UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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2011 JUN -7 PM 3: 14
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EPA REGION VI

In the Matter of:	)	
	)	
AMERICAN ACRYL, N.A., L.L.C.,	)	**Docket No. CAA-06-2011-3302**
	)	
Respondent.	)	

ORDER ON RESPONDENT'S MOTION TO DISMISS

I. Background

This action was initiated on December 8, 2010 by the Director of the Compliance and Assurance Division, United States Environmental Protection Agency, Region 6 ("Complainant" or "EPA"), filing an Administrative Complaint against Respondent, American Acryl, N.A., L.L.C.,[1] under Section 113(d) of the Clean Air Act ("CAA" or the "Act"), as amended, 42 U.S.C. § 7413(d). The Complaint alleges in a single count that Respondent failed to comply with the "general duty clause" of Section 112(r)(1) of the CAA, 42 U.S.C. § 7412(r)(1),[2] by "failing to maintain a safe facility and taking such steps as are necessary to prevent releases of an extremely hazardous substance." Complaint ¶ 22. A penalty in the amount of $37,500 is proposed for the violation.

On or about January 12, 2011, Respondent filed a single pleading entitled "Answer to Complaint and Motion to Dismiss." In the Answer portion of the pleading (pp. 1-3), Respondent admitted that on December 9, 2009 an explosion and fire occurred at its plant in Harris County, Texas, destroying a tank storing toluene, and sending two employees to the hospital for observation. Answer ("Ans.") ¶¶ 13, 15. However, Respondent denied violating the general duty clause, claiming that toluene is not an "extremely hazardous substance," and that the accidental release of toluene was the result of the explosion, not the cause of it. Ans. ¶¶ 18, 22.

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[1] The Complaint identified the Respondent as "American Acryl, N.A., L.L.C." However, in its Answer, Respondent represented that its correct corporate name is "American Acryl L.P." To date, no motion to change the caption or Respondent has been filed.

[2] In parts of the Complaint, Complainant mistakenly identifies 42 U.S.C. § 7412(r)(1) as § 741<u>3</u>(r)(1); no such subsection exists. Complaint at 1-2.

Consistent therewith, in the Motion to Dismiss portion of the pleading (pp. 3-7) ("Motion"), Respondent asserted that the CAA's general duty clause is not applicable because: "(1) toluene . . . is not an extremely hazardous substance; and (2) the explosion was not caused by the accidental release." Motion ("Mot.") at 3. It alternatively argued that if the general duty clause does apply to the incident, Respondent met its duty thereunder and/or the general duty clause is "void for vagueness." Attached to the pleading was an Affidavit in Support of Respondent's Motion to Dismiss of Joseph Goins, its General Manager at the "relevant time," dated January 12, 2011 ("Affidavit"). Affidavit ("Aff.") ¶ 2.

On February 28, 2011, Complainant filed a Response in Opposition to Respondent's Motion to Dismiss ("Response"). In the Response, EPA claimed that, while not listed as such, toluene is nevertheless an "extremely hazardous substance" based upon its toxicity, volatility and corrosivity, and further that an accidental release to the ambient air is not an element of liability under the general duty clause of CAA section 112(r)(1). Response ("Res.") at 4-7. Additionally, EPA asserted that Respondent failed to meet its general duty by not identifying the potential hazard which led to the release, and that the general duty clause provides reasonable notice of what is prohibited. Res. at 7-16. EPA attached to its Response four exhibits: three Material Safety Data Sheets for toluene (Complainant's ("C's") Exs. 1-3) and a "Tap Root Investigation, Interim Report" on the explosion dated January 14, 2010 (C's Ex. 4) ("Investigation Report.").[3]

On April 6, 2011, Respondent submitted a Reply to Complainant's Response to Respondent's Motion to Dismiss ("Reply") primarily reiterating the arguments made in its Motion. In support thereof, it attached to its Reply certified court records from an action styled *United States v. D.D. Williamson & Co.*, Civil Action No. 3:09-cv-00633-JGH (W.D. Ky. 2009) (Respondent's ("R's") Ex. 1).

II. Applicable Standards

The Consolidated Rules of Practice, 40 C.F.R. Part 22 ("Rules"), are applicable to this proceeding. With regard to motions to dismiss, the Rules provide:

> The Presiding Officer, upon motion of respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of complainant.

40 C.F.R. § 22.20(a).

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[3] The Response states that Respondent has claimed the Investigation Report is "Confidential Business Information." Res., at "Complainant's List of Exhibits."

Respondent's Motion to Dismiss under section 22.20 is analogous to a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The standards for deciding such a motion are well established. The factual allegations in a complaint must be enough to "state a claim for relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). That is, the allegations must "allow the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

In determining whether a complaint fails to state a claim, only the facts alleged in the complaint are considered, along with documents attached thereto, or matters as to which judicial notice may be taken. *EEOC v. St. Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997). If additional materials outside the pleadings are considered, the tribunal can exercise its discretion to convert the motion to one seeking summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *cert. denied* , 512 U.S. 1219 (1994).

