

Environmental Guidance Document:

**Release Reporting for the Oil and Gas
Exploration and Production Industry as
Required by the Clean Water Act, the
Comprehensive Environmental Response,
Compensation and Liability Act, and the
Emergency Planning and Community
Right-to-Know Act**

API BULLETIN E4
SECOND EDITION, MAY 2003



**Helping You
Get The Job
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Upstream Segment

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FOREWORD

This document has been developed to provide the oil and gas production industry guidance on reporting releases of hazardous substances and petroleum to water as required by the Clean Water Act (CWA) and reporting releases of hazardous substances into the environment as required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA). This document only covers federal requirements for release reporting under the CWA, CERCLA and EPCRA. There are other federal, state, and local laws with spill or release reporting requirements. It is important to understand that compliance with federal reporting requirements does not necessarily satisfy state or local reporting requirements and vice versa.

The document covers the reporting of what most in the industry consider “emergency” releases, which are unplanned and typically are not covered under a permit issued by a government agency. These releases may be to the air, to the ground (and potentially groundwater), to a storm water drainage system, to a waste water system which discharges into a publicly owned treatment works, to traditionally navigable waters or to any other body of water. This document addresses permit exceedances only to the extent that the exceedances are in excess of an established reportable quantity. Releases exceeding permit stipulations, but not meeting an established reportable quantity, may be reportable under other state and federal regulations outside the scope of the CWA, CERCLA and EPCRA.

In preparing the document, API recognized the complexity of the reporting requirements and chose a format to help the user through the various steps associated with deciding what and when to report. The heart of the document is Section 3, which consists of several flowcharts that address the numerous exemptions and requirements of the regulations. The flowcharts were developed with the understanding that the user would have some basic knowledge of the various reporting requirements.

The flowcharts are supported by text (Sections 4, 5, and 6) designed to provide the user with additional insight into the specific questions addressed in the flowcharts. For example, the EPCRA section 302 flowchart asks, “Does the facility have an extremely hazardous substance on site?” The text of the document provides specific guidance on 1) what is considered a facility and 2) what chemicals are considered to be extremely hazardous substances.

Section 7 consists of 17 examples of potentially reportable releases that can occur in oil and gas production operations and shows the user of the document how the flowcharts and text are applied to determine whether an event is reportable.

A list of common oilfield chemicals that may trigger release reporting requirements is included as Appendix A.

The document is not meant to be a substitute for legal advice provided by an attorney. Individuals and organizations using this guidance document are cautioned that requirements of federal, state, and local regulations are constantly evolving and should be reviewed periodically to assure that a company’s practices are consistent with current law and regulations.

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NOTE ON REFERENCES: All references to the Code of Federal Regulations in this document are to the edition revised as of July 1, 2002, unless otherwise noted, as updated by Federal Register notices as of the date of publication of this Bulletin. References to the statutes are to the versions in effect as of the date of publication. Daily Federal Register notices

and the Code of Federal Regulations are available online from the Government Printing Office website and the Environmental Protection Agency website.¹

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¹The Federal Register is available from the Government Printing Office website at http://www.access.gpo.gov/su_docs/aces/aces140.html, and daily notices are posted on the Environmental Protection Agency website at <http://www.epa.gov/epahome/rules.html#proposed>. The National Archives and Records Administration makes the current Code of Federal Regulations available online at <http://www.access.gpo.gov/nara/CFR/index.html>, and the EPA posts its regulations at <http://www.epa.gov/epahome/cfr40.htm>.

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Environmental Guidance Document: Release Reporting for the Oil and Gas Exploration and Production Industry as Required by the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Emergency Planning and Community Right-to-Know Act

1 Overview of Relevant Statutes

1.1 CLEANWATER ACT (CWA)¹

Section 311(b) of the CWA, 33 U.S.C. §1311(b), prohibits the discharge of harmful quantities of oil or hazardous substances in or on “navigable waters of the United States,” including a broad range of bodies of water that are not literally navigable. The person in charge of a vessel, an onshore facility, or an offshore facility must report to the National Response Center (NRC) prohibited discharges of oil or hazardous substances. Regulations define the reportable quantities (RQs) of hazardous substances and the harmful quantity of oil, which includes any amount that creates a sheen. Section 4 includes a detailed discussion of CWA notice requirements.

1.2 THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT (CERCLA OR SUPERFUND)²

Although CERCLA is known primarily for its provisions dealing with the clean-up of sites where hazardous wastes and hazardous substances have been abandoned, CERCLA §§102 and 103, 42 U.S.C. §§9602 and 9603, establish a program for reporting releases of hazardous substances. Section 103(a) requires any person in charge of a vessel or an onshore or offshore facility to notify the NRC as soon as that person has knowledge of a release of an RQ of a hazardous substance in a 24-hour period. CERCLA provides relief from reporting releases that are “federally-permitted,” and reduced reporting requirements apply for releases that qualify as “continuous releases.” Crude oil (petroleum) and natural gas, or any fraction thereof, are excluded from the definition of hazardous substance under CERCLA. Section 5 includes a detailed discussion of CERCLA notification requirements.

1.3 EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA)³

EPCRA was adopted in 1986 as part of the Superfund Amendments Reauthorization Act, but it is a free-standing statute, separate from the Superfund program.

EPCRA section 301 establishes a framework for local emergency response planning and requires the governor of each state to establish a State Emergency Response Commission (SERC). These state commissions then designate emergency planning districts and appoint local emergency planning committees (LEPCs) for each district. EPCRA §301, 42 U.S.C. §11001.

EPCRA also imposes several obligations on industry. Each facility with a threshold planning quantity (TPQ) of an extremely hazardous substance (EHS) present must appoint an emergency coordinator and must notify the state commission that it is subject to emergency planning requirements. EPCRA §§302-303, 42 U.S.C. §§11002-11003. Most importantly, §304, 42 U.S.C. §11004, requires a facility to notify SERCs and LEPCs when it releases an RQ of an EHS or a CERCLA hazardous substance in a 24-hour period.⁴

Other EPCRA provisions focus on providing information to the public on chemicals present in the community, including the type, amount, location, use, disposal, and release into the environment of such chemicals. EPCRA §311, 42 U.S.C. §11021, requires covered facilities to file copies of Material Safety Data Sheets (MSDSs) (or a list of chemicals covered by an MSDS)

¹Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.* Subsequent citations to the CWA will appear in the text.

²Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 *et seq.* Subsequent citations to CERCLA will appear in the text.

³Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §11001 *et seq.* Subsequent citations to EPCRA will appear in the text.

⁴In the case of the release of an EHS that is a CERCLA hazardous substance EPCRA, like CERCLA, requires notice if the release is of an RQ; however, in the case of the release of an EHS that is not a CERCLA hazardous substance, the statute requires notice if the release “is in an amount in excess of” an RQ. EPCRA §304(a)(2)(B) (*emphasis added*). Although the statute defines the reporting obligation for such EHS releases as in excess of the RQ, the regulations require a report of a release of an RQ. 40 CFR §355.40(a). For the sake of simplicity, this Bulletin, even when referring to the statutory reporting obligations will, like the EPA regulations, ignore the distinction

with LEPCs, SERCs, and local fire departments. Any facility required to submit MSDSs or chemical lists also must submit annual emergency and hazardous chemical inventory forms to the LEPC, SERC, and local fire department.

EPCRA §313, 42 U.S.C. §11023, requires facilities in certain industrial sectors to file toxic release inventory (TRI) information for certain chemicals they manufacture, process, or otherwise use. This Bulletin does not cover the TRI program because oil and gas exploration and production operations are not included among the industrial categories subject to the TRI program.⁵

2 Overview of Government Agencies

2.1 NATIONAL RESPONSE CENTER

The Clean Water Act requires the person in charge to notify “the appropriate agency” of prohibited discharges to “navigable waters” of oil or a hazardous substance in an RQ. CWA §311(b), 33 U.S.C. §1321(b). The “appropriate agency” is the National Response Center (NRC) of the U.S. Coast Guard. 40 *CFR* §110.6. Similarly, CERCLA directs that notice of a hazardous substance release be provided to the NRC. CERCLA §103(a), 42 U.S.C. §9603(a).

The NRC, located at U.S. Coast Guard Headquarters, acts as the point of contact for all reports of pollution incidents reportable under the CWA and CERCLA and as the communications center for the National Response Team. The NRC receives and immediately relays telephone notices of discharges or releases to the appropriate federal on-scene-coordinator (OSC), including the Federal Emergency Management Agency in the event of a potential disaster or evacuation situation.

Both the CWA and CERCLA regulations require telephone notice to the NRC of releases or discharges. The telephone number is (800) 424-8802, or in metropolitan Washington, D.C. (202) 267-2675. Regulations implementing the CWA reporting requirement allow notice to the pre-designated OSC when direct reporting to the NRC is not practicable. 40 *CFR* §110.6. See 4.5.

See 4.5 and 5.14 and Appendix B for additional information on online reporting and for an outline of information the NRC will request.

2.2 THE STATE EMERGENCY RESPONSE COMMISSION OR SERC

EPCRA section 301(a) calls for the establishment of state emergency response commissions (SERCs)⁶. The Governor of each state is directed to appoint the SERC, and members of the SERC are to be technical experts in their respective fields. The SERC is responsible for the following:

- appointing the local emergency planning committees (LEPCs),
- supervising and coordinating the activities of the LEPCs,
- establishing procedures for receiving and processing requests from the public for information, and
- designating an official to serve as information coordinator.

2.3 THE LOCAL EMERGENCY PLANNING COMMITTEE OR LEPC

EPCRA also directs the SERC to designate emergency planning districts and to appoint members of a LEPC for each district.⁷ The membership of each LEPC is to include, among others, elected state and local officials and representatives of law enforcement, civil defense, fire departments, community groups, and facilities subject to EPCRA.

The LEPC must establish procedures for receiving and processing requests for information. Each LEPC also must establish rules to provide for public notification of committee activities, public meetings to discuss the emergency plan, and distribution of the emergency response plans.

Each LEPC prepares a comprehensive emergency response plan. In so doing, the LEPC must evaluate the need for resources to develop and implement the plan and must make recommendations regarding any additional resources that may be required.

⁵EPCRA allows the Environmental Protection Agency (EPA) to expand the program's coverage by regulation. EPA proposed adding E&P operations, along with other industrial categories, to the TRI program in 1996. See “Addition of Facilities in Certain Industry Sectors; Toxic Chemical Release Reporting; Community Right to Know; Proposed Rule,” 61 Fed. Reg. 33,587 (June 27, 1996). In adopting a final rule adding the other categories, EPA in 1997 deferred action on E&P operation pending further study. See “Addition of Facilities in Certain Industry Sectors; . . . Final Rule,” 62 Fed. Reg. 23,834, 23,855 (May 1, 1997). EPA included the addition of E&P operations to TRI to its regulatory plan in October 1997 but withdrew the issue from its unified agenda in August 2000, stating, “Agency Plans No Further Action.” “TRI; Addition of Oil and Gas Exploration and Production to the Toxic Release Inventory” (The Regulatory Plan), 62 Fed. Reg. 57,149 (Oct. 29, 1997); “TRI; Addition of Oil and Gas Exploration and Production to the Toxic Release Inventory” (Unified Agenda), 65 Fed. Reg. 74,587 (Nov. 30, 2000).

⁶EPA's Chemical Emergency Preparedness and Prevention Office maintains a list of SERC contacts on its website (<http://www.epa.gov/swer-cepp/serclist.htm>).

⁷EPA's Chemical Emergency Preparedness and Prevention Office maintains a list of LEPCs on its website (<http://www.epa.gov/ceppo/lepclist.htm>).

3 Release Reporting Flowcharts

This section provides the user of this document with a simple set of flowcharts for determining when release reporting is required. The first chart is a “master” chart giving an overview. It is followed by flowcharts that provide further detail on each type of report or notification.

Flowcharts address release reporting requirements under the CWA, CERCLA and EPCRA. The CERCLA and EPCRA flowcharts are supplemented by two flowcharts addressing the exemption for federally permitted releases.

Additional flowcharts address EPCRA §§302 notification and EPCRA §§311 and 312 hazardous chemical reporting requirements.

For detailed information not readily available in the flowcharts, the reader should refer to specific sections which address the reporting requirements in more detail.

Appendix A includes a list of common oilfield chemicals with TPQs and RQs. Section 7 contains examples of potential release reporting scenarios.

