

Incident Planning and Response and RMP and FRP Updates

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PREPARED FOR

36th Annual Texas Environmental Superconference

PRESENTED BY

Name

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The Time is Now

Updated rules, policies and enforcement initiatives

- Updated RMP rule (Feb. 27, 2024)* and expanded FRP requirements (Mar. 21, 2024)
- EPA's FY 2024-27 National Enforcement and Compliance Initiatives include chemical accident risk reduction
- OSHA's Process Safety Management (PSM)/Covered Chemical Facilities National Emphasis Program
- Updated OSHA PSM enforcement policy (Jan. 26, 2024)

Extreme weather events

Concern for employees, neighbors, environment

Risk management (assets, reputation, litigation, financial market impact, etc.)

*Subject to legal challenge/petition for reconsideration

Preparation

Legal Requirements*

- CERCLA
- CAA
- CWA/OPA
- EPCRA
- Risk Management Program (RMP) Rule
- FRP
- OSHA Process Safety Management (PSM) Standard

Agencies*

- EPA
- TCEQ
- Railroad Comm.
- CSB
- OSHA
- PHMSA
- NTSB
- USCG
- ATF
- State/local law enforcement

Recommendations / Best Practices / New Standards*

- Chemical Safety Board (CSB)
- Center for Chemical Process Safety (CCPS)
- NTSB
- API

Build Team*

- Management
- Operations/technical
- Response team
- Technical and forensic experts
- Toxicologists (monitoring, etc.)
- Env. experts (impact, NRDA, etc.)
- Public relations
- Outside counsel

Response: First 12 Hours

Attain Situational Awareness

Implement Emergency Response Procedures

- Facilitate Information Flow to First Responders
- Release Containment And Mitigation
- Secure Scene

Immediate Notifications (e.g., government, insurers)

Interview key people/preserve evidence

Stand Up Incident Command

Communications Management

First 24-48 Hours and Thereafter

1. Staff-up
2. Records and physical evidence preservation
3. Defending on multiple fronts (EPA, OSHA, CSB, third-parties)
4. Holding statement
5. Initiate incident investigation
 - a) Privileged v. Nonprivileged v. Dual Track
 - b) Methodology (e.g., TapRoot, 5 Whys, etc.)
 - c) Consultant retention
 - d) Witness interviews
6. Identify key players and records
7. Assess legal exposure, agency jurisdiction, and commercial impacts

Defending on Multiple Fronts

CIVIL AND CRIMINAL PROSECUTION

- U.S. Department of Justice — Environmental and Natural Resources Division
 - Prosecutes violations of U.S. federal laws
- U.S. Department of Justice — U.S. Attorney's Offices
 - Prosecute violations of U.S. federal law, including fraud and false statements
 - Renewed focus on prosecution of individual employees (including executives and in-house attorneys)
- Other Jurisdictions Worldwide
 - Prosecute violations of laws of their own jurisdictions
- Procuring Agencies/Departments
 - Debarment proceedings for government contracts

