

**SEPTEMBER 5, 2018**

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Updates to EPA's Risk Management Program Immediately Effective After D.C. Circuit Issues Unexpected Early Mandate

On Friday, the U.S. Court of Appeals for the District of Columbia unexpectedly granted a request to issue its mandate expeditiously following its decision regarding the U.S. Environmental Protection Agency's ("EPA") updates to the Risk Management Program ("RMP Update Rule").¹ With Friday's issuance of the mandate, the RMP Update Rule¹ is immediately effective and covered facilities are now subject to the requirements whose compliance deadlines have passed.

As discussed in our Client Alert issued last week, on August 17, 2018 the D.C. Circuit invalidated EPA's June 2017 final rule delaying effectiveness of the RMP Update Rule.² It was expected that the court's mandate would issue in early October 2018 after EPA had received an opportunity to petition for rehearing. On August 24, 2018, Petitioners, including environmental groups and ten State Attorneys General, requested that the court grant expedited issuance in light of "serious and irreparable harm and imminent threats to public health and safety."³

As a result of the court's decision to issue the mandate early, 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) are immediately subject to new requirements.

Specifically, the newly effective rule clarifies that compliance audits by Program 2 and Program 3 owners and operators must address every "covered process."⁴ The additional phrase amending the prior requirements makes 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. Additionally, covered facilities must immediately comply with new emergency response coordination requirements. Owners and operators of covered facilities should contact counsel to review their audit processes and ensure their emergency response coordination activities are in compliance with the now effective rule.

Beyond the newly effective requirements, owners and operators should also begin to prepare for the those regulations with future compliance dates. The RMP Update Rule broadly amended the RMP to provide for (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, emergency response committees, and more intensive incident response exercises; and (3) public information disclosure, including public disclosure of safety information and public meeting requirements. Future requirements include third-party compliance audits, the requirement to conduct a costly safer technology and alternatives analysis (“STAA”) for certain facilities with Program 3 regulated processes, and changes to incident investigation root cause analysis. EPA has proposed a rule that would alter or remove many new requirements in the RMP Update Rule, but the outcome of EPA’s ongoing rulemaking is uncertain and cannot provide relief from complying with existing obligations in the interim.

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.

ABOUT KING & SPALDING

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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.”

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¹ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4594 (Jan. 13, 2017).
² Air Alliance Houston v. U.S. Environmental Protection Agency, No. 17-1155, 2018 WL 4000490 (D.C. Cir. Aug. 17, 2018).
³ Pet'r Joint Mot. Expedited Issuance Ct. Mandate, 2, 4, Air Alliance Houston v. U.S. Environmental Protection Agency, No. 17-1155 (D.C. Cir.).
⁴ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4594 (Jan. 13, 2017); 40 C.F.R. § 68.58(a), § 68.79(a).