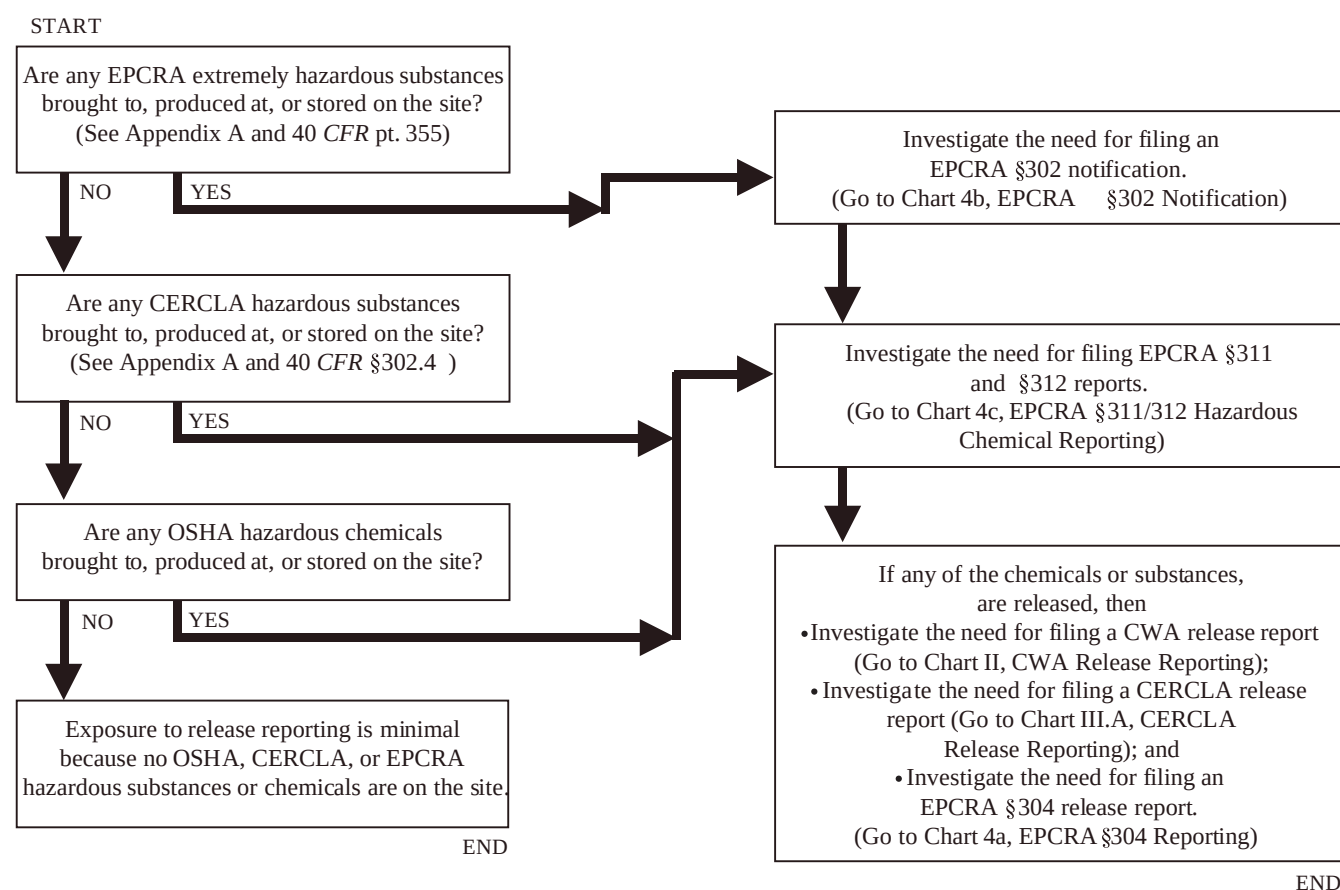


Chart 1—Summary of Release Reporting and Other EPCRA Notification Requirements

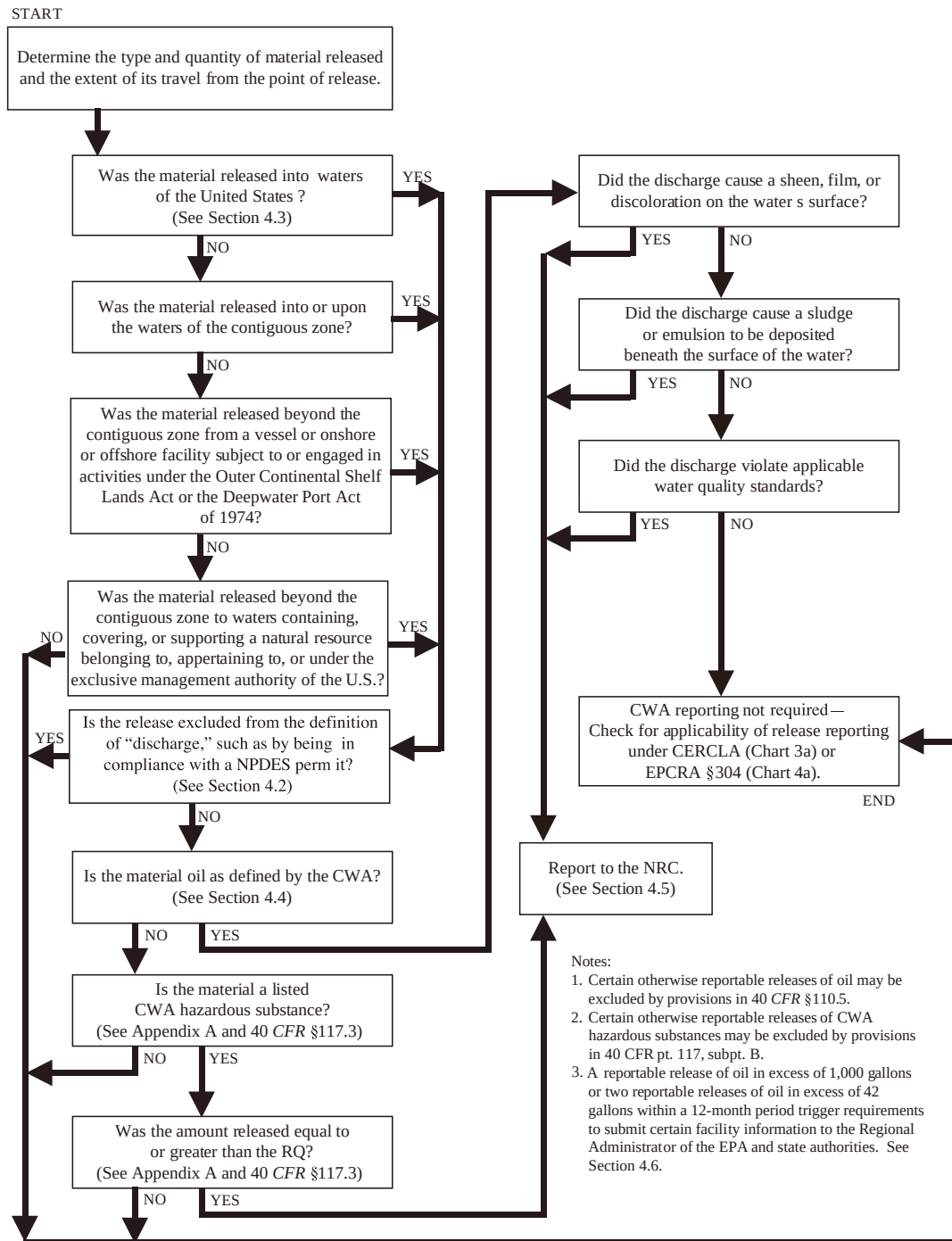


Chart 2—CWA Release Reporting

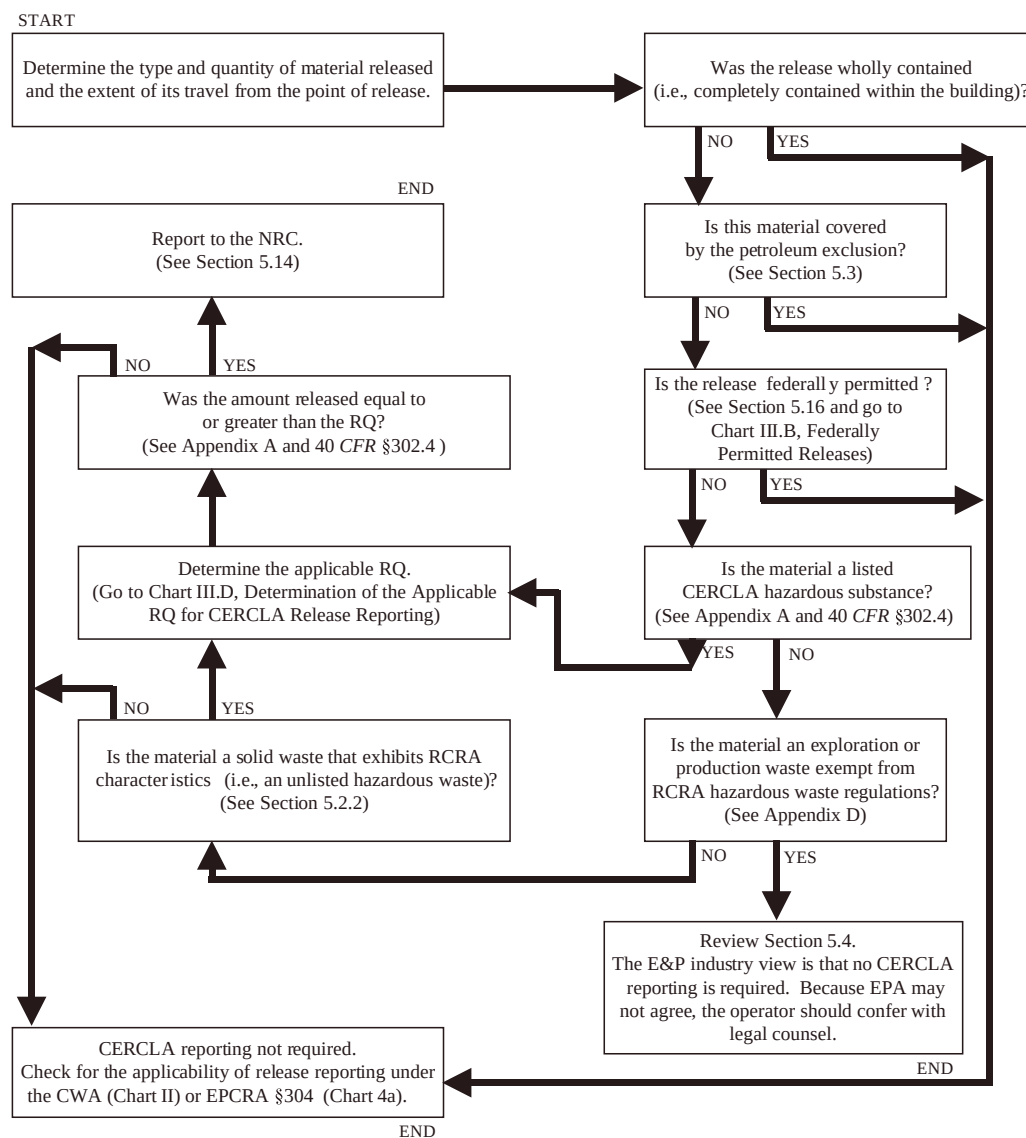


Chart 3a—CERCLA Release Reporting

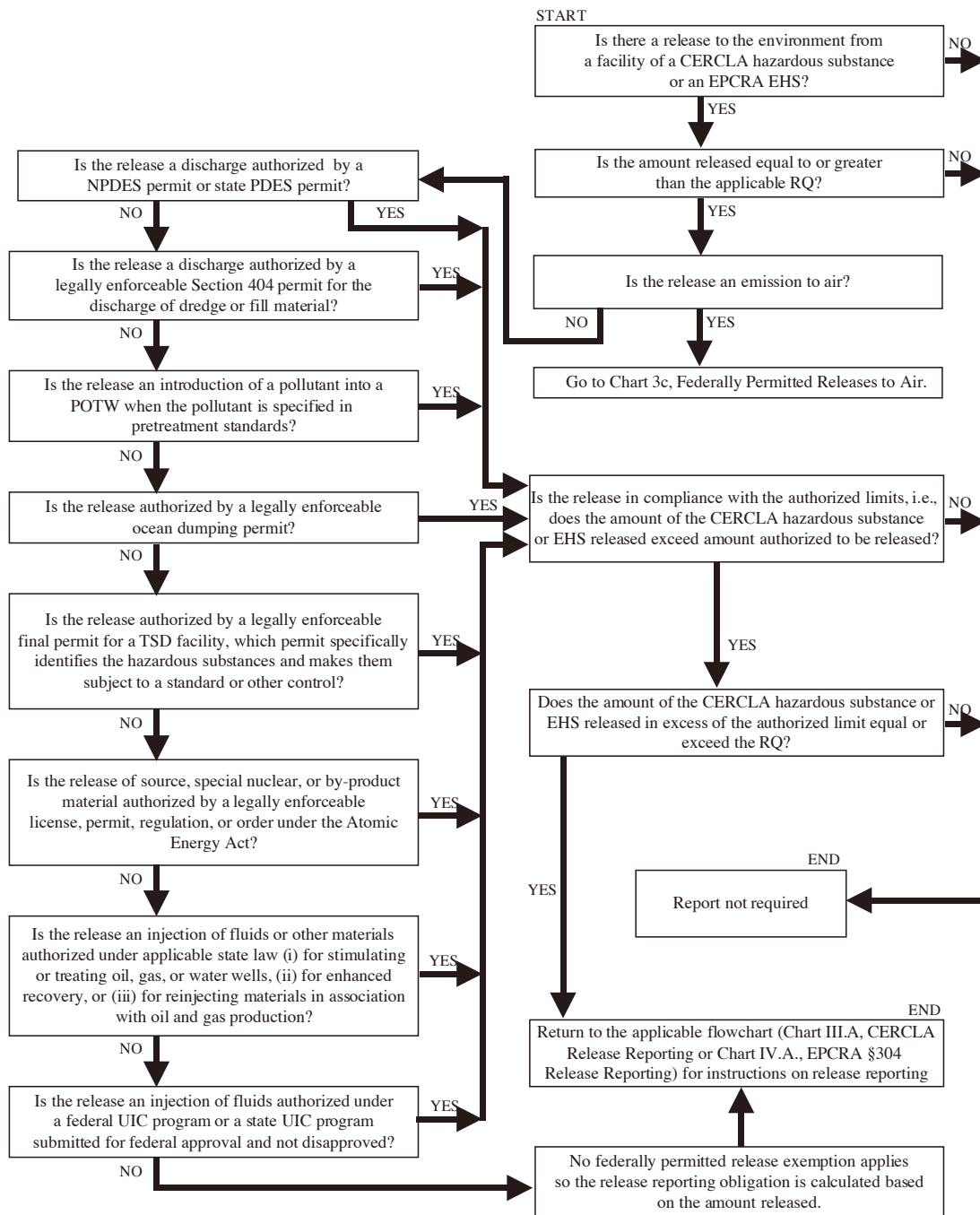


Chart 3b—Federally Permitted Releases

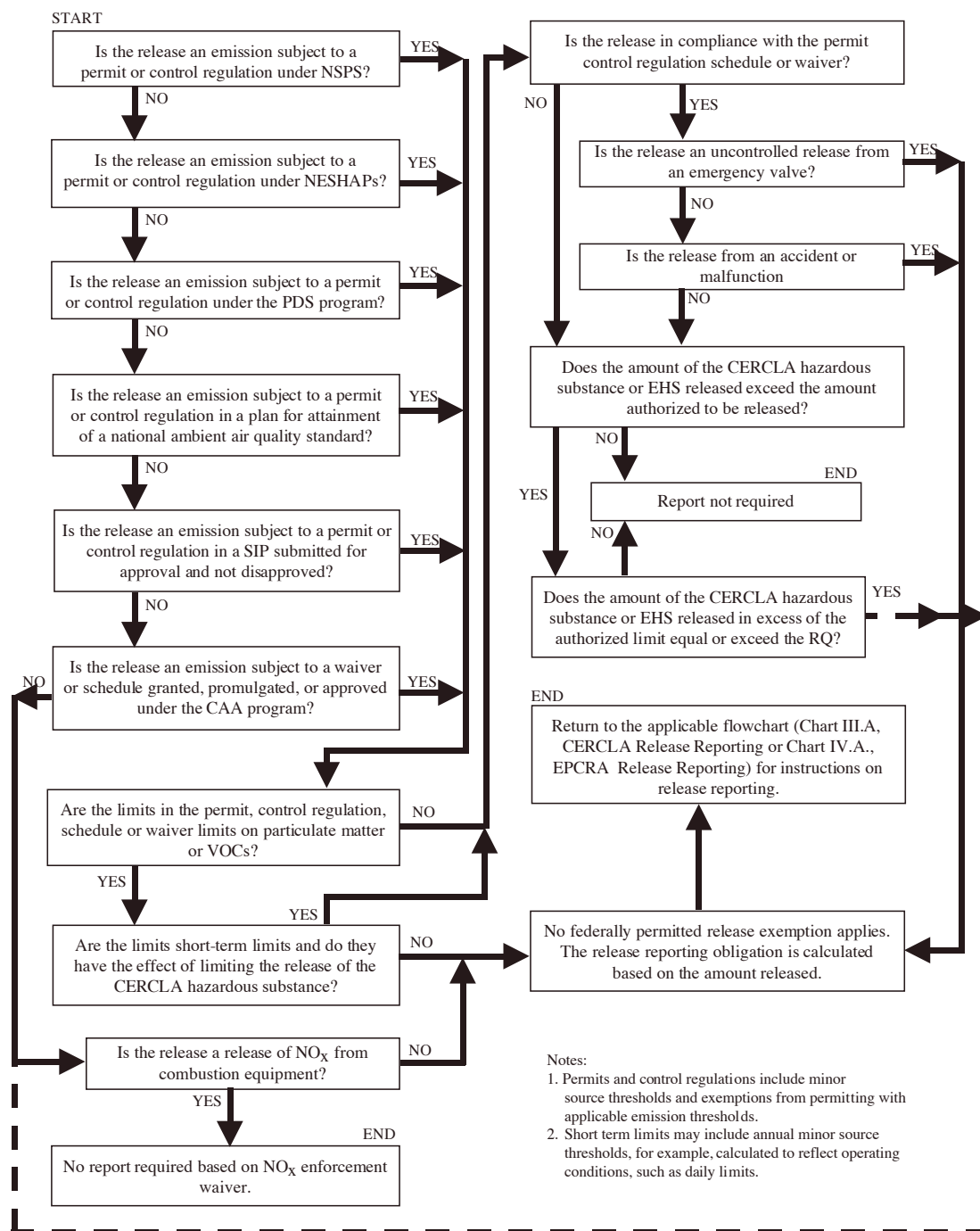


Chart 3c—Federally Permitted Releases to Air

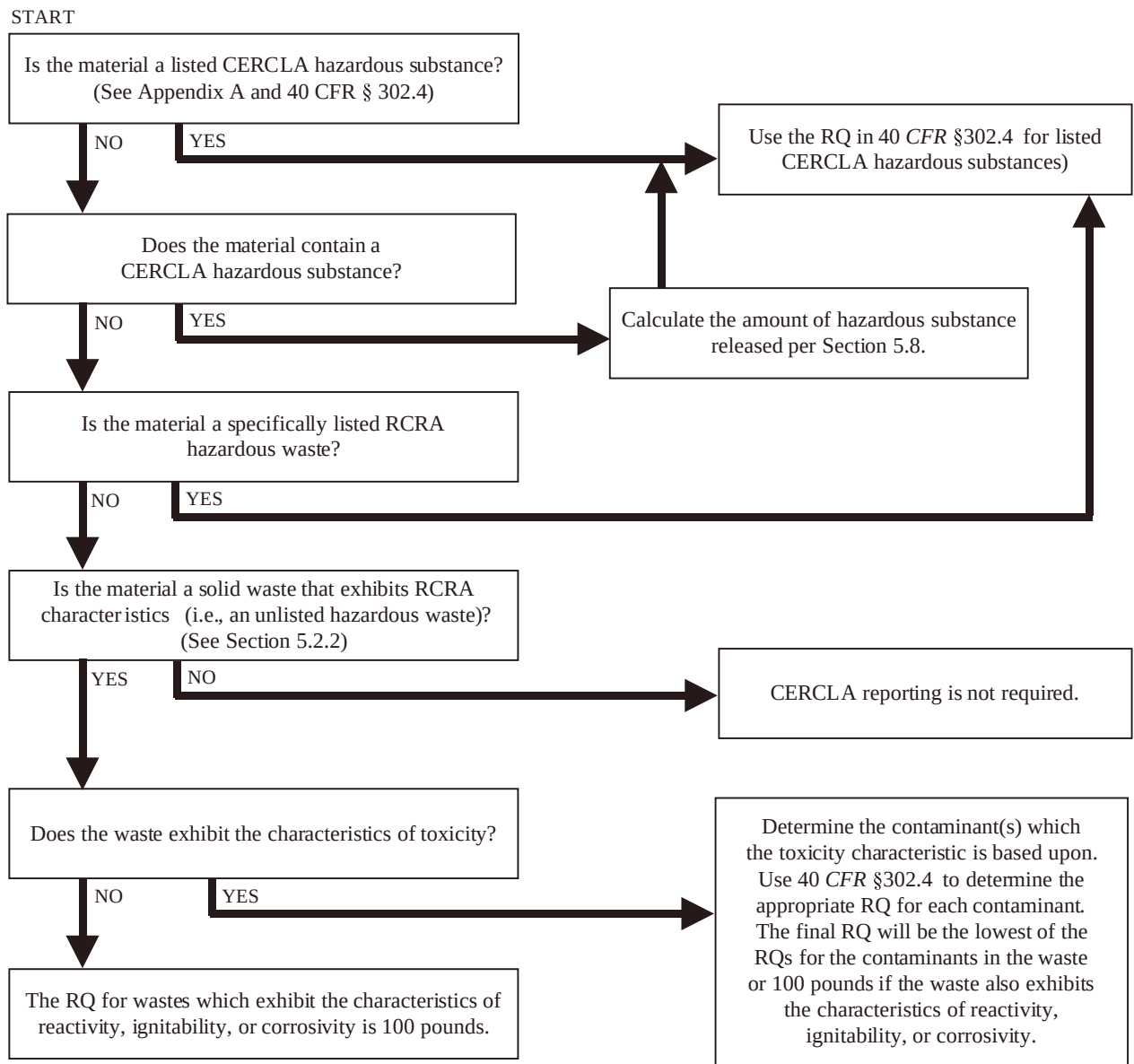


Chart 3d—Determination of Applicable RQ for CERCLA Release Reporting

