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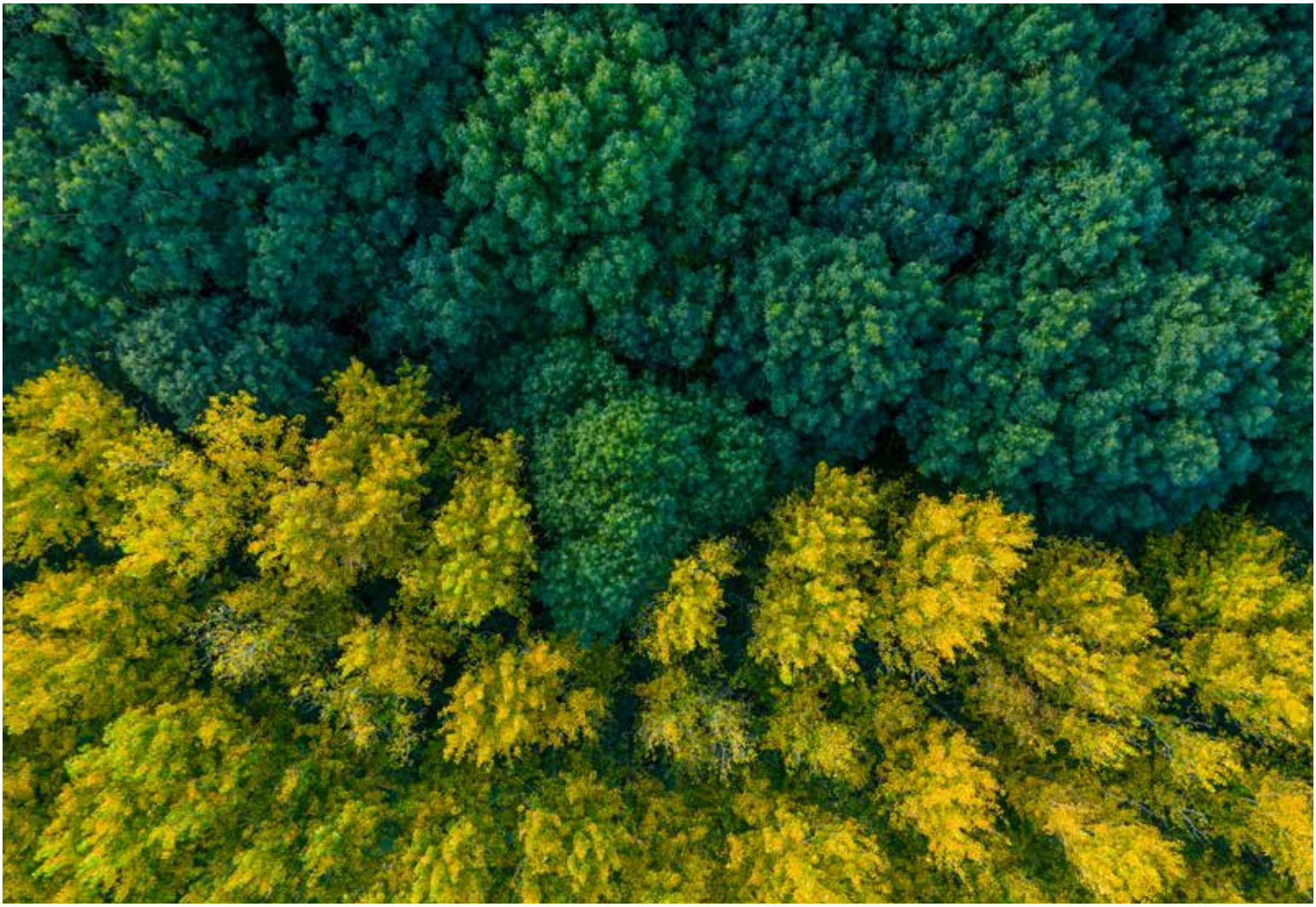

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Clock is Ticking as EPA Proposes Ban of the Manufacture, Processing and Commercial Use of the Widely Used Chemical TCE

BY: SUSIE BRANCACCIO

Introduction

EPA recently proposed a ban of trichloroethylene, commonly known as TCE, under the Toxic Substances Control Act (TSCA) which will have sweeping impacts on a variety of industries. Notably, EPA's proposed rule cites an inexhaustive list of 250 NAICS codes representing the number of different industries that could be impacted by this rulemaking.

