



Freedom Industries facility located on the Elk River in Charleston, WV. Photo: West Virginia Department of Environmental Protection, 1/13/2014.

► **HALEY & ALDRICH REGULATORY UPDATE**

EPA initiates rulemaking for chemical storage in aboveground tanks: implications and what you can do now to prepare

On March 26, 2018, EPA submitted a draft proposal to the White House Office of Management and Budget (OMB) for a rulemaking for prevention of hazardous substances discharges under the Clean Water Act (CWA).¹ EPA is developing proposed regulation for prevention of hazardous substances spills from onshore facilities, including aboveground tanks, in response to a 2016 Consent Decree. EPA is required to publish a Notice of Proposed Rulemaking by June 16, 2018, and issue a final rule on August 29, 2019. The final rule will, for the first time, regulate chemical storage in aboveground tanks at the federal level.

BACKGROUND

In January 2014, a chemical release from Freedom Industries resulted in disruption of potable water supplied to more than 300,000 residents in nine counties for nine days. The Chemical Safety Board (CSB) and the West Virginia State Attorney General (State AG) investigated the incident to determine its cause and actions to prevent a similar incident in the future.

Both the CSB and State AG concluded that the lack of enforceable standards and regulation of chemical

storage in aboveground tanks was a contributing factor. They determined that relying on voluntary programs was inadequate to prevent releases such as what occurred at Freedom Industries.

Some states such as Pennsylvania and New York already regulate chemical storage in aboveground tanks. West Virginia developed aboveground storage tank regulations for chemical storage in the aftermath of the Freedom Industries release. Corresponding federal regulations governing chemical storage in aboveground tanks do not currently exist.

ACTIONS BEING TAKEN BY EPA

In 2015, EPA was sued for failing to promulgate regulations to prevent and contain hazardous substances spills as required under the CWA.² One of the named plaintiffs was People Concerned About Chemical Safety (PCAS), a community organization based in West Virginia's Kanawha Valley. PCAS represents residents of the Kanawha Valley that were affected by the Freedom Industries release.

¹ RIN 2050-AG87. Clean Water Act Hazardous Substances Spill Prevention. 3/26/2018.

² Environmental Justice Health Alliance for Chemical Policy Reform, et. al v. U.S. EPA, 15-cv-5705. 7/21/2015.

Plaintiffs asserted that EPA has a non-discretionary duty under CWA Section 311(j)(1) to issue regulations to prevent and contain discharges of oil and hazardous substances from onshore facilities, including aboveground tanks.

In 2016, EPA entered a Consent Decree with the plaintiffs that required the agency to undertake certain actions pertaining to the issuance of Hazardous Substances Regulations.³ The court required that EPA issue a Notice of Proposed Rulemaking (NPRM) by June 2018 with promulgation of the final rule by August 2019.

IMPLICATIONS OF EPA ACTIONS UNDER THE CONSENT DECREE

On March 26, 2018, EPA submitted a notice of its intent to initiate rulemaking for the prevention of hazardous substances discharges under the CWA to the OMB. EPA is currently evaluating options and alternatives to meet its CWA obligations.

While the notice to OMB does not identify options and alternatives being considered by EPA, it is reasonably anticipated that EPA will issue an Information Collection Request (ICR) and data gathering from facilities storing hazardous substances stored in aboveground tanks.

Issuance of an ICR pushes back the court-ordered deadline for promulgation of the final regulation by 14 months to December 2020. However, federal regulation of hazardous chemicals in aboveground tanks is seen as inevitable.

Below are some of the requirements in EPA's proposed hazardous substance regulations that companies with chemical storage in aboveground tanks can likely expect:

- Registration of aboveground chemical storage tanks;
- Individual certificates to operate for each tank and/or individual tank CWA permits;
- Detailed construction, maintenance, and performance requirements for secondary containments;
- Tank maintenance, inspection, and corrosion plans;

- Requirements for design, construction, alteration, or repair of aboveground tanks; and
- State agency review and approval of spill prevention, control and countermeasures plans, and stormwater pollution prevention plans

WHAT YOU CAN DO NOW

While specific requirements of the final hazardous substance regulations are in a nascent stage of development, below are actions you can take now to prepare:

- Create a comprehensive aboveground tank inventory that includes location, size, contents, age, and materials of construction;
- Identify the status of each tank: whether the tank is in service, out of service but still usable, or permanently out of service;
- Define the conditions of service for each tank that include chemical compatibility with the materials of construction, and history of chemical storage, where possible; and
- Determine the history of third-party inspections for each tank or group of tanks under similar conditions of service.

To discuss implications stemming from EPA's regulation of chemical storage in aboveground tanks please contact:

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³ Environmental Justice Health Alliance for Chemical Policy Reform, et. al v. U.S. EPA. 15 Civ. 5705 (SAS). 2/16/2016