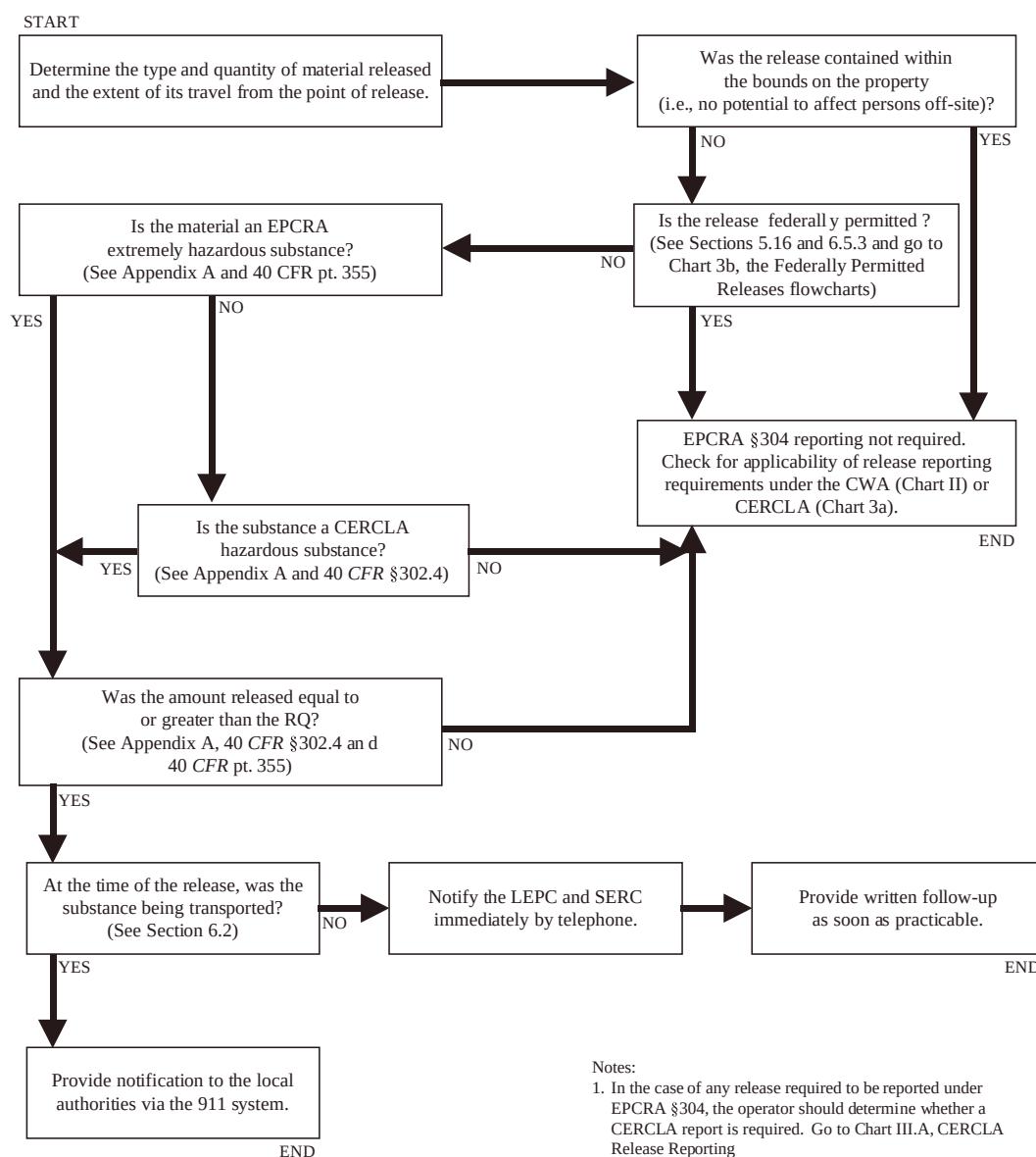


Chart 4a—EPCRA Section 304 Reporting

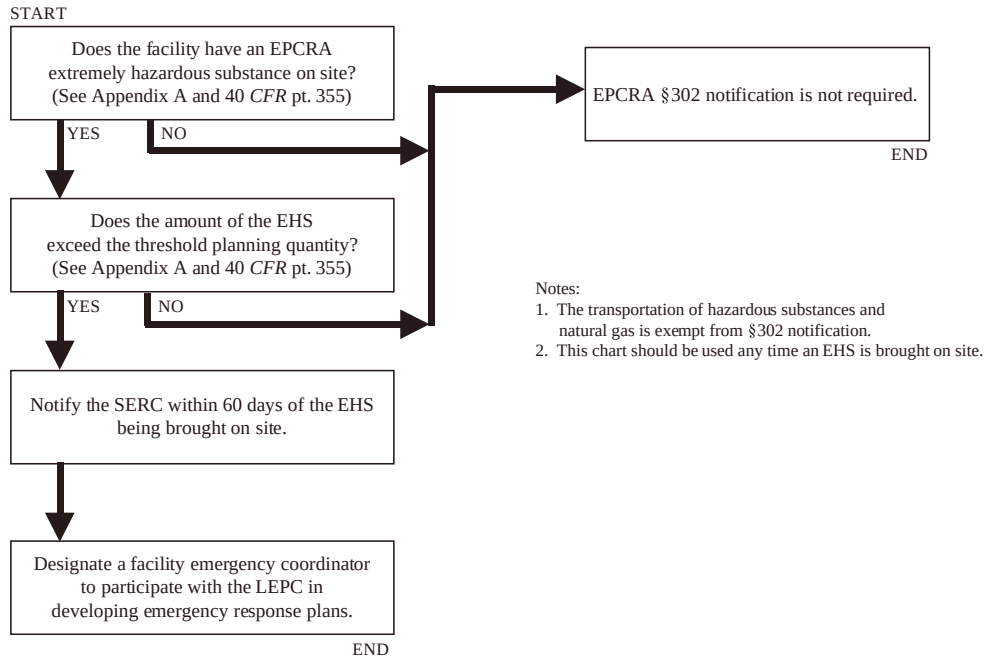


Chart 4b—EPCRA Section 302 Notification

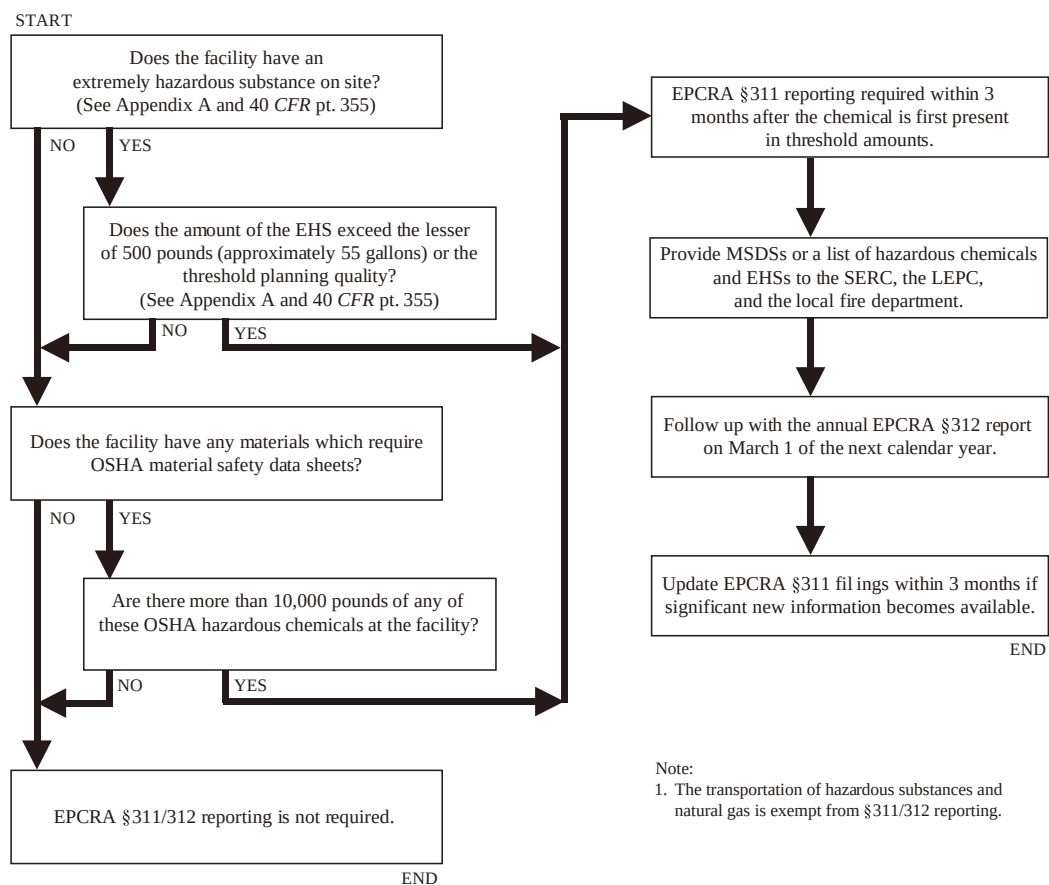


Chart 4c—EPCRA Section 311/312 Hazardous Chemical Reporting

4 Reporting Requirements under the Clean Water Act (CWA)

4.1 GENERAL REQUIREMENTS

The CWA prohibits the discharge of harmful quantities of oil or hazardous substances into or upon the “navigable waters of the United States” and requires immediate notice of a prohibited discharge. CWA §311(b), 42 U.S.C. §1321(b).

