

# Client Alert

Tort Litigation &amp; Environmental Practice Group

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## EPA Poised to Elevate Clean Air Act 112(r) Enforcement

### *Overview*

In the wake of the United States Environmental Protection Agency's (EPA) recent \$5.6 million settlement with Bayer CropScience under Clean Air Act Section 112(r), companies should expect more from EPA in the chemical accident prevention and risk management space – more in terms of investigations, enforcement, and rules. In this two-part series, we first explore EPA's enforcement efforts and initiatives under the Clean Air Act Section 112(r) program. A forthcoming companion client alert will address pending Section 112(r) rules and proposed legislation.

### *Background*

EPA is marshalling enforcement resources to prosecute companies that violate the General Duty Clause (GDC) and Risk Management Program (RMP) under Clean Air Act Sections 112(r)(1) and (7). In fact, there has been a notable increase in the dollar amounts that EPA is seeking to resolve Section 112(r) matters in recent years based on a review of publicly available enforcement data. Since January 2014, over 360 companies have paid more than \$14 million in civil penalties and spent almost \$20 million in injunctive relief at their facilities (i.e., actions to return their facilities to compliance with Section 112(r)).

The Clean Air Act General Duty Clause requires facilities with extremely hazardous substances present in any amounts to know the chemical's hazards, assess the consequences of releases, design and operate the facility to prevent accidental releases, and minimize the consequences of any releases. Section 112(r)(7) requires facilities handling more than a threshold quantity of certain regulated chemicals to, among other things, develop risk management plans and properly operate and maintain the equipment needed to prevent, detect, and respond to releases.

### *EPA's Enforcement Focus on Section 112(r)*

Even though Section 112(r) obligations have been on the books for over a decade, according to EPA, operations in various industries still present significant risks of accidental chemical releases. Earlier this month, EPA proposed adding Section 112(r) enforcement (“Reducing the Risks and Impacts of Industrial Accidents and Releases”) as one of three new **National Enforcement Initiatives (NEI) for Fiscal Years 2017-2019**. See **King & Spalding Client Alert, “EPA Seeks Comment on National Enforcement Initiatives.”** In the notice, EPA indicated that “[a]pproximately 2,000

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facilities are currently considered ‘high-risk’ because of their proximity to densely populated areas, the quantity and number of extremely hazardous substances they use, or their history of significant accidents.” *See* 80 Fed. Reg. 55,352, 55,354 (Sept. 15, 2015). Companies falling into one or more of these three categories may find themselves a target for inspection. EPA’s stated goal of the initiative is to increase industry attention to preventing accidents, instead of addressing problems after accidents happen. *See id.* Given EPA’s momentum in investigating and enforcing Section 112(r), its emphasis on communities and environmental justice, and the fact that EPA has not selected a new NEI since Fiscal Year (FY) 2011, there may be good reason for EPA to select Section 112(r) as an NEI for FY 2017-2019. Further, even if it isn’t selected, the Office of Enforcement and Compliance Assurance’s FY 2016-2017 National Program Manager guidance already expressly identifies Section 112(r) cases as ones that merit enforcement attention. Indeed, in February 2015, the enforcement program **announced it was focusing enforcement efforts on prevention of chemical accidents at refrigeration facilities using anhydrous ammonia.**

### *EPA’s Section 112(r) Enforcement Actions*

EPA’s enforcement office, however, has done more than simply announce its interest in Section 112(r) —it has been bringing and settling noteworthy Section 112(r) cases over the last several years. On September 21, 2015, EPA announced a proposed settlement with Bayer CropScience to resolve GDC and RMP violations at its Institute, West Virginia facility arising from a 2008 explosion. Bayer CropScience will fund over \$4 million in supplemental environmental projects in the Institute community, spend \$450,000 in safety improvements at its chemical storage facilities across the U.S., and pay a penalty of \$975,000. At the end of 2013, EPA announced a settlement to resolve Section 112(r) violations with a metal recycler for over \$7.5 million in upgrades after its West Virginia facility had an explosion with three fatalities. The company paid a \$100,000 civil penalty.

In recent years, EPA has brought other significant Section 112(r) enforcement actions.

- June 2015, EPA settled GDC and RMP violations for a \$3 million penalty with a company that operated numerous cold storage facilities across the United States.
- August 2014, a major chemical manufacturer settled an action in West Virginia that included GDC claims, among others, and agreed to pay a civil penalty of \$1.275 million and spend \$2.276 million in injunctive measures.
- June 2013, EPA settled with a large food processor for a \$3.95 million penalty, an estimated \$500,000 for injunctive relief, and \$300,000 in equipment for local emergency responders. As part of the settlement, the company was required to fund third-party audits of its RMP compliance at nearly two dozen of its facilities and correct any deficiencies noted in the audits.
- December 2012, a dairy processing company settled GDC and RMP violations by agreeing to spend \$3.75 million to upgrade systems and to pay a penalty of \$275,000.

During the past 18 months, EPA has resolved a number of smaller, but noteworthy, RMP enforcement cases. In December 2014, EPA announced that one company spent over \$500,000 in compliance upgrades at two cold storage warehouses and agreed to pay a penalty of \$124,181 to resolve RMP violations related to anhydrous ammonia. In a similar case involving anhydrous ammonia announced in late July 2015, another company spent over \$300,000 in compliance upgrades and agreed to pay a penalty of \$41,000. In September 2014, an Alaskan seafood processor handling chlorine and anhydrous ammonia agreed to pay a penalty of \$142,175 and spend about \$50,000 on injunctive measures to resolve RMP violations. In July 2015, a fertilizer company agreed to pay a \$67,404 civil penalty and fund a supplemental environmental project worth \$113,121 to resolve RMP issues. And in May 2014, a refrigeration services company settled GDC violations by spending \$345,000 to correct deficiencies and agreeing to pay a civil penalty of \$108,000.

In light of the enforcement spotlight on both GDC and RMP issues, companies that handle chemicals subject to Clean Air Act Section 112(r) requirements should consider acting now to prevent potential future enforcement issues. Some

companies have found it beneficial to review their chemical use, storage, and handling practices and consider whether non-regulated chemicals can be substituted for regulated ones or whether they can reduce stored quantities to below applicable RMP thresholds. If changes are made, the facility then confirms whether Section 112(r)(7) would still apply. Facilities will, however, remain subject to GDC for extremely hazardous substances regardless of the quantities involved. Where operational requirements keep the facility within any part of Section 112(r), management may consider conducting an initial Section 112(r) compliance review/audit, followed by prompt completion of any needed improvements and periodic monitoring of continued compliance. It is also important that workers are trained on their RMP and/or GDC duties and know what to do if EPA personnel arrive to conduct a Section 112(r) inspection. EPA has issued guidance for facilities subject to the RMP program, available at <http://www2.epa.gov/rmp/guidance-facilities-risk-management-programs-rmp>, guidance regarding RMP inspections, available at [http://www2.epa.gov/sites/production/files/2013-10/documents/clean\\_air\\_guidance.pdf](http://www2.epa.gov/sites/production/files/2013-10/documents/clean_air_guidance.pdf), and GDC guidance, available at <http://www2.epa.gov/sites/production/files/2013-10/documents/gdcregionalguidance.pdf>.

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