



Clean Air Act General Duty Clause

EPA Enforcement Trends and Other
Emerging Issues

Mark L. Farley
Katten Muchin Rosenman LLP
Houston
713.270.3434
mark.farley@kattenlaw.com

The Incidents



The Stakes

- High profile incidents continue to drive focus on process industries
- Stakes are higher than ever
 - Accidents are increasingly criminalized
 - Significant potential for lasting reputational harm
- Incidents pose unique challenges for even most sophisticated organizations
 - Anticipate “alphabet soup” of investigating and enforcement agencies (e.g., EPA, OSHA, CSB, NTSB)

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 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”

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
- July 2016 – CAA maximum civil penalties increased
 - Now \$93,750 per day for each violation; up from \$37,500
- 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 \$356,112
 - Alleging violations that occurred more than one year prior to enforcement

National Enforcement Initiatives

- EPA recently announced priorities for FY 2017-2019
- “Reducing Risks of Accidental Releases at Industrial and Chemical Facilities” added as new 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”
 - 150 catastrophic accidents occur per year
 - More than 2,000 high-risk facilities

Recent Major Enforcement

- 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 Supplemental Environmental Project (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 developing proposals largely independent of OSHA
 - Reversal from EPA simply following OSHA's lead
- Timeline
 - July 2014 – EPA issued Request for Information (RFI)
 - March 2016 – EPA published its proposed RMP rule
 - Late 2016 / 2017 – Potential final rule

Regulatory Reform Efforts (cont.)

- EPA Proposal
 - Third party audit requirement after reportable accident
 - Enhanced incident investigation requirements, including root cause analysis
 - Requirement that certain industry categories conduct safer technology and alternatives analysis
 - Increased local coordination with local emergency planning committees (LEPC)
 - Increased information disclosure to LEPCs and public

Katten Muchin Rosenman LLP Locations

AUSTIN

One Congress Plaza
111 Congress Avenue
Suite 1000
Austin, TX 78701-4073
+1.512.691.4000 tel
+1.512.691.4001 fax

HOUSTON

1301 McKinney Street
Suite 3000
Houston, TX 77010-3033
+1.713.270.3400 tel
+1.713.270.3401 fax

LOS ANGELES – CENTURY CITY

2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
+1.310.788.4400 tel
+1.310.788.4471 fax

ORANGE COUNTY

100 Spectrum Center Drive
Suite 1050
Irvine, CA 92618-4960
+1.714.966.6819 tel
+1.714.966.6821 fax

WASHINGTON, DC

2900 K Street NW
North Tower - Suite 200
Washington, DC 20007-5118
+1.202.625.3500 tel
+1.202.298.7570 fax

CHARLOTTE

550 South Tryon Street
Suite 2900
Charlotte, NC 28202-4213
+1.704.444.2000 tel
+1.704.444.2050 fax

IRVING

545 East John Carpenter Freeway
Suite 300
Irving, TX 75062-3964
+1.972.587.4100 tel
+1.972.587.4109 fax

LOS ANGELES – DOWNTOWN

515 South Flower Street
Suite 1000
Los Angeles, CA 90071-2212
+1.213.443.9000 tel
+1.213.443.9001 fax

SAN FRANCISCO BAY AREA

1999 Harrison Street
Suite 700
Oakland, CA 94612-4704
+1.415.293.5800 tel
+1.415.293.5801 fax

CHICAGO

525 West Monroe Street
Chicago, IL 60661-3693
+1.312.902.5200 tel
+1.312.902.1061 fax

LONDON

Paternoster House
65 St Paul's Churchyard
London EC4M 8AB United Kingdom
+44.0.20.7776.7620 tel
+44.0.20.7776.7621 fax

NEW YORK

575 Madison Avenue
New York, NY 10022-2585
+1.212.940.8800 tel
+1.212.940.8776 fax

SHANGHAI

Suite 4906 Wheelock Square
1717 Nanjing Road West
Shanghai 200040 P.R. China
+86.21.6039.3222 tel
+86.21.6039.3223 fax

Katten refers to Katten Muchin Rosenman LLP and the affiliated partnership as explained at kattenlaw.com/disclaimer.

Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.

Katten

Katten Muchin Rosenman LLP

www.kattenlaw.com