



Summer 2018

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Austin, TX

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Message from the Chair

Welcome and Introduction

Welcome to the Environmental Committee Newsletter. While becoming Chair of the Environmental Committee with the 2017 Annual Meeting, we have seen a sea change in environmental policy with the new Trump Administration beginning Inauguration Day, January 20, 2017. Our committee goals include serving Section needs regarding trends in environmental law, particularly educational needs through the rapid changes we are seeing with this administration. Generally speaking, after several decades observing trends in environmental policy, and relative efforts to mitigate pollution in the environment, the pendulum which swings left during liberal administrations, driving expenditures toward prospective compliance and lowering litigation risk, has swung back sharply right, which may save on compliance cost, but tends to increase uncertainty in third-party litigation expense where unaddressed compliance issues remain vulnerable to citizen suits and unmitigated pollutant releases trigger third party common law litigation.

Fans of deregulation may rejoice with these developments while others may object. Pragmatic corporate defense attorneys, including environmental regulatory and litigation attorneys, recognize the shifts in costs that tend to occur in this scenario. Because environmental regulation is adopted to protect human health and environment by mitigating risk from pollutants, deregulation can result in litigation arising from risks that are no longer mitigated. Thus, waste and pollution costs businesses money either way - if more of the business operating budget is spent on compliance costs in a pro-regulatory administration, then in a deregulatory environment where less of the budget is directed to compliance costs, there are potentially higher pollution rates, arguably more litigation risk, potential litigation expense and associated uncertainty. After more than three decades in this field, I have seen these contrasts in approaches up close, beginning with my first job working for President Reagan's EPA in 1985, as a chemical engineer in the Superfund emergency response program, then during President G.H.W. Bush's administration, as an environmental compliance manager for a pervasively regulated hazardous waste incineration company, and then later working for President Clinton's EPA in 1994, as a law clerk for EPA's Office of General Counsel, Air and Radiation Division. As a corporate environmental defense attorney since 1995, the contrasts continued between the Clinton, then G.W. Bush, then Obama Administrations, particularly regarding climate change and greenhouse gas regulation, taking us to where we are now.

We are living in very interesting times. Deregulation fans should note: uniform national environmental laws help to avoid the patchwork quilt of individual state approaches, allowing more consistent deployment of technology and compliance approaches throughout the fifty states; competent environmental regulation and proactive compliance minimizes citizen suits and common law environmental litigation, mitigating litigation risk; apart from those actions completed pursuant to the Congressional Review Act, full regulatory reversals are difficult to accomplish under the Administrative Procedures Act, require more time than most expect, and may not survive judicial review. On the other hand, of course, overly aggressive regulation can result in inefficiency without commensurate environmental benefits. Striking the right balance is always the challenge.

Many entities are tracking this administration's attempts to stop or reverse

regulation, with various perspectives. These websites are quite useful in monitoring regulatory events, litigation status and trends. For example, compare the US EPA's "[EPA Deregulatory Actions](#)", with the Brookings Institution, "[Tracking Deregulation in the Trump Era](#)," (applying the "Environmental" filter), and the ABA Section of Environment Energy and Resources "[Administration Tracker](#)."

For climate change specifically, see the [Columbia University Sabin Law Center Climate Change Litigation Databases](#).

This Issue

With this issue, we offer articles relevant to the Trump Administration's regulatory reversals, including *State Reactions to the Trump Administration's Energy and Environment Agenda*, by Ethan Shenkman and Chase Raines, Arnold & Porter. Ethan did an excellent job summarizing more generally the impact of the Trump Administration's agenda at the 2017 Annual Meeting, summarized below. Individual states are generally delegated authority to implement national environmental laws and rely on federal funding. A continuing question is how states will respond to these regulatory reversals, particularly regarding climate change and greenhouse gas regulation. Also, there are practical questions regarding how delegated states will continue to implement delegated programs during the interim period while proposed regulatory reversals are litigated, particularly given budget cut-backs. With this article, Ethan and Chase review the trend in state responses to these issues providing guidance for businesses. Also included are two articles focusing on the Clean Air Act, first, with Daniel J. Brown reviewing enforcement with *Federal Enforcement of the Clean Air Act: Past, Present and Future*, then our former Environmental Committee Chair, Bernard F. Hawkins, Jr., and our Newsletter Editor, Rose-Marie T. Carlisle address enforcement of the Clean Air Act's General Duty Clause for the prevention of accidental releases of hazardous air pollutants, with *The Risk of 20/20 Hindsight Under the Federal Clean Air Act General Duty Clause*. Also included are summaries of recent relevant regulatory actions and litigation.

Environmental Committee Participation in ABA Business Law Section Meetings

2017 Annual Meeting

At the 2017 Annual Meeting in Chicago, the Environmental Committee presented *Managing Environmental Business Risk in the New Administration*, with excellent presentations by Ethan Shenkman, Partner, Arnold & Porter, LLP and Lindene Patton, Partner, Earth & Water Law, LLC, which I moderated with an intent to highlight the most important transition issues. Check back on our committee website for the presentations, but in the meantime, the recording of this panel session is available on the [Section website](#).

2018 Spring Meeting

At the 2018 Spring Meeting in Orlando, in an early morning session on Friday, April 13, 2018, the Environmental Committee presented *Adapting Business Transactions to Climate Change*, with co-sponsoring committees: Federal Regulation of Securities, International Business Law, International Coordinating, Law and Accounting, Project Finance. This session was chaired by Cynthia A.M. Stroman, Esq., King & Spalding, joined by Lindene Patton, Esq., E&W Law, LLC, Shari Libicki, Ph.D., Ramboll, Shelby Guilbert, Jr., Esq., King & Spalding, and Mel Meinhardt.

