

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-6513-2]

### Interim Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Certain Air Emissions

**ACTION:** Notice, request for comments.

**SUMMARY:** The Environmental Protection Agency (EPA) is seeking comments on its interim guidance on the CERCLA section 101(10)(H) federally permitted release definition for certain air emissions. The interim guidance is published as an Appendix to this notice.

**DATES:** Submit comments on or before February 22, 2000.

**ADDRESSES:** Send comments to EPA, CERCLA Federally Permitted Release Definition, Docket Number EC-G-1999-029, Mail Code 2201-A, and mail to: 401 M Street, SW, Washington DC, 20460, or fax to: (202) 501-1011 or email to: docket.oeca@epa.gov. Submitters who want EPA to acknowledge receipt of their comments must mail a self-addressed, stamped envelope.

**FOR FURTHER INFORMATION:** Visit the OECA Docket Web Site at [www.epa.gov/oeca/polguid/enfdock.html](http://www.epa.gov/oeca/polguid/enfdock.html) or contact the RCRA/UST, Superfund and EPCRA Hotline at 1-800-424-9346 (703-412-9810 in Washington, DC area). For general questions about this guidance, please contact Lynn Beasley at (703) 603-9086 and for enforcement related questions, please contact Cheryl Rose at (202) 564-4136.

#### SUPPLEMENTARY INFORMATION:

##### Purpose of this Notice

This notice publishes interim guidance on the federally permitted release exemption to section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. 9603 and section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. 11004. The guidance responds to specific questions raised by industry groups. It discusses EPA's interpretation of the federally permitted release exemption as it applies to some air emissions.

The notice also solicits public comment on the issues discussed in the interim guidance and EPA intends to conduct a public meeting on the guidance. EPA will revise the guidance if, after reviewing the comments, the Agency believes that the guidance warrants modification.

CERCLA section 103 requires the person in charge of a facility or vessel to immediately notify the National Response Center (NRC) of any release of a hazardous substance in an amount equal to or greater than its reportable quantity. EPCRA section 304 requires the owner or operator of a facility to notify the State Emergency Response Commissions (SERC) and Local Emergency Planning Committees (LEPC) of any release of a CERCLA hazardous substance or an EPCRA designated extremely hazardous substance (EHS) in an amount equal to or greater than its reportable quantity. These statutes, however, do not require notification for a "federally permitted release" as defined in CERCLA section 101(10).

The attached guidance discusses the CERCLA section 101(10)(H) notification exemption for certain air emissions. The guidance will assist EPA regional offices, state and local emergency response and other authorities, as well as the regulated community, to determine whether or not a particular release meets that definition. Whether the exemption applies to a particular release often depends upon the language and purposes of a facility's permits and control regulations. EPA recognizes that additional questions may arise regarding the scope of the federally permitted release exemption, and will address those circumstances on a case by case basis. For additional guidance on specific questions regarding whether to report a release, the person in charge, owner or operator should contact EPA's Office of Emergency and Remedial Response (OERR).

The Office of Solid Waste and Emergency Response (OSWER) and the Office of Enforcement and Compliance Assurance (OECA) jointly issue this guidance.

Dated: December 3, 1999.

**Timothy Fields, Jr.,**

*Assistant Administrator for Solid Waste and Emergency Response.*

Dated: December 12, 1999.

**Sylvia K. Lowrance,**

*Acting Assistant Administrator for Enforcement and Compliance Assurance.*

#### Appendix—Interim Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Certain Air Emissions

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##### Summary

Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. 9603, requires the person in charge of a facility or vessel to immediately report any release of a hazardous substance in an amount equal to or greater than its reportable quantity (RQ) to the National Response Center (NRC). Section 304 of the Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. 11004, requires the owner or operator of a facility to immediately notify the State Emergency Response Commissions (SERC) and Local Emergency Planning Committees (LEPC) of any release of a CERCLA hazardous substance or an EPCRA designated extremely hazardous substance (EHS) in an amount equal to or greater than its RQ and provide written followup notice as soon as practicable thereafter.<sup>1</sup> When a release is continuous and stable in quantity and rate, the facility may submit a report on the circumstances of the continuous release that complies with the applicable regulations. For those releases that qualify, continuous release reporting eliminates the burden of having to report each release as it occurs. The immediate and continuous release notifications provide important information for numerous activities. They help government agencies and regulated industries to:

1. Respond to releases;
2. Assess future risks and cumulative effects;
3. Identify chronic problems;
4. Develop pollution prevention and pollution reduction plans; and
5. Educate local communities and the public.

