Clean Air Risk Management Plan Issues and Enforcement

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§ 1.Introduction

In response to terrifying chemical-release accidents in the U.S. and abroad, Congress enacted section 112(r) as part of the 1990 Clean Air Act Amendments. Section 112(r) required the Environmental Protection Agency (EPA) to publish regulations aimed at preventing accidental releases of various "extremely hazardous substances" and to minimize the consequences of accidental releases that do occur. The resulting "Risk Management Program" regulations—applicable to companies of all sizes—include development of risk management plans (RMPs), implementation of audit programs and a "general duty" to identify hazards that may result from accidental releases. Shortly before the inauguration of President Trump, EPA promulgated amendments to "modernize" the Risk Management Program in response to an executive order issued by then-President Obama. However, under new Administrator Scott Pruitt, EPA has since signed a final rule to delay the effective date of the amendments until February 19, 2019. Nevertheless, EPA has become increasingly active in section 112(r) enforcement efforts over the past several years, and the amendments—if they become final—contain new types of requirements that the regulated community might find challenging. Against

this backdrop, this paper addresses the history and requirements of section 112(r) and its implementing regulations, summarizes the "modernized" section 112(r) requirements and their expected impacts—focusing specifically on refineries, and then related topics such as the relationship of the Risk Management Program to OSHA regulations, and regulatory enforcement.

§ 2.Section 112(r) of the 1990 Clean Air Act Amendments

In the 1990 Clean Air Act Amendments, Congress authorized and directed EPA to create regulations that prevent explosive chemical accidents that could cause death and injury beyond facility fences.[1] The Senate Committee on Environment and Public Works, in its report on a version of what ultimately became the 1990 Amendments, pointed to a number of reasons for the new directive.[2] Among other things, it cited an accidental toxic release of methyl isocyanate in August of 1985 in Institute, West Virginia, which sent 409 residents and workers to emergency rooms, and a summary from EPA of 11,048 accidental releases of extremely hazardous substances in the U.S. between 1982 and 1986.[3] The West Virginia incident occurred approximately nine months after the facility's sister operation in Bhopal, India released the same chemical, killing 3,400 people and injuring 200,000.[4] Following these incidents, the Occupational Safety and Health Administration (OSHA) and EPA launched efforts to examine the potential for injury and damage from such accidental releases.[5] OSHA concluded that its

[1] 42 U.S.C. § 7412(r)(7).

[2] S. REP. NO. 101-228 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385.

[3] *Id*. at 3519.

[4] *Id*.

[5] *Id*. at 3520.

program was better suited than EPA's program "to protect worker safety and health against common hazards, not rare catastrophic events."[6] In response, Congress designed section 112(r) to close the gap between the two agencies by giving EPA the ability to issue rules for the prevention, detection and correction of accidental releases of extremely hazardous substances.[7]

EPA responded in the 1990s by promulgating the Risk Management Program regulations, which require owners and operators of regulated facilities to, among other things, conduct worst-case scenario hazard analyses and plan for emergency responses in case the contemplated releases actually occur. Regulated facilities include "any buildings, structures, equipment, installations, or substance emitting stationary activities" from which an accidental release may occur.[8] Thus, the scope of section 112(r) and its implementing regulations is broad. This paper turns to a couple of the primary risk-prevention concepts in the statute: RMPs and the "general duty" that Congress imposes on the regulated community to address accidental releases of extremely hazardous substances.

[1] Risk Management Plans

In the Clean Air Act, Congress directed EPA to "promulgate reasonable regulations and appropriate guidance to provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances and for response to such releases by the owners or operators of the sources of such releases."[9] Congress further instructed that the

[6] *Id*. at 3521.

[7] *Id*. at 3528.

[8] 40 C.F.R. §§ 68.3 (definition of "Stationary source"), 68.130.

[9] 42 U.S.C. § 7412(r)(7)(B).

regulations would have to require regulated entities to submit "a risk management plan to detect and prevent or minimize accidental releases" of regulated substances.[10]

EPA promulgated regulations implementing Congress' requirements as the Chemical Accident Prevention Provisions, at Part 68, Title 40 of the Code of Federal Regulations. To comply with the statute and implementing regulations, a regulated facility must submit an RMP to EPA if it has more than a "threshold quantity of a regulated substance in process."[11] An RMP must cover three main areas: the potential effects of a chemical accident, steps the facility is taking to prevent an accident and emergency response procedures should an accident occur.[12] Specific elements of the RMP vary somewhat depending on the substances involved and the facility's history. Generally, an RMP must include (i) an offsite-consequence analysis of worst-case release scenarios;[13] (ii) a five-year accident history;[14] (iii) information regarding prevention programs for accidental releases, with the prevention requirements becoming increasingly rigorous depending on whether EPA would consider the facility to require a "Program 1," "Program 2" or "Program 3" accident-prevention program;[15] and (iv) information regarding an

[10] *Id.* § 7412(r)(7)(B)(ii).

[11] 40 C.F.R. § 68.10(a).

[12] RISK MANAGEMENT PLAN (RMP) RULE OVERVIEW (Nov. 21, 2017, 1:37 PM), https://www.epa.gov/rmp/risk-management-plan-rmp-rule-overview.

[13] 40 C.F.R. § 68.165.

[14] 40 C.F.R. § 68.168.

[15] 40 C.F.R. §§ 68.170, 68.175

emergency response plan.[16] Thus, the Risk Management Program regulations require both backward- and forward-looking analyses, and consideration of various "what-if" scenarios.

[2] The General Duty Clause

In the "General Duty Clause" (GDC), Congress subjected the owners and operators of regulated facilities to a broad duty to prevent and mitigate accidental releases in addition to the more specific requirements such as those for RMPs:

> The owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty in the same manner and to the same extent as section 654 of Title 29 to identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur.[17]

Section 654, Title 29, referenced in the statute, is the general duty clause in the Occupational Safety and Health (OSH) Act, which states, in relevant part, that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[18] The GDC and the reference to OSH Act put the responsibility on the owner and operator of a facility not only to design and maintain a safe facility, but also to use all feasible means to reduce the threat of death, substantial injury or property damage.[19] Congress also

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[16] 40 C.F.R. § 68.180.

[17] 42 U.S.C. § 7412(r)(1).

[18] 29 U.S.C. § 654(a)(1).