We also participated in an afternoon session that Friday, presented by the Government Affairs Practice Committee, entitled, *The Politics of Trump, Trudeau and Pena Nieto: Three Amigos or What?: A Look at NAFTA, Immigration, and Climate Change*, with co-sponsoring committees: Corporate Counsel, Corporate Governance, Environmental, International Business Law, Taxation and Corporate

Compliance. This session was chaired by Amy Kellogg, Partner, Harter, Secrest & Emery, LLP, with Moderator J. David Stewart, III, Partner, Bradley Arant Boult Cummings, LLP, and excellent presentations from panelists: Edgar Mayorga Compean, Partner, De La Vega & Martinez Roja, S.C., Sheela Murthy, President and CEO, Murthy Law Firm, Jacques Shore, Partner, Gowling WLG, Mary Ellen Ternes, Partner, Earth & Water Law, LLC

[2018 Spring Meeting Materials and Audio](#) (must log in first to access)

We hope you find our newsletter useful, and welcome your ideas for areas of focus. Please call or email me and Rory, or any of our Committee Leadership, with your ideas for programming and materials. And as always, a special thanks to our Newsletter Editor Rory Carlisle and contributors to this month's newsletter.



Mary Ellen Ternes, Esq.

Featured Articles

State Reactions to The Trump Administration's Energy & Environment Agenda

By Ethan Shenkman and Chase Raines

Newton's third law of motion states that for every action, there is an equal and opposite reaction. That principle has been playing out between the Trump Administration and the states as they act and react to rapid change in the field of environmental law and policy. In-house counsel would be well advised to keep this dynamic in mind as they manage legal and business risk in this area.

During the first part of the Trump Presidency, the Administration has undertaken a series of deregulatory actions. Often in direct and explicit response, a number of states have stepped in with their own regulatory actions to fill the vacuum. Although many of the Trump Administration's actions are still in the proposal stage and must survive various legal challenges, state governments are not necessarily waiting for the legal processes to play out. Particularly in the climate change arena, states such as California have asserted leadership in the face of federal withdrawal.

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Federal Enforcement of the Clean Air Act: Past, Present, and Future

By Daniel J. Brown

A central theme of this edition of the Newsletter is the Trump Administration's (the "Administration's") impact on EPA's implementation of the Clean Air Act (CAA). Other articles in this edition have focused on the Administration's impact on specific aspects of the CAA. In contrast, this article will focus more generally on the Administration's impact on EPA's use of its enforcement authority under the

CAA. The general structure of EPA's enforcement authority, as well as the Agency's practical application of such authority, is reviewed before discussing how EPA's approach to enforcement might be impacted by the change of administration. Finally, this article discusses options for mitigation of penalties in federal enforcement actions under the CAA.

[Read more...](#)

The Risk of 20/20 Hindsight Under the Federal Clean Air Act General Duty Clause

By Rose-Marie T. Carlisle and Bernard F. Hawkins, Jr.

In the past few years a little-considered section of the federal Clean Air Act (CAA) has resulted in significant penalties for some manufacturing facilities, often following an accident of some sort. EPA has sought penalties for violations of CAA Section 112(r)(1), the General Duty Clause (GDC), based on facilities' alleged failures to properly assess, plan for, prevent, and minimize the consequences of accidental releases of extremely hazardous substances. The absence of regulations defining key terms used in the GDC has made it difficult for companies to predict whether their efforts to comply with the GDC are sufficient. Settlements of EPA's notices of violation and EPA's guidance documents on Section 112(r)(1) reflect the potential breadth of the duties EPA may view as existing for facilities' owners and operators.

[Read more...](#)

Significant Cases

National Association of Manufacturers v. Department of Defense, 2018 WL 491526, 583 U.S. ____ (January 22, 2018). The U.S. Supreme Court held that the Clean Water Act requires that challenges to the "Waters of the United States" rule (WOTUS), 80 Fed. Reg. 37055 (2015), which clarified EPA's interpretation of the definition of waters of the United States that are subject to federal jurisdiction under the CWA, be brought in federal district courts rather than in federal courts of appeal. The government argued that CWA's provision that review of the EPA Administrator's action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 . . ." be decided by a federal court of appeals required that challenges to the WOTUS rule be presented only to federal courts of appeals. In a unanimous decision, the Court held that "other limitation" in the phrase "effluent limitation or other limitation" means "a limitation related to the discharge of pollutants. The Court noted that the preamble to the WOTUS rule specified that the rule is a definitional rule rather than a rule establishing regulatory requirements.

American Petroleum Institute v. EPA, 862 F.3d 50 (D.C. Cir. 2017): The D.C. Circuit Court of Appeals struck down both the Verified Recycler Exclusion and the fourth factor of EPA's recycling legitimacy test in 40 C.F.R. §260.43(a). The Verified Recycler Exclusion provided hazardous secondary material would not be classified as hazardous waste if it were sent to a reclaimer who either had a RCRA permit or a RCRA variance provided that the generator of the material took steps to minimize the possibility of releases of the hazardous secondary material, had certain emergency preparedness processes, and evaluated the risks of the secondary material. The court rejected these requirements, stating, "[T]he Verified Recycler Exclusion covers materials that might be labeled waste only because of a reclamation-equals-discard rule that EPA has all but conceded is overbroad." The court emphasized that a material is a waste if it is "part of the waste disposal problem." As for the legitimacy test in C.F.R. §260.43(a), Factor 4 of that test specified that a secondary material would be considered to be legitimately recycled and therefore outside the scope of RCRA regulation if it met

the other three factors of the legitimacy test and if the product of the recycling process was "comparable to a legitimate product or intermediate." The court rejected Factor 4 entirely. The court also held that the third factor of the legitimacy test, requiring that the secondary materials be handled as a valuable commodity and either handled in an equally protective manner as an analogous raw material or contained, was a reasonable element of determining legitimate recycling. The D.C. Circuit issued a subsequent opinion in this case on March 6, 2018 clarifying its affirmance of EPA's removal of the spent catalyst bar from the vacated portions of the Verified Recycler Exclusion, its vacatur of Factor 4 in its entirety, and the applicability of the Transfer-Based Exclusion. [Read more.](#)

