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EPA Announces National Enforcement Initiatives for 2017-2019

On February 18, 2016, the U.S. Environmental Protection Agency (“EPA”) announced its National Enforcement Initiatives (“NEIs”) for fiscal years 2017 to 2019, beginning October 1, 2016. The NEIs indicate areas where the EPA will focus its enforcement resources in the coming three-year period. The announced NEIs include two new initiatives (reducing the risk of accidental releases at industrial and chemical facilities and keeping industrial pollutants out of the nation’s waters), the expansion of one existing initiative (cutting hazardous air pollutants) and the continuation of four existing initiatives (reducing air pollution from the largest sources, ensuring energy extraction activities comply with environmental laws, keeping raw sewage and contaminated stormwater out of U.S. waters, and preventing animal waste from contaminating surfaces and groundwater).

We consider the new initiatives worthy of note.

The EPA’s efforts to reduce the risk of accidental releases at industrial and chemical facilities are likely to focus on the Risk Management Plans that must be maintained by facilities that make, use or store extremely hazardous substances, particularly with respect to accident prevention measures and improving response capabilities. EPA may have added leverage in this enforcement initiative from its pending proposal to update and enhance its Risk Management Plan rule, which is likely to augment current risk mitigation and public outreach requirements.

The EPA’s initiative to limit the discharge of industrial pollutants to the nation’s waters may drive tighter permit limits on wastewater discharges from facilities in the chemical and metal manufacturing, mining, and food processing sectors and increased enforcement of existing permit limits in those sectors.

The EPA’s expansion of its initiative to reduce hazardous air pollutants to air emissions from large organic liquid product storage tanks, large quantity hazardous waste generators and hazardous waste treatment, storage and disposal facilities will subject air emissions from a significant number of additional facilities to EPA’s enforcement attention.

Background

The NEIs target what the EPA believes are important environmental problems, with high rates of noncompliance. The EPA promises more aggressive federal enforcement in these compliance areas to reduce pollution and protect public health and the environment.

The EPA has observed that accidental releases at industrial and chemical facilities that make use or store extremely hazardous substances result in about 150 catastrophic accidents annually. The EPA also noted that these accidents often kill or injure employees and emergency responders and release chemicals that threaten harm to neighboring communities, and that many of these facilities are located in low income or minority communities.¹

The EPA's main tool for reducing the number of and harm resulting from these accidental releases is its Risk Management Plan rule, which requires facilities that make, process, use or store more than a threshold quantity of a listed extremely hazardous substance prepare and implement a Risk Management Plan.² A Risk Management Plan must include, among other elements, a hazard assessment of the facility, an accident prevention program, and an emergency response program. The Risk Management Plan must be resubmitted every five years, and is provided to local fire, police and emergency response personnel and must be made available to the public.³ In proposing these NEIs, the EPA noted the increased risk presented by inadequacies in the implementation of Risk Management Plans, including failure to adequately train personnel, maintain equipment or conduct routine inspections.⁴

In order to keep industrial pollutants out of the nation's waters, the EPA stated that it would focus on wastewater discharges from industrial sectors like chemical and metal manufacturing, mining and food processing based on EPA's assertion that these sectors are responsible for a disproportionate amount of nutrient and metal pollution, frequently in violation of permit limits, that is degrading water quality and threatening drinking water sources in national waters. The EPA has announced that it plans to reduce this pollution through its wastewater discharge permit programs and through pursuing illegal pollution discharges.⁵

The EPA is also expanding the scope of its NEI concerning hazardous air pollutants by including air emissions from large organic liquid product storage tanks, hazardous waste generators and hazardous waste treatment, storage and disposal facilities. In support of this expanded scope, the EPA identified widespread violations of air emissions requirements applicable to these facilities.⁶ This NEI began in 2004, with the intent of identifying and addressing illegal and excess emissions of toxic air pollutants

¹ <http://www.epa.gov/enforcement/national-enforcement-initiatives>.

² 40 C.F.R. §68.130. List of regulated substances at 40 C.F.R. §68.130, and also available at <http://www.epa.gov/rmp/list-regulated-substances-under-risk-management-plan-rmp-program>.

³ 40 C.F.R. §68.210.

⁴ 80 Fed. Reg. 55352, 55354 (September 15, 2015).

⁵ *Id.* EPA News Release, "EPA Announces National Enforcement Initiatives for Coming Years", February 18, 2016.

⁶ 80 Fed. Reg. 55352, 55354 (September 15, 2015).

from leaks and flares at certain facilities, particularly those associated with petroleum refineries and chemical manufacturing facilities. As a result of the expanded NEI, regulated parties can expect the EPA to scrutinize the permitting status of large product storage tanks, and of hazardous waste facilities regulated under the Resource Conservation and Recovery Act (“RCRA”). In particular, the inclusion of RCRA facilities extends the initiative’s reach to many additional facilities and represents a significant expansion.

Conclusion

EPA’s recently-announced National Enforcement Initiatives raise the possibility of stricter permit standards and increased enforcement attention for companies and facilities subject to certain regulations or in certain industry sectors.⁷ Companies that are required to prepare Risk Management Plans for their facilities face the possibility of additional requirements being added to those Plans and of more aggressive inspections and enforcement with respect to implementation of the Plan. Companies in the chemical and metal manufacturing, mining and food processing sectors that discharge wastewater to waters of the U.S. can expect stricter discharge limits or other conditions in their federal permits and more aggressive enforcement of those permits. Operators of large organic liquid product storage tanks and of hazardous waste treatment, storage and disposal facilities can expect increased attention to their air emissions. Companies and facilities subject to new or expanded NEIs may wish to consider assessing their current compliance with regulations that are the focus of the new NEIs, to address any potential vulnerability to an EPA enforcement action.

Please do not hesitate to contact us if you are interested in discussing the EPA’s National Enforcement Initiatives.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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⁷ The EPA also announced its intention to employ its Next Generation Compliance measures, which include new monitoring technologies, electronic reporting, and an increased emphasis on sharing information with the public.