



## THE CUBICAL

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### *Under Pressure:* **The Expansive Reach of *Lockout-Tagout***



Those who work in and around industrial operations probably have at least a general familiarity with OSHA's lockout-tagout ("LOTO") standard. They probably understand that this standard establishes requirements for the isolation and control of the sources of electrical energy for equipment that is being serviced or maintained. However, the LOTO standard's reach extends well beyond sources of electrical energy. It also applies to sources of hydraulic, pneumatic, chemical, and thermal energy as well. And in fact, the LOTO standard is also known by a somewhat more general - and more official - name: *The Control of Hazardous Energy Standard*.

The purpose of the LOTO standard is to ensure that *all sources* of hazardous energy are effectively isolated or controlled before any maintenance or servicing activities on the potentially impacted equipment is performed. The standard requires employers to develop and implement a comprehensive LOTO program that includes specific procedures and training for all employees who work with hazardous energy sources. Such procedures must require that: all hazardous energy sources be identified; appropriate steps for controlling such sources be developed; equipment be isolated from all sources of energy before any maintenance or servicing activities are performed; and lockout or tagout devices are installed to prevent re-energization of isolated equipment.

The LOTO standard requires employers to train their employees on the proper use of lockout/tagout procedures and equipment. In addition, procedures established pursuant to a LOTO program must be reviewed and updated on a regular basis. Failure to comply with the LOTO standard can result in significant fines and injunctive relief.

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## New EJ Executive Order Aims to Leverage Information From Reported Releases

On April 21, 2023, the Biden Administration issued the most recent in a series of Executive Orders on the topic of Environmental Justice (EJ). While the *Executive Order on Revitalizing Our Nation's Commitment to Environmental Justice for All* (the "New EJ Executive Order") addresses a wide variety of EJ-related issues, there is one section that should be of particular interest to manufacturers. Section 6 of the New EJ Executive Order - *Community Notification on Toxic Chemical Releases* aims to "ensure that the public, including members of communities with environmental justice concerns, receives timely information about releases of toxic chemicals that may affect them ...."

Section 6 of the New EJ Executive Order focuses primarily on leveraging information from the notification of releases required under Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA). EPCRA Section 304 requires the owner or operator of a facility to provide immediate notice of any release of an extremely hazardous substance (EHS) in excess of the substance's reportable quantity (RQ) to the appropriate state emergency planning commission (SEPC) and local emergency planning committee (LEPC). The notification must include the identity of the EHS, an estimate of the quantity released to the environment, and any known or anticipated acute or chronic health risks associated with the release event. In addition to the initial notification, the owner or operator must also provide a written follow-up report to the SEPC & LEPC. A written follow-up report is typically expected within five to seven business days after the initial release.

Pursuant to Section 6(c) of the New EJ Executive Order, EPA will now be expected to require or encourage follow-up actions from non-Federal facilities that report releases under EPCRA Section 304. The Executive Order is silent on what types of additional actions are to be required or encouraged. Presumably, they would at least include efforts to eliminate or reduce the possibility of similar releases in the future. They may also include steps to address any harms suffered by the surrounding community as a result of the release.

While many questions remain as to how Section 6(c) of the New EJ Executive Order might be implemented, operating facilities should be prepared for a renewed focus on EPCRA 304 enforcement and compliance. For example, EPA may scrutinize the timing of such release notifications more closely, and pursue enforcement against facilities whose notifications were not *immediate*. EPA may also take a closer look at making connections between community complaints of odors or visible emissions on the one hand, and facility release notifications on the other hand. EPA may have very probing questions for the facility if the Agency sees data gaps or "disconnects" between community complaints and facility release reporting. Facilities should prepare now for the possibility of such a renewed focus by updating their respective release notification procedures. In addition, appropriate personnel (including off-shift

## Georgia's OSAH Upholds Stream Buffer Variance for Proposed Rivian Manufacturing Site

Proponents of a proposed electric vehicle manufacturing site located about 45 miles east of Atlanta scored a victory recently in Georgia's Office of State Administrative Hearings ("OSAH"). In *Jenkins v. Georgia Dept. of Natural Resources, Env'tl Protection Div.*, OSAH rejected challenges to the Environmental Protection Division's ("EPD's") decision to grant a stream buffer variance to two economic development agencies involved in the development of the manufacturing site. Rivian Automotive, Inc., a manufacturer of electric SUVs and trucks, hopes to build its second U.S.-based manufacturing plant at the site.



Georgia law establishes a 25-foot buffer (with certain limited exceptions) along the banks of all state waters. A stream buffer variance from EPD is required to conduct activities that would impact the buffer area for a body of water. In *Jenkins*, OSAH concluded that the application for the variance to develop the Rivian manufacturing site was complete, and that all regulatory requirements for obtaining such a variance, including the submission of an adequate Erosion and Sedimentation Pollution Control Plan ("ESPCP"), had been met. OSAH further concluded that the challengers failed to prove by a preponderance of the evidence that EPD improperly moved forward with the buffer variance process, improperly put the permit application on public notice, or failed to consider all the required factors in deciding to issue the variance.

The challengers have petitioned for judicial review, so this matter is now before Superior Court in Fulton County. It is important to note that this is only one part of a multi-front legal battle over efforts to develop this manufacturing site. Other legal challenges, including a zoning challenge and a federal lawsuit alleging environmental harms due to clearing activities associated with site preparations, are also pending.

It will be interesting to track the progress of these legal challenges. Perhaps even more interesting will be the alignment of various stakeholders in connection with these challenges. Clean energy supporters may see the development of EV manufacturing facilities as a necessary element of the transition to a carbon-free economy. Regional and state economic development authorities will also have a keen interest in ensuring that their constituents benefit economically from this transition. At the same time, property owners and public interest groups dedicated to protecting particularly impacted resources are likely to continue to raise questions about which projects are necessary, and whether the scope and location of such projects are appropriate.

Stay tuned!

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