

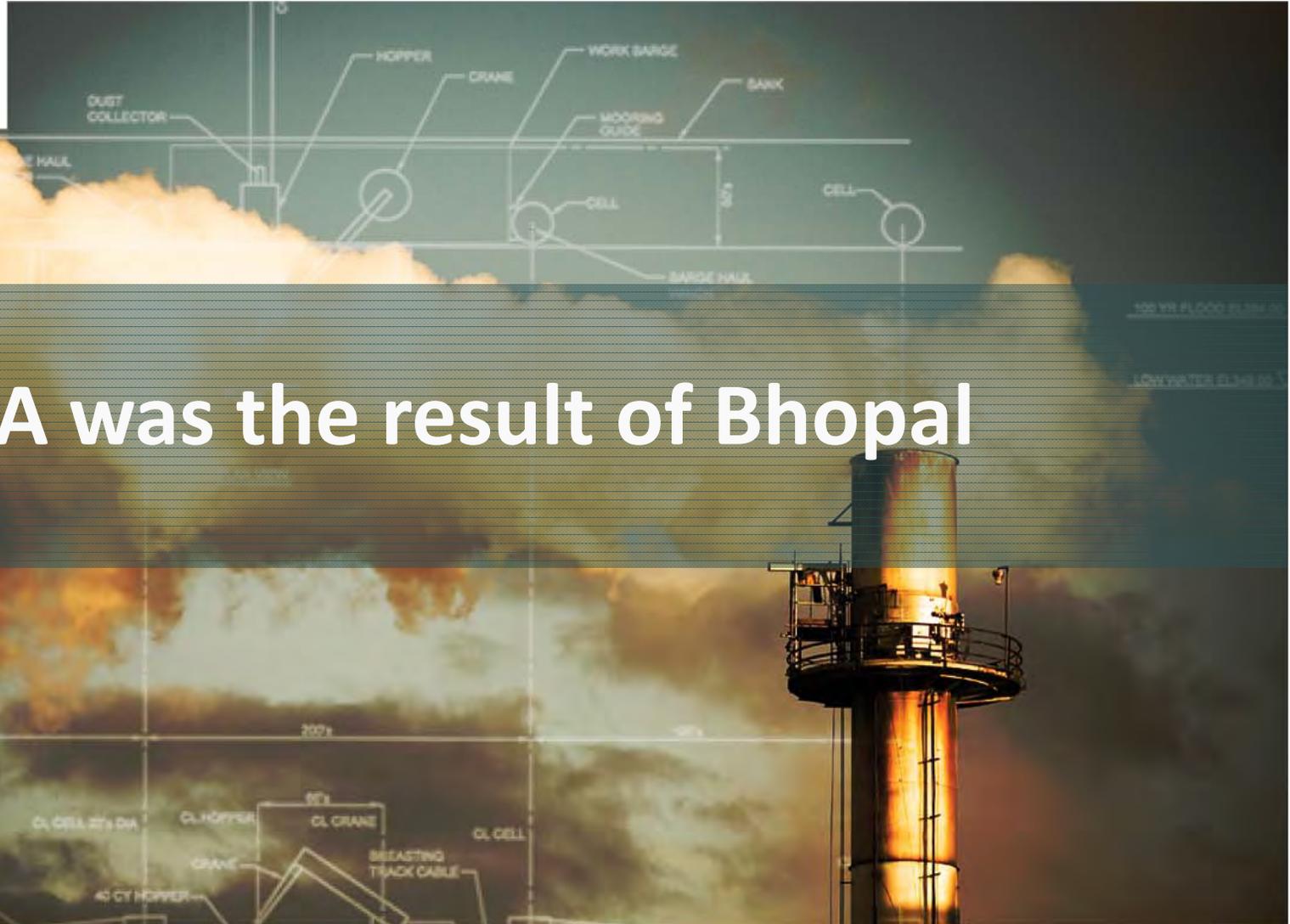


▶ Avoiding and Resolving EPCRA Reporting Violations

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▶ EPCRA was the result of Bhopal