National Environmental Development Association's Clean Air Project v. EPA, No. 16-1344, D.C. Cir., June 8, 2018: The D.C. Circuit Court of Appeals upheld EPA's Regional Consistency Rule, 40 CFR §56.3(d), which specifies that only decisions of the U.S. Supreme Court and the D.C. Circuit Court of Appeals arising from challenges to nationally applicable regulations or final action apply uniformly to enforcement of the Clean Air Act by EPA Regions. The regulation excepts EPA Regional Office interpretations and actions that are required to conform to decisions issued by other federal courts from the policy of uniformly applying its criteria, procedures, and policies to implementing and enforcing the Clean Air Act. The petitioner, NEDACAP, argued that the requirement that regulations provide for uniformity under the CAA stated in CAA Section 301(a)(2)(A) requires that decisions of all courts must be adhered to, and that Section 301(a)(2)(A) was intended to "resolve the problem of inconsistent judicial decisions generated by" Section 307. Section 307 provides that challenges to regulations of national application under the CAA be brought only in the D.C. Circuit Court of Appeals and that challenges involving purely local or regional actions of EPA be brought in the federal court for the jurisdiction in which the action occurred. The court held that Section 301(a)(2)(A) applied only to situations in which the Administrator's powers were delegated to EPA employees, and that EPA could not under any circumstances fail to conform to court decisions applicable in the jurisdiction for which they were decided. Applying the principles of *Chevron*, the court held that EPA had reasonably fashioned the Regional Consistency Rule to provide for compliance with applicable court orders in the face of the inconsistent rulings by federal courts interpreting the CAA that grow out of Section 307's judicial review provisions.

Georgia v. Pruitt, S.D. Ga., Brunswick Div., No. 2:15-cv-79 (June 8, 2018). The district court granted a preliminary injunction against the application of the "Waters of the United States" rule (WOTUS), 80 Fed. Reg. 37055 (2015). The case followed the Supreme Court's ruling in *National Association of Manufacturers* that jurisdiction over the WOTUS rule lies in the federal district courts and relied on that case to find that a case or controversy exists notwithstanding EPA's current plan to revisit the WOTUS rule and EPA's final Applicability Rule extending the effective date of the WOTUS rule to February 6, 2020. The district court found that the challengers had demonstrated all elements required for a preliminary injunction against the application of the WOTUS rule. A key determination by the district court was the likely failure of the WOTUS rule to follow Justice Kennedy's plurality decision in *Rapanos* that stated that the CWA's statutory scope of regulated waters did not extend further than those waters with a "significant nexus" with a navigable water.

Ohio Valley Environmental Coalition et al. v. Pruitt, No. 17-1430, 4th Cir. (June 20, 2018). The Fourth Circuit overturned the district court's ruling that West Virginia had made a "constructive submission" to EPA that no TMDLs were needed for waters within the state, and that EPA was required to either approve or disapprove of the submission within 30 days.

RCRA Generator Improvements Rule: EPA promulgated the final Generator Improvements Rule on November 28, 2018, 81 Fed. Reg. 85732. The rule amends requirements for hazardous waste generators relating to hazardous waste determinations, labeling and marking containers when accumulating hazardous waste, emergency procedures, satellite accumulation areas, biennial reporting by large quantity generators, and disposal of liquid hazardous wastes in landfills. The rule also consolidates most of the generator requirements into 40 C.F.R. Part 262. Practitioners have noted that Section 262.11's clarification of generator knowledge that is acceptable for making a hazardous waste determination and the associated recordkeeping requirements may alter the practices of many generators.

Clean Air Act: EPA has proposed to rescind the Risk Management Program Amendments that require enhancements to RMPs under 40 CFR Part 68 that were set out in a final rule at 82 Fed. Reg. 4594 (Jan. 13, 2017). The proposed rule can be found at 83 Fed. Reg. 24850 (May 17, 2018) and <https://www.gpo.gov/fdsys/pkg/FR-2018-05-30/pdf/2018-11059.pdf>. A public hearing the proposal was held on June 14, 2018 in Washington, DC. More information is available [here](#). The proposal would rescind the amendments for safer technology and alternatives analyses, third-party audits, incident investigations, and information availability. The rationale stated for the proposed rescission is the failure of EPA to adequately consult and coordinate with OSHA in formulating the Risk Management Program Amendments, which overlap with the Process Safety Management standard adopted by OSHA prior to any RMP regulations. Comments to the proposal are due by July 30, 2018.

NEPA: The Council on Environmental Quality (CEQ) issued an Advance Notice of Proposed Rulemaking soliciting comments on updates to NEPA's implementing regulations. 83 Fed. Reg. 28591 (June 20, 2018). The APNR identifies 20 questions on which it seeks public comment. Comments will be due Monday, July 30, 2018.

BLM Methane Waste Prevention Rule (Venting and Flaring Rule): BLM issued a proposed rule to re-establish the pre-2016 regulations on venting and flaring methane from oil and gas activities on federal and Indian lands. 83 Fed. Reg. 7924 (Feb. 22, 2018). The 2016 rule, 81 Fed. Reg. 83008, seeks to reduce natural gas emissions from venting, flaring, and leaks during oil and natural gas production facilities, as well as clarifying when produced gas lost through such activities is subject to royalties. The preamble to the proposed rule states that the 2016 rule's compliance costs could exceed its benefits, that it would pose a particular compliance burden on operators of marginal or low-producing wells to the point that such wells would no longer be economical to operate, that its requirements overlap with EPA's Clean Air Act requirements as well as state requirements, and that BLM has concerns that some provisions of the 2016 rule would not survive judicial review. This proposed rule follows a rule that suspended until January 17, 2019 aspects of the 2016 rule that had not already been implemented. 82 Fed. Reg. 58050 (Dec. 8, 2017). BLM stated that it plans to complete revisions to the 2016 rule to reduce regulatory burdens on the regulated community no later than the date the suspension expires.

State Reactions to The Trump Administration's Energy & Environment Agenda

Ethan Shenkman¹ and Chase Raines²

Newton's third law of motion states that for every action, there is an equal and opposite reaction. That principle has been playing out between the Trump Administration and the states as they act and react to rapid change in the field of environmental law and policy. In-house counsel would be well advised to keep this dynamic in mind as they manage legal and business risk in this area.

During the first part of the Trump Presidency, the Administration has undertaken a series of deregulatory actions. Often in direct and explicit response, a number of states have stepped in with their own regulatory actions to fill the vacuum. Although many of the Trump Administration's actions are still in the proposal stage and must survive various legal challenges, state governments are not necessarily waiting for the legal processes to play out. Particularly in the climate change arena, states such as California have asserted leadership in the face of federal withdrawal.

