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Calling for Backup: Power Loss Under EPA's New Process Safety Regulations

In August 2022, EPA published proposed amendments that would amend its Risk Management Plan ("RMP") Rule. The proposed provisions were driven by concerns about climate change. In support of the proposed amendments, EPA had cited a recent report from the U.S.

Power Loss Under SCCAP: EPA Says "Show Your Work"

Although the final SCCAP Rule only requires backup or standby power supplies for monitoring equipment associated with the prevention and detection of accidental releases, facilities to which the Rule applies haven't been let completely off the hook when it comes to the impacts of power loss on general operations. Under amendments to the Hazard Review and Process Hazard Evaluation sections of the RMP Rule, "standby or emergency power systems" are now explicitly listed among the types of engineering and administrative controls that must be evaluated when conducting these types of reviews and evaluations. As EPA notes in the preamble to the final rule, while facilities are

Department of Energy which opined that "an increase in extreme weather events has led to an increase in power outages in recent years." In the Agency's view, this conclusion justified a requirement for affected facilities to consider standby or emergency power systems when conducting process hazard evaluations.

The final rule - entitled the "Safer Communities by Chemical Accident Prevention Rule" ("SCCAP") - moves beyond merely requiring facilities to *consider* backup power systems. Under the new rule, backup power systems will be *required* in certain circumstances. In particular, affected facilities will now be required to ensure that "monitoring equipment associated with prevention and detection of accidental releases ... has standby or backup power to provide continuous operation."

This language raises an important question. When is a monitoring system "associated with prevention and detection of accidental releases?" The answer may be relatively straightforward for systems designed to *prevent* accidental releases. For example, a system designed to prevent the release of hydrofluoric acid in the alkylation unit of an oil refinery would presumably be the very kind of system to which this language applies.

The answer to this question starts to get a little murkier for systems that are capable of *detecting* releases, but which are not necessarily installed for this particular purpose. An example might be a network of area monitors to detect and measure benzene for the purpose of ensuring compliance with OSHA exposure standards. Such monitors would likely not have been installed for the explicit purpose of detecting accidental releases. But, if data from these monitors are used to determine the direction of a release plume or to estimate how much benzene has been released, would these systems then be "associated with the *detection* of accidental releases?"

It is too early to say how these questions may be resolved. However, EPA's "ace in the hole" is always the General Duty Clause. EPA may take the broad view that any monitoring equipment should have backup power supplies available if it is, or can be, used to measure the quantity of accidental releases or make assessments about the direction such releases. Even if EPA can't make this argument stick under the power loss provisions of the new amendments to the RMP Rule, the Agency

not required to maintain backup power for general operations, they do need "to explain decisions not to implement backup power."

This requirement echoes a theme that comes up frequently in engineering evaluations for property insurance programs, process safety audits, and even compliance audits. This is the distinction between *implementing* a finding and *addressing* it. To take the example of property insurance evaluations, insurers are not always necessarily looking for an insured to implement every finding from a particular evaluation. However, insurers do want to see that the insured has reviewed and considered each finding. For the findings that the insured has declined to implement, the insurer wants to see a reasoned explanation for each such declination, as well as a description of any planned alternative actions. In other words, the insurer wants the insured to "show its work."

Similarly, EPA wants regulated facilities to show their work where they have determined that backup power supplies for certain operations are either unnecessary or inadvisable. The Agency clearly prefers the implementation of backup power supplies for hazardous operations. Regulated facilities are not bound to *implement* such systems. However, regulated facilities must *address* such systems, and explain why they were not implemented.

Having said the above, it is worth considering how EPA would respond to a release from a hazardous operation with no standby or emergency backup

may still be able to make the argument fit within the broad boundaries of the General Duty Clause.

(Editor's Note: This is a version of an article that was previously published on the LinkedIn personal page for Daniel J. Brown.)

supply. As noted in the article to the immediate left, the EPA's "ace in the hole" is always the General Duty Clause. The Agency may very well respond to such a release by playing this card.

PFAS & Corrective Action: EPA Proposes to Clarify Its Authority

In the Year-End 2021 edition of *The Cubical*, I had written about EPA's response to a petition from the Governor of New Mexico asking the Agency to regulate PFAS-containing wastes under RCRA. (See *PFAS, Hazardous Waste & Taxes* which can be accessed by clicking [here](#).) In response to the petition, EPA announced that it would take two separate actions in response to the petition. According to the announcement, one of these actions would be an effort to *clarify* by regulation, EPA's authority to require investigation and cleanup of PFAS-containing wastes under RCRA's Corrective Action Program. As I had noted at the time, EPA's announcement belied a belief that although PFAS-containing wastes would not meet the definition of "hazardous waste" under RCRA's hazardous waste regulations, the Agency already had the authority to regulate such wastes under the broad definition of "hazardous waste" in the statute itself.