Structure and Purpose of EPCRA



▶ EPCRA Sections 301 to 303 – Emergency planning

- Establishment of state commissions, planning districts and local committees
- Identification of extremely hazardous substances (EHS)
 - 355 EHS
 - Threshold planning quantities = 1 to 10,000 lbs on site for EHS and hazardous chemicals
- Facilities covered – **notification required**
- Covered facilities must:
 - Participate in planning process as facility emergency coordinator
 - **Promptly inform committee of changes**
 - **Provide requested information**

▶ Section 304 – Emergency Notification

Report each time there is a release above reportable quantity

Three types of releases require **different notifications**:

- release of EPCRA-listed EHS requires CERCLA section 103(a) notice
- release of EPCRA-listed EHS does not require CERCLA section 103(a) notice
- Release is not an EPCRA-listed EHS but does require CERCLA section 103(a) notice

Release which results in exposure to persons solely within the site on which a facility is located is exempted.

▶ Section 304 – Emergency Notification

Notice:

- immediate
- to whom?
- content of notice
- written follow up notice

Applies to:

- numerous** substances (not just EHS)
- reportable quantities 1 to 5,000 lbs in 24-hour period

▶ Section 311 – 312 – Community Right to Know

- Maintain SDS for each hazardous chemical (over 500,000 hazardous chemicals must have SDS - not just EHS)
 - What is a hazardous chemical? It has hazardous characteristics
 - Toxicity – acute or chronic
 - Flammable
 - Reactive
 - Sudden release of pressure

▶ Section 311 – 312 – Community Right to Know

- **Reporting requirement:**

- Provide copies of SDS for materials above threshold quantities
 - Lesser of 500 lbs or threshold planning quantities for EHS
 - 75,000 gallons for gasoline
 - 100,000 gallons for diesel
 - 10,000 for all other chemicals
- Can provide a chemical list instead of SDS – must include chemical or common name and hazard classification
- If a facility adds or changes its chemical inventory to increase amounts or exceed threshold must **report changes**

Structure and Purpose of EPCRA



▶ Section 311 – 312 – Community Right to Know

**Tier I or Tier II inventory reports required annually (by March 1)
– don't just copy over last year's report!**

Tier I Reports

provide estimates by category of chemical including maximum on site at any one time in the past year and average daily amount on site. Include general location of chemicals in each category.

Tier II Reports

more detail than Tier I, includes specific chemicals including the chemical or common name, maximum present and average daily amount, description of storage, location, is information deemed private.

Kentucky requires electronic reporting and fee payment.

▶ Section 313 – Toxic Release Inventory (TRI)

- Applies to certain industry sectors – see <http://www.epa.gov/tri/lawsandregs/naic/ncodes.htm>
- Program is not just for releases. Includes information about recycling, energy recovery, treatment as well as environmental releases.
- **Report is due July 1**
- Information is available to the public at www.epa.gov/tri

▶ Failure to reevaluate when the facility or chemicals at the facility change

- Lack of up-to-date SDS
- Lack of accurate inventory
- Failure to recognize EHS

► Mistakes in classifying, measuring or considering materials

- De minimus chemicals – any hazardous chemicals that are 1% or more of a mixture must be reported (see SDS); carcinogens in excess of 0.1% must be reported
- Identifying when to list a mixture and when to list a pure chemical
- Industrial batteries containing sulfuric acid
- Manufacturing support materials
- Residual in drums

Practice points

- Start with a thorough audit of materials on site
- Develop and maintain an accurate inventory system that tracks materials coming on site, SDS management, materials used, recycled, disposed of
- Understand threshold reporting quantities and reportable release quantities for each material
- Create a release notification guidance
- Begin early when preparing Tier II reports and TRI
- Engage with your local responders and emergency planning committee

▶ EPA Fact Sheet -

http://www2.epa.gov/sites/production/files/2015-05/documents/epcra_fact_sheet.pdf

The Title III List of Lists -

<http://www.epa.gov/emergencies/tools.htm#lol>

Kentucky's "How to Comply Packet" -

<http://kyem.ky.gov/programs/Documents/2015%20EPCRA%20How%20to%20Comply%20Packet.pdf>