STATE ATTORNEYS GENERAL

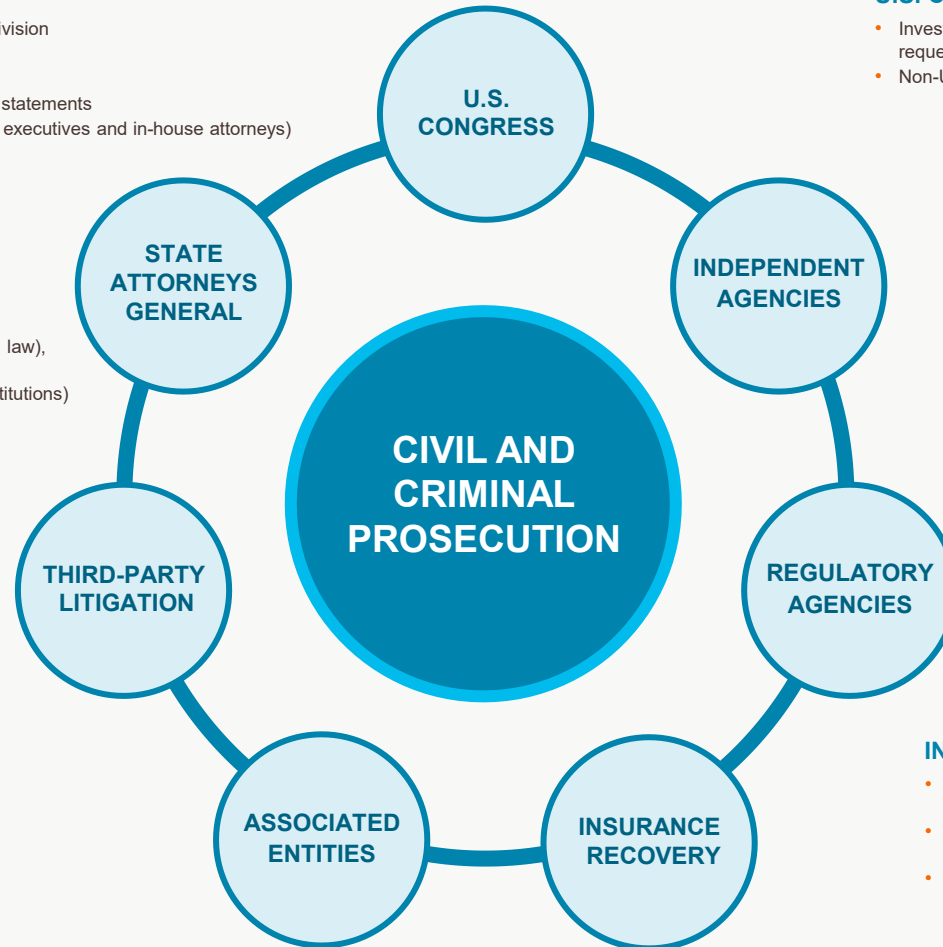
- Pursue penalties for violations of state laws (as opposed to U.S. federal law), including consumer protection and environmental violations
- Often negotiate multi-state settlements (e.g., VW, tobacco, financial institutions)

THIRD-PARTY LITIGATION

- Citizens will sue under environmental statutes seeking cessation of alleged environmental violations
- Whistleblowers will sue using "Qui Tam" action for improper profits
- Consumers will seek damages for personal injury, product liability and unfair business practices
- Lawsuits across the U.S. may be grouped to be heard by one court, via Multi-District Litigation ("MDL") rules
- Third parties will seek damages for business interruption, loss of property value, and personal injury under torts like trespass, negligence and nuisance theories

ASSOCIATED ENTITIES

- Board or Audit Committee may conduct its own internal investigation
- Suppliers and vendors will face their own investigations and litigation
- Suppliers and vendors will sue for losses



U.S. CONGRESS

- Investigates matters of public health, safety or environmental concern through information requests and public hearings
- Non-U.S. executives have testified before Congress (e.g., VW diesel, Firestone tires)

INDEPENDENT AGENCIES

- Chemical Safety Board
 - Investigates major chemical / environmental incidents
- National Transportation Safety Board
 - Determines probable cause of pipeline and transportation accidents

REGULATORY AGENCIES

- U.S. Environmental Protection Agency and U.S. Department of the Interior
 - Investigate violations of U.S. federal environmental laws and regulations through requests for information
 - Enforce by requiring environmental upgrades and mitigation and imposing civil penalties
- State Environmental Agencies
 - Investigate violations of state environmental laws and regulations
 - Enforcing by revoking permits and imposing civil penalties
- Occupational Safety and Health Administration ("OSHA")
- U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration ("PHMSA")

INSURANCE RECOVERY

- Recovery following a catastrophic loss as a result of an accident (fire, explosion, or natural disaster)
- Re-establish operations, mitigate losses, deal with property/casualty insurers and pursue potential third parties responsible for the loss
- Pollution legal liability insurance coverage litigation, including defense of declaratory judgment actions filed by carriers

RMP — Pre-SCCAP

RMP regulations (40 CFR Part 68) —approx. 12,000 facilities that use extremely hazardous substances above threshold quantities.

