



## Chapter XIII

### SARA TITLE III

Title III of SARA (Superfund Amendments and Reauthorization Act of 1986), known as the Emergency Planning and Community Right-To-Know Act or EPCRA, 42 U.S.C. §§11001, *et seq.*, provides a comprehensive system for planning response to accidents involving hazardous chemicals, and for the public to be informed about the use of such chemicals in their community.

#### A. Emergency Planning

Subtitle A of EPCRA is entitled “Emergency Planning and Notification,” and sets forth a procedure for development of state and local emergency plans to deal with the threat of chemical accidents. Pursuant to EPCRA §301(a), 42 U.S.C. §11001(a), each state was required to appoint a state emergency response commission (“SERC”), which could be an existing commission.

In New York State, by Executive Order #95 of 1987, former Governor Cuomo appointed the Disaster Preparedness Commission (“DPC”) as SERC. In carrying out its role under EPCRA, DPC receives extensive administrative assistance from the State Emergency Management Office (“SEMO”), and the Office of Fire Prevention and Control in the Department of State. Further, DEC has been designated as responsible for receiving and compiling all chemical reporting (including spill reports) required in New York State under EPCRA.

Under EPCRA, each SERC was then required to establish emergency planning districts within the state, EPCRA §301(b), 42 U.S.C. §11001(b), and can revise its designations and appointments as it deems appropriate. EPCRA §301(d), 42 U.S.C. §11001(d). In New York, DPC established each county as an emergency planning district, except that the five counties of New York City were designated as one district.

EPCRA §301(c), 42 U.S.C. §11001(c), requires each SERC to appoint a local emergency planning committee (“LEPC”) for each emergency planning district, which is responsible for preparing a comprehensive emergency response plan. Each LEPC must include representatives from:

- a. elected state and local officials;
- b. law enforcement;
- c. civil defense, fire fighting, first aid, health, local environmental, hospital and transportation personnel;
- d. broadcast and print media;
- e. community groups; and
- f. owners and operators of facilities subject to the requirements of EPCRA Subtitle A.

EPCRA §301(c), 42 U.S.C. §11001(c). Such committees must appoint a chairperson, and establish rules that provide “for public notification of committee activities, public meetings to discuss the emergency plan, public comments, response to such comments by the committee, and distribution of the emergency plans.” *Id.* Moreover, LEPCs must establish procedures to process requests for information available to the public under EPCRA §324, 42 U.S.C. §11044.

Pursuant to EPCRA and 40 C.F.R. §355.30, each facility that had a threshold planning quantity (“TPQ”) of an extremely hazardous substance (“EHS”) was required to notify the SERC, within seven months of enactment of EPCRA in 1986, or else must do so within 60 days of attaining such a quantity. EPCRA §302(c), 42 U.S.C. §11002(c). In turn, the SERC must notify the EPA of each such facility, as well as any additional facilities it designates as subject to the EPCRA emergency planning provisions. §302(b,d), 42 U.S.C. §11002(b,d).

Each LEPC was required to complete the comprehensive emergency response plan within two years of enactment of EPCRA, and review it (and revise it if necessary) “once a year, or more frequently as changed circumstances in the community or at any facility may require.”

§303(a), 42 U.S.C. §11003(a). EPCRA §303(c), 42 U.S.C. §11003(c), requires that each such plan discuss or include the following provisions:

- (1) Identification of the facilities subject to EPCRA emergency planning requirements, routes likely to be used for transportation of EHSs, and identification of additional facilities “contributing or subjected to additional risks due to their proximity to facilities” subject to EPCRA.
- (2) Methods and procedures for facilities and local emergency and medical personnel to respond to any release of an EHS.
- (3) Designation of a community emergency coordinator, and emergency coordinators for each facility.
- (4) Notification of releases of EHSs by the community and facility emergency coordinators to persons designated in the plan and the public (consistent with previously discussed spill reporting requirements under CERCLA and EPCRA).
- (5) Methods for determining the occurrence of a release, and the area or population most likely to be affected.
- (6) Description of community emergency equipment and facilities, and identification of the person responsible for such equipment and facilities.
- (7) Evacuation plans, including plans for precautionary evacuation and alternative travel routes.
- (8) Training programs, including schedules for training of local emergency response and medical personnel.
- (9) Methods and schedules for exercising the emergency plan.

Each LEPC must evaluate the need for resources “to develop, implement and exercise the emergency plan,” and “make additional recommendations with respect to additional resources that may be required and the means for providing such additional resources.” EPCRA §303(b), 42 U.S.C. §11003(b). Each facility subject to EPCRA emergency planning was required to identify its emergency coordinator to the LEPC. EPCRA §303(d)(1), 42 U.S.C. §11003(d)(1). Facilities must also notify the LEPC of any relevant changes at the facility, and provide

information to the LEPC that may be “necessary for developing and implementing the emergency plan.” §303(d)(2,3), 42 U.S.C. §11003(d)(2,3).

Each LEPC's emergency plan must be submitted to the SERC, which then reviews the plan and makes “recommendations to the committee for revisions to the plan that may be necessary to ensure coordination of such plan” with plans from other LEPCs. EPCRA §303(e), 42 U.S.C. §11003(e). Pursuant to the National Contingency Plan established under CERCLA §105, 42 U.S.C. §9605, national and regional response teams have been established. EPCRA §303, 42 U.S.C. §11003, charges the national response team with publishing “guidance documents for preparation and implementation of emergency plans,” EPCRA §303(f), §11003(f), and the applicable regional response team with reviewing and commenting upon local emergency plans or related issues upon request of a LEPC