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A Closer Look at Title III of SARA: Emergency Planning and Community Right-to-Know Act of 1986

Jayne S.A. Pritchard

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I. Introduction

In December 1984, methyl isocyanate,[1] an intermediate used in the manufacture of pesticides, was released at a Union Carbide facility in Bhopal, India. More than 2500 people were killed and thousands were injured as a result of the early morning release.[2]

In August 1985, aldicarb oxime, an intermediate reacted in combination with methyl isocyanate to produce an insecticide, was released at a Union Carbide facility in Institute, West Virginia. The chemical leak began at 9:24 a.m., and Union Carbide officials failed to notify local authorities for twenty minutes because the company did not believe the gas would go beyond the plant boundaries. More than 150 individuals sought medical attention.[3]

This release and others from Union Carbide's West Virginia facility, occurring as they did after the Bhopal tragedy, renewed calls for tighter controls over industry.[4] Though no known injuries resulted from the West Virginia release, the

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1. Methyl isocyanate is produced by Union Carbide. Approximately 12,000-14,000 metric tons of methyl isocyanate were produced in the U.S. in the 1975, primarily for use in the manufacture of insecticides and herbicides. 13 ENCYCLOPEDIA OF CHEMICAL TECHNOLOGY 806 (3d ed. 1981). All isocyanates are potentially hazardous and require care in handling, with the primary health effect being respiratory irritation caused by isocyanate vapors. Skin allergies have been observed but are not common. *Id.* at 810. The oral toxicity of isocyanates is relatively mild. *Id.* at 812. Exposure to moisture leads to formation of carbon dioxide and the development of pressure in closed containers. *Id.* at 812.

2. Shabecoff, *Industry to Give Vast New Data on Toxic Perils*, N.Y. Times, Feb. 14, 1988, at 1, col. 1.

3. *Steam In Chemical Storage Tank Named As Likely Cause Of Union Carbide Accident*, 16 ENV'T REP. (BNA) 635 (Aug. 16, 1985).

4. *Carbide Accident May Speed Controls, Right-To-Know, Emergency Response Rules*, 16 ENV'T REP. (BNA) 635 (Aug. 16, 1985).

fact that unplanned releases occurred in the United States caused considerable concern,[5] and led to the enactment of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), found in Title III of the Superfund Amendments and Reauthorization Act of 1986.[6]

In 1985, EPA determined that more than 6,900 accidents involving spills or releases of toxic chemicals had occurred in the past five years, including 135 deaths and 1,500 injuries. Three-quarters of the accidents took place in plants, and the balance during transport. Thirty-six percent were from improper storage, sixteen percent from valve and pipe failures, and twelve percent from production processes. Chlorine caused the most deaths. Ammonia, sulfuric acid, polychlorinated biphenols (PCBs), and hydrochloric acid all caused deaths; injuries from these chemicals were common.[7]

Many communities consider hazardous material accidents to be their most significant threat. Ninety-three percent of the more than 3,100 localities completing a survey by the Federal Emergency Management Agency during 1985 identified hazardous materials risks (e.g., on highways and railroads, or at facilities) as a significant threat to their communities.[8] In New York state, 735 toxic chemical accidents were reported from 1983 through 1985. At least twenty-two people died and 267 were injured. More than 4,000 people were forced to evacuate homes and workplaces.[9]

As a result of these concerns, pressure was brought to

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5. *Id.*

6. The Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. §§ 11001-11050 (Supp. IV 1986). EPCRA was originally introduced as a separate bill but was later incorporated into the Superfund Amendments and Reauthorization Act., H.R. REP. No. 99-962, 99th Cong., 2nd Sess. 281, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3374. In *A.L. Laboratories, Inc. v. EPA*, 826 F.2d 1123 (D.C. Cir. 1987), the court held that EPCRA was an independent act rather than an amendment to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986).

7. *Draft EPA Study Counts 6,900 Releases Of Acutely Toxic Chemicals In Five Years*, 16 ENV'T REP. (BNA) 1022 (Oct. 11, 1985).

8. NATIONAL RESPONSE TEAM, HAZARDOUS MATERIALS EMERGENCY PLANNING GUIDE 1 (1987).

9. OFFICE OF ATTORNEY GENERAL, REPORT OF JOINT PUBLIC HEARINGS ON TOXIC CHEMICAL ACCIDENTS IN NEW YORK STATE 3 (1986).

bear on federal agencies thought to have authority over such accidental releases of chemicals at industrial facilities.[10] However, no agency had clear authority over releases such as those which occurred in Bhopal and West Virginia.[11] Imminent hazard response authority already existed in a number of federal statutes which confer primary response authority on the federal Environmental Protection Agency (EPA).[12]

The Department of Transportation has response authority limited to releases which occur during transportation.[13] Because EPA believed that the existing regulatory programs were adequate, it declined to consider a new program specifically designed to address such accidental releases. Instead, the EPA offered to assist communities who choose to develop emergency response procedures.[14]

Even with community programs and the number of federal environmental statutes dealing with "imminent and substantial hazards,"[15] it became apparent that the existing emergency response provisions were not sufficient to protect against the possibility of releases of hazardous substances. A nationwide need existed for emergency planning to help prevent accidental releases, not merely plan for cleanup once a release occurs, and to facilitate timely and effective emergency response. To assist in such planning, the EPA initiated the voluntary Chemical Emergency Preparedness Program (CEPP), part of EPA's "Air Toxics Strategy," a program developed to address accidental releases of acutely toxic sub-

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10. *See* 52 Fed. Reg. 13,377, 13,379 (1987); *Mandatory Chemical Disclosure Program Not Needed, EPA Tells State, Local Officials*, 16 ENV'T REP. (BNA) 1397 (Nov. 22, 1985).

11. S. NOVICK, LAW OF ENVIRONMENTAL PROTECTION 2 13-190 (1987).

12. Imminent and substantial hazard authority is contained in the Federal Insecticide, Fungicide and Rodenticide Act § 6d(c), 7 U.S.C. § 136d(c) (1982 & Supp. IV 1986); Toxic Substances Control Act § 7, 15 U.S.C. § 2606 (1982); Clean Water Act § 504, 33 U.S.C. § 1364 (1982); Safe Drinking Water Act § 1431, 42 U.S.C. § 300i (1982 & Supp. IV 1986); Resource Conservation and Recovery Act § 7003, 42 U.S.C. § 6973 (1982 & Supp. IV 1986); Clean Air Act § 303, 42 U.S.C. § 7603 (1982); and Comprehensive Environmental Response, Compensation, and Liability Act §§ 104, 106, 42 U.S.C. §§ 9604, 9606 (1982 & Supp. IV 1986).

13. Hazardous Material Transportation Act, 49 U.S.C. § 1811 (1982).

14. NOVICK, *supra* note 11.

15. *Supra* note 12.

stances into the air. CEPP was designed to increase community awareness of potential chemical hazards and to promote the development of state and local emergency response plans.[16] In November of 1985, the EPA developed guidance materials and other resources to assist communities developing emergency response plans.[17] Included in these materials was a list of one hundred "extremely hazardous substances" to help communities focus their planning.[18]

In spite of voluntary efforts sponsored by EPA or industry,[19] such voluntary emergency planning programs were not viewed by either Congress or the public as adequate. Congress responded to the lack of mandatory emergency planning by enacting the Emergency Planning and Community Right-To-Know Act (EPCRA) of 1986.

The purpose of EPCRA is simple. It is designed "to provide the public with important information on hazardous chemicals in their communities, and to establish emergency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals."[20]

EPCRA contains two separate programs which, in essence, mandate the type of emergency response envisioned under the voluntary CEPP. Subtitle A, "Emergency Planning and Notification," establishes the framework for state and local emergency response planning committees, and mandates

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16. 50 Fed. Reg. 51,451 (1985).

17. 52 Fed. Reg. 13,378, 13,379 (1987). Other programs and resources which can be used in emergency planning include the *Federal Emergency Management Agency Guide for the Development of State and Local Emergency Operations Plans*; several U.S. Department of Transportation publications including *Community Teamwork, Lessons Learned,* and *Emergency Response Guidebook;* and the Chemical Manfacturers Association's Community Awareness and Emergency Response program.

18. Extremely hazardous substances are those capable of causing serious irreversible health effects from accidental releases. This list can be found in Appendix A of the Chemical Emergency Preparedness Program Interim Guidance, published by the EPA in November 1985.

19. The Chemical Manufacturers Association sponsored the Community Awareness and Emergency Response (CAER) program, designed to encourage an industry initiative to develop emergency response plans with the cooperation of the local community. NATIONAL RESPONSE TEAM, *supra* note 8, at 9.

20. H.R. REP. No. 99-962, 99th Cong., 2nd Sess. 281, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3374.

the preparation of emergency response plans.[21] Subtitle B, "Reporting Requirements," provides the mechanism for community awareness, and includes reporting requirements for facilities where toxic and hazardous chemicals are found.[22] In addition, Subtitle C contains the general provisions including trade secret protection, availability of information to the public, enforcement, and citizen suits.[23]

This discussion will first focus on the rather complex reporting requirements contained in Subtitles A and B, the portions of EPCRA which require those who manufacture or handle chemicals to inform federal and state governments and local communities of both the presence and release of chemicals. Emphasis will be placed on inconsistencies in the definitions and their effect on the reporting requirements. The discussion will then move to potential enforcement problems, and then onto some of the unforeseen effects of the statute as a whole.

II. EPCRA Substances and Their Reporting Requirements

EPCRA defines three distinct categories of substances: extremely hazardous substances,[24] hazardous chemicals,[25] and toxic chemicals.[26] Each category is subject to a different type of reporting and/or emergency notification requirement.

Five sections of EPCRA impose either notification or reporting requirements on facility owners or operators: section 302 requires a facility to give notice of the presence of an extremely hazardous substance; section 304[27] requires emergency notification of releases of extremely hazardous substances be given to the local emergency planning committee (LEPC) and the state emergency response commission (SERC); section 311[28] requires the submission of material

21. §§ 301-305, 42 U.S.C. §§ 11001-11005 (Supp. IV 1986).
22. §§ 311-313, 42 U.S.C. §§ 11021-11023 (Supp. IV 1986).
23. §§ 312-330, 42 U.S.C. §§ 11041-11050 (Supp. IV).
24. §§ 302, 329(3); 42 U.S.C. §§ 11002, 11049(3) (Supp. IV 1986).
25. §§ 311(e), 329(5); 42 U.S.C. §§ 11021(e), 11049(5) (Supp. IV 1986).
26. §§ 313, 329(10); 42 U.S.C. §§ 11023, 11049(10) (Supp. IV 1986).
27. 42 U.S.C. § 11004 (Supp. IV 1986).
28. 42 U.S.C. § 11021 (Supp. IV 1986).

safety data sheets (MSDSs) for Occupational Safety and Health Act (OSH Act)[29] hazardous chemicals to the LEPC, SERC, and local fire department; section 312[30] requires facility owners or operators who must submit MSDSs to prepare emergency and hazardous chemical inventory forms; and section 313[31] requires that annual toxic chemical release forms be prepared and submitted to the EPA and the states.

A. *Facility*

The statute defines "facility" rather broadly and, at first glance, in a rather straightforward way. A facility is defined by the buildings, equipment, and other stationary items which are located on either single, contiguous, or adjacent sites. The definition includes those facilities which are owned or operated by the same person or by any person controlling such person.[32] Any off-site storage would be considered a separate facility since the definition of facility only extends to adjacent or contiguous sites.[33]

However, the statute leaves unanswered some questions as to exactly what is included in the definition of a facility. It is unclear whether federal facilities are included in the definition. No specific waiver of federal sovereign immunity is included in the statute. It may thus be inferred that federal facilities are not covered by EPCRA. This assumption is supported by EPA's "encouraging" federal agencies to comply with EPCRA and its report that federal compliance is uneven.[34] But, as indicated in a September 30, 1988 letter from EPA Administrator Lee Thomas, EPA interprets EPCRA to

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29. Material Safety Data Sheets (MSDSs) are required for hazardous chemicals under the Hazard Communication Standard, pursuant to the Occupational Safety and Health Act of 1970. 29 U.S.C. §§ 651-678 (1982). The definition of a hazardous chemical for purposes of a MSDS is found at 29 C.F.R. § 1910.12000(c) (1987).

