



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

AUG 1 2013

The Honorable Mike Pompeo
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Pompeo:

Thank you for letter of May 28, 2013, to the U.S. Environmental Protection Agency (EPA) regarding the use of the Clean Air Act (CAA) General Duty Clause (GDC). I appreciate your interest in chemical plant safety. Please see the enclosure for answers to the questions from your letter.

Again, thank you for your letter. If you have further questions, please contact me, or your staff may call Carolyn Levine, in the EPA's Office of Congressional and Intergovernmental Relations, at 202-564-1859.

Sincerely,

A handwritten signature in black ink that reads "Mathy Stanislaus". The signature is written in a cursive, flowing style.

Mathy Stanislaus
Assistant Administrator

Enclosure

U.S. EPA Response to May 28, 2013, Letter from Congressman Pompeo

1) Will the EPA issue a regulation to define the scope of the General Duty Clause, including a complete list of chemicals covered?

Response: The General Duty Clause in section 112(r) of the Clean Air Act (CAA) clearly requires facilities 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.

The EPA believes that issuing a regulation would be contrary to the Congressional intent reflected in 112(r) of the CAA. The GDC is a broad, performance-based, self-enabling requirement that reflects the Congressional intent that the owners and operators of chemical handling facilities take responsibility for the prevention of chemical accidents from recognized hazards, including hazards that may not be identified or substances that may not be listed, in 112(r) regulations. A regulatory effort by the EPA to define the scope of the GDC, either by specifying a limited set of covered hazards or by identifying a limited number chemicals covered by the GDC, through an implementing regulation, would limit the scope of the GDC and could relieve facilities of that responsibility.

Congress patterned the CAA GDC after the general duty clause of the Occupational Safety and Health (OSH) Act. The OSH Act general duty provision has been enforced in countless cases to promote worker safety. As noted by the 101st Congress, the Occupational Safety and Health Administration (OSHA) cites the OSH Act general duty provision when there is no specific applicable OSHA regulation or standard and when an employer is aware that a hazard exists (Senate Environment and Public Works, Report 101-228, at 209 (1989)). The CAA directly references the OSH Act general duty provision as informing the nature of the duty under the CAA GDC. Section 112(r)(1) provides that facilities have a general duty “in the same manner and to the same extent as” the general duty in the OSH Act.

In accordance with the general duty clause of the OSH Act, an employer must render a workplace free of a hazard; the hazard must be recognized either by the employer or generally within the employer’s industry; the hazard causes or was likely to cause death or serious harm; and, it was feasible for the employer to have eliminated or materially reduced the hazard. The *Secretary of Labor vs. Duriron Co.*, 11 OSHC (BNA) 1405, 1407 (OSHRC 1983). For purposes of complying with the Clean Air Act general duty clause, these same responsibilities apply to owner/operators of stationary sources with extremely hazardous substances. Like the OSH Act general duty provision, the CAA GDC functions as a gap-filler when a serious hazard is recognized by a source or within the source’s industry and there is not a specific regulation on point. Therefore, issuing a regulation on the scope of the GDC would appear to be contrary to the design of the statute.

With regard to the listing of chemicals, while Congress expressly required the EPA to issue a list of substances and thresholds to implement the risk management plan requirements of CAA 112(r)(7), it intentionally left the substances potentially covered by the CAA GDC open-ended. The guidance at the time of enactment was that “extremely hazardous substances would include, but are not limited to” the list of substances that covered in the risk management plan requirements, all extremely hazardous substances identified under the Emergency Planning and Community Right-to-Know Act, and “other

agents which may or may not be listed or otherwise identified by any Government agency” that may cause death, injury, or serious property damage in an accidental release (Senate Report at 211). The Senate provided further guidance by saying that “the release of *any* substance which causes death or serious injury or which causes substantial property damage would create a presumption that such substance is extremely hazardous” (Id.) (emphasis added). The EPA has implemented the GDC consistent with this intent and refrained from listing specific chemicals since the earliest days after enactment of section 112(r) (59 Fed. Reg. 4478, 4481 (Jan. 31, 1994)). Any purportedly complete list of chemicals covered by the CAA GDC would risk missing substances that could cause grievous harm. Consistent with the nature of the GDC described above, establishing a limited list of substances subject to the GDC by the EPA would appear to be contrary to the design of the statute.

2) Do you believe the EPA has the authority to regulate chemical plant security under the General Duty Clause?

