



National Association of SARA Title III Program Officials

Concerned with the Emergency Planning and Community Right-to-Know Act

CLEAN AIR ACT 112r (RMP) ENFORCEMENT BY LEPCs A WHITE PAPER (Version 1.0)

Introduction

Section 112(r) of the Clean Air Act (CAA) deals with the prevention and detection of accidental releases of hazardous chemicals. Section 112(r) sets forth an objective to minimize the consequence of such accidental releases and requires owners and operators of facilities to identify hazards and prevent and minimize the effects of accidental releases when extremely hazardous substances are present at their facility.¹ The Risk Management Program is a regulatory program developed by the EPA, found in the Chemical Accident Prevention Provisions of 40 C.F.R. Part 68, which regulates hazard assessment, prevention, and response.

Within the Risk Management Program regulations, there are emergency response requirements that apply to facilities deemed to have “Program 2” or “Program 3” processes. A process is considered “Program 2” if, within the five years prior to the submission of a risk management plan, it had an accidental release of a regulated substance where exposure lead to death, injury, or response activities, and emergency response procedures have not been coordinated between the stationary source and local emergency planning and response organizations.² A process is considered “Program 3” if the process is in a specified NAICS code or the process is subject to the OSHA process safety management standard.³

Under the CAA Chemical Accident Prevention Provisions, the owner or operator of a facility that falls into the parameters of Program 2 or Program 3 must meet certain requirements to prepare for accidental releases of regulated substances. If a facility’s employees will respond to accidental releases, the owner or operator must develop and implement an emergency response program to ensure employee safety.⁴ The required emergency response plan developed under the CAA must be coordinated with the community emergency response plan developed under Emergency Planning and

¹ 42 U.S.C. § 7412.

² 40 C.F.R. § 68.10(c).

³ *Id.* § 68.10(d).

⁴ *See id.* §§ 68.90; 68.95.

Community Right-to-Know Act (EPCRA) section 303.⁵ In addition, the owner or operator of the facility must promptly provide any information requested by the LEPC relating to the development of its community emergency response plan developed under EPCRA section 303.⁶

However, the owner or operator of a facility whose employees will not respond to accidental releases need not comply with the emergency response program requirements provided they coordinate with local response agencies to ensure that the agencies are prepared to respond to an emergency at the facility.⁷ If the owner or operator chooses not to develop and implement an emergency response program, he or she must meet other requirements under the regulations.⁸ The other requirements include: (1) for facilities with any regulated toxic substance held in a process above the threshold quantity, the facility must be included in the community emergency response plan developed under EPCRA section 303; (2) for facilities with only regulated flammable substances held in a process above the threshold quantity, the owner or operator must have coordinated response actions with the local fire department; and (3) appropriate mechanisms must be in place to notify emergency responders when there is a need for a response.⁹ If the facility does not abide by the above requirements, it must develop and implement an emergency response program, coordinate the CAA emergency response plan with the EPCRA emergency response plan, and provide the LEPC with any information it requests.¹⁰

When facilities fail to coordinate their emergency response plans with LEPCs as required, LEPCs can bring a citizen suit under the CAA to enforce the requirements; however, notice to the violator is required and therefore this may not be the best option for LEPCs looking for immediate action.¹¹ A lawsuit under the EPCRA may be the fastest way to require a facility to abide by the CAA risk management plan requirements. This memo looks at the options available to LEPCs under the CAA and EPCRA to enforce the requirements of the risk management plan rule under the CAA Chemical Accident Prevention Provisions.

⁵ *Id.* § 68.95(c).

⁶ *Id.* § 68.95(c).

⁷ See U.S. EPA, GENERAL GUIDANCE ON RISK MANAGEMENT PROGRAMS FOR CHEMICAL ACCIDENT PREVENTION (40 CFR PART 68) 8-1 (2004), <http://www.epa.gov/oem/docs/chem/Chap-08-final.pdf>.

⁸ See 40 C.F.R. §§ 68.90; 68.95. For Program 2 and Program 3 eligibility requirements, see 40 C.F.R. § 68.10(c), (d).

⁹ *Id.* § 68.90(b)(1)-(3).

¹⁰ *Id.* § 68.95(c).

¹¹ See *id.* § 54.2.