Nowhere was this more evident than in the events surrounding Trump's withdrawal from the Paris Climate Agreement. Under the Paris Agreement, the United States agreed to reduce its greenhouse gas ("GHG") emissions by 26-28 percent below its 2005 level by 2025.³ Virtually every other nation made reciprocal commitments, although they varied significantly in their levels of ambition. Although United States' reduction goal was not legally enforceable, it was expected to facilitate international cooperation and incentivize future domestic environmental regulation.

President Trump announced his intent to withdraw the United States from the Agreement on June 1, 2017.⁴ However, pursuant to Article 28 of the Agreement, the United States cannot actually withdraw until 2020.⁵ Coincidentally, the earliest possible date for the United States' withdrawal will fall just after the November 2020 presidential election.⁶

¹ Partner, Arnold & Porter.

² Associate, Arnold & Porter.

³ Paris Agreement, United States Nationally Determined Contribution, available at <http://www4.unfccc.int/ndcregistry/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf>.

⁴ See *Statement by President Trump on the Paris Climate Accord* (June 1, 2017), available at <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord>.

⁵ United Nations, *Paris Agreement, Article 28* (2015), available at http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf. See also *9 Things to Know About Trump's Paris Agreement Decision*, available at <https://www.apks.com/en/perspectives/publications/2017/06/9-things-to-know-about-trumps-paris-agreement>.

⁶ See *id.*

State governments, however, did not wait until the withdrawal became final, and leapt immediately into action. On the same day that President Trump announced the anticipated withdrawal, California, New York and Washington announced the formation of the United States Climate Alliance.⁷ The Alliance members each pledged to meet the same 26-28% reduction that the United States had pledged under the Paris Agreement. Currently, sixteen states and Puerto Rico are members of the Alliance, representing approximately 40% of the population of the United States and a \$9 trillion economy.⁸ Dozens of U.S. cities also signed the Chicago Climate Charter in December 2017, committing to meet the same Paris Agreement reduction goal.⁹

A related example comes from the Clean Power Plan (“CPP”), which was drafted and finalized under the Obama Administration.¹⁰ Under the CPP, the United States Environmental Protection Agency (“EPA”) proposed to set limits for carbon dioxide (CO₂) emissions from the power generation sector.¹¹ However, several states challenged the rule and the Supreme Court stayed its implementation pending litigation in the D.C. Circuit.¹² The D.C. Circuit has repeatedly issued orders holding the case in abeyance while the Trump EPA considered how it wanted to proceed.¹³

The Trump Administration announced a review of the CPP on March 28, 2017¹⁴ and formally proposed repeal of the rule on October 16, 2017.¹⁵ Additionally, on December 28, 2017, the EPA published an Advance Notice of Proposed Rulemaking soliciting input on a replacement for the CPP.¹⁶ EPA’s. After a repeal becomes finalized, and if a replacement rule is ever created, lengthy legal challenges are almost certain to follow.

While the Federal government was stepping back, several states took the opposite approach and increased regulation of GHG emissions from the power sector. Most notably, California took steps towards achieving its already-existing 2030 goal of reducing GHG emissions 40% from 1990 levels.¹⁷ To help achieve this goal, on July 19, 2017, California

⁷ See Office of Governor Edmund G. Brown Jr., *CA Governor Brown, NY Governor Cuomo and WA Governor Inslee Announce Formation of U.S. Climate Alliance* (June 1, 2017), available at <https://www.gov.ca.gov/news.php?id=19818>.

⁸ See <https://www.usclimatealliance.org>.

⁹ See *Chicago Climate Charter* (December 5, 2017), available at <https://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2017/December/ChicagoClimateCharter.pdf>

¹⁰ 80 FR 64662 (October 23, 2015).

¹¹ See *id.*

¹² *State of W. Virginia et al. v. E.P.A. et al.*, 136 S. Ct. 1000 (2016).

¹³ See, e.g., *State of W. Virginia et al. v. E.P.A. et al.*, No. 15-1363 (D.C. Cir. Mar. 1, 2017).

¹⁴ Executive Order 13783, 82 FR 16093 (March 31, 2017).

¹⁵ 82 FR 48035 (October 16, 2017).

¹⁶ 82 FR 61507 (December 28, 2017).

¹⁷ See California Senate Bill 32 (2016).

extended its cap-and-trade program through 2030.¹⁸ In December 2017, the California Air Resources Board unanimously approved a scoping plan, which sets out a suite of actions aimed at achieving the 2030 goal.¹⁹

Additionally, the nine Northeastern and Mid-Atlantic states participating in the Regional Greenhouse Gas Initiative (“RGGI”) took a similar course of action in August 2017. RGGI is a regional cap-and-trade program for CO₂ generated from the electric power sector.²⁰ Despite, or possibly because of, the anticipated repeal of the CPP, the member states of RGGI announced a goal of a 30% reduction from 2020 GHG levels by 2030 on August 23, 2017.²¹ All told, then, at least ten states actually accelerated their power sector GHG reduction plans in the same period that the federal government began pulling back its own efforts.

Methane regulation is another area in which we see the action-reaction dynamic. Methane is a short-lived but powerful GHG that is the primary component of natural gas.²² EPA had previously begun regulating methane emissions from oil and gas production facilities under the Obama Administration.²³ As part of this regulatory effort, EPA required oil and gas producers to report on their facilities and methane emissions to the EPA.²⁴ In March 2017, the Trump EPA announced the withdrawal of this information request.²⁵ The EPA then attempted to stay implementation of parts of the regulation for 90 days, although those efforts were blocked in the D.C. Circuit.²⁶ Currently, the EPA is in the process of finalizing three-month and two-year stays on implementation of parts of the methane regulations.²⁷

California moved quickly to promulgate its own methane regulations in direct reaction to this federal regulatory withdrawal. In March 2017, soon after the withdrawal of the

¹⁸ See California Assembly Bill 398 (2017).

¹⁹ California Air Resources Board, *California’s 2017 Climate Change Scoping Plan* (December 4, 2017), available at https://www.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf?_ga=2.225969178.186673901.1514412172-92030890.1514412172.

²⁰ <https://www.rggi.org/design/overview>.

²¹ Regional Greenhouse Gas Initiative, *RGGI States Announce Proposed Program Changes: Additional 30% Emissions Cap Decline by 2030* (August 23, 2017), available at https://www.rggi.org/docs/ProgramReview/2017/08-23-17/Announcement_Proposed_Program_Changes.pdf.