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is analogous to accelerated decision under Rule 22.20, which provides as follows:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of a proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

For a respondent to prevail on a motion for accelerated decision on liability, it must present "evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it." *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (quoting *BWX Technologies, Inc.*, 9 E.A.D. 61, 76 (EAB 2000)). "Evidence not too lacking in probative value must be viewed in the light most favorable to the party opposing the motion." *Rogers Corp.*, 275 F.3d at 1103. Inferences may be drawn from the evidence if they are "reasonably probable." *Id.* Summary judgment is inappropriate where contradictory inferences may be drawn from the evidence or where there are unexplained gaps in materials submitted by the moving party, if pertinent to material issues of fact. *Id.*; *see also O'Donnell v. United States*, 891 F.2d 1079, 1082 (3rd Cir. 1989). When ruling on a motion for summary judgment it is the court's function to ascertain whether there is a genuine issue for an evidentiary hearing. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1985).

When the movant has met its burden, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." *Id.*; Fed. R. Civ. P. 56(e). Unsupported allegations or affidavits with ultimate or conclusory facts and conclusions of law are insufficient to defeat a properly supported motion for summary judgment. *Galindo v. Precision Am. Corp.*, 754 F.2d

1212, 1216, *reh'g denied*, 762 F.2d 1004 (5th Cir. 1985); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). The non-movant cannot demonstrate a fact issue by resting on the mere allegations of his pleadings. *Galindo*, 754 F.2d at 1216.

Even where it is technically proper to grant a motion for summary judgment, "sound judicial policy and proper exercise of judicial discretion" may permit denial of the motion and full development of the case at hearing. *Roberts v. Browning,* 610 F.2d. 528, 536 (8th Cir. 1979).

III. Relevant Statutory Provision

CAA Section 112(r)(1) provides in pertinent part as follows:

> It shall be the objective of the regulations and programs authorized under this subsection to prevent the accidental release and to minimize the consequences of any such release of any substance listed pursuant to paragraph (3) *or any other extremely hazardous substance*. The owners and operators of stationary sources producing, processing, handling or storing such substances have a ***general duty*** in the same manner and to the same extent as section 654 of title 29 of the United States Code,[4] to identify hazards which *may* result from *such releases* using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary *to prevent* releases, and to minimize the consequences of *accidental releases which do occur*.

42 U.S.C. § 7412(r)(1) (emphasis added).

This provision of the CAA (§ 112(r)(1)) is known as the "general duty clause." *See,* S. Rep. No. 101-228(1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3595 and 89 WL 236970 **181, ("Subsection (a) of the new section 129 of the Act [CAA § 112(r)(a)] includes a 'general duty

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[4] The cited code provision is part of the Occupational Safety and Health Act of 1970 (OSHA) and provides in pertinent part that :

> (a) Each employer--
> (1) shall furnish to each of his employees employment and a place of employment which are free from *recognized hazards* that are causing or are likely to cause death or serious physical harm to his employees;

29 U.S.C. § 654(a)(1)(italics added). This provision has been held to create a "general duty" running from employers to their employees. *Solis v. Summit Contrs., Inc.*, 558 F.3d 815, 818 (8th Cir. 2009).

clause' placing responsibility the responsibility to design and maintain a safe facility (not free of accidents, but equipped for release mitigation and community protection should a release occur) on the owner or operator of the facility."). *See also*, EPA Guidance For Implementation of the General Duty Clause of the Clean Air Act Section 112(r)(1), EPA Doc. # 550-800-002, (May 2000), accessible at: http://www.epa.gov/osweroe1/docs/chem/gdcregionalguidance.pdf; Kevin Johnson, Environmental News, *Mandatory Compliance Required with the Clean Air Act's "General Duty" Clause*, 7 MO. ENVTL. L. & POL'Y REV. 122 (2000).

Enforcement of the general duty clause is provided by CAA Section 113(a)(3) which states in relevant part: "whenever . . . the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter, . . . the Administrator may – (A) issue an administrative penalty order in accordance with subsection (d) of this section . . . ." 42 U.S.C. § 7413(a)(3). Subsection (d), in turn, authorizes the assessment of a "civil administrative penalty of up to $25,000, per day of violation" of any requirement or prohibition of the subchapter or "requirement or prohibition of any rule . . . promulgated, issued or approved under this chapter." 42 U.S.C. § 7413(d)(A), (B).

IV. Arguments of the Parties

In its Motion to Dismiss, Respondent makes a number of arguments, the first of which is that the general duty clause of Section 112(r) applies only to "extremely hazardous substances" and that toluene is not such a substance. Mot. at 4.

An "extremely hazardous substances" for the purposes of Section 112(r), Respondent asserts, is either one listed as a 112(r) regulated substance or as an "extremely hazardous substance" under the Emergency Planning and Community Right-To-Know Act (EPCRA), or "the substance is otherwise identified as extremely hazardous due to its toxicity, reactivity, flammability, volatility or corrosivity." Mot. at 4. It notes that toluene (CAS # 108883) is not on either the CAA or EPCRA list. *Id.* (citing 40 C.F.R. § 68.130 (CAA § 122(r) Tables of Regulated Substances) and 40 C.F.R. Part 355, Appendix A (EPCRA List of Extremely Hazardous Substances)). *Id.*

Next, Respondent counsels, there is a difference between a "hazardous substance" and an "*extremely* hazardous substance" and that the general duty clause only applies to the latter. Mot. at 4. Furthermore, Respondent claims, an explosion by itself does not make a substance extremely hazardous. *Id.* Respondent avers that the type of substances which were intended to be deemed "extremely hazardous" are only those whose release causes injury or damage, quoting in support from the Report of the Senate Committee on the Environment regarding the 1990 CAA Amendments as follows -

> the *release* of any substance *which causes* death or serious injury because of its acute toxic effect or *as a result of* an explosion or fire or which causes substantial property damage by blast, fire, corrosion or other reaction would create a

presumption that such substance is extremely hazardous.