30. 42 U.S.C. § 11022 (Supp. IV 1986).

31. 42 U.S.C. § 11023 (Supp. IV 1986).

32. § 329(4), 42 U.S.C. § 11049(4) (Supp. IV 1986). *See also* 52 Fed. Reg. 38,344, 38,347 (1987).

33. 52 Fed. Reg. 38,322, 38,347 (1987).

34. FEDERAL AGENCIES ENCOURAGED TO COMPLY WITH REQUIREMENTS OF RIGHT-TO-KNOW LAW, 19 ENV'T REP. (BNA) 1288 (Nov. 4, 1988).

include contract operators of government owned and contractor operated facilities. Such facilities are subject to EPCRA to the same extent as non-government owned operation.[35]

"Facility" becomes even more confusing when it is looked at in conjunction with the statute's reporting requirements. Though the general definition of facility is contained in section 329(4), sections 304, 311, 312, and 313 each limit the definition of facility based on the classification of substances or chemicals found at that facility. Each section imposes different notification and reporting requirements based on what substances or chemicals are present.

Sections 311 and 312 requirements apply only to those facilities required to comply with OSH Act Hazard Communication Standards (those facilities listed in the Standard Industrial Classification codes 20-39.)[36] Motor vehicles, rolling stock and aircraft are also "facilities," but only for the limited purposes of section 304 emergency release notification.[37] This means that transportation, including storage incident to transportation, of EPCRA substances are exempt from all EPCRA provisions,[38] with the exception of emergency release notification of section 304.

B. *Release*

A release[39] means "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) of any hazardous chemical, extremely hazardous substance, or toxic chemical."[40] The EPCRA definition of release is similar to Comprehensive Environmental Response, Compensation, and Liability Act

35. *Id.*
36. 29 C.F.R. § 1910.1200(b)(1) (1987).
37. 52 Fed. Reg. 38,344, 38,347 (1987).
38. § 327, 42 U.S.C. § 11047 (Supp. IV 1986).
39. § 329(8), 42 U.S.C. § 11049(8) (Supp. IV 1986).
40. *Id.*

(CERCLA) section 101(22)[41] but does not include any of the CERCLA exemptions. As a result, the EPCRA definition is broader, giving EPCRA a more expansive reach than CERCLA.

C. *Extremely Hazardous Substances*

In deciding which substances should be classified as extremely hazardous substances (EHSs), Congress used Appendix A of the CEPP Interim Guidance document, published by the EPA in November of 1985, to form the initial list.[42] This list, currently containing 406 substances, was first generated under the voluntary CEPP.[43] In defining this term, Congress intended that EHSs should include those substances which cause both short-term and long-term health effects following short-term exposure as a result of an accidental release.[44] Revisions of this list are allowed, provided EPA considers a substance's toxicity, reactivity, volatility, dispersability, combustibility, or flammability.[45] The characteristics of infectivity and radioactivity are not included, focusing EPA's revisions on substances used in industrial and commercial activities.

The term "extremely hazardous substance" was apparently used to clearly differentiate between those substances on the CEPP list, and those listed as hazardous substances under

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41. 42 U.S.C. § 9601(22) (Supp. IV 1986).

42. §§ 302(a)(2), 329(3); 42 U.S.C. §§ 11002(a)(2), 11049(3) (Supp. IV 1986). Section 329(3) defines an extremely hazardous substance as a "substance on the list described in § 302(a)(2)." The list of extremely hazardous substances can be found at 40 C.F.R. § 355 app. A & B (1988).

43. NATIONAL RESPOSE TEAM, *supra* note 8, at A-13.

44. § 302(a)(4), 42 U.S.C. § 11002(a)(4) (Supp. IV 1986).

45. *Id.* The EPA declined a request to delist forty chemicals from the EHS list until the Agency "has taken into account the other (i.e., long-term health) effects resulting from short-term exposure." 52 Fed. Reg. 13,378, 13,388 (1987). But in *A.L. Laboratories v. EPA*, 674 F. Supp. 894 (D.D.C. 1987), the court ordered EPA to remove four substances from the extremely hazardous substances list because their inclusion was based on clerical error. The court rejected EPA's argument that before it could delist the substances, it had to do a regulatory risk analysis. EPA interpreted the court's reasoning to be that it is "not required, and in fact is not authorized, to consider long-term toxicity" prior to removing any of these substances from the list. 53 Fed. Reg. 5575 (1988).

CERCLA.[46] However, EPA plans to eliminate any differences between the two, at least as far as EPCRA is concerned, by adding the 232 EHSs to the CERCLA hazardous substance list.[47]

1. *Reporting the Presence of EHSs*

Threshold planning quantities (TPQs) are used as the trigger for determining when a facility must give notice to the SERC of the presence of an EHS, and it is subject to the statute's emergency notification provisions. There is a continuing obligation to report the presence of an EHS in excess of its TPQ within sixty days after the facility first begins handling the substance or if a substance has been added to the EHS list. The SERC is then required to inform the EPA of each section 302(c) notification received.[48]

TPQs are determined by using an index which accounts for the toxicity and the potential of each chemical to become airborne in an accidental release.[49] TPQs are to be established for each extremely hazardous substance, and may be based on either classes of chemicals or categories of facilities. Though section 301(a)(4) specifies the factors to be taken into account when revising the EHS list, i.e., a substance's toxicity, reactivity, volatility, dispersability, combustability, and flammability, it is not completely clear if the same factors are to be used in determining a substance's TPQ.

The threshold planning quantity of each substance on the extremely hazardous substance list was initially set at two pounds.[50] In April 1987, the EPA set the TPQ at one pound for substances "considered to be of the highest potential hazard."[51] It is important to remember that TPQs are not absolute levels below which no hazard exists but rather levels that allow communities to prioritize their response plans. To deter-

46. 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986).
47. 19 ENV'T REP. (BNA) 1346 (Nov. 4, 1988).
48. § 302(d), 42 U.S.C. § 11002(d) (Supp. IV 1986).
49. 52 Fed. Reg. 13,378, 13,389 (1987).
50. § 302(a)(3)(C), 42 U.S.C. § 11002(a)(3)(C) (Supp. IV 1986).
51. 52 Fed. Reg. 13,378, 13,381 (1987).

mine if a TPQ has been exceeded, the owner/operator of the facility determines the total amount of a particular EHS present at any one time at the facility, regardless of the location, number of containers, or the method of storage. The amount of an EHS present in mixtures in excess of one percent must also be included in the TPQ determination.[52]

The TPQ for solid form substances is 10,000 pounds. The one pound TPQ is applied to only those solids in forms which are highly reactive or with levels of reactivity which may potentially result in an airborne release.[53]

To date, no challenges to the designated TPQs and how they are determined have been reported. However, an approach to use in a challenge to TPQ is suggested in *Manufacturing Chemists Association v. Costle*.[54] There, a trade association was granted a preliminary injunction staying the effect of an EPA rule, which set one pound as a "harmful quantity" of a hazardous substance under section 311(b)(3) of the Clean Water Act.[55] The statute prohibited the discharge of hazardous substances in "harmful quantities," and defined a "harmful quantity" by the "times, locations, circumstances, and conditions" of the discharge.[56] But EPA, when promulgating the rule, made no reference to the considerations required by section 311(b)(3), and they seemed to play no part in EPA's decision. In staying the rule, the court stated that "the tests which form the underpinnings of that system must have some rational relationship to the harm sought to be prevented."[57]

In setting TPQs, EPA must consider the toxicity, reactivity, volatility, dispersability, combustibility, or flammability.[58] If EPA fails to consider these factors, the TPQs are open to attack, using the rationale found in *Manufacturing Chemists Association.*

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52. *Id.* at 13,380.
53. *Id.* at 13,381.
54. 451 F. Supp. 902, 11 Env't Rep. Cas. (BNA) 1792 (W.D. La. 1978).
55. 33 U.S.C. § 1321(b)(3) (1982).
56. Clean Water Act § 311(b)(4), 33 U.S.C. § 1321(b)(4) (1982).
57. *Mfg. Chemists Ass'n*, 451 F. Supp. at 909, 11 Env't Rep. Cas. (BNA) at 1798.
58. §§ 302(a)(3)-(4), 42 U.S.C. §§ 11002(a)(3)-(4) (Supp. IV 1986).

2. *Emergency Notification of EHS Releases*

The first notification requirement applies to all facilities which produce, use, or store hazardous chemicals (as defined by EPCRA), and contain extremely hazardous substances above a threshold planning quantity (TPQ). Notification must be given to the local emergency planning committee (LEPC)[59] and the state emergency response committee (SERC).[60] Notification of the National Response Center (NRC)[61] may also be required. Section 302(b) requires that each covered facility must report its existence to its SERC by May 17, 1987.[62]

Section 304(a) requires the owner/operator of a "facility at which a *hazardous chemical* is produced, used, or stored" to give emergency notification to the LEPC and to the SERC of the "release of an *extremely hazardous substance.*"[63] If the facility owner/operator should have known of the release, the fact that the owner/operator was unaware of it will not relieve them of the duty to give notice.[64]

It is interesting to note that before any emergency notice must be given to the community, no matter what danger the release poses or how large the release, a hazardous chemical must be present at the facility before any notice is required. There is no good reason to include the presence of a hazardous chemical as a condition that must exist before emergency notification is required. But the language is clear: if no HCs are present, and an EHS is released, no emergency notice must be given. It would be more in keeping with EPCRA's purpose if emergency reporting was not dependent upon the presence of HCs. At the very least, facilities containing EHSs should be required to give emergency notification in the event of a release.

As it stands, if no hazardous chemical is present, and a

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59. § 301(c), 42 U.S.C. § 11001(c) (Supp. IV 1986).

60. § 301(a), 42 U.S.C. § 11001(a) (Supp. IV 1986).

61. CERCLA § 103(a), 42 U.S.C. § 9603(a) (1982).

62. The date of EPCRA's enactment was October 17, 1986. Pub. L. 99-499, 100 Stat. 1729 (1986).

63. 42 U.S.C. § 11004(a) (Supp. IV 1986) (emphasis added).

64. 52 Fed. Reg. 13,378, 13,393 (1987).

release of an EHS occurs, no notification would be required. However, though the statute exempts facilities with no HCs present from emergency notification requirements, it does not exempt them from section 302 planning requirements.[65]

The definition of a HC[66] specifically excludes substances to the extent used in a research laboratory, hospital, or other medical facility. Substances that would be HCs at a manufacturing facility are not when the same substance is at a research laboratory. In addition, section 304 specifies that releases of EHSs are reportable only where HCs are present. Is the danger any less when the release is from a medical facility than from a manufacturing operation?

The effective date for emergency release notifications was May 22, 1987,[67] by which date SERCs were to have been established.[68] Notification must also be given to LEPCs beginning August 17, 1987. If no LEPC has been established, notification should be given to local emergency response personnel.[69] Both owner and operators are responsible if no notification is provided.[70]

The statute specifically addresses three types of releases which require some sort of emergency notification: substances which are both EPCRA extremely hazardous substances and CERCLA hazardous substances, those which are only EPCRA extremely hazardous substances but not CERCLA hazardous substances, and those which are not EPCRA hazardous substances but are CERCLA hazardous substances. At a minimum, section 304(b)(1) requires notice be given to the LEPC and SERC. Whether or not the NRC must be notified depends on the substance and the amount released. CERCLA notification hinges on the amount of a substance released, its "reportable quantity."[71] If there has been a release and no re-

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65. 52 Fed. Reg. 13,378, 13,384 (1987).

66. § 311(e), 42 U.S.C. § 11021(e) (Supp. IV 1986).

67. 52 Fed. Reg. 13,378, 13,381 (1987).