CERCLA and EPCRA, however, do not require notification to the NRC, SERC,

<sup>1</sup> This guidance refers to the CERCLA "person in charge" and EPCRA "owner or operator" collectively as "the facility." This document does not provide a detailed discussion of the distinctions between the two statutes, such as the different definitions of "facility" and reporting exemptions that may apply to one and not the other. Each facility should review the statutes and regulations in order to determine its obligations.

and LEPC of "federally permitted releases," as defined in CERCLA section 101(10). An air emission is a federally permitted release under the CERCLA definition when it is subject to a permit or control regulation that is issued under section 112, section 111, Title I part C or Title I part D of the Clean Air Act (CAA) or under a CAA section 110 State Implementation Plan (SIP), including any schedule or waiver granted, promulgated or approved under these sections.

This guidance document resolves some commonly asked questions regarding the CERCLA federally permitted release exemption as it applies to air emissions. This document does not specifically address every possible application of the definition. A facility should use this document as a general guide to determine whether its individual releases of hazardous substances and EHSs, on a case by case basis, are subject to a CAA permit or control regulation and, therefore, qualify for the CERCLA federally permitted release exemption.

This guidance document explains why a release is generally subject to a permit or control regulation, as defined in CERCLA section 101(10)(H), and therefore exempt from the CERCLA/EPCRA notification requirement when the release is controlled by and in compliance with provisions issued under CAA section 112, including limits and other controls under that section that are technology-based and provisions under that section that control hazardous air pollutants (HAPs) individually or as a class of compounds.

This guidance document also explains why, in the situations discussed herein, a release is generally not subject to a permit or control regulation, as defined in CERCLA section 101(10)(H), and therefore does *not* qualify for the CERCLA federally permitted release exemption when the release is:

1. An unpermitted or unregulated release, including releases from facilities that are exempt from CAA permits or control regulations, such as grandfathered or some minor sources;
2. Caused by an accident or malfunction;
3. Released during start-up or shut-down of a facility and there is no limit or other control on the release of the hazardous substance or EHS during the start up or shut down period;
4. Regulated solely to address volatile organic compound contributions to ozone ambient air quality problems; or
5. Regulated solely to address particulate matter ambient air quality concerns.

In all of these examples, hazardous substances and EHSs are not controlled and may be released directly to the environment without any limits or other control requirements. These uncontrolled releases can involve, for example, highly toxic materials like chromic acid, mercury, methyl isocyanate or 1,3 butadiene, and may occur near sensitive populations, such as elementary schools or senior citizen homes. The law gives emergency response authorities and the public the right to receive information about these hazardous releases so that they can take steps to avoid or minimize exposure, develop responsible emergency response planning and respond to emergencies.

#### **I. Notification Requirements: CERCLA 103/EPCRA 304**

CERCLA establishes broad federal authority to respond to releases or threats of releases of hazardous substances from vessels and facilities. In order to alert federal officials of potentially dangerous releases of hazardous substances, CERCLA section 103 requires the facility to immediately notify the National Response Center (NRC) of any release of a hazardous substance in an amount equal to or greater than the reportable quantity (RQ) for that substance. Section 103(a) states, in part, as follows:

Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to Section 9602 of this title, immediately notify the National Response Center....

42 U.S.C. 9603(a).

This notification provides release information to the government so that government personnel can evaluate the need for a response and undertake any necessary action in a timely fashion. CERCLA section 104 authorizes the federal government to respond whenever there is a release or a substantial threat of a release of a hazardous substance.

CERCLA section 101(14) defines the term "hazardous substance" by reference to provisions in other environmental statutes that identify substances as hazardous and to CERCLA section 102, which instructs the EPA Administrator to designate additional hazardous substances, as appropriate, when a release of such substances into the environment may present substantial danger to the public health or welfare or the environment. Pursuant to section 102, the Administrator also

sets the quantities for hazardous substances that, when released, require reporting. If the Administrator has not established a quantity, section 102(b) provides for a default RQ. A table at 40 CFR section 302.4 lists the CERCLA hazardous substances with their RQs.

The Superfund Amendments and Reauthorization Act of 1986 (SARA) revised and extended the authorities established under CERCLA. Title III of SARA, also known as the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11001 *et seq.*, established new authorities for emergency planning and preparedness, emergency release notification, community right-to-know reporting and toxic chemical release reporting. One purpose of EPCRA is to provide communities and the public with information on potential chemical hazards and to foster state and local planning efforts to control hazardous substance releases.