[19] 1990 U.S.C.C.A.N. at 3594-95.

included the GDC in response to concerns expressed by EPA that, absent the clause, EPA or the federal government might be liable for failure to respond to a reported hazard.[20]

Unlike RMPs, there are no specific regulations implementing the GDC, and there are no substance thresholds. In other words, even if a facility uses a regulated substance in amounts below the threshold for submitting an RMP, the facility is still subject to the "general duty," and could be subject to penalties for violating the GDC under Clean Air Act section 113(b).[21]

§ 3."Modernized" Section 112(r) Requirements for Refineries

In 2013, a massive explosion at a fertilizer storage and distribution facility in West, Texas, fatally injured volunteer firefighters and members of the public.[22] President Obama responded by ordering EPA to review how it regulated fence-line risks.[23] In 2016, EPA proposed to "modernize" the Risk Management Program regulations. On January 13, 2017, EPA published amendments (the "Amendments") to the Risk Management Program regulations that subjected regulated facilities to third-party audit, root-cause analysis, safer technology and alternatives analysis, information availability, and public-participation requirements that would

[20] *Id*. at 3595.

[21] Environmental Protection Agency, 550-F-09-002, The General Duty Clause (2009), https://www.epa.gov/sites/production/files/2013-10/documents/gdc-fact.pdf.

[22] U.S. Chemical Safety and Hazard Investigation Board, INVESTIGATION REPORT, FINAL, WEST FERTILIZER COMPANY FIRE AND EXPLOSION, § 1.1 at p. 13 (2016). On May 11, 2016, the Bureau of Alcohol, Tobacco, Firearms and Explosives ruled that the fire was intentionally set. *See* ATF Announces $50,000 Reward in West, Texas Fatality Fire, https://www.atf.gov/news/pr/atf-announces-50000-reward-west-texas-fatality-fire.

[23] Exec. Order No. 13650 (Aug. 1, 2013).

phase in over a five-year period.[24] The intent of the amendments was to "further protect human health and the environment from chemical hazards through advancement of process safety management based on lessons learned."[25] Specific "social benefits" identified by EPA included: reduced fatalities, injuries, and property damage; fewer evacuations and people sheltered in place; avoided lost productivity, emergency response costs, transaction costs, property value impacts, and environmental impacts; and improved efficiency of property markets and emergency response resource allocations.[26]

EPA originally set March 14, 2017, as the Amendments' effective date. However, the Trump administration's January 20, 2017 "regulatory freeze" and the regulated community's aggressive pushback convinced EPA to propose further delaying the effective date of the Amendments until February 19, 2019.[27] Given the compliance dates in the Amendments, this delay pushes the deadline for implementation for many provisions to 2022 or later.[28]

There has been speculation that EPA may revisit the Amendments entirely, or that Congress could use its Congressional Review Act authority to overturn them. However, EPA's website still lists "Reducing Risks of Accidental Releases at Industrial and Chemical Facilities

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[24] 82 Fed. Reg. 4594 (Jan. 13, 2017).

[25] *Id.* at 4595.

[26] *Id.* at at 4598 (Table 4).

[27] 82 Fed. Reg. 16146 (Apr. 3, 2017); 82 Fed. Reg. 13968 (Mar. 16, 2017); 82 Fed. Reg. 8499 (Jan. 26, 2017); 82 Fed. Reg. 8346 (Jan. 24, 2017); *see also* EPA, "Final Amendments to the Risk Management Program (RMP) Rule" (2017), https://www.epa.gov/rmp/final-amendments-risk-management-program-rmp-rule.

[28] 82 Fed. Reg. 4594, 4675, 4678 (Table 6).

(Fiscal Years 2017-2019)" as a National Enforcement Initiative,[29] and it is unclear whether the current Congress will be able to take action on anything of substance. Accordingly, industry would be wise to take note and begin planning for the Amendments to take effect eventually. Significant or noteworthy portions of the Amendments are summarized below.

[1] Third-Party Audits

The Amendments do not change the requirement to conduct regular Risk Management Program audits. They do add the requirement that facilities with Program 2 or Program 3 processes conduct third-party audits in two circumstances: (1) if they have had an RMP-reportable incident, or (2) if the implementing agency determines that conditions at the facility could lead to an accidental release of a regulated substance or that a prior third-party audit failed to meet the competence or independence criteria set out in the Amendments.[30] Such third party-audits must be completed within twelve months of the incident or agency determination (as applicable), unless the implementing agency specifies a different timeframe.[31] Facilities can appeal a final determination requiring a third-party audit to the EPA Regional Administrator (or the administrator or director of the applicable implementing agency).[32] A facility owner or

[29] National Enforcement Initiative: Reducing Risks of Accidental Releases at Industrial and Chemical Facilities (Fiscal Years 2017-2019), https://www.epa.gov/enforcement/national-enforcement-initiative-reducing-risks-accidental-releases-industrial-and. As shown by the website, information on this National Enforcement Initiative is sparse.

[30] *Id.* at 4595, 4610-11.

[31] *Id.* at 4611.

[32] *Id.* at 4697.

operator must submit required third-party audit reports to the audit committee of its Board of Directors, or other comparable committee or individual.[33]

The Amendments also added requirements regarding the qualifications and independence of third-party auditors.[34] A facility must either engage a third-party auditor that meets all the competency and independence criteria of the Amendments, or assemble an auditing team led by a third-party auditor that meets such competency and independence criteria.[35] The competency requirements state that the third-party auditor must be: "(i) [k]nowledgeable with the requirements" of the rule, "(ii) [e]xperienced with the stationary source type and processes being audited and applicable recognized and generally accepted good engineering practices," and "(iii) [t]rained and/or certified in proper auditing techniques."[36] The auditor must act impartially in the conduct of the audit, have policies and procedures to guarantee personnel comply with the independence requirements, and ensure all third-party personnel involved in the audit sign statements documenting that they meet the independence requirements.[37] The auditor must receive no financial benefit from the outcome of the audit, other than payment for the audit services.[38] Retirees are eligible to serve as independent third-party auditors if their sole continuing financial attachment to facility owner or operator is a retirement or health plan.[39]

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[33] *Id.* at 4701.

[34] *Id.* at 4611, 4697-98.

[35] *Id.*

[36] *Id.* at 4611, 4698.

[37] *Id.*

[38] *Id.*

[39] *Id.*

Former employees and contractors also can be independent third-party auditors if they have not conducted research, development, design, construction services, or consulting for the owner or operator within the last two years, and do not provide such services for at least two years following the final audit report.[40]

The third-party auditing requirements enacted by EPA contain several important changes from the proposed Amendments, which were made in response to comments. First, EPA removed as a competency requirement the condition that an auditor be a professional engineer (P.E.).[41] EPA also removed the requirement that the entire "auditing team" meet the competency and independence requirements of the Amendments.[42] EPA agreed with commenters that a variety of qualified personnel could be effective third-party auditors (that is, a P.E. is not necessary to be an effective auditor), and that applying competency and independence criteria to all members of an auditing team would reduce the number of qualified auditors and increase costs of auditing.[43] In the preamble to the final Amendments (the Preamble), EPA also recognized the common practice at facilities to include in audit teams employees with specific skills, expertise, or knowledge, thereby increasing the efficiency and effectiveness of the audit teams.[44] Similarly, in recognition of the industry practice of hiring into audit firms retired or

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[40] *Id.*

[41] *Id.* at 4610, 4620.

