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CLIMATE CHANGE & FEDERAL CONTRACTORS

More news on the new administration's climate change agenda. On May 20, 2021, President Biden issued the *Executive Order on Climate-Related Financial Risk*. The stated purpose of the Executive Order is to further the Biden Administration's policy of advancing "clear, intelligible, comparable, and accurate disclosure of climate-related financial risk." The Executive Order is far-reaching, and extends into just about every activity within the federal government's sphere of influence. This includes the activities of federal contractors. Section 5(b) of the Executive Order directs the Federal Acquisition Regulatory Council (FARC) to consider amending the Federal Acquisition Regulations (FAR) to require *major federal suppliers* to: (i) publicly disclose greenhouse gas emissions (GHG); (ii) publicly disclose climate-related financial risk; and (iii) set science-based targets for reduction of GHGs. While the Executive Order only directs FARC to *consider* such amendments, it is a safe bet that such amendments will ultimately be promulgated.

It is important to remember that the reach of the FAR is quite broad. It applies to just about any entity that does business with the federal government. This can be any entity from a large multi-billion dollar defense contractor to a smaller manufacturing firm that supplies federal government agencies with unique specialty materials. Interestingly, the term "major federal supplier" is not defined in the FAR. Presumably, by using this term, the Biden Administration intends for FARC to focus its efforts on larger federal contractors in its deliberations. The issue of which federal contractors will be considered as major federal suppliers remains to be seen. It is an issue that federal contractors of all types and sizes should monitor.

APPEALS COURT EXPANDS SCOPE OF

FEDERALLY PERMITTED RELEASE EXEMPTION

The U.S. Court of Appeals for the Third Circuit - which covers New Jersey, Pennsylvania, Delaware, and the Virgin Islands - recently ruled that the "federally permitted release" exemption to CERCLA's release notification and reporting requirements applies to any air release that is governed or affected by a Clean Air Act (CAA) permit, regardless of whether such release was in compliance with the permit in question. This decision flies in the face of EPA guidance that has been in place since at least 1995. According to this long-standing EPA guidance, the federally permitted release exemption only applies to air releases that are in compliance with the terms of an applicable CAA permit.

Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires notification and reporting of releases of certain listed hazardous substances that exceed specified reportable quantities. "Federally permitted releases" are exempt from these notification and reporting requirements. The term "federally permitted release" is defined in Section 101(10) of CERCLA. In *Clean Air Council v. U.S. Steel Corp.*, No. 20-2215 (3d Cir. Jun. 21, 2021), the Third Circuit addressed this definition as it applied to releases to the air. Pursuant to Section 101(10)(H) of CERCLA, the term "federally permitted release" includes "any emission into the air *subject to* a permit or control regulation under [applicable sections of the CAA]." (emphasis added) The court focused on the phrase "subject to" in this part of the definition and concluded that it meant "governed by" or "affected by" rather than "obedient to" or "in compliance with." Thus, the exemption applies to an air release governed by a CAA permit even if the release is not in compliance with the permit. The court noted that while the "subject to" language was used for air releases, sections of the "federally permitted release" definition pertaining to releases to other media conditioned the applicability of the exemption on compliance. According to the Third Circuit, if Congress had wanted to condition the exemption for a release to the air on compliance with the applicable permit, it could have done so explicitly.

This decision should simplify release notification and reporting practices for regulated facilities in the three states and one territory that comprise the Third Circuit. However, this decision is only binding in those jurisdictional areas. EPA is not bound to apply the legal holding in *Clean Air Council* anywhere else. Nonetheless, regulated entities in jurisdictions beyond the territorial reach of the Third Circuit should monitor EPA's response to this decision. Although unlikely, it is possible that in the interest of uniformity and consistency, EPA may amend its guidance to more closely conform to the Third Circuit's decision.

EPA EJ ENFORCEMENT PART II: THE SPECTER OF PARALLEL PROCEEDINGS

As a follow-up to the April 30, 2021 memorandum entitled *Strengthening Enforcement in Communities with Environmental Justice Concerns*, Lawrence E. Starfield, EPA's Acting Assistant Administrator (AA) for the Office of Enforcement and Compliance Assurance issued a memorandum addressing Environmental Justice (EJ) in criminal enforcement on June 20, 2021. This memorandum, entitled *Strengthening Environmental Justice Through Criminal Enforcement*, focuses on three criminal enforcement activities that EPA believes can advance its EJ goals: (i)

strengthening detection of environmental crimes in overburdened communities; (ii) improving outreach to crime victims; and (iii) enhancing remedies sought in environmental criminal cases. (To access this memorandum, click here.)

The section of the Memorandum addressing the detection of environmental crimes in overburdened communities raises an issue that has long been a concern for the regulated community. That concern is the specter of having to deal with parallel civil and criminal proceedings. In this section, the Acting AA notes that in accordance with existing EPA policy, "civil and criminal staff should maintain regular and open communications regarding increased facility inspections in overburdened communities." According to the Acting AA, such coordination will allow criminal case teams to be apprised of violations involving potentially criminal conduct that turn up during facility inspections and other related activities.

Parallel civil and criminal enforcement proceedings can exact an enormous economic and emotional toll on organizations and individuals. More importantly, they can increase the risk of undermining an individual's right against self-incrimination under the Fifth Amendment to the U.S. Constitution (and similar state constitutional rights). Statements made by an individual made during a facility inspection may end up being used against him or her later in a criminal prosecution. In addition, an organization can find its defense against a civil environmental enforcement action hindered if management personnel facing the prospect of criminal prosecution invoke their Fifth Amendment rights. In contrast to criminal proceedings, such silence from management officials can be used against the organization in the civil proceeding in certain circumstances. Government lawyers and enforcement officials are well aware of these concerns and have policies in place to protect the rights of the accused. Having said that though, the government's main objective in such enforcement matters is to get convictions and fines. Parallel proceedings provide the government with additional leverage in the pursuit of this objective.

NEW ADMINISTRATION READINESS CHECKUP: INCREASED CRIMINAL ENFORCEMENT

In a previous article from my New Administration Readiness Checkup series - *Compliance Inspections* - I discussed some of the measures that regulated entities may want to consider to prepare for the inevitable increase in inspection activity by the new administration. *Compliance Inspections* focused on the inevitable increase in *civil* enforcement activity. In light of the issuance of*Strengthening Environmental Justice Through Criminal Enforcement*, the following is an illustrative list of some of the things that regulated entities may want to consider to prepare for the coming increase in *criminal* enforcement activity:

- Consider developing and implementing programs for "knock-on-the-door" training. Such programs may include training on how to respond to regular facility inspections, enhanced civil inspections such as multi-media inspections, and perhaps even how to deal with OSHA's administrative warrant regime. Most importantly though, it would involve training employees on how to respond when government officials come flashing badges, wearing sidearms, and presenting search warrants.

- Consider making arrangements with local criminal counsel to be on call in the event of the execution of a criminal search warrant at a regulated entity's

facility.

- In recent years, a significant focus of environmental criminal enforcement activity has been the prosecution of *individuals*; and not just organizations. The reason for this is simple: individuals can be thrown in jail; organizations can't. When civil enforcement is pursued against an organization and several of its employees, it is not uncommon for the parties to be jointly represented by counsel retained by the organization. However, such an arrangement is a non-starter in defending against criminal prosecutions. The organization may find and retain criminal defense counsel for its employees. However, each employee needs to be represented by separate counsel in order to protect his or her legal rights. In-house legal departments may thus want to consider establishing or reviewing policies regarding how such situations are to be handled if they should ever arise.

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