Response: The EPA has the authority to issue regulations and implement programs intended to prevent accidental chemical releases, and to minimize the consequences of such releases under CAA section 112(r)(7). In addition, many federal agencies have important roles and have specific statutory responsibilities in chemical safety and security that may impact chemical plant security. The EPA is focused on the prevention of and the preparation for chemical accidents arising from natural disasters or technological failure while the Department of Homeland Security (DHS) is focused on addressing acts of terrorism or other security-related concerns. Other agencies, such as the Occupational Safety and Health Administration in the Department of Labor, also have a role in preventing chemical disasters impacting workers. Each agency, in the course of fulfilling its mandates, coordinates its actions when it impacts roles of other agencies so that the policies implemented are complementary as allowed under current law.

3) What steps has the EPA taken to assist covered entities in complying with the General Duty Clause?

Response: The EPA has taken numerous steps to assist sources with complying with the GDC. For example, the EPA published detailed guidance (*Guidance for Implementation of the General Duty Clause Clean Air Act Section 112(r)(1)*, May 2000) and a fact sheet on the CAA General Duty Clause. The guidance is primarily intended to assist the EPA inspectors in promoting compliance with the GDC. However, it is a public document that establishes the agency’s expectations for compliance, and is therefore also useful to owners and operators of covered facilities in understanding their obligations under the GDC. The fact sheet provides owners and operators of stationary sources with information on GDC compliance and also refers readers to the guidance for more detailed information. The EPA has also published numerous chemical safety alerts that promote awareness of chemical hazards and provide information on safety measures that facilities can take to control or mitigate hazards. For example, the EPA has published a chemical safety alert on the hazards of ammonium nitrate. The GDC guidance document and fact sheet can be obtained from the EPA’s website at: www.epa.gov/emergencies/guidance.htm#rmp and the chemical safety alerts can be obtained at www.epa.gov/emergencies/publications.htm#alerts.

4) What provisions in the Clean Air Act's Risk Management Program do you believe are absent or deficient which would result in your applying the General Duty Clause?

Response: The Risk Management Program and the General Duty Clause have distinct functions that serve to help prevent chemical accidents. For sources covered by both, the Risk Management Program imposes greater and more specific obligations than the GDC. However, the Risk Management Program applies only to stationary sources with more than a threshold quantity of any of 140 listed substances, whereas the GDC is not limited to a specific list of substances (i.e., the GDC applies to all RMP substances and any other extremely hazardous substance) or threshold quantities.

As provided in the CAA, the focus of the Risk Management Program is on substances that "pose the greatest risk of causing death, injury, or serious adverse effect on human health or the environment from accidental release (CAA 112(r)(3)), and on quantities known to cause the effects for which the substance was listed (CAA 112(r)(5)). The GDC, as described in the answer to question #1, above, is broader in its scope and is intended to include chemicals that, due to case specific factors, pose serious risks [see 63 Fed. Reg. 640, 642 (January 6, 1998) ("The general duty clause of section 112(r)(1) would apply when site-specific factors make an unlisted chemical extremely hazardous")]. This means that the GDC applies in situations where the RMP regulation does not apply, but does not demonstrate a deficiency in EPA's authority under the RMP program.

5) Does EPA plan to apply the General Duty Clause to regulate chemical plant security?

Response: No. We understand concerns with using the General Duty Clause of the CAA to address site security to prevent terrorist attacks at chemical facilities. Other federal agencies play an important role and have specific responsibilities in this area, and we will continue to coordinate our activities with them to ensure there is no duplication of effort and that the mission and responsibilities of each agency are preserved.

6) Do you believe the EPA has the authority to mandate the use and/or consideration of Inherently Safer Technologies under Section 112(r) of the Clean Air Act?

Response: CAA section 112(r)(7)(A) and (B) provide the EPA with broad authority to promulgate regulations for chemical accident prevention. In producing such regulations, the Act allows the agency to consider factors such as facility design, equipment, and quantity of substances handled (and other factors). The EPA is currently evaluating various methods of improving increased chemical plant safety including safer management, increased preparedness management, and facility design and operations, and will do so in consultation with stakeholders, including industry. This evaluation will include examining best practices currently being utilized by industry leaders.

7) Does the EPA plan on issuing any guidance or proposing any rule mandating the use or consideration of Inherently Safer Technologies?

Response: The EPA has received input from some stakeholders regarding this issue. By a petition dated July 25, 2012, various groups asked the EPA to develop a rulemaking and interim guidance on this issue. We continue to evaluate the concerns raised by this petition. The agency is evaluating potential improvements to chemical safety, but has not made any decision at this time to issue new guidance or regulations relating to Inherently Safer Technologies, or alternatively, examining best practices being utilized by industry.