



Chapter X

REPORTING OF RELEASES AND SPILLS

Federal and state environmental laws and regulations are filled with requirements to report unpermitted spills or releases. Some of the more important requirements under federal and New York law will be discussed.

A. CERCLA Release Reporting

CERCLA requires the reporting of releases of hazardous substances, pursuant to regulations set forth at 40 C.F.R. Part 302. Part 302 requires the immediate reporting by “any person in charge of a vessel or an offshore or onshore facility... as soon as he has knowledge,” to the National Response Center at (800) 424-8802, of any release, of a “reportable quantity” within a 24-hour period of a CERCLA hazardous substance, 40 C.F.R. §302.6(a), except from certain continuous releases. 40 C.F.R. §302.8. The reportable quantities of hazardous substances are listed at 40 C.F.R. §302.4.

Generally, the reportable quantity for an unlisted hazardous substance is 100 pounds in a 24-hour period. 40 C.F.R. §302.5(b). Similar reporting is also required for discharges to the surface waters of reportable quantities of Clean Water Act hazardous substances. *See* 40 C.F.R. §117.21, discussed below.

Also, under CERCLA §103(c), 42 U.S.C. §9603(c), a report to EPA was required, within 180 days of CERCLA's enactment, with respect to all facilities at which hazardous substances are or have been “stored, treated, or disposed of,” and which did not have a RCRA permit. All persons who owned or operated the facility at that time, or at the time of disposal, and all transporters who selected the disposal site, were required to make the report. Since the deadline

for this report has long since passed, this requirement probably does not apply to newly-discovered sites.

B. SARA Title III Reporting

In reaction to the tragedy in Bhopal, India, additional federal release reporting requirements were added by the Title III of SARA (Superfund Amendments and Reauthorization Act of 1986), known as the Emergency Planning and Community Right-To-Know Act (“EPCRA”), 42 U.S.C. §§11001, *et seq.* Pursuant to 40 C.F.R. Part 355, any facility which had the “threshold planning quantity” (“TPQ”) of an extremely hazardous substance (“EHS”) on site, was required to make a notification by 1987, or within 60 days of reaching a TPQ, to the state emergency response commission (“SERC”). 40 C.F.R. §355.30(b). In New York, this is accomplished by notice to New York DEC.

Such a facility must also designate an emergency coordinator. 40 C.F.R. §355.30(c). The extremely hazardous substances, along with their TPQs and reportable quantities, are set forth at Appendix A to Part 355.

Further, a release or spill of a reportable quantity of a CERCLA hazardous substance or an extremely hazardous substance which results in exposure outside of the boundaries of a facility, 40 C.F.R. §355.40(a), must generally be immediately reported by the owner or operator to the (1) “community emergency coordinator for the local emergency planning committee of any area likely to be affected by the release,” and (2) “the state emergency response commission of any state likely to be affected by the release.” 40 C.F.R. §355.40(b)(1). In New York State, this is accomplished by calling the DEC spill hotline at (800) 457-7362. For transportation-related releases, the report may be made by calling 911. 40 C.F.R. §355.40(b)(4)(ii).

The report must include the following information:

- (i) The chemical name or identity of any substance involved in the release.
- (ii) An indication of whether the substance is an extremely hazardous substance.
- (iii) An estimate of the quantity of any such substance that was released into the environment.
- (iv) The time and duration of the release.
- (v) The medium or media into which the release occurred.
- (vi) Any known or anticipated acute or chronic health risks associated with the emergency and, where appropriate, advice regarding medical attention necessary for exposed individuals.
- (vii) Proper precautions to take as a result of the release, including evacuation (unless such information is readily available to the community emergency coordination pursuant to the emergency plan).
- (viii) The names and telephone number of the person or persons to be contacted for further information.

40 C.F.R. §355.40(b)(2). A written follow-up report is also required “as soon as practicable,” setting forth the above information, as well as:

- (i) Actions taken to respond to and contain the release.
- (ii) Any known or anticipated acute or chronic health risks associated with the release, and
- (iii) Where appropriate, advice regarding medical attention necessary for exposed individuals.

40 C.F.R. §355.40(b)(3).

C. RCRA Facility Reporting

If a hazardous waste treatment, storage or disposal facility has “a release, fire or explosion” by which a hazardous waste “could threaten human health or the environment outside

the facility,” regulations under the federal Resource Conservation and Recovery Act require that it must immediately:

1. Notify local authorities,
2. Call the National Response Center at (800) 424-8802 or the federal “on-scene coordinator” designated under the NCP, and in New York the state’s spill hotline, (800) 457-7362, to report:
 - (a) name and telephone number of reporter;
 - (b) name and address of facility;
 - (c) time and type of incident (e.g. release, fire);
 - (d) name and quantity of material(s) involved, to the extent know;
 - (e) the extent of injuries, if any; and
 - (f) the possible hazards of human health, or the environment, outside the facility.