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EPCRA Enforcement

- ▶ Overview
 - ▶ EPCRA Enforcement Responsibility
 - ▶ EPRCA Enforcement Trends
 - ▶ EPA Inspections
 - ▶ EPA Enforcement Response Policies/Penalty Policies
 - ▶ Tips on Negotiating EPCRA Enforcement Cases
 - ▶ Voluntary Self-Disclosure Considerations

EPCRA Enforcement Responsibility

- ▶ In Kentucky, EPCRA is enforced by EPA Region 4, based in Atlanta
- ▶ Region 4 covers Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee
- ▶ EPCRA not addressed by state agency enforcement of other programs
 - ▶ Cannot rely on prior inspections under other programs for assurance of compliance with EPCRA requirements

EPCRA Enforcement Trends

- ▶ Significant enforcement activity within Region 4
- ▶ For example, from August 1, 2014 – August 1, 2015, Region 4 filed 32 administrative complaints initiating new enforcement cases. This does not include other types of enforcement (citizen suits, federal lawsuits, etc.). This also does not include settlements reached without filing of complaint or consent agreement/final order.
- ▶ Bottom line – if an EPCRA violation exists at a facility, there is a good chance it will be discovered

EPA Inspections

- ▶ Performed by Region 4 inspectors
- ▶ Take place at the facility
- ▶ Involve both a review of records and inspection of facility and operations
- ▶ Focus on:
 - ▶ Completion, accuracy, and retention of required reports and documents
 - ▶ Operations that may be subject to reporting

EPA Inspections

- ▶ Advance notice of inspection may or may not be provided
- ▶ If advance notice is provided, critical that all necessary records be gathered and made available for review
- ▶ As with all inspections under any program, focus should be on preparation and cooperation.
 - ▶ General good housekeeping of facility presents a positive impression to inspector
 - ▶ Cooperative attitude
 - ▶ Key personnel available to accompany inspector/address questions or locate documents

EPA Inspections

- ▶ Inspector will likely hold some form of close-out meeting with personnel, but may not address ultimate findings of compliance/non-compliance
- ▶ A positive meeting does not necessarily mean no violations have been discovered
- ▶ There is often a significant lag time between inspection and a letter or NOV alleging violations – a delay of 6-12 months is not uncommon

EPA Inspections

- ▶ If inspection identifies potential violations, EPA will in most cases issue a letter of potential violations or NOV
- ▶ This letter will typically ask the facility to appear for a “show cause” meeting to address EPA’s allegations. Such meetings may be held telephonically or in Atlanta
 - ▶ EPA has authority to directly file a complaint in federal court or take other action, but the vast majority of cases are addressed in the administrative setting.
 - ▶ EPA will usually, at first, operate under the assumption that the violation can be settled without litigation

Enforcement Response Policy

- ▶ Upon receipt of communication from EPA indicating that violations have been identified, preparation should begin for show cause call or written submittal to EPA addressing alleged violations
- ▶ If using legal counsel, they should be involved early in the process
 - ▶ This avoids unnecessary admissions of liability, and allows legal counsel to present the case in the best light from the outset
 - ▶ Waiting until EPA proposes a penalty is not ideal time to involve legal counsel

Enforcement Response Policy

- ▶ Majority of violations discovered during inspection are resolved via Consent Agreement/Final Order negotiated using EPA's EPCRA "Enforcement Response Policy" documents, often referred to as the "Penalty Policy"
- ▶ The CA/FO is a settlement, but is also legally binding order of EPA
- ▶ Signing a CA/FO requires that the facility certify compliance with EPCRA

Enforcement Response Policy

- ▶ EPA Region 4 adheres very closely to the guidelines in the Enforcement Response Policies
- ▶ It is very difficult to negotiate a penalty that is outside of the ranges contained in the Enforcement Response Policy
- ▶ EPA CA/FOs are publicly available, and EPA Region 4 staff have stated that a primary goal is consistency in the types of penalties imposed in similar cases
 - ▶ While this provides predictability, it significantly limits EPA's discretion to reduce the penalty

Enforcement Response Policy

- ▶ EPA's Enforcement Response Policy requires enforcement staff to assign each violation a "gravity" component, based on: the type of violation, the amount of chemical involved, and the size of the facility
- ▶ Based on its "gravity," the violation is assigned a location on a "penalty matrix" which provides a dollar amount range of civil penalty
- ▶ EPA is also required to seek any "economic benefit of noncompliance," but this is typically minimal for most EPCRA violations