EPA's proposed rule would prohibit the manufacture (and import), the processing, distribution in commerce, the commercial and industrial use, and the disposal of TCE. The proposed rule essentially establishes a "countdown" for TCE—a deadline of when businesses would be expected to comply with the ban, with some activities or industries being provided a longer period to come into compliance due to concerns of feasibility, economic need, and national security. The deadlines in the "countdown" range from as little as 3 months to as long as 50 years. **The proposed deadlines are outlined in the following table, with the entries shaded to illustrate those specific activities or industries that EPA has carved-out from the general ban to provide them more time to phase-out the use of TCE.** The activities or industries are organized in the table by similar industry or activity where possible.

Proposed Ban Timeline

Activity or Industry	Time After Final Rule is Adopted to Comply
Manufacturing or importing TCE.	3 months
Processing and distributing in commerce TCE, including any TCE-containing products.	6 months
Industrial and commercial use of TCE.	9 months
Manufacturing or importing for industrial and commercial use of TCE for batch vapor degreasing in open-top and closed-loop degreasing equipment.	6 months
Processing for industrial and commercial use of TCE for batch vapor degreasing in open-top and closed-loop degreasing equipment.	9 months
Industrial and commercial use of TCE for batch vapor degreasing in open-top and closed-loop degreasing equipment.	12 months
Manufacturing and importing, distribution in commerce, and processing of TCE as an intermediate for manufacturing HFC-134a. *Note: There are additional phase-out periods and monitoring requirements relating to HFC-134a that could not be summarized into this table. Please see §751.07 of the proposed rule for more information.	8 years and 6 months
Manufacturing and importing for processing TCE as a reactant/intermediate and processing TCE for the industrial and commercial use of TCE as a processing aid for several categories including battery separator manufacturing.	18 months
Processing TCE as a reactant/intermediate and from processing TCE for the industrial and commercial use of TCE as a processing aid for several categories including as a processing solvent used in battery manufacture.	2 years
Industrial and commercial use of TCE as a processing aid for battery separatory manufacturing, importing, processing, and distribution in commerce of TCE.	10 years

Activity or Industry	Time After Final Rule is Adopted to Comply
Industrial and commercial use of TCE as a solvent in closed-loop batch vapor degreasing for rayon fabric scouring for end use in producing rocket booster nozzles for Federal agencies and their contractors, and manufacturing, importing, processing, or distribution of commerce of TCE for such use.	5 years (unless certain records are kept relating to pre-launch tests completed with a TCE alternative)
Industrial and commercial use of TCE as a solvent in closed-loop batch vapor degreasing for rayon fabric scouring for end use in producing rocket booster nozzles for Federal agencies and their contractors, and manufacturing, importing, processing, or distribution of commerce of TCE for such use.	10 years (if certain records are kept relating to pre-launch tests completed with a TCE alternative)
For DoD naval vessels and their systems, and in the maintenance, fabrication, and sustainment for and of such vessels and systems, as well as other related activities including the industrial and commercial use of TCE as potting compounds for naval electronic systems.	10 years
Industrial and commercial use of TCE as a solvent in closed-loop vapor degreasing necessary for human-rated rocket engine cleaning by NASA and its contractors, and the manufacturing, importing, processing and distribution in commerce of TCE for such use.	7 years
Industrial and commercial uses of TCE for certain essential laboratory uses and from the manufacturing, importing, processing, and distributing in commerce of TCE for such uses.	50 years
If manufacturing, importing, processing, and using TCE, disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works.	9 months (unless part of a cleanup project)
Disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works for the purposes of cleanup projects of TCE-contaminated water and groundwater.	50 years

