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# THE CUBICAL

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## EPA'S EJ ENFORCEMENT GUIDANCE: HOW WILL *EARLY RELIEF* BE SOUGHT?

On April 30th, Lawrence E. Starfield, EPA's Acting Assistant Administrator (AA) for the Office of Enforcement and Compliance Assurance issued a memorandum entitled *Strengthening Enforcement in Communities with Environmental Justice Concerns*. (This memorandum can be accessed by clicking here.) The April 30th Memorandum outlines the Agency's enforcement program goals to advance Environmental Justice (EJ). On page 2 of the Memorandum, the Acting AA asks case teams "[t]o explore ideas for obtaining early relief for affected communities...." This raises the following question: How will such *early relief* be sought?

While the examples of of early relief cited in the April 30th Memorandum seem vague, they do suggest that EPA enforcement teams may consider issuing administrative orders pursuant its statutory authority under provisions such as Section 303 of the Clean Air Act or Section 7003 of RCRA. These provisions give the Agency with authority to issue administrative orders to prevent and remedy imminent and substantial threats to public health, welfare, and the environment.

This is a significant concern for the regulated community because such orders require immediate compliance prior to any opportunity for judicial or administrative review. In contrast, regulated entities generally have the right to seek review prior to complying with administrative or civil orders mandating the payment of fines. Even if an administrative order requiring immediate compliance is improperly issued or overly expansive in scope, the choices for a regulated entity on the receiving end of such an order are limited. It can either negotiate with EPA in the hope of narrowing the scope of the order, or not comply in the hope of prevailing when the Agency inevitably seeks to have the order judicially enforced. The risks associated with the

latter option are usually too great for it to be given serious consideration.

Already, there is at least one example of the issuance of such an order being motivated - at least in part - by EPA's desire to advance its EJ goals. On May 14th, EPA issued a CAA Section 303 order to the Limetree Bay refinery in St. Croix, Virgin Islands. The order mandated an immediate pause to Limetree Bay's operations. In the press release announcing its action, EPA noted that recent repeated incidents at the refinery "[r]aise significant environmental justice concerns, which are a priority for EPA." Whether this action portends an increase in EPA's use of its authority under CAA Section 303 and other similar statutes in order to advance its EJ goals remains to be seen.

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## TRI COMPLIANCE: AVOIDING A FAILURE TO LAUNCH

What April 15th is to tax professionals (at least in most years), July 1st is to many EHS professionals. This is because July 1st is the reporting deadline for EPA's Toxic Release Inventory (TRI) program. Under TRI, covered entities are required to file reports detailing air emissions, wastewater discharges, land disposal, and other process information for listed toxic chemicals that are used in amounts exceeding certain thresholds. With this deadline fast approaching, now is a useful time for a few tips on avoiding the most common TRI noncompliance issue: *failure to report in a timely manner*. There are number of reasons why this can happen; however, two stick out: (i) a lack of understanding about which listed chemicals are being used at the facility; and (ii) errors in making threshold determinations for listed chemicals.

As for the first reason, a covered facility usually has a firm handle on the listed chemicals contained in its raw materials, intermediates, and products. Where it can sometimes get tripped up is in accurately identifying and quantifying listed chemicals in additives, processing aids, and other ancillary materials that are received in smaller quantities and at less frequent intervals. Ideally, a covered facility should have a robust chemical screening procedure to ensure compliance with TRI, and other requirements such as EPA's Hazardous Chemical Inventory Reporting Requirements or OSHA's Hazardous Communications Standard. If it does not, content information about new or substitute materials may not be captured by the facility's TRI reporting systems.

As for the second reason, the process of making threshold determinations is quite a bit more complex now than it was back in the early days of the TRI program. When TRI began in the mid-1980s, reporting thresholds were essentially uniform. In more recent years, as EAP began to add bioaccumulative and biopersistent chemicals such as dioxins to the reporting list, thresholds began to diverge.

All of this can be quite a challenge to keep up with. A robust chemical screening procedure is also useful in avoiding threshold determination errors. However, for listed chemicals with very low reporting thresholds, a much more holistic understanding of what is entering, exiting, and happening in the facility's unit operations is necessary. This requires the active participation of the EHS management, operations, procurement, and maintenance functions.

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# EPA'S AUDIT POLICY: TRI NONCOMPLIANCE AS A TEXTBOOK APPLICATION

With the July 1st deadline for filing TRI reports on the horizon, now is also a good time for a quick primer on making timely disclosures of noncompliance under EPA's Audit Policy. (A copy of this Policy can be accessed by clicking here.) Seeking relief from penalties for noncompliance with TRI is probably *the* textbook application of the Policy. Under EPA's Audit Policy, a facility can achieve up to a 100 percent reduction in the gravity component of penalties associated with noncompliance if it provides notification to EPA of such noncompliance in accordance with the procedures set forth in the Policy.

To obtain the penalty relief afforded by the Policy, a facility must disclose the violations in question to EPA within 21 days after such violations have occurred, or *may have occurred*. It is this "may have occurred" language that can trip up a facility seeking such penalty relief. The reason for this has more to do with human behavior and psychology than with the law.

TRI noncompliance is usually discovered when a facility is gathering information and making preparations for filing reports for the most recently completed reporting year. Initially, it may not be all that clear as to whether violations for previous reporting years actually occurred. In this situation, it may be difficult to resist the instinct to gather information and perform more analyses before escalating the issue to facility management, or the corporate EHS and legal functions. The problem with this is that the clock for obtaining relief from penalties under EPA's Audit Policy may have already begun since facility EHS personnel may already know that a violation "may have occurred."

Relatedly, it may also be difficult to resist the instinct to correct a failure to report without escalating the issue at all. When compared against other EHS compliance issues that a facility may face, a failure to timely file a handful of TRI reports may not seem all that significant. The straightforward solution may be to simply submit the late reports and hope that nothing comes of it. However, the potential penalties associated with even a handful of missed reports over a period of as many as five years can add up pretty quickly. The best course of action is often to disclose and correct this noncompliance pursuant to the terms of the Policy.

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