



Tips for Tackling Tier II Trouble

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Companies with hazardous chemical reporting obligations know the significance of March 1. On that date each year, facilities that at any time during the prior year had 10,000 pounds or more of an OSHA hazardous chemical, or 500 pounds or more (or the threshold planning quantity, whichever is less) of an extremely hazardous substance (EHS), must file an EPCRA Tier II report identifying such chemicals. Tier II reports must be filed with the State Emergency Response Commission, the Local Emergency Planning Committee, and the local fire department.

While common mistakes and oversights in Tier II filings have often led to significant civil penalties, this year the price of noncompliance has been increased greatly. Effective August 1, 2016 and again on January 15, 2017, EPA's civil penalty policies were amended to account for inflation, resulting in significantly higher civil penalties for violations of many regulatory programs, including EPCRA Tier II reporting. Previously, a Tier II violation could result in a daily maximum civil penalty of \$37,500; with the recent amendments, the daily maximum civil penalty is now \$54,789.

With March 1 quickly approaching, understanding typical Tier II shortcomings may help facilities avoid steep penalties. The majority of Tier II violations involve a few very common chemicals. Lead and sulfuric acid frequently are overlooked. Facilities with forklifts or other large battery-powered equipment that contain lead and sulfuric acid often make the mistake of believing that batteries fall under the "article" exemption or the "consumer product" exemption from Tier II reporting. However, because they have the potential to leak, spill, or break during normal conditions of use, batteries in forklifts and other large equipment are not considered exempt "articles." Also, because they are industrial batteries that contain chemicals not in the same form and concentration as a product packaged for use by the general public, these batteries are not exempt "consumer products."

Ammonia is also a commonly overlooked chemical in Tier II reporting. Facilities with onsite refrigeration equipment using ammonia as a refrigerant should remember it is an EHS, with a 500 pound reporting threshold. Finally, diesel fuel, which is commonly stored in large quantities, is frequently cited in Tier II enforcement.

Given the recent increase in civil penalties, companies that discover a Tier II violation should consider the benefits of voluntary self-disclosure to EPA. Under EPA's Audit Policy, a company may be eligible for up to 100% reduction of gravity-based civil penalties for violations disclosed voluntarily. To be eligible, a disclosure must meet nine criteria. The violation must 1) be discovered through an environmental audit or compliance management system; 2) be discovered voluntarily, not through a legally required monitoring procedure; 3) be promptly disclosed (within 21 days of discovery); 4) be discovered independent of agency investigation; 5) be corrected and remediated within 60 days of discovery; 6) be prevented from recurring; 7) not be a repeat violation; 8) not cause serious actual harm or present imminent and substantial endangerment to human health or the environment; and 9) be

followed by the company's cooperation with EPA during any investigation of the disclosure.

Even if a voluntary disclosure does not meet the nine criteria of the Audit Policy, the disclosure will still be considered as an adjustment factor when EPA calculates civil penalties. Self-disclosed Tier II violations are eligible for up to a 50% reduction in gravity-based civil penalties under EPA's EPCRA Enforcement Response Policy.

Companies storing or using chemicals should maintain robust environmental auditing practices to ensure proper identification and classification of these chemicals. If violations of Tier II reporting obligations are discovered, companies should remember the potential benefits of self-disclosure. With proper attention to facility conditions, common Tier II mistakes and penalty exposure can be avoided.

EPA's Civil Monetary Penalty Inflation Adjustment Rule, 81 Fed. Reg. 43091 (July 1, 2016); 82 Fed. Reg. 3633 (Jan. 12, 2017).

EPA's Audit Policy, 65 Fed. Reg. 19618 (April 11, 2000).

[**EPA's EPCRA Enforcement Response Policy**](#)

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