68. *Id.* After April 17, 1987, the Governor of the state becomes the SERC and notification should be made to him/her. *Id.*

69. *Id.*

70. 52 Fed. Reg. 13,378, 13,383 (1987).

71. CERCLA § 102(a), 42 U.S.C. § 9602(a) (1982). The CERCLA list currently

portable quantity has been established under CERCLA section 102(a), reporting is still required under CERCLA section 103(a), and the reportable quantity is one pound.[72] Notification must be given to both the LEPC and to the NRC.

The statute best serves its purpose when the released substance is subject to both EPCRA and CERCLA. When this is the case, notification must be given to the NRC, and to the LEPC and SERC.

If the release is an extremely hazardous substance not covered by section 103(a) of CERCLA, i.e., if the amount is less than the reportable quantity under CERCLA or the substance has not been designated as a CERCLA hazardous substance, EPCRA section 304(a)(2) requires that only the LEPC and SERC be notified. EPCRA notification need only be given if the release is not a federally permitted release under section 101(19) of CERCLA, is in excess of the threshold planning quantity, and occurs in a manner requiring notification under CERCLA section 103(a).[73] No notification need be given to the National Response Center if the substance is one the 256 EHSs which are not hazardous substances under CERCLA, though EPA intends to designate those substances as hazardous substances under CERCLA section 102.[74] At that time, all EHS releases will also require notice be given to the NRC. This will not only expand emergency notification requirements, but also those for contingency planning under section 303.[75]

EPA recognizes that the current section 304 reporting is confusing, so much so that it believes compliance may be hindered. EPA's plan to simplify reporting by adding all EPCRA EHSs not already on the CERCLA list to the CERCLA hazardous substance list will only correct EPCRA reporting. It will not alter CERCLA section 103 reporting; there will still be substances requiring CERCLA reporting to the NRC but

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contains 721 hazardous substances. 53 Fed. Reg. 27,268 (1988).

72. CERCLA § 102(b), 42 U.S.C. § 9602(b) (1982 & Supp. IV 1986).

73. §§ 304(a)(2)(A)-(C), 42 U.S.C. §§ 11004(a)(2)(A)-(C) (Supp. IV 1986).

74. 52 Fed. Reg. 13,378, 13,386 (1987).

75. 42 U.S.C. § 11003 (Supp. IV 1986).

no EPCRA notification to LEPCs and SERCs.

CERCLA allows additions to be made to its hazardous substance list when a release may present a "substantial danger to the public health or welfare or the environment."[76] If a release of one of CERCLA's 721 hazardous substances requires that the NRC be notified, and may present a danger to the public, should not the local community and state also be notified? EPA recognized this discrepancy and acted. Effective April 30, 1988, facilities must give emergency notification of spills of chemicals on the CERCLA hazardous substance list but not on EPCRA's extremely hazardous substance list. If there is no final reportable quantity, the substance remains subject to CERCLA's one pound limit. Notice must be given to the SERC as well as the LEPC and NRC. Prior to this, only the LEPC and NRC needed to be notified.[77]

Until April 30, 1988 the same type of notice given to the NRC was sufficient for the LEPC.[78] After that date, however, notification of the LEPC must be in accordance with section 304(b) of EPCRA, and two types of notification must be prepared, one for the LEPC and another for the NRC.[79]

The underlying problem of this emergency notification provision is the existence of two lists, each carrying different reporting obligations. There does not appear to be a difference between the toxicity or hazard potential of those substances listed as an EHS and those as a CERCLA hazardous substance. If the purpose of this section is to provide communities with the means to prepare for an emergency and to give the community timely notice so it can respond, there is no logic in not requiring notification of the NRC in the event of an EHS release as well as the LEPC and SERC. The resources of the NRC could only aid the LEPCs and SERCs in their response action.

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76. CERCLA § 102(a), 42 U.S.C. § 9602(a) (1982 & Supp. IV 1986).

77. *Additional Spill Reporting Requirements Become Effective April 30 For Facilities*, 18 ENV'T REP. (BNA) 2556-57 (Apr. 29, 1988).

78. 40 C.F.R. § 355.40(b)(4) (1988).

79. § 304(a)(3)(B), 42 U.S.C. § 11004(a)(3)(B) (Supp. IV 1986).

3. *Exemptions to EHS Reporting and Emergency Notification*

Releases which result in exposure[80] to "persons solely within the site or sites on which the facility is located" are specifically exempted from section 304 notification obligations,[81] an exemption not found in section 103 of CERCLA. But it is EPA's position that "releases need not result in actual exposure to persons off-site in order to be subject to release reporting requirements."[82] So, for an owner/operator to comply, he must determine that there can be no possible exposure off-site, a determination that may be difficult to make accurately. Hence, EPA seems to be saying that if there is a release, it should be reported.

It is easy to question the usefulness of this exemption, especially as to whether it is possible for an aerial release (the primary concern of EPCRA) of a covered substances to be contained within the facility and not disperse outside its boundaries. Industry seems to concur with this. A Hoechst-Celanese manager, reflecting a pro-active stance common to large industry, stated that all chemical releases should be reported to the LEPC even though the release was contained within the plant site. He voiced the opinion that industry must make sure that the release does not extend beyond the borders of the facility. To this end, if the release is a ground spill, it must be cleaned up immediately to avoid groundwater contamination. Further, even if the release is less than a reportable quantity, a company may want to notify the LEPC anyway, especially if the substance has a low odor threshold.[83]

The exemption based on the presence of hazardous chemicals also applies. If no hazardous chemical is produced, used or stored at a facility, that facility is not subject to section 304

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80. "Exposure" is not defined by the statute. An "exposure" could be any measurable quantity, a quantity having adverse health effects, or a quantity causing adverse environmental effects.

81. § 304(a)(4), 42 U.S.C. § 11004(a)(4) (Supp. IV 1986).

82. 52 Fed. Reg. 13,378, 13,381 (1987).

83. *Firms Urged To Begin EPCRA Compliance Even If Previous Deadlines Were Missed*, 18 ENV'T REP. (BNA) 2275 (Mar. 4, 1988).

emergency notification.[84]

The statute also exempts federally permitted releases as defined in CERCLA section 101(10),[85] and is thus identical to the exemption in section 103 of CERCLA. If a release is federally permitted under CERCLA section 110(10), the release need not be reported under section 304.[86] As CERCLA section 103 is modified, these modifications will apply equally to EPCRA section 304 release notifications.[87] State permitted releases are exempt, but only to the extent that they are considered federally permitted under CERCLA section 101(10).[88]

In addition, "continuous" releases, as defined in CERCLA section 101(10), are exempt from section 304.[89] However, to the extent that " 'statistically significant increases' from a continuous release must be reported as an episodic release" under CERCLA section 103(a), such release must also be reported under section 304(a).[90] Facility owners determine when a "statistically significant increase" has occurred.[91]

Disposal of an EHS at a disposal facility in accordance with EPA regulations (such as under the Resource Conservation and Recovery Act) is not subject to either CERCLA or EPCRA. Accidental releases which occur "during disposal and outside of the approved operation" resulting in the release of an EHS or a CERCLA hazardous substance must be reported under section 304.[92]

EPA has proposed to administratively exempt approved PCB disposal from CERCLA section 103(a) release notification requirements, and thus also from EPCRA emergency re-

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84. § 304(a), 42 U.S.C. § 11004(a) (Supp. IV 1986).

85. 42 U.S.C. § 9601(10) (Supp. IV 1986).

86. 52 Fed. Reg. 13,378, 13,383 (1987).

87. EPA has proposed modifications to the definition of "federally permitted releases" for CERCLA and EPCRA purposes. 53 Fed. Reg. 27,268 (1988).

88. *Id.*

89. Continuous releases are subject to annual reporting under CERCLA § 103 (f), 42 U.S.C. § 9603(f) (1982).

90. 52 Fed. Reg. 13,378, 13,381 (1987).

91. *Definition Proposed For Continuous Releases Exempt From Notification Under EPCRA, CERCLA*, 18 ENV'T REP. (BNA) 2534 (Apr. 22, 1988).

92. 52 Fed. Reg. 13,378, 13,384 (1987).

lease obligations.[93] Though approved PCB disposal (under the Toxic Substances Control Act) is not included in the CERCLA section 101(10) definition of a federally permitted release, EPA has determined that such releases are not reportable under CERCLA section 103 provided the disposal is approved and proper. However, if the facility is not in compliance with TSCA approved disposal requirements, any disposal of a reportable quantity or more of PCB waste must be reported to the NRC, LEPC, and SERC. Also, if there is a PCB spill of a reportable quantity during disposal and outside of approved operation procedures, the release must be reported.[94]

The only notification requirements that apply to transportation are the section 304 emergency notification provisions.[95] Transportation of covered substances are specifically exempted from any other reporting requirements found in the statute.[96] Should there be a release during transportation, notification is to be given by dialing 911, in lieu of calling the LEPC or SERC. In the absence of a 911 number, the operator is to be notified of the release,[97] the rational being that transportation operators may not know the telephone number of the LEPC or SERC nor in whose jurisdiction the transporter is in when a release occurs.[98] However, there is no requirement for either the 911 operator or the operator to relay the release information to appropriate officials. There is no assurance that the emergency information will get to those capable of responding. The best a community can do is to train those who may receive such calls on the proper way to handle them. This gap has the potential of allowing vital information to fall between the cracks of EPCRA's regulatory scheme, potentially endangering a community, something surely not within Congress' intent.

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93. 53 Fed. Reg. 27,268, 27,278 (1988).
94. *Id.*
95. §§ 304(b)(1), 304(d); 42 U.S.C. §§ 11004(b)(1), 11004(d) (Supp. IV 1986).
96. § 327, 42 U.S.C. § 11047 (Supp. IV 1986).
97. § 304(b)(1), 42 U.S.C. § 11004(b)(1) (Supp. IV 1986).
98. 52 Fed. Reg. 13,378, 13,385 (1987).

4. *Section 304 Critique*

Section 304(a) is similar to the notification provision found in section 103(a) of CERCLA but has a much broader reach. EPCRA's emergency notification applies to a greater range of substances, including CERCLA hazardous substance as well as EPCRA extremely hazardous substances. Any time there is a release of a CERCLA hazardous substance above its reportable quantity, even if the substance is not listed as an EHS, notice must be given. However, once EPA adds the extremely hazardous substances to the CERCLA hazardous substance list, the substances subject to CERCLA reporting and EPCRA emergency notification will be identical.

The problems mentioned above are not the only ones found in section 304. Only extremely hazardous substances are subject to section 304 emergency notification. Neither hazardous chemicals nor toxic chemicals must be reported. As with CERCLA hazardous substances, there is no discernible difference between either the toxicity or the hazard potential of these chemical designations. There is no valid basis for not requiring notification a release of any of these substance. It again seems that such arbitrary designations interfere with the purpose of EPCRA.

D. *Hazardous Chemicals*

Hazardous chemicals[99] (HCs) are defined using the Occupational Safety and Health Administration's (OSHA) hazard communication standard.[100] The purpose of the hazard communication standard is to inform workers of the health effects of hazardous chemicals in the workplace, and to reduce the incidence of chemically related occupational illnesses and injuries in workers who handle chemicals. The standard is aimed at those businesses in the "manufacturing sector," as defined by the Office of Management and Budget's Standard Industrial Classification (SIC) Manual.[101]

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99. §§ 311(e), 329(5); 42 U.S.C. §§ 11021(e), 11049(5) (Supp. IV 1986).

100. 29 C.F.R. § 1910.1200(c) (1987). *See also* 48 Fed. Reg. 53,280 (1983).

101. Industries and businesses which fall into SIC codes 20-39 are subject to

The hazard communication standard requires manufacturers, importers, distributors, and other manufacturing sector employers to determine whether the chemicals they use or import are hazardous. Containers of hazardous chemicals must be labeled, identifying the chemical along with its manufacturer's name and address and any hazard warning. Further, material safety data sheets (MSDSs) must be prepared by the manufacturer or importer for each chemical. An MSDS must include the name of the chemical and, if a mixture, its constituents; its physical and chemical characteristics; toxicity data and any health hazards; exposure information; precautions for safe handling; and first aid procedures. Copies of each MSDS must be kept in the workplace, readily available to workers.

