

**USEPA ISSUES IMPLEMENTATION GUIDANCE
FOR CLEAN AIR ACT SECTION 112(r)(1):
THE ACCIDENTAL RELEASE GENERAL DUTY
CLAUSE**

CHICAGO
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603

DALLAS
717 N. Harwood
Suite 3400
Dallas, Texas 75201

LOS ANGELES
555 West Fifth Street
Los Angeles, California 90013

NEW YORK
875 Third Avenue
New York, New York 10022

SEATTLE
One Union Square
600 University St., Suite 1601
Seattle, Washington 98101

WASHINGTON
1722 Eye Street, N.W.
Washington, D.C. 20006

HONG KONG
Two Exchange Square
Suite 3403-5
Central, Hong Kong

LONDON
1 Threadneedle Street
London EC2R 8AW
England

SHANGHAI
Suite 1601, 16th Floor
Shui On Plaza, No. 333
Middle Huai Hai Road
Shanghai 200021 P.R. China

SINGAPORE
6 Battery Road #38-01A
Singapore 049909

TOKYO
9-1, Yurakucho 1.chome
Chiyoda.ku
Tokyo 100 Japan

WWW.SIDLEY.COM

The United States Environmental Protection Agency (“USEPA”) recently issued a guidance document (“Guidance Document”) interpreting the general duty clause (“General Duty Clause”) of Section 112(r)(1) of the Clean Air Act (“CAA”). Under USEPA’s expansive interpretation of this provision, owners and operators of any emitting source, including those not subject to the Risk Management Plan (“RMP”) requirements of Section 112(r)(7), have a broadly-defined obligation to plan for, minimize and control accidental releases of extremely hazardous substances.

Applicability of the General Duty Clause

USEPA interprets the General Duty Clause — which has been in effect and enforceable since November 15, 1990 — as having far-reaching applicability. USEPA states that it is applicable to any owner or operator of a stationary source that produces, processes, handles, or stores an “extremely hazardous substance.”

- “Extremely hazardous substances” are not defined in the CAA. The legislative history of the 1990 Clean Air Act Amendments, however, expressly indicates that the category does not parallel the Emergency Planning and Community Right-to-Know Act’s (“EPCRA’s”) list of extremely hazardous substances. By way of further guidance, the legislative history broadly describes the category as including any substance which has the capacity to cause death, injury, or property damage due to short-term exposure because of its toxicity, reactivity, flammability, volatility, or corrosivity. USEPA expects owners and operators to classify substances as extremely hazardous based on hazards identified by the facility or industry.
- According to USEPA, significant differences exist between applicability of the RMP requirements of Section 112(r) of the CAA and the General Duty Clause. USEPA claims that unlike the RMP requirements, obligations arising under the General Duty Clause are not limited to specifically listed substances. Because the provision does not include any *de minimis* exclusions, an owner or operator of a stationary source can be subject to the General Duty Clause regardless of the quantity of the extremely hazardous substance at the source. A source even has general duty obligations for RMP chemicals that are present at below-threshold levels.

Obligations of Owners and Operators Under the General Duty Clause

The Section 112(r)(1) General Duty Clause applies in the same manner and to the same extent as the general duty obligations of the Occupational Safety and Health Act (“OSHA”) (29 U.S.C. § 654). According to USEPA, the General Duty Clause places a general duty on owners and operators of stationary sources to comply with three basic obligations: *identify* hazards from the potential release of extremely hazardous substances from their facilities; *design and maintain* a safe facility so as to prevent such releases; and *minimize* the consequences of an accidental release, should one occur. The Guidance Document includes USEPA’s aggressive interpretation of these requirements:

- *Hazard Identification.* USEPA states that owners and operators should identify process hazards by completing a Process Hazard Analysis (“PHA”) for each process involving extremely hazardous substances. According to the Guidance Document, this entails using appropriate hazard assessment techniques to identify hazards associated with substances and processes, potential release scenarios, and the consequences of each release scenario using modeling or an applicable dispersion analytical technique.
- *Facility Design and Maintenance.* USEPA states that, at a minimum, designing a safe facility requires facility design to be based on applicable design codes, federal and state regulations and recognized industry practice. USEPA indicates that proper facility maintenance requires preparation of standard operating procedures for every aspect of each process to ensure that equipment is operated at safe levels. Facilities should also develop and implement training programs, incident investigation programs, self audits, and preventive maintenance programs.
- *Consequence Minimization.* Finally, USEPA states that each owner and operator should establish a tailored emergency response plan for its facility that anticipates types of releases, develops mitigation processes, and incorporates mechanisms for local responder notification and involvement. Facility employees should additionally be trained to recognize emergency situations and be empowered to take action to prevent or mitigate releases.

In evaluating the adequacy of programs and measures implemented by a stationary source to meet these General Duty Clause obligations, USEPA first instructs inspectors and auditors to assess whether the programs and measures meet industry standards or state and federal regulations. Where no industry standard exists or an industry standard inadequately protects public health and the environment, the Guidance Document states that the owner or operator is responsible for taking additional appropriate measures to prevent releases and minimize their consequences.

Pursuant to Section 113 of the CAA, owners and operators who fail to comply with applicable General Duty Clause requirements may be subject to civil and/or criminal enforcement actions.

* * *

For more information about these developments, contact the following:

Chicago
Susan V. Harris
(312) 853-4663
svharris@sidley.com

Los Angeles
Judith Praitis
(213) 896-6637
jpraitis@sidley.com

New York
Maureen M. Crough
(212) 906-2323
mcrough@sidley.com

Washington, DC
Christopher L. Bell
(202) 736-8118
cbell@sidley.com

Thomas G. Echikson
(202) 736-8161
techikso@sidley.com



To receive future copies of the Environmental Advisory via E-mail, please send your name, company/firm name and E-mail address to Marie Grippo at mgrippo@sidley.com