



Clean Air Act RMP and GDC: Enforcement Trends and Emerging Issues

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OSHA and EPA – A Paradigm Shift

- OSHA traditionally on point on major accident prevention rules and post-incident enforcement
 - EPA's Risk Management Program (RMP) essentially adopted OSHA's Process Safety Management (PSM) Standard
- Agency's roles are now largely reversed
- EPA increasingly driving efforts
 - Enforcement
 - Regulatory reform

CAA General Duty Clause

- 1990 Clean Air Act Amendments included General Duty Clause (42 U.S.C. § 7412(r))
 - Modeled after Occupational Safety and Health Act's General Duty Clause
- Requires stationary sources with extremely hazardous substances (EHS) to identify hazards, and prevent and minimize effects of accidental releases
 - Resulting requirement to design and maintain safe facility

CAA General Duty Clause (cont.)

- To establish GDC violation, EPA must prove –
 - Owner or operator did not maintain facility free of hazard
 - Hazard recognized by owner or operator, or recognized by industry
 - Hazard was likely to cause harm
 - Owner or operator could have eliminated or reduced hazard
- Compliance obligations are vague
 - EPA has not issued any implementing regulations
 - No reported interpretations

Enforcement Authority

- EPA has authority to bring administrative or civil judicial enforcement action for GDC and RMP violations
 - Agency pursues both penalties and injunctive relief
- January 2017 – CAA maximum civil penalties increased
 - Now \$97,229 per day for each violation; up from \$95,284
- Agency now routinely pursues administrative orders for GDC violations associated with even modest chemical releases

Enforcement Authority (cont.)

- Role of Department of Justice (DOJ)
 - Civil judicial enforcement requires DOJ involvement
 - EPA may not pursue administrative enforcement in certain circumstances without DOJ approval
 - Assessing penalties greater than \$369,532
 - Alleging violations that occurred more than one year prior to enforcement

Enforcement Drivers

- Post-accident outcry is main enforcement driver
- BP Texas City (2005)
 - 15 contractor fatalities and over 170 injuries
 - \$15M RMP civil penalty (among other enforcement actions)
 - Largest ever assessed for civil RMP violations
- West Fertilizer Company (2013)
 - 15 fatalities, 260 injuries, widespread community damage
 - Led to Executive Order – “Improving Chemical Facility Safety and Security”

National Enforcement Initiatives

- EPA announced “Reducing Risks of Accidental Releases at Industrial and Chemical Facilities” as FY 2017-2019 initiative
- Agency justification
 - “[A]ll too common occurrence for serious accidents and explosions that kill or injure employees and emergency responders, and... threaten neighboring communities”
- In FY2017, EPA inspected 363 facilities that use extremely hazardous substances and “addressed” 255 facilities

Recent Major Enforcement

- StarKist and Starkist Samoa Company (2017)
 - \$6.5M to resolve environmental violations at tuna processing facility in American Samoa
 - Primarily violations of wastewater and stormwater provisions of Clean Water Act
 - Included violations of GDC for failing to ensure proper operation / maintenance of ammonia, butane, and chlorine systems
 - \$88,000 for Supplemental Environmental Project (SEP) to provide emergency equipment to American Samoa for responses to chemical releases

Recent Major Enforcement (cont.)

- Millard Refrigerated Services (2015)
 - \$3M settlement to resolve alleged GDC and RMP violations as well as release reporting requirements
 - Involved multiple releases of industrial refrigerant anhydrous ammonia
 - EPA identified 37 separate RMP violations
 - No injunctive relief because Millard no longer owned facility where releases occurred

Recent Major Enforcement (cont.)

- Bayer CropScience LP (2015)
 - \$5.6M settlement to resolve GDC and RMP violations at WV facility after explosion resulting in two fatalities
 - \$452,000 on series of measures to improve safety at U.S. chemical storage facilities (e.g., enhancing inspections, standardizing operating procedures)
 - \$4.23M SEP to improve emergency preparedness and response (e.g., mobile communications equipment and protective equipment for local emergency responders)
 - \$975,000 penalty

Regulatory Reform Efforts

- EPA at forefront of efforts to reform federal major accident prevention regulations
 - EPA issued proposals largely independent of OSHA
 - Reversal from EPA simply following OSHA's lead
- Timeline
 - June 12, 2017 – RMP implementation delayed until February 19, 2019
 - Possible that EPA is drafting a Reconsideration Rule that would rescind or modify originally proposed elements

Regulatory Reform Efforts (cont.)

- EPA Final Rule
 - Third party audit requirement after reportable accident
 - Root cause analysis requirements for catastrophic release or near miss
 - Requirement that certain industry categories conduct safer technology and alternatives analysis during PHAs
 - Increased local coordination with local emergency planning committees (LEPC)
 - Increased information disclosure to LEPCs and public



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