The statute specifically allows for revisions of the toxic chemical list and the extremely hazardous substance list, but not the hazardous chemical list. EPA may modify the Occupational Safety and Health Act (OSH Act) categories of hazards for EPCRA purposes, but may not revise the hazardous chemical list.[102] Hazardous chemicals, for EPCRA and OSH Act purposes, are defined by OSH Act Hazard Communication Standard. This list is open-ended, and constantly expands as OSHA adds chemicals. According to the SARA conference report, the OSH Act definition of hazardous chemicals, which includes mixtures, has resulted in the creation of MSDSs for over 50,000 products.[103] Under OSH Act regulations, if the results of any valid study report to a statistically significant conclusion regarding adverse health effects of a chemical, that chemical must be added to the list, expanding not only OSH Act's reach, but EPCRA's as well.[104]

OSHA may classify a chemical as hazardous using one of two criteria. A chemical which presents a physical hazard, i.e., a chemical that is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyro-

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OSH Act Hazard Communication Standards. 29 C.F.R. § 1910.1200(b) (1987).

102. § 311(a)(2), 42 U.S.C. § 11021(a)(2) (Supp. IV 1986).

103. H.R. REP. No. 962, 99th Cong., 2nd Sess. 286, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3379.

104. 29 C.F.R. §§ 1910.1200(c)-(d) (1987)

phoric, unstable (reactive), or water-reactive, can be classified as hazardous. OSHA may also classify a chemical as hazardous based on its health hazard, which includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, and agents which damage the lungs, skin, eyes, or mucus membranes.

OSH Act regulations exempt some substances from MSDS requirements, including RCRA hazardous wastes, tobacco products, wood, and manufactured products.[105] In addition, five groups of chemicals, including household chemicals and those regulated under other statutes, are specifically excluded from the EPCRA definition of hazardous chemicals.[106]

The hazard communication standard is a performance standard, and not a specific list of chemicals. By using the standard as the basis for determining which chemicals are EPCRA hazardous substances, Congress has included over 50,000 substances in the definition, with the result being a very broad application of hazardous chemical reporting requirements.

1. *Section 311 MSDS Reporting*

Under section 311, the owner/operator of a facility is required to submit either the MSDS or a list of chemicals for which a MSDS is required to the LEPC, SERC and the local fire department.[107] Section 311(a) applies only to hazardous chemicals, as defined by OSH Act Hazard Communication Standard. Neither extremely hazardous substances nor toxic chemicals are subject to this section's reporting requirements. A continuing obligation is also imposed on facility owners or operators to keep the LEPC up to date on any "significant new information" on a hazardous chemical.[108]

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105. 29 C.F.R. §§ 1910.1200(b)(5)(i)-(iv) (1987).

106. The five exempted groups consist of substances regulated by the Food and Drug Administration, those used in agricultural operations, those used in research, household substances, and those which are solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions of use. §§ 311(e)(1)-(5), 42 U.S.C. §§ 11021(e)(1)-(5) (Supp. IV 1986).

107. 52 Fed. Reg. 38,344, 38,353 (1987).

108. § 311(d)(2), 42 U.S.C. § 11021(d)(2) (Supp. IV 1986).

2. *Hazardous Chemical Threshold Quantities*

Section 311(b) gives EPA broad authority to establish threshold quantities (as distinguished from section 304(a) threshold planning quantities for extremely hazardous substances) for hazardous chemicals. If there is less than the threshold quantity present, a facility is exempt from sections 311 and 312 reporting requirements. From the statute's legislative history EPA finds that Congress intended for EPA to balance the public right-to-know against the "overwhelming flood of information" which would inundate state and local governments, providing it with the authority to adopt a "phase-in" approach when setting threshold quantities.[109] This approach sets decreasing thresholds for reporting quantities of hazardous chemicals in an attempt to reduce the "paper flood" to a manageable level during the start-up years of emergency planning and response.

However, to alleviate concern over the lack of access to necessary information on chemicals stored below the threshold level, EPA did not include EHSs in the phase-in. Because EHS information is of particular interest to communities, and is necessary for the completion of their emergency response plans,[110] EPA has not included EHSs in the phase-in of threshold quantities.[111] But EHSs still remain subject to section 302 threshold planning quantities. EPA has set the reporting threshold for EHSs at 500 pounds or the TPQ, whichever is less.[112]

EPA's phase-in approach has been criticized as interfering with access to the needed information. However, EPA's decision not to include EHSs in the phase-in reporting has somewhat countered this concern. In addition, the public retains access to MSDSs for hazardous chemicals below the threshold, though the information must be requested. Also, the phase-in schedule is limited to a three-year period, effec-

109. 52 Fed. Reg. 38,344, 38,350 (1987).
110. § 303(c)(1), 42 U.S.C. § 11003(c)(1) (Supp. IV 1986).
111. 52 Fed. Reg. 38,344, 38,353 (1987).
112. *Id.* at 38,352.

tive from the first year of reporting.[113]

The EPA has not yet set the final threshold levels, those levels effective after the phase-in period ends, and is deferring its decision until the third year of phase-in.[114] Arguments supporting a threshold level of zero emphasize the amount of information lost to communities and Emergency Response Commissions if the threshold were greater than zero, the difficulty of requesting information for below threshold substances if no section 311 chemical specific information were available for all quantities of chemicals, and the potential hazard posed by even small amounts of chemicals.[115] Against a zero threshold level is the very practical concern of an overwhelming data management burden on both emergency response committees and business if all chemicals stored in however small a quantity were subject to reporting. This problem is exacerbated if a zero threshold is applied to the constituents of mixtures, and each HC constituent of the mixture requires reporting. It is possible that the paper burden could even jeopardize public access to the information. EPA recognizes these competing concerns; it must balance a community's need to have ready access to information on those substances of concern to it, against the burden on those receiving the information.

Wherever the threshold level is set, states and local governments could request information on substances below the thresholds, or states could, under state law, require reporting of substances at lower thresholds.[116] EPCRA does not limit the ability of any state or locality to enact supplemental laws or ordinances governing information submission or distribution. Nor does EPCRA preempt existing state and local community right-to-know laws.[117]

The initial year reporting threshold is 10,000 pounds. Facilities having 10,000 pounds or greater of HCs are obligated to submit MSDSs to their LEPC, SERC, and local fire depart-

113. *Id.*
114. *Id.* at 38,351.
115. *Id.* at 38,350.
116. *Id.* at 38,351.
117. § 321, 42 U.S.C. § 11041 (Supp. IV 1986).

ment. This threshold is reduced to zero in 1989.[118] EPA believes this provides a balance between ensuring public access to information regarding large volumes of stored chemicals and reducing the quantity of reports to a manageable level.[119]

3. *Critique of MSDS Reporting*

There is nothing in section 311 which requires the facility owner/operator to submit any information except that which is on the MSDS. For the purpose of an MSDS, a trade name is sufficient. The MSDS trade secret provision allows the identity of the chemical/components to be withheld. The submitter is not required to provide the type of information which would be most useful, i.e., the actual components of mixtures which contain hazardous chemicals located at the facility. Granted, requiring the submission of MSDSs is a substantial step in informing the local community of substances which present a potential hazard. But provisions for supplying information to communities are not in and of themselves adequate. There must also be compliance. A recent report indicates that only 10-15% of the required section 311 information has been received.[120]

4. *Section 312 Inventory Reporting*

Under section 312, owners and operators of facilities required to submit an MSDS under section 311 are also required to submit additional information on the HCs present at the facility.[121] This information, to be submitted annually, must include an estimate of both the maximum amount of HCs and the average daily amount of HCs present during the preceding year, and the location of these chemicals at the fa-

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118. 40 C.F.R. § 370.20(b)(1)-(3) (1988).

119. *Id.*

120. *Counties Seek EPCRA Reporting Deadline Extension; Congress Said Unlikely To Change Statute*, 19 ENV'T REP. (BNA) 44 (May 13, 1988).

121. Inventory forms need only be submitted when a MSDS is required under section 311. When the amount of a chemical at a facility is less than the threshold quantity, no MSDS or inventory form need be submitted. §§ 311(b), 312(b); 42 U.S.C. §§ 11021(b), 11022(b) (Supp. IV 1986).

cility. The annual emergency and hazardous inventory forms are to be submitted to the LEPC, SERC, and local fire department. The chemical industry views the annual inventory reporting requirements of this section to be the most controversial of EPCRA's reporting provisions.[122] Facilities required to submit MSDS under section 311 must also submit emergency and chemical inventory forms to the LEPC and SERC.

Any OSHA expansion of the Hazard Communication Standard to non-manufacturing sectors automatically extends EPCRA reporting requirements as well.[123] The first such expansion occurred in June 1988 when OSHA expanded the Hazard Communication Standard to non-manufacturing, requiring that MSDSs be submitted to LEPCs, SERCs, and fire departments by Sept. 4, 1988.[124]

Facilities will meet the section 312 if they use any state or local form with identical content as the federal form.[125] States and localities may also add supplemental questions if they choose.[126]

This section imposes a continuing obligation to report the presence of HCs and significant new information regarding them. When additional hazardous chemicals become present at a facility, either the MSDSs or a list of the chemicals must be submitted to the LEPC, SERC, and fire department within three months.[127] If the owner/operator receives new information regarding a chemical, a revised MSDS must be submitted.[128]

The statute breaks down the required information into

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122. Mason, *The Emergency Planning and Community Right-To-Know Act of 1986: Summary and Analysis*, 315 PRACTISING L. INST. 479, 487 (1986).

123. 52 Fed. Reg. 38,344, 38,358-59 (1987). The reporting requirements of sections 311 and 312 are applicable to those businesses covered by the expanded Hazard Communication Standard. *Id.*

124. *EPA Announces MSDS Reporting Deadline For Facilities Subject To OSHA Standard*, 19 ENV'T REP. (BNA) 610 (Aug. 12, 1988).

125. *See* 52 Fed. Reg. 38,344 (1987) for the final federal form.

126. 52 Fed. Reg. 38,344, 38,357 (1987).

127. *Id.* at 38,353.

128. *Id.* Because the OSH Act regulations require that a MSDS be revised within three months of the receipt of new information, EPCRA also requires an updated MSDS be submitted. *Id.*

two groups: Tier I[129] and Tier II[130] information. Tier I information is further broken into five categories, based on a chemicals health hazard (acute or chronic hazard) or physical hazard (fire hazard, sudden pressure release hazard, and reactive hazard).[131] Tier I inventory information is general in nature and requires that the maximum amount (in ranges) of each hazardous chemical category present at the facility at any time during the previous year, the average daily amount,[132] and the general location of hazardous chemicals in each category be reported. This information must be submitted to local and state authorities by March 1, 1988 and yearly thereafter.

Tier I information is generally available to the public. Section 324[133] requires all SERCs and LEPCs to make both MSDSs and inventory forms available. However, access is limited to information these organizations receive. There is no access to information on a facility's chemicals if the amount of chemicals present is below the regulatory threshold. Though access to the inventory information is limited, access to MSDSs are not.[134] Any person may request an MSDS through the LEPC. If the LEPC does not have the information, it in turn must request the MSDS from the facility. Within thirty days, the facility must submit the MSDS, and the LEPC must then provide the MSDS to the requester.[135]

How broadly these reporting ranges are set will determine both the usefulness of the reports and of industry's compliance. Industry is concerned that the information contained in these publicly available forms could be used by a competitor to compile an accurate picture of a facility's operations.[136] If the ranges are set broadly, it is more likely that industry will

129. § 312(d), 42 U.S.C. § 11022(d) (Supp. IV 1986).

130. § 312(d)(2), 42 U.S.C. § 1022(d)(2) (Supp. IV 1986).

131. 52 Fed. Reg. 38,322, 38,354 (1987).

132. The average daily amount is based on the number of days a chemical is present at a facility. It is determined by totalling all the daily weights and dividing by the number of days a chemical is actually on site. *Id.* at 38,356.