²² <https://www.epa.gov/ghgemissions/overview-greenhouse-gases#methane>.

²³ 81 FR 35824 (June 3, 2016)

²⁴ 81 FR 35859 (June 3, 2016)

²⁵ 82 FR 12817 (March 7, 2017)

²⁶ *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017)

²⁷ 82 FR 51794 (November 8, 2017) (three-month stay); 82 FR 51788 (November 8, 2017)(two-year stay). The three-month stay was proposed in addition to the two-year stay because the two-year stay would likely be considered a major rule subject to at least a 60-day delay under the Congressional Review Act. While those stays are going through the rulemaking process, EPA has finalized an amendment to two narrow aspects of the methane rule related to a requirement to conduct delayed repairs on leaking components during unplanned or emergency shutdowns and the timing of monitoring requirements for well sites on the Alaskan North Slope. 83 FR 10628 (March 12, 2018).

information request, California announced new methane regulations for oil and gas facilities.²⁸ The press release announcing the planned regulations directly stated that they were being developed because “[t]he Trump administration has backed away from efforts to develop a federal rule to curb methane leaks from existing facilities—the nation’s largest source of methane pollution.”²⁹ California’s methane regulations became effective on October 1, 2017.³⁰

Another area where the concept of “cooperative federalism” may be put to the test is in automobile emissions standards. In March 2017, EPA and NHTSA announced that they were considering whether to revisit GHG emissions and fuel economy standards that were originally projected to achieve an industry fleet-wide average of 54.5 miles per gallon for cars and light trucks by model year 2025.³¹ EPA issued a new Midterm Evaluation for GHG emissions standards in April, 2018 where EPA announced that current standards were no longer “appropriate” and that it would initiate a joint rule making process with NHTSA to promulgate new standards.³²

Meanwhile, the California Air Resources Board has determined to maintain the current MY 2022-2025 standards under a special preemption waiver granted by EPA.³³ California’s ambitions in addressing mobile source greenhouse gas emissions has come into even sharper focus, as a California Assembly Bill was introduced in January 2018 that would require all new vehicles sold in California after 2040 to be zero emissions vehicles.³⁴

States have also reacted to federal environmental deregulation in the form of litigation. Most recently, California sued over EPA’s decision to withdraw the “once in always in” policy for major sources under Section 112 of the Clean Air Act.³⁵ The policy mandated that facilities which qualified as a “major source” due to their hazardous air pollutant emissions had to continue implementing the Maximum Available Control Technology (“MACT”), even if implementation of those control technologies brought emissions below the threshold quantity for qualifying as a major source in the first place. As with other federal regulatory withdrawals, California publicly announced its lawsuit as a direct response to the federal regulatory

²⁸ California Air Resources Board, *CARB approves rule for monitoring and repairing methane leaks from oil and gas facilities* (March 23, 2017), available at <https://www.arb.ca.gov/newsrel/newsrelease.php?id=907>.

²⁹ *Id.*

³⁰ California Code of Regulations, Article 17, Sections 95665-95677, available at <https://www.arb.ca.gov/regact/2016/oilandgas2016/ogfro.pdf>.

³¹ 82 Fed. Reg. 14671 (March 22, 2017).

³² See U.S. Environmental Protection Agency, *EPA Administrator Pruitt: GHG Emissions Standards for Cars and Light Trucks Should Be Revised* (April 2, 2018), available at <https://www.epa.gov/newsreleases/epa-administrator-pruitt-ghg-emissions-standards-cars-and-light-trucks-should-be>; see also 83 FR 16077 (April 13, 2018).

³³ See California Air Resource Board, *California’s Advanced Clean Cars Midterm Review* (Jan. 18, 2017), available at https://www.arb.ca.gov/msprog/acc/mtr/acc_mtr_finalreport_full.pdf.

³⁴ California Assembly Bill 1745 (2018).

³⁵ See U.S. Environmental Protection Agency, *Reducing Regulatory Burdens: EPA withdraws “once in always in” policy for major sources under Clean Air Act* (January 25, 2018), available at <https://www.epa.gov/newsreleases/reducing-regulatory-burdens-epa-withdraws-once-always-policy-major-sources-under-clean>.

withdrawal.³⁶ This is far from an isolated instance; in 2017 alone California sued the federal government for its actions related to, among other things: flaring of methane on federal lands, coal leasing on federal lands, appliance energy efficiency standards, NHTSA penalty policies, and measuring GHGs on roadways.

This federal-state push-and-pull can be expected to continue in the future as the Trump Administration continues to pursue its environment and energy agenda. For example, the Trump Administration has promulgated several Executive Orders aimed explicitly at reducing the number of regulations.³⁷ As those Executive Orders are implemented and environmental regulations are reduced, there is good reason to believe that various states will continue to step into the breach, either with their own regulations or with litigation. True to form, the California Attorney General recently intervened in a case challenging, as a violation of the Administrative Procedures Act, the so-called “Two-for-one” Executive Order 13771, which requires agencies to rescind two regulations for every new regulation they issue.³⁸

The business community should carefully monitor these developments, keeping a close eye out for new state regulations that emerge after federal withdrawals are announced. Additionally, federal deregulatory actions are subject to administrative processes and legal challenges that may delay their implementation, while the accompanying state regulatory reaction may become finalized into law much more quickly. This federal-state give-and-take has the potential to create a patchwork regulatory environment, and it will require vigilance by the regulated community to keep abreast of the latest changes and developments.

³⁶ See State of California Department of Justice, *Attorney General Becerra Sues EPA Over Illegal Decision to Let Polluters off the Hook* (April 10, 2018), available at <https://oag.ca.gov/news/press-releases/attorney-general-becerra-sues-epa-over-illegal-decision-let-polluters-hook>.

³⁷ Executive Order 13771, 82 FR 9339 (January 30, 2017); Executive Order 13777, 82 FR 12285 (February 24, 2017).

³⁸ See State of California Department of Justice, *Attorneys General Becerra and Rosenblum Petition to Intervene and Challenge Trump Administration's Sophomoric 'Two for One' Executive Order* (June 5, 2018), available at <https://oag.ca.gov/news/press-releases/attorneys-general-becerra-and-rosenblum-petition-intervene-and-challenge-trump>.

