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Client Alert

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D.C. Circuit Vacates Risk Management Program Delay Rule

On August 17, 2018, the U.S. Court of Appeals for the District of Columbia vacated an Environmental Protection Agency ("EPA") rule delaying the effective date of the Obama administration's final rule updating EPA's Risk Management Program regulations under the Clean Air Act ("RMP Update Rule"). The RMP Update Rule was finalized in 2017 in response to several "catastrophic" releases, including the explosion of a fertilizer plant in West, Texas in 2013. It was originally set to go into effect in March 2017. In response to several petitions for reconsideration from trade associations and states, EPA agreed to reconsider the RMP Update Rule and delayed its effective date while developing a replacement. EPA first issued a 90-day "administrative stay" under Section 307(d)(7)(B) of the Clean Air Act. Later, on June 14, 2017, EPA issued a final rule under its general rulemaking authority setting a new effective date of February 19, 2019 (the "Delay Rule").

The August 17th ruling by the D.C. Circuit found the EPA did not have statutory authority to issue the Delay Rule under its general rulemaking authority. This ruling vacates the Delay Rule meaning the RMP Update Rule will go into effect as soon as the court's mandate issues. Covered facilities will be immediately subject to the requirements whose compliance deadlines have already passed. The court's mandate will issue as soon as October 9, 2018, when the period for the federal government to petition for rehearing has passed.[1]

The RMP Update Rule includes a number of changes to intensify requirements for facilities with processes that are subject to the Occupational Safety and Health Administration's ("OSHA's") Process Safety Management Program ("Program 3" processes), or that have a history of accidents or are close to public receptors such as offsite residences, businesses, or recreational areas ("Program 2") processes. Updated requirements relate to (1) accident prevention, including expanded post-accident investigations, more rigorous safety audits, safety training, and safer technology requirements; (2) emergency response, including more frequent coordination with local first responders and

emergency response committees, and more intensive incident response exercises; and (3) public information disclosure, including public disclosure of safety information and public meeting requirements.

The newly effective obligations amend the requirement for compliance audits by Program 2 and Program 3 owners and operators. Specifically, the rule clarifies that a compliance audit must address every "covered process" and specifies certain circumstances when a compliance audit must be conducted by a third party. These changes make clear that owners and operators may not limit an audit to only representative examples of processes, potentially expanding the cost and time required. RMP audits completed before this clarification may not satisfy these requirements. In light of this change, owners and operators should consult counsel as to which of their processes are "covered" and consider preparing to undertake an audit in the next few months before the court issues its mandate.

Additionally, the emergency response coordination activities required by the RMP Update Rule, which originally had a compliance date of March 14, 2018, **will immediately go into effect** with the issuance of the mandate. This provision requires owners or operators of stationary sources to coordinate with local emergency planning and response organizations about how the stationary source is addressed in community emergency response plans. Coordination must occur at least annually and requires providing information and materials to the local emergency planning and response organizations. This regulation lists examples but also extends to "any other information that local emergency planning and response organizations identify as relevant to local emergency response planning."[2] The owner and operator must also document the coordination process. Owners and operators should begin identifying the organizations with which they must work and the materials to be provided.

Although these two effective provisions may ultimately be rescinded, the predicted outcome of EPA's ongoing rulemaking cannot provide relief from complying with existing obligations in the interim. In May 2018, EPA issued a proposed rule, "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act." The proposed rule was amended to correct technical errors and the comment period extended on July 31, 2018.[3] If finalized, this rule would rescind the addition of the phrase "each covered process" and the requirement that owners and operators share with local emergency planning and response organizations "any other information that local emergency planning and response organizations identify as relevant to local emergency response planning."[4]

Additionally, EPA's proposed rule would remove or change many of the significant new requirements in the RMP Update Rule due to phase in over the next four years, including all requirements for third-party compliance audits, the requirement to conduct a costly safer technology and alternatives analysis ("STAA") for certain facilities with Program 3 regulated processes, the requirement that hazard reviews include findings from incident investigations, and the requirement that Program 2 incident investigation teams consist of at least one person knowledgeable in the process involved and other persons with experience to investigate an incident.[5] EPA is currently reviewing comments on the proposed changes.

The D.C. Circuit's decision to vacate the Delay Rule is one of several recent setbacks to the Trump Administration's environmental agenda. Earlier this month, the Ninth Circuit ruled against the EPA's decision not to finalize a ban on chlorpyrifos and a federal judge issued an injunction against the Administration's delay of the Waters of the United States Rule. These recent decisions demonstrate that there are limits to the Trump Administration's ability to implement its regulatory reform agenda. Further, the D.C. Circuit's decision on the Delay Rule may have a lasting impact on EPA's willingness and ability to reconsider final rules issued under the Clean Air Act.

King & Spalding has significant experience across the country in administrative and environmental matters, including advising manufacturers on implementation and compliance with EPA rules and regulations. If you have questions about how these actions may affect you or your business, please contact any of our lawyers noted on the first page.

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[1] D.C. Cir. L.R. 40-41.
[2] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4594 (Jan. 13, 2017); 40 C.F.R. § 68.93(b).
[3] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 83 FR 36,837 (July 31, 2018).
[4] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 83 Fed. Reg. 24,850, 24,852 (May 30, 2018).
[5] *Id.*