133. 42 U.S.C. § 11044 (Supp. IV 1986).

134. § 311(c), 42 U.S.C. § 11021(c) (Supp. IV 1986).

135. 52 Fed. Reg. 38,344, 38,354 (1987).

136. MASON, *supra* note 122, at 489.

comply. Industry believes that broad ranges will provide its trade secrets (chemical quantities and identities) some measure of protection. On the other hand, if the ranges are too broad, local emergency response efforts could be hampered by information so general that it is of marginal value.

Tier II information is both more detailed and chemical specific. The information must be compiled by the facility's owner/operator if requested by the LEPC, SERC, or fire department. Tier II information includes the chemical or common name of any above threshold quantities (in ranges) of a hazardous chemical, an estimate (in ranges) of one time and the average daily amounts, a description of its storage, its location within the facility,[137] and an indication of whether chooses to withhold the above information from public disclosure.

Tier II information is available without restriction to LEPCs, SERCs, and fire departments as well as local and state authorities acting in their official capacity.[138] To gain access, local and state officials must request the information from the SERC or LEPC who, in turn, must request the information from the facility owner.[139] Citizen access to Tier II information is generally governed by the public availability provisions of section 324.[140] Tier II information may be viewed during operating hours of the SERC and LEPCs and on their premises.[141] Requests for the information must be both in writing and facility specific.[142] The SERC or LEPC must respond with forty-five days to a request.[143] If the information is in the possession of the SERC or LEPC,[144] the information must be made available, with the exception of location infor-

137. The Tier II form provides for reporting of location by building or lot and allows for a brief description of the location rather than requiring site plan or site coordinates. Additional location information may be required under state or local law. 52 Fed. Reg. 38,344, 38,356 (1987).

138. § 312(e), 42 U.S.C. § 11022(e) (Supp. IV 1986).

139. § 312(e)(2), 42 U.S.C. § 11022(e)(2) (Supp. IV 1986).

140. 42 U.S.C. § 11044 (Supp. IV 1986).

141. *Id.*

142. § 312(e)(3)(A), 42 U.S.C. § 11022(e)(3)(A) (Supp. IV 1986).

143. § 312(e)(3)(D), 42 U.S.C. § 11033(e)(3)(D) (Supp. IV 1986).

144. § 312(e)(3)(B), 42 U.S.C. § 11022(e)(3)(B) (Supp. IV 1986).

mation that the facility owner elects to withhold from disclosure.[145]

If the SERC or LEPC does not have the information, it must both request the information from the facility and make it available, provided the facility has stored more than 10,000 pounds of the hazardous chemical at any time during the preceding calendar year.[146]

If the facility has stored less than 10,000 pounds, the SERC or LEPC has the discretion of requesting the information from the facility. However, if the SERC or LEPC obtains any information requested on behalf of the citizen, it must make the information available to the requester.[147] Included in the request must be a statement of the general need for such information. The requirement of a statement of need applies only to information requested under the section 312(e)(3)(C) discretionary access provision.[148]

Only the fire department has authority to conduct an on-site inspection. When the fire department requests specific information regarding the location of hazardous chemicals, such information must be provided.[149] The public does not have access to specific location information,[150] the reasoning apparently being that the fire department may be called to respond if there is a fire at the facility, and needs the location information to maximize its efforts both in planning and making its response.

The only information protected from the public is the specific chemical identity[151] and specific location information.[152] Because of the detailed information required under Tier II reporting, non-compliance with this section may be a

145. § 324(a), 42 U.S.C. § 11044(a) (Supp. IV 1986).

146. § 312(e)(3)(B), 42 U.S.C. § 11022(e)(3)(B) (Supp. IV 1986).

147. § 312(e)(3)(C), 42 U.S.C. § 11022(e)(3)(C) (Supp. IV 1986).

148. The LEPC and SERC have the responsibility for setting the guidelines concerning statements of need. 52 Fed. Reg. 38,344, 38,355 (1987).

149. § 312(f), 42 U.S.C. § 11022(f) (Supp. IV 1986).

150. §§ 312(d)(2)(F), 324(a); 42 U.S.C. §§ 11022(d)(2)(F), 11044(a) (Supp. IV 1986).

151. § 322(a)(1), 42 U.S.C. § 11042(a)(1) (Supp. IV 1986).

152. §§ 312(d)(2)(F), 324(a); 42 U.S.C. §§ 11022(d)(2)(F), 11044(a) (Supp. IV 1986).

problem. Industry compliance with section 312 inventory reporting likely will depend upon how strictly it is interpreted and how strong EPA's enforcement. Industry is concerned that the inventory information may allow competitors to determine the type of activities being conducted at a facility simply by studying the publicly available inventory forms.

In an attempt to deal with industry concerns about valuable trade secrets being revealed, EPA adopted a mixture rule. Basically, the rule provides that if mixtures composed of several hazardous chemicals are present at a facility, only the total of the hazardous chemical components need be submitted in the Tier II report; a separate report for each mixture is not required.[153] Companies may also consider chemical quantities, as well as identities, to be trade secrets. If the specific chemical identity is not a trade secret, the negative impact of the reporting could be minimized by using broad ranges to report quantities, so that trade information is not revealed, increasing the likelihood of compliance.[154]

E. *Toxic Chemicals*

The initial listing of toxic chemicals[155] (TCs) contains 329 chemicals/chemical categories. The lists generated under the right-to-know acts of the states of New Jersey[156] and Maryland[157] which form the foundation of EPCRA toxic chemicals:[158] The initial list is not static but may be revised. Criteria used in adding or deleting a chemical is not limited to human health effects but also includes adverse environmental effects.[159] Additions and deletions are made by the EPA when

153. 40 C.F.R. § 370.28 (1988).

154. MASON, *supra* note 122, at 489.

155. §§ 313(c), 329(10); 42 U.S.C. §§ 11023(c), 11049(10) (Supp. IV 1986). Section 313(c) defines toxic chemicals as "those chemicals on the list in Committee Print Number 99-169 of the Senate Committee on Environment and Public Works, titled 'Toxic Chemicals Subject to Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986.'"

156. N.J. STAT. ANN. §§ 34i:5A-1 to -31 (West Supp. 1986).

157. MD. HEALTH-ENVTL. CODE ANN. §§ 22-501, 22-502 (1982).

158. NATIONAL RESPONSE TEAM, *supra* note 8, at A-13.

159. §§ 313(d)-(e), 42 U.S.C. §§ 11023(d)-(e) (Supp. IV 1986).

information is either generated by it or brought to its attention through petition by "any person"[160] or a state governor.[161]

1. *Section 313 Toxic Release Inventory*

Section 313 obligates facility owners or operators to report annually all toxic chemical emissions with the exception of extremely hazardous substance releases, which are handled under section 304 emergency notification procedures. Releases which are a part of normal business operations must be must be reported, including "fugitive emissions," i.e., low-level routine releases from around seals, valves, and doors. Federally permitted releases, such as under the Clean Air Act and Clean Water Act, are not exempt. Obviously, this section does not have much to do with emergency preparedness but rather is to form the basis of a computer data base of toxic chemical inventories[162] and as part of a mass balance study.[163]

Facilities which must comply with section 313 are those having ten or more full time employees, are in Standard Industrial Classification (SIC) codes 20-39 (primarily manufacturing facilities), and that manufacture, process, or use a toxic chemical in excess of the threshold quantity.[164] If a facility is composed of only one establishment which falls within SIC codes 20-39, is comprised of several establishments all having a primary SIC code of 20 through 39, or comprised of several

160. § 313(e)(1), 42 U.S.C. § 11023(e)(1) (Supp. IV 1986).

161. § 313(e)(2), 42 U.S.C. § 11023(e)(2) (Supp. IV 1986).

162. § 313(j), 42 U.S.C. § 11023(j) (Supp. IV 1986).

163. § 313(l), 42 U.S.C. § 11023(l) (Supp. IV 1986). A mass balance study is designed to account for the entire quantity of a chemical as it is used in a facility. Basically, a mass balance study determines if the amount of a chemical entering the facility is the same as that which leaves by the various routes (the amount transported into, produced at, consumed at, used at, accumulated at, release from, and transported out of a facility).

164. § 313(b)(1)(A), 42 U.S.C. § 11023(b)(1)(A) (Supp. IV 1986). The SIC code system was developed to classify establishments by type of economic activity. A SIC code applies to an establishment, defined as an economic unit, where business, industrial operations, or services are performed. A facility is located on a single or adjacent site owned or operated by the same person. A facility is larger and more complex than an establishment, and may include several establishments. 53 Fed. Reg. 4500, 4501 (1988).

establishments with at least one having a primary SIC code of 20 through 39, the entire facility is subject to section 313. All releases of TCs from the entire facility must be accounted for, even from individual establishments in the facility that are not within SIC codes 20-39.[165]

Several exemptions apply to toxic release inventory (TRI) reporting. Certain owners are exempted from TRI reporting. Owners of property who have no business interest in the property, other that a real estate interest, are exempted. If the owner has a business interest beyond a real estate interest, that owner has the ability to exert some control over the operator and is then subject to TRI reporting. An owner who is part of the same business organization as the operator is not exempt, and neither are owners of a business that contract out the operation of a site exempt.[166] Also exempted are laboratories, even if they "manufacture, process, or otherwise use" toxic chemicals, the standard for determining if reporting is necessary.[167]

The primary purpose of toxic chemical reports is for use by the federal and state governments, not local communities. The forms go to the EPA and to officials designated by the state governor. The first report for the 1987 calendar year was due July 1, 1988.[168] The reporting frequency may be modified by the EPA, but reporting may not be more frequent than once a year.[169]

All chemicals listed under section 313(c),[170] the toxic chemicals list, are subject to release reporting. The statute authorizes EPA to modify the list based on a chemical's acute toxicity, its chronic human health effects, or if it causes serious environmental damage.[171] A chemical may be added if it

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165. 53 Fed. Reg. 4500, 4501-02 (1988).

166. *Id.* at 4502.

167. § 313(a), 42 U.S.C. § 11023(a) (Supp. IV 1986); 53 Fed. Reg. 4500, 4503 (1988).

168. § 313(a), 42 U.S.C. § 11023(a) (Supp. IV 1986).

169. § 313(i)(1), 42 U.S.C. § 11023(i)(1) (Supp. IV 1986).

170. 42 U.S.C. § 11023(c) (Supp. IV 1986).

171. §§ 313(d)(2)-(3), 42 U.S.C. §§ 11023(d)(2)-(3) (Supp. IV 1986).

meets one of these criteria, and deleted if none are met.[172] This is the only EPCRA chemical list which specifically includes environmental damage as an element for defining subject chemicals.

Additions or deletions to the list of toxic chemicals may be requested by a citizen or a state governor through petitioning the EPA. A citizen petition must be based on human health effects, and does not extend to environmental damage.[173] A petition by a governor may be based on any of the criteria, including adverse environmental effects.[174]

The EPA has developed a uniform toxic chemical release form which is to include the name and location of the facility, certification by a senior management facility of the accuracy and completeness of the report, a designation of whether a TC is used, manufactured or processed at the facility, the maximum amount present at any time during the year, waste treatment and disposal methods used, and the annual quantity of TCs entering the environment.[175] Beginning in 1989, suppliers of mixtures and trade name products must notify their customers of the presence and amounts of toxic chemicals in their products. If the TC is less than one percent of a mixture or less than 0.1% by weight if the chemical is an OSH Act regulated carcinogen, the supplier is not obligated to inform the customer, and the chemical is not subject to reporting.[176]

No monitoring is required to generate the information required by section 313. The statute only requires that readily available information be used. If the information is not readily available, reasonable estimates are to be used.[177]

One business is doing its best to provide accurate release information. Nepera, Inc., a chemical manufacturer, has spent more than 1,400 hours and more that $40,000 worth of time in

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172. *Id.*

173. § 313(e)(1), 42 U.S.C. § 11023(e)(1) (Supp. IV 1986).

174. § 313(e)(2), 42 U.S.C. § 11023(e)(2) (Supp. IV 1986).