Enforcement Response Policy

- ▶ The Gravity component of a violation may be adjusted upward or downward based on many factors, including:
 - ▶ Facility's history of prior violations
 - ▶ Facility's cooperative attitude (or lack thereof)
 - ▶ Ability to pay
 - ▶ "Other factors as justice may require"
 - ▶ Up to a 30% reduction for cooperation is available, providing a significant incentive to work in a cooperative manner with EPA

Enforcement Response Policy

- ▶ Because the Enforcement Response Policy is relatively rigid, EPCRA violations often carry significant financial penalties
- ▶ The majority of resolved EPCRA enforcement cases in recent years have involved five-figure civil penalty amounts, even when they involve only a handful of alleged violations and no environmental harm

Tips for Resolving EPCRA Violations

- ▶ Cooperative attitude from time of inspection through negotiation of CA/FO
- ▶ Involvement of legal counsel
- ▶ Preparation of written submittals where appropriate
- ▶ Ensuring full compliance prior to signing CA/FO certification
- ▶ Evaluation of Supplemental Environmental Projects (SEPs) in mitigation of penalty amount
 - ▶ There are pros and cons to SEPs

Voluntary Self-Disclosure

- ▶ Given the rigid EPCRA Enforcement Response Policy, and high potential penalty amounts, there is a significant incentive to consider voluntary self-disclosure under EPA's Audit Policy
 - ▶ Audit Policy can be found at 65 Fed. Reg. 19,618 (April 11, 2000) (“Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations”)
 - ▶ This policy provides for a potential complete elimination or 75% reduction in the “gravity-based” component of civil penalty for identified violations
 - ▶ As noted above, “gravity” component is major component of most EPCRA violations

Voluntary Self-Disclosure

- ▶ **Nine conditions of Audit Policy to receive complete elimination of gravity-based component**
 - ▶ Violation discovered through environmental audit or compliance management system
 - ▶ Violation identified voluntarily
 - ▶ Prompt disclosure
 - ▶ Disclosure not result of EPA or third party action
 - ▶ Correction/remediation of violation
 - ▶ Take steps to prevent recurrence
 - ▶ No repeat violation
 - ▶ No environmental harm
 - ▶ Cooperation with EPA

Voluntary Self-Disclosure

- ▶ **Environmental Audit or Management System**
 - ▶ Necessary to receive full reduction; only 75% reduction available if no audit or EMS
 - ▶ No bright-line rule on what constitutes environmental audit, but must be systematic, intentional activity by the facility to discover and remedy potential violations

Voluntary Self-Disclosure

- ▶ Violation is voluntarily identified
 - ▶ Cannot be identified as part of activity required by some other environmental law – e.g., ordinary monitoring under NPDES or Clean Air Act permit

Voluntary Self-Disclosure

- ▶ **Prompt Disclosure**

- ▶ Violation must be self-disclosed within 21 days of discovery
- ▶ Attention must be paid to this deadline during the course of any audit or other systematic review of compliance to ensure that the deadline is met

Voluntary Self-Disclosure

- ▶ **Not the result of EPA or Third Party Action**
 - ▶ Cannot, for example, receive a citizen suit notice letter or EPA NOV and then claim to have discovered the violation

Voluntary Self-Disclosure

- ▶ Violation Must Be Corrected/Remedied
- ▶ Steps Must Be Taken to Prevent Recurrence of Violation
- ▶ No Actual Harm to the Environment
 - ▶ Usually not an issue in EPCRA self-disclosure situations
- ▶ No “Repeat” Violation
 - ▶ The facility cannot take advantage of voluntary self-disclosure if it had the same or a closely-related violation in the prior three years

Voluntary Self-Disclosure

- ▶ Facility must cooperate with EPA and provide EPA with information necessary to determine whether the Audit Policy applies
- ▶ Legal counsel should be consulted in drafting the voluntary self-disclosure and evaluating whether the Audit Policy applies to a discovered violation

Questions?

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