ENVIRONMENTAL LAW INFORMATION MEMO

November 1999

Clean Air Act Section 112(r) General Duty Clause
and 1999 Amendments to Section 112(r)

Background

As most environmental, safety and health (ESH) managers are aware, the U.S. Environmental Protection Agency (EPA) promulgated an accidental release prevention rule under § 112(r) of the Clean Air Act Amendments of 1990 (CAA) (40 CFR Part 68, entitled “Chemical Accident Prevention Provisions”). This rule requires stationary sources with more than a threshold quantity of a regulated toxic or flammable substance in a “process” (referred to as a “covered” process in this Memo) to develop a risk management program, and document that program in a Risk Management Plan (RMP). No later than June 21, 1999, facilities covered by 40 CFR Part 68 were required to submit their RMP to an appropriate governmental agency. Facilities in New York State currently are required to submit RMPs only to EPA.

Risk Management Program Update

1. Since EPA promulgated 40 CFR Part 68, ESH managers have carefully evaluated the extent to which EPA’s risk management program requirements apply to their facilities. Frequently, the focus of these evaluations has been limited to whether development and submission of an RMP was required. However, even if a facility is not required to develop and submit an RMP, CAA § 112(r) contains a “General Duty Clause” that makes owners and operators responsible to ensure that regulated substances or extremely hazardous substances are managed safely.

2. A recent amendment of CAA § 112(r), entitled the “Chemical Safety Information, Site Security and Fuels Regulatory Relief Act,” has changed accidental release prevention compliance responsibilities for many facilities. For example, the amendment requires certain facilities which submitted an RMP to conduct a public meeting or other public outreach activity before February 5, 2000, and certify that they did so to the Federal Bureau of Investigation (FBI). The amendment also removes certain flammable fuels from coverage by the RMP requirement.

Compliance with the General Duty Clause

Although facilities have been required to comply with the General Duty Clause since the passage of the CAA in November 1990, many ESH managers may be unaware of their compliance responsibilities. However, compliance with the General Duty Clause is mandatory, and a failure to comply is a violation of the CAA that can result in the imposition of penalties of up to $27,500 per day for each violation.

The General Duty Clause provides that:

The owners and operators of stationary sources producing, processing, handling or storing [40 CFR Part 68 regulated substances or any other extremely hazardous substance] have a general duty . . . to identify hazards which may result from releases 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 releases which do occur.

**Substances Covered by the General Duty Clause**

The General Duty Clause applies to facilities with any quantity of a listed 40 CFR Part 68 regulated substance or any other extremely hazardous substance. The term “extremely hazardous substance” is intended to be very broad, and ESH managers should generally consider any substance which may, as a result of a release to the air, cause death, injury or property damage, to be covered by the General Duty Clause (these substances are not limited to the list of extremely hazardous substances under § 302 of the Community Right-to-Know Act (40 CFR Part 355, Appendices A and B)).

**Compliance with the General Duty Clause**

EPA guidance indicates that any facility with a listed 40 CFR Part 68 regulated substance or any other extremely hazardous substance is responsible for (at a minimum):

- knowing the hazards posed by chemicals and assessing the impacts of possible releases;
- following codes, standards and other business practices to ensure the facility is properly constructed and maintained, and that the chemical is managed safely; and
- having a contingency planning process, which could include involvement of community emergency responders, to assist in the response in the event of an accident.

Methods to help assure continuous compliance could include:

- adopting or following relevant industry codes or standards for a process, and also for particular chemicals or pieces of equipment at a facility;
- understanding the unique characteristics of a facility which could require development of an individualized accident prevention program; and
- knowing the types of accidents that occur in an industry that can indicate potential hazards, and taking action to prevent and minimize the effects of accidental releases.

In 1998, EPA concluded its first judicial enforcement action under the General Duty Clause relating to a 1994 explosion at a nitrogen fertilizer facility that killed four persons and injured 18 others. The explosion released approximately 4,200 tons of anhydrous ammonia to the air, and other chemicals to the ground. EPA ultimately settled the case, and obtained a civil penalty of $500,000 and response costs of $150,000, among other concessions by the facility. EPA Region II staff have indicated that the Agency will conduct an investigation in all cases where releases caused death or serious personal injury or property damage and assess the appropriateness of an enforcement action under the General Duty Clause.

**Amendment of CAA § 112(r): The Chemical Safety Information, Site Security and Fuels Regulatory Relief Act**

Stationary sources which have developed and submitted an RMP have already classified each “covered” process at their facility into one of three programs. Program 1 imposes the fewest substantive requirements, while Programs 2 and 3 impose more significant substantive requirements. Different processes at a stationary source can be classified in different programs.

**Offsite Consequence Analysis**

For a Program 2 or 3 stationary source, the RMP must contain, among other things, an offsite consequence analysis (OCA). The OCA portion of the RMP must include a “worst-case” release scenario and an “alternative” release scenario. Because all RMPs will be available on an EPA Internet database, there has been concern that the OCA for a stationary source could be used to plan a terrorist attack. Federal legislation enacted on August 5, 1999, entitled the “Chemical Safety Information, Site Security and Fuels Regulatory Relief Act” (Act), amends § 112(r) of the CAA and attempts to address this concern.
Under the Act, public access to the OCA sections of a facility’s RMP will be limited until at least August 5, 2000. Until then, the portions of a source’s RMP which address the offsite consequences of a “worst-case” and “alternative” release scenario are not available on the Internet, and are exempt from disclosure under the federal Freedom of Information Act. However, certain categories of persons, including federal, state or local employees, may obtain OCA information for “official use” related to emergency planning and response purposes. By August 5, 2000, the federal government must publish regulations governing public access to OCA data. If regulations are not published by this date, the exemption from mandatory disclosure under the Freedom of Information Act will expire.

**Public Meeting Requirement**

The Act also generally requires each Program 2 and 3 RMP facility to hold a public meeting, after “reasonable” public notice, to describe and discuss the local implications of the facility’s RMP. The public meeting must be held within 180 days of the Act’s August 5, 1999 enactment date, that is, no later than February 1, 2000. At the public meeting, the facility must also provide a summary of the OCA portion of the RMP.

An alternative to the public meeting requirement is available to stationary sources which meet specific “small business stationary source” criteria. Qualifying sources can choose to publicly post a summary of their OCA information instead of holding a public meeting. Among other criteria, to be considered a “small business stationary source,” the facility must be owned or operated by a person that employs 100 or fewer persons, and it cannot be a “major” stationary source under the CAA.

Not later than June 5, 2000, facilities must submit a certification that it held the required meeting or publicly posted its OCA information (for small business stationary sources only) to the FBI. Sources may also choose to release the OCA sections of its RMP or a document providing information regarding those sections.

**Flammable Fuel Exclusion**

The Act also provides some “regulatory relief” by removing flammable fuels (such as propane) which are used as fuel or held for sale at a “retail facility” from coverage by the RMP. A retail facility is “a stationary source at which more than one-half of the income is obtained from direct sales to end users or at which more than one-half of the fuel sold, by volume, is sold through a cylinder exchange program.” Facilities which produce a flammable fuel, or use it as a feedstock in producing another product, or which do not meet the definition of a retail facility, are still subject to RMP requirements for that fuel.

For additional information concerning CAA § 112 risk management program requirements, or to request a copy of the “Chemical Safety Information, Site Security and Fuels Regulatory Relief Act,” please contact:

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