Examples:

- Agricultural Supply Distributors
- Water and Wastewater Treatment Facilities
- Chemical Manufacturers and Distributors
- Food and Beverage Manufacturers
- Oil Refineries

Three prevention program levels based on the complexity of release scenarios and associated risks:

- Program 1 (no release w/ offsite consequences for 5 years; emergency response coord.; toxic or flammable endpoint worst case < distance to any public receptor) (40 CFR 68.12(a) & (b))
- Program 2 (not Program 1 or 3) (40 CFR 68 Subpart C)
- Program 3 (certain NAICS or subject to OSHA PSM) (40 CFR 68 Subpart D)

RMP — Pre-SCCAP



Required to develop a Risk Management Plan which:

- Identifies the potential effects of a chemical accident
- Identifies steps the facility is taking to prevent an accident
- Specifies emergency response procedures should an accident occur

RMPs are revised and resubmitted to EPA every five years, subject to update/correction requirements

RMPs are publicly available

- Provides valuable information to local fire, police, and emergency response personnel
- Improves accident prevention and emergency response practices at the local level

Safer Communities by Chemical Accident Prevention (SCCAP)

Signed on Feb. 27, 2024; Effective May 10, 2024

New Requirements:

- Safer Technologies and Alternatives Analysis
- Evaluate Risks of Natural Hazards and Climate Change
- Third-party Compliance Audits and Root Cause Analysis Incident Investigation For Facilities That Have Had a Prior Accident
- RMP Facility Information to Be Provided to Communities
- Increased Employee Participation/Decision-making



SCCAP — Selected Requirements

Prevention Program (Subparts C and D)

Program 2: Hazard Reviews and

Program 3: Process Hazard Analyses

- Natural Hazards and Power Loss
- Facility Siting
- Safer Technologies and Alternatives Analysis
- RAGAGEP should be reviewed in process hazard analyses to determine gaps

Incident Investigation and Root Cause Analysis

Third-party Compliance Audits

Employee Participation

Emergency Response (Subpart E)

Community Notification of RMP Accidents

Emergency Response Exercises

Information Availability (Subpart H, § 68.210)

Enhanced Information Availability

Program 2: Hazard Reviews and Program 3: Process Hazard Analyses

Natural Hazards and Power Loss

- Natural hazards — including those that result from climate change — and loss of power are among the hazards that must be addressed in hazard reviews and PHAs
- Requires back-up power for release monitoring equipment

Facility Siting

- Facility siting should be addressed in hazard reviews and PHAs
- “Stationary source siting, including the placement of processes, equipment, and buildings within the facility, and hazards posed by proximate stationary sources, and accidental release consequences posed by proximity to the public and public receptors.”

Program 2: Hazard Reviews and Program 3: Process Hazard Analyses

Safer Technologies and Alternatives Analysis (STAA)

Applies to only petroleum refining and chemical manufacturing Program 3 processes

Requires a STAA evaluation for all such processes

Requires a practicability assessment of inherently safer technologies and designs (IST/ISD) considered for:

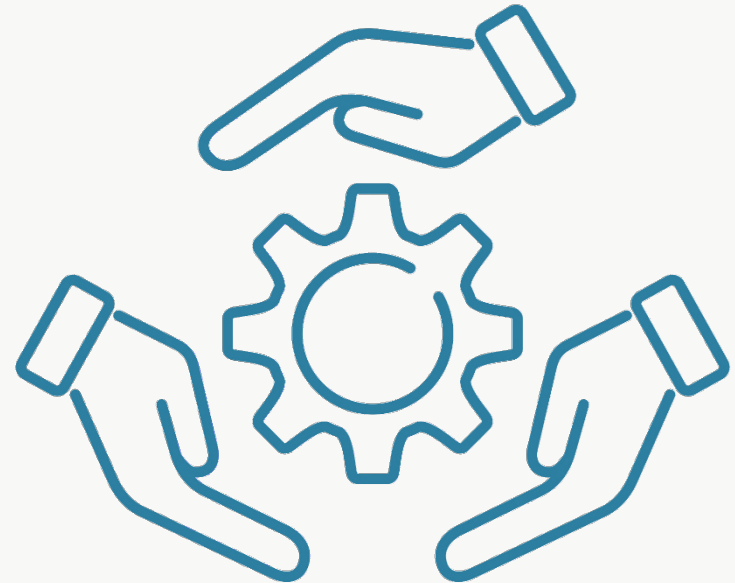
- Covered processes within one mile of another petroleum refining and chemical manufacturing Program 3 process;
- Hydrofluoric acid alkylation processes at refineries; and
- Covered process with an RMP-reportable accident since the facility's most recent PHA.

Requires implementation of at least one passive measure at the facility, or IST/ISD, or a combination of active and procedural measures equivalent to or greater than the risk reduction of a passive measure for the same facilities required to conduct the practicability assessment

Program 2: Hazard Reviews and Program 3: Process Hazard Analyses

Recognized and Generally Accepted Good Engineering Practices (RAGAGEP)

- PHAs must consider “any gaps in safety between the codes, standards, or practices to which the process was designed and constructed and the most current version of applicable codes, standards or practices” (68.67(c)(10)).



Third-party Compliance Audits

Requires the next scheduled 3-year compliance audit be a third-party audit when:

- The facility had an RMP-reportable accident since the last audit; or
- “An implementing agency requires [it] due to conditions at the stationary source that could lead to an accidental release of a regulated substance, or when a previous third-party audit failed to meet the competency or independence criteria of § 68.80(c).”

Third-party auditor’s findings response report should be immediately provided to the Board’s audit committee.

Employee Participation

Program 2 and 3 Facilities:

- Requires written plans for employee participation
- Requires employee participation in resolving PHAs, compliance audit and incident investigation recommendations and findings
- Requires process for employees to anonymously report hazards, unreported incidents, “or any other noncompliance with this part”
- Requires employees be provided access to hazard reviews and other RMP information

Employee Participation

Program 3 Facilities:

- “Consult with employees and their representatives on the conduct of and development of [PHAs] and other elements of process safety” (68.83(b))
- “Consult with employees and their representatives on resolving PHAs, compliance audits, and incident investigations” (68.83(c))
- Provide stop work authority, *i.e.*, allow a qualified operator in charge of unit to shut down an operation/process based on the potential for a catastrophic release; allow others to recommend to operator in charge that an operation/process be shut down (68.83(d))

Emergency Response



Community Notification of RMP Accidents:

- Requires non-responding RMP facilities to develop procedures for informing the public about accidental releases
- Requires release notification data be provided to local responders
- Requires partnering with local responders to ensure a community notification system is in place for notification of RMP-reportable accidents

Emergency Response Exercises:

- Requires a 10-year frequency for field exercises unless local responders indicate that frequency is infeasible
- Requires mandatory scope and reporting requirements for emergency response exercises

Information Availability (Subpart H, § 68.210) — Enhanced Information Availability

Information Available: Owner or operator shall provide the following upon request: regulated substances information, SDSs, 5-year accident history, emergency response program information, a list of scheduled exercises, LEPC contact information, and declined PHA recommendations and justifications

Persons Entitled to This Information: members of the public residing, working, or spending significant time within 6 miles of the fence line (68.210(d))

Public Notice: Owner or operator “shall provide ongoing notification on a company website, social media platforms, or through other publicly accessible means that describes the information available and how to request it

Deadline: Owner or operator shall provide requested information with 45 days of receipt of request

Language: The information shall be made available in English or in at least any two other commonly spoken languages by the population potentially affected

Risk Management Plan

Risk Management Plan must include justification whenever the following recommendations are not adopted:

- Natural Hazard Evaluation Recommendations
- Facility Siting Hazard Recommendations
- STAA Recommendations
- Third-party Compliance Audit Recommendations

SCCAP Final Compliance Dates

May 10, 2027 for Most Requirements:

New STAA, incident investigation root cause analysis, third-party compliance audit, employee participation, emergency response public notification, exercise evaluation reports, and information availability provisions

March 15, 2027 (or within 10 years of the date of an emergency response field exercise conducted between Mar. 15, 2017, and Aug. 31, 2022):

Field Exercises

May 10, 2028:

Updates and Resubmission of Risk Management Plans with New and Revised Data Elements

Facility Response Plans (FRP)

The Facility Response Plan (FRP) rule requires certain facilities that store and use **oil** to prepare and submit a response plan for a worst-case oil discharge or threat of a discharge. (40 CFR Part 112, Subpart D)

On March 28, 2024, EPA issued a new rule requiring certain non-transportation-related onshore facilities with **CWA hazardous substances** to prepare, submit, and implement a facility response plan to respond to potential “worst case discharges” or substantial threat of such discharges. (40 CFR Part 118; 40 CFR § 116.4)

EPA anticipates approx. 5,400 facilities will be required criteria to submit a facility response plan — industries ranging from crop production, food manufacturing, and textile manufacturing to plastics manufacturing, chemical manufacturing, and mining.

Clean Water Act Hazardous Substance Facility Response Plans — Applicability

Applies to owner or operator of any non-transportation related onshore facility that:

- Has a maximum quantity onsite of any CWA hazardous substance, at any time, meets or exceeds 1,000 times the Reportable Quantity;
- Is located within one-half mile of navigable waters or a conveyance to navigable waters; and
- Meets one or more of the following substantial harm criteria:
 - Ability to cause injury to fish, wildlife, and sensitive environments;
 - Ability to adversely impact a public water system;
 - Ability to cause injury to public receptors; and
 - Has had a reportable CWA hazardous substance discharge within the last five years that reached navigable waters.

CWA Hazardous Substance FRPs

Regulated facilities must submit response plans May 28, 2027; review and recertify every five years.

Key Plan Requirements:

- Identify the potential worst-case discharge (the largest foreseeable discharge in adverse weather conditions, including extreme weather conditions due to climate change)
- Identify qualified individual having full authority to implement response actions
- Identify (and ensure by contract or other approved means) resources to respond to the maximum extent practicable to a worst-case discharge; cannot shift the response burden to public agencies and resources
- Include extensive Emergency Response Information

About King & Spalding



1,200

lawyers across the world

Environmental, Health and Safety / Toxic & Environmental Torts 2024 rankings

- Ranked in Chambers USA Nationwide, in California, Illinois, Washington, D.C., Texas, and Georgia; ranked in Chambers Europe for France
- Ranked in Legal 500 for all Environment categories: Transactions, Regulatory, and Litigation

Crisis Management and Government Oversight Award Recipient

— *National Law Journal* 2021

“King & Spalding has strong experience and history in CAA which is invaluable. Its client service is great and it is really responsive.”

— *Chambers USA* California Environment, 2024



175+

Nearly 200 King & Spalding lawyers are former government attorneys, including 48 former DOJ, five former EPA, and more.

Environmental Law Firm of the Year 2024



WINNER
USA AWARDS 2024



Law Firm of the Year 2023

According to a client in the Nationwide Environment ranking, “*The firm was very knowledgeable on the process of enforcement and navigating the complex engineering details of compliance to the legal authority the state has.*”

A client’s feedback in the Georgia Environment ranking states, “*Matters are handled very well by King & Spalding.*”

A client of our D.C. environmental team says, “*King & Spalding has several attorneys who have held significant, decision-making positions in a variety of agencies. They know the art and science of how decisions are made.*”

— *Chambers USA*, 2024

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Market-leading offerings, strategically positioned where clients need us to be.

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(including key energy and financial hubs)

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Questions?



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