EPCRA section 304 requires the facility where a hazardous chemical is produced, used or stored to immediately report the release of reportable quantities of CERCLA hazardous substances to state and local emergency planning authorities (*i.e.*, the SERC and LEPC) for each area that the release is likely to affect. In addition, the facility must notify the SERC and LEPC of any release of a reportable quantity of any EPCRA extremely hazardous substance (EHS). These substances are listed in 40 CFR Part 355 Appendices A & B. EPCRA section 304(c) also requires the facility, as soon as practicable after a reportable release, to provide a written followup notice that includes information on the release, response actions, risks and medical advice.

CERCLA section 103(f) establishes an alternative reporting scheme for releases that are continuous and stable in quantity and rate. CERCLA and EPCRA recognize that it is not necessary for the facility to immediately notify the NRC, SERC and LEPC every time such a release occurs in an amount equal to or greater than its RQ. Instead, the facility should report these releases in compliance with EPA's regulations at 40 CFR sections 302.8 and 355.40(a)(2)(iii).

Reporting releases of hazardous substances and EHSs to federal, state, and local emergency planning and response authorities serves several functions. It provides these authorities with important information to respond to the release as quickly as possible in order to minimize the danger to human health and the environment—in particular to that of children, other sensitive populations and sensitive ecosystems. The reports also alert

emergency planning personnel to the potential for future risks so that local communities can work with facilities to minimize harm. Emergency planning agencies also use the reports to assess emergency planning needs, to identify and develop appropriate responses to acute as well as chronic exposure and to assess cumulative effects from many different sources in local areas. These agencies and other local authorities may use this information to develop plans for pollution prevention, pollution reduction, zoning and land use planning. EPCRA also emphasizes that members of the public, including local communities and individuals, have a right to know the types and amounts of releases of hazardous substances and EHSs in their communities.

## II. Federally Permitted Release: Controlled and In Compliance

The CERCLA section 103 and EPCRA section 304 notification requirements do not apply to "federally permitted releases" of hazardous substances, as defined in CERCLA section 101(10). The CERCLA definition of a federally permitted release is incorporated by reference into EPCRA and, therefore, applies to the notification requirements of both statutes. The CERCLA section 101(10) definition of federally permitted release lists eleven categories of releases that are subject to permits or authorizations under enumerated provisions of specific environmental statutes. With respect to air releases, section 101(10)(H) exempts:

any emission into the air subject to a permit or control regulation under section 111, section 112, Title I part C, Title I part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections[.]

CERCLA 101(10)(H); 42 U.S.C. 9601(10)(H)(internal citations omitted).

EPA administrative rulings have clarified that a release is a federally permitted release only if it is in compliance with and controlled by one of the CAA provisions identified in CERCLA section 101(10)(H). The EPA Environmental Appeals Board (EAB) concluded that an air emission must be in compliance with a permit limitation in order to qualify for the federally permitted release exemption and that a facility must report a release of a hazardous substance that exceeds a permit limit by the RQ or more.<sup>2</sup> An

<sup>2</sup>The EAB's decision, *In re Mobil Oil Corp.*, EPCRA Appeal No. 94-2, 5 EAD 490 (EAB Sept. 29,

EPA Administrative Law Judge explained that a release is only a federally permitted release if the regulation imposes an emission limit or otherwise controls the release. The judge concluded that a relief valve discharge was not controlled and, therefore not federally permitted, by a NESHAP regulation that prohibited any discharge from relief valves on equipment in vinyl chloride service except for an emergency relief valve discharge.<sup>3</sup>

Congress did not intend for CAA permit or regulatory provisions to provide a loophole for facilities to avoid notifying the NRC, SERC and LEPC of potentially dangerous releases of hazardous substances. The Senate Report by the Committee on Environment and Public Works that accompanied the 1980 CERCLA bill explained that "[t]he federally permitted release exceptions are not directed at avoiding notice, but rather to make it clear which provisions of law apply to discharging sources." Senate Rep. No. 848, 96th Cong., 2d Sess. 50 (1980).

Congress drafted the federally permitted release exemption to apply only to releases of CERCLA hazardous substances or EPCRA EHSs that are controlled by a CAA permit or regulation. The Senate Report explained, "Subparagraph (H) of the definition covers several sections of the Clean Air Act, as amended, where they result in the control of air emissions of hazardous substances.... Whether control of hazardous substance emissions is achieved directly or indirectly, the means must be specifically designed to limit or eliminate emissions of a designated hazardous pollutant or a criteria pollutant." Senate Rep. No. 96-848 at 49.