Id. at 4-5 (italics in original) (quoting S. REP. NO. 101-228, at 211 (1989) ("Senate Report") *reprinted in* 1990 U.S.C.C.A.N. 3385, 3596, 1989 WL 236970 **182).

In this case, "the release of toluene did not cause an explosion, a death or serious injury"; rather, the explosion occurred inside a process vessel and resulted in a "post-explosion" release of toluene, Respondent declares. Mot. at 5. Therefore, because "the release" to the ambient air did not present a hazard, toluene does not meet the criteria for an extremely hazardous substance, Respondent offers. *Id.* To reach a contrary result "requires reading the word 'release' out of the general duty clause" and is contrary to the basic tenet of statutory construction that all words in a statute have meaning. *Id.* citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Respondent also suggests that its reading of the statute is consistent with the statute's objective which is to "prevent the accidental *release* of substances which may *cause* death, injury or property damage as a result of even short term exposure." *Id.* (italics in original) (quoting Senate Report at 207).

Alternatively, Respondent asserts it met its obligations under the general duty clause, noting that its duty thereunder is the same as under OSHA. Mot. at 5. Under OSHA, only "preventable," "recognized hazards" are within the general duty clause, making compliance with it "achievable," and so too with the CAA, citing in support EPA CAA Guidance that "the hazard must be recognized either by the employer or generally within the employer's industry." Mot. at 5-6, citing U.S. EPA, Guidance for Implementation of the General Duty Clause Clean Air Act Section 112(r), 550-B00-002 (2000), p. 11 n. 4, and *Nat'l Realty & Constr. Co., v. OSHRC*, 489 F.2d 1257, 1265-66 (D.C. Cir. 1973). Respondent maintains that it "did not recognize the potential for large volumes of oxygen to reach TK-1124," and it acted in response to the alarm, "but those actions were not effective at mitigating the unforseen cause of oxygen entering the tank." Mot. at. 6. It further reports that it kept the unit damaged by the explosion off-line for seven months while it evaluated the cause of the explosion, and designed and constructed changes to prevent the incident from reoccurring, as a result of which it incurred considerable expense and sacrificed productivity. *Id.*

Respondent's final argument is that the CAA's general duty clause "as applied" is void for vagueness, because it fails to provide the requisite reasonable notice of what is prohibited or required. Mot. at 6, citing *Nat'l Realty*, 482 F.2d at 1268 n. 41, and *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974). Respondent explains that that CAA 112(r) is directed towards releases of extremely hazardous substances, but here the explosion occurred in a closed process vessel and there was no release to the ambient air. Therefore, the statute did not afford reasonable warning that it would apply to the incident as it occurred. Mot. at 7.

Respondent offers in support of its arguments the Affidavit of Joseph Goins. In his Affidavit, Mr. Goins declares that he was Respondent's General Manager on December 9, 2009, on which date "an explosion inside TK-1124 . . . destroyed TK-1124." Affidavit ("Aff.") ¶ 3. "Following the explosion inside the process tank, unburned toluene from the tank mixed with

water and fire fighting materials and was contained within the concrete secondary containment around TK-1124. American Acryl ultimately sent the water mixture to a water treatment process." Aff. ¶¶ 3, 4. "The December 2009 explosion occurred inside a process vessel and resulted in the release of some toluene. However, the release was post-explosion and the release did not cause or result in an explosion, a death or serious injury." Aff. ¶ 8. Particularly, "[t]he explosion did not result from an accidental release to the ambient air of an extremely hazardous substance." Aff. ¶ 7. In addition, Mr. Goins proclaims that cause of the incident, a large amount of oxygen reaching TK1124, was "unforeseen" and "not previously recognized." Aff. ¶¶ 9, 11.

In its Response to the Motion, Complainant acknowledges that toluene is not a "listed" extremely hazardous substance under the CAA, that the term "extremely hazardous substance" is not defined in the Act, and that the Senate Report cited by Respondent may be looked to as guidance in regard thereto. Response ("Res.") at 4. The Senate Report, EPA states, indicates that the term "extremely hazardous substance" would include "any agent . . . 'which may as the result of short-term exposures associated with releases to the air cause death, injury or property damage due to its toxicity, reactivity, flammability, volatility, or corrosivity.'" *Id.*, quoting Senate Report at 211. In that the Material Safety Data Sheets ("MSDSs") indicate that toluene is toxic, volatile and corrosive, Complainant suggests that this Tribunal can, at this point, find it is an "extremely hazardous substance" covered by CAA § 112(r). *Id.* at 4-5, citing C's Exs. 1-3. In further support of such a finding, EPA cites a case in which it claims "a court of law has recognized EPA's position . . . that even water . . . can be an extremely hazardous substance." *Id.* at 5 (citing *U.S. v. D.D. Williamson & Co., Inc.*, Civil Action No. 3:09-cv-00633-JGH (W.D. Ky. 2009)). It also notes that it has instituted other cases alleging CAA 112(r) general duty clause violations for unlisted substances which were flammable like toluene. *Id.* (citing Complaint, *United States v. CAI, Inc.*, No. 1:10cv10390 (D. Mass., Mar. 4, 2010)). Alternatively, Complainant suggests whether toluene was an extremely hazardous substance at the time of the explosion "may be a factual issue to be determined at hearing." *Id.* at 6.