The requirement to report prohibited discharges is very similar to the release reporting requirements under CERCLA section 103, 42 U.S.C. §9603. There are, however, some important differences:

- The CWA requires reports only for releases to navigable waters, while CERCLA requires reports of releases to all environmental media—water, air and land.
- The list of hazardous substances reportable under the CWA is considerably smaller than that under CERCLA.
- The CWA requires reports of releases of petroleum, but CERCLA does not.
- CWA regulations include specific exclusions from reporting at 40 *CFR* 117.11(a)-(j) that diverge from the CERCLA exclusions.

4.2 SCOPE OF THE DISCHARGE REPORTING REQUIREMENT

The statute prohibits discharges of oil or hazardous substances into or upon “the navigable waters of the United States [and] adjoining shorelines.” The scope of “navigable waters” is outlined below in 4.3.

Also prohibited are:

- discharges into or upon the waters of the contiguous zone; and
- discharges beyond the contiguous zone “in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).”

CWA §311(b)(1), 33 U.S.C. §1321(b)(1). EPA regulations designating CWA hazardous substances have clarified that the contiguous zone is the zone established under article 24 of the Convention of the Territorial Sea and the Contiguous Zone. The regulations identify other prohibited discharges as those into waters beyond the contiguous zone.

- if the discharge is from a vessel or onshore or offshore facility subject to or engaged in activities under the Outer Continental Shelf Lands Act (43 U.S.C. §1331 *et seq.*) or the Deepwater Port Act of 1974 (33 U.S.C. §1501 *et seq.*), or
- if the waters contain, cover, or support a natural resource belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976, 16 U.S.C. §1801 *et seq.*).

See 40 *CFR* §116.3 Discharges to the contiguous zone or beyond the contiguous zone are not prohibited if they are permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973. CWA §311(b), 33 U.S.C. §1321(b).

Excluded from the definition of “discharge” are:

- discharges in compliance with a National Pollutant Discharge Elimination System (NPDES) permit;
- discharges resulting from circumstances identified and reviewed and made part of the public record issued with respect to an issued or modified NPDES permit, and subject to a condition in the permit;
- continuous or anticipated intermittent discharges from a point source identified in a NPDES permit or permit application that are caused by events occurring within the scope of relevant operating or treatment systems; and
- certain discharges authorized under the National Contingency Plan.

See CWA §311(a)(2), 33 U.S.C. §1321(a)(2).

4.3 DEFINITION OF “NAVIGABLE WATERS OF THE UNITED STATES”

The CWA defines “navigable waters of the United States” as “the waters of the United States, including the territorial seas.” CWA §502(7), 33 U.S.C. §1362(7). Until the United States Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*⁸ (“SWANCC”) in early 2001, judicial decisions generally upheld the interpretations of the agencies administering CWA programs, such as the EPA and the U.S. Army Corps of Engineers (Corps), that expanded the scope of the definition well beyond waters that are navigable in fact.⁹ The law regarding the scope of the definition, however, is still evolving, so consultation with legal counsel is advisable in cases of doubt.

⁸531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001).

The EPA regulations implementing the CWA release reporting requirements define the term, “navigable waters of the United States,” broadly as including:

- all waters which are presently used, or were used in the past, or may be susceptible to use as a means to transport interstate or foreign commerce, including all waters subject to the ebb and flow of the tide, including adjacent wetlands;
- tributaries of navigable waters, including adjacent wetlands;
- interstate waters, including wetlands; and
- all other waters such as intrastate lakes, rivers, streams, mudflats, sandflats and wetlands, the use, degradation or destruction of which affect interstate commerce including intrastate lakes, rivers, streams, and wetlands with a connection to interstate commerce (recreation, fish or shellfish harvesting, industrial use).

Wetlands include areas inundated or saturated by surface or ground water often enough and for long enough periods to support typical wetlands vegetation. They generally include swamps, marshes, bogs and similar areas, and may include playa lakes, sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds. The definitions in the regulations for reporting discharges of oil and those for reporting releases of hazardous substances are similar but not identical.¹⁰

Prior to SWANCC, courts had been reasonably consistent in affirming the EPA and the Corps in their treatment of tributaries of navigable waters as regulated “navigable waters of the United States.”¹¹ Many courts also recognized as “navigable” those tributaries that flow only intermittently.¹² Less consistent has been their treatment of groundwater. Some courts have found that a discharge to groundwater is prohibited by the CWA and may require a permit if the groundwater is hydrologically connected to surface waters that are waters of the United States.¹³ Others have concluded that groundwater is not waters of the United States.¹⁴

Several decisions also had recognized so-called “isolated” wetlands—that is, wetlands not adjacent to a navigable waterway or to a tributary of a navigable waterway—as “navigable waters of the United States.” SWANCC changed the treatment of some “isolated” wetlands as “navigable waters of the United States.” In that decision, the Supreme Court overruled the Corps of Engineers’ “migratory bird rule” under which the Corps treated some wetlands not connected to navigable waters as subject to Corps jurisdiction under the CWA because migratory birds used the wetlands as habitat.

The EPA and the Corps on January 10, 2002, issued a joint advance notice of proposed rulemaking to solicit comments on revision of their regulations in light of SWANCC. With the notice, the agencies also issued a joint memorandum announcing how they will interpret their jurisdiction pending a rule revision. The memorandum advises that the agencies will not assert jurisdiction over isolated waters that are both intrastate and non-navigable, where the only basis for asserting jurisdiction is the waters use (i) as habitat for birds protected by Migratory Bird Treaties, (ii) as habitat for federally protected endangered or threatened species, or (iii) to irrigate crops sold in interstate commerce. EPA and Corps field staff are advised to seek formal, project-specific headquarters approval before asserting jurisdiction over such isolated waters based on their use by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; or use of the water

⁹See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 106 S.Ct. 455, 462, 88 L. Ed. 2d 419 (1985) (holding that wetlands adjacent to “navigable waterway” are “navigable waters of the United States”).

¹⁰For example, regulations designating hazardous substances define adjacent as “bordering, contiguous or neighboring.” See 40 *CFR* §116.3. The oil discharge and hazardous substance discharge regulations exclude prior converted cropland and waste treatment ponds (other than cooling ponds) from the definition of navigable waters. See 40 *CFR* §§110.1 and 117.1. The Part 110 regulations address the discharge of oil, the Part 116 regulations designate hazardous substances, and the Part 117 regulations set reportable quantities and require reports of releases of hazardous substances.

¹¹See, e.g., *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001) (“*Headwaters*”) (holding that irrigation canals connected to streams that flow to navigable waters are “waters of the United States”); *Aiello v. Brookhaven*, 136 F. Supp. 2d 81, 119 (E.D.N.Y. 2001) (tributaries of navigable waters that are not themselves navigable in fact are “waters of the United States”).

¹²See *Headwaters*, 243 F.3d at 534 (tributaries with only intermittent flow are “waters of the United States”); and *Quivira Min. Co. v. U.S.E.P.A.*, 765 F.2d 126, 130 (10th Cir. 1985) (“*Quivira*”) (affirming EPA authority to require National Pollutant Discharge Elimination System Permits for discharges to dry arroyos which channel rainfall to navigable waters during heavy rainfall).

¹³See *Quivira*, 765 F.2d at 130; *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997) (finding release from oil pipeline tanks to groundwater a prohibited release to waters of the United States); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1357-58 (D. N. Mex. 1995) (groundwater connected to surface water is within the scope of the CWA); *In McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1185, 1196 (E.D. Cal. 1988) (holding that discharge to groundwater connected to surface water may require a CWA permit), *vacated on other grounds*, 47 F.3d 325 (9th Cir. 1995); and *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2000). The EPA, in the preamble to the July 17, 2002, regulation revising Spill Prevention Control and Countermeasures Plan regulations, stated, “EPA agrees...that groundwater underlying a facility that is directly connected hydrologically to navigable waters could trigger the requirement to produce an SPCC Plan based on geographical or locational aspects of the facility.” “Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities; Final Rule,” 67 Fed. Reg. 47,042, 47,062 (July 17, 2002) (codified at 40 *CFR* pt. 112) (SPCC Plan Rule).

¹⁴See *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992); *Village of Oconomowoc v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (affirming that stormwater retention pond does not require a discharge permit for water percolating to groundwater); *Kelley v. United States*, 618 F. Supp. 1103, 1105-07 (W.D. Mich. 1985) (dismissing CWA claim that a release to groundwater eventually migrate into navigable waters); and *U.S. v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex. 1975).

for industrial purposes by industries in interstate commerce. The memorandum instructs field staff to continue to assert jurisdiction over “traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands).”¹⁵

Although the joint EPA and Corps memorandum adopts a relatively conservative interpretation of the impact of SWANCC, the advance notice of proposed rulemaking raises the possibility that a revised definition of “waters of the United States” could further narrow the scope of the agencies’ reach. Because of the unsettled nature of the law in this area, a facility operator should consult legal counsel when in doubt of the treatment of a wetland or water body.

4.4 DEFINITION OF “HAZARDOUS SUBSTANCE” AND “HARMFUL QUANTITY”

The term “hazardous substance” is defined as any substance designated by the EPA pursuant to CWA section 311(b)(2). CWA hazardous substances are substances other than oil that present an imminent and substantial danger to the public health or welfare, including danger to fish, shellfish, wildlife, shoreline and beaches, or federal natural resources. A list of hazardous substances is published at 40 *CFR* Section 116.4.¹⁶ All CWA hazardous substances are also CERCLA hazardous substances, but not all CERCLA hazardous substances are on the CWA list. Harmful quantities of hazardous substances, RQs, are listed in 40 *CFR* §117.3.

Oil is broadly defined by statute to mean oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil. CWA §311(a)(1), 33 U.S.C. §1321(a)(1). The definition in the July 17, 2002, Spill Prevention Control and Countermeasures Plan (SPCC Plan) regulations is similarly broad and includes synthetic oils and mineral oils, as well as vegetable oils and fats, oil, or grease of animal origin.¹⁷

EPA regulations at 40 *CFR* §110.3 specify that harmful quantities of oil that have to be reported when released to waters of the United States include:

- a discharge that violates applicable water quality standards;
- a discharge that causes a sheen, film, or discoloration on the water’s surface; or
- a discharge that causes a sludge or emulsion to be deposited beneath the surface of the water.

4.5 PROCEDURES FOR REPORTING TO THE NRC

The procedure for reporting CWA discharges is found in U.S. Coast Guard Regulations at 33 *CFR* §153.203. The regulations require the person in charge, as soon as he has knowledge of any reportable discharge of oil or a hazardous substance, to notify the NRC immediately. The telephone number is (800) 424-8802 or (202) 267-2675 in the Washington, D.C., metropolitan area.

If direct reporting by telephone is not practicable, the report may be made to the Coast Guard or the EPA-designated on-scene-coordinator (OSC) for the region where the discharge occurs. If immediate notice to the OSC or NRC is not possible, the report should be made to the nearest Coast Guard unit, with follow-up notice to the NRC as soon as possible. Appendix C contains tables listing the addresses and telephone numbers of the Coast Guard District offices and EPA regional offices.

Although the regulations still require telephone reporting under most circumstances, the NRC website at <http://www.nrc.uscg.mil/index.htm> includes online reporting forms for different categories of releases, such as continuous releases and releases from offshore platforms, vessels, storage tanks, fixed onshore facilities and mobile sources. Because the regulations do not specifically authorize online reporting, any incident reported to the NRC online also should be reported to the NRC by telephone.

Appendix B includes additional information on reporting, including an outline of the kinds of information the NRC will request.

¹⁵“Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of ‘Waters of the United States,’” 68 Fed. Reg. 1,991 (Jan. 15, 2003). The joint EPA and Corps memorandum includes an exhaustive summary of court decisions following SWANCC. As the memorandum notes, some lower courts have interpreted SWANCC’s effect as limited to overruling the migratory bird rule. See, e.g., *United States v. Interstate General Co.*, 152 F. Supp. 2d 843, 847 (D. Md. 2001) aff’d, 2002 WL 1421411 (4th Cir. 2002) (refusing to reverse, based on SWANCC, a conviction for filling without a permit wetlands that were adjacent to tributaries of navigable interstate waters); and *United States v. Buday*, 138 F. Supp. 2d 1282, 1292 (D. Mont. 2001) (tributaries and adjacent wetlands deemed waters of the United States based on impacts to those waters having the potential to harm interstate navigable waters). Other courts have interpreted statements in the decision that did not address the specific, narrow circumstances before the Court as having a broader effect on the jurisdiction of the EPA and the Corps under the CWA. Courts holding that SWANCC has a broad impact on the agencies’ jurisdiction would require the agencies to demonstrate some substantial connection to navigability before they can treat isolated intrastate waters as “navigable waters” subject to CWA jurisdiction. See *United States v. Krilich*, 152 F. Supp. 2d 983, 988 (2001) (suggesting that unless wetlands are connected to waters that are navigable in fact, they must have a substantial connection to interstate commerce to be “navigable waters”).

¹⁶The EPA also makes available online at <http://yosemite.epa.gov/oswer/ceppoweb.nsf/index.html> a “list of lists,” that includes CERCLA hazardous substances listed as of October 2001. Follow the links for tools and resources, then to the site offering EPA databases and software. Specifically, the site is [http://yosemite.epa.gov/oswer/ceppoweb.nsf/vwresourcesbyfilename/title3.pdf/\\$file/title3.pdf](http://yosemite.epa.gov/oswer/ceppoweb.nsf/vwresourcesbyfilename/title3.pdf/$file/title3.pdf)

¹⁷See SPCC Plan Rule, 67 Fed. Reg. at 47,142, 40 *CFR* §112.2. The definition of “petroleum oil” in the SPCC Plan rule is “petroleum in any form, including but not limited to crude oil, fuel oil, mineral oil, sludge, oil refuse, and refined products.” SPCC Plan Rule, 67 Fed. Reg. at 47,142.