The Senate Committee Report also explained that "[w]hile the exemptions from liability for federally permitted releases are provided to give regulated parties clarity in their legal duties and responsibilities, these exemptions are not to operate to create gaps in actions necessary to protect the public or the environment." Senate Rep. No. 96-848 at 47. In order to avoid the "gaps" in protection of public health and the environment that concerned Congress, the federally permitted release provision

1994), is available at the following internet address: <http://www.epa.gov/eab/alpha.htm>, or by contacting the Clerk of the Board, (202) 501-7060.

<sup>3</sup>The ALJ's decision, *In re Borden Chemicals & Plastics, Co.*, [CERCLA] EPCRA 003-1992 (Order Granting Partial Accelerated Decision Concerning Liability, Feb. 18, 1993), is available by contacting the EPA Hearing Clerk at Headquarters, (202) 260-4865, and is also available through legal research services such as Lexis or Westlaw.

exempts only those releases that are subject to emission limits and other controls that are specifically designed to address hazardous impacts from the release of the hazardous substance or EHS at issue.

## III. Hazardous Air Pollutant Releases That Are Controlled Under CAA Section 112

Releases of hazardous substances and EHSs that are controlled by and in compliance with a permit or control regulation under CAA section 112 qualify for the CERCLA section 101(10)(H) federally permitted release exemption and do not have to be reported under CERCLA section 103 and EPCRA section 304. CAA section 112 provides authority for EPA, by regulation, to establish National Emission Standards for Hazardous Air Pollutants (NESHAPs). The emission limits and other control provisions in the NESHAPs control releases of hazardous air pollutants (HAPs), as defined in CAA section 112(a)&(b). CAA section 112 also provides some authority, for example in subsections 112(g) and 112(j), to set HAP emission limits on a case by case basis in permits.

Pursuant to CERCLA section 101(14), all HAPs are also CERCLA hazardous substances. A HAP emission is generally a CERCLA/EPCRA federally permitted release if the release is in compliance with all of a NESHAP's limits and other control provisions for the specific HAPs (or groups of HAPs) and methods of release (*i.e.*, the particular emission points) at issue. EPA typically identifies the HAPs and emissions points that each NESHAP provision controls in the NESHAP and/or the preamble to the final rule promulgating the NESHAP. The pre-1990 health-based, as well as post-1990 NESHAP controls that are often technology-based, upon maximum achievable control technology (MACT), are designed to limit or eliminate emissions of HAPs—substances that were listed because of their individual hazardous qualities and impacts. Releases of hazardous substances or EHSs that are controlled by and in compliance with health-based and MACT-based NESHAP limits and other control provisions that are directed at controlling those substances, therefore, qualify for the CERCLA/ EPCRA federally permitted release exemption.

CAA section 112(l) authorizes EPA to delegate to states the authority to implement and enforce the federal NESHAPs. Under section 112(l), EPA may approve state programs to implement and enforce emissions standards and other HAP requirements in place of federal NESHAPs, provided

the state requirements are no less stringent than federal requirements. State programs that EPA approves under CAA section 112(l) are federally enforceable pursuant to section 112(l)(7). Releases of CERCLA hazardous substances and EPCRA EHSs that are controlled by and in compliance with these EPA-approved state programs also qualify for the CERCLA and EPCRA federally permitted release exemption.

#### **IV. Hazardous Substance and Extremely Hazardous Substance Releases That Are Not Controlled**

A release of a hazardous substance is not subject to a permit or control regulation when the facility does not have a permit or regulation that controls the release at issue. The following provides a few examples of releases that do not qualify for the CERCLA/EPCRA federally permitted release exemption. In these situations, the facility must immediately notify the NRC, SERC and LEPC when it releases a hazardous substance or EHS release in an amount that is equal to or greater than the RQ or file a continuous release report for its releases that are continuous and stable in quantity and rate.

##### *A. Sources That Are Exempt From CAA Regulation*

Air emissions of hazardous substances or EHSs that are not subject to a permit or control regulation issued under CAA sections 111, 112, Title I—part C, Title I—part D, or a section 110 SIP are not CERCLA federally permitted releases. A CAA exemption from these CAA provisions does not exempt a facility from its obligation to comply with CERCLA and EPCRA notification requirements. Emissions that are exempt from CAA requirements are not subject to a permit or control regulation, do not qualify for the CERCLA/EPCRA federally permitted release notification exemption, and must comply with CERCLA and EPCRA notification requirements. Pursuant to CERCLA and EPCRA, the facility must notify the NRC, SERC and LEPC of hazardous substance or EHS releases that are exempt from CAA permits or control regulations when the releases are equal to or greater than the applicable RQs, or file a continuous release report for its releases that are continuous and stable in quantity and rate.

