two distinct chemical accident programs under CAA Section 112(r) is discussed below.

A. Section 112(r)(7) - Part 68 Risk Management Program Rule

EPA's RMP Rule requires certain owners and operators of stationary sources to develop and submit to EPA a Risk Management Plan. The RMP Rule is are based largely upon existing industry codes and standards.

A stationary source will be subject to the RMP Rule if it manufactures, uses, stores, or otherwise handles more than a threshold quantity of a listed "regulated substance" in a covered "process."

- A "process" is defined by the RMP Rule as any activity involving a listed regulated substance. Such activities include, among other things, onsite movement, use, storage, manufacturing and handling.
- The list of "regulated substances" and their threshold quantities appear in four Tables at 40 CFR Section 68.130. By statute, in the development of the list of regulated substances, EPA was required to use, at a minimum, the list of extremely hazardous substances published under the Emergency Planning Community Right-to-Know Act ("EPCRA"). There are a few significant statutory exemptions from the list including pollutants for which a national primary ambient air quality standard has been established.[15]

The requirements applicable to a process that uses a regulated substance in excess of the threshold quantity are tailored depending upon the size of the process and the risks it poses. EPA has classified RMP processes into three Program Levels with Program Level 1 carrying the least stringent requirements. Briefly, the Program Levels are:

- Program Level 1 which applies to processes that would not affect the public in situations of a worst case release and with no accidents with specific offsite consequences in the past five years;
- Program Level 2 which is a default level for processes that are not eligible for Program 1 or subject to Program 3; and
- Program 3 which applies to processes that are not eligible for Program 1, and either are subject to OSHA's Process Safety Management standard[16] or fall into one of ten specified NAICS codes, including pulp mills, certain chemical manufacturers, and petroleum refineries.

[15] CAA Section 112(r)(3), 42 USC §7212(r)(3).

[16] 29 CFR §1910.119.

The Program Levels are applicable process-by-process so a single stationary source may have different requirements for different processes. The eligibility of one process for a particular Program Level does not affect eligibility of other processes. However, if a process consists of multiple production or operating units or storage vessels, the highest Program level that applies to any segment of the process applies to all parts.

A Risk Management Plan under the RMP Rules contains three elements: (i) a hazard assessment; (ii) an accident prevention program; and (iii) an emergency response program. For Program Level 1 processes, only limited hazardous assessment, and minimal accident prevention and emergency response requirements apply. For the Program Level 2 and 3 processes, all three of the elements must be addressed in full.[17]

B. Section 112(r)(1) – The General Duty Clause

The opening clause in Section 112(r)(1) entitled "Purpose and General Duty," the General Duty Clause, creates a self-implementing statutory obligation that is used by EPA as a stand-alone basis for enforcement.

1. The Statutory Provision

The General Duty Clause in Section 112(r)(1), in effect and enforceable since November 15, 1990, states:

> Purpose and General Duty – It shall be the objective of the regulations and programs authorized under [subsection 112(r)] to prevent the accidental release and to minimize the consequences of any such release of any substance listed pursuant to paragraph (3) or any other extremely hazardous substance. The owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty, in the same manner and to the same extent as section 654, title 29 of the United States Code,[18] to identify hazards which may result from such releases using appropriate hazard

[17] Note that emergency response program development and implementation is only required for Program Levels 2 or 3 processes if facility employees will responded to releases of regulated substances as opposed to public responders.

[18] That duty, described in the Occupational Safety and Health chapter of the Labor code, states that "(a) Each employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this chapter. (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur.

There are no separate EPA regulations establishing how a regulated entity can demonstrate compliance with the mandate at any particular time. In fact, one of EPA's own summaries of the General Duty Clause cautions that "It is important to understand that the General Duty Clause is not a regulation and compliance cannot be checked against a regulation or submission of data."[19]

2. General Duty Clause-Specific Guidance

In 2000, EPA issued "Guidance for Implementation of the General Duty Clause Clean Air Action Section 112(r)(1)"[20] (the "Guidance"). The Guidance notes EPA's position that the General Duty Clause does not require the promulgation of regulations defining how to meet the general obligations established by the Clause; however, the Guidance offers EPA's thoughts about what might constitute compliance. The Guidance explains that EPA believes the General Duty Clause imposes three primary obligations:

1. Identify hazards which may result from accidental releases using appropriate hazards assessment techniques;
2. Design and maintain a safe facility taking such steps as are necessary to prevent releases; and
3. Minimize the consequences of accidental releases which do occur.

The Guidance states that the General Duty Clause is a performance-based authority recognizing that owners and operators have primary responsibility in prevention of chemical accidents.

