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THE CUBICAL

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The Cubical Is Back!

After a three-month hiatus, The Cubical is back! The months of March, April, and May were taken up with tending to the growing pains associated with an expanding law practice. In the meantime, the breathless pace of change in the world of EHS hasn't slowed. If anything, it has only accelerated.

Thank you to all who have taken the time to read The Cubical since the inaugural edition was launched in February 2021. I will continue to provide what I hope is a unique perspective on these changes. This perspective has been formed by more than 25 years of experiences in settings ranging from the corporate boardroom to the wastewater treatment plant of an oil refinery on a cold, windswept, wintry morning.

To those of you who have been accessing The Cubical through my LinkedIn posts, and like the content, feel free to subscribe by clicking the Subscribe button below. We'd love to have you join!

24 Hours a Day: Clearing Up Misconceptions About Reporting Continuous Releases

The prompt notification and reporting of unpermitted releases to the environment has been an essential component of environmental compliance since at least the 1980s. There are a

number of laws and regulations that require a facility to notify the appropriate regulatory authorities immediately, or at least within a very short time, after such a release. Most notably, under CERCLA § 103(a), a facility is required to immediately notify the National Response Center (NRC) about any unpermitted release of a listed *hazardous substance* to the environment if the release exceeds the applicable reportable quantity (RQ) for the substance in question.

A source of confusion over the years has been how these notification requirements apply in the case of "continuous releases." Before getting into why this special case has been the source of such confusion though, it is useful to review the applicable notification and reporting requirements. CERCLA § 103(f)(2) and its implementing regulation, 40 C.F.R. § 302.8, establish streamlined notification and reporting requirements for "continuous releases." A continuous release is defined as any release "that occurs without interruption or abatement, or that is routine, anticipated, and intermittent and incidental to normal operations or treatment processes." The notification and reporting provisions for continuous releases are fairly detailed and complex. Most importantly, these provisions establish a system wherein a facility only needs to provide: (i) initial notification and follow-up reporting; (ii) follow-up notification and reporting on an annual basis; and (iii) notification of any significant changes.

Most of the confusion arises from one particular element of the initial written notification requirements for continuous releases. Among the information that must be included in this initial written notification is an estimate of the upper and lower bounds of the *normal range* of the release over the previous year. The*normal range* of a release is defined as "all releases of a hazardous substance reported or occurring over *any 24-hour period* under normal operating conditions."

Over time, the reference to a "24-hour period" has taken on a life of its own. And, it has been misunderstood and misapplied in a variety of different contexts. To take one example, I have seen where the release reporting and notification requirements under CERCLA § 103(a) have been interpreted in a way that calls for the quantity of *any release* to be measured over a 24-hour period, and then compared against the applicable RQ to determine whether notification and reporting of the release is required. This, however, is not the case. The relevance of a 24-hour period only comes into play *after* it has been determined that a release is continuous. If an episodic release of a hazardous substance occurs at a facility over a period of 72 or 96 hours, the quantity the hazardous substance released during the entire duration of the release must be estimated for the purpose of determining whether the applicable RQ has been exceeded. Any reference to a 24-hour period only comes up in a fairly narrow and limited context. Namely, it is the period of time over which upper and lower bounds of the so-called "normal range" for a continuous release are to be estimated.

With respect to the mechanics associated with the notification and reporting of continuous releases, there is one relatively recent change that operators should be aware of. On November 12, 2021, EPA issued a final rule which now requires any continuous release report to be submitted to the appropriate EPA headquarters office. Prior to the issuance of this final rule, continuous release reports were typically submitted to the respective EPA regional offices.

DOJ Takes a Page from EPA's EJ Strategy: Endorses Early Relief Approach to Enforcement

On May 5th, the U.S. Department of Justice issued its*Comprehensive Environmental Justice Enforcement Strategy.* Among other things, DOJ's EJ Enforcement Strategy describes four Principles for Environmental Justice Enforcement. One of these principles is to "make strategic use of all available legal tools to address environmental justice concerns." According to the EJ Enforcement Strategy, in order to implement this principle, DOJ will pursue "timely effective remedies in enforcement matters," including "preliminary or interim relief to prevent or minimize exposure to harmful pollution while permanent remedies are being considered."

DOJ's intention to pursue such preliminary or interim relief is notable because it dovetails with EPA's emphasis on "early relief" in EJ enforcement guidance that the Agency issued a little over a year ago. On April 30, 2021, Lawrence E. Starfield, EPA's then Acting Assistant Administrator for the Office of Enforcement and Compliance Assurance issued a memorandum entitled *Strengthening Enforcement in Communities with Environmental Justice Concerns* wherein he emphasized the need "to explore ideas for obtaining early relief for affected communities..." As I noted in the June 2021 edition of The Cubical, this emphasis will likely lead to an expansion of the use of EPA's authority under statutes such as Section 303 of the Clean Air Act or Section 7003 of RCRA. (For a link to this edition of The Cubical, click here.) Under these provisions, the Agency has broad authority to issue administrative orders to prevent and remedy imminent and substantial threats to the environment. The ability to challenge such orders prior to taking the steps necessary to achieve compliance is extremely limited.

It is also important to note that back on July 1, 2021, EPA issued EJ enforcement guidance for cleanup actions. This guidance similarly emphasized the need to achieve immediate and tangible benefits for overburdened communities by seeking early relief through the use of tools such as unilateral orders mandating cleanup under CERCLA Section 106.

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