175. 53 Fed. Reg. 4500 (1988).

176. *EPA Announces Final Rule Under Title III Governing Toxic Chemical Release Reporting*, 18 ENV'T REP. (BNA) 2131 (Feb. 12, 1988).

177. § 313(g)(2), 42 U.S.C. § 11023(g)(2) (Supp. IV 1986).

its effort to comply. The reason for this effort is to avoid alarming the local community; Nepera realized how high its chemical leakage would appear if it used the EPA calculation guidelines, and did not believe its emissions were actually that high.[178]

2. *Toxic Chemical Reporting Thresholds*

Information obtained under this section may be of questionable value. If no monitoring is required and a best "guesstimate" suffices, the usefulness of EPA's computer data base is limited. If Congress is truly concerned about the presence of potentially hazardous substance, it should have taken the next step and required accurate information be submitted.

But even if the quality of the information is questionable, the release reporting requirement and information generated are having an effect. Monsanto announced that it will reduce toxic emissions from its thirty U.S. plants from the current twenty million pounds annually to two million pounds annually by 1992, a reduction of ninety percent.[179]

The reporting thresholds are set by the statute, and not left to EPA to determine through rulemaking. The thresholds differ depending on whether a chemical is "used" at a facility or if it is "manufactured or processed." The reporting threshold for chemicals used at a facility is 10,000 pounds/year. For facilities which manufacture or process TCs, the initial threshold is 75,000 pounds/year, and is reduced to 50,000 pounds/year for 1989. In 1990, the threshold is further reduced to 25,000 pounds/year.[180]

The reporting requirements are triggered when a facility manufactures or processes a chemical above the chemical's threshold or when it uses a chemical above that chemical's threshold. EPA interprets this threshold requirement to mean

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178. N.Y. Times, July 3, 1988, at F8, col. 1.

179. Hanson, *Chemical Firms Succeed In Effort To Comply With Title III Rules*, Chem. & Eng'g News, Dec. 19, 1988, at 13; Shabecoff, *U.S. Calls Poisoning Of Air Far Worse Than Expected and Threat to Public*, N.Y. Times, Mar. 23, 1989, at B11, col. 6.

180. § 313(f), 42 U.S.C. § 11023(f) (Supp. IV 1986).

that if, for example, a company manufactured 20,000 pounds of a toxic chemical and used 15,000 pounds during one year, the company must report emissions from both the manufacturing and use of the chemicals, even though the company only exceeded the use threshold.[181]

The statute clearly distinguished between the terms "used" and "manufactured or processed," but only defines the terms "manufacture and processed."[182] Presumably, a chemical that is within the meaning of the terms "manufactured and processed" cannot also be "used," given that each is subject to a different reporting threshold. If only considering the terms "manufacture and process" alone, without the statute's definitions of these terms, the terms seem to imply chemicals that are "value added" in the manufacturing process. But when the definitions of these terms are looked at closely, they seem to be more inclusive, and not limited to products which result directly from the manufacturing process.

Manufacturing, as defined by the statute, means "to produce, prepare, import, or compound a toxic chemical."[183] EPA has included coincidental production of TCs, the production of TCs concurrent with the production, use, or disposal of another chemical, in a final rule.[184] The statute's definition of manufacture is broadly drawn, and leaves little that would not be covered. But TCs which are impurities remaining when another chemical is processed, as opposed to by-products which are either disposed of or processed in their own right, are subject to de minimis concentration limits similar to that adopted for mixtures, and do not require reporting. By-products are not subject to de minimis concentration limits.[185]

"Process" focuses on the incorporation of a chemical into a product that is distributed in commerce.[186] Processing is limited to what happens to a toxic chemical after manufacturing, when it is being prepared for distribution in commerce,

181. 52 Fed. Reg. 21,152, 21,157 (1987).
182. § 313(b)(1)(C), 42 U.S.C. § 11023(b)(1)(C) (Supp. IV 1986).
183. § 313(b)(1)(C)(i), 42 U.S.C. § 11023(b)(1)(C)(i) (Supp. IV 1986).
184. 53 Fed. Reg. 4500, 4504 (1988).
185. *Id.*
186. *Id.* at 4506.

and includes such things as repackaging, reformulating, and blending or mixing, e.g., incorporating a chemical into a product such as a surfactant, pigment, or solvent.[187]

EPA's definition of "otherwise used" includes activities that "support, promote, or contribute to the facility's activities, where the chemical does not intentionally become a part of the product distributed in commerce." Included are catalysts, solvents, and reaction terminators, chemicals which are an integral part of a reaction but not part of the product. Manufacturing aids such as lubricants and refrigerants and chemicals used as degreasers and fuels also fall within "otherwise used."[188]

Several exemptions to "otherwise used" have been included in the final regulations. These include uses of TCs as a structural component of the facility, for routine janitorial or grounds maintenance, for personal uses by employees, for motor vehicle maintenance, and as process and non-contact cooling water and TCs in compressed air or as part of combustion.[189]

Obviously, it is industry's interest to have "manufactured or processed" defined broadly, so that industry only has to report releases of chemicals present above the higher threshold. The manner in which a threshold is determined is also a key concern. In the final rule, the threshold is determined by the total amount actually used or processed at the facility, not the total amount brought into the facility during the year. But the manufacturing threshold is determined a different way. In manufacturing, which includes importing a chemical into the facility, any amount brought on site is included when calculating the manufacturing threshold. In addition, once the threshold is exceeded, any emissions from the chemical in the inventory, i.e., storage, must be included in the emissions calculations.[190]

Once a facility exceeds any threshold, whether through

187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*

the use, manufacturing, or processing of a TC, all releases from the facility into all environmental media must be included in the TRI. The thresholds are used as the means for determining facility coverage, not as a factor in determining which emissions from the facility must be reported.[191]

3. *Critique of Toxic Release Inventory Reporting*

But does a chemical that is "used" present a greater risk than one that is "manufactured or processed"? What if the same chemical can be both "used" and "manufactured or processed," depending on the industry or the process? Is there logic behind this dichotomy?

The production/use approach to setting thresholds for reporting has been criticized by the Small Business Association. It believes that reporting should be either risk based or emission based.[192] Though other industry organizations have also criticized this section, there is little agreement among industry regarding the best way to determine reporting thresholds.[193]

But given the current uncertainty of how the terms will be defined, industry would seem be justified as considering that most, if not all, chemicals are "manufactured or processed." And communities would likely want as many chemicals as possible classified as being "used." How the terms will be defined by EPA has yet to be decided.

4. *Compliance With Toxic Release Inventory Reporting*

EPA expects an average of ten forms from each of the 30,000 facilities obligated to submit toxic release forms[194] by the July 1, 1988 reporting deadline.[195] In a recent report, EPA inspectors have found that roughly one-third of the companies

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191. *Id.*

192. *SBA Urges Exemption For Small Firms From Community Right-To-Know Reporting*, 18 ENV'T REP. (BNA) 399 (July 31, 1987).

193. *Id.*

194. *Title III Filings Suggest Underreporting; Enforcement To Focus On Nonfilers, Elkins Says*, 19 ENV'T REP. (BNA) 399 (July 22, 1988).

195. § 313(f)(1)(B)(i), 42 U.S.C. § 11023(f)(1)(B)(i) (Supp. IV 1986).

inspected had not fully complied with the reporting requirements.[196] EPA reported that it has received about 70,000 emission reports from 17,000 facilities, meaning that each facility has submitted about four reports. EPA is not sure how many facilities should be filing reports, but guesses that the compliance rate is running about seventy percent.[197]

One area where companies may not be reporting accurately is mixtures. The amount of each listed chemical contained in a mixture must be included in total reported quantity of that chemical, unless the amount of the chemical in the mixture falls under the de minimis exception of less than one percent, and 0.1 percent if a carcinogen.[198]

The statute does not specifically authorize inspections by either the EPA or states. However, EPA believes it may have implicit authority to enter and inspect a facility under section 313 because toxic release forms must be sent directly to EPA. But if its inspection authority is challenged, EPA has stated that it may use the inspection authority given to it under the Toxic Substances Control Act.[199]

EPA issued its final compliance monitoring strategy on July 15, 1988. Targeted in the first year will be reporters who submitted reports with readily apparent errors, late reporters, and non-reporters. EPA plans to levy substantial fines for non-reporting, and lesser penalties for late or incorrect reports unless there is evidence of wilful or fraudulent behavior. If there is a major error in a facility's report, EPA will issue a notice of non-compliance, and the reporter has thirty days to respond. Penalties will be assessed if the reporter fails to respond; if the reporter continues to ignore EPA's action and the assessment of the initial penalty, an even larger penalty will be assessed.[200]

EPA has begun its enforcement effort, and has levied al-

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196. N.Y. Times, Dec. 21, 1988, at A26, col.2.

197. Hanson, *supra* note 179, at 13.

198. 53 Fed. Reg. 4500, 4509 (1988).

199. *Creative Approaches May Be Needed For EPCRA Enforcement, Officials Say*, 19 ENV'T REP. (BNA) 340 (July 8, 1988).

200. *EPA Guidance On EPCRA Section 313 Details Two-Part Enforcement Strategy*, 18 ENV'T REP. (BNA) 2372 (Mar. 25, 1988).

most $1.5 million in fines against twenty-five companies for failing to meet the reporting deadlines. One company, Inland Steel Company of East Chicago, Indiana, has been assessed a fine of $721,000 for failing to report emissions of thirty-three substances. All of the facilities were inspected by EPA personnel.[201]

Both EPA and industry associations are recommending that its members undertake an aggressive public relations campaign to educate the local community and put the information in context, to avoid "chemophobia."[202] Industry fears that citizens may overreact to the large annual release figures, even though releases are only a fraction of the amounts processed daily. Industry officials believe that companies should explain why releases are necessary, any health impacts, and progress made in reducing emissions. Industry is concerned that citizens may assume that the releases pose a significant health risk.[203] Such assumptions may depend on whether citizens are familiar with the substance. The reports will also remove some of the "mystery" about the effects of chemicals on people's health,[204] and may also impact toxic tort litigation.

In addition, the reporting may have a marketplace impact, causing users to switch to substances not containing toxic chemicals.[205] It may also have an adverse effect on industries with a "clean" reputation, and communities may no longer view an industry's presence in their community with favor.

It is also possible that the information generated may re-

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201. *Supra* note 196, at A26, col. 1.

202. *Prepare Now For Public's Questions On Emissions Data, EPA Official Recommends*, 18 ENV'T REP. (BNA) 1561 (Oct. 16, 1987); *CMA Advises Firms To Go Beyond Compliance With Title III Mandates To Avoid Problems*, 18 ENV'T REP. (BNA) 1327 (Sept. 11, 1987); Reisch, *Firms Boost Community Programs To Fight Chemicals Poor Image*, Chem. & Eng'g News, Dec. 5, 1988, at 13.

203. *Petroleum Industry Faces Problems in Complying With EPCRA, EPA Head Says*, 19 ENV'T REP. (BNA) 303 (July 1, 1988).

204. *Compliance With Right-To-Know Advised Although Payoff Is Not Immediately Obvious*, 18 ENV'T REP. (BNA) 1035 (Aug. 14, 1987).

205. *Prepare Now For Public's Questions On Emissions Data, EPA Official Recommends*, 18 ENV'T REP. (BNA) 1561 (Oct. 16, 1987).

sult in additional laws being written; laws designed to further limit releases. If industry does not make an effort to work closely with the LEPCs and take the time to explain the information to communities, more restrictive legislation could be enacted. Air emission controls may be tightened, and there may be more legislation mandating waste minimization. There may be more stringent controls on transport and land disposal of chemicals. Ground water protection could be increased. Chemical specific permits could be required before a facility can be operated, and there may be more controls on chemical process design an safety.[206]

III. Enforcement

Civil, administrative and criminal penalties are authorized under sections 325 and 326 for the enforcement of EPCRA's emergency planning, emergency notification, routine reporting, and trade secret provisions.[207] The different requirements may be enforced by either EPA, citizens, states and localities, SERCs and LEPCs, or health professionals or a combination of them. Actions may be against facility owners/operators, EPA, a state governor, or a SERC.

