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ENVIRONMENTAL NOTES

Ethan R. Ware | April 2015

TSCA REPORTING: VIOLATIONS MAY NEVER LAPSE, BUT CORROBORATIVE INFORMATION IS BETTER UNDERSTOOD

A recent ruling by EPA's Environmental Appeals Board (EAB) may keep manfacturers on the hook for failing to report new health risks under the Toxic Substance Control Act (TSCA) for a very long time. However, those same facilities now have a better idea what information is covered by TSCA.

Under Section 8(e) of TSCA, a facility must report to EPA any link it discovers between a TSCA chemical and health risks to employees. An exception to this reporting requirement is where EPA is "adequately informed already" of the information because it is "corroborative of well-established adverse effects."

In the case of IN RE: Elementis Chromium, Inc., the EAB reversed a lower court ruling and dismissed a $2.5 million fine against the company for violating Section 8(e) of TSCA. In the late 1990's, the company obtained an epidemiology study showing prolonged exposure to hexavalent chromium could increase risks of lung cancer. Elementis did not share the lung cancer study with EPA for six years.

In the opinion, the EAB concluded the company was not required to file the 8(e) report because EPA was already aware of the lung cancer risk at the dose levels in the study:

As stated in Section 8(e) guidance documents, EPA considers itself to be 'adequately informed already' of information that is 'corroborative of well-established adverse effects.'

The EAB Panel ruled information is deemed not to be "corroborative" if the adverse effects in a new study are "of a more serious degree or a different kind" than risks already known by EPA. Specifically, the EAB determined any information showing health risks at lower dose levels is treated as "non-corroborative." The Elementis study did not indicate lung cancer risks at lower dose levels than those known by EPA.

Importantly, the EAB took the opportunity to re-affirm a controversial interpretation of the five-year statute of limitations for TSCA claims. Under Elementis, the EAB concluded, had the TSCA Section 8(e) reporting requirement been triggered, Elementis would be in violation, even though more than five years passed before the company filed its epidemiology study with EPA. Although this is beyond the Federal statute of limitations, the EAB concluded that each day the report was not filed triggered a new statute of limitations.

While the Elementis decision does clarify what information EPA is now deemed to have knowledge of, it leaves industry on the hook virtually forever for TSCA 8(e) reporting violations.

SOUTH CAROLINA GENERATOR INSPECTION SCHEDULE INCREASES

Generators of hazardous waste with facilities in South Carolina are subject to revised inspection protocols beginning 2015. Now, South Carolina is allocating more resources to provide for increased hazardous waste inspections.

Historically, the South Carolina Department of Health and Environmental Control (DHEC) inspects hazardous waste treatment, storage, and disposal (TSD) facilities annually.

Large quantity generators (LQG), facilities generating more than 1,000 kg of hazardous waste per month, are inspected at least every five (5) years, and small quantity generators (SQG) generating less than 1,000 and more than 100 kg of hazardous waste per month are inspected when complaints are filed.

DHEC recently published a new state inspection schedule, changing the prior inspection schedule as follows for each type of regulated facility:

TSD: Inspect every other calendar year

LQG/SQG: At least as frequently as once per five (5) years

According to a recent DHEC newsletter, "[t]his will allow staff more flexibility to increase inspection efforts at SQGs and LQGs."

Hazardous waste generators of all levels should prepare for increased scrutiny at generator sites.

FREQUENT QUESTIONS: FORM R

EPCRA 313 requires certain facilities manufacturing or "processing" more than 25,000 lbs. or otherwise using 10,000 lbs or more of a listed toxic chemical to annually file a Form R on or before July 1. These Frequent Questions will assist preparation of the Form R for your facility.

QUESTION: If a solvent is a listed toxic chemical and used to clean equipment but does not become part of the final product, is the chemical considered "processed" or "otherwise used"?

ANSWER: If the solvent is not incorporated into a product for distribution in commerce, for purposes of Form R reporting the solvent is considered otherwise used. If the solvent is used to produce a product and becomes part of the final product, it is considered processed. Accordingly, because the solvent is being used only to clean equipment and is not distributed in commerce as part of the final product, it is considered "otherwise used" and subject to the 10,000 lbs reporting threshold.

QUESTION: Does placement of a bulk liquid containing small amounts of a 313 toxic chemical into small bottles for consumer sale constitute a reportable activity?

ANSWER: Yes. Repackaging for distribution in commerce is a type of processing, and the threshold for processing applies. If the bulk liquid contains a listed toxic chemical in excess of de minimis levels (1% or 0.1% for carcinogens) or a listed PBT chemical at any level, the toxic chemical in the liquid would have to be included in calculations determining whether the processing threshold is exceeded for the toxic chemical.

QUESTION: A facility coincidentally manufactures a listed toxic chemical as part of a mixture, which is a byproduct of the primary manufacturing process. The specific concentration of the toxic in the byproduct is not known. Does the facility include the byproduct in its 313 calculations? If so, how does the facility determine the amount?

ANSWER: Yes. Because the reporting facility is manufacturing the toxic chemical byproduct onsite, the facility is required to calculate the amount of toxic chemical coincidentally produced during the reporting year based upon a "reasonable estimate" of the percentage of the toxic chemical in the mixture and byproduct. The quantity of toxic chemical must be aggregated to determine if the facility exceeds the 25,000 lbs threshold under EPCRA.

QUESTION: Is the transfer of a listed toxic chemical from Storage Facility 1 to Storage Facility 2 considered processing a toxic chemical where customers purchase the toxic chemical exclusively from Storage Facility 2?

ANSWER: Yes. Under EPCRA 313 processing includes preparation of a listed toxic chemical after its manufacture for distribution in commerce. Distribution in commerce includes any distribution activity in which benefit is gained by the transfer, even if there is no direct benefit derived from a retail customer. Listed toxics sent from one facility to another under common ownership are considered distributed in commerce, because an economic benefit is derived by the company. The amount of toxic chemical prepared at Facility 1 must be counted towards the processing threshold.

COMPARABLE FUELS NOW HAZARDOUS WASTE WHEN BURNED FOR ENERGY RECOVERY

EPA's Comparable Fuels Exclusion is now vacated. Effective March 30, 2015, fuels produced from a hazardous waste, but comparable to currently used fossil fuels, are no longer excluded from hazardous waste requirements.

In 1998, environmentalists petitioned to block the Comparable Fuels Exclusion from becoming law. The case was held in abeyance until 2013 to allow for settlement discussions and an administrative appeal. In June 2014, the U.S. Court of Appeals for the District of Columbia determined the regulatory exclusion allowing fuels produced from hazardous waste to be burned for energy recovery violated the Resource Conservation and Recovery Act (RCRA).

> [RCRA] unequivocally provides that EPA 'shall promulgate regulations establishing standards… applicable to… owners and operators that produce a fuel from any hazardous waste… facilities which burn, for purposes of energy recovery, any such fuel and… any person who distributes or markets any [such] fuel.'

The Court concluded the repeated use of "any" makes this mandate broadly inclusive. It concluded:

> Given the plain intent of [RCRA], EPA had no discretion, as it claimed, to create its own Comparable Fuels Exclusion….

The Comparable Fuels Exclusion expired March 30, 2015 by Court Order.

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