Disposal

One of the more interesting aspects of the proposed rule is the deadline provided for disposal of TCE. TCE is prohibited from being disposed of in an industrial pre-treatment, treatment, or publicly owned treatment works 9 months after the final rule is adopted. EPA believes that only one percent of TCE is disposed of as wastewater. Nevertheless, those businesses that fall into an exception category (and thereby are allowed to continue to process, use or manufacture TCE after that 9-month period) may face additional hurdles, including higher costs, in determining when, where, and how to dispose of (or treat) TCE in their possession. For facilities that generate solid waste with TCE concentrations, the appropriate Resource Conservation and Recovery Act (RCRA) requirements still apply to disposal. Moreover, EPA's proposed rulemaking also serves as a reminder that dilution of hazardous waste (including by mixing it with wastewater) as a substitution for adequate treatment under RCRA is prohibited.

Also of note in the proposed rule related to disposal is the longer phase-out period for disposal of TCE when that disposal is part of a cleanup project related to TCE-contaminated water and groundwater. Even though the phase-out period is longer (50 years), this means that the countdown is nonetheless approaching for cleanups addressing contamination from TCE. If you are the owner of a contaminated property, intend to cleanup a contaminated property, or may be responsible for the cleanup of a contaminated property, it will be beneficial to evaluate the issue of TCE contamination and cleanup sooner rather than later—as the clock ticks closer to the implementation of the ban. According to one study, TCE is the second-leading chemical found at Superfund sites (present at 42% of all Superfund sites studied), and EPA itself asks for comment in the proposed rule if 50 years is a long enough phase-out period for disposal of TCE related to cleanups.

Workplace Protections

In addition to the ban of TCE, the proposed rule also imposes a workplace chemical protection program (WCPP) for those businesses that are permitted to use TCE one year after the rule becomes final. Critically, the proposed rule establishes that an owner or operator must "ensure to the extent possible that no person is exposed to an airborne concentration of TCE in excess of [.0011 ppm] as an eight (8)-hour [time weighted average]." To achieve compliance with such "existing chemical exposure limit" (ECEL) companies must institute "one or a combination of elimination, substitution, engineering controls or administrative controls to reduce exposure to or below the ECEL except to the extent that the owner or operator can demonstrate such controls are not feasible in the interim." And if feasible exposure controls are not sufficient to reduce exposure at or below the ECEL, an owner or operator may be required under the proposed rule to supplement its controls through the use of personal protective equipment. The proposed rulemaking

also contains significant monitoring and recordkeeping requirements related to the WCPP.

Key Takeaways

EPA's proposed ban of TCE will have significant implications and potential costs, for both businesses subject to a ban in the short term as well as those businesses who are given longer to phase-out their use of TCE. These costs include finding alternatives to TCE, complying with workplace safety requirements, complying with monitoring and recordkeeping requirements, and the potential for disposal or cleanup issues in the future. EPA's proposed rulemaking ultimately signals that the clock is ticking *now* for TCE; do not wait until the "midnight hour" to learn how your business may be impacted by this potential rulemaking. The time to start preparing for these potential regulatory changes is now.

88 Fed. Reg. 74712 (October 31, 2023)

What to Know About EPA's Inflation Adjustments for Civil Penalties

BY: BILL KURIGER

EPA recently promulgated a final rule (the Rule) adjusting civil penalties issued by the agency for inflation. This action was performed pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), which mandates EPA adjust maximum and minimum civil penalty amounts for inflation. Pursuant to the 2015 Act, notice and comment was not required for this rulemaking.

The 2015 Act provides a two-step formula which agencies must use to adjust civil penalties annually. First, the agency calculates the difference between the Consumer Price Index for Urban Consumers for the most recent October with that of the October one year prior. The difference is multiplied by the current penalty amount, resulting in a "raw adjusted penalty value." Step two merely requires the agency to round the raw adjusted penalty value to the nearest $1. The result is the final penalty value for the year.