A. *EPA Enforcement*

Civil, criminal, and administrative enforcement may be undertaken by the EPA against any facility owner/operator for failing to assist in emergency planning, for failing to give emergency notification, for violating the various reporting requirements, or for filing frivolous trade secret claims.[208]

B. *Citizen Enforcement*

EPCRA gives authority to citizens, local governments, and states to act as "private attorneys general" in civil actions against violators. The scope of authority is determined by who

206. *CMA Advises Firms To Go Beyond Compliance With Title III Mandates To Avoid Problems*, 18 ENV'T REP. (BNA) 1328 (Sept. 11, 1987).

207. 42 U.S.C. §§ 11045-11046 (Supp. IV 1986).

208. §§ 325(a)-(d), 42 U.S.C. §§ 11045(a)-(d) (Supp. IV 1986).

is bringing the suit. Citizens may bring civil actions against facility owners/operators for failing to submit a followup emergency notice, for failing to submit a MSDS, for failing to complete and submit a Tier I form, or failing to submit a TRI form. Citizens may also bring suit against the EPA for failing to publish inventory forms, for failing to respond to a toxic chemical addition or deletion petition, for not publishing a TRI form, for failing to establish a toxic chemical computer database, for not promulgating trade secret regulations, or for failing to decide on a petition requesting disclosure of trade secret information. Citizen actions may also be brought against the EPA, a state governor, or SERC for failing to provide public access to EPCRA information. In addition, citizens may commence an action against a state governor or SERC for failing to respond within 120 days to a request for Tier II information.[209] Health professionals may bring an action against a facility owner/operator for failing to comply with section 323 information requests, and includes a provision for health professional access to trade secret information.[210]

The provision for citizen suits could enhance EPCRA's enforcement, especially with the required submission of reports (a paper trail somewhat analogous to that found in the Clean Water Act and RCRA) under sections 311, 312, and 313. The language used in EPCRA's citizen suit provision allows for citizen enforcement against owners/operators "for failure to" comply with any of their statutory duties.[211] Unlike the language in the Clean Water Act's citizen suit provision, which authorizes citizen suits against those "alleged to be in violation,"[212] EPCRA's citizen suit provision does not contain this sort of present tense language. The U.S. Supreme Court

209. § 326(a)(1), 42 U.S.C. § 11046(a)(1) (Supp. IV 1986).

210. § 325(e), 42 U.S.C. § 11045(e) (Supp. IV 1986). Section 313 allows health professionals access to trade secret information under three circumstances: for non-emergency diagnosis or treatment; in an emergency situation, where the specific chemical identity is necessary for diagnosis or treatment; or to facilitate epidemiological or toxicological research. 42 U.S.C. § 11043 (Supp. IV 1986).

211. §§ 326(a)(1)(A)-(D), 42 U.S.C. § 11046(a)(1)(A)-(D) (Supp. IV 1986).

212. 33 U.S.C. § 1365 (1982 & Supp. IV 1986).

in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*[213] held that the Clean Water Act language does not authorize citizen suits for "wholly past" violations. From the plain language of EPCRA, citizen suits for past violations are authorized.

C. *State and Local Government Enforcement*

States and localities may commence civil actions against facility owners/operators for failing to provide followup emergency notice, for not submitting a MSDS or failing to provide a MSDS on request, or for failing to complete a Tier I information form.[214] State emergency response commissions and local emergency planning committees may also commence civil suits against facility owners/operators for failure to provide information needed to establish a community response plan, or for failing to submit Tier II information.[215] And states may bring a civil action against the EPA for failing to provide information supporting a trade secret claim.[216]

D. *Penalties*

Civil penalties range from a low of $10,000 per day for failing to supply EPA with substantiation for a trade secret claim,[217] to $75,000 per day for failing to comply with section 304 emergency notification requirements.[218] Criminal penalties range from one to two years for disclosing trade secret information or for violating section 304 emergency notification provisions.[219]

E. *Health Professional Provision*

These enforcement provisions bear marked similarities to

213. 108 S.Ct. 376 (1987).
214. § 326(a)(2)(A), 42 U.S.C. § 11046(a)(2)(A) (Supp. IV 1986).
215. § 326(a)(2)(B), 42 U.S.C. § 11046(a)(2)(B) (Supp. IV 1986).
216. § 326(a)(2)(C), 42 U.S.C. § 11046(a)(2)(C) (Supp. IV 1986).
217. § 325(c)(2), 42 U.S.C. § 11045(c)(2) (Supp. IV 1986).
218. § 325(b)(2), 42 U.S.C. § 11045(b)(2) (Supp. IV 1986).
219. §§ 325(d)(2), 325(b)(4); 42 U.S.C. §§ 11045(d)(2), 11045(b)(4) (Supp. IV 1986).

the enforcement provisions found in other environmental statutes.[220] The only truly new enforcement provision is the one allowing health professionals to bring an action against a facility owner/operator to reveal information necessary for medical purposes.

It is interesting to note that only health professionals may bring an action against a facility owner/operator for failing to provide the requested information.[221] The person needing medical treatment may not. It appears from the statute that the access to trade secret information received is limited to the health professional, and the patient is not entitled to know the specific chemical identity of the trade secret protected chemical causing the injury, nor may such information be revealed to the patient's attorney.[222]

It could be argued that sections 323 and 325(e) may also be used to gain access to information about chemical exposure in the workplace. Though EPCRA is primarily a community right-to-know act, and not specifically applicable to the workplace, health professional information access is allowed whenever there is a "reasonable basis to suspect" that the information is needed for diagnosis or treatment of an individual exposed to the chemical concerned, and that knowledge of the specific chemical identity will assist in diagnosis and treatment.[223] Nothing in the statute specifically disallows such a use, and the information obtained would be just as valuable

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220. *See generally* Clean Water Act §§ 309, 505, 33 U.S.C. §§ 1319, 1365 (1982 & Supp. IV 1986); Clean Air Act §§ 167, 304, 42 U.S.C. §§ 7477, 7604 (1982); RCRA §§ 3008, 6072, 42 U.S.C. §§ 6928, 6972 (1982 & Supp. IV 1986); CERCLA § 109, 42 U.S.C. § 6909 (1982 & Supp. IV 1986); TSCA §§ 15-16, 15 U.S.C. §§ 2615-2616 (1982).

221. 53 Fed. Reg. 28,772, 28,797 (1988). Only treating physicians and nurses are entitled to access. Paramedics and other emergency medical service workers are not included. *Id.*

222. In *Lawlor v. Shannon*, No. 86-2516-MC (D. Mass. Aug. 29, 1988), a public interest group challenged a provision of a Massachusetts right-to-know law that limited disclosure of information obtained under the law to only those authorized to receive it. Basically, the law prohibited those who obtain information under the law from communicating the health and safety information to others including their doctor, lawyer, selectman, or neighbor. The court, rejecting the defendants' argument that the law is not a freedom of information act, held the section to unconstitutional on its face as violative of the First Amendment.

223. §§ 323(a)(1)-(3), 42 U.S.C. §§ 11043(a)(1)-(3) (Supp. IV 1986).

for worker treatment as for an individual in the community.

F. *Inspection*

EPCRA does not specifically authorize EPA or states to enter and inspect a facility suspected of not being in compliance with the reporting requirements. However, EPA may have implicit authority to enter and inspect under section 313, which requires facilities to send TRI reports directly to EPA. EPA may have to rely on the inspection authority within CERCLA, TSCA, or the Clean Air Act to gain entrance to a facility being investigated under EPCRA.[224]

EPA has the authority to enforce section 311 and 312, but has no inspection authority under these sections. The information required under these sections is only submitted to SERCs, LEPCs, and local fire departments, and not to the EPA. EPA hopes to work with states to get the information necessary to enforce sections 311 and 312. Only local fire departments have explicit inspection authority under section 312. EPA may be able to get section 312 information from state agencies who have in turn received it from local fire departments.[225]

One state has recognized the problems that the statute's inadequate inspection authority creates. In May 1988, the Wisconsin governor signed a state community right-to-know act which adopts federal reporting requirements on reporting on hazardous substances. The Wisconsin statute gives the state the authority to enforce its provisions without going through EPA or the U.S. Department of Justice.[226]

EPA plans to use information obtained under EPCRA not only to enforce EPCRA, but in the enforcement of RCRA, CERCLA, the Clean Air Act, and the Clean Water Act. EPA will be able to look at EPCRA reports and determine if the reporter has violated its permit issued under one of the other

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224. *Creative Approaches May Be Needed For EPCRA Enforcement, Officials Say*, 19 ENV'T REP. (BNA) 340 (July 8, 1988).

225. *Id.*

226. *Governor Signs Right-To-Know Statute Giving State Authority To Enforce Federal Law*, 19 ENV'T REP. (BNA) 50 (May 13, 1988).

environmental statutes.[227]

G. *Effectiveness of EPCRA Enforcement*

The strongest enforcement measures are used to assure compliance with the emergency notice of EHS releases. Section 304's emergency notification provisions provide for a written followup emergency notice; the form of the initial notice is not specified. But only if there is an immediate and noticeable effect, be it a strong odor or a health effect on those individuals in the vicinity of a facility when a release occurs, will enforcement be made easier. Disgruntled employees may also play a role in section 304 enforcement.

EPA's enforcement efforts have been criticized by Senator Lautenberg. EPA budget documents indicate that only twenty-five enforcement cases were to be developed in 1988, and only 116 compliance inspections were scheduled, out of a potential 30,000 subject facilities.[228] But in a letter from the EPA to Senator Lautenberg, EPA indicated that it had completed 131 facility compliance inspections by mid-October 1988. To date, EPA has filed fifty-five enforcement cases, fifty-one of which were for alleged section 313 violations.[229]

However, before facilities can comply with the notification and reporting requirements, they must be aware of the existence of such requirements. This is the weak link in the entire EPCRA regulatory scheme. How the EPA, the state, communities and industry deal with this will ultimately determine EPCRA's effectiveness.

EPA is preparing a booklet on section 313 toxic chemical inventory and release reporting requirements. It is also preparing a video to inform subject businesses of EPCRA requirements.[230] The Chemical Manufacturer's Association, an

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227. *Emergency Releases Most Likely Target Of Initial Enforcement, State Official Says*, 18 ENV'T REP. (BNA) 2241 (Feb. 26, 1988).

228. Hanson, *Chemical Firms Succeed In Effort To Comply With Title III Rules*, Chem. & Eng'g News, Dec. 19, 1988, at 14.

229. *Relaxed Concurrence*, 2 RIGHT-TO-KNOW-PLANNING GUIDE (BNA), No. 17, at 1 (May 11, 1989).

230. Telephone conversation with Marion Herz, Chemical Manufacturers Association (May 10, 1988).

industry trade group, is supplementing EPA's efforts by encouraging member manufacturers and distributors to include a cover letter with every MSDS sent out explaining EPCRA and informing customers that they are subject to EPCRA.[231] Media coverage of EPCRA continues, increasing the likelihood that those subject to EPCRA will be informed of their duties.

But however comprehensive the enforcement provisions and substantial the penalties for violation provisions of EPCRA, EPA's enforcement policies (and budget) will play the major role in determining whether EPCRA's purpose will be accomplished.

IV. Impact of EPCRA

A. *EPCRA and Toxic Tort Suits*

EPCRA can have a wide ranging effect on toxic tort suits in this country. Information previously unavailable or available only at great cost is now publicly available, and may lower entry barriers to toxic tort suits. EPCRA can make the initial investigation of a potential toxic tort suit less burdensome. Proper defendants can be more easily identified. Once an action is commenced, EPCRA generated information has the potential to make discovery easier. The causation burden, one of the most difficult elements of a toxic tort to prove, may be eased. Liability may be easier to prove, by showing the defendant's actual or constructive knowledge of the presence of harmful chemicals, that the chemicals were released, or the adverse health effects the chemicals cause.