Releases that are not subject to CAA permits or control regulations may include emissions from facilities that are exempt from CAA controls because they existed prior to enactment of the CAA requirement, such as unmodified “grandfathered” sources, or releases from facilities that are exempt from

CAA controls because they emit an annual, cumulative amount of pollution below a stated threshold, such as unpermitted minor sources. The hazardous substance and EHS releases from these facilities are not controlled or limited by, and therefore are not subject to, a permit or control regulation. Without CERCLA and EPCRA notification, emergency response authorities would not learn of potentially dangerous releases that are exempt from CAA requirements.

A facility that is exempt from CAA permits and control regulations could release a dangerous amount of a hazardous substance that requires a federal, state or local emergency response action. Even a very small source could have a release of a hazardous substance that has catastrophic consequences and requires an immediate response. Information about emissions from exempt sources may also be crucial to emergency and pollution prevention planning. It would frustrate the notification purposes of CERCLA and EPCRA to interpret the federally permitted release exemption to authorize these releases without alerting the NRC, SERC and LEPC.

The CERCLA definition of federally permitted release includes releases that are subject to any schedule or waiver granted, promulgated or approved under the CAA sections identified in the definition. The terms “schedule” and “waiver” have specific meanings under the CAA. CERCLA’s reference to CAA schedules and waivers covers only those specific meanings and does not include exempt sources. Under section 111(j)(1) of the CAA, for example, EPA may grant a waiver from a New Source Performance Standard (NSPS) in order to encourage the use of an innovative technological system or systems of continuous emission reduction. If a technology does not result in an emission reduction that equals or exceeds the applicable standard, the regulator will terminate the waiver and establish a schedule for compliance. A release of a hazardous substance or EHS that is controlled by and in compliance with a schedule or waiver issued pursuant to a CAA section listed in CERCLA section 101(10)(H) is a CERCLA/EPCRA federally permitted release, provided the schedule or waiver includes and authorizes a release of that hazardous substance.

##### *B. Accidents and Malfunctions*

Unanticipated releases, such as accidents or malfunctions, are the most obvious types of releases that concerned Congress when it enacted CERCLA section 103 and EPCRA section 304. An

accident or malfunction can result in an extremely large and/or extremely toxic release. Many accidents or malfunctions require immediate responses, which could include shutting down the facility, evacuating the local population or sealing off the affected area.

A fundamental purpose of CERCLA section 103 and EPCRA section 304 is to ensure that emergency response personnel are immediately alerted of unanticipated releases. Once notified, emergency response experts can assess the dangers from the release and initiate appropriate action to ensure that the harm is minimized, the release is brought under control as quickly as possible and any remaining damage is cleaned up or repaired.

Congress did not intend to exempt unanticipated releases from CERCLA section 103 and EPCRA section 304. As explained in the Senate Report, “Accidents—whatever their cause—which result in, or can reasonably be expected to result in releases of hazardous pollutants would not be exempt from the requirements and liabilities of this bill. Thus, fires, ruptures, wrecks and the like invoke the response and liability provisions of the bill.” Senate Rep. No. 96–848 at 48.

Some CAA programs recognize that accidents and malfunctions may happen even when the facility has implemented reasonable measures to avoid them. A release caused by an accident or malfunction, therefore, may not violate the facility’s CAA obligations if the facility develops, maintains and is operating in compliance with an accident and malfunction plan. The CAA requires accident and malfunction plans in order to prevent accidental releases, identify accidents and malfunctions when they occur, bring accidental releases under control as quickly as possible and clean up any damage. Accident and malfunction plans, however, do not control unanticipated releases. Even when a facility is in compliance with its accident and malfunction plan, an unanticipated release of hazardous substances or EHSs could result in severe impacts that require immediate response. Unless the facility prevents a release, or until it brings an unanticipated release under control through repairs or other means, the release is uncontrolled and does not qualify for the CERCLA/EPCRA federally permitted release notification exemption. An unanticipated release of a hazardous substance or EHS that is due to an accident, malfunction or otherwise, is not subject to a permit or control regulation and must be reported under CERCLA section 103 and EPCRA

section 304 when the amount of the release is equal to or greater than the applicable RQ.