Clean Air Act

a. Chemical Accident Prevention Provisions

Under the CAA Chemical Accident Prevention Provisions, a facility whose employees will respond to an accidental release must develop and implement an emergency response program; however, a facility whose employees will not respond to accidental releases can either develop and implement an emergency response program or meet the other requirements discussed above.¹² If the facility develops and implements an emergency response program, the program must contain certain requirements that are set out under the regulation.¹³ These requirements include: (1) an emergency response plan maintained at the source, (2) procedures for the use of emergency response equipment and for its inspection, testing, and maintenance, (3) training for all employees, and (4) procedures to review and update the emergency response plan to reflect changes at the stationary source.¹⁴ The emergency response plan that is maintained at the source must include: (1) procedures for informing the public and local emergency response agencies about accidental releases, (2) documentation of proper first-aid and emergency medical treatment necessary to treat accidental human exposures; and (3) procedures and measures for emergency response after an accidental release of a regulated substance.¹⁵

In addition, as part of the emergency response program, the emergency response plan developed under the CAA regulations must be coordinated with the community emergency response plan developed under section 303 of EPCRA.¹⁶ Neither the CAA nor the regulations define “coordinated” or elaborate on how the two emergency response plans should be “coordinated.” However, two of EPA’s guidance documents discuss the need for coordination with local emergency planning entities. EPA’s *Guidance for Implementation of the General Duty Clause Clean Air Act Section 112(r)(1)* states that the emergency response plan should include coordination with local officials and in order to minimize the consequences of a release

[t]he facility should open communications with local emergency planning and response officials, including the local emergency planning committee (LEPC), if one exists. Involvement in the activities of the LEPC can have positive effect on the facility’s emergency response program. The facility should provide the LEPC with draft versions of any emergency response program related to local emergency planning efforts. The facility should coordinate with the LEPC, local response organizations, local hospitals,

¹² *Id.* §§ 68.90(a); 68.95.

¹³ *See id.* § 68.95.

¹⁴ *Id.* § 68.95(a).

¹⁵ *Id.* § 68.95(a)(1)(i)-(iii).

¹⁶ *Id.* § 68.95(c).

and other response organizations upon completion of the emergency response plan for the facility.¹⁷

The EPA's *General Guidance on Risk Management Programs for Chemical Accident Prevention (40 CFR Part 68)* further discusses the coordination requirement; however, it does not specifically address the need to coordinate the emergency response plan developed under the CAA regulations with the community emergency response plan developed under section 303 of EPCRA.¹⁸ It does emphasize the importance of coordinating with local response agencies on how to best respond to potential releases of regulated substances and the ability of the coordination process to help both the community and the facility prepare for an emergency, reduce expenditures of time and money, and help eliminate redundant efforts.¹⁹

For their respective emergency response plans, EPCRA section 303 sets forth a more detailed list of requirements than does the CAA. EPCRA emergency response plan requirements include: (1) methods and procedures to be followed in the event of a release, (2) designation of a community emergency coordinator, (3) procedures to provide notification of a release to emergency coordinators and the public, (4) methods for determining the occurrence of the release and the area likely to be affected, (5) evacuation plans, (6) training programs, and (7) methods and schedules for exercising the emergency plan.²⁰ CAA regulations include only three broad requirements: (1) procedures for informing the public and local emergency response agencies about accidental releases, (2) documentation of proper first-aid and emergency medical treatment necessary to treat accidental human exposures; and (3) procedures and measures for emergency response after an accidental release of a regulated substance.²¹

Based on the language used the EPA guidance documents, coordination of the two emergency response plans likely requires an effort to produce two complimentary, all-inclusive plans that brings all stakeholders to the table so that when an emergency does arise, emergency responders can respond in the most efficient and effective way possible. The EPA documents stress the importance of communication with LEPCs and response officials to ensure an open dialogue about emergency planning. This is evident in the CAA regulations where, if an LEPC or emergency response official requests information

¹⁷ U.S. EPA, GUIDANCE FOR IMPLEMENTATION OF THE GENERAL DUTY CLAUSE CLEAN AIR ACT SECTION 112(R)(1) 17 (2000), <http://www.acusafe.com/Guidance/US-EPA/GenDutyClauseGuidance0500.pdf>.

¹⁸ See U.S. EPA, GENERAL GUIDANCE ON RISK MANAGEMENT PROGRAMS FOR CHEMICAL ACCIDENT PREVENTION (40 CFR PART 68) 8-15 (2004), <http://www.epa.gov/oem/docs/chem/Chap-08-final.pdf>.

¹⁹ *Id.* at 8-14, 8-15.

²⁰ EPCRA § 303(c)(1)-(9).

²¹ *Id.* § 68.95(a)(1)(i)-(iii).

necessary for developing and implementing the community emergency response plan required under the Act, the owner or operator is required to promptly provide the information requested.²²

b. LEPC's Ability to Sue Under the CAA

If an owner or operator of a facility fails to coordinate its emergency response plan with the LEPC, the LEPC may be able to enforce the requirements using the citizen suit provision of the Clean Air Act. The citizen suit provision allows any person to sue a person who is alleged to be in violation of an emission standard or limitation under the statute.²³ The CAA defines the terms “emission limitation” and “emission standard” to include any requirement relating to the operation or maintenance of a source to assure continuous emission reduction and any design, equipment, work practice, or operational standard promulgated under the statute.²⁴

Because the risk management plan rule under the CAA can be considered “work practice” and an “operational standard” intended to control emissions by preventing releases, an LEPC should be able to use the citizen suit provision to sue an owner or operator of a facility who does not coordinate its emergency plan as required under the regulations. However, the Act does require a plaintiff to give 60 days’ notice to any alleged violator of the standard or limitation, the EPA administrator, and the State in which the violation occurs before commencing the action.²⁵ The notice requirement may give the owner or operator ample time to give in to the LEPC without consequence.