In addition, Complainant goes on to contend that "an accidental release to the ambient air is not an element of liability under 112(r)(1)." Res. at 6. The purpose of the statute is preventative, and it "would be contrary to the intent of Congress to hold that the very harm that the GDC [general duty clause] is meant to prevent is required for a finding of liability." *Id.* Respondent can be found liable under the general duty clause even if toluene was not released at all, as Complainant explains -

> The issue is whether the company was maintaining a safe facility by doing what the industry standards require for all plants, which is adequate process safety management, including hazard identification and control, equipment inspections, safe work practices and process operations, equipment maintenance, and employee training. The fact that an explosion occurred at the facility is indicative of process safety failures which are the real GDC violations. The explosions themselves are not the GDC violations. The explosions are the result of GDC violations and may be the cause of subsequent GDC violations (e.g., releasing EHS [extremely hazardous substance] to the ambient air. Explosions are evidence

> of a risk of harm to the public. In the instance [sic] case, it is sufficient to prove that the unsafe storage or handling of toluene, an extremely hazardous substance, could have caused a fire or explosion.

Res. at 7. In support of this assertion, Complainant cites to *Sec. of Labor v. Duriron Co., Inc.*, 11 OSHC (BNA) 1405, 1983 OSAHRC LEXIS 121 (OSAHRC 1983), for the proposition that under OSHA's general duty clause "we look to risk of harm to determine a GDC failure." *Id.*

Moreover, Complainant characterizes as "incomprehensible and incongruous" Respondent's claim that because it failed to recognize the potential hazard, it complied with its general duty. Res. at 8. Again citing the Senate Report, EPA asserts that Respondent was obliged to take all feasible actions to reduce hazards "'known to exist' at its facility, 'or which have been identified for similar facilities in the same industrial group,'" noting that the existence of an industry code or consensus standard establishes an "employer's awareness of the hazard." *Id.* at 11-12 citing Senate Report, 1990 U.S.C.C.A.N. at 3593-94. EPA alleges that industry standards exists for the process vessel in question. *Id.* at 12-13. Respondent did not meet its duty under 112(r) to prevent accidental releases, Complainant argues, because it failed to assess or identify the hazards posed by extremely hazardous substances in its tanks and piping, noting such assessment is an extensive process. Res. at 7-9, citing Senate Report, 1990 U.S.C.C.A.N. at 3605-07, 3609-10. Further, EPA asserts that the installation of the oxygen sensing alarm "shows that Respondent was well aware of the hazard." *Id.* The fact that Respondent turned the alarm sensor off after 150 warnings, believing it malfunctioning, and continued operating TX-1124, evidences that it failed to operate its facility in a safe manner and minimize the risk of accidental release, as evidenced by the resulting explosion, Complainant alleges. *Id.* at 8-9.

Finally, as to the vagueness argument, EPA states that the law is clear as to an owner's obligation to evaluate hazards posed by chemicals used at its facility, to maintain the facility in a way to prevent accidental releases of those chemicals, and to minimize the consequences of release that do occur. Res. at 13. Citing a case interpreting OSHA's general duty clause, EPA asserts "[t]he key is safety" and industry codes and consensus standards must be looked to in terms of hazards to be eliminated. *Id.* at 13-14, citing *Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 721 (4th Cir. 1979). Further, EPA suggests that its regulations published in 1994 and its more recent guidance document, publically accessible via the web, provided notice of what was prohibited or required. *Id.* at 15-16 citing 59 Fed. Reg. 4478-79 (Jan. 31, 1994), www.epa.gov/emergencies/docs/chem/gdcregionalguidance.pdf and http://www.epa.gov/oem/content/rmp/caa_faqs.htm

In its Reply, Respondent exclaims that "EPA is attempting to expand the application of the general duty clause beyond its plain language. The legislative history of CAA and EPA's RMP [Risk Management Plan] general duty clause guidance make it clear that the measuring point for harm under the general duty clause occurs after an extremely hazardous substance has been released to the ambient air." Reply at 1-3. Further, it argues that when evaluated after the release to the air, the toluene involved in the explosion is "in no way an extremely hazardous substance." *Id.* at 2. Citing authority in support, Respondent asserts that neither the *D.D. Williamson* (water) case, resolved upon consent, nor mere allegations made by the Agency in

complaints filed other cases, constitute precedent in this case. *Id.* at 3.