### C. Start-Up and Shut-Down

Start-up and shut-down releases can be large and/or toxic and may cause harm to human health and the environment. It is important for federal, state and local emergency response personnel to have information about uncontrolled emissions during start-up and shut-down periods for analysis of chronic and cumulative impacts, proper planning and emergency response.

Some CAA regulations do not require sources to meet emission limits during start-up and shut-down. A regulation may exempt a release from CAA emission limits or other controls because, for example, it may not be technologically feasible for the source to achieve the requirement during start-up and shut-down.

If a permit or control regulation contains explicit emission limits or other controls on the releases of listed hazardous substances or EHSs during start-up or shut-down, then releases of those substances qualify for the CERCLA/EPCRA federally permitted release notification exemption up to the controlled amount. If, however, a release of a hazardous substance or EHS is exempt from CAA regulation, or is otherwise not subject to emission limits or technology controls during the start-up or shut-down of an operation, then these uncontrolled releases do not qualify for the CERCLA/EPCRA federally permitted release notification exemption and must comply with CERCLA and EPCRA notification requirements.

In many instances, facilities must have a start-up, shut-down and malfunction (SSM) plan that sets forth procedures for operating and maintaining a source during those periods. See, for example, 40 CFR 63.6(e)(3). Even when a facility is in compliance with its SSM plan, it may experience uncontrolled or unanticipated releases of a hazardous substance or EHS that require a response. To the extent that an SSM plan does not incorporate permit or regulation requirements for specific emission limits or other technology controls on the facility's releases of hazardous substances and EHSs during start-up or shut-down, then those releases are not controlled by the SSM plan and must comply with CERCLA and EPCRA notification requirements, even when the uncontrolled releases occur while the facility is operating in accordance with its CAA SSM plan.

### D. Volatile Organic Compound/Ozone Controls and Particulate Matter Controls

An independent, unrelated requirement for ozone or particulate matter does not qualify a release of a hazardous substance or EHS for the CERCLA/EPCRA federally permitted release exemption. Limits or other controls on volatile organic compounds (VOCs) as ozone precursors or on small particles as particulate matter (PM) do not exempt hazardous substance and EHS releases from the CERCLA and EPCRA notification provisions. To conclude otherwise would frustrate the purposes of the CERCLA and EPCRA release notification requirements and potentially allow thousands of pounds of highly toxic chemicals to be released—perhaps next to a schoolyard, nursing home or other sensitive population, without any notice to federal, state or local response and emergency planning authorities or to the public. These releases could potentially endanger surrounding populations and have a significant impact on human health and the environment.

Hazardous substances and EHSs have RQs that range from one pound to 5,000 pounds per 24 hour period. The RQ is based upon the intrinsic physical, chemical and toxicological properties of the substance. Facilities must report a release of CERCLA hazardous substances or EPCRA EHSs when the release amount is equal to or greater than the substance's RQ. Emergency response personnel and local emergency planning officials need to have complete and accurate information regarding the releases of these different hazardous substances in order to evaluate the impact on human health and the environment from the release amount.

The manner in which EPA and authorized states regulate VOCs/ozone precursors and PM is inconsistent with the CERCLA and EPCRA notification requirements. The EPA and authorized state ambient air quality programs that regulate VOCs as ozone precursors or that regulate small particles as PM are not designed to control releases of hazardous substances and EHSs and do not address the hazardous impacts that concerned Congress when it enacted the CERCLA and EPCRA release notification requirements. The CAA provisions in CERCLA section 101(10)(H) that control hazardous emissions, and not CAA provisions directed at ozone or particulate ambient air quality, regulate hazardous substances and EHSs consistently with CERCLA and EPCRA.

Congress established separate CAA programs with independent control schemes for the different impacts from

emissions of different types of substances. The different CAA programs focus on the particular harms from the substances that they are designed to regulate and impose permit and regulatory limits and other controls to achieve the specific purposes of the individual program. EPA and authorized states control hazardous emissions through NESHAPs or other hazardous emission controls that they issue pursuant to sections 112, 111 or 110 or Title I Parts C or D of the CAA. A release of a hazardous substance or EHS is only exempt from the CERCLA/EPCRA notification requirements when the release is subject to a permit or control regulation under a CAA program that is specifically designed to control the hazardous substance or EHS release. Limits and other controls on VOCs as ozone precursors or on small particles as PM do not control releases for this purpose.

