

Client Alert

Environmental, Health & Safety Practice Group

March 16, 2018

EPA Signals Changes to Clean Air Act Accidental Release Program

There are recent, noteworthy developments affecting the U.S. Environmental Protection Agency's ("EPA") accidental release program. On March 16, EPA defended its decision to delay implementation of an Obama-era rule updating EPA's Risk Management Plan ("RMP") regulations before the United States Court of Appeals for the D.C. Circuit. And, on February 5, EPA and the Department of Justice ("DOJ") announced a court settlement to resolve Clean Air Act Section 112(r) claims stemming from a 2013 ammonia release that killed a contract worker.¹

Importantly, these recent events raise questions about the future of Section 112(r) obligations for stationary sources. The Trump Administration's possible rollback of EPA's RMP regulations is months in the making, raising the question of which, if any, portions of the 2017 rule may be preserved. Notably, EPA's efforts to reverse the previous administration's "modernization" of the RMP rule is in tension with its FY 2017-2019 National Enforcement Initiative, "Reducing Risks of Accidental Releases at Industrial and Chemical Facilities." Will the enforcement office pursue this national enforcement initiative and, if so, what types of facilities is the agency likely to target?

RMP Update Rule

On August 1, 2013, in response to a fertilizer plant explosion in West, Texas, and other "catastrophic" releases, President Obama issued Executive Order 13650 to address risks from industrial use and storage of hazardous substances. The interagency working group convened under the Executive Order identified ten priority action areas, including "modernization" of EPA's RMP rule.² EPA ultimately published a final "update rule" in January 2017.³

The update rule included a number of changes to intensify requirements for facilities with processes that are subject to the Occupational Safety and Health Administration'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

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(“Program 2” processes). Some of the changes in the Obama Administration’s update rule include:

- **Safer Technology and Alternatives Analysis (“STAA”).** Certain types of facilities with Program 3 processes (chemical manufacturing, petroleum and coal products manufacturing, and paper manufacturing facilities) must conduct a STAA as part of the already required Process Hazard Analysis. EPA identified this requirement as the most expensive portion of the rule to implement, with an average annual cost of \$70 million.⁴
- **Third-Party Audit.** Facilities with Program 2 and Program 3 processes must conduct a third-party audit following an RMP reportable accident or an agency determination that a third-party audit is necessary.
- **Incident Investigation and Root-Cause Analysis.** Facilities with Program 2 and Program 3 processes must conduct an incident investigation and root-cause analysis following a catastrophic release or near miss, i.e., an event that “could reasonably have resulted in a catastrophic release.”⁵
- **Enhanced Emergency Preparedness Requirements.** Facilities with Program 2 or Program 3 processes must coordinate annually with local emergency response agencies, conduct annual notification exercises, and conduct periodic field and tabletop exercises.
- **Increased Public Availability of Chemical Hazard Information.** Owners and operators of stationary sources must share certain information about chemical hazards (e.g., names of regulated substances used in facility processes and accident history information) with the public upon request.

EPA’s impact analysis indicates that a total of 12,542 facilities would be affected by this rule. Although EPA’s STAA requirements are limited to NAICS codes that are responsible for the most reported accidental releases, more than half of affected facilities would be subject to the rule because they use anhydrous ammonia for refrigeration.⁶

EPA’s Reconsideration of the RMP Update Rule

EPA received petitions to reconsider the RMP update rule from several trade associations and states. Key issues raised by these stakeholders include security concerns with the enhanced information disclosure requirements; the disproportionate expense of STAAs; the duplicative nature of third-party audits given pre-existing compliance audit requirements; and uncertainty about the legal triggers for incident investigations and root cause analyses. Stakeholders also expressed concerns about EPA’s basis for updating its RMP regulations in the first place. Shortly before the rule’s release, the federal Bureau of Alcohol, Tobacco, and Firearms concluded that the West, Texas release had been caused by arson, not the type of industrial accident that EPA seeks to prevent with its RMP regulations.

In response to the petitions for reconsideration, EPA granted a 90-day administrative stay of the final rule.⁷ EPA later issued a rule extending the stay until February 19, 2019, indicating intent to take further regulatory action “with the potential for a broad range of rule revisions.”⁸ A coalition of NGOs, a steelworkers’ union, and state attorneys general have challenged EPA’s delay of the update rule in court.

Signals from Air Alliance Houston v. EPA⁹

The central question in the pending litigation before the D.C. Circuit is whether EPA had the authority to stay the 2017 rule for twenty months. In its briefs and oral argument, however, the United States appears to be sending signals about the potential fate of the rule.

One provision that appears to be under threat is the enhanced requirement to provide chemical hazard information to local authorities. The United States has argued that delaying implementation of these requirements does not harm Petitioners because “the pre-existing Risk Management Program remains in effect” and, under those requirements, local officials can request information “which can include similar information as would be required under the Amendments’ coordination provision.”¹⁰ This argument lays groundwork for a position that the enhanced requirements are unnecessary to achieve EPA’s accident prevention goals.