[42] *Id.* at 4610.

[43] *Id.* at 4610-21.

[44] *See id.* at 4620-21, 4624 ("EPA encourages owners or operators, when assembling both third-party audit teams and conducting self-audits . . . to include on their teams a mix of personnel previously familiar, and unfamiliar, with the specific facilities they are tasked with auditing.").

other skilled personnel precisely because of their experience at regulated facilities, EPA revised the proposed Amendments to clarify the ability of retirees to serve as independent third-party auditors, and decreased from three years to two the amount of time a third-party auditor is prohibited from working for a facility either before or after an audit.[45]

One final change to the proposed Amendments regarding third-party audits is particularly important for attorneys representing companies conducting such audits. EPA initially proposed language that specifically stated that the "third-party audit and related records could not be claimed as attorney-client communications or as attorney work products, even if written for or reviewed by legal staff."[46] This language was removed in the final version of the Amendments, but EPA commentary in the Preamble clearly indicates that EPA holds a view that is consistent with the proposed language, and will likely scrutinize any privilege or work-product claims asserted for documents related to third-party audits.[47] EPA's discussion can help provide guidance to attorneys as they advise on and review audits for clients.

[2] Root-Cause Analysis

Under the Amendments, all facilities with Program 2 or 3 processes must conduct a root-cause analysis as part of an incident investigation of a catastrophic release or a "near-miss."[48] Such investigations must be complete within twelve (12) months of the release or near miss, unless the implementing agency approves an extension request, in writing.[49] EPA considers (but

[45] *See id.* at 4611, 4622.

[46] *Id.* at 4610.

[47] *Id.* at 4614, 4625.

[48] *Id.* at 4595.

[49] *Id.* at 4607.

does not define) a "near miss" to be an incident that could have reasonably resulted in a catastrophic release.[50] The Amendments define "Root cause(s)" as a "fundamental, underlying, system-related reason why an incident occurred," and specify that a root cause must be identified through the "use of a recognized method."[51]

EPA specifically declined to identify what constitutes a "recognized method" for purposes of determining a root cause.[52] It explained that "[i]nvestigation methods evolve over time, and new methods may be developed, so any list promulgated by EPA in this rule may soon be obsolete."[53] EPA recommended that facilities consult "available literature on root cause investigation" and referenced as a source of helpful information the Center for Chemical Process Safety Guidelines for Investigating Chemical Process Incidents.[54]

[3] Safer Technology and Alternatives Analysis

The Amendments require facilities with Program 3 processes in North American Industrial Classification System (NAICS) codes 322 (paper manufacturing), 324 (petroleum and coal products manufacturing), and 325 (chemical manufacturing) to conduct a safer technology and alternatives analysis (STAA) and evaluate the practicability of any inherently safer

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[50] *Id.* at 4595. EPA considered adding a regulatory definition of "near-miss," but declined to do so. *Id.* at 4605-06. Instead, EPA stated that "[t]he criteria for determining incidents that require investigation will continue to include events that 'could reasonably have resulted in a catastrophic release.'" *Id.* at 4605.

[51] *Id.* at 4696 (definition of "Root cause" in 40 C.F.R. § 68.3).

[52] *Id.* at 4609.

[53] *Id.*

[54] *Id.*

technology (IST) identified, both as part of facilities' Process Hazard Analyses (PHAs).[55] The current Risk Management Program regulations require updating PHAs every five years.[56]

As explained by EPA, STAA refers to risk reduction strategies developed using a hierarchy of controls that are considered *inherent, passive, active, and procedural*.[57] This includes the concept of IST (also known as ISD, or inherently safer design), which "reduce[s] or eliminate[s] the hazards associated with materials and operations used in process."[58] According to EPA, "the four major inherently safer strategies" are: (1) minimization (using smaller quantities of hazardous materials); (2) substitution (using less hazardous materials); (3) moderation (using a less hazardous form of materials, under less hazardous conditions, or designing facilities to minimize impacts of a release); and (4) simplification (designing facilities to eliminate complexity and reduce operational errors).[59]

The Amendments require facilities in the identified NAICS codes to go through the STAA process as part of their PHAs, by considering, in order of preference, IST or ISD, passive measures, active measures, and procedural measures.[60] In doing so, the facility must determine

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[55] *Id.* at 4595.

[56] *Id.*

[57] Environmental Protection Agency, Office of Land and Emergency Management, EPA Activities under EO 13650: Risk Management Program (RMP) Final Rule Questions & Answers (Dec. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/rmp_final_rule_qs_and_as_12-21-16_final_formatted_342.pdf.

[58] *Id.*

[59] *Id.*

[60] 82 Fed. Reg. 4594, 4629, 4696.

the "practicability" of such measures to achieve a reduction in risk at the facility.[61] The Amendments add definitions of "inherently safer technology or design" (which identifies the four major strategies noted above), "active measures" ("risk management measures or engineering controls that rely on mechanical or other energy input to detect and respond to process deviations" such as alarms and detection hardware), "passive measures" ("risk management measures that use design features that reduce either the frequency or consequence of the hazardous without human, mechanical, or other energy input" such as dikes and berms) and "procedural measures" ("risk management measures such as policies, operating procedures, training, administrative controls, and emergency response actions to prevent or minimize incidents").[62] The Amendments also define "practicability" in a way that recognizes the many and varied inputs to facility decisions: "the capability of being successfully accomplished within a reasonable time, accounting for economic, environmental, legal, social and technological factors. Environmental factors would include consideration of potential transferred risks for new risk reduction measures."[63] For further guidance on what constitutes "practicability," EPA referred to guidance from the New Jersey Department of Environmental Protection.[64]

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[61] *Id.*

[62] *Id.* at 4696.

[63] *Id.*

[64] 82 Fed. Reg. 4636, referencing the New Jersey Department of Environmental Protection's Guidance for Toxic Catastrophe Prevention Act (TCPA)-Inherently Safety Technology (IST) Review, Attachment 1 Feasibility guidance, http://www.nj.gov/dep/enforcement/tcpa/downloads/IST_guidance.pdf.