Federal Enforcement of the Clean Air Act: Past, Present, and Future

Daniel J. Brown¹

A central theme of this edition of the Newsletter is the Trump Administration's (the "Administration's") impact on EPA's implementation of the Clean Air Act (CAA). Other articles in this edition have focused on the Administration's impact on specific aspects of the CAA. In contrast, this article will focus more generally on the Administration's impact on EPA's use of its enforcement authority under the CAA. The general structure of EPA's enforcement authority, as well as the Agency's practical application of such authority, is reviewed before discussing how EPA's approach to enforcement might be impacted by the change of administration. Finally, this article discusses options for mitigation of penalties in federal enforcement actions under the CAA.

EPA's Enforcement Authority Under the CAA

EPA's main source of authority to pursue civil penalties against stationary sources is found in § 113 of the CAA. CAA § 113 provides two avenues by which EPA can pursue civil penalties. The first avenue is civil judicial enforcement. Under CAA § 113(b), EPA can pursue civil penalties of up to \$97,229 *per day, per violation* in federal district court.² If EPA chooses this avenue, it will refer the matter to the Department of Justice ("DOJ").

Rather than refer an enforcement matter to DOJ, EPA may instead choose to pursue administrative enforcement. EPA's maximum penalty authority when pursuing administrative enforcement is \$46,192.³ Under CAA § 113(d)(3), EPA may pursue such administrative enforcement if the following two criteria are met:

- (1) The total penalty sought does not exceed \$369,532⁴; and
- (2) The first alleged date of violation occurred no more than 12 months before the initiation of the administrative action.

Either of these limitations may be waived if EPA and DOJ jointly determine that administrative enforcement is appropriate despite the larger penalty amount or longer period since first occurrence of a violation.

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² Emphasis added. 40 C.F.R. § 19.4, Table 2; 83 Fed. Reg. 1193 (Jan. 10, 2018)(current statutory maximum after accounting for inflation).

³ 40 C.F.R. § 19.4, Table 2.

⁴ 40 C.F.R. § 19.4, Table 2.

Practical Enforcement of the CAA: EPA's Civil Penalty Policies

Given EPA's maximum statutory penalty authority, EPA could easily assess a 7-figure or even 8-figure penalty for a handful of violations without breaking a sweat. However, EPA only pursues such maximum amounts in the most egregious or the most vigorously litigated cases. Typically, EPA assesses penalties that are considerably less than the statutory maximum.

To achieve fair, consistent, and expeditious resolution of enforcement matters, EPA has developed a series of civil penalty policies. While these policies may differ in the details, they all incorporate the following fundamental elements:⁵

- 1.) A method for determining the economic benefit of noncompliance (the "EBN");
- 2.) A method for calculating the "Gravity Component" of a penalty. This component reflects the seriousness of the violation;
- 3.) A Base Penalty, which is the sum of the Gravity Component and the EBN;
- 4.) Guidance for making upward adjustments to the Base Penalty ("Upward Adjustments") such as size of the violator or severity of an accident; and
- 5.) Guidance for making downward adjustments to the Base Penalty ("Downward Adjustments") to account for factors such as cooperation and good faith efforts to comply.

There are two civil penalty policies that apply to stationary sources under the CAA: The *Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68* (Oct. 25, 1991)(the "CEP"), and the *Clean Air Act Stationary Source Civil Penalty Policy* (June 2012)(the "Stationary Source CPP"). The CEP guides EPA's assessment of penalties for violations under the specific provisions, as well as the general duty clause ("GDC"), of EPA's Chemical Accident Prevention Program (the "CAPP"). The Stationary Source CPP guides EPA's assessment of penalties for most other violations of the stationary source provisions of the CAA.

Under the CEP, the Upward Adjustments can cause even a modest Base Penalty to quickly spiral into a high 6-digit total penalty. To take just one example, the Upward Adjustment accounting for severity of an accident can easily end up doubling or tripling the Base Penalty, even where an accident results in no serious injuries. For catastrophic events, this Upward Adjustment can increase the Base Penalty by a factor of five or more.⁶

Alternatives to Civil Penalties: Supplemental Environmental Projects

While the assessment of penalties is EPA's main tool for civil enforcement of the CAA, the Agency does have other tools at its disposal, particularly in the context of settlement. One of the Agency's favorite tools is the supplemental environmental project ("SEP"). EPA has been using SEPs to settle enforcement actions for many years, and most recently updated its policy for SEPs

⁵ The fundamental elements for a civil penalty policy were originally presented in *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* (Feb. 16, 1984).

⁶ CEP, p. 14 & App. B.

in 2015.⁷ EPA likes SEPs because they allow EPA to achieve environmental protection goals that it could not otherwise achieve by simply enforcing the law. Correspondingly, many regulated entities like SEPs because they can be used to mitigate a civil penalty. Moreover, regulated entities gain the added satisfaction of knowing that a portion of the money paid in settlement will result in tangible benefits to the environment.

According to the SEP Policy, a SEP is:

[A]n [e]nvironmentally beneficial project... which a settling party agrees to undertake in settlement of an enforcement action, but which the settlement party is not otherwise legally required to perform.”⁸

The SEP Policy establishes the criteria that a proposed project must meet to be included as part of the settlement. Chief among these is the criterion that there be a nexus between the scope of the project and the subject matter of the enforcement action. For example, for non-compliance with the CAA’s General Duty Clause, EPA has accepted the settling regulated entity’s acquisition for the local government of emergency vehicles and emergency communications systems that would tend to reduce the effects of hazardous conditions. Settling regulated entities should be aware, though, that they usually cannot obtain “dollar-for-dollar” credit for SEPs against civil penalties. Settling regulated entities also cannot completely avoid a civil penalty in exchange for agreeing to perform a SEP.⁹

The Shifting Landscape of Federal Enforcement of the CAA

Administrative agencies tend to adapt to changes in administration at a rather deliberate pace. EPA is no exception to this tendency. Nonetheless, since the change of administration in 2017, at least two distinctly different approaches to enforcement by EPA appear to be emerging. These are:

- (i) A shift towards allowing delegated states to assume the lead role in a greater share of enforcement actions; and
- (ii) Greater use of existing self-disclosure policies as a tool for assuring compliance.