4.6 PROCEDURES FOR REPORTING TO THE REGIONAL ADMINISTRATOR OF THE EPA

Regulations requiring onshore and offshore facility operators to develop and implement Spill Prevention Control, and Countermeasure Plans (SPCC Plans) for facilities that could experience a reportable release of oil also require affected facility operators to notify the EPA Regional Administrator of certain reportable releases of oil. If a facility required to maintain a SPCC Plan has a reportable discharge of more than 1,000 gallons of oil in a single discharge, or two discharges of more than 42 gallons of oil during any twelve-month period, the facility must submit the following information to the Regional Administrator within 60 days of triggering the reporting requirement:

- the name of the facility;
- the owner's or operator's name;
- the location of the facility;
- the maximum storage or handling capacity of the facility and its normal daily throughput;
- corrective action and countermeasures taken, including a description of equipment repairs and replacements;
- an adequate description of the facility, including maps, flow diagrams, and topographical maps, as necessary;
- the cause of the discharge(s), including a failure analysis of the system or subsystem in which the failure occurred;
- additional preventive measure taken or contemplated to minimize the possibility of recurrence; and
- other information the Regional Administrator may reasonably require pertinent to the SPCC Plan or discharge(s).¹⁸

The facility must submit the same information to the agency or agencies in charge of oil pollution control activities in the state in which the facility is located. The EPA Regional Administrator may require the facility to amend its SPCC Plan based on the information submitted and recommendations from the state regulators regarding additional measures to prevent and contain discharges.¹⁹

4.7 ENFORCEMENT

An operator may be subject to a civil penalty for the release of oil of \$25,000 per day of violation or \$1,000 per barrel of oil or unit of hazardous substances discharged. CWA §311(b)(6)-(7), 33 U.S.C. §1321(b)(6)-(7). Failure to provide the required notification of a reportable discharge of oil or a hazardous substance is punishable by criminal penalties, including fines, imprisonment for not more than 5 years, or both. CWA §311(b)(5), 33 U.S.C. §1321(b)(5).

5 Reporting Requirements under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)

5.1 GENERAL REQUIREMENTS

CERCLA establishes a program of notification requirements for releases of "hazardous substances." CERCLA requires the EPA to establish RQs for releases of hazardous substances as defined by section 101(14) of Superfund. CERCLA §102, 42 U.S.C. §9602. CERCLA, like the CWA, requires notice of reportable releases to the NRC. CERCLA §103(a), 42 U.S.C. §9603(a). The statute exempts certain releases from notification, establishes penalties for failure to notify, and authorizes the EPA to establish recordkeeping requirements.

5.2 DEFINITION OF HAZARDOUS SUBSTANCE

CERCLA defines "hazardous substance" by reference to five environmental statutes:

- any element, compound, mixture, solution or substance designated as a "hazardous substance by EPA under CERCLA, §102 42 U.S.C. §9602;
- any substance designated as a toxic pollutant under CWA §307(a) or as a hazardous substance under CWA §311(b)(2)(A), 42 U.S.C. §§1317(a) and 1321(b)(2)(A);
- any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which has been suspended by Act of Congress), 42 U.S.C. §6921;

¹⁸ See SPCC Plan Rule, 67 Fed. Reg. at 47,144, 40 *CFR* §112.4(a). The reporting requirement does not apply until the time has expired for initial preparation and implementation of the SPCC Plan. See SPCC Plan Rule, 67 Fed. Reg. at 47,144, 40 *CFR* §112.4(b). Under the new SPCC Plan Rule, as amended April 17, 2003, a facility that becomes operational after August 16, 2002, through February 18, 2005, and could reasonably be expected to have a discharge, must prepare and implement a plan no later than February 18, 2005. Facilities first becoming operational after February 18, 2005, must prepare and implement a plan before they begin operations. See "Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities; Final Rule," 68 Fed. Reg. 18,890, 18,894 (Apr. 17, 2003) (codified at 40 *CFR* §112.3(a)-(b)).

¹⁹ See SPCC Plan Rule, 67 Fed. Reg. at 47,144, 40 *CFR* §112.4(c)-(d).

- any hazardous air pollutant listed under section 112 of the Clean Air Act (CAA), 42 U.S.C. §7412; and
- any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2606.

The CERCLA definition of hazardous substance specifically excludes petroleum, including crude oil or any fraction thereof that is not otherwise specifically listed as a hazardous substance under the cited provisions of those five statutes. Also excluded are natural gas, natural gas liquids, and mixtures of natural gas or synthetic gas. CERCLA §101(14), 42 U.S.C. §9601(14). The CERCLA “petroleum exclusion” is discussed in 5.3.

5.2.1 Listed CERCLA Hazardous Substances

EPA regulations list CERCLA hazardous substances at 40 *CFR* §302.4 in Table 302.4. Chemicals are listed by name, and an appendix to the list provides a cross reference to the chemical names from a list of hazardous substances arranged sequentially by Chemical Abstracts Service (CAS) Registry Number. Where relevant, the list identifies the hazardous waste identification number for the chemical and lists the RQ for each substance.

The CERCLA hazardous substance list includes some generic or broad classes of chemicals, such as zinc compounds, for which EPA has not assigned an RQ. CERCLA states that until a regulation establishes a different reportable quantity for a hazardous substance, the RQ shall be 1 pound. EPA, however, has not applied that default RQ to broad classes of compounds. EPA to date has determined that notification requirements apply only to the specific compounds for which RQs are established in 40 *CFR* §302.4. Although EPA has not applied the notification requirements to those broad classes of CERCLA hazardous substances, EPA has stated that the owner or operator of a vessel or facility that releases any hazardous substance falling within the broad category, regardless of whether an RQ listing in Table 302.4 requires notification of that release, is liable for cleaning up the release.²⁰

A consolidated “list of lists,” that includes the CERCLA hazardous substances listed as of October 2001, is available online from EPA’s Chemical Emergency Preparedness and Prevention Office (<http://yosemite.epa.gov/oswer/ceppoweb.nsf/index.html>) by following the links for databases and software to the site offering EPA databases and software.

5.2.2 “Unlisted” CERCLA Hazardous Substances

The CERCLA reporting obligations also apply to the so-called “unlisted” hazardous substances, which are the so-called “characteristic” hazardous wastes under the Resource Conservation and Recovery Act (RCRA). Characteristic wastes are those that exhibit the “characteristics” of either toxicity, reactivity, ignitability, or corrosivity and that are not excluded from regulation as a hazardous waste under 40 *CFR* §261.4(b).²¹ Note that a characteristic substance must be a “waste” in order to be an “unlisted hazardous substance.” If an unlisted hazardous substance that exhibits a RCRA “characteristic” is spilled and immediately cleaned up for repackaging, reprocessing, recycling or reuse, it is not a waste and, therefore, the facility operator does not need to report the spill as a CERCLA “release.” This assumes that no release to the environment of an RQ occurs from evaporation or from material left on the ground or in the water.²² An example of such an incident would be a spill of a pelletized chemical that is completely picked up, creating no waste.

²⁰In 1985, EPA determined that it would not apply the notification requirements to the broad classes of compounds listed as “hazardous substances” because of their designation as toxic pollutants under section 307(a) of the CWA. See “Notification Requirements, Reportable Quantity Adjustments,” 50 Fed. Reg. 13,456, 13,460 (April 4, 1985) (“Reportable Quantity Rule”). EPA made a similar determination for treating the categories of chemicals newly listed by the Clean Air Act Amendments of 1990, deciding that it would not assign an RQ to the category of compounds but would identify specific compounds within the categories and assign RQs to them. See “Reportable Quantity Adjustment,” 60 Fed. Reg. 30,926, 30,933 (June 12, 1995). But see, “National Emission Standards for Hazardous Air Pollutants for Source Categories: Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry and Other Processes Subject to the Negotiated Regulation for Equipment Leaks,” 62 Fed. Reg. 2,722, 2,725 (Jan. 17, 1997). The preamble to the rule clarification, in responding to a comment regarding the impact of listing 21 specific organic hazardous air pollutants within the standard for controlling hazardous air pollutants in the synthetic organic chemical manufacturing industry, asserts that the 1 pound RQ applies to all compounds within the category. The statement in the 1997 notice cites the 1995 notice as authority for a policy that is in conflict with the interpretation in the 1995 notice and, therefore, appears to be an error. In cases of doubt, the facility operator should consult legal counsel.

²¹See “Superfund Programs; Reportable Quantity Adjustments; Final Rule,” 51 Fed. Reg. 34,534, 34,539 (Sept. 29, 1986) (clarifying that the 100 pound RQ for release of characteristic ignitable, corrosive, or reactive hazardous wastes, so-called “ICR substances,” applies not just to ICR substances which are wastes before their release, but also to ICR substances “which become wastes only after their release”) (“ICR Clarification Notice”).

²²ICR Clarification Notice, 51 Fed. Reg. at 34,539 (“For purposes of clarification, if an ICR substance which is not a waste prior to release is released and only partially cleaned up, the release need not be reported only if the amount not recovered equals or exceeds an RQ, i.e., 100 lbs. If the amount spilled and not recovered (or recovered only for eventual disposal) is less than 100 pounds, there has been no release of an RQ or more of a hazardous substance and the reporting requirements of section 103, therefore, are not triggered.”)

5.3 PETROLEUM EXCLUSION

The CERCLA definition of hazardous substance excludes petroleum, including natural gas, crude oil, or any fraction thereof, that is not specifically listed or designated by one of the five environmental statutes referred to in the statutory definition of hazardous substance.

Guidance on the scope of the exclusion is available from several internal EPA memoranda, as well as court decisions. For example, a July 31, 1987, General Counsel's opinion, still available on EPA's website, interprets the hazardous substance definition in CERCLA to "exclude from CERCLA response and liability, crude oil and fractions of crude oil, including the hazardous substances, such as benzene, which are indigenous in these petroleum substances," and "hazardous substances which are normally mixed with or added to crude oil or crude oil fractions during the refining process." The opinion also states that the term petroleum does not include hazardous substances "which are added to petroleum or which increase in concentration solely as a result of contamination of petroleum during uses."²³ Current EPA guidance, offered in question and answer format on the EPA website, offers the same guidance.²⁴

Court decisions confirm the EPA's approach. Fractions of crude oil and additives mixed with petroleum during the normal process of refining, even if listed as hazardous substances, do not prevent exclusion from liability.²⁵ However, results may vary in the case of used petroleum products and wastes, and consulting legal counsel in cases of doubt is advisable.²⁶

5.4 EXPLORATION AND PRODUCTION WASTE EXEMPTION

The CERCLA definition of hazardous substance includes RCRA hazardous wastes but excludes "any waste the regulation of which under the Solid Waste Disposal Act [SWDA or RCRA] has been suspended by Act of Congress." CERCLA §101(14), 42 U.S.C. §9601 (14). Under RCRA, drilling fluids, produced water, and other wastes associated with the exploration, development, or production of crude oil or natural gas (E&P wastes) are exempt from regulation as hazardous waste. A list of both exempt and non-exempt E&P wastes is contained in Appendix D. In legislative history clarifying the definition of hazardous substances under CERCLA, Congress stated that the exclusion for E&P wastes applies "notwithstanding the presence in such substance of any hazardous or toxic chemical."²⁷ The oil and gas industry, therefore, considers RCRA-exempt E&P wastes as excluded from the definition of CERCLA hazardous substance.

EPA has not always treated RCRA-exempt E&P wastes as excluded from the definition of CERCLA hazardous substance; however, compelling arguments exist that EPA misreads CERCLA by treating RCRA-exempt E&P wastes as hazardous substances if they contain hazardous substance constituents. EPA's interpretation relies on court decisions that concluded that *mining wastes* that are exempt from RCRA are not excluded from the definition of CERCLA hazardous substance if they contain constituents otherwise listed as hazardous substances.²⁸ No judicial decision, however, has ruled on the issue of the exclusion of RCRA-exempt E&P wastes from CERCLA's definition of hazardous substances.²⁹ Because RCRA-exempt E&P wastes, are clearly distinguishable from mining wastes, precedents for treatment of mining wastes should not apply to RCRA-exempt E&P wastes.³⁰ RCRA-exempt E&P wastes are subject to a specific exemption in RCRA, while mining wastes are listed as special study wastes

²³Memorandum from Francis S. Blake, EPA General Counsel, to J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, Scope of the CERCLA Petroleum Exclusion under section 101(14) and 101(a)(2) (July 31, 1987), available on EPA's website at (<http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/petro-exclu-mem.pdf>).

²⁴See "Petroleum Exclusion, Frequently Asked Questions," on EPA's website at (<http://www.epa.gov/superfund/programs/er/triggers/haztrigs/whatsub3.htm>).

²⁵ See *Washington v. Time Oil Co.*, 687 F. Supp. 529, 532 (W.D. Wash. 1988) (denying exclusion when contaminants are present "in excess of amounts that would have occurred in petroleum during the oil refining process") and *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 803-05 (9th Cir. 1989) (presence of hazardous substance additives in leaded gasoline does not prevent operation of petroleum exclusion). See also *Organic Chemical Site PRP Group v. Total Petroleum, Inc.*, 58 F. Supp. 2d 755, 763-64 (W.D. Mich. 1999) (holding that concentration of polynuclear aromatic hydrocarbons at Superfund site that is higher than concentration in petroleum products does not prevent operation of petroleum exclusion if the increased concentration is consistent with that from volatilization and biodegradation of products over time).

²⁶ See, e.g., *New York v. Exxon Corp.*, 766 F. Supp. 177, 187 (S.D.N.Y. 1990) (finding that used oil contaminated with hazardous substances is not within the scope of the petroleum exclusion); but see, *Southern Pacific Transp. Co. v. California*, 790 F. Supp. 983, 985-86 (C.D. Cal. 1991) (holding that used petroleum products are covered, provided that CERCLA-listed hazardous substances have not been added to the petroleum product during its use). See also *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 893-94 (10th Cir. 2000) (holding that petroleum exclusion does not apply to released petroleum that has commingled in the soil and groundwater with hazardous wastes); and *Cose v. Getty Oil Co.*, 4F.3d 700, 708-09 (9th Cir. 1993) (holding that waste crude oil tank bottoms are not "petroleum" within the scope of the petroleum exclusion).

²⁷The statement comes from the Senate Report accompanying S. 1480, where the CERCLA hazardous substance definition originated. S. Rep. No. 848, 96th Cong., 2d Sess. 28 (1980). The Report also states: "Thus, drilling muds and brines which have been excluded by regulation are not hazardous substances under S. 1480." *Id.*

²⁸See, e.g., *Eagle-Picher Indus. v. EPA*, 759 F.2d 922, 930-31 (D.C. Cir. 1985).

²⁹*Nixon-Egli Equip. Co. v. John A. Alexander Co.*, 949 F. Supp. 1435, 1444 n.7 (C.D. Cal. 1996), concludes, based on *Cose v. Getty Oil Co.*, that drilling by-products and drilling would not fall within the petroleum exclusion, a separate issue.

along with coal combustion and cement kiln dust wastes.³¹ Any question regarding exclusion of exempt E&P wastes from the definition of CERCLA hazardous substances should be referred to legal counsel.

5.5 DEFINITION OF REPORTABLE QUANTITY

A key premise of CERCLA notification is that notification is required only when there is a release of a hazardous substance in an amount equal to or greater than the reportable quantity for that substance.