More generally, the United States has pointed out that under the old RMP rule, reportable releases declined by an average of 3.7 percent per year between 2004 and 2013.¹¹ The United States has also argued repeatedly that the Obama EPA failed to show that the benefits of the update rule outweigh the costs, potentially signaling a rollback of most or all of the rule’s major provisions.¹²

Litigation aside, the stay expires in less than a year, meaning that industry has limited time to begin preparing for implementation. It is therefore in industry’s interest for EPA to act soon. During oral arguments on March 16, Judge Rogers questioned the United States’ claim that the delay would not affect implementation of most major provisions, which do not go into effect until 2021, since in setting the original compliance deadlines EPA had accepted representations from industry that it needed more time to prepare. DOJ responded that it is sufficient for industry to be “on notice” that the original deadlines could apply if the update rule is not revised. On the other hand, DOJ also asked the court to take judicial notice that a new proposed rule was sent to the Office of Management and Budget on March 12, thus appearing to confirm that the update rule will not stand as written.

Future Enforcement Under Section 112(r)

EPA inspections have been steadily declining in recent years. In FY 2017, only 11,700 inspections were performed across all of EPA’s enforcement programs—less than half the number performed a decade ago.¹³ EPA’s FY 2019 budget request potentially signals that EPA will reduce traditional Section 112(r) inspections. EPA is proposing a voluntary fee program for RMP compliance assistance that would allow facility owners and operators to request a compliance inspection. Depending on the rate of industry participation, and in light of EPA’s declining budget, this program could potentially reduce traditional inspections. This trend raises questions about the fate of EPA’s National Enforcement Initiative focused on reducing risks from accidental releases of hazardous substances.

United States v. Gibson Wine Co. may provide a window into the type of enforcement that EPA is likely to pursue given its declining enforcement resources. In that case, EPA performed its inspection in response to a fatal release of anhydrous ammonia.¹⁴ The civil complaint originally contained only claims under the General Duty Clause of Section 112(r), which, unlike the RMP program, does not have a quantity threshold. Upon reviewing additional evidence during discovery, however, the United States determined that certain processes at the facility contained over 10,000 pounds of anhydrous ammonia—the threshold quantity for RMP compliance. The United States accordingly amended its complaint to include RMP claims.¹⁵

Although EPA is performing fewer inspections, we would expect that, going forward, reportable and, especially, catastrophic releases are likely to trigger inspections. In such cases, EPA may seek penalties under the General Duty Clause even if the RMP quantity threshold is not met. EPA is also likely to bring heavy scrutiny to the facility’s processes that may result in expanded enforcement claims and compliance burdens going forward.

Conclusion

Companies with facilities that are subject to EPA’s RMP requirements should pay close attention to EPA’s upcoming regulatory actions. The 2017 update rule assumed that most requirements would require several years of preparation for

new compliance burdens. Accordingly, if EPA remains slow to act, regulated parties may need to consider whether it makes sense to begin preparing to implement that rule as promulgated. Regardless of what happens with the update rule, all facilities that use listed or extremely hazardous substances should review their processes to ensure that chemical hazards have been properly assessed. Quantity determinations should be performed carefully to ensure that the facility is complying with the appropriate set of requirements. King & Spalding attorneys have extensive experience assisting clients with Section 112(r) compliance activities and responding to accidental releases. Please contact the attorneys listed in this Client Alert for additional information.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

¹ Press Release, U.S. EPA, U.S. Department of Justice Finalize Settlement with Sanger, Calif., Winery over Deadly Ammonia Release (Feb. 5, 2018), <https://www.epa.gov/newsreleases/us-epa-us-department-justice-finalize-settlement-sanger-calif-winery-over-deadly>.

² See Report for the President, Executive Order 13650: Actions To Improve Chemical Facility Safety and Security – A Shared Commitment (May 2014), available at https://www.osha.gov/chemicalexecutiveorder/final_chemical_eo_status_report.pdf.

³ See Accidental Release Prevention Requirements; Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4594, 4594 (Jan. 13, 2017).

⁴ *Id.* at 4597.

⁵ *Id.* at 4605.

⁶ *Id.* at 4596.

⁷ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 13,968, 13,968 (Mar. 16, 2017).

⁸ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 27,133, 27,135 (June 14, 2017).

⁹ No. 17-1155 (D.C. Cir.).

¹⁰ Preliminary Br. of Respondents 20-21, *Air Alliance Houston v. EPA*, No. 17-1155 (D.C. Cir. Dec. 8, 2017).

¹¹ Final Br. of Resp'ts 22, *Air Alliance Houston v. EPA*, No. 17-1155 (D.C. Cir. Jan. 31, 2018).

¹² See, e.g., *id.* at 32.

¹³ See EPA, Enforcement Annual Results Analysis and Trends for Fiscal Year 2017, <https://www.epa.gov/enforcement/enforcement-annual-results-analysis-and-trends-fiscal-year-2017>.

¹⁴ Am. Compl. ¶ 34, *United States v. Gibson Wine Co.*, No. 1:15-cv-01900-AWI-SKO (E.D. Cal. Dec. 1, 2016).

¹⁵ Pls.' Notice of Unopposed Mot. and Unopposed Mot. to Amend Compl., *United States v. Gibson Wine Co.*, No. 1:15-cv-01900-AWI-SKO (Nov. 25, 2016).