EPCRA does not require those suing a facility to give any prior notice to the owner or operator; therefore, it may be a quicker option for LEPCs to force coordination in emergency planning between the facility and the LEPC.

Emergency Planning and Community Right-to-Know Act

a. Failure to provide information under section 303(d)

A facility is subject to the emergency planning requirements of the Emergency Planning and Community Right-to-Know Act if an extremely hazardous substance (EHS) is present at the facility at or above the established threshold planning quantity (TPQ).²⁶ If a facility has an EHS in excess of the TPQ under EPCRA, it is required under EPCRA

²² 40 C.F.R. § 68.95(c).

²³ 42 U.S.C. § 7604(a)(1).

²⁴ *Id.* § 7602(k).

²⁵ *Id.* § 7604(b).

²⁶ EPCRA § 302(b)(1). The list of EHSs and their TPQs are listed in 40 C.F.R. Part 355, Appendices A and B.

section 303(d)(3) to provide the LEPC, upon request, with any information necessary for developing and implementing the emergency plan.²⁷ The LEPC can also use its authority to request information pertaining to a facility that has more than a threshold quantity of a regulated substance in a process under the CAA. If the facility fails to provide the information, the LEPC may be able to sue under EPCRA to enforce the requirements of the Clean Air Act Chemical Accident Prevention Provisions.²⁸

EPCRA § 303(d)(3) states, “ Upon request from the emergency planning committee, the owner or operator of the facility shall promptly provide information to [the LEPC] necessary for developing and implementing the emergency plan.” If the owner or operator of a facility fails to provide the information requested under § 303(d)(3), an LEPC may sue for failure to provide the information.²⁹

If an LEPC can show that the emergency response plan required under the CAA is “necessary for developing and implementing the emergency plan” required under EPCRA § 303(d)(3), and the facility fails to provide the information, then the LEPC is authorized under EPCRA § 326(a)(2)(B) to sue the facility to provide the information. The LEPC is not required to provide notice of intent to sue under this provision.

b. Failure to submit tier II information under section 312(e)(1)

EPCRA § 326(a)(2)(B) also allows LEPCs to sue an owner or operator of a facility for failure to submit tier II information under EPCRA § 312(e)(1). EPCRA § 312(e)(1) requires an owner or operator of a facility to provide tier II information to an LEPC upon request. Tier II information includes:

- The chemical name or the common name of the chemical as provided on the material safety data sheet.³⁰
- An estimate (in ranges) of the maximum amount of the hazardous chemical present at the facility at any time during the preceding calendar year.³¹
- An estimate (in ranges) of the average daily amount of the hazardous chemical present at the facility during the preceding calendar year.³²
- A brief description of the manner of storage of the hazardous chemical.³³
- The location at the facility of the hazardous chemical.³⁴

²⁷ EPCRA § 303(d)(3).

²⁸ The list of substances and threshold quantities under the Clean Air Act Chemical Accident Prevention Provisions can be found at 40 C.F.R. § 68.130.

²⁹ EPCRA § 326(a)(2)(B).

³⁰ *Id.* § 312(d)(2)(A).

³¹ *Id.* § 312(d)(2)(B).

³² *Id.* § 312(d)(2)(C).

³³ *Id.* § 312(d)(2)(D).

- An indication of whether the owner elects to withhold location information of a specific hazardous chemical from disclosure to the public under section 324.³⁵

If the LEPC requests any of the above Tier II information but the facility fails to provide it, the LEPC can sue the facility under EPCRA § 326(a)(2)(B) for failing to provide tier II information under section 312(e)(1). If any of the above information is “necessary for developing and implementing the community emergency response plan” under the CAA Chemical Accident Prevention Provisions, 40 C.F.R. § 68.95(c), and the facility fails to provide the information, the LEPC can again sue under EPCRA § 326(a)(2)(B) for failing to provide tier II information a required under section 312(e)(1).

It is important to note that these requirements are distinct from whether the facility supplies the Tier II form. LEPC’s are not restricted to the Tier II form; an LEPC may ask a facility’s owner or operator to submit inventory information and the owner or operator must comply with such request.³⁶

Conclusion

If the owner or operator of a facility subject to the Clean Air Act Chemical Accident Prevention Provisions fails to coordinate its emergency plans as required, LEPCs may be able to enforce the requirements by bringing a lawsuit under the CAA or EPCRA. The CAA requires LEPCs to provide 60 days notice before filing suit; however, EPCRA allows LEPCs to file right away. Therefore, EPCRA may be the most efficient way for LEPCs to force coordination in emergency planning.

³⁴ *Id.* § 312(d)(2)(E)

³⁵ *Id.* § 312(d)(2)(F).

³⁶ *See* 40 C.F.R. § 370.20(b)(5).