



Enforcement Trends Under The Clean Air Act's General Duty Clause

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Comprehensive Risk Management Plans (RMP) under Section 112(r) the Clean Air Act (Act) are not just required for facilities processing listed regulated substances in excess of regulatory thresholds. Recent EPA enforcement trends suggests the agency believes the Act's General Duty Clause requires plants storing or processing unlisted chemicals to have an RMP if a catastrophic release of those chemicals could pose a significant risk to human health or the environment.

Scope of RMP

The RMP program generally requires a facility to "prevent the accidental release and to minimize the consequences of release of any substance listed [as a regulated substance] or extremely hazardous substance." §112(r)(1) CAA, 42 U.S.C.A 7412(r)(1). EPA promulgated an elaborate regulatory scheme to implement RMPs in 2004, 40 CFR Part 68, and published the list of "regulated substances" at 40 CFR 68.130. While other statutes reference lists of extremely hazardous substances (EHS), there is no defined list of EHS under the Act.

The RMP program is not unlimited, of course. Articles or manufactured items are exempted, along with chemicals used as structural components, for routine janitorial services, products regulated by FDA and in wastewater treatment.

Once subject to RMP requirements, a covered facility must develop an RMP and file a copy with EPA every 5 years. The RMP must include the following components:

- Hazard Assessment: The assessment must detail the potential effects of an accidental release and the facility's accident history for 5 years, and evaluate "worst-case" scenarios;
- Prevention Program: A program must be developed to implement safety protocols and necessary maintenance, monitoring, and employee training to minimize catastrophic events; and
- Emergency Response Program: A program must be developed to provide information and emergency response, employee training measures and procedures for public notice in the event of

release.

These requirements are more than 15 years old.

Covered Chemicals

What is new under the Act is how EPA interprets what chemicals trigger RMP requirements. If a facility provides, processes, stores, or handles any chemicals, the RMP Plan can be triggered:

The owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty to identify hazards which may result from such release 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 release which do occur.

§112(r)(1) CAA, 42 U.S.C.A 7412(r)(1) (emphasis added). EPA coined the phrase "General Duty Clause" for this provision.

The General Duty Clause applies to stationary sources "producing, processing, handling, or storing" any EHS, regardless of whether the chemical substance is a listed Section 112(r) regulated substance. Because EHS is not defined in the Act, there is no specific list of chemicals a facility handling such substances may consult to determine whether it is now covered by the General Duty Clause.

There is some guidance on what is meant by the term EHS in a 1990 Senate Report that was issued when Section 112(r) of the Act was passed. There, the United States Senate stated a substance may be presumed to be an EHS requiring an RMP if release of the chemical substance could:

- Cause death or serious injury due to acute toxicity or explosion; or
- Result in substantial property damage by blast, fire, corrosion, or other reaction.

Community Right-to-Know, Vol. 33, No. 2, p. 4 (November, 2019). This is a broad array of substances and not limited to the Act's list of regulated substances.

Moreover, EPA regulations under the Act do not provide guidance on what threshold amount of an EHS may require action under the General Duty Clause. Consequently, the release of any amount of a chemical substance which may cause acute toxicity, explosion or substantial property damage may be enough to trigger the need for an RMP.

As a result, a large number of facilities may be subject to the RMP program under the General Duty Clause and not know it. At a minimum, regulated substances covered by Section 112(r) of the Act would be included, but apparently it is not necessary for the regulated substance to exceed promulgated thresholds to be covered. A plant with substances listed as extremely hazardous substances under the Emergency Planning and Community Right-to-Know (EPCRA) regulations, 40 CFR 355, App. A and B, may be covered, but nowhere does the RMP rule require EPCRA-listed substances be onsite at any

one time in excess of EPCRA ?threshold planning quantities? to trigger the General Duty Clause.

Recent EPA Action

In recent years, EPA has stepped up enforcement against companies not implementing RMPs under the General Duty Clause. In July, 2019, a cold storage operation was fined \$80,000 and paid more than \$200,000 in corrective measures to upgrade alarms, replace rusted pipes/values, improve ventilation and modify emergency response procedures for failing to implement an RMP, even though all Section 112(r) regulated substances onsite were less than regulatory thresholds. The facility used anhydrous ammonia for refrigeration purposes in small quantities.

Shortly thereafter, a facility producing windshield wiper fluid paid almost \$400,000 in fines and corrective action costs to come back into compliance with the RMP program. There, EPA alleged the company did not have adequate spill containment for and did not ground methanol equipment; EPA also claimed the facility?s lack of ventilation for storage tanks and insufficient employee training and personal protection equipment violated the General Duty Clause. Methanol is not a listed regulated substance under the RMP rules.

Next Steps

Every facility is left to evaluate its own chemical processes, production, handling, and storage of chemicals to determine if its chemicals are acutely toxic or explosive, or could cause substantial property damage if released. The General Duty Clause and its requirements are not detailed by EPA in any regulations. Accordingly, a stationary source must make its own determination and must recognize that it will be ?second-guessed? if a catastrophic event occurs.

To avoid the risk of liability under the General Duty Clause, each facility should consider the following steps:

- Identify Hazards from chemicals onsite, focusing on potential risks of acute toxicity or explosion and the likelihood of substantial property damage, even if the RMP program does not appear to apply;
- Design the RMP and maintain the facility to prevent and minimize the consequences of any release of unlisted chemicals when such risks exist; and
- Respond in accordance with the RMP with trained and prepared personnel when a release occurs.

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