



## THE CUBICAL

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### Independent Third-Party Audit Requirements in EPA Settlements

In recent years, there have been efforts by EPA to require the conduct of independent third-party compliance audits at regulated facilities. These efforts have manifested themselves in the form of both broad regulatory initiatives and individual enforcement actions. On the regulatory front, EPA has incorporated independent third-party compliance audit requirements into its proposed reforms to the Risk Management Plan ("RMP") Rule. Under these proposed reforms, formally known as the Safer Communities for Chemical Accident Prevention ("SCCAP") Proposed Rule, a regulated facility would be required to facilitate the conduct of an independent third-party audit of compliance with the RMP Rule if it exceeded certain thresholds for RMP-reportable accidents within a five-year period. On the enforcement front, EPA's Office of Enforcement and Compliance Assurance ("OECA") stressed in its April 26, 2021 memorandum entitled *Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements* that compliance audits can be included in a settlement "to achieve compliance beyond the focus of a specific enforcement action."

A possible early example of the Injunctive Relief Tools Memorandum being put into action may be found in a settlement that comes out of EPA Region 4, which covers South Carolina. EPA entered into a consent decree with 3V Sigma USA, Inc. - a chemical manufacturer located in Georgetown, S.C. - to settle allegations of Clean Air Act violations. Under the consent decree, 3V is required to facilitate the performance of compliance audits by an independent third-party auditor. The scope of these audits will include emissions limits and/or work practice requirements associated with: leak detection and repair ("LDAR"); storage tanks; closed vent systems; and wastewater streams. Auditors must be licensed professional engineers. In addition, the facility is limited to selecting auditing firms that have not conducted any business with the facility

within at least the last three years.

The consent decree sets forth detailed requirements for the audit deliverables. These requirements include a detailed description of each area of noncompliance, recommendations for corrective measures, a description of any difficulties encountered in performing the audit, measures taken to address such difficulties, and a certification by the independent third-party auditor that the audit has been performed in accordance with the consent decree. The facility is required to provide a copy of any final audit report to EPA.

While there may be risks associated with the regulatory supervision of a compliance audit program, the inclusion of independent third-party audit provisions into the consent decree seems to have played an important role in avoiding a significantly larger penalty. The facility ultimately paid slightly more than \$700,000 to settle allegations of violations of the NESHAP for Miscellaneous Organic Chemical Manufacturing (also known as the "MON") pertaining to LDAR, closed vent systems, and wastewater streams. The MON is probably one of the most complex sets of air regulations on the books. More importantly, anyone who has been in and around chemical manufacturing facilities knows that the sheer number of points of compliance associated with LDAR (i.e., pumps, valves, connectors, etc.) alone means that there are hundreds, if not thousands, of opportunities for noncompliance. One doesn't need to resort to the "per day, per violation" aspect of EPA's maximum penalty authority to imagine a big number. A simple and straightforward application of EPA's applicable penalty guidance can easily result in a robust seven-figure penalty amount.

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## EPA Proposes to Phase Out *Perc* Use in Dry Cleaning

The use of tetrachloroethylene (also known as perchlorethylene, or simply, *perc*) in the dry cleaning industry has been on a downward trend in recent years. However, such use persists to this day. EPA estimates that 6,000 dry cleaning facilities continue to use this chlorinated solvent in their operations. A recent EPA proposal rule would change this by putting an official end date for such use within reach.



On June 16, 2023, EPA published its proposed Regulation of Perchloroethylene Under the Toxic Substances Control Act (the "Perc Proposal"). The Perc Proposal aims to implement the findings of an EPA risk evaluation of health effects associated with exposure to perc. EPA found that exposure to perc presents an unreasonable risk of injury to health under most conditions of use. Such implementation includes a ban of all consumer uses of perc, and a ten-year phase out of the usage of perc in the dry cleaning industry. Finally, although some industrial uses of perc will be allowed to continue, they will be subject to strict workplace practice requirements.

The phase out of perc in the dry cleaning industry would take place in several stages.

Facilities acquiring new dry cleaning machines would be the first to feel the effects of the phase out, The usage of perc would be prohibited in any machines that are acquired and put into operation more than six months after the promulgation of a final rule. Perc usage would be prohibited for third generation machines three years after a final rule is promulgated. A total prohibition would come ten years after promulgation of a final rule. This would include a prohibition on the manufacture or importation of perc for use as a dry cleaning solvent.

It is difficult to say how much of an impact a final perc regulation would have. Many dry cleaners have turned to more ecologically friendly alternatives. In addition, a number of states are phasing out, or have already banned perc usage in the dry cleaning industry. For example, California promulgated a ban that went into effect on January 1st of this year.

While the actual impact of final perc regulation on the dry cleaning industry remains to be seen, the environmental issues associated with the usage of perc in the dry cleaning industry will continue to linger for many decades to come. Dry cleaning facilities can be found in just about every commercial area in the country. Numerous spills and leaks of perc have occurred at these facilities over the decades, resulting in significant contamination of soils and groundwater. As I had noted in a previous edition of The Cubical, dry cleaning facilities are the number one source of new Superfund sites according to two members of the task force that developed the ASTM's most recent Phase I Environmental Site Assessment standard - Julie Kilgore and Paul Zovic. Chlorinated solvent contamination is notoriously difficult to remediate, so these sites can present significant challenges. In addition, contaminated dry cleaning sites are responsible for a significant share of vapor intrusion concerns in industrial and commercial buildings. In short, even with a looming ban, environmental issues associated with historical uses of perc in the dry cleaning industry aren't going anywhere anytime soon!

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## GA, NC & SC to Receive Grants Totaling More Than \$15 Million for Brownfields Projects



In May, EPA announced that sponsors and stakeholders associated with brownfields assessment and remediation projects in Georgia, North Carolina, and South Carolina will be the beneficiaries of new and/or additional funding. These sponsors and stakeholders will receive grants totaling more than \$15 million under its Multipurpose, Assessment, Revolving Loan Fund, and Cleanup ("MARC") Grant programs. The individual grant programs that comprise MARC have been around for a while. However, they received a boost in

funding from the passage of the Bipartisan Infrastructure Law in November 2021.

Sponsors and stakeholders in Georgia will receive a total of \$4 million in grants. Approximately half of this total will go to a project to clean up the Chattahoochee Brick Company site in the Whittier Mill Village area near where the west side of the I-285 perimeter crosses the Chattahoochee River. The Chattahoochee Brick Company

operated from the late 19th century until 2011. It is considered to be a site of historical significance in part because of its extensive use of convict lease labor in its early years of operation. (This practice continued until it was outlawed in the early 20th century.) The site is contaminated with heavy metals, petroleum products, and miscellaneous debris. The plans for this site are to transform it into a public park and memorial the injustices suffered by the convict lease laborers. (More information can be found by visiting The Conversation Fund's webpage for the Chattahoochee Brick Company site which can be accessed by clicking [here](#).)

Sponsors and stakeholders in North Carolina will receive a total of \$2.7 million. Nearly half of this total will go to two brownfields projects involving the assessment and cleanup of former furniture manufacturing sites in the state. Sponsors and stakeholders in South Carolina will receive \$9 million. Most of this money will go to brownfields projects throughout the state that are still mostly in the assessment phase.

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