EPA has established five levels of RQs: 1, 10, 100, 1,000, or 5,000 lbs. Note that EPA decided not to develop separate RQs for each hazardous substance for each of the various environmental media into which a release might occur. EPA instead chose one RQ for each hazardous substance. For example, the RQs for NO and NO₂, 10 each pounds in a 24-hour period, were established based on releases to water and releases to the soil or groundwater, not releases to air.³² As a result, the RQ for releases of NO and NO₂ to air are lower than warranted for such releases. Until the EPA establishes an RQ for a hazardous substance, the RQ is 1 pound. CERCLA §102(b), 42 U.S.C. §9602(b).

The RQs for listed hazardous substances can be found at 40 *CFR* §302.4, in Table 302.4, and in EPA's List of Lists.³³ The reader using either the online List of Lists or Table 302.4 must consult Federal Register notices for revisions after the document's date of publication.

"Unlisted" hazardous wastes displaying the characteristics of ignitability, corrosivity, or reactivity³⁴ are assigned a 100-lb. RQ. Wastes exhibiting the characteristic of toxicity are assigned RQs based on the RQs listed for the contaminants on which the extraction procedure (EP) toxicity characteristic is based. The RQ applies to the waste itself, not just the contaminant in the waste. 40 *CFR* §302.5(b). If EP toxicity is based on more than one contaminant, the RQ will be the lowest of the RQs listed for those contaminants. Finally, if a waste exhibits toxicity combined with another characteristic, the RQ will be the lowest of the applicable RQs.

5.6 DEFINITION OF REPORTABLE RELEASE

CERCLA defines a "release" to mean:

Any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).

The statute excludes certain categories of releases, including releases that result in exposure to persons solely within a workplace, with respect to a claim such persons may assert against the employer of such persons. The exclusions also address emissions from the engine exhaust of motor vehicles, rolling stock, aircraft, vessels, or pipeline pumping station engines. CERCLA §9601 (22), 42 U.S.C. §9601(22).

5.7 PERIOD OF RELEASE

The CERCLA regulations specify that a 24-hour period is used for measuring whether the RQ of a substance has been released. 40 *CFR* §302.6(a). The 24-hour rule does not refer to the length of time a person has in which to report a release; the duty to report the release is immediate³⁵ once the RQ is exceeded. In addition, the 24-hour rule does not mean "midnight-to-midnight" or one calendar day. For example, if one half of the RQ is released between 10:00 p.m. and midnight, and one half is released between midnight and 2:00 a.m., the facility has a duty to report.

5.8 MIXTURES OF HAZARDOUS SUBSTANCES

Discharges of mixtures containing hazardous substances of known concentrations are reportable only where the hazardous substance component of a mixture or solution is discharged in a quantity equal to or greater than its RQ. If the quantity of one or more of the hazardous constituents is not known, notification is required when the weight of the entire mixture released equals the RQ

³⁰For a discussion of arguments for exclusion of E&P wastes from CERCLA's definition of hazardous substances, see Jeffrey M. Gaga and Donald W. Stever, 1 *Law of Solid Waste, Pollut. Prevent. and Recycl.* §7:14 (2001); see also Michael M. Gibson and David P. Young, *Oil and Gas Exemptions under RCRA and CERCLA: Are They Still "Safe Harbors" Eleven Years Later?*, 32 *S. Tex. L. Rev.* 361 (1991).

³¹ See 42 U.S.C. §6921(b)(2)(A) regarding E&P wastes, and 42 U.S.C. §§6921(b)(3) and 6924(x) regarding special study wastes.

³²40 *CFR* §302.4 lists section 3001 of Resource Conservation and Recovery Act as the statutory source for the listing of NO and NO₂, and section 311(b)(4) of the Clean Water Act as an additional source for the NO₂ listing.

³³The List of Lists is available online from EPA's Chemical Emergency Preparedness and Prevention Office (<http://yosemite.epa.gov/oswer/ceppoweb.nsf/index.html>) by following the links for databases and software to the site offering EPA databases and software.

³⁴See 5.2.2 for further discussion of these "unlisted" hazardous substances.

³⁵See 5.13.

of any hazardous substance constituent. 40 *CFR* §302.6(b). The mixture rule conforms to the standard established for reporting hazardous substances under the CWA.³⁶ RQs of different substances (other than radionuclides) are not additive under the rule. The release of a mixture containing half the RQ of one substance and half the RQ of another hazardous substance does not, therefore, require a report.

5.9 DETERMINING THE RQ FOR WASTE STREAMS

Wastes can be mixtures of various substances, and the rule for mixtures containing hazardous substances (See 5.8) sometimes applies for determining the waste's RQ. If a mixture qualifies as a "characteristic" hazardous waste and, therefore, an "unlisted" CERCLA hazardous substance, its RQ is 100 pounds (See Sections 5.2.2 and 5.5). If a mixture qualifies as a listed hazardous waste (e.g., API separator sludge, a refinery waste stream) and is, therefore, a listed CERCLA hazardous substance, its RQ is listed in 40 *CFR* §302.4, Table 302.4 (See 5.2.1 and 5.5). Otherwise, the mixture rule applies to a waste stream that contains a CERCLA hazardous substance. For example, if a waste that is a mixture of toluene and other materials is not a "characteristic" hazardous waste, the operator would apply the mixture rule to determine the RQ. Such a mixture would have an RQ of 1,000 pounds if the facility owner does not know the concentration of the toluene in the mixture. If the concentration of toluene is known, the release is reportable only if 1,000 pounds of toluene is released when the mixture is released.

5.10 DEFINITION OF FACILITY

Releases of hazardous substances from vessels, offshore facilities, and onshore facilities must be reported.

The term "vessel" means:

[Every] description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

The term "facility" means:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

The statute also defines "offshore" and "onshore" facility:

The term "offshore facility" means any facility located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel.

The term "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land or non-navigable waters within the United States.

Because the statutory definitions are all-inclusive, there is usually very little debate about whether a "facility" exists for CERCLA purposes.³⁷

5.11 RELEASES INTO THE ENVIRONMENT

A hazardous substance must be released "into the environment" in an RQ before CERCLA notification is required. The CERCLA regulations define "environment" to mean:

(1) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation & Management Act of 1976, and (2) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

40 *CFR* §302.3. Releases of volatile liquids from tanks or valves onto outside concrete pads or into lined ditches open to the outside air, releases from pipes into lined open lagoons or ponds, or any other discharges that are not wholly contained within buildings or structures are reportable if an amount equal to the RQ is released through evaporation or otherwise escapes into the environment. A release of a hazardous substance at a facility does not have to be reported only if it does not enter the environment,

³⁶See "Reportable Quantity Rule," 50 Fed. Reg. at 13,463.

³⁷Definitions are from CERCLA §101, 42 U.S.C. §9601.

such as a spill onto the concrete floor in a manufacturing plant. EPA considers “ambient air” to be air that is not completely enclosed in a building or structure but that is over and around the grounds of a facility; therefore, a release inside a building is reportable only if an RQ leaves the building or structure.³⁸

5.12 WORKPLACE EXCLUSION

A closely-related issue is CERCLA’s so-called “workplace exclusion.” The CERCLA definition of “release” excludes “any release which results in exposure to persons solely within any workplace, with respect to a claim which such persons may assert against the employer of such persons.” CERCLA §101(22), 42 U.S.C. §9601(22). EPA has interpreted the exclusion as meaning that a worker exposed to a release within the workplace does not have a claim under CERCLA for that exposure. The availability of workers’ compensation insurance does not prevent a facility from having to notify the NRC of a release that enters the environment, even if it only exposes workers within the workplace. If a release does not remain wholly contained within a building or structure, then it is a release into the environment for CERCLA purposes, regardless of whether it occurs within a workplace and should be reported if it equals or exceeds the RQ.³⁹

5.13 “IMMEDIATE” NOTICE

The regulations do not provide any guidance on when the reporting obligation is triggered or how soon after someone at a facility has knowledge of a release a report is required to meet the statute’s standard of “immediate” notification. Based on the legislative history of CERCLA, at least one decision has concluded that the “person in charge” whose knowledge triggers the reporting obligation is a person in a supervisory position, even if it is a relatively low-level supervisor.⁴⁰ The level of knowledge required also is undefined; however, decisions in EPA administrative enforcement cases suggest that a facility’s notification requirement is triggered when a facility “has some degree of certainty that a reportable release has occurred.”⁴¹ Finally, although EPA’s current enforcement policy suggests that a release should be reported within 15 minutes of when the person in charge has knowledge of the release,⁴² decisions in enforcement actions suggest that what qualifies as “immediate” depends on the circumstances of each individual release.⁴³

5.14 MECHANICS OF CERCLA NOTIFICATION

A release of a hazardous substance must be reported to the NRC. 40 *CFR* §302.6. The toll-free-number of the NRC is (800) 424-8802. The number for metropolitan Washington, D.C., is (202) 426-2675. Unlike the regulations for reporting releases of hazardous substances or oil under the CWA, the CERCLA regulations do not provide alternative reporting standards in the event reporting to the NRC is not practicable. See Appendix B for an outline of the kinds of information NRC requires in a report.

Although the regulations require the person in charge to report the release to the NRC by telephone, the NRC website at <http://www.nrc.uscg.mil/index.htm> includes online reporting forms for different categories of releases, such as continuous releases and releases from offshore platforms, vessels, storage tanks, fixed onshore facilities and mobile sources. Until revised regulations clarify that online reports meet the terms of the statute, any facility reporting a CERCLA release through an online report also should report the release by telephone in a manner conforming to the requirements of the regulations.

EPA has stated that, while all concurrent releases of the same substances from a facility must be aggregated to determine if an RQ has been exceeded, the person in charge of a facility need not report each individual release separately, such that one report could suffice for individual releases from multiple pieces of equipment within a facility. The notice provides as an example an operator reporting in a single notification “multiple concurrent RQ releases . . . occurring at various parts of a contiguous plant or installation on contiguous grounds under common ownership (e.g., at a chemical manufacturing plant or an oil refinery).”⁴⁴

³⁸See Reportable Quantity Rule, 50 Fed. Reg. at 13,462.

³⁹See Reportable Quantity Rule, 50 Fed. Reg. at 13,462-63.

⁴⁰See *United States v. Carr*, 880 F.2d 1550, 1554 (2d Cir. 1989) (holding that knowledge of release by maintenance foreman supervising drum disposal triggered notification requirement).

⁴¹*In re Morton International, Inc.*, 1997 WL 821128 (EPA), Docket No. EPCRA-VII-96E-218 (Dec. 12, 1997).

⁴²Office of Regulatory Enforcement, United States Environmental Protection Agency, “Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act,” 11-12 (Sept. 30, 1999) (“Enforcement Policy”).

⁴³See *In re B.F. Goodrich*, 1998 WL 289247 (EPA), Docket No. EPCRA 002-95 (Apr. 29, 1998). The decision specifically rejects the complaint’s citation of a 15-minute standard, noting that neither Congress nor EPA in its regulations defines “immediate,” and the variety of possible release scenarios dictates that the term be interpreted “in this and many other cases . . . by reference to circumstances.”

⁴⁴Notification Requirements Rule, 50 Fed. Reg. at 13,459.

5.15 REPORTING“CONTINUOUS RELEASES”

CERCLA grants relief from the release notification requirements for hazardous substance releases that are “continuous” and “stable in quantity and rate.” Notice of releases may fall under the reduced reporting requirements if:

- the releases are continuous and stable in quantity and rate; and
- the person in charge has notified the NRC of the release for a period sufficient to establish the continuity, quantity and regularity of the release.

CERCLA §103(f)(2), 42 U.S.C. §9603(f)(2). In addition to regulations at 40 *CFR* §302.8 implementing the continuous release reporting requirements, EPA has published a guide for facilities reporting continuous releases.⁴⁵

5.15.1 Definitio of“Continuous”

EPA defines continuous release to mean “a release that occurs without interruption or abatement, or that is routine, anticipated and intermittent during normal operations or treatment processes.” 40 *CFR* §302.8(b). Examples include:

- production of a batch of a substance at the same time every week,
- startup of a machine every workday morning and its shutdown every workday evening, and
- use of a hazardous substance at a facility every day or at the same time every week.

A hazardous substance release also may be continuous if it occurs during a process that is run infrequently but at anticipated intervals that depend on market demand for a product. Variable, unanticipated, or episodic releases are *not* covered by the definition of continuous. Examples include:

- releases associated with accidents,
- releases associated with emergency shutdowns, and
- releases associated with pipe rupture.⁴⁶

5.15.2 Definitio of“Stable in Quantity and Rate”

The regulations define a release that is stable in quantity and rate to mean “a release that is predictable and regular in amount and rate of emission.” 40 *CFR* §302.8(b). The rule preamble specifies that predictability and regularity do not equate to uniformity.⁴⁷

5.15.3 Reporting Requirements for Continuous Releases

The regulations require an initial telephone call to the NRC and, if EPCRA reporting is applicable, to the SERC and LEPC.⁴⁸ The telephone notification should identify the release as “continuous” and announce the intent to report under the continuous release provisions. The notice must include:

- the name and location of the facility or vessel; and
- the name and identity of the hazardous substance being released.

Within 30 days of the telephone notification, initial written notification must be made to the appropriate EPA Regional Office, as well as the SERC and LEPC. EPA Regional Offices are identified in Appendix C. Like the initial notice by telephone, the initial written notification must identify the intent to report under the continuous release provisions. The initial written notification must provide basic identifying information, including information regarding the population in the area of the release and information on the normal range of the release. 40 *CFR* §302.8(e). The normal range is defined to include all the releases (in pounds or kilograms) of a hazardous substance reported or occurring over any 24-hour period under normal operating conditions during the preceding year, as long as those releases are both continuous and stable in quantity and rate. 40 *CFR* §302.8(b).

No new measurements are required to establish the normal range. The normal range is determined by the person in charge based on the professional judgment of the facility engineering staff, the operating history of the facility, experience with the operating equipment and processes, and any existing data.⁴⁹

⁴⁵ Office of Emergency and Remedial Response, United States Environmental Protection Agency, “Reporting Requirements for Continuous Releases of Hazardous Substances, A Guide for Facilities on Compliance” (1997). The guide is available from EPA’s website for the Superfund program, at (<http://www.epa.gov/superfund/action/guidance/index.htm>).

⁴⁶ See “Reporting Continuous Releases of Hazardous Substances,” 55 Fed. Reg. 30,166, 30,169-70 (July 24, 1990) (“Continuous Release Rule”).

⁴⁷ Continuous Release Rule, 55 Fed. Reg. at 30,170-71.

⁴⁸ For additional information on EPCRA release reporting requirements, see Section 6.

⁴⁹ See 40 *CFR* §302.8(e) and Continuous Release Rule, 55 Fed. Reg. at 30,174.

