

Client Alert

EPA Advances Environmental Justice with Novel Expansion of TRI Discretionary Authority

November 29, 2021

In a November 15, 2021 [Federal Register notice](#), EPA described a new policy under which the Agency will use “discretionary authority” to require reporting by facilities that are not subject to the Toxics Release Inventory (TRI) program. TRI reporting is governed by Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), which requires facilities primarily in the manufacturing sector that handle threshold quantities of listed toxic chemicals to estimate and report the release of those chemicals into the environment “to help communities plan for chemical emergencies.” EPA has never before invoked its “discretionary authority” under Section 313, but is doing so now as part of its broader environmental justice initiative. In brief, based on application of “environmental justice screening” tools, the Agency is concerned that certain communities may be exposed to heretofore unreported releases of the carcinogen ethylene oxide (EtO) from facilities that are not otherwise subject to Section 313. Although EPA’s current exercise of discretionary authority under Section 313 appears to be limited to EtO, it is foreseeable that EPA could broaden its use of this discretionary authority to advance the Agency’s environmental justice initiative.

Background on EPCRA Section 313

Under Section 313(b)(1), facilities must submit annual TRI reports to EPA if they fall within certain Standard Industrial Classification (SIC) Codes, have ten or more full-time employees, and handle a toxic chemical in quantities that exceed a regulatory threshold. For facilities that “manufacture or process” a toxic chemical, the applicable threshold is 25,000 pounds per year; for facilities that simply “use” a toxic chemical, the threshold is 10,000 pounds per year.

Notably, under the discretionary prong of Section 313(b)(2), EPA may mandate reporting from facilities regardless of SIC, employee size, or the threshold amount:

The Administrator, on his own motion . . . may apply the requirements of [Section 313] to the owners and operators of any particular facility that manufactures, processes, or otherwise uses a [listed toxic chemical] if the Administrator determines that such action is warranted on the basis of toxicity of the toxic chemical, proximity to other facilities that release the toxic chemical or to population centers, the history of releases of such chemical at such facility, or such other factors as the Administrator deems appropriate.

Use of Discretionary Authority to Advance Environmental Justice Initiative

EPA has now used this discretionary authority for what appears to be the first time. In October, EPA sent notice letters to 31 facilities stating that they are being considered for mandatory TRI reporting for their use of EtO. Eight of the 31 facilities are run by Sterigenics, which made headlines when its Willowbrook, IL facility stopped reporting EtO emissions in 2017 because it was below the regulatory threshold and thus not required to do so. Earlier this year, its New Mexico facility was the subject of a novel public nuisance lawsuit for EtO emissions, raising industry concerns that court injunctions would create inconsistencies with federal and state regulations. At the time, EPA filed an amicus brief seeking to stay out of what it described as a state law dispute; now, the New Mexico facility is among the 31 facilities to which EPA has sent notice letters.

In its 31 nearly identical letters, EPA applied the Section 313(b)(2) factors for selecting these facilities: EtO's toxicity, the facility's proximity to population centers, history of releases, and "other factors as . . . appropriate." Under the discretionary "other" factor, EPA identified concerns about environmental justice and facility employees. More than two-thirds of the facilities had previously submitted TRI reports for EtO releases but have since ceased doing so. It appears that EPA's novel use of discretionary authority is limited to these 31 facilities, judging by the proposed burden hours identified in EPA's supporting statement.

The Implications

EPA's use of its discretionary authority to require TRI reporting by facilities that are not otherwise subject to the TRI could have broad implications. First, it could create information that could be used against such facilities in toxic tort litigation. Notably, EtO is the focus of a large wave of toxic tort litigation. In 2020, more than 700 lawsuits were filed against an EtO facility in Illinois state court; in 2021, another 175 lawsuits were filed in Georgia state court, as well as in the U.S. District Court for Southern Georgia; lawsuits were also filed in Pennsylvania state court earlier this year.

Second, if EPA's first attempt to use discretionary authority under Section 313 goes unchallenged, EPA may be emboldened to make more aggressive, broader use of this discretionary authority provision to advance its environmental justice initiative. This could create significant reporting burdens for all kinds of facilities that may lack the resources to prepare these annual TRI reports.

In sum, facilities that are not subject to EPCRA Section 313 must now consider the possibility of EPA using discretionary authority under the statute to compel them to submit TRI reports estimating toxic chemical releases. Such facilities may even consider the possibility of switching to alternative non-listed chemicals as a precaution, particularly where EPA's environmental justice screening criteria are triggered. Crowell attorneys are familiar with this evaluation and available to assist clients as necessary.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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