With respect to applicability of the General Duty Clause, the Guidance discusses the meaning of "stationary source" and "accidental release," two terms defined in Section 112(r)(2)(A) and (C). Together, those defined terms tell us that accidental releases are unanticipated releases of "regulated substances" or "*any other extremely hazardous substance*" into the ambient air from a stationary source. The list of "regulated substances" appears in the RMP Rule, as required by Section 112(r). However, the term "extremely hazardous substance," a crucial term in compliance with, and enforcement of, the General Duty Clause, is undefined in

[19] OSWER, EPA 550-F-09-002 (March 2009); www.epa.gov/emergencies.

[20] OSWER, EPA 550-B00-002 (May 200); www.epa.gov/ceppo/.

Section 112(r).[21] EPA believes - and not without support – that an undefined universe of substances is potentially subject to the General Duty Clause.[22]

V.
Section 112(r) Enforcement Policy and Penalty Calculation

If your facility is subject to an EPA enforcement action under Section 112(r) of the Clean Air Act, the following policy document will be used to determine the enforcement path and the calculation of penalties.

A. The Policy

On June 20, 2012, the Director of EPA's Waste and Chemical Enforcement Division transmitted to all Regional Division Directors a "Final Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7) and 40 C.F.R. Part 68" (the "Policy"). The Policy describes EPA's range of enforcement options including: administrative compliance orders, notices of noncompliance, civil administrative penalty orders, civil judicial referrals, and criminal sanctions. Of these options, a civil administrative penalty order is identified as the typical appropriate response to Section 112(r) violations.[23]

B. Penalties

The Policy provides EPA with specific direction on how to penalize Section 112(r) violations. The Policy is largely consistent with other EPA penalty policies in terms of the penalty formula (i.e. Economic Benefit + Gravity Component + Duration + Size of Violator $\pm$ Adjustment Factors) and process.

A penalty under the Policy is calculated pursuant to factors identified in CAA Section 113.[24] These will be familiar to anyone who has explored EPA's penalty policies under other

[21] The Guidance states that that the General Duty Clause itself does not require the development of a list of chemicals subject to Section 112(r)(1).

[22] Recommended reading is Susan L. Biro's fascinating June 2, 2011 Order on Respondent's Motion to Dismiss in *In the Matter of American Acryl, N.A., LLC.,* Docket No. CAA-06-2011-3302, a single count General Duty Clause case initiated by EPA Region 6 involving a fire and a toluene release.

[23] For historical, Region 6-specific, enforcement context, s*ee Attachment 1*, which contains an excerpt from this author's paper, *Heavy Duty: Section 112(r) Enforcement*, presented at the "26th Annual Texas Environmental Superconference."

[24] CAA Section 113, 42 U.S.C §7414.

federal environmental statutes. The factors are: economic benefit of noncompliance, seriousness of the violation, duration of the violation as established by any credible evidence, size of the business, compliance history, good faith efforts to comply, economic impact of the penalty, payment of penalties previously assessed for the same violation, and other factors as justice may require. The Policy divides these factors into two components of the penalty: the economic benefit component and the gravity component.

The Policy recognizes the RMP Rule and the General Duty Clause as two separate and distinct obligations imposed on sources. Accordingly, the Policy establishes two sets of tables for determining the seriousness of the violation factor (which is a crucial part of the gravity component). Each table uses guidelines to identify whether (i) the potential for harm associated with a violation, and (ii) the extent of deviation from the requirements are Major, Moderate, or Minor. Those determinations lead to a cell in the appropriate penalty table, or matrix, that contains a penalty amount.

One unique aspect of the Policy is a discretionary multiplier that EPA can use to increase the base penalty amount where actual damage caused by the violation is so severe that the gravity component alone is not a sufficient deterrent. If EPA determines that this is the case, it can increase the penalty amount using an Extent of Damages Matrix that assigns a multiplier factor. Generally this could happen in the case of a fire, explosion or other significant event. The Extent of Damages Matrix consists of a list of incident consequences contained in Appendix B of the Policy. Each consequence has a number of points associated with it. Consequences carrying the highest points include such things as: (i) creation of a plume large enough to migrate off site and reach into populated areas and impact more than one county or more than 50 to 100 miles, (ii) deaths or potential deaths (multiplied by each person), (iii) closure of air space or closure of businesses more than 5 days, (iv) releases of substances in high amounts, the worst being over 10,000,000 pounds, and (v) releases involving high toxicity substances.

As with other penalty policies, the Policy includes a separate table for the duration of the violation if the violation lasts for greater than one day. Unlike some other penalty policies, the Duration of a Violation table in the Penalty contains relatively modest numbers. For example a violation that lasts between 0 and 12 months will increase the penalty by $750 per month. EPA has discretion to reduce the duration component to no less than the gravity amount if the additional duration component amount seems to be disproportionately high.