Within 30 days of the one-year anniversary date of the initial written notification, the person in charge must evaluate the reported releases and submit a one-time follow-up report to the appropriate EPA Region (but not the SERC or LEPC). 40 *CFR* §302.8(f).

5.15.4 Change in Source, Composition, or Volume

If there is any change in the source or composition of the release, the release is considered a new release. The required initial telephone and written notifications must be made in order for the release to qualify as a continuous release. 40 *CFR* §302.8(g)(1).

If a release exceeds the upper bound of the reported normal range, the release must be reported as a statistically significant increase (SSI), defined as any “increase in the quantity of the hazardous substance released that exceeds the upper bound of the reported normal range.” Notice of a SSI must be provided to the NRC, SERC, and LEPC as soon as the person in charge has knowledge of the release. The notification may be made initially by telephone and followed up by a written notification within 30 days. 40 *CFR* §302.8(b)(g)(2) and (h).

All change notices must include a signed certification statement and the case number assigned by the NRC. 40 *CFR* §302.8(g)(4)

5.15.5 Annual Evaluation

The person in charge of the facility or vessel must evaluate each hazardous substance release annually to determine if changes have occurred in the information submitted in the initial written notification, the follow-up notification or in a previous change notification, but no routine annual report is required. 40 *CFR* §302.8(i).

5.16 “FEDERALLY PERMITTED” RELEASES

The provision in CERCLA requiring reports of releases specifically excludes a release that is “a federally permitted release.” CERCLA §103(a), 42 U.S.C. §9603(a). The term “federally permitted” is in some ways a misnomer, because the exemption applies to permits and authorizations under six federal statutes and under state statutes authorizing certain oil and gas industry and water well injection practices. The following releases are considered federally permitted and therefore not reportable under CERCLA (or EPCRA):

- **Clean Air Act (CAA):** any emission into the air subject to a permit or control regulation under (1) new source performance standards in CAA §111, (2) standards to control hazardous air pollutants in CAA §112, (3) requirements for prevention of significant deterioration of air quality in title I part C, (4) plan requirements for nonattainment areas in title I part D, or (5) state implementation plans submitted in accordance with CAA §110 and not disapproved by the EPA, and (6) any schedule or waiver granted, promulgated, or approved under any of the CAA sections. CERCLA §101(10)(H), 42 U.S.C. §9601(10)(H).
- **Federal Water Pollution Control Act or Clean Water Act (CWA):** discharges in compliance with a National Pollutant Discharge Elimination System (NPDES) permit;⁵⁰ discharges in compliance with a legally enforceable CWA §404 permit for the discharge of dredged or fill material, CERCLA §101(10)(D), 42 U.S.C. §9601(10)(D); and the introduction of any pollutant into a publicly owned treatment works when the pollutant is specified in and in compliance with applicable pretreatment standards of CWA §307(b) or (c) and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval, CERCLA §101(10)(J), 42 U.S.C. §9601(10)(J).
- **Marine Protection, Research and Sanctuaries Act:** any release in compliance with a legally enforceable ocean dumping permit. CERCLA §101(10)(F), 42 U.S.C. §9601(10)(F).
- **Solid Waste Disposal Act:** a release in compliance with a legally enforceable final permit for a hazardous waste treatment, storage or disposal facility, when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases. CERCLA §101(10)(D), 42 U.S.C. §9601(10)(D).
- **Atomic Energy Act:** any release of source, special nuclear, or by-product material in compliance with a legally enforceable license, permit, regulation, or order. CERCLA §101(10)(K), 42 U.S.C. §9601(10)(K).

⁵⁰See 42 U.S.C. §9601(10)(A). Also federally permitted under the aegis of the NPDES permit program are (1) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to the issuance or modification of a NPDES permit and subject to a condition of the NPDES permit, and (2) continuous or anticipated intermittent discharges from a point source, identified in a NPDES permit or NPDES permit application, which are caused by events occurring within the scope of relevant operating or treatment systems. See CERCLA §101(10)(B) and (C), 42 U.S.C. §9601(10)(B) and (C).

- **Safe Drinking Water Act:** any injection of fluids authorized under federal underground injection control programs or state programs submitted for federal approval, and not disapproved by EPA. CERCLA §101(10)(G), 42 U.S.C. §9601(10)(G).
- **State Statutes:** any injection of fluids or other materials authorized under applicable state law (i) for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are re-injected.

Releases of hazardous substances in amounts greater than those authorized by federal or state permits, or by other regulatory controls or standards, must be reported to the applicable government agencies as stipulated in those permits or regulations. Once the amount released exceeds the amount authorized to be released by an amount that is equal to or greater than the RQ, and if no other exclusion applies, the release should be reported to the NRC and, when applicable, to the SERC and LEPC under EPCRA. See Chapter 6 for additional information on EPCRA reporting.

5.16.1 EPA Statements Regarding the Scope of the Federally Permitted Releases Exclusion

EPA issued an advance notice of proposed rulemaking in 1983 soliciting comments on the scope of the federally permitted release exclusion, a proposed rule in 1988, and a supplemental notice clarifying the proposal in 1989.⁵¹ EPA has not, however, adopted regulations to implement the exclusion beyond references to the terms as defined in the statute. In April 2002, EPA issued two notices providing guidance on the interpretation of the federally permitted releases exclusion for certain air emissions.⁵² The two guidance documents regarding air emissions are reprinted in Appendix E and are discussed in detail in 5.16.2.

EPA's statements about the scope of the exclusion in the proposal notices and in the April 17 and April 23 guidance documents provide evidence of how EPA may interpret the scope of the exclusion in any enforcement action; however, they should not be treated as if they had the effect of regulations. The documents are not regulations, and there is some authority from judicial decisions suggesting that EPA's interpretation of the exclusion may not be definitive.⁵³ Legislative history of the exclusion also may provide some guidance.⁵⁴

Questions about the scope of the exclusion should be referred to legal counsel.

5.16.2 EPA Guidance Documents on Reporting Releases to Air

The CERCLA legislative history that discusses the federally permitted release exclusion acknowledges that CAA emission controls work through a variety of means, including express emission limitations, technology requirements, operational requirements, work practices, or other control practices.⁵⁵ EPA cites that legislative history in the April 17 Guidance when discussing the limitations of the Guidance:

This guidance is intended for you to use as a general guide to determine, on a case-by-case basis, whether an air release of a hazardous substance qualifies as a federally permitted release. You should consider any permit language as a whole rather than reviewing specific language in isolation and also look at all applicable control

⁵¹“Notification Requirements; Reportable Quantity Adjustments,” 48 Fed. Reg. 23,552 (May 25, 1983); “Reporting Exemptions for Federally Permitted Releases of Hazardous Substances,” 53 Fed. Reg. 27,267 (July 19, 1988); and “Reporting and Liability Exemptions for Federally Permitted Releases of Hazardous Substances,” 54 Fed. Reg. 29,306 (July 11, 1989).

⁵² “Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Certain Air Emissions,” 67 Fed. Reg. 18,899 (April 17, 2002) (“April 17 Guidance”); “Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Clean Air Act ‘Grandfathered’ Sources,” 67 Fed. Reg. 19,750 (April 23, 2002) (“April 23 Guidance”). The April 17 Guidance and April 23 Guidance were issued pursuant to settlement of a lawsuit filed by API and a number of affiliated trade associations in the Court of Appeals for the District of Columbia Circuit challenging “interim guidance” on federally permitted releases to air that EPA issued in December 1999. “Interim Guidance Documents on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Certain Air Emissions,” 64 Fed. Reg. 61,613 (Dec. 21, 1999). The December 1999 “interim guidance” was suspended and, in effect, withdrawn soon after the trade associations filed their lawsuit.

⁵³*Kelley v. Environmental Protection Agency* suggests that EPA lacks authority under CERCLA to issue a regulation interpreting the federally permitted release exclusion. In *Kelley*, the U.S. Circuit Court of Appeals for the District of Columbia Circuit held that Congress left the determination of issues of liability under sections 106 and 107 of CERCLA to the courts, and, therefore, did not explicitly or implicitly authorize EPA to issue substantive regulations to determine when a secured creditor could incur CERCLA liability as an owner or operator. 15 F.3d 1100, 1106 (D.C. Cir. 1994), *reh’d denied*, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied*, *American Bankers Ass’n v. Kelley*, 513 U.S. 1110, 115 S.Ct. 900, 130 L.Ed. 2d 784 (1995). Because the federally permitted release exclusion can be central to a determination of liability, EPA arguably lacks authority to promulgate a rule defining federally permitted release. The D.C. Circuit Court also specifically held, on rehearing *Kelley*, that a court would not accord EPA’s interpretation on issues of liability the kind of deference a court normally accords agency interpretations when Congress has delegated adjudicatory functions to the agency. *Kelley v. EPA*, 25 F.3d 1088, 1091-92 (D.C. Cir. 1994). The decision rejects the applicability of *Chevron* deference to the EPA’s interpretation, referring to the formulation in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), under which an agency has significant latitude in interpreting terms of a statute.

requirements in order to determine whether, taken together, they subject a release of a hazardous substance to a relevant CAA permit or control regulation.⁵⁶

The April 17 Guidance addresses the following issues related to federally permitted releases to air: releases exceeding permit limits (5.16.2.1); permit or control limits on volatile organic compounds and particulate matter (5.16.2.2); permit or control limits on nitrogen oxides (5.16.2.3); treatment of minor sources of air emissions (5.16.2.4); waivers (5.16.2.5); accidents and malfunctions (5.16.2.6); and start-up and shut-down operations (5.16.2.7). The April 23 Guidance addresses grandfathered sources (5.16.2.8).

5.16.2.1 Releases Exceeding Permit Limits and Control Regulations

EPA does not consider a release of a hazardous substance that is in excess of limits set by a CAA permit or control regulation to be a federally permitted release.⁵⁷ Accordingly, a release of a hazardous substance that exceeds the limits of a permit or control regulation is subject to reporting requirements if the amount released that is in excess of that permit or control regulation or permit also equals or exceeds the RQ. In support of this conclusion, EPA cites an EPA Environmental Appeals Board (EAB) decision that rejected the argument that a release “subject to” a control requirement was a federally permitted release, even though it was out of compliance with the control requirement.⁵⁸

5.16.2.2 Permit or Control Limits on Volatile Organic Compounds and Particulate Matter

The definition of federally permitted release cites requirements that limit emissions of specific hazardous air pollutants and of criteria pollutants, such as volatile organic compounds (VOCs) and particulate matter (PM). Permits or control regulations limiting emissions of VOCs and PM may not list the specific CERCLA hazardous substances that are part of the controlled emission stream. In such a case, the April 17 Guidance indicates that the facility operator should consider whether the federally enforceable CAA permit limit or the applicable control regulations have the specific effect of limiting or eliminating the release of the designated hazardous substance, or EHS in the case of EPCRA reporting. The April 17 Guidance suggests several criteria to take into account in making that determination:

- The term of the federally enforceable limits: The guidance suggests that short term limits, including those for VOCs or PM, are more likely to minimize the possibility of a substantial release of a hazardous substance or EHS.
- Other evidence that the federally enforceable limits would have the specific effect of limiting or eliminating the release of a hazardous substance or EHS: The guidance suggests that information in the permit application or applicable regulation (including supporting materials such as preambles, technical background documents, or details in the permit application that are referenced in the permit) that clearly shows that the federally enforceable VOC or PM limits have the specific effect of limiting or eliminating the release of a hazardous substance or EHS would bolster an argument for finding a release to be a federally permitted release.⁵⁹

5.16.2.3 Permit or Control Limits on Nitrogen Oxides

With respect to emissions of NO and NO₂ that are subject to permit limits and control regulations designed to limit emissions of NO_x, the April 17 Guidance indicates that the NO_x permit limits are sufficient to meet the federally permitted release definition for NO and NO₂.⁶⁰

EPA also has announced a policy that provides some relief from release notification requirements for combustion sources, such as engines and flares, that otherwise would have to report releases of relatively low levels of NO_x as continuous releases (See 5.15). The April 17 Guidance announces that EPA agrees with comments it received asserting that the 10-lb. RQ for reporting

⁵⁴See Senate Rep. 848, 96th Cong., 2d Sess. 46-50 (1980). Judicial decisions on the scope of the exemption have construed it narrowly. See *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1054 (D. Ariz. 1984) (limiting exemption to terms specified for releases from RCRA-permitted facilities); *Reading Co. v. Philadelphia*, 823 F. Supp. 1218, 1230-31 (E.D. Pa. 1993) (declining to read exemption as covering releases of PCBs from transformers based on authorization to use them in non-totally enclosed manner under TSCA because compliance with TSCA not equivalent to obtaining a RCRA permit); *Idaho v. Hanna Mining Co.*, 699 F. Supp. 827, 831-32 (D. Idaho 1987) (limiting exemption to point source discharges under NPDES permit); and *United States v. United Nuclear Corp.*, 814 F. Supp. 1552, 1565 (D. N. Mex. 1992) (holding that tailings seepage was not federally permitted by state license, even though agency staff were aware of seepage, because it was not specifically authorized by the permit).

⁵⁵See Senate Rep. 848, 96th Cong., 2d Sess. 49 (1980).

⁵⁶April 17 Guidance, 67 Fed. Reg. at 18,901.

⁵⁷April 17 Guidance, 67 Fed. Reg. at 18,902.

⁵⁸See *In re Mobil Oil Corp.*, EPCRA Appeal No. 94-2, 5 EAD 490, 508, 1994 WL 544260 (EAB, Sept. 29, 1994).

⁵⁹April 17 Guidance, 67 Fed. Reg. at 18,902.

⁶⁰April 17 Guidance, 67 Fed. Reg. at 18,902.

releases of NO and NO₂ is unreasonably low for certain NO_x releases. The Agency supports adoption of an administrative reporting exemption for those releases⁶¹ and has published a notice announcing exercise of enforcement discretion for such releases. According to the notice, until EPA completes action on an administrative reporting exemption for NO_x emissions, or until it publishes a notice stating otherwise, EPA will exercise discretion not to enforce against facilities for failure to report air releases of NO and NO₂ that would otherwise trigger a requirement to notify. The policy of enforcement discretion will not apply in the case of releases that are the result of an accident or malfunction.⁶²

5.16.2.4 Minor Sources of Air Emissions

A significant number of small sources of air emissions do not have CAA permits because their emissions fall below a threshold for permitting set by regulations. The April 17 Guidance indicates that a release in compliance with a federally enforceable threshold, including releases that comply with technology requirements, operational requirements, work practices, or other control practices, are federally permitted releases when the threshold limits or eliminates the release of the hazardous substance or EHS.⁶³

Releases of HAPs such as benzene from area sources of hazardous air pollutants (HAPs), those that do not have a potential to emit 10 tons per year or more of a single HAP or 25 tons per year of a combination of HAPs, would be federally permitted releases as long as the releases remain below that threshold. For example, a release of benzene from a glycol dehydrator in compliance with the area source threshold in the national emission standards for hazardous air pollutants from oil and natural gas production facilities would be a federally permitted release.⁶⁴

A similar result applies in the case of federally enforceable thresholds adopted under a state implementation plan (SIP) for criteria pollutants. A release of a hazardous substance or EHS from the normal operations of a minor source in compliance with a regulation in a SIP setting a threshold for imposition of permitting or other control requirements will be considered a federally permitted release. The EPA guidance suggests that releases of nitrogen oxides or sulfur dioxide from an internal combustion engine meeting the threshold for exemption from permitting under a state regulation incorporated in a SIP could be federally permitted releases.

