

Alert | Environmental/OSHA



October 2019

United States Indicts Facility Owner Under Clean Air Act General Duty Clause

The U.S. Environmental Protection Agency (EPA) continues to increase its enforcement role in industrial accidents, at times overshadowing the role traditionally played by the Occupational Safety and Health Administration (OSHA). EPA often takes tougher enforcement actions than OSHA and is more willing to bring criminal charges. This trend is reflected in a recent case affirming EPA’s authority to bring criminal charges for alleged violations of the General Duty Clause (GDC) of Section 112(r)(1) of the Clean Air Act (CAA) (42 U.S.C. § 7412(r)(1)). *U.S. v. Margiotta*, No. CR 17-143-BLG-SPW-2, 2019 LEXIS 156994, 11 (D. MT. Sept. 13, 2019).

Under the GDC, owners and operators of facilities that produce, process, handle, or store extremely hazardous substances have a “general duty” to identify hazards that may result from releases; design and maintain safe facilities to prevent releases; and minimize the consequences of accidental releases. 42 U.S.C. § 7412(r)(1). This general duty applies “in the same manner and to the same extent as” the GDC contained in the Occupational Safety and Health Act of 1970 (OSH Act), which directs employers to provide their employees with a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 USC 654(a)(1).

EPA has never promulgated implementing regulations for the GDC, making it an undefined enforcement “catch-all” EPA can use even if it does not find violations of any other specific CAA requirement. Not even the scope of the GDC is clearly defined; there is no list of the “extremely hazardous substances” that subject a facility to the GDC. All EPA must demonstrate is that the substance is one that, in the event of an

“accidental release,” is “known to cause or may reasonably be anticipated to cause’ acute serious injury or damage.” See *In the Matter of American Acryl, N.A., L.L.C.*, Docket No. CAA-06-2011-3302, 2011 EPA ALJ LEXIS 9, 26-27 (E.P.A. June 2, 2011). EPA guidance suggests that non-regulatory criteria are relevant to GDC compliance, such as conformance with industrial codes, “recognized industry practices” and consensus standards, even noting that “safety newsletters” are relevant. See [EPA Guidance for Implementation of the General Duty Clause Clean Air Act Section 112\(r\)\(1\) \(May 2000\)](#), at 12–14.

Though relatively unused after it was added to the CAA in 1990, the GDC is playing an increasingly prominent role in EPA’s enforcement toolbox. The past 10 years have seen enforcement cases that included GDC claims settled for well into the six figures, with some reaching into the millions of dollars. Enforcement of the CAA Risk Management Planning requirements are now more often accompanied by GDC claims. Reducing the incidence of accidental releases at industrial chemical facilities, including through the enforcement of the GDC, is highlighted by EPA as a National Compliance Initiative for the next several years. See [EPA Memorandum: FY2020- FY2023 National Compliance Initiatives \(June 7, 2019\)](#). The criminalization of the GDC in the *Margiotta* case takes this trend one step further.

In 2012, three employees were injured when vapors from a mislabeled tanker truck ignited and exploded at the Custom Carbon Processing Inc. facility in Montana. The United States indicted the company owner for, among other things, knowingly violating the CAA’s GDC, since the company owner allegedly knew the facility wasn’t safe for disposal or reclamation operations. Because the OSH Act’s GDC only allows for recovery of civil penalties, the owner argued that criminal charges could not be brought under the CAA GDC. The court found the CAA’s GDC does not derive its enforceability from the OSH Act, and thus cannot limit violations of the CAA’s GDC to civil penalties.

The imprecise nature of the GDC leaves companies with an open-ended “do the right thing” mandate rather than sharply defined regulatory obligations. This recommends broader and more comprehensive risk management strategies that are not limited to purely regulatory analyses, as well as enhanced communication between environmental and safety professionals to coordinate compliance with the CAA and OSH Act GDC provisions.

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