The Rule includes a Table listing code sections that provide for civil penalties and assigning adjusted penalty amounts which vary depending on when violations occurred and when penalties are assessed. The new penalty amounts apply to violations that occurred on or after November 2, 2015; those amounts vary depending on whether penalties are assessed after December 27, 2023, or between January 6, 2023, and December 27, 2023.

The 2015 Act and its 1990 predecessor statute have affected EPA policy in a manner likely unintended. Because the 2015 Act requires inflation adjustments from the time a statute providing for a penalty was enacted, penalties that started at the same amount are now vastly different. For example, take the Clean Air Act, enacted in 1963, and the Clean Water Act, enacted in 1972. Both statutes provide for a $25,000 penalty in certain instances. Yet, due to when the statutes were enacted, those same $25,000 penalties now cost a violator $121,275 under the Clean Air Act and $66,712 under the Clean Water Act. The mandatory inflation adjustment schedule prescribed by statute has inflated older penalties relative to newer penalties, resulting in a skewed policy at EPA.

Because EPA's adjustments are mandated by a statute lending EPA no discretion, regulated entities seeking to challenge EPA's adjustments are unlikely to succeed. Our research revealed no case in which a party challenged EPA's authority to adjust civil penalties pursuant to the 2015 Act. Regulated entities should assume the new penalty amounts will apply to any potential violations and plan accordingly.

88 Fed. Reg. 89309 (December 27, 2023) and
28 U.S.C.A. § 2461 note

EPA to Issue Information Collection Requests to Set PFAS Limitations for Textile Wastewaters

BY: ETHAN WARE & JESSIE KING

The textile manufacturing sector cannot escape EPA's rush to regulate per- and polyfluoroalkyl substances (PFAS). EPA recently requested comment on an Information Collection Request (ICR) to finish the process. Response to the ICR will be mandatory.

Setting Effluent Limitations and Standards for Textiles

It is clear EPA is targeting industrial wastewater dischargers as the primary source of PFAS in streams and lakes throughout the United States with near-term goals of reducing PFAS loadings on those waterbodies. To that end, "EPA determined PFAS are used by some textile manufacturing facilities to impart water, grease, and stain resistance to finished textiles, including consumer apparel, carpets, and technical textiles." "Information Collection Request Supporting Statement, United States Environmental Protection Agency: Textile Mills Industry, Part 1" (November 2023) ("Supporting Statement").

EPA intends to use information from the ICR to evaluate the necessity for more stringent effluent limitation guidelines and standards (ELGs) for wastewaters discharged from the textile manufacturing sector, since current ELGs do not restrict PFAS levels in plant wastewaters. "Through this collection, the EPA will obtain data essential to determine if updated regulations are required to address PFAS in wastewater discharges from textile manufacturing facilities, including facilities regulated under the Textile Mills point source category as specified by the [ELGs] codified in Title 40 of the Code of Federal Regulations (CFR) Part 410." *Id.*

For purposes of the ICR, EPA has cast a broad net and sent the ICR to more than 2,200 facilities. EPA considers textile mills to include plants "[that] receive and prepare fibers; transform fibers into yarn, thread, and webbing; convert yarn and webbing into fabric or related products; and finish textile materials using various chemical and physical applications" regulated by 40 CFR Part 410, as well as those manufacturing products under the organic chemicals, plastics, and synthetic fibers (OCPSF) (40 CFR 414) and plastic molding/forming subcategories (40 CFR Part 463).

Information to be Collected is Broad

EPA plans a two-part ICR process. The first part is billed as a "census" and from that a more detailed ICR process will follow.