Perhaps the clearest shift in the enforcement priorities of the Administration is a shift towards allowing the states to assume a more significant role in the enforcement of most environmental laws and regulations. In its *FY 2018-2022 Strategic Plan* (Feb. 12, 2018)(the “Strategic Plan”), EPA expressed a preference for shifting more of the burden for routine enforcement of the nation’s environmental laws, including the CAA, to states with delegated enforcement authority.¹⁰ This preference was re-emphasized by EPA in a recent memorandum.¹¹

⁷ U.S. Environmental Protection Agency Supplemental Environmental Projects Policy – 2015 Update (Mar. 11, 2015)(the “SEP Policy”).

⁸ SEP Policy, p. 6.

⁹ SEP Policy, pp. 7-8, 21-24.

¹⁰ Strategic Plan, pp. 1, 4, 21-22.

¹¹ EPA Memorandum: *Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States* (Jan. 22, 2018).

EPA has also signaled a desire to increase its reliance on the use of existing self-disclosure policies as a means of assuring compliance. Under EPA’s Audit Policy, a regulated entity that discovers evidence of noncompliance may be able to mitigate penalties by voluntarily disclosing such noncompliance to EPA. Up to 100 percent of the gravity component of a penalty may be achieved if all of the conditions of the Audit Policy are met.¹²

The Audit Policy has been in existence since 2000. In a formal announcement issued on May 15, 2018, EPA stated that it intends to “[e]nhance and promote ... opportunities to increase compliance through the use of existing self-disclosure policies...” It is not yet clear how EPA plans to carry out its stated intention. However, EPA did indicate that it plans in the future to supplement Agency guidance interpreting the Audit Policy.¹³

Mitigating Liability in Federal Enforcement Actions Under the CAA

The best protection from exposure to large penalties for noncompliance with the CAA is a robust and rigorous compliance program and culture. Nonetheless, if a regulated entity finds itself at risk of exposure to large penalties due to noncompliance with the CAA, there are still measures the regulated entity can take to protect its interests and mitigate its liability. These include the following:

- If the regulated entity discovers evidence of noncompliance prior to an enforcement, it may choose to voluntarily disclose such noncompliance to EPA under the Audit Policy.
- If the Agency is already considering enforcement action under the CAA, the regulated entity should consider cooperating and communicating with the Agency as early as, and to the extent, possible. The potential benefits of such cooperation are two-fold. First, the Agency may apply Downward Adjustments to reward the regulated entity’s cooperation. Second, once EPA has calculated the Base Penalty, it is difficult to persuade EPA to change its calculation, or any of the underlying assumptions.
- While it is not easy to persuade EPA to alter the Base Penalty, it is certainly not impossible. The regulated entity should scrutinize the Agency’s penalty calculation, and advance any reasonable argument for reducing it. As previously discussed, even small changes in the Gravity Component or the Base Penalty can have a significant impact on the total amount.
- The regulated entity should consider proposing SEPs as a means of mitigating the penalty in a potential settlement.

¹² 65 Fed. Reg. 19618 (Apr. 11, 2000).

¹³ *EPA Announces Renewed Emphasis on Self-Disclosed Violation Policies* (May 15, 2018)(the “May 15, 2018 Announcement”).

The Risk of 20/20 Hindsight Under the Federal Clean Air Act General Duty Clause

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In the past few years a little-considered section of the federal Clean Air Act (CAA) has resulted in significant penalties for some manufacturing facilities, often following an accident of some sort. EPA has sought penalties for violations of CAA Section 112(r)(1), the General Duty Clause (GDC), based on facilities' alleged failures to properly assess, plan for, prevent, and minimize the consequences of accidental releases of extremely hazardous substances. The absence of regulations defining key terms used in the GDC has made it difficult for companies to predict whether their efforts to comply with the GDC are sufficient. Settlements of EPA's notices of violation and EPA's guidance documents on Section 112(r)(1) reflect the potential breadth of the duties EPA may view as existing for facilities' owners and operators.

Patterned after OSHA's General Duty Clause, 29 USC §654,³ the CAA General Duty Clause's text states,

It shall be the objective of the regulations and programs authorized under this subsection [Prevention of Accidental Releases] to prevent the accidental release and to minimize the consequences of any such release of any substance listed pursuant to paragraph (3) [substances for which Risk Management Plans (RMPs) are required] or any other extremely hazardous substance. 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 [OSHA Hazard Identification Duty] 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.

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³ The OSHA GDC provision referred to in the CAA GDC states,

Each employer (1) 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 . . .

29 USC §654(a) (emphasis added). OSHA provides for potential violations of its GDC when (1) an employer fails to keep the workplace free of a hazard to which employees of that employer were exposed, (2) the hazard was recognized by the employer, the industry, or the manufacturer of equipment involved, (3) the hazard was causing or was likely to cause death or serious physical harm, and (4) there was a feasible and useful method to correct the hazard. OSHA has interpreted compliance with this duty in a strict manner. For example, in one matter, OSHA alleged a violation of the GDC by a company whose employees were exposed to a substance at levels below the PEL, but above "recognized best practices" in the industry. See OSHA news release on Fiberdome settlement, Region 5 News Release: 14-1379-CHI, <https://www.osha.gov/news/newsreleases/region5/07312014> .

42 USC §112(r)(1) (emphasis added).

The statutory provision was adopted as part of the 1990 amendments to the CAA. It was identified as providing for facility owners “to operate a safe facility free of accidental releases that threaten life [or] property.” Senate Committee on Environment and Public Works, Report 101-228 at 208. EPA has taken the position that the CAA GDC can impose upon owners stationary sources that handle an extremely hazardous substance at their locations a duty to perform hazard assessments to identify and prevent releases and minimize the consequences of accidental releases of such substance.

