EMERGENCY RELEASE NOTIFICATION REQUIREMENTS:
HOW SOON IS SOON ENOUGH?

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Companies that use federally regulated substances in their day-to-day operations are obligated to notify various agencies following a significant release. The specific amount of any given substance that triggers the reporting requirements varies as set forth in applicable regulations. Many companies are surprised to learn that seemingly common chemicals (like ammonia) require notification when released in sufficient quantities. Their surprise turns to shock when slapped by the United States Environmental Protection Agency ("U.S. EPA") with civil – and potentially, criminal – penalties for violating the release reporting requirements. It is not uncommon for U.S. EPA to seek the maximum penalty of $32,500 per reporting violation. Alleged reporting errors frequently relate to a company's failure to notify "immediately" at least three separate governmental agencies, and to make the required follow up report to state and local agencies, for a total of (at least) five violations. These five violations can add up to a penalty in excess of $162,500.

This article aims to introduce industry newcomers to (and remind experienced companies of) the emergency reporting requirements codified in the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCA") and the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA"). Note, this article does not address all release reporting obligations that may exist under federal and state law.

I. When is a Notification Requirement Triggered?

Notification is triggered when (1) a regulated hazardous substance (2) is released, (3) from a "facility," (4) in excess of its "reportable quantity" (5) within a 24-hour period. Regulated hazardous substances include hundreds of chemicals listed in CERCLA's implementing regulations as well as substances that exhibit certain hazardous characteristics. In addition, under ECPRA, reporting requirements attach both to releases of CERCLA hazardous substances and to a separate (sometimes overlapping) set of chemicals designated "extremely hazardous substances." By regulation, U.S. EPA has designated a reportable quantity or "RQ" for each chemical. The RQ can vary from 1 pound to 5,000 pounds, depending on the substance.

Pursuant to CERCLA, a "release" is broadly defined and includes virtually any discharge or emission, subject to limited exceptions. CERCLA excludes certain emissions, such as those from motor vehicles, from the definition of release. Federally permitted releases (*e.g.* releases pursuant to a Clean Water Act NPDES permit) are also excluded. EPCRA defines the term "release" to include all of the activities regulated under CERCLA, as well as releases of hazardous chemicals and extremely hazardous substances. As with CERCLA, EPCRA excludes certain emissions from the definition of release (*e.g.* emissions from motor vehicles and federally permitted releases).

Under CERCLA, the term "facility" includes more than buildings, warehouses and factories; facility is defined to encompass all sites (with limited exception) where a hazardous substance is located. EPCRA likewise defines the term "facility" broadly. Importantly, however, the only facilities subject to EPCRA reporting requirements are ones that produce, use, or store a "hazardous chemical."

II. To Whom Must Notification be Provided?

When a release of an RQ occurs, notification must be provided to three levels of government. Under CERCLA, the "person in charge" must notify the National Response Center ("NRC"). Although the term person in charge is undefined, U.S. EPA expects companies to designate one or more individuals or positions responsible for reporting to the NRC. The NRC is a continuously staffed communication center charged with coordinating federal response actions. Under EPRCA, the facility "owner or operator" must provide notice to both the state emergency response commission (SERC) and local emergency planning committees (LEPCs) in all areas likely to be affected by the release. Note that, unlike CERCLA, EPCRA specifically exempts from the reporting requirements releases that do not escape the facility boundary. This exemption covers those releases from which exposure is limited to persons within the site(s) of the facility. This exemption has been interpreted to apply only in instances where the release lacks potential to affect persons off-site.

III. How Long After the Release of an RQ does a Company Have to Notify?

The statutes require reporting "immediately" whenever there exists knowledge – or "constructive knowledge," as explained below – that the release has exceeded the RQ in any 24-hour period. Releases of less than the RQ do not trigger the statutes' reporting requirements.

Do not confuse the 24-hour period for measuring whether a RQ has been triggered as the amount of time a company has to report a release. The 24-hour period simply relates to the duration of time during which the amount of a release is measured. However, as soon as the RQ is met (whether it takes fifteen minutes or the full 24-hour period), a company must immediately notify the NRC, SERC, and LEPC(s).

Although neither statute defines the term immediately, in enforcement, U.S. EPA relies on a comment in CERCLA's legislative history that requires notification within fifteen (15) minutes after knowledge of a release of a RQ is acquired. If U.S. EPA believes that notification occurred beyond this fifteen minute window, expect U.S. EPA to threaten or bring an enforcement action for late reporting. Although U.S. EPA applies a rigid definition of "immediate" to commence an enforcement action, case law has rejected this approach, recognizing that the determination of immediacy is a fact-specific inquiry. Nonetheless, the period of delay is an important factor used by U.S. EPA in setting the amount of the proposed penalty. Therefore, notification should be provided within fifteen minutes whenever possible.