[4] Emergency Preparedness and Response Enhancements—Coordination

The Amendments attempt to enhance emergency preparedness in two ways. The first is by requiring facilities with Program 2 or 3 processes to coordinate with local emergency response agencies at least once a year to determine how the facility is addressed in its community emergency response plan, and to ensure that local response organizations are aware of the regulated substances at the facility, the risks posed by those substances, and the ability of the facility itself to respond to an accidental release at the facility.[65] Such facilities must also: (1) conduct notification exercises annually (to ensure their emergency contact information is accurate and complete); (2) conduct field exercises at least once every ten years;[66] and (3) conduct tabletop exercises at least once every three years.[67]

EPA's Preamble makes a few comments on the emergency coordination provisions that are worthwhile to note. First, EPA clearly stated that it intended to place the burden on *facilities*—and not Local Emergency Planning Committees (LEPCs), emergency response agencies, or other involved community organizations—to carry out coordination activities in the final rule.[68] EPA specifically noted that "[l]ocal response organizations are not obligated to participate in the coordination activities specified in the final rule."[69]

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[65] 82 Fed. Reg. 4594, 4595.

[66] A facility that has an RMP-reportable incident may use its response to the incident to satisfy the field-exercise-response requirement if its documentation of the response is comparable to that required of a field exercise. *Id.* at 4595.

[67] *Id.*

[68] *Id.* at 4656.

[69] *Id.*

Second, despite placing this burden on facilities, EPA did seem to endorse the idea that a facility must simply use "good faith" efforts to ensure coordination.[70] For example, with respect to the required annual coordination meeting, EPA explained that it "worded the meeting requirement to only require the owner or operator to request such a meeting, so that the owner or operator would not be required to hold a meeting if local authorities are unable or unwilling to participate."[71] With respect to coordination activities generally, EPA similarly recognized the possibility that a facility might not obtain cooperation as envisioned by the Amendments:

> If local emergency planning and response organizations decline to participate in coordination activities, or the owner or operator cannot identify any appropriate local emergency planning and response organization with which to coordinate, the owner or operator should document their coordination efforts, and continue to attempt to perform coordination activities at least annually.[72]

Finally, commenters to the proposed Amendments identified the concern that EPA could use the evaluation reports required to be completed following required exercises in a subsequent enforcement action. EPA did not dispute this concern, instead noting that such a report is just like any other record required under 40 C.F.R. Part 68, and stating that whether a report would be used would "depend on the specific facts and circumstances of the case."[73]

[5] Emergency Preparedness and Response Enhancements—Information Availability and Public Participation

The second way the Amendments attempt to enhance emergency preparedness is through additional information availability and public participation requirements. Facilities must share

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[70] *Id.*

[71] *Id.* at 4657.

[72] *Id.* at 4656.

[73] *Id.* at 4665.

information relevant to the emergency response planning with the LEPC or other local emergency response agencies.[74] In response to concerns regarding security and duplication with other statutory schemes (such as the Emergency Planning and Community Right to Know Act, or EPCRA), EPA declined to specify the types or formats of information considered "relevant" under the Amendments, instead opting to leave this determination to the LEPCs and other local emergency officials.[75] EPA assumed that "relevant" information would be identified as part of the emergency coordination activities that occur between the facility and the local emergency response agencies.[76]

The Amendments also require facilities to provide the following to the public within 45 days of a request: (1) the RMP itself; and (2) chemical hazard information for all regulated processes, including: (a) names of regulated substances, (b) safety data sheets, (c) a five-year accident history and related information, (d) emergency response information (including designation as responding or non-responding, name and phone number of local emergency response organizations with which the facility last coordinated emergency response efforts, and procedures for informing the public and local emergency response agencies about accidental releases), (e) a list of scheduled exercises, and (f) LEPC contact information.[77] The facility owner or operator must provide "ongoing" notification of availability of this information (including how to request the information) to the public on a website, social medial platform, or

[74] *Id.* at 4596.

[75] *Id.* at 4666-67.

[76] *Id.* at 4596.

[77] *Id.* at 4596, 4667, 4704.

some other publicly accessible means.[78] The notification also must tell the public where to access community preparedness information, such as shelter-in-place and evacuation procedures.[79] In the Preamble, EPA noted that other "publicly-accessible means" of notification could include hard copy notices at publicly accessible locations, such as public libraries, local government offices, or e-mail.[80]

Finally, the Amendments require facilities to hold a public meeting within 90 days of an RMP-reportable incident.[81] In these public meetings, the facility must provide all information that is required to be kept for each release as part of the facility's five-year accident history, specifically: (1) date, time, and duration of the release; (2) chemicals released; (3) estimated quantities released; (4) the NAICS code; (5) the type of release event and its source; (6) weather conditions; (7) onsite impacts; (8) offsite impacts; (9); initiating event and contributing factors (if known); (10) whether offsite responders were notified; and (11) any operational or process changes that resulted from the investigation of the release.[82] The facility also must provide "other relevant chemical hazard information," such as the information that is available from a facility to the public upon request (*i.e.*, the chemical hazard information for all regulated processes).[83]

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[78] *Id.*

[79] *Id.* at 4596, 4667, 4705.

[80] *Id.* at 4670.

[81] *Id.* at 4596.

[82] *Id.* at 4672, 4705; *see also* 40 C.F.R. 68.42.

[83] 82 Fed. Reg. 4594, 4672, 4705.

In the Preamble, EPA suggested (but did not require) that the content of the public meeting also include a facility's description of "the risks that are associated with the facility and what the facility is doing to protect the public from those risks" and "relay information that would assist the public to prepare for accidental releases."[84] EPA noted that it would be "extremely useful" if the LEPC and other local emergency response officials participated in the meeting "to discuss the community emergency response plan and explain how the facility is incorporated into the plan" but again, stopped short of requiring such participation.[85]

§ 4. Practical Impact of the "Modernized" Requirements and Recommendations for Facilities

The impact of the Amendments largely depends on an existing facility's sophistication and current processes. But there are a number of actions facilities can take now to prepare for when (and if) the Amendments become effective. Many of these are "no regret" or "low regret" actions; that is, they do not require significant investments of either time or money that will be lost if the Amendments are withdrawn.

With respect to the third-party audit requirements, many facilities conduct third-party audits as a matter of course. These facilities should evaluate whether their auditors meet the competence and independence criteria in the Amendments, and if they do not meet the criteria, then the facilities should identify auditors that do. Facilities that typically use in-house audit teams should identify third-party auditors that they can utilize if needed. At the very least, all facilities should begin asking potential third-party auditors and audit firms how they plan to meet the requirements of the Amendments, so that they are prepared once (and if) the Amendments become effective.

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[84] *Id.* at 4672.

[85] *Id.*

Given the delay in the effective date of the Amendments, facilities have time to review their incident investigation and PHA processes to determine compliance with the Amendments regarding root-cause analysis, STAA, and IST. Again, many facilities already include these new requirements in their PHA processes. But even those facilities that already include these requirements should review their current practices to ensure alignment with the specifics in the Amendments, including by identifying current "recognized methods" of determining root causes and reviewing the New Jersey Department of Environmental Protection guidance referenced by EPA. Facilities may want to review their documentation requirements to make sure they account for the need to establish "practicability" or lack thereof.