For example, the New Mexico Air Quality Bureau (“NMAQB”) limits small sources to de minimis emission rates of 10 tons per year of criteria pollutants and one ton per year of lead, and Colorado exempts from permit requirements sources emitting up to 25 tons per year.⁶⁵ Emissions authorized by such exemptions from permit requirements should qualify as federally permitted releases. Releases from a minor source authorized by a control regulation but not required to obtain an individual permit, such as a small source authorized by Texas’ “permit by rule” regulations, also could be federally permitted releases.⁶⁶

The April 17 Guidance emphasizes that the area source and minor source thresholds generally do not control unanticipated releases such as accidents or malfunctions. EPA, therefore, would not consider RQ releases that are not part of a facility’s normal operations, such as unanticipated releases and those caused by accidents and malfunctions, to be federally permitted releases.⁶⁷

5.16.2.5 Waivers

EPA has published only one example of a release that is federally permitted because it is subject to a schedule or waiver granted under a SIP, new source performance standards (NSPS), hazardous air pollutant source standards, prevention of significant deterioration requirements, or plans for attainment of air quality standards. The Guidance cites as an example a release in compliance with a waiver from NSPS to allow use of alternative innovative technology, or with a schedule for compliance imposed if the alternative technology does not reduce emissions that equal or exceed the NSPS.⁶⁸

5.16.2.6 Accidents and Malfunctions

EPA generally considers releases of an RQ of a hazardous substance arising from an accident or malfunction a reportable release, even when the release occurs from a facility that is operating consistent with an accident and malfunction plan required by

⁶¹April 17 Guidance, 67 Fed. Reg. at 18,900.

⁶²April 17 Guidance, 67 Fed. Reg. at 18,904.

⁶³April 17 Guidance, 67 Fed. Reg. at 18,903.

⁶⁴See 40 CFR §63.760.

⁶⁵The NMAQB regulation requires sources exceeding the exemption limit to register with the NMAQB and in some cases submit a permit application. 20 N.M. Admin. Code §2.73.200. Colorado requires permit applications for sources above 25 tons per year; below that level, it requires a source to file an “Air Pollutant Emission Notice,” and very small sources (less than two tons/year, or one ton/year in nonattainment areas) are exempt from that notice requirement. 5 Colo. Code Regs. 1001-5, Regulation No. 3, §II.D. Reg. 3 also includes some specific standards in individual exemptions. Petroleum industry flares are exempt if burning natural gas with a concentration of hydrogen sulfide (“H₂S”) below 500 ppmw and total uncontrolled emissions of any pollutant of less than 5 tons per year.

⁶⁶See Permits by Rule, 30 Tex. Admin. Code Ch. 106.

⁶⁷April 17 Guidance, 67 Fed. Reg. at 18,903.

⁶⁸April 17 Guidance, 67 Fed. Reg. at 18,903.

a CAA permit or control requirement. In *In re Borden Chemicals & Plastics Co.*,⁶⁹ an EPA Administrative Law Judge concluded that a release from an emergency relief valve at a facility operating consistent with an accident and malfunction plan required by national emission standards for hazardous air pollutants (NESHAP) was not federally permitted because the NESHAP regulation did not control the discharge.

The EPA guidance, however, suggests that it is possible that some releases from facilities operating under accident and malfunction plans could qualify as federally permitted releases. EPA states that the wide variety of approaches to emission controls and standards under the CAA may create “unusual circumstances” in which such a release could qualify for the exclusion from reporting requirements. Although the guidance does not provide any examples of what those “unusual circumstances” could be, it leaves the door open to consideration of an argument for an exemption in the case of circumstances that are not identical to those in *In re Borden*.⁷⁰

5.16.2.7 Start-up and Shut-down Operations

EPA’s policy on releases subject to a start-up and shut-down plan is similar to its policy on releases from operations consistent with an accident and malfunction plan. EPA believes that the start-up and shut-down plan should include federally enforceable procedures to limit or control the releases during the start-up and shut-down operations before releases occurring from operations consistent with that plan would be considered federally permitted releases. Releases during such operations that are exempt from CAA regulation, or otherwise not subject to emission limits or other controls, would not qualify as federally permitted releases.⁷¹

5.16.2.8 Grandfathered Sources

EPA has stated that generally releases from grandfathered sources, emission sources in existence when the CAA was enacted and not subsequently modified, do not qualify as federally permitted releases. To the extent that releases from such sources, however, are subject to applicable permit or control regulations, such as NESHAPS, limits or controls in a state’s federally enforceable plan to attain air quality standards or a SIP (including minor source thresholds), the releases may qualify as federally permitted releases.

5.17 ENFORCEMENT PROVISIONS

Section 103 of CERCLA provides for criminal penalties for failure to report a release of a hazardous substance or for knowingly submitting false or misleading information. The statute calls for fines to be set in accordance with the criminal code and for imprisonment of up to three years (five years for subsequent convictions).

Section 109 of CERCLA provides for civil penalties of up to \$25,000 per incident for violation of the section 103 notification requirements. Section 109 also provides for Class II Administrative penalties of up to \$25,000 per day for each day during which the violation continues. Subsequent violations may be fined up to \$75,000 per day.

⁶⁹Order Granting Partial Accelerated Decision Concerning Liability, 1993 WL 70228 (EPA), Docket No. EPCRA 003-1992 (Feb. 18, 1993).

⁷⁰April 17 Guidance, 67 Fed. Reg. at 18,903.

⁷¹April 17 Guidance, 67 Fed. Reg. at 18,904.

6 Reporting Requirements under the Emergency Planning and Community Right-to-Know Act (EPCRA)

Release reporting requirements in EPCRA of concern to oil and gas operations are in EPCRA section 304, which establishes a program with many similarities to the CERCLA release reporting programs, but requires that releases be reported to state and local authorities instead of to the NRC. This chapter provides a limited discussion of other EPCRA reporting provisions for identifying the presence of certain chemicals in a facility's operations instead of their release, specifically requirements in EPCRA §§302, 311 and 312.⁷²

6.1 KEY DEFINITIONS FOR EPCRA PROGRAMS

6.1.1 Extremely Hazardous Substance and Threshold Planning Quantity

EPCRA defined a new category of hazardous substance, the extremely hazardous substance or EHS. EHSs are intended to be chemicals that cause serious, irreversible health effects from accidental releases. The list of over 300 chemicals identified as EHSs is in Appendices A and B of 40 *CFR* Part 355, and in EPA's List of Lists.⁷³ The Appendices to the Code of Federal Regulations lists EHSs alphabetically by name and by CAS Registry Number. The Lists of Lists is in numerical order by CAS number, but includes an index by chemical name. Users of either document should consult current editions of the Federal Register for updates.

Three kinds of reporting requirements apply to EHSs. First, EPCRA establishes an RQ for each EHS and requires a facility to notify the SERC and the community emergency coordinator for the LEPC of any RQ release of an EHS or a CERCLA hazardous substance. Second, any facility that contains an EHS in excess of the threshold planning quantity (TPQ), identified in the regulations and in the List of Lists, must notify the appropriate SERC that it is subject to the emergency planning requirements of Subchapter I.⁷⁴ Third, EPCRA requires facilities to submit certain initial notifications and annual inventory reports on EHSs present in their operations. The reporting quantity is the TPQ or 500 pounds, whichever is lower.

Obviously, not all of the more than 800 CERCLA hazardous substances are EHSs. The facility operator should take note, however, that not all EHSs are CERCLA hazardous substances. For example, sulfur dioxide is an EHS with a TPQ and RQ of 500 pounds; however, it is not a CERCLA hazardous substance. Therefore, a facility operator with an RQ release of sulfur dioxide that is not a federally permitted release would report the release to the SERC and LEPC, but not to the NRC.

6.1.2 Definition of Facility

The EPCRA regulations confusingly offer different definitions of "facility" for the different reporting programs, and all of the EPCRA program definitions differ from the one governing CERCLA reporting.⁷⁵ The EPCRA regulations for release reporting define "facility" as follows:

Facility means all buildings, equipment, structure[s], and other stationary items that are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person). *Facility* shall include man-made structures in which chemicals are purposefully placed or removed through human means such that it functions as a containment structure for human use. For purposes of emergency release notification, the term includes motor vehicles, rolling stock, and aircraft.⁷⁶

40 *CFR* §355.20. The regulations for the EPCRA section 311 and 312 hazardous chemical reporting program (See 6.7) include the following additional term:

Facility shall include man-made structures as well as all natural structures in which chemicals are purposefully placed or removed through human means...

⁷² Requirements for toxic chemical release reporting under EPCRA section 313 do not apply to E&P operations. See 1.3.

⁷³ The List of Lists is available online from EPA's Chemical Emergency Preparedness and Prevention Office (<http://www.epa.gov/ceppo/>) by following the links for databases and software to the site offering EPA databases and software.

⁷⁴ The facility operator should take care not to confuse the EPCRA threshold planning quantity with the "threshold quantity" that triggers certain obligations for risk management planning under Section 112(r) of the Clean Air Act. See 40 *CFR* Part 68 and API Publication 761, Model Risk Management Plan Guidance for Exploration and Production (E&P) Facilities, 2d Ed. (June 1998), for additional information on Risk Management Program requirements.

⁷⁵ The "facility" definition for the EPCRA section 313 toxic chemical release reporting program, not discussed in the text, excludes the references to "man-made structures" and "natural structures" for chemical storage and specifies: "A facility may contain more than one establishment." 40 *CFR* §372.3. The rule defines establishment as "an economic unit, generally at a single physical location, where business is conducted or where services or industrial operations are performed." *Id.*

⁷⁶ 40 *CFR* §§355.20 and 370.2.

40 *CFR* §370.20. The preamble to the rule does not explain the difference between the definition for emergency planning and release reporting in Part 355 and for hazardous chemical reporting in Part 370.⁷⁷

6.1.2.1 The “Facility” Definition and Subsurface Structures

The reference to “natural structures” in the Part 370 definition and the discussion of “Subsurface Operations” in the preamble to the rule adopting the definition raised a question about whether a naturally occurring oil and gas reservoir was a “structure” qualifying as a “facility” for hazardous chemical reporting. An October 25, 1990, letter from EPA to the American Petroleum Institute clarified the rule, concluding that oil deposits are not “structures” and that drilling and production operations would not convert the deposits to “containment structures” subject to the EPCRA reporting requirements. The text of the letter is reprinted in Appendix F.

6.1.2.2 The “Facility” Definition and Offshore and OCS Facilities

The CWA and CERCLA specifically define a facility required to report releases as including an “offshore facility.” CWA §311(a)(11), 33 U.S.C. §1321(a)(11); CERCLA §101(17), 42 U.S.C. §9601(17). The EPCRA “facility” definitions do not refer specifically to offshore facilities, but they can be interpreted to include offshore platforms. A platform arguably includes “equipment, structure[s], and other stationary items... located on a single site.”

Some EPCRA reporting requirements, however, may not apply to offshore and OCS facilities. EPCRA section 311 and 312 hazardous chemical reporting requirement do not apply to OCS facilities, which are outside of the jurisdiction of SERCs, LEPCs, and local fire departments. OCS facilities also appear to be excluded from EPCRA section 302 notification and emergency planning requirements. Offshore facilities in state waters generally are outside the jurisdiction of fire departments and LEPCs, but may be subject to the authority of SERCs. Such facilities, for example, may be required to submit EPCRA section 311 and 312 reports to the SERC, but not to the LEPC or local fire department. In the case of a facility, however, with a TPQ of an EHS that could, if released, affect an onshore area, an operator should consider whether the notification and emergency planning requirements apply. EPA has not issued guidance on this issue, and in cases of doubt a facility operator should consult legal counsel.

Whether an offshore facility is outside the jurisdiction of SERCs and LEPCs does not appear to affect release notification requirements. The emergency release notification rule requires notice to “the community emergency coordinator for the local emergency planning committee of any area likely to be affected by the release and the State emergency response commission of any State likely to be affected by the release.” 40 *CFR* §355.40(b)(1). Although a facility in state waters may be outside the jurisdiction of a LEPC, and an OCS facility may be outside the jurisdiction of both LEPCs and SERCs, the regulations require notice to the officials of areas that could be affected by a release.

6.2 TRANSPORTATION EXCLUSION

Except for reporting emergency releases under EPCRA section 304, the transportation, including the storage incident to transportation, of any substance or chemical is exempt from the requirements of EPCRA. The statute specifies that the exclusion applies to the “transportation and distribution of natural gas.” 42 U.S.C. §11047. A facility from which there is a transportation-related release can meet the EPCRA section 304 reporting obligations by providing the required information to the 911 operator or, in the absence of a 911 operator, to the telephone operator. 40 *CFR* 355.40(b)(4)(ii). No follow-up notifications appear to be required, although Department of Transportation regulations applicable to the mode of transportation (pipeline, motor carrier, railroad) may require submission of a follow-up report.⁷⁸

Regulations define a “transportation-related release” to mean:

a release during transportation, or storage incident to the transportation if the stored substance is moving under active shipping papers and has not reached the ultimate consignee.

40 *CFR* §355.40(b)(4)(ii).

The regulatory definition notwithstanding, not all modes of transport rely on “active shipping papers.” EPA question and answer documents available on the website for the Chemical Emergency Preparedness and Prevention Office may offer some guidance on when storage begins and ends for a variety of modes of transportation.⁷⁹ The online EPA guidance suggests a broad definition of transportation by pipeline, citing the definition in Department of Transportation pipeline safety regulations.⁸⁰ In a case of doubt, however, when a facility operator is uncertain whether a release report to the 911 operator will fulfill the EPCRA section 304 requirements, a prudent operator may choose to follow a 911 operator report with a report to other local authorities.

⁷⁷See “Community Right-to-Know Reporting Requirements,” 55 Fed. Reg. 30632 (July 26, 1990).

⁷⁸For example, see 49 *CFR* pt. 191 for reporting obligations for natural gas pipelines; 49 *CFR* pt. 195, subpt. B for reporting obligations for hazardous liquids pipelines; and 49 *CFR* §§171.15 and 171.16 for motor, rail, and air transportation.