The Part 1 Census Survey solicits more general information about facilities currently or historically involved in textile operations, regardless of size or production levels. A draft of the Census appended to the Supporting Statement requests the following information:

- General facility identification, industrial classification, ELG applicability, and wastewater permitting information;
- Type and size (both production and employees) of each facility;
- Details on textile mill operations, including the type(s) of products manufactured and types of processes performed;
- Use of PFAS in textile mill operations, including type and quantity of PFAS used, rationale for use, and whether these operations generate PFAS-containing wastewater; and
- Wastewater generation, characteristics (including PFAS and other pollutant concentrations and flow rate), and management data.

EPA instructs the recipient of the Census to conduct the questionnaire via a web platform, Qualtrics Survey Software (Qualtrics) and the Census is not limited to current operations.

Part 2 of the ICR involves Sampling Profiles. "Following receipt of the completed questionnaires, the EPA will request approximately 20 textile manufacturing facilities to collect wastewater samples." Supporting Statement, Part 2(a). EPA contends the wastewater sampling program will "generate information and data critical to characterizing wastewaters generated and discharged by textile manufacturing facilities and assess capability of existing wastewater treatment units to reduce or eliminate PFAS." *Id.* The Supporting Statement suggests targeted facilities for Sampling Profiles include "a mix of facility types, sizes, and current practices/technologies such that the data generated reflect wastewater from all types of textile manufacturing operations." Obviously, this data will be used to characterize wastewater discharges from the industry, including PFAS discharges and facility treatment system capabilities.

EPA estimates the burden to compile this information will not be significant. It is estimated plants will spend about 28 hours and $917.00 completing the e-filing.

Comment Period

EPA published a notice in the Federal Register announcing the agency's intent to submit a request for a new ICR and to collect comments on the draft initial questionnaire and the draft list of textile manufacturing facilities in the United States. Supporting Statement, Part 8(a). Confidential business information requirements are applicable to this process. 40 CFR 2.203.

Conclusion and Recommended Action

The ICR will come at a cost to covered textile operations. We recommend the textile industry monitor and review the Federal Register for further developments. Companies may wish to work together to limit the Part 1 Census to those textiles most likely to have used PFAS and restrict the scope of Part 2 Sampling Profiles to PFAS parameters.

88 Fed. Reg. 83125 (November 28, 2023)

EPA Chemical Facility Anti-Terrorism Standards Lapse

BY: ETHAN WARE

It has now been more than six months since Congress allowed the statutory authority for the Chemical Facility Anti-Terrorism Standards (CFATS) program (6 CFR Part 27) to expire on July 28, 2023. EPA recently advised all Chemical Facilities the CFATS program is currently not being enforced due to this inaction by Congress. Accordingly, the federal administrative body responsible for enforcing CFATS, the Cybersecurity and Infrastructure Agency (CISA), may not require compliance with applicable regulations unless and until Congress acts.

CFATS Applicability

The CFATS program applies to Chemical Facilities with a requisite amount of chemicals. A "chemical facility" is any establishment or individual that possesses or plans to possess any of the more than 300 chemicals of interest (COI) at or above screening threshold quantities (STQ) and concentrations for the chemicals. EPA estimates CFATS regulations broadly apply to chemical manufacturing, storage and distribution, energy and utilities, agriculture and food, explosives, mining, electronics, plastics, colleges and universities, laboratories, paint and coatings, and healthcare and pharmaceuticals, among others.

The list of COI is extensive. It includes chemicals common to many manufacturers such as ammonia (anhydrous), ammonia nitrate, acetaldehyde, chlorine, chlorine dioxide, ethane, ethyl ether, fluorine, formaldehyde (solution), hydrogen chloride (anhydrous), methyl chloride, methyl ether, nitric acid, nitric oxide, phosphorous, silane, and vinyl chloride. See 6 CFR 27, Appendix A (complete list of COIs).

The STQ for any given COI may be sufficiently low that even small manufacturers may be covered. For example, phosgene has an STQ of 500 lbs., while hydrogen cyanide's STQ is 1,000 lbs. Most chemical STQs, however, are in the 5,000 lbs. or higher range, including propone with an STQ of 60,000 lbs.