### VOCs as Ozone Precursors

Permit provisions and regulations that regulate ozone through VOCs are not directed at controlling releases of hazardous substances and EHSs. These limits are based upon VOC contributions to ozone formation, not upon the toxicity of individual substances. Particularly in areas that have attained the ozone national ambient air quality standard (NAAQS), Ozone-control limits on VOCs may be very large, are often expressed in annual terms, may apply to numerous substances with various toxicity levels and are unrelated to the risks posed by individual hazardous substances. Ozone-control limits on VOCs are typically not designed to control the facility's releases of hazardous substances or EHSs. Specific hazardous releases are often dangerous to human health and the environment in much smaller amounts than general VOC emissions. A facility could have a dangerous peak release of an individual hazardous substance that is consistent with a VOC limit for ozone control, but that may require an immediate response in order to protect human health and the environment.

Formaldehyde, 1,3 butadiene or ethylene oxide, for example, are VOCs that, along with less hazardous VOCs, such as dimethyl ether or ethylene, contribute to ozone formation. Formaldehyde and ethylene oxide, however, are HAPs that are subject to controls under section 112 and other CAA provisions that Congress established within the CAA to control HAPs. EPA controls formaldehyde and ethylene oxide through the HAP programs and not through limits that are

designed to address ambient ozone levels. Unlike general VOC limits, a HAP limit imposes controls on specific substances and often provides a list of hazardous substances and hourly emission limits for each. Hazardous substance and EHS releases qualify for the CERCLA/EPCRA federally permitted releases notification exemption when they are controlled by and in compliance with provisions to control HAP releases. Hazardous substances and EHSs, therefore, are not subject to a permit or control regulation under CERCLA section 101(10)(H), when the facility has a general emission limit or other control for VOCs as ozone precursors in order to address ozone ambient air quality.

#### Particulate Matter

PM is a designation that identifies particles of a certain size, mass or amount. CAA permits and control regulations for PM address the impacts on human health and the environment from these particles, taking into account the particles' size and mass and the dangers presented by the inhalation of small particles. The EPA program for PM is not designed to address the independent impacts from hazardous substances or EHSs that may be released in small particles. PM permits and control regulations control the emission amounts of small particles of any substance. They typically apply to hazardous and non-hazardous substances alike. Releases of hazardous substances and EHSs are subject to specific CAA provisions that are intended to address these releases.

Chromium, for example, which may be released as small particles, is a HAP that has many severe hazardous effects independent of any impact due to small particle size. Chromium is extremely toxic and may be found in its acid mist form, chromic acid. Some forms of chromium, such as hexavalent chromium, are also considered to be carcinogenic. EPA and authorized states' particulate matter provisions do not control releases of chromium or chromic acid as hazardous substance or EHS releases. These hazardous substances are subject to permits and control regulations that specifically limit or otherwise control chromium releases under the CAA's HAP programs. Releases of hazardous substances or EHSs, therefore, are not subject to a permit or control regulation under CERCLA section 101(10)(H), when the facility has a general emission limit or other control for PM.

#### V. Continuous Releases

In CERCLA section 103(f)(2), Congress established an alternative notification method for hazardous substance releases that do not qualify for the federally permitted release exemption under CERCLA section 101(10)(H), but that are "continuous" and "stable in quantity and rate." The continuous release reporting program provides response authorities with important information regarding the quantity, nature and potential impact of these releases, while reducing the notification burden. Response agencies maintain the immediate and continuous release notification information and use it for emergency planning and cumulative impact analysis.

Continuous release notifications perform, for example, the following important functions: (1) They provide information on releases into the environment that is often not otherwise available to emergency response personnel and the public; (2) they may alert government officials and the public as to when releases are expected to increase; and (3) they help government officials and emergency planning personnel to predict when peak exposures to nearby populations may occur. Local planners may use the continuous release applications to plan outdoor activities in the community; to assist with urban planning decisions, such as where to locate buildings that may house or provide services to sensitive populations (*e.g.*, senior citizen centers, day care centers and schools); and to assess the risk from total emissions in a community.

Facilities who believe a release could qualify as "continuous" must:

- (1) Make an initial telephone call to the NRC, SERC and LEPC;
- (2) Provide an initial written notification describing the release to the EPA Region, SERC and LEPC within 30 days of the telephone call; and
- (3) Provide a one-time written follow-up notification to the EPA Region within 30 days of the first anniversary of filing the initial written report.

