

EPCRA: Federal Environmental Reporting 101

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The Emergency Planning and Community Right-to-Know Act of 1986 (“EPCRA”), Title III of the Superfund Amendments and Reauthorization Act of 1986, codified at 42 U.S.C. 116, was enacted to protect the environment after several serious chemical releases. Thousands of people were killed following a 1984 release of methyl isocyanate in Bhopal, India. A release from a similar chemical plant in West Virginia in 1985 also had serious environmental consequences. Shortly thereafter, in 1986, Congress enacted EPCRA to facilitate community awareness of chemical hazards, largely through reporting requirements. EPCRA requires facilities manufacturing, storing, or processing certain chemicals to report usage and spill data to EPA, state and local governments, and tribes, which in turn make the data publicly available, unless it is protected by a valid trade secret claim.

EPCRA requires each state to appoint a State Emergency Response Commission (“SERC”). The SERC appoints Local Emergency Planning Committees (“LEPCs”); coordinates and supervises the activities of the local committees; reviews the local emergency response plans each year; and receives all chemical release notifications and inventory reports.

Under EPCRA and its implementing regulations (at 40 C.F.R. Parts 350-72), there are four types of reporting obligations for the owners and operators of defined facilities:

1. Emergency Planning and Notification
2. Emergency Release Reporting
3. Hazardous Chemical Notification and Inventory Reporting
4. Toxic Release Inventory Reporting

Emergency Planning and Notification

EPCRA Section 302 imposes an emergency planning and notification obligation. Owners or operators of facilities subject to this section are required to notify the appropriate SERC within 60 days after receiving or producing a chemical subject to regulation. 40 C.F.R. § 355.20. The owner or operator must then appoint a facility representative to participate in the local emergency planning process and notify the Commission of the representative’s appointment within 30 days of the local emergency planning process’s creation. *Id.*

Facilities are required to notify the proper SERC and LEPC if there is a release of an “extremely hazardous substance,” as defined at 40 C.F.R. § 355, in excess of the threshold amount as soon as the facility learns of the release. 40 C.F.R. § 302.6. The threshold amount is determined by examining which radionuclide is involved and whether the exact quantity is capable of being determined. 40 C.F.R. § 302(b). Exemptions from this notification requirement include releases from naturally occurring radionuclides, releases from operations involving coal and coal ash, and releases of a reportable quantity (“RQ”) of certain elements, as listed at 40 C.F.R. § 302.6(c). Additionally, releases only resulting in exposure to persons within the boundaries of a facility are exempt from the notification requirements. 40 C.F.R. § 355 App. A. Penalties for failure to notify, including criminal penalties, are set out at EPCRA Section 103. Releases that are continuous and stable in quantity and rate do not require normal notification under EPCRA. 40 C.F.R. § 302.8. Instead, EPCRA requires that facilities or vessels with continuous releases follow these steps:

1. Initial telephone notification;
2. Initial written notification within 30 days of the first anniversary of the initial telephone notification;
3. Follow-up notification within 30 days of the first anniversary date of the written notification;
4. Notification of a change in the composition or source(s) of the release or in the other information submitted in the initial written notification; and,
5. Notification at such times as an increase in the quantity of the hazardous substance being released during any 24-hour period represents a statistically significant increase.

40 C.F.R. § 302.8(c).

Emergency Release Reporting

If an accidental chemical release exceeds the threshold quantity specified in 40 C.F.R. Appendices A-B, the facility must notify the SERC and LEPC regarding any potentially affected areas. Facilities subject to this requirement are those that release extremely hazardous substances or CERCLA hazardous substances in excess of the required reporting quantities. The emergency notification must include the following:

1. Name of the chemical;
2. Whether it is extremely hazardous;
3. Quantity released;
4. Time and duration of release;
5. Medium in which release occurred (land, water, and/or air);
6. Any potential health risks associated with the release;
7. Evacuation or sheltering precaution information; and,
8. Name and telephone number of contact person.

40 C.F.R. § 355.40

Following the initial notification, the facility must then provide written follow-up notice to the SERC and LEPC as soon as possible. This notice should include updated information on the release and advice for medical care of those affected, if necessary. *Id.*

Hazardous Chemical Notification and Inventory Reporting

EPCRA Sections 311 and 312 govern hazardous chemical notification and inventory reporting requirements. The Occupational Safety and Health Administration (OSHA) requires certain facilities to maintain material safety data sheets (MSDSs) for hazardous chemicals used or stored in the workplace. MSDSs provide data on chemicals' health hazards and physical hazards of chemicals and describe associated protective measures. Covered facilities must maintain MSDSs to submit to the appropriate SERC, LEPC, and local fire department. 40 C.F.R. § 370.12. A facility may submit a detailed list of chemicals used instead of MSDSs. Afterwards, the LEPC may request an MSDS for each hazardous chemical in the facility. *Id.*

An annual inventory, the contents of which must be made public, must also be submitted in a report no later than March 1. The minimum amount of information a facility is required to report is called Tier I information, and is described at 40 C.F.R. § 370.41. A facility can also choose to submit Tier II information, or a SERC or LEPC can request it. 40 C.F.R. § 370.42. Tier I information includes:

1. Certification;
2. Calendar year for the reporting period;
3. Complete name (and company identifier where appropriate) and address of the facility;
4. North American Industry Classification System (NAICS) code for the facility;
5. Dun and Bradstreet number for the facility;
6. Owner or operator's full name, address, and phone number;
7. Emergency contact;
8. Whether the information is identical to that of the previous year;
9. Estimate of maximum amount of hazardous chemicals present at the facility;
10. Estimate of average daily amount of hazardous chemicals present at the facility;
11. Maximum number of days that any single hazardous chemical was present at the facility; and,
12. General location of each hazardous chemical.

40 C.F.R. § 370.41

Toxic Release Inventory Reporting

The Toxic Release Inventory (TRI) program is authorized by EPCRA Section 313. TRI mandates and facilitates compilation of toxic chemical release data and waste management activities, which is then made available through electronic databases. Covered facilities are those which:

1. Have 10 or more full-time employees;
2. Fall under one of a number of specific industrial classification codes; and,
3. Have manufactured, processed, or otherwise used a listed toxic chemical.

42 U.S.C. 11023(b)(1)(A) (2010).

Covered facilities must report every calendar year, even if there are no releases within a particular year. 40 C.F.R. § 372.85(5). Following 42 U.S.C. 11023(g)(1), EPA publishes yearly the reporting form, and covered facilities must list their "principal business activities." *Id.* EPA has interpreted these activities to correspond to the primary industrial classification codes specified elsewhere in Section 313. 71 Fed. Reg. 32464, 32465 (2006). Typically, a covered facility's primary code is the code related to the types of products distributed from an establishment that have the highest dollar value added. 53 Fed. Reg. 4500, 4501 (1988). Facilities must determine on their own what the most appropriate code is, according to current operations. See 73 Fed. Reg. 32466, 32470 (2008). Section 313 originally included Standard Industrial Classification code sectors 20 through 39 in the TRI program and also gave EPA authority to expand the scope of covered facilities. EPA has since expanded the scope and begun using the North American Industrial Classification System, so that code sectors 11, 21, 22, 31-33, 42, 48-49, 51, 54, 56, and 81 are now listed. For more information, see EPA, "NAICS in TRI Reporting," available at <http://www.epa.gov/tri/lawsandregs/naic/ncodes.htm#q562112>.

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