On February 8th, EPA acted on its originally expressed intent by publishing a proposed rule to - again, in its own words - clarify its authority to regulate PFAS-containing wastes under RCRA's Corrective Action Program. Under this proposal, EPA seeks clarify its authority with a few relatively simple tweaks to the *regulatory* definition of "hazardous waste" in 40 CFR § 260.10, and 40 CFR § 261.1(b) which identifies certain programs under RCRA to which the *statutory* definition of "hazardous waste" applies. Taken together, these tweaks explicitly require the application of the broader *statutory* definition of "hazardous waste" under the Corrective Action Program.

While the action taken by EPA on February 8th is only a proposed rule, it is important to remember that in EPA's view, this action *clarifies* authority that the Agency believes it already possesses. As I had noted in the 2021 Year-End edition of *The Cubical*, EPA may not wait for the promulgation of a final rule, but rather may choose to act now pursuant to authority that it believes it already possesses. Treatment, storage, and disposal facilities engaged in corrective action should continue to remain prepared for this possibility.

Under Control: SEC's Climate Disclosure Rules and the Accounting Function's Evolving Role in EHS Management

As had been widely anticipated in recent weeks, the Securities and Exchange Commission ("SEC") approved the set of final rules entitled *The Enhancement and*



Standardization of Climate-Related Disclosures for Investors (referred to herein as the "Climate Disclosure Rule" or simply, the "Rule"). Among other things, the Climate Disclosure Rule will require certain publicly traded companies to disclose their greenhouse gas ("GHG") emissions in registration statements and annual reports.

Interestingly, companies to which the Rule potentially applies seem to have dodged two rather significant bullets. The proposed Climate Disclosure Rule would have required these companies to disclose all GHG emissions falling within Scope 1 (direct emissions) and Scope 2 (emissions resulting from consumption of power provided by electric utilities). In addition, disclosures of GHG emissions falling within Scope 3 (GHG emissions throughout the value chain) would have been required if such emissions were considered as material. Under the softened final rules, disclosures of Scope 1 and Scope 2 emissions will only be required if they are material. The requirement to disclose Scope 3 emissions has been entirely stricken.

These near misses notwithstanding, the final Climate Disclosure Rule is likely to have a significant impact on the accounting function's role in a company's Environmental, Health & Safety ("EHS") management activities. The reason for this can be summed up in a simple two-word phrase that strikes fear into the heart of every director, CEO, CFO, general counsel, and corporate accounting professional - *material weakness*. EHS professionals lose countless hours of sleep over what seems to be the near limitless authority of environmental regulatory agencies to assess penalties in the tens of thousands of dollars range *per violation, per day*. However, most reasonably foreseeable scenarios of the financial impact of violations of environmental requirements (at least within the civil enforcement realm) pale in comparison to the consequences of findings of material weaknesses in a publicly traded company's internal financial reporting controls. Such findings can hammer stock prices, bring about changes in leadership, result in expensive litigation, and invite further scrutiny from government regulators.

The fear of such consequences and the desire to avoid them are why corporate accounting functions may be compelled to take a much greater supervisory role in the process of measuring, estimating, calculating, and reporting GHG emissions. EHS professionals are accustomed to working within the confines of operational and EHS management controls in place to ensure the completeness and accuracy of environmental reports and permit applications. Now though, they may find themselves operating within the documentation and reporting procedures dictated by internal auditors, outside auditors, and corporate accounting and financial reporting guidelines.

This may be so even where a company's Scope 1 and 2 emissions are not material. According to the Climate Disclosure Rule, the materiality of a company's GHG emissions is dependent on a multitude of factors, including the magnitude of the emissions. Many companies already measure and estimate their GHG emissions for other reasons (i.e., to comply with investor demands or EPA's GHG emissions reporting requirements). Measurements and estimates of GHG emissions that are inaccurate or incomplete may lead to incorrect conclusions about the materiality of such emissions. A determination that these inaccuracies were the result of poor management practices could lead to findings of material weaknesses in the company's internal financial reporting controls.

Judicial challenges to the Climate Disclosure Rule have already been filed. And it's entirely possible that the Rule may not survive an administrative law landscape that now includes a robust Major Questions Doctrine, and the possible imminent demise of the Chevron Doctrine. If the Climate Disclosure Rule does survive though, EHS and accounting professionals may find themselves navigating one more "dotted line" in their respective organizational charts.

EHS and accounting professionals are accustomed to working closely together on financial reporting issues such as estimates of anticipated capital expenditures related to pollution control, contingent environmental liabilities, and liabilities associated with material environmental enforcement actions. For these activities though, corporate accounting professionals typically defer to the methods, practices, and judgment of their EHS management colleagues. Operating *directly within* a company's internal financial reporting control regime, on the other hand, would be entirely new for most EHS professionals. Nonetheless, it is a mode of operation for which these professionals may need to be ready.

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