The issue that gets most companies in trouble involves U.S. EPA's belief that a company could have, and should have, reported sooner than it did. As noted, U.S. EPA has a difficult time understanding why it can take a company more than minutes to determine if the RQ has been – or for an on-going release, is being – exceeded. In contrast, companies frequently make safety considerations (e.g. addressing and containing the release) their first priority, with notification following as soon as practicable. U.S. EPA is unsympathetic to such prioritizing, contending that safety considerations and notification should be pursued independently and simultaneously. Also, some companies assume incorrectly that they must determine the exact volume of the release before providing notification. In reality, the literal terms of the statutes' require notification once it is determined that the RQ has been exceeded, whatever the exact amount.

Ironically, even prompt notification following a company's actual knowledge that a RQ has been

exceeded will often fail to satisfy U.S. EPA. This is because, as noted, U.S. EPA believes that the company possessed sufficient information prior to the time of notification such that it had constructive knowledge that the RQ was exceeded. To complicate the issue further, there is no hard consensus on what constitutes constructive knowledge. One oft cited case states that constructive knowledge "neither indicates nor requires actual knowledge but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts . . . ." In re Thoro Products, Co., EPCRA No. VII-90-04 (ALJ, May 19, 1992). Under this formulation, U.S. EPA has virtually unfettered discretion to "second guess" the company's actions, probing for information available to the company that, in the exercise of due diligence, would have enabled it to more quickly gain actual knowledge of a reportable release.

Other cases acknowledge that a company is entitled to investigate the extent of the release and must be afforded some flexibility in interpreting information available to it. These cases support the company's obligation to report only if the RQ is actually exceeded, and recognize that factual inquiry needed to reach that conclusion may take some time; in some cases, even days to reach a determination. Even so, these cases have faulted companies that neglected to diligently investigate the amount of the release. Such failure was deemed indicative of the companies' ignorance of or hostility to the notification requirements.

At bottom, the constructive knowledge standard prevents a company from waiting to provide notice until it has conclusive knowledge of the amount of the release. Once sufficient information exists to conclude that the RQ was exceeded, it is time to report.

IV. Form and Content of the Notification

Another pitfall for companies concerns proper notification to the authorities. In an emergency, the first contact is commonly to 911. The 911 operator may itself notify the LEPC, SERC, NRC, or all three. A company may assume, incorrectly, that if the LEPC, SERC, or NRC receive notification of the release from such a third-party, it need not make further efforts to report the release. This is not U.S. EPA's position. U.S. EPA insists that it is always the responsibility of the person in charge or the owner/operator to separately report to each the NRC, SERC, and LEPC(s). Therefore, a company should never act as though a third-party's notification to these authorities will fulfill the company's reporting obligations.

A company should immediately notify the NRC of a reportable release by telephone. Once notified, the NRC will request such information as the:

- contact information of the person reporting the release and the responsible party;
- location of the release;
- date and time the release occurred or was discovered;
- name of the substance released;
- cause of the release;
- amount released;
- medium into which the release was discharged;
- bodies of water, if any, affected;
- weather conditions at the time of the release;
- number and type of injuries;
- estimated amount of property damage;
- current and future cleanup actions planned at the site of the release; and
- other agencies notified of the release.

Initial notification to the SERC and LEPC under EPCRA may be made by telephone, radio or in person. Initial notification must include the following information, provided that it is known to and will not delay the company in reporting the release:

- the name or identity of the substance released;
- whether the substance released is an extremely hazardous substance;
- the time and duration of release;
- where the release occurred (*e.g.* in a warehouse, vented to the outside);
- known or anticipated acute or chronic health risks;
- advice regarding medical attention necessary for persons exposed;
- precautions to take following the release; and
- the name and telephone number of the company's contact person(s).

EPCRA also requires that follow-up written notice be provided "as soon as practicable" after a release to affected SERCs and LERCs. Many states, however, require that the follow-up report be made within 30 days of the release. CERCLA does not mandate follow-up reporting.

V. Conclusion: When in Doubt, Report

U.S. EPA aggressively pursues deviations from CERCLA and EPCRA's reporting requirements. Although case law interpreting the reporting requirements provides a company with some tools to contest a proposed violation, the potential benefit of a legal defense is small consolation to a company facing the expense and distraction of an enforcement action, particularly one that may be highly fact-dependent.

Therefore, given the complexity of and the potentially serious consequences for failing to timely observe the emergency release reporting requirements, a company should make it a priority to apply the reporting requirements conservatively. Ensure that company personnel are properly trained and adequately equipped to make meaningful calculations of the volume of chemical released very soon after a release occurs, if not during the release. Assign reporting responsibility to personnel on a 24-hour basis, and ensure they have access to telephone numbers for the NRC, SERC and all LEPCs. Finally, unless it is known with certainty that there has not been a release in excess of the RQ, consider providing prompt notice of the release despite doubt regarding the volume of the release. A few phone calls and the required supplemental written report could save a company from six-figure penalties and shield it and its corporate officers from criminal liability.