



EPA Facility Inspections May Lead To Expanded Liability Due To Employee Participation

On June 22, 2010, the United States Environmental Protection Agency (“EPA”) issued interim guidance (“Guidance”) advising EPA staff conducting Clean Air Act Section 112(r) on-site compliance evaluations that an offer to participate in such evaluations should be provided to facility employees and employee representatives. The Guidance was published in a Memorandum dated April 2, 2010 issued by Mathy Stanislaus, Assistant Administrator of Office of Solid Waste and Emergency Response, and Cynthia Giles, Assistant Administrator, Office of Enforcement and Compliance Assurance.¹ The Guidance was issued, according to the Memorandum, as a result of recent discussions between EPA and labor and environmental group representatives.

Background

Section 112(r) of the Clean Air Act, 42 U.S.C.A. § 7412(r), imposes a “general duty” on owners and operators of stationary sources that produce, process, handle or store any listed substance or other extremely hazardous substance to identify hazards associated with those substances and to minimize any consequences from accidental releases of those substances. Owners and operators of stationary sources are also required to develop and implement a Risk Management Plan when a listed substance is present in more than threshold quantities.

Section 112(r)’s listed substances are identified in 40 CFR § 68.130. The Clean Air Act does not define the phrase

“other extremely hazardous substances,” but a list of extremely hazardous substances has been developed in connection with other environmental statutes such as the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C.A. § 11001 et seq.

EPA conducts evaluations and Risk Management Plan audits of facilities subject to Section 112(r) to ensure compliance with the statute and associated regulations. Section 112(r) grants employees and their representatives the same right to participate in on-site compliance evaluations as are provided for inspections conducted under the Occupational Safety and Health Act (“OSHA”), 29 U.S.C.A. § 651 et seq. However, EPA has never issued formal guidance clarifying the specific OSHA rights to which Section 112(r) refers. Although not specifically stated in the Memorandum, the Guidance may be EPA’s attempt to eliminate confusion and inconsistencies that resulted from EPA’s failure to previously adopt guidance on this issue.

EPA’s Guidance

The Guidance states that EPA staff should immediately begin offering employee and employee representatives the opportunity to participate in Section 112(r) on-site compliance evaluations. EPA staff should follow OSHA standards as outlined in the OSHA Field Operations Manual² until final guidance is issued. The Guidance identifies specific provisions of the OSHA Manual that may be particularly helpful for EPA staff, include:

- Providing advance notice of inspections to ensure employee and employee representative participation,
- Conducting opening conferences to inform employees of the purpose of the inspection and closing conferences to discuss any apparent violations or issues; and
- Denying the right of participation to any person whose conduct interferes with a full and orderly inspection.

The Guidance advises EPA staff to document participation offers. In addition, EPA staff should include information concerning the nature, extent, and substance of the participation in the required Section 112(r) compliance evaluation report.

Conclusion

EPA expects to issue final guidance later this year on the participation of employee and employee representative in Section 112(r) on-site compliance evaluations. EPA requests that State and local agencies with Clean Air Act Section 112(r) delegation adopt similar procedures at that time, but they are not required to do so.

Until EPA issues its final guidance, and despite EPA's reference to the OSHA Field Operations Manual, it is not clear that EPA's Guidance will result in a more consistent approach to including employees and employee representatives in Section 112(r) evaluations. Unlike the OSHA Manual, which requires compliance officers to provide employees and employee representatives with the opportunity to participate in an on-site inspection or evaluation, the Guidance merely states that EPA staff should provide such an oppor-

tunity. It remains to be seen whether EPA's final guidance will eliminate the subjectivity that is currently associated with an employee's or employee representative's ability to participate in the Section 112(r) on-site compliance evaluation process.

Employee participation in Section 112(r) compliance evaluations may be beneficial for a business when the employee provides information necessary to successfully resolve a potential issue or to demonstrate environmental health and safety compliance. However, employee participation in any type of inspection always comes with risks.

For example, an uninformed but well-meaning employee may draw attention to issues that would otherwise not be of concern to EPA inspectors. In addition, an unhappy or disgruntled employee has the ability to misrepresent a company's environmental compliance and health and safety practices to the serious detriment of the company. As a result, it is very important for every business to understand its rights and obligations in connection with Section 112(r) on-site compliance evaluations as well as for other types of EPA on-site inspections. Blank Rome LLP has experienced attorneys in numerous practice areas and business sectors that are available to assist both existing and potential clients with an understanding as to how EPA's Guidance may affect your company and its business plans. ■

1. EPA's interim guidance is available at http://www.epa.gov/oem/content/mp/ms_cg_memo_caa_12r.pdf.

2. The OSHA Field Operations Manual is available at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf.

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