40 C.F.R. §264.56(d); 6 N.Y.C.R.R. §373-2.4(g)(4)(ii). Further, the hazardous waste must be contained and cleaned up as soon as practicable. 40 C.F.R. §264.56(e); *see also* 6 N.Y.C.R.R. §373-2.4(g). Similar requirements also apply to “accumulators” of hazardous wastes. 40 C.F.R. §262.34(d)(5)(iv)(C); 6 N.Y.C.R.R. §372.2(a)(8)(ii), 373-1.1(d)(iii)(c)(5), 373-3.4(g)(4)(iii).

D. Federal UST Regulations

Federal regulations at 40 C.F.R. Part 280, promulgated under RCRA, generally cover underground storage tanks (“USTs”) of at least 110 gallons that store petroleum or any substance defined as hazardous under CERCLA. *See* 40 C.F.R. §§280.11, 280.12. Hazardous waste tanks are excluded, since they are regulated as hazardous waste storage facilities under RCRA. *See, e.g.,* 6 N.Y.C.R.R. Part 373.

Under these regulations, if there is a spill or overflow of more than 25 gallons or that causes a sheen on nearby surface waters, owners and operators of the UST must immediately report the spill to EPA, or to the state if designated by EPA. 40 C.F.R. §280.53(a)(1). In New York, EPA has designated DEC to receive these reports, and the report is made to the DEC spill

hotline. If spills of less than 25 gallons cannot be cleaned up within 24 hours, they must also be reported. 40 C.F.R. §280.53(b). The spill must be immediately cleaned up or contained. 40 C.F.R. §280.53(a). Corrective measures for spills are also specified by federal regulation, including requirements for initial response, site characterization and abatement measures, free product removal, corrective action plans, groundwater cleanup, and public participation. 40 C.F.R. §§280.60-280.67.

E. Surface Water Spills

The Clean Water Act contains a reporting requirement. Any discharge of a “reportable quantity” of a “hazardous substance” (as designated under that Act -- not CERCLA), including oil, into or upon surface waters or shorelines must be reported immediately to the National Response Center at (800) 424-8802. 40 C.F.R. §110.10. A “reportable quantity” of oil is defined as a quantity which violates an applicable water quality standard, or which causes a sheen on the water, 40 C.F.R. §110.3, while reportable quantities for Clean Water Act hazardous substances are specified by regulation. *See* 40 C.F.R. Part 116.

F. New York Petroleum Bulk Storage Regulations

The New York State petroleum bulk storage regulations contain an important spill reporting requirement, which is contained in regulations applicable “to all above-ground and underground petroleum storage facilities with a combined storage capacity of over 1,100 gallons, including all facilities registered under Part 612 of this title.” 6 N.Y.C.R.R. §613.1(d). Under these regulations:

Any person with knowledge of a spill, leak or discharge of petroleum must report the incident to the department within two hours of discovery. The results of any inventory record, test or inspection which shows a facility is leaking must be reported to the

department within two hours of the discovery. Notification must be made by calling the telephone hotline (518) 457-7362.

6 N.Y.C.R.R. §613.8. Note that the DEC hotline can also be reached with an “800” prefix (800-457-7362).

This reporting requirement extends beyond the owner or operator of a facility to “any person with knowledge,” including a consultant. In a Decision of the DEC Commissioner, *In the Matter of Middleton, Kontokosta Associates, Ltd.* (Dec. 31, 1998), a consultant who observed an oil spill at a site may have violated this provision by failing to report, even though he was neither an owner nor an operator. DEC Commissioner Cahill ruled that:

The term “any person” in §613.8 should be given a broad, not limited or restrictive, interpretation. The term “any person” is intended to apply, not only to persons who are “owners” and “operators”, but also to all other persons with knowledge of a spill, leak or discharge in order to implement the remedial and preventive purposes of the Petroleum Bulk Storage Code, of which §613.8 is a part. The rationale for requiring “any person” to report a spill or discharge to the Department within two hours is obviously to enable stoppage of ongoing contamination as quickly as possible after detection of a spill. For example, in the case of an ongoing gush of oil from an overturned tanker truck on the highway, an immediate report will enable a quick response in order to minimize environmental damage. The reporting duty is on everyone with knowledge of the spill.

By policy, DEC has created the following exception for *de minimis* spills:

3. What petroleum spills need to be reported?

All petroleum spills that occur within New York State (NYS) must be reported to the NYS Spill Hotline (1-800-457-7362) within 2 hours of discovery, except spills which meet all of the following criteria:

1. The quantity is known to be less than 5 gallons; and
 2. The spill is contained and under the control of the spiller;
- and

3. The spill has not and will not reach the State's water or any land; and
4. The spill is cleaned up within 2 hours of discovery.

A spill is considered to have not impacted land if it occurs on a paved surface such as asphalt or concrete. A spill in a dirt or gravel parking lot is considered to have impacted land and is reportable.

<http://www.dec.ny.gov/chemical/8692.html>.