CFATS Requirements

Under the terms of the currently expired CFATS program, covered facilities must report their chemicals to CISA via an online survey, known as a **"Top-Screen."** CISA uses the Top-Screen information a facility submits to determine if the facility is considered high-risk and must develop a security plan.

The reporting process may fall into one of several categories:

Top-Screen. All covered facilities were required to complete a Top-Screen filing within 60 calendar days of November 20, 2007, for facilities that possess any of the chemicals listed in Appendix A at or above the STQ for any applicable Security Issue and within 60 calendar days for facilities that come into possession of any of the chemicals listed in Appendix A at or above the STQ for any applicable Security Issue. The term "Security Issue" refers to the type of risks associated with a given chemical. There are four main security issues identified in the regulations:

1. Release (including toxic, flammable, and explosive);
2. Theft and diversion (including chemical weapons and chemical weapons precursors, weapons of mass effect, and explosives and improvised explosive device precursors);
3. Sabotage and contamination; and
4. Critical to government mission and national economy.

6 CFR 27.105.

Security Vulnerability Assessment. Unless otherwise notified, a covered facility must complete and submit a Security Vulnerability Assessment within 90 calendar days of written notification from the Department of Homeland Security (Department) or within the time frame specified in any subsequent Federal Register notice.

Site Security Plan. Unless otherwise notified, a covered facility must complete and submit a Site Security Plan within 120 calendar days of written notification from the Department or within the time frame specified in any subsequent Federal Register.

Congress Failure to Renew

The consequences of this lapse in CFATS statutory authority are significant. CISA cannot enforce compliance with the CFATS regulations at this time. This means that CISA will not require facilities to report their chemicals of interest or submit any information in the Chemical Security Assessment Tool (CSAT), perform inspections, or provide CFATS compliance assistance, amongst other activities.

The current impacts to our nation's chemical security, the 3,200 facilities previously designated as high-risk, and the communities surrounding these locations include the following:

- CISA has not received information on dangerous chemicals from more than two hundred chemical facilities, meaning the locations of dangerous chemical may be unknown to CISA and local first responders.
- CISA cannot inspect high-risk sites, meaning more than 750 facilities have not been inspected. On average, 35% of inspections turn up security gaps, meaning that more than 260 facilities currently have security gaps that CISA has been unable to identify, or to work with those facilities to prevent bad actors from exploiting those gaps.
- Previously, more than 90% of CFATS visits ensured outreach with law enforcement and local fire department. CISA can no longer require these important relationships to ensure critical information sharing and preparedness.
- CISA cannot require the implementation of cyber and physical security measures, nor can CISA assess the risk to these facilities. On average, facilities improve

their security posture by nearly 60% to comply with CFATS.

- CISA has not conducted terrorist vetting for around 45,000 personnel who have gained access to dangerous chemicals—that's 9,000 names each month going unvetted. Over the lifespan of the Personnel Surety Program, CISA has identified more than 10 individuals with possible ties to terrorism. Given that rate of vetting, CISA would have likely identified an individual with or seeking access to dangerous chemicals as a known or suspected terrorist in the last four months.

Conclusion and Recommended Action

Failure of Congress to act provides an opportunity for facilities subject to the CFATS program. Where a plant has a COI present at STQs, it should take this interim period of relief to "get its house in order" by taking the following measures:

Measure No. 1: Audit. Use the requisite steps to protect information from disclosure and audit your facility's compliance with the CFATS program.

Measure No. 2: Corrective Action. Remedy any deficiencies with guidance from legal counsel to protect from premature release of confidential information to agencies and departments.

Measure No. 3: Voluntary Disclosure Decision. Because the CFATS program is not in effect, your facility may have a unique opportunity to comply with the Federal self-policing policies adopted by the Department of Justice and EPA to report the potential for noncompliance and mitigate or eliminate civil liability.

CFATS Announcement

Contact Us: We find ways to help you move forward.

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