Facilities also should make use of the delay in the Amendments' effective date to build or strengthen relationships with LEPCs and community response organizations, including fire departments. This effort may include discussing whether such organizations can or will participate in exercises and public meetings. Facilities should begin thinking about (and even budgeting for) ways to ensure this cooperation. And if it appears local organizations may not cooperate, facilities may want to create forms, checklists, or other documents that will help them show their "good faith" efforts to obtain cooperation.

The multiple ways in which the Amendments necessitate additional documentation—whether required by the language of the Amendments or by their practical impact—raise an important question for facilities regarding their written records: are they accurate, complete, and do they represent your facility appropriately? This is by no means a new inquiry, but it does remind facilities to think about whether and how they are training the individuals responsible for this documentation. Do these individuals at your facility stick to facts, or do they speculate unnecessarily? Do they use informal language that might inaccurately reflect the results of an

exercise? Do they fully understand the need for accuracy and truthfulness? Facilities should assume that EPA and the public will see exercise evaluations, RMPs, and associated documentation. When they do, what will they see?

Relatedly, in addition to creating a process and assigning roles, responsibilities, and accountabilities for responding to public information requests, facilities should engage the appropriate functions within their organizations to ensure that they are prepared for additional questions and concerns raised by the information submitted in response to these requests. These functions also will be helpful in planning for possible public meetings, including by deciding how to explain facts and information that may not yet be available within the 90-day timeframe required for these meetings.

Finally, lawyers should review EPA's language in the Preamble regarding the attorney-client privilege and audits. While it is clear that final audits themselves are not privileged, the question remains open whether communications or other documents related to audits can be protected by attorney-client privilege or the attorney work-product doctrine. To avoid a fight with EPA, however, lawyers representing facilities should consider how they can best advise on and review audit findings without jeopardizing confidentiality.

§ 5.Relationship of Risk Management Program to OSHA Process Safety Management

As part of the 1990 Clean Air Act Amendments, Congress also directed the Secretary of Labor, in coordination with the EPA Administrator, to promulgate a chemical process safety standard under the OSH Act designed to protect employees from hazards associated with accidental releases of highly hazardous chemicals in the workplace.[86] The OSHA process safety

[86] 29 U.S.C. § 655 note (CHEMICAL PROCESS SAFETY MANAGEMENT); *accord* 82 Fed. Reg. 4594, 4599. The OSHA PSM standard was published in 1992. 57 Fed. Reg. 6456 (Feb. 24, 1992).

management (PSM) regulations share the same goal as the Risk Management Program—"to prevent or minimize the consequences of accidental chemical releases through implementation of management program elements that integrate technologies, procedures, and management practices."[87] They largely parallel the Risk Management Program regulations; in fact, many facilities manage the Risk Management Program and PSM as one program, with the same policies, procedures, and guidelines.[88]

Similar to EPA's promulgation of the Amendments, OSHA proposed revisions to the PSM regulations in response to Executive Order 13650, "Improving Chemical Facility Safety and Security," after the West, Texas fertilizer-plant explosion.[89] When EPA published the Amendments, OSHA already had completed a Small Business Advocacy Review Panel report on its proposed PSM revisions.[90] However, OSHA has not yet promulgated final PSM revisions.

In light of the similarity between the Risk Management Program and PSM regulations, industry practice, and the seemingly similar amendment schedules, it is no surprise that commenters on the proposed Amendments noted a variety of potential conflicts, inconsistencies,

[87] 82 Fed. Reg. 4594, 4600.

[88] *Id.* at 4687.

[89] 78 Fed. Reg. 73756 (Dec. 9, 2013); *see also* OSHA, Process Safety Management, https://www.osha.gov/dsg/psm/index.html.

[90] Report of the Small Business Advocacy Review Panel on OSHA's Potential Revisions to the Process Safety Management Standard (Aug. 1, 2016), available at https://www.regulations.gov/document?D=OSHA-2013-0020-0116.

redundancies, or confusion vis-a-vis the PSM regulations.[91] Commenters even suggested that EPA withdraw the proposed Risk Management Program rulemaking to allow closer coordination with OSHA's PSM rulemaking.[92]

While acknowledging that further work was needed to harmonize and streamline Risk Management Program and PSM regulations,[93] EPA deflected these comments.[94] EPA contended that the record adequately reflected EPA's coordination with OSHA with respect to the

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[91] *See, e.g.*, 82 Fed. Reg. 4594, 4603 (noting that commenters argued that EPA's proposed definition of "catastrophic release" was redundant of OSHA's authority); 4607 (disagreeing with the comment that incident investigation team requires were already covered by the OSHA PSM standard); 4631 (discussing comments that STAA and IST analyses were more properly within the scope of OSHA); 4638 ("[a] facility noted that the proposed definition of 'feasible' . . . could cause the potential for confusion because the proposed rulemaking preamble states that OSHA has indicated that it would be unable to adopt the term feasible, as defined in this notice, under its PSM standard . . . .").

[92] *Id.* at 4688.

[93] *Id.* at 4638 ("This is an illustration of the need to harmonize the requirements of EPA RMP requirements with that of OSHA PSM.").

[94] *Id.* at 4631, 4688; *see also* OSHA, Process Safety Management, https://www.osha.gov/dsg/psm/index.html (listing as a topic to be considered by OSHA's Small Business Advocacy Review Panel "feedback on any similar provision of EPA's RMP rule and the PSM standard that could be streamlined.")

Amendments.[95] EPA also referenced the 1990 Clean Air Act Amendments' separate timelines for initial OSHA and EPA rulemakings, explaining that nothing in the Clean Air Act restricted timeframes for either agency to amend its rules.[96] Accordingly, while the Amendments were finalized in January of 2017, OSHA's PSM revisions appear to have stalled, at least for the time being.[97]

OSHA is not necessarily easing up on PSM, however. In the last days of the Obama administration, OSHA issued a revised National Emphasis Program (NEP) for inspecting PSM-covered facilities.[98] Under the NEP as originally envisioned, OSHA planned programmed and un-programmed inspections for all OSHA regions.[99] In support of the revised NEP, OSHA

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[95] 82 Fed. Reg. 4594, 4631, 4688. *See also* Environmental Protection Agency, Office of Land and Emergency Management, EPA Activities under EO 13650: Risk Management Program (RMP) Final Rule Questions & Answers (Dec. 2016) at 12, https://www.epa.gov/sites/production/files/2016-12/documents/rmp_final_rule_qs_and_as_12-21-16_final_formatted_342.pdf.

[96] 82 Fed. Reg. 4594, 4631, 4688. *See also* Environmental Protection Agency, Office of Land and Emergency Management, EPA Activities under EO 13650: Risk Management Program (RMP) Final Rule Questions & Answers (Dec. 2016) at 12, https://www.epa.gov/sites/production/files/2016-12/documents/rmp_final_rule_qs_and_as_12-21-16_final_formatted_342.pdf.