G. New York Oil Spill Law

The New York Oil Spill Law provides, at Navigation Law §175, that “[a]ny person responsible for causing a discharge shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge.” Regulations at 17 N.Y.C.R.R. §§32.3 and 32.4 implement that statute. Under §32.3, the notification requirement under Navigation Law §175 extends to “[a]ny person responsible for causing a discharge,” “the owner or operator of any facility from which petroleum has been discharged,” and “any person who has actual or constructive control of such petroleum immediately prior to such discharge.” Notification is required by a telephone call to the DEC spill hotline, and a list of detailed information that must be provided with the notification is set forth at 17 N.Y.C.R.R. §32.4(b).

The reporting requirement under 6 N.Y.C.R.R. §613.8 appears limited to regulated bulk tanks – although it may be interpreted more broadly by DEC. However, the reporting requirement under Navigation Law §175 is not limited to bulk tanks, and covers any unpermitted “discharges,” as defined by the New York Oil Spill Law. *See* Navigation Law §172(8).

H. Bulk Storage Spills in New York

New York Environmental Conservation Law §17-1743 sets forth the following reporting requirement:

Any person who is the owner of or in actual or constructive possession or control of more than 1,100 gallons, in bulk, of any liquid, including petroleum, which if released, discharged or spilled would or would be likely to pollute the lands or waters of the state, including the groundwaters thereof shall, as soon as he has knowledge of the release, discharge or spill of any part of such liquid in his possession or control onto the lands or into the waters of the state including the groundwaters thereof immediately notify the department.

Thus, this provision requires an immediate call to the DEC spill hotline for a spill from a facility that stored more than 1,100 gallons of petroleum or any other liquid that might pollute ground or surface waters.

I. Releases of Hazardous Substances in New York

New York State regulations also require reporting of releases of designated quantities of hazardous substances listed at 6 N.Y.C.R.R. Part 597. While the designated substances and quantities may be similar to those specified under CERCLA, they are not identical. Also note that the requirements do not appear to be limited to bulk storage facilities regulated by 6 N.Y.C.R.R. Part 596.

The reporting requirement applies to (1) “an owner or operator” of a “storage facility,” (2) “any person in a contractual relationship with an owner or operator who inspects, tests, or repairs any portion of a storage facility which is or was used for the storage of hazardous substances,” (3) “any person in actual or constructive control or possession of a hazardous substance prior to its release,” and (4) “any employee, agent or representative” of such persons. 6 N.Y.C.R.R. §595.3(a)(1). Further, releases of lesser quantities which cause or “may reasonably be expected to cause” an explosion, “vapors, dust and/or gases,” which may cause illnesses (not including illnesses to persons in the same building), or contravention of air or water quality standards, must also be reported. 6 N.Y.C.R.R. §595.3(a)(2). All such releases must be

reported to the DEC spill hotline within two hours. Nonetheless, a spill to a secondary containment system that is completely contained and accounted for within 24 hours need not be reported. 6 N.Y.C.R.R §595.3(a)(4).

Furthermore, within 24 hours of discovery, “[t]he owner or operator of a storage facility shall notify [DEC] of a suspected or probable release of a hazardous substance unless an investigation shows that a release has not occurred or does not need to be reported.” 6 N.Y.C.R.R §595.3(b)(1). The regulations also prohibit a reportable release, unless it was due to “an unavoidable accident,” or a continuous release reported pursuant to 40 C.F.R. §302.8. 6 N.Y.C.R.R §595.2.

J. Notification of Test Results in New York

Title 24 to ECL Article 27, enacted in 2008, requires that certain notifications be given of test results. First of all, within 30 days of validation of any test results received pursuant to ECL Article 27 (including the State Superfund and Brownfield Cleanup Programs) or Navigation Law Article 12 (Oil Spill Law), a responsible party under the State Superfund Law or a participant under the Brownfield Cleanup Program must provide the test results to any “identifiable owner of real property” that is tested. ECL §27-1403. DEC is likewise obligated to provide the test results within 30 days of validation to property owners. ECL §27-1403.

In turn, within fifteen days of receipt of indoor air contamination test results “conducted on indoor air, subslab air, ambient air, subslab groundwater samples, and subslab soil samples” received from an “issuer” (defined to include certain responsible parties, brownfield participants and DEC) that exceed New York State Department of Health (“NYSDOH”) or OSHA indoor air standards, a fact sheet and notice of required public meetings must be provided by a property owner (or their agent) to tenants and occupants, as well as, upon request, the test

results and any closure letter. ECL §27-1405(1,2). NYSDOH is required to prepare generic fact sheets. ECL §27-1405(2). Further, for a property where an “engineering control is in place to mitigate indoor air contamination, or if the real property is subject to ongoing monitoring pursuant to an ongoing remedial program,” an owner (or their agent) to whom indoor air contamination test results have been provided must provide fact sheets, and on request test results and any closure letter, to a tenant prior to signing a lease. ECL §27-1405(3). In addition, the lease or rental agreement must provide the following notice in at least 12-point bold type:

NOTIFICATION OF TEST RESULTS

The property has been tested for contamination of indoor air: test results and additional information are available upon request.