Thereafter, no further notification is required, unless there is a change in the information submitted or there is a statistically significant increase in the release. If there is a change in the composition or source of a release that did qualify as continuous, the change must be treated as a new release.<sup>4</sup>

<sup>4</sup>The above description of the continuous release reporting requirements is a summary of the requirements and is not intended to modify or replace the continuous release regulations. In order to determine whether a release qualifies for continuous release reporting and for instructions on

The continuous release notification requirements do not impose new, independent emissions limits. They do, however, offer a less burdensome way to report predictable releases while also providing government agencies and local communities with information that may be critical to managing risks and reducing exposure to sensitive populations.

#### Conclusion

CERCLA section 103 and EPCRA section 304 require facilities to provide important information about hazardous substances and EHSs that are released into the environment to the NRC, SERCs, LEPCs, and indirectly to EPA, the Coast Guard, other agencies and the public. The continuous release reporting option provides a less burdensome method for facilities to notify these federal, state and local authorities of certain hazardous substance and EHS releases.

The federally permitted release exemption to CERCLA 103 and EPCRA 304 notification requirements eliminates the notification requirement, including the continuous release reporting option, for certain air emissions of hazardous substances and EHSs when the release is subject to a permit or control regulation issued pursuant to CAA, sections 112 and 111, Title I part C, Title I part D, or a section 110 SIP. This guidance document discusses the federally permitted release exemption as it would be applied in the specific situations described herein. A brief statement of the guidance's conclusions is set forth in the Summary section, above.

The facility must determine whether its hazardous substance and EHS releases qualify for the notification exemption. In order to overcome the presumption that a release of a hazardous substance or EHS is not federally permitted and that a facility must immediately notify the NRC, SERC and LEPC when the amount of release is equal to or greater than the substance's RQ, the facility must demonstrate that the CERCLA federally permitted release definition exempts the hazardous substance or EHS release from the notification requirements.

This guidance does not impose any new reporting obligations or burdens and does not recommend new forms or reporting mechanisms. CAA permit modifications are not required as a result of this guidance. When a facility's

how to comply, use the continuous release reporting regulations at 40 CFR section 302.8, 40 CFR 355.40(a)(2)(iii) and 55 FR 30,166 (July 24, 1990).

CAA permit or control regulations do not control a release as the release of a particular hazardous substance or EHS, or when the release is not in compliance with such a permit or control, then the facility must comply with CERCLA section 103 and EPCRA section 304 notification requirements.

This guidance is consistent with statements that the Agency has previously made regarding the federally permitted release exemption. EPA issued two Notices of Proposed Rulemaking (NPRMs) and one Supplemental Notice regarding the application of the federally permitted release exemption in CERCLA section 101(10).<sup>5</sup> Subsequent administrative adjudications have provided additional guidance, and EPA has published regulations to explain the reduced reporting option for continuous releases.

When developing this guidance, EPA considered the public comments on air emissions that were submitted in response to the two NPRMs and the Supplemental Notice. Some of those comments are no longer applicable because EPA has already addressed the issues discussed in those comments through administrative adjudications or other Agency statements. EPA also

considered its experience in implementing the reporting requirements under CERCLA section 103 and EPCRA section 304 and the success of the CERCLA and EPCRA programs in providing information to communities about releases of hazardous substances and EHSs.

This guidance document provides notice of EPA's interpretation of the CERCLA term "federally permitted release" as it applies in the situations described herein. It does not modify, amend or in any way change current law regarding release notification requirements under CERCLA and EPCRA. This guidance document does not impose new legally-binding requirements on EPA, states or the regulated community. EPA may revise this guidance in the future.

EPA intends to apply the interpretations set forth in this guidance in enforcement actions, but retains the discretion to adopt approaches that differ from this guidance when appropriate. When setting priorities to determine whether to pursue an enforcement action, EPA generally considers the potential for significant risks and adverse impacts on human health and the environment, as well as the integrity of the federal program.

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure

"meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations and regulatory policies that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This interim guidance document does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, nor on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This guidance does not impose any new requirements nor modify existing law. It explains a CERCLA provision that defines an exemption to notification requirements that are imposed by statute. The guidance does not preempt any State or local law, and does not impose any mandate on State and local governments. The requirements of section 6 of the Executive Order, therefore, do not apply to this interim guidance.

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<sup>5</sup>Notice of Proposed Rulemaking, 48 FR 23,552 (May 25, 1983); Notice of Proposed Rulemaking, 53 FR 27,268 (July 19, 1988); Supplemental Notice, 54 FR 29,306 (July 12, 1989).