1. *Investigation*

Before a toxic tort action can be initiated, it is vital that there is sufficient information to evaluate early on the strength and weaknesses of the case. There must be adequate information regarding the plaintiff's exposure to the chemical and the chemical's known health effects. The information ob-

231. *Id.*

tained under sections 304 and 313 (emergency notification of an EHS release and routine emissions of TCs) can correlate the release of the chemical with the plaintiff's exposure and the resulting health effects. Knowing the specific identity of the chemical reduces speculation as to the exact cause of the health effect, and provides strong documentary evidence that the chemical released caused the health effects seen in the plaintiff. This information can also assist health professionals in their diagnosis and treatment of the plaintiff.

The MSDS of the released chemical, available under section 312, informs the plaintiff of the known health effects, and allows a comparison between the effects seen in the plaintiff and those documented by the MSDS. The combination of the emergency notification information with the MSDS may also indicate that an exposure standard was exceeded. Once the chemical identity is known, air and groundwater testing can be focused to determine if there has been contamination and the degree of that contamination, reducing the cost of such testing by eliminating the need for multi-compound analysis.

2. *Identifying the Defendant*

EPCRA can assist in identifying the proper defendant. The volume of information available under EPCRA, such as the emergency notification of an EHS release and the follow up notice, the HC inventory report, and the annual toxic release inventory, all identify the facility releasing the chemicals. In combination with the MSDS information, it may be easier to focus on the proper defendant much earlier in the litigation than would otherwise be possible.

3. *Discovery*

Once it is determined that there are sufficient grounds to support a toxic tort suit and an action is filed, the discovery process begins. The availability of a chemical's identity and location and exposure information can accelerate this initial phase of toxic tort litigation, and give the defendant notice that the plaintiff will actively pursue the case. The plaintiff's attorney, armed with this information, can focus the discovery

requests to elicit key information early in the discovery process, and it is likely that the first and possibly additional rounds of interrogatories can be eliminated

The information obtained under EPCRA can be used to double check the accuracy of the information turned over during discovery. In addition, a comparison of the EPCRA information with the information obtained during discovery allows the plaintiff to determine if there are gaps in either set of information.

4. *Proving the Case*

Exposure is the first element that must be proven in a toxic tort case. EPCRA can provide this information, either from the emergency notification of a release or through toxic release inventory reporting. Each type of reporting is best utilized with different types of underlying claims. The section 304 emergency notification information is especially valuable for cases based on short-term exposure, and provides the name of the chemical released, the quantity released, the time and duration of the release, and the media to which it was released. Routine emissions reporting (the toxic release inventory) is of less value for short-term exposure cases, as it reports only the annual quantity of a chemical released into an environmental medium, but may be very supportive of a case based on long-term exposure. Depending on the underlying claim, each category provides evidence of different types of exposures.

Causation is likely to be the most difficult element of a toxic tort to prove. Even if exposure can be proved, the plaintiff must still demonstrate that the health effects were caused by the chemical. Information available under EPCRA, in particular the information regarding the chemical's identity and amount released, be it for a short duration or over a period of years, can be very useful in assisting the treating health professional in identifying the problem, and educating the health professional in the effects of such exposure. It may also ease a physician's concern that the plaintiff's injuries were, in the physician's opinion, caused by exposure to the chemical, and

may allow the physician to be more comfortable in testifying to causation. This information can also be used as the basis of an epidemiological study into the effects of the exposure. Also, where the plaintiff can demonstrate actual exposure to a chemical by use of EPCRA generated reports, courts may be more willing to admit epidemiological studies as reliable evidence of causation.

Once exposure and causation are proved, the defendant's responsibility must be established. The release or emission documentation, information actually prepared and reported by the defendant, provide strong evidence of that the defendant's actions (or inaction) caused the exposure. EPCRA's reporting obligations place a defendant company on notice of the presence of hazardous substances and their toxic effects, and may even be used to impute knowledge of the effects on the defendant. The information may also be used to reconstruct the release, to demonstrate how the plaintiff was exposed and injured, and the defendant's responsibility for that injury.

5. *The Effect of EPCRA on Toxic Tort Suits*

The quality and quantity of the information available to plaintiffs under EPCRA can lower some of the barriers to toxic tort suits that earlier existed. Information previously protected as a trade secret or difficult to obtain without going through procedures designed to protect confidentially may now be publicly available. Plaintiffs and their attorneys can determine early on, and with comparatively little expense, the strength of their case. As a result, once plaintiffs and their attorneys become aware of the pool of information now available, more toxic tort actions may be filed. The information places the plaintiff in the position of being able to aggressively litigate from the beginning of the suit, and correspondingly, may put the defendant in a frame of mind more conducive to settlement.

But access to EPCRA information is not unlimited, and neither does EPCRA generated information provide all the detail needed for toxic tort litigation. Though information re-

garding the amounts (in ranges) and the time of release are available, the actual identity of the released chemical may not be available to the public. Section 323[232] limits access to the specific chemical identity for chemicals protected under EPCRA's trade secret provision to "health professionals, doctors, and nurses." The trade secret provision protects only chemical identity, and effectively keeps the exposed individual and the attorney from learning the specific identity of a chemical. Only through working with a "health professional," and having the health professional request a chemical's identity is it possible for the exposed individual and the attorney to learn the chemical's identity. But the health professional may be prevented from revealing the identity of the chemical under the provisions of a confidentiality agreement. Section 313(d)[233] requires the health professional to agree in writing that the information received will not be used for "any purpose other than the health needs asserted in the statement of need," unless the confidentiality agreement authorizes such disclosure. Depending on how limiting the confidentiality agreement is written, access to a specific chemical identity protected as a trade secret may be limited.

There are also limitations in the reporting requirements, such as the exemption from section 311 MSDS reporting for research laboratories, hospitals, or other medical facilities. If the release was limited to the site of the facility, no section 304 emergency notification is required. Not only are there gaps in the reporting requirements, but if facilities do not comply with the law, a vast amount of information may simply never be available.

Though access to EPCRA information is, in theory at least, available to the public, two states having community right-to-know laws in place, New Jersey and Massachusetts, which have released information on the number of requests received for such information. In New Jersey, fewer than 200 information requests were made in over three years of the program. In Massachusetts, only sixty-three requests were re-

232. 42 U.S.C. § 11043 (Supp. IV 1986).
233. 42 U.S.C. § 11023(d) (Supp. IV 1986).

ceived in over eighteen months. Citizens complain about procedures used to access the information. And once the data is received, it is difficult to understand. Additional information regarding health effects and exposure levels are needed to put the information into context. Even with such information, the potential for misinterpretation is great.[234]

B. *EPCRA and Trade Secrets*

EPCRA allows only the specific chemical identity to be withheld.[235] The chemical is still subject to all applicable reporting but instead of the chemical's specific identity being reported, a generic class or category may be used. No other information is protected as a trade secret. Thus it is possible that manufacturers may be required to report information under EPCRA previously withheld as confidential business data under TSCA. Once a trade secret is revealed through one public disclosure, it is lost forever. The end result will be that a company will no longer be able to make TSCA confidentiality claims.[236]

Few trade secret claims have been made. Through July 28, 1988 EPA received only 12 trade secret claims among section 313 reports. More trade secret claims have been made for section 311 MSDS information, with approximately 2000 such requests.[237]

V. Conclusion

EPCRA has already begun to have an impact. The first national survey of 320 toxic chemicals released into the air by industry reveals that 2.4 billion pounds of chemicals were emitted in 1987. Of those 320 toxic chemicals, only seven are regulated by the EPA. Sixty of the chemicals are listed as

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234. *Localities Not Benefitting Fully From Right-To-Know Law, Texas Study Says*, 19 ENV'T REP. (BNA) 745 (Aug. 26, 1988).

235. § 322, 42 U.S.C. § 11042 (Supp. IV 1986).

236. *TSCA Confidentiality Claims May Be Lost With Community Right-To-Know Law, ACS Told*, 17 ENV'T REP. 2098 (Apr. 10, 1987).

237. *Procedures For Claiming Confidentiality Of Trade Secret Information Issued By EPA*, 19 ENV'T REP. (BNA) 469 (Aug. 5, 1988).

causing cancer. And the EPA believes the situation could be worse than the survey indicates because automobile pollution, releases from toxic waste dumps, and pollution from companies producing less than 75,000 pounds of toxic substances annually were not included in the survey.[238]

The EPA previously estimated that toxic air pollution causes approximately 2,000 cases of cancer a year, but the numbers are based on an analysis of only twenty chemicals and did not consider the combined effect of the chemicals. At least one industry group, the Chemical Manufacturers Association, believes that the high numbers in the survey do not correspondingly indicate a national health problem, and is concerned that the public will be needlessly frightened if the information is misused.[239]

This survey is causing renewed interest in Congress to change the Clean Air Act to deal with the problem of air toxics. Several Representatives plan to introduce legislation "that would amend the Clean Air Act to require that industry make sharp reductions in its emissions of toxic substances."[240] The Administration also supports such changes.[241]

Though the first information generated under EPCRA appears to be having quite an impact, serious problems exist within the statute's framework. That risk assessment procedures were not included, particularly in the determination of which chemicals should be subject to what type of reporting or notification, demonstrate the hodgepodge analysis used in the statute's drafting. The actual risk posed by a substances presence, as determined by its toxicity, volume or any of a number of factors, is not adequately reflected by this regulatory scheme.

EPCRA categorizes substances into three groups: extremely hazardous substances, hazardous chemicals, and toxic chemicals. What purpose is served by breaking down substances into three separate and distinct categories? A logical

238. Shabecoff, *supra* note 179, at B11, col. 1.
239. *Id.* at B11, col. 6.
240. *Id.* at B11, col. 4.
241. *Id.* at B11, col. 2.

basis for differentiating these lists, each of which are subject to a different reporting requirement, would be on the basis of a substance's toxicity, reactivity, volatility, combustability, flammability, or the potential hazard to both human health and the environment created by accidental releases. However, there are no such differences between the lists. There is even some duplication of substances. Congress, in its determination of what chemicals should be subject to EPCRA, simply chose to include existing lists that Congress itself or federal agencies had already developed.[242]

To further complicate the question of substances subject to emergency notification, Congress included hazardous substances under CERCLA and made them subject to EPCRA emergency reporting requirements[243] but did not correspondingly subject EPCRA extremely hazardous substances to CERCLA. As a result of there being two distinct lists, one for EPCRA reporting and one for CERCLA reporting, releases of EHS which are not also listed under CERCLA are reported only to state and local governments, and no notice must be given to the National Response Center.

The lack of awareness of business, especially small ones, may completely undermine the statute's purpose. Much more must be done to insure that compliance at all levels of industry and business is as complete as possible. If the paper burden is perceived as too onerous, many businesses simply won't comply. If the government is thought to be intruding too much into industry's day to day operations (as "Big Brother"), noncompliance will be the norm.

But if compliance with EPCRA, especially its emergency notification provision, is not one hundred percent, the potential for serious accidents still exists. The balance between these competing interests and the implementing regulations

242. The list of "extremely hazardous chemicals" was first created by EPA in November 1985. The list of "hazardous chemicals" was created by OSHA pursuant to the Occupational Safety and Health Act § 6(b), 29 U.S.C. § 655(b) (1982). The "toxic chemical" list was created by the Senate Environment Committee, subject to modifications made by the EPA pursuant to EPCRA §§ 303(d)-(e), 42 U.S.C. §§ 11023(d)-(e) (Supp. IV 1986).

243. § 302(a)(3), 42 U.S.C. § 11004(a)(3) (Supp. IV 1986).

will determine in large part the effectiveness of this statute.

EPCRA also has the potential to impact toxic tort suits. The ready availability of chemical exposure information will at the very least reduce the plaintiff's burden. It is certainly possible that as the public becomes aware of the existence and public availability of EPCRA information, more toxic tort suits may be brought.

Overall, EPCRA is designed to do what all must agree is a worthwhile end: the protection of the health and safety of citizens. The Emergency Planning and Community Right-To-Know Act takes the first steps, faltering though they may be, to accomplish this.

Jayne S.A. Pritchard