[97] OSHA, Process Safety Management, https://www.osha.gov/dsg/psm/index.html

[98] OSHA Directive CPL-03-03-00-021, PSM Covered Chemical Facilities National Emphasis Program (Jan. 17, 2017), https://www.osha.gov/OshDoc/Directive_pdf/CPL_03-00-021.pdf

[99] *Id*. at Abstract 1.

noted that it had issued "69 significant enforcement cases to chemical facility employers" under a prior NEP for PSM-covered chemical facilities and "24 significant enforcement cases to petroleum refinery employers" during the same period.[100] It further noted that refineries had "experienced numerous fatal and/or catastrophic process-related incidents since 2010" and cited specific examples.[101] It is not clear whether and to what extent the Trump administration will adhere to the NEP, but as of December 2017, the PSM NEP was still listed as "active" on OSHA's webpage.[102]

§ 6.Risk Management Program Enforcement

[1] Enforcement Authority

EPA enforces the Risk Management Program regulations through the administrative and judicial actions authorized by the Clean Air Act, Section 113.[103] Section 113(a)(3) authorizes EPA to issue an administrative penalty order or an order requiring compliance with the Risk Management Program requirements, or bring a civil action.[104] Section 113 also allows EPA to request that the Attorney General commence a criminal action for knowing violations of the Risk Management Program regulations,[105] or for (among other things) knowingly making false

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[100] *Id.* at 5.

[101] *Id*.

[102] OSHA's Active National & Special Emphasis Program Index, https://www.osha.gov/dep/neps/nep-programs.html.

[103] 42 U.S.C. § 7413.

[104] *Id.* § 7413(a)(3).

[105] *Id.*

material statements or omitting material facts from records, reports, plans or other documents (such as a RMPs or other required documentation).[106]

[2] Recent Enforcement: 2014-2017

Recent enforcement of the Risk Management Program regulations often occurs in the context of multi-media enforcement; that is, EPA frequently alleges Risk Management Program violations in addition to violations of other environmental statutes. In addition, while Risk Management Program-related allegations do result in settlements in the millions (or even tens or hundreds of millions) of dollars, more often, they result in settlements in the tens or hundreds of *thousands* of dollars. Consistent with the purpose of the Risk Management Program regulations (and of enforcement in general), they frequently contain affirmative requirements tailored to remedying alleged violations or requirements that money be paid to supplemental environmental projects, including for the enhancement of emergency response capabilities in the event of a future release. The authors note, however, that the United States Department of Justice issued guidance in the summer of 2017 stating that it will "no longer engage in this practice" of entering settlement agreements that include "payments to various non-governmental, third-party organizations as a condition of settlement with the United States [where the] third-party organizations were neither victims nor parties to the lawsuits."[107] If the Department of Justice holds to this new position, then regulated entities likely would have fewer opportunities to offset or otherwise reduce federal penalties or other exposure by agreeing to supplemental environmental projects.

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[106] *Id.* § 7413(c).

[107] Dep't of Justice, Memorandum, "Prohibition on Settlement Payments to Third Parties" (June 5, 2017), https://www.justice.gov/opa/press-release/file/971826/download.

Turning to recent enforcement examples, in September 2017, StarKist Co. and StarKist Samoa Co. (collectively, StarKist) entered into a Consent Decree resolving alleged violations of the Clean Water Act, EPCRA, RCRA, and the Risk Management Program regulations.[108] EPA alleged that StarKist violated the GDC by failing to ensure proper operation and maintenance of its ammonia, butane, and chlorine systems.[109] The total penalty paid by StarKist to settle the alleged violations was $6,300,000.[110] StarKist agreed to numerous ongoing requirements, including (but not limited to) upgrading its ammonia refrigeration system, modifying its pressure relief valve piping designs, implementing safer designs for its chlorine system, and adding community notification requirements to its emergency action response plans.[111] StarKist also agreed—notwithstanding the Department of Justice's new third-party payment prohibition

[108] StarKist Clean Water Act, Clean Air Act, Resource Conservation and Recovery and Emergency Planning and Community Right to Know Act Settlement, https://www.epa.gov/enforcement/starkist-clean-water-act-clean-air-act-resource-conservation-and-recovery-and-emergency; *United States v. StarKist Co. and StarKist Samoa Co.*, Civil No. 2:17-cv-01190-DXC (W.D. Penn. 2017).

[109] StarKist Clean Water Act, Clean Air Act, Resource Conservation and Recovery and Emergency Planning and Community Right to Know Act Settlement, https://www.epa.gov/enforcement/starkist-clean-water-act-clean-air-act-resource-conservation-and-recovery-and-emergency.

[110] *United States v. StarKist Co. and StarKist Samoa Co.*, Civil No. 2:17-cv-01190-DXC (W.D. Penn. 2017) at 5.

[111] *Id*. at 7-20.

policy—to implement an $88,000 supplemental environmental project to purchase emergency response equipment for a local fire department.[112]

Harcros Chemicals, Inc. (Harcros) also paid a significant civil penalty ($950,000) to settle alleged violations of the Risk Management Program regulations in 2017.[113] The Harcros Consent Decree resulted from a series of EPA "pilot" audits at a representative sample of Harcros facilities.[114] Through the audits, EPA discovered alleged non-compliance with Risk Management Program "requirements to identify hazards using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases."[115] In addition to the payment of civil penalties, the Harcros Consent Decree required performance audits and the completion of a supplemental environmental project that installed foam fire suppression systems at eight Harcros facilities, at a cost of approximately $2.5 million.[116]

The year 2017 also had its share of "smaller" Risk Management Program settlements. North Pacific Seafoods (a cannery in Seattle) paid $45,743 and committed to spend $175,000 on a supplemental environmental project (installation of a solar power system and LED lighting

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[112] *Id*. at 18.

[113] Harcros Chemicals, Inc. Clean Air Act Settlement (July 31, 2017), https://www.epa.gov/enforcement/harcros-chemicals-inc-clean-air-act-settlement; *United States v. Harcros Chems., Inc.*, Civil No. 2:17-cv-2432 (D. Kan. 2017) at 10.

[114] Harcros Chemicals, Inc. Clean Air Act Settlement (July 31, 2017)_, https://www.epa.gov/enforcement/harcros-chemicals-inc-clean-air-act-settlement.

[115] *Id*.

