



EPA ADOPTS REVISIONS to CLEAN AIR ACT GENERAL DUTY CLAUSE ENFORCEMENT POLICY – FACTORS CONSIDERED in ASSESSMENT of CIVIL PENALTIES

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On June 20, 2012, the EPA adopted a revised [Combined Enforcement Policy](#) (the “Policy”) that is used to determine penalties for violations of Section 112(r) of the Clean Air Act (“CAA”), known as the [General Duty Clause](#) (“GDC”). The GDC requires all owners and operators of “stationary sources” to prevent accidental releases of listed hazardous substances, including to:

- Identify potential hazards;
- Design and maintain a safe facility; and
- Minimize the consequences any accidental release that occurs.

Despite imposing these mandates, the EPA has not adopted a clear set of regulatory standards for affected facilities to follow, which may leave many entities uncertain or unaware of their GDC-related compliance obligations.

The hazardous substances subject to the GDC include chemicals utilized across industries, such as ammonia and chlorine in certain formulas and concentrations. Furthermore, the GDC applies regardless of the quantity present at a facility, even if the facility is not subject the requirements of the [40 C.F.R. Part 68 Risk Management Program](#), which only targets facilities with substances in an amount at or above listed thresholds. It is important that counsel work with their clients to ensure that the mandates of the GDC are being met at a given facility in order to avoid potential costly penalties for non-compliance.

The Policy proposes varying levels of enforcement, including a spectrum of administrative orders, civil judicial referrals, civil penalty orders, and criminal sanctions—all aimed at achieving timely compliance and serving as a deterrent to future violations. Common failures that have resulted in EPA-recognized GDC violations include failing:

- To identify a chemical or process in a facility that could result in an accidental release;
- To adhere to applicable design codes, industry guidelines, or manufacturer’s procedures;
- To train employees regarding the hazards they encounter in their workplace; and
- To develop or follow an emergency plan or to coordinate with local emergency management agencies—including agencies at the local, county, state, and federal levels.

Multiple GDC penalties can be imposed for the same event, as the EPA views each of the three statutory duties listed above as a separate compliance obligation.

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While the CAA authorizes a maximum penalty of \$37,500 per day, per violation, the EPA will determine the appropriate penalty assessed by utilizing nine factors listed in Section 113(e) of the CAA:

- The economic benefit of noncompliance;
- The seriousness of the violation;
- The duration of the violation;
- The size of the business;
- The violator's full compliance history;
- Good faith efforts to comply;
- Economic impact of penalty on the business;
- Payment of penalties previously for same violation; and
- Other factors as justice requires.

The EPA will first determine the economic benefit the violator received from noncompliance, and will then assess a gravity-based penalty, determined by the seriousness and duration of the violation, as well as the size of the business. In regards to the seriousness of the violation, the EPA utilizes a matrix to evaluate whether the potential harm from the violation and extent of deviation from the GDC's requirements was minor, moderate, or major—ranging from a potential maximum per diem penalty of \$37,500 for “major” violations to a minimum \$500 per diem penalty for “minor” violations. In cases where a fire, explosion, or other significant event occurs, the EPA will apply an “extent of damages” multiplier based on:

- The creation of a cloud or plume of hazardous substance;
- Injury to human health;
- Damage to the environment;
- Damage to the facility;
- Damage offsite;
- Inconvenience to the public;
- Interruption of commerce;
- The amount of chemical released;
- The toxicity of the chemical; and
- Whether the chemical is a carcinogen.

EPA will also adjust the penalty based on net-worth of the business. For small business whose net worth is under \$1 million, no upward adjustment will be applied. For businesses whose net worth is over \$1 million, the EPA may apply a \$10,000 – 70,000+ increase in the penalty assessed (determined on a graduated scale).

Once the EPA arrives at a penalty figure, the Policy allows for flexibility based on various additional factors. While culpability is irrelevant under the CAA's strict liability framework, the EPA will impose a 25 percent upward adjustment based on the violator's level of sophistication, the extent to which the violator knew or should have known of the applicable requirements, and the level of control over the events that caused the violation. The Policy also penalizes repeat offenders—violators will see their penalty adjusted upward by 25 percent if they had at least one prior violation, and by 50 percent if they had two or more prior violations. The Policy does give a break for good behavior—allowing a 15 percent downwards adjustment for cooperation throughout the process and an additional 15 percent credit for the violator's immediate good faith efforts to comply.

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The EPA will assume that the violator has the ability to pay the proposed penalty absent proof to the contrary. It then becomes the owner or operator's burden to establish, through detailed financial documentation, that it is unable to pay all, or a portion of the proposed penalty. The EPA may also allow penalties previously paid for the same violation to another government agency as an offset, and will consider the value of a supplemental environmental project that the violator agrees to undertake that it is not otherwise legally obligated to perform. In extraordinary circumstances, the EPA may also agree to a further reduction in a proposed penalty.

The adoption of the Policy is coupled with an increased effort by the EPA to enforce violations of the GDC. Counsel should work with facility owners and operators to review their current risk management, maintenance, and emergency response procedures to ensure that they comply with the GDC's regulatory mandates so that in the event of an accidental release, instances of non-compliance are minimized and counsel can argue for the lowest possible penalty under the Policy.