This author's long experience in penalty negotiations in EPA Section 112(r) enforcement actions underscores that penalty calculation is highly dependent upon the appropriate and defensible selection of the values of the variables in the Penalty's formula. Numerous considerations can affect practically every number used to derive a final penalty. In an enforcement negotiation, there are almost always legitimate methods of calculating several different supportable penalties, and penalty components, while strictly applying EPA's Policy.

VI.
Final Thoughts

The RMP Rule, although currently effective with the Obama-era amendments in the Final Rule, is caught in a political tug-of-war. The D.C. Circuit has forced implementation of amendments to the RMP Rule that EPA already is in the process of rescinding. The long-standing RMP Rule requirements will not be going anywhere, anytime soon. However, the Final Rule amendments have risen, and can fall, based on White House philosophy and a change of administration. The regulated community is largely an observer to this show, but has no choice other than to watch carefully as the implementation schedule of new requirements drive RMP Rule compliance. Indeed, this is "Not for the Squeamish or Faint of Heart.

Jean M. Flores
Guida, Slavich & Flores, P.C.
5949 Sherry Lane, Suite 1000
Dallas, Texas 75225
Tel – 214.692.0009
flores@gsfpc.com
GUIDA SLAVICH & FLORES, P.C.
The Environmental Law Firm℠

ATTACHMENT 1

Excerpt from Section III, *Heavy Duty: Section 112(r) Enforcement,*
Flores, Jean M. (2014), paper presented at the
"26th Annual Texas Environmental Superconference."

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III.
EPA Enforcement

A. Reasons for Ramped-up Enforcement

A combination of factors have kept Section 112(r) enforcement in the spotlight. In November 2007, EPA's Office of the Inspector General ("OIG") commenced a nationwide evaluation of EPA's implementation of the CAA Section 112(r) Risk Management Program. On February 10, 2009, OIG issued its Evaluation Report on that assessment.[25] The report was fairly critical of EPA's program management and oversight. In particular, the report noted that EPA had not established national procedures for identifying covered facilities that had not submitted Risk Management Plans and, of 1,516 facilities identified by EPA in 2005 as being past their due date for re-submitting a Risk Management Plan, 452 (nearly one-third) had not been resolved. The report recommended that EPA strengthen its inspection process, implement additional management controls to identify facilities with regulated chemicals that have not filed Risk Management Plans, and develop inspection requirements to target higher-priority facilities for inspection and track its progress in completing inspections of those facilities. EPA concurred with all of the recommendations. The findings were repeated pointedly by OIG in its April 28, 2009 EPA's Key Management Challenges For Fiscal Year 2009 memorandum to EPA's Administrator Lisa P. Jackson. The same general concerns were incorporated into OIG's 2010 Fiscal Year Challenges memo.

This round of scrutiny was followed by Fiscal Year EPA Strategy Plans that specifically identified "Reduce Chemical Risks at Facilities" as an objective that could be achieved by continuing to maintain the Risk Management Plan program and reducing by 10 percent the number of accidents at RMP facilities, using a baseline of 190/annually between 2005 and 2009.

B. Region 6

[25] EPA-OIG Report, "EPA Can Improve Implementation of the Risk Management Program for Airborne Chemical Risk," Report No. 09-P-0092 (February 10, 2009).

While no Region was completely spared from Evaluation Report's conclusions, Region 6 received quite a bit of individual attention. Highlights (or lowlights) included being one of the top Regions by number of RMP facilities (over 2,300) while posting the lowest percentage of inspections/audits at facilities that reported accidents in their Risk Management Plans. The Evaluation Report also included this note immediately prior to its conclusion:

> We noted that accidents occurred at two RMP facilities in Region 6 after we began our evaluation, and neither facility was ever inspected/audited by the Risk Management Program office. One of these facilities was on OEM's list of Tier 1 facilities. These accidents resulted in one worker death, multiple injuries, and significant on-site monetary damage. In a worst-case scenario, over 35,000 people could have been impacted by each of these accidents.

Region 6 has embraced the findings for a number of reasons that do not simply stem from national policy. Those include the facts that Region 6 has 18% of the national total of RMP facilities, 35% of the national total of high risk facilities, 382 large complete Title V facilities (70% in Environmental Justice communities), and a surprisingly large number of monthly accidental releases that are reported to the National Response Center. As a result, the Region's current enforcement initiatives give special focus to both the Section 112(r)(7) RMP Rule and the Section 112(r)(1) General Duty Clause. Based on the number of enforcement actions in the last two years, Region 6 is the nation's leader in enforcement of Section 112(r).

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