[116] *Id*.; *United States v. Harcros Chems., Inc.*, Civil No. 2:17-cv-2432 (D. Kan. 2017) at 14-17.

upgrades) to settle allegations that it failed to develop and implement an RMP with respect to its anhydrous ammonia processes.[117] Pitman Farms, Inc. (Pitman) settled alleged Risk Management Program violations following three ammonia releases at a poultry processing facility in California by paying $242,980 in civil penalties and agreeing to perform two supplemental environmental projects—the purchase of emergency response equipment for the local hazmat response team and fire department—valued at approximately $200,000.[118] The Pitman facility also was required to install centralized safety controls, and at the time of settlement, already had installed a new ammonia refrigeration system and filed a revised RMP.[119] Two facilities in Massachusetts, owned by Performance Food Group, Inc. and Solutia Inc., settled Risk Management Program and EPCRA claims related to anhydrous ammonia and vinyl acetate for civil penalties of $184,717 and $15,222 (plus a supplemental project worth approximately $59,779), respectively.[120]

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[117] North Pacific Seafoods to reduce air pollution from Maknek facility in settlement with EPA over failure to plan for risks from hazardous chemicals (Oct. 18, 2017), https://www.epa.gov/newsreleases/north-pacific-seafoods-reduce-air-pollution-naknek-facility-settlement-epa-over-failure.

[118] U.S. EPA commits Sanger, Calif., poultry processor to protect workers, local community from risk of chemical release (Feb. 6, 2017), https://www.epa.gov/newsreleases/us-epa-commits-sanger-calif-poultry-processor-protect-workers-local-community-risk.

[119] *Id.*

[120] Two Springfield, Mass. Facilities Agree to Improve Handling and Reporting of Hazardous Chemicals (May 5, 2017), https://www.epa.gov/newsreleases/two-springfield-mass-facilities-agree-improve-handling-and-reporting-hazardous.

The type of settlements reached by EPA with facilities in 2017 was consistent with settlements in the years 2014-2016. For example, in April of 2016, EPA filed a complaint against Tesoro Refining and Marketing Company (Tesoro) alleging violations at its Anacortes, Washington refinery, including for allegedly failing to: include required written process safety information, address PHA findings, appropriately document safety processes and written operating procedures, and evaluate all Risk Management Program covered processes.[121] EPA proposed a $718,361 penalty.[122] Tesoro and EPA ultimately entered into a Consent Agreement resolving the allegations in the Complaint for a civil penalty of $325,000.[123]

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[121] EPA files complaint against Tesoro refinery in Anacortes, Washington, alleging chemical accident prevention violations (Apr. 20, 2016), https://www.epa.gov/newsreleases/epa-files-complaint-against-tesoro-refinery-anacortes-washington-alleging-chemical; *In the Matter of Tesoro Ref. and Mktg. Co., LLC*, Docket No. CAA-10-2016-0044, Complaint ¶¶3.22-3.75, https://yosemite.epa.gov/OA/rhc/EPAAdmin.nsf/Filings/D38218746C574CF685257FA2001BBF66/$File/CAA-10-2016-0044-COMPLAINT.pdf.

[122] EPA files complaint against Tesoro refinery in Anacortes, Washington, alleging chemical accident prevention violations (Apr. 20, 2016), https://www.epa.gov/newsreleases/epa-files-complaint-against-tesoro-refinery-anacortes-washington-alleging-chemical.

[123] Letter from Robert Hartman, Assistant Regional Counsel, EPA Region 10, to Honorable Barbara A. Gunning, Administrative Law Judge, EPA, In the Matter of: Tesoro Refining and Marketing Company LLC, Docket No. CAA-10-2016-0044, https://yosemite.epa.gov/OA/RHC/EPAAdmin.nsf/Filings/5FC32C3B0DFF61A08525802D001BC9B8/$File/CAA-10-2016-0044%20FINAL%20ADR_OCR.pdf.

In October of 2016, two New York companies, Finger Lakes LPG Storage LLC (the owner/operator of a facility that received and stored liquefied petroleum gas for wholesale customers) (Finger Lakes) and Twin Lakes Chemical Inc. (a chemical manufacturing company that was using and storing phosgene) (Twin Lakes) settled alleged Risk Management Program violations for $154,000 and $40,000, respectively.[124] Finger Lakes allegedly failed to comply with hazard identification and equipment safety requirements (such as accurate piping and instrumentation diagrams).[125] In addition to the civil penalty, Finger Lakes committed to spend approximately $158,000 to purchase equipment and vehicles for three local fire departments. [126] Twin Lakes allegedly "failed to adequately support, secure, and label phosgene equipment and pipes" and failed to "comply with hazard identification and equipment safety requirements." [127] Twin Lakes committed to spend approximately $100,000 to purchase hazardous material equipment for a local fire department.[128]

In 2015, Bayer CropScience LP (Bayer) entered into a Consent Decree that required it to pay $975,000 in civil penalties and spend $4.23 million to enhance local emergency preparedness and response, and $452,000 to implement measures to improve safety at chemical

[124] New York Companies Fined for Clean Air Act Violations (Oct. 11, 2016), https://www.epa.gov/newsreleases/new-york-companies-fined-clean-air-act-violations.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

storage facilities.[129] The Consent Decree followed a 2008 explosion at Bayer's West Virginia facility that killed two people.[130] EPA alleged that Bayer did not comply with its RMP, including by failing to engage a safety interlock system properly on a digital control system and training employees to understand the system, which ultimately resulted in the chemical reaction that caused the explosion.[131]

Also in 2015, Western Operating Company paid $122,900 to resolve alleged Risk Management Program and EPCRA violations relating to its gas plant in Morgan County,

[129] Bayer CropScience to Enhance Safeguards at Chemical Facilities in Four States to Settle Violations at W. Va. Plant (Sept. 21, 2015), https://www.epa.gov/newsreleases/bayer-cropscience-enhance-safeguards-chemical-facilities-four-states-settle-0; Notice of Lodging of Proposed Consent Decree Under the Clean Air Act, 80 Fed. Reg. 57873 (Sept. 25, 2015). The Bayer CropScience Consent Decree was not finalized until 2016, and has been subsequently modified. *See* Notice of Lodging of Proposed Second Modification to Consent Decree Under the Clean Air Act 82 Fed. Reg. 42838 (Sept. 12, 2017) (modifying the Consent Decree to replace a supplemental environmental project that required expansion of a wastewater sump with another project to purchase emergency response equipment, decreasing the total cost of the supplemental environmental projects to $3.05 million).

[130] Bayer CropScience to Enhance Safeguards at Chemical Facilities in Four States to Settle Violations at W. Va. Plant (Sept. 21, 2015), https://www.epa.gov/newsreleases/bayer-cropscience-enhance-safeguards-chemical-facilities-four-states-settle-0.

[131] *Id.*

Colorado.[132] EPA alleged that the Western Operating Company facility did not adequately implement the Risk Management Program requirements for flammable substances at the facility, including by failing to: timely resolve equipment maintenance problems; provide employees with accurate written operating procedures; implement maintenance procedures on piping; and properly test gas-detection equipment.[133]

In 2014, Suncor Energy[134] similarly paid $230,400 to resolve alleged Risk Management Program and EPCRA violations relating to its Commerce City Refinery, including the allegation that it had not adequately implemented Risk Management Program requirements related to flammable substances and hydrogen sulfide by compiling incomplete process safety information and failing to follow procedures for maintaining process equipment.[135] Also in 2014, Kemps Dairy (a dairy processing facility) (Kemps) and GlaxoSmithKline Vaccines (a manufacturing

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[132] Western Operating Company agrees to resolve alleged risk management planning and chemical reporting violations at Wiggins Gas Plan facility (Colo.) (Mar. 5, 2015), https://archive.epa.gov/epa/newsreleases/western-operating-company-agrees-resolve-alleged-risk-management-planning-and-chemical.html.

[133] *Id.*

[134] We note that, as identified on the title page, two of the authors are employees of Suncor entities, and three of the authors participated in the resolution of the Risk Management Program enforcement described in the text.

[135] Commerce City (Colo.) refinery agrees to resolve alleged risk management planning and chemical reporting violations (Sept. 29, 2014), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/b76bc2968166abcd85257d620062fbdb.html.

facility with on-site quantities of chloroform) (GlaxoSmithKline) paid $57,000 and $172,900, respectively, to resolve violations associated with their alleged failure to submit RMPs.[136] Kemps and GlaxoSmithKline both had submitted RMPs by the time of the settlements.[137] Numerous other Risk Management Program settlements were negotiated in 2014[138], 2015[139], and 2016[140].

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[136] Kemps, LLC agrees to resolve risk management violation at Fargo, North Dakota dairy processing facility (Sept. 15, 2014), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/9002db51aea0fed785257d540075f3a3.html; GlaxoSmithKline Vaccines agrees to resolve risk management violation at Hamilton, Montana facility (Sept. 15, 2014), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/f718fdf86212909085257d5400761b8d.html.

[137] *Id.*

[138] *See* EPA settles with Jerome Cheese for chemical risk management violations at Jerome, Idaho plant (Oct. 17, 2014), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/004dda6ce131de3d85257d74005894f3.html; U.S. EPA requires Rancho LPG to comply with safety measures for community protection (July 24, 2014) https://archive.epa.gov/epapages/newsroom_archive/newsreleases/138e8d63e8b80f8385257d1f006f5df9.html; EPA settles with Alaska seafood processor UniSea for chemical risk management planning violations (Sept. 24, 2014), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/a196516c557d7c9d85257d5d0072e5cd.html; Chemical Company Takes Steps to Make Fall River, Mass. Community Safety

Following EPA Enforcement (Oct. 20, 2014), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/c0d88a96d1225fb785257d770055ada0.html; US Settles with DuPont to Resolve Clean Air Act Violations and Protect Communities, Kanawha River Near West Virginia Facility (Aug. 27, 2014), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/f7e930442eed166f85257d41006ae467.html.

[139] EPA Inspections Reveal Clean Air Act Violations at Wilbur-Ellis Company Facilities in White Cloud, Troy and Silver Lake, Kan. (July 16, 2015), https://www.epa.gov/newsreleases/epa-inspections-reveal-clean-air-act-violations-wilbur-ellis-company-facilities-white; U.S. EPA cites two Guam bulk fuel companies for chemical safety violations (Oct. 6, 2015), https://www.epa.gov/newsreleases/us-epa-cites-two-guam-bulk-fuel-companies-chemical-safety-violations; Bayer CropScience to Enhance Safeguards at Chemical Facilities in Four States to Settle Violations at W. Va. Plant (Sept. 21, 2015), https://www.epa.gov/newsreleases/bayer-cropscience-enhance-safeguards-chemical-facilities-four-states-settle-0.

[140] City of Fort Dodge, Iowa, to Pay Penalty and Perform Project to Settle Water Plant Risk Management Program Violations (May 24, 2016), https://www.epa.gov/newsreleases/city-fort-dodge-iowa-pay-penalty-and-perform-project-settle-water-plant-risk-management; EPA Settlement with Owner of Fertilizer Plant in Culbertson, Neb. to Resolve Risk Management Program Issues (June 24, 2016), https://www.epa.gov/newsreleases/epa-settlement-owner-fertilizer-plant-culbertson-neb-resolve-risk-management-program; EPA Settles with Oregon Ice Cream Company Over Chemical Safety Violations (Mar. 29, 2016), https://www.epa.gov/newsreleases/epa-settles-oregon-ice-cream-company-over-chemical-safety-

[3] Future Enforcement and Conclusion

Despite the new administration, 2017 has still seen its fair share of settlements related to alleged Risk Management Program violations. This is not surprising, given that the incidents or inspections that resulted in agreements in 2017 occurred in years prior, and negotiations regarding those agreements likely were well underway by early 2017.

Yet, as noted above, EPA's website still lists "Reducing Risks of Accidental Releases at Industrial and Chemical Facilities (Fiscal Years 2017-2019)" as a National Enforcement Initiative,[141] and EPA staff confirms that the Initiative is still on ongoing priority. OSHA also continues to maintain its PSM NEP.[142] Facilities therefore should continue to expect focus on Risk Management Program and PSM in the coming years, although the intensity of that focus—including the frequency of inspections—may wane. EPA staff has indicated a willingness to

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violations; EPA Settlement with Chesapeake Appalachia Improves Safety, Protects Chapmanville and Kermit, W.Va. Residents (Mar. 1, 2016), https://www.epa.gov/newsreleases/epa-settlement-chesapeake-appalachia-improves-safety-protects-chapmanville-and-kermit; Clean Air Act Settlement Improves Chemical Safety at Bloomfield, Conn. Meat Processor (July 7, 2016), https://www.epa.gov/newsreleases/clean-air-act-settlement-improves-chemical-safety-bloomfield-conn-meat-processor.

[141] National Enforcement Initiative: Reducing Risks of Accidental Releases at Industrial and Chemical Facilities (Fiscal Years 2017-2019), https://www.epa.gov/enforcement/national-enforcement-initiative-reducing-risks-accidental-releases-industrial-and.

[142] *See* OSHA Directive CPL-03-03-00-021, PSM Covered Chemical Facilities National Emphasis Program (Jan. 17, 2017), https://www.osha.gov/OshDoc/Directive_pdf/CPL_03-00-021.pdf.

engage with industry in advance of an audit or government enforcement action, leaving facilities an opening to ask questions and seek input as they review their own processes and procedures.

Moreover, despite the ongoing debate over whether the Amendments will ever become effective, facilities can take several no- or low-regret actions to begin preparing for the Amendments. As a result, facilities would be wise to begin learning about and preparing for the Amendments while they are still several years out, and while EPA remains open to assist them in doing so.