EPA has not promulgated regulations for directly implementing the CAA GDC; it has issued only guidance for EPA staff to use in inspections, audits, and investigations. EPA’s “Guidance for Implementation of the General Duty Clause Clean Air Act Section 112(r)(1), EDIC-2000-1, <https://www.epa.gov/enforcement/guidance-implementation-general-duty-clause-clean-air-act-cao-section-112r1-may-2000>, (GDC Guidance) offers some insight into EPA’s interpretation of the GDC in the absence of regulations.⁴

In EPA’s view, chemicals that must be assessed are not limited to those for which RMPs are required under 40 CFR Part 68 or those identified as extremely hazardous substances under EPCRA. March 2009 OSWER Directive, EPA 550-F-09-002 (“GDC Fact Sheet”). EPA has also indicated that it considers the GDC to apply even when the quantities of RMP chemicals are below the threshold that triggers the application of the RMP regulations. GDC Fact Sheet at 2.

EPA has indicated that specific duties imposed on a facility owner or operator include (1) assessing and identifying hazards imposed by extremely hazardous chemicals and the impacts of possible releases, (2) designing and maintaining a safe facility to prevent accidental releases, and (3) minimizing the consequences of accidental releases that do occur. GDC Guidance at 10-12.

Penalties for failure to comply with the GDC can be severe. For actions brought under §113(b) current maximum civil penalty is \$97,229 per day per violation for violations occurring after November 2, 2015. In administrative actions under §113(d), the maximum penalty for violations of CAA after November 2, 2015 is \$46,192 per day per violation).

The potential for EPA’s strict application of the GDC is evident in enforcement actions it has pursued. Many were brought following releases of hazardous substances or other reports of non-compliance by a facility.

- Millard Refrigerated Services (2015): Following what EPA claimed were multiple releases of anhydrous ammonia, the company paid a \$3 million civil penalty to resolve EPA’s

⁴ Bills requiring EPA to issue regulations to clarify terms used in the GDC have been introduced in recent years but have failed to be passed. See, e.g., S.1781, 113th Cong. <https://www.congress.gov/bill/113th-congress/senate-bill/1781/text>

complaint that the company failed to identify the hazards that created the releases and failed to design its facility to minimize the hazard.

- Bayer CropScience LP (2015): Bayer paid a \$5.6M settlement to resolve GDC and RMP violations at a West Virginia facility after an explosion there. The amount paid included a Supplemental Environmental Project to improve emergency preparedness and response and safety enhancements at the plant.
- Harcros Chemicals (2017): After the company voluntarily disclosed non-compliance with RMPs for three of its facilities and subsequently had third party audits conducted of the three facilities, EPA and the company entered into a global settlement for potential RMP and GDC requirements at all of its U.S. facilities. Harcros Chemicals paid a \$950,000 civil penalty plus interest, paid \$2.5 million for Supplemental Environmental Projects and agreed to have independent third party audits of all its facilities.
- Starkist (September 2017, Consent Order; December 2017, Revised Consent Order): EPA conducted multiple inspections of Starkist's tuna processing facility in American Samoa following the plant's report of a rupture of its wastewater discharge pipe. EPA filed a complaint detailing what it alleged were longstanding violations of the Clean Water Act, the CAA, EPCRA, and RCRA. Among the CAA violations alleged was a violation of the GDC. In settlement, Starkist paid a civil penalty of \$6.5 million and performed various actions to upgrade the facility and take actions in addition to those required to comply with applicable statutes and regulations.
- Big Ox Energy—Siouxland, LLC (Dec. 2017): After an employee drilled a hole in an anaerobic digester at the company's biogas production and packaging facility and was injured by the released biogas, methane, and/or hydrogen sulfide, EPA inspected the facility and claimed that it found that the facility owner "had not completed an adequate or sufficient hazard assessment to identify hazards which may result from releases of biogas, methane, or hydrogen sulfide." BOE responded to EPA's satisfaction, producing a GDC plan with a formal process hazard analysis to identify, evaluate, and develop controls to address potential risks. The Consent Agreement required BOE to pay a civil penalty of \$10,320 under Section 113(b) and to perform a Supplemental Environmental Project costing \$39,225.

EPA has also brought enforcement actions following facility inspections even when no accident has occurred. For example, in 2016, EPA claimed that its inspection of Newport Biodiesel's manufacturing plant revealed violations of the CAA GDC in that its processes involved flammable liquids that constituted extremely hazardous substances under the GDC and that the company failed to follow various industry standards to identify hazards associated with the substances, and failed to design and maintain a safe facility as required by the GDC. EPA also claimed that the company failed to comply with the MON, failed to obtain a Title V Permit, failed to file as required under EPCRA, and failed to prepare its CWA SPCC Plan.

The future of GDC enforcement by EPA under the current Administration is unclear. The lower penalty obtained in the action against Big Ox Energy, under \$50,000 in total, might reflect that EPA, under the current Administration, is less enthusiastic about pursuing GDC violations. On the other hand, the lower penalty value could have resulted from a view that the action of the injured employee was so reckless that it defied common sense, and therefore was not something that could have been prevented through planning.

EPA's May 17, 2018 proposal to rescind or modify the RMP Amendments that were promulgated in the last days of the Obama Administration⁵ following EPA's postponement of those Amendments might also signal a reluctance to impose a broad interpretation of statutory obligations for planning under the GDC. The Amendments to 40 CFR Part 68 would require a third party audit after a reportable accident, enhanced incident investigation requirements, including a root cause analysis, increased local coordination with local emergency planning committees (LEPCs), and increased information disclosure to LEPCs and the public. 82 Fed. Reg. 4594. Even with uncertainty as to future interpretation and enforcement, the potential for a broad interpretation of the scope of potential obligations under the GDC (particularly following a catastrophic event) remains something for which facilities should be aware. Companies may want to consider the following.

- Preparing an assessment of its extremely hazardous substances, particularly those listed as EHSs under EPCRA, and evaluating those listed under other environmental statutes, as well as the design and operation of its facilities.
- Periodically reviewing operations and maintenance recommendations for equipment at the facility.
- Keeping up with evolving industry standards -- as many professional organizations are currently preparing evolving guidance/standards addressing risk in the workplace (during normal operations and in light of risks posed by outside events).
- Conducting Internal or third-party audits and correcting identified deficiencies.
- Planning for emergency responses to possible releases to minimize their consequences.
- In storm prone areas, such as areas prone to hurricanes and flooding, consider steps that may be identified to prepare for rapid shutdown and to minimize releases during such event.

⁵ 82 Fed. Reg. 4594 (Jan. 13, 2017).