Additionally, while acknowledging that a general duty clause violation can occur without an actual release, Respondent contends that the Complaint here identified "the hazard" as the explosion. Reply at 4. Toluene was explosive in this case because of the unique conditions created inside the process vessel, not after it was released, Respondent asserts. *Id.* In that the explosion occurred inside the process vessel, it cannot be characterized "as the result of an accidental release." *Id.* at 2, 4-5. "Here, there was no release of any substance to the atmosphere which created a risk of explosion." *Id.* at 4.

As to its compliance, and industry standards, Respondent raises two points. First, it states that EPA did not contend in its Complaint that Respondent failed to adequately "assess" the hazards of its process, but only alleged that it violated the general duty clause by not preventing an accidental release and minimizing the consequences thereof. Respondent denies EPA's right to cure this deficiency by asserting a new claim in its Response. Reply at 6. Second, Respondent asserts that, in fact, it did assess the hazards of its process, and did not identify the hazard, and that "EPA did not controvert this fact." *Id.* at 6. Moreover, Respondent declares that it was only obliged to identify hazards which may result from accidental releases to the atmosphere of a regulated substance, which did not occur here. *Id.* at 7.

Finally, as to vagueness, Respondent advises that none of the guidance as to the general duty clause cited by EPA indicates its applicability to "hazards internal to a process without a release." Reply at 8.

V. Discussion of Toluene as an Extremely Hazardous Substance and the Necessity of a "Release"

Respondent's submission of the Affidavit of Joseph Goins in support of its arguments provides a basis for considering the Motion under the standards for accelerated decision. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *cert. denied* , 512 U.S. 1219 (1994); 40 C.F.R. § 22.20(a). Accordingly, the initial question presented is whether Respondent has shown the absence of any issues of material fact and that it is entitled to judgment as a matter of law that the toluene at its facility is not an "extremely hazardous substance" within the meaning of Section 112(r)(1) of the CAA.

As indicated above, CAA Section 112(r)(1) states in pertinent part as follows:

> It shall be the objective of the regulations and programs authorized under this subsection to prevent the *accidental release* . . . of any substance listed pursuant to paragraph (3) *or any other extremely hazardous substance*. The owners and operators of stationary sources producing, processing, handling or storing *such substances* have a *general duty* in the same manner and to the same extent as section 654 of title 29 of the United States Code, to identify hazards which *may* result from *such releases* using appropriate hazard assessment techniques, to

> design and maintain a safe facility taking such steps as are necessary *to prevent* releases, and to minimize the consequences of *accidental releases which do occur*.

42 U.S.C. § 7412(r)(1) (emphasis added).

As such, it is clear that Section112(r)(1)'s "general duty clause" only applies in regard to preventing the release of either a "substance listed pursuant to [112(r)] paragraph (3)" or "any *other* extremely hazardous substance." 42 U.S.C. § 7412(r)(1)(italics added). Both parties acknowledge that toluene is not now, and has never been, "listed" as an "extremely hazardous substance" under CAA 112(r)(3).[5] *See,* 59 Fed. Reg. 4478 (Jan. 31, 1994) ("List of Regulated Substances and Thresholds for Accidental Release Prevention); 40 C.F.R. 68.130(a)(Tables 1-4)("Regulated toxic and flammable substances under section 112(r) of the Clean Air Act are the substances listed in Tables 1, 2, 3, and 4.") Thus, for the general duty clause to arise and apply in regard to it, EPA must show that toluene is an "extremely hazardous substance," under CAA112(r)(1).

The CAA does not provide a definition for the term "extremely hazardous substance."[6]

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[5] Section 112(r) was added to the CAA as part of the CAA Amendments of 1990, and interestingly, toluene *was listed* as an "extremely hazardous substance" in the proposed bill (S. 1630). Senate Report at 212, 1990 USCCAN at 3598 (Table III-8.--Extremely Hazardous Substances)("The named substances are those which are associated with the largest number of accidental: (1) events; (2) deaths; (3) injuries; and (4) evacuations . . . "), 1989 WL 236970 **455 (proposed legislation). *See also*, 1990 USCCAN at 3513 (identifying toluene ("a constituent of gasoline") as an "air toxic of concern" and one of the "chemicals most frequently released"). Toluene, however, was not so identified in the statute as enacted, and explanation therefor may be found in the Minority Views of Senator Syms, wherein he stated -

> Despite the explicit instructions regarding the selection of the substances, the [Senate] Committee [on Environment and Public Works] then inserts on its own part an initial list of 25 substances to be subject to the accidental release provisions, . . . eleven [of which] . . . do not appear to meet the specified criteria . . . . Some of these [including] toluene–are widely used throughout American industry, and have not been implicated in the Bhopal-like incidents that the emergency release provisions are designed to address.

Senate Report, 1990 U.S.C.C.A.N. at 3861. Nevertheless, toluene is listed as a "hazardous air pollutant" in CAA Section 112(b) (42 U.S.C. § 7412(b)).

[6] EPCRA also uses the term "extremely hazardous substance," which it defines as "a substance on the list describe in section 11002(a)(2) of this tile." 42 U.S.C. § 11049(3). Section

(continued...)

However, other provisions in Section 112(r) do give meaning to the term. Specifically, paragraph (3) thereof states that the list the Administrator promulgates consistent with the Section shall include "substances which, in the case of an *accidental release*, are *known to cause or may reasonably be anticipated to cause* death, injury, or serious adverse effects to human health or the environment." 42 U.S.C. § 7412(r)(3)(italics added).[7] Further, paragraph (4) thereof states that in listing substances the Administrator shall consider "(i) the severity of any *acute* adverse health effects associated with accidental releases of the substance; (ii) the *likelihood* of accidental releases of the substance; and (iii) the *potential* magnitude of human exposure to accidental releases of the substance." 42 U.S.C. § 7412(r)(4) (A)(i)-(iii)(italics added). The term "accidental release," is defined in Section 112(r) statute as an "unanticipated emission of a regulated substance or other extremely hazardous substance *into the ambit air* from a stationary source." 42 U.S.C. § 7412(r)(2)(A)(italics added). Thus, "extremely hazardous substances" for the purposes of 112(r) are those whose unanticipated emission into the ambit air are "known or may be reasonably anticipated to cause" acute and serious adverse effects to human health or the environment.

Such anticipatory phrasing, *i.e.* that the objective the section is to "prevent" releases, that extremely hazardous substances" are those which "*may* . . . cause" injury or damage "*in case of* an accidental release," and the description of the duty as including "identifying" hazards (using hazard assessment techniques), "which *may* result from such releases," and taking steps to "*prevent* releases," indicates that neither an *actual release* of a extremely hazardous substance, nor proof that such release *directly caused* injury or damage, are conditions of the clause's application. Rather, as Complainant asserts, the general duty clause in Section 112(r) is a prophylactic measure, imposed upon all owners/operators of stationary sources who produce, process, handle or store "extremely hazardous substances," regardless of whether a "release" has occurred and/or has directly caused injury or damage. *See*, Senate Report, 1990 U.S.C.C.A.N. at 3591, 1989 WL 236970 at **177 (explaining that the objective of the section is the "prevention of accidental releases" and that "[s]ystems and measures which are effective in preventing accidents are preferable to those which are intended to minimize the consequences of a release."). Such holding is also consistent with OSHA's general duty clause, to which the CAA duty is to apply in the "same manner and to the same extent." *See, Brennan v Smoke-Craft, Inc.* 530 F. 2d 843 (9th Cir. 1976) (Secretary of Labor need not show occurrence of actual injury before citing employer for OSHA violation).

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[6](...continued)
11002(a)(2), in turn, provides for the EPA Administrator to publish a list of "extremely hazardous substances" under EPCRA. 42 U.S.C. § 11002(a)(2). Such list of extremely hazardous substances under EPCRA is published at 40 C.F.R. Part 355 Appendix A. Toluene is not on that list.

[7] Compare this description to that of substances to be added to the list of "hazardous air pollutants," under Section 112(b), which are "pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects . . . or adverse environmental effects . . ." 42 U.S.C. § 7412(b)(2).

Thus, to successfully make out a claim for application of the general duty clause, all EPA must allege is that Respondent is an owner/operator of a stationary source who produces, processes, handles or stores "an extremely hazardous substance," *i.e.*, 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. 42 U.S.C. § 7412(r)(3). The Complaint broadly makes such allegations, and specifies the substance as toluene and its location at the facility. Complaint ¶¶ 7, 13, 16. Moreover, Respondent has in large measure admitted the truth thereof, resting its denial of toluene being an "extremely hazardous substance" only upon the arguments discredited above regarding preconditions of release and injury. Complaint ¶ 7; Ans. ¶ 7. As such, Respondent has not shown that the allegations in the Complaint fail to "state a claim for relief that is plausible on its face" under *Twombly, supra,* and has not shown that it is entitled to judgment as a matter of law as to its initial arguments for dismissal.

Similarly unpersuasive is Complainant's assertion that this Tribunal can find on the record as it now exists that toluene is, in fact, an "extremely hazardous substance." In support thereof, EPA has proffered a series of Material Safety Data Sheets (MSDS) which indicate that toluene has "potential acute health effects." C's Exs. 1-3. However, it cannot be determined by review of such sheets alone, if, upon "accidental release" *from Respondent's facility* to the ambit air such potential health effects would rise to the level of being "extremely hazardous," *i.e.* the substance is likely to acutely cause "death, injury, or serious adverse effects to human health," especially as the quantity of toluene available thereat for release is not yet established.[8] C's Ex. 1. Therefore, EPA's request for a ruling in this case that toluene is an "extremely hazardous substance" is denied as premature.[9]

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[8] CAA Section 112(r) provides that a "threshold quantity" shall be established "by rule" by the Administrator for each listed extremely hazardous substance, "taking into account the toxicity, reactivity, volatility, dispersibility, combustibility, or flammability of the substance and the amount of the substance which, as a result of an accidental release, is known to cause or may reasonably be anticipated to cause death, injury or serious adverse effects to human health." 42 U.S.C. § 7412(r)(5). As toluene is not a listed substance, no threshold quantity has been established for it. Thus, it remains an issue to be established whether Respondent had a sufficient quantity of toluene such that it would constitute an "extremely hazardous substance."

[9] Both parties at various points in their pleadings cite the legislative history of the CAA regarding a presumption that a substance is "extremely hazardous," specifically that: "[t]he *release* of any substance which *causes* death or serious injury because of its acute toxic effect or as the result of explosion or fire or which causes substantial property damage by blast, fire, corrosion or other reaction would create a presumption that such substance is extremely hazardous." Mot. at 4; Complaint n. 1, both citing S. Rep., 1990 U.S.C.C.A.N. at 3596 (italics added). It is observed that such presumption was not incorporated into the CAA Amendments as enacted in 1990. Further, Complainant has not challenged Respondent's claim that the "release" of toluene did not cause the injury or damage, and therefore the presumption would not come into play in this case.

VI. Discussion of Respondent's Compliance with the General Duty Clause

In its Motion, Respondent suggests that even if the general duty clause applied to it, it was in compliance with its duty thereunder "because the hazard was not recognized." Mot. at 6. It is observed, however, that the operative language of the CAA, "known to cause or may reasonably be anticipated to cause," does not limit the knowledge or anticipation to that possessed by owner/operator personally. Further, such a reading would be absurd as it would potentially reward intentional ignorance. Thus, the knowledge and "reasonable anticipation," must arise from a wider source, as indicated by the Senate Report --

> A fourth element of the program is a general duty imposed on each facility owner or operator . . . The facility owner or operator is obligated to take all feasible actions that are available to reduce hazards which are known to exist at that particular facility *or which have been identified for similar facilities in the same industrial group.*

Senate Report, 1990 U.S.C.C.A.N. at 3593, 1989 WL 236970 at **179 (italics added). As such, the fact that Respondent did not recognize the hazard at its facility prior to the incident does not alone prove its compliance with its obligations under the general duty clause. *Cf.*, *Cape & Vineyard Div. of New Bedford Gas v. Occupational Safety & Health Review Com.*, 512 F.2d 1148, 1152 (1st Cir. 1975)(Under the OSHA general duty clause, in the absence of actual knowledge, the standard of conduct is set with reference to "industry custom and practice.").

As noted above, Respondent argues that EPA is attempting in its Response to alter its allegations of violations from failing to prevent the hazard or minimize the consequences thereof, to failing to do a hazard assessment, and that it did conduct a hazard assessment. The Complaint alleges that "Respondent did not exercise its general duty to assure a safe facility by not taking *such steps* as are necessary to prevent releases." Complaint ¶ 18 (italics added). Such allegations, read in a light most favorable to Complainant, would include a violation based upon the failure to do an adequate hazard assessment in that the general duty clause of Section 112(r) indicates that a hazard assessment is a "step" necessary to prevent releases. 42 U.S.C. § 7412(r)(1) ("owners . . . have a general duty . . . to identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases . . . "). 42 U.S.C. § 7412(r)(1) (emphasis added).

Second, while Respondent alleges it conducted a "hazard assessment," it is observed that Respondent has not alleged that such assessment was consistent with industry standards. Reply at 6-7. In its Response, EPA implies that had Respondent followed the American Institute of Chemical Engineers' published "Guidelines for Hazard Evaluation Procedures" (1985), it would have identified the hazard which led to the release of toluene. Res. at 10-11. Thus, the issues at play here are not merely what "Respondent knew and when did it know it," but whether the hazard assessment Respondent undertook, if any, was compliant with industry custom and practice. Therefore, at this point it cannot be determined as a matter of law whether Respondent fully complied with its general duty clause obligations, if any such obligations existed in regard

to it prior to the incident.

VII. Discussion of the Void for Vagueness Issue

It is well established that a law is "void for vagueness" and therefore violates due process, "if men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 44 (1991); *Grayned v. City of Rockford*, 408 U.S. 104, 108, (1972). "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct." *Jordan v. De George*, 341 U.S. 223, 230 (1951) (emphasis added); *see also Grayned*, 408 U.S. at 108. Although "the doctrine's chief application is in respect to criminal legislation," *Lopez-Lopez v. Aran*, 844 F.2d 898, 901 (1st Cir. 1988), it has also been applied to laws implicating fundamental constitutional rights, especially First Amendment rights (*see e.g.*, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)). The prohibition against vagueness applies not only to statutes but also to administrative regulations. *General Electric Co. v. U.S. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

However, where the provision at issue neither imposes criminal penalties nor implicates fundamental constitutional rights, its language is subject to a less strict vagueness test than those laws that do. As the Supreme Court explained:

> The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depend in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.

Hoffman Estates, 455 U.S. at 498-99 (footnotes omitted).

In determining whether a challenged provision is unconstitutionally vague, the courts ask the question, "Does the regulation provide a person of ordinary intelligence reasonable notice of the prohibited conduct?" *See, Grayned v. City of Rockford*, 408 U.S. 109 (1972); *Norma J. Echevarria* 5 E.A.D. 626, 637 (EAB 1994); *Tennessee Valley Authority*, 8 E.A.D. 357, 412 (EAB 2000) ("The question is not whether a regulation is susceptible to only one possible interpretation but rather whether the particular interpretation advanced by the regulator was ascertainable by the regulated community."); *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable

certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation."). *See also, Allis-Chalmers Corp. v OSHRC*, 542 F.2d 27 (7th Cir. 1976)(Test as to whether cited standard is unconstitutionally vague is whether standard is so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application; so long as standard affords reasonable warning of proscribed conduct in light of common understanding and practices, it will pass constitutional muster.); *Ensign-Bickford Co. v OSHRC*, 717 F.2d 1419, 1421 (D.C. Cir. 1983), *cert den*, 466 U.S. 937 (1984)(OSHA's general duty clause (29 U.S.C. § 654(a)(1)), narrowly construed as requiring only that employers eliminate "preventable hazards" likely to cause death or serious injury to employees, provides employers with sufficiently specific notice of the requirements of the general duty clause and is not unconstitutionally vague).

In terms of whether the interpretation was "ascertainable" by a reasonable person, *i.e.* the regulated community, evidence of industry's practice is relevant. *Secretary of Labor v. Voodo Constr. Corp.*,17 BNA OSHC 1143 (OSHRC ALJ 1995).

In this case, Respondent has asserted that CAA 112(r)(1) is unconstitutionally vague because it did not provide reasonable notice of its application to toluene or to conditions inside process vessels. Mot. at 7. It notes the CAA "is directed to the consequences of releases of extremely hazardous substances," the explosion incurred in a process vessel, and "the explosion occurred before release and the consequence of the release did not meet the criteria for an unlisted extremely hazardous material." *Id.*

With regard to toluene, it is noted that CAA 112(r) clearly indicated that substances beyond those listed were covered by the general duty clause. At the time EPA published its list of regulated substances, it emphasized this fact stating –

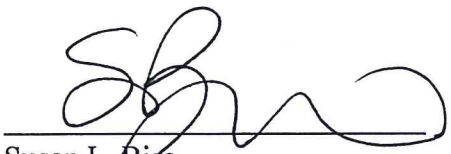
> The list of substances and thresholds promulgated today identifies sources that are subject to accident prevention regulations promulgated under section 112(r)(7) of the Act. The list of substances is intended to focus accidental release prevention efforts on those stationary sources and substances that pose *the most* significant risks to the community. . . . *EPA strongly emphasizes that the substances promulgated in today's listing are not the only substances that may pose a threat to communities upon release*. There are large numbers of compounds and mixtures in commerce in the U.S. that *in specific circumstances* could be considered dangerous to human health or the environment; however, it would not be feasible to include all such substances and circumstances. This list should serve to focus prevention efforts and *is not a list of all* substances that could be considered for accident prevention. . . . Although stationary sources will be required to comply with the accidental release prevention regulations under section 112(r)(7)(B) only if they have listed substances in quantities exceeding the threshold quantity, it does not mean that these substances in smaller quantities represent no potential hazard to the community in certain circumstances. In support of this principle Congress included general duty provisions under section 112(r)(1) of the Act.

59 Fed. Reg. 4478, 4481 (Jan 31, 1994) (italics added). EPA cites its General Duty Clause Guidance document as providing further certainty as to the criteria for determining whether an unlisted substance is extremely hazardous and therefore subject to the general duty clause. There is a dearth of evidence as to whether toluene has been treated by others in as an "extremely hazardous substance." More importantly, it has yet to be determined whether toluene is, in fact, an extremely hazardous substance in this instance, taking into account the as yet unknown quantity maintained at Respondent's facility, and other issues. Therefore, at this point, no definitive ruling on the Respondent's claim of vagueness with regard to the statute's application to it can be made.[10]

The same uncertainty exists on the record as it now stands with regard to the issue of the hazard being the level of the oxygen causing the explosion *inside* a process vessel, and not the release of toluene to the ambient air itself. Complainant has alleged in its Response that its General Duty Clause Guidance document, "industry safety standards, as well as requirements or safety and building codes of other federal agencies, such as OSHA," are relevant for determining the hazards Respondent was required to assess and/or recognize. Res. at 14. Respondent suggests none of those documents provided notice of the specific hazard at issue here. Reply at 8. At this point, with the facts as to the history and cause of the incident not yet established, Respondent has not shown the absence of genuine issues of material fact as to this issue.

ORDER

Upon consideration of the foregoing, Respondent's Motion to Dismiss is hereby **DENIED**.



Susan L. Biro
Chief Administrative Law Judge

Date: June 2, 2011
Washington, D.C.

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[10] As noted by Respondent, Complainant's argument that even water has been recognized by courts of law as an "extremely hazardous substance" is misplaced. The case cited by Complainant, *U.S. v. D.D. Williamson & Co.*, was resolved by unpublished consent decree, has substantially different facts, and offers virtually no precedential value to Complainant's position. *See Ware v. Estes*, 328 F. Supp 657, 659 (N. Dist. Tex. 1971) ("consent decree . . . has little, if any, precedential value"). Even the terms of the consent decree itself limit its own authority regarding this matter: "by agreeing to entry of this Consent Decree, D.D. Williamson makes no admission of law or fact with respect to any of the allegations set forth in the Consent Decree or the Complaint filed herewith." *U.S. v. D.D. Williamson & Co., Inc.*, Civil Action No. 3:09-cv-00633-JGH, ¶ 3 (W.D. Ky. 2009).

In the Matter of American Acryl N.A., L.L.C., Respondent
Docket No.CAA-06-2011-3302

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Respondent's Motion To Dismiss**, dated June 2, 2011, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale

Maria Whiting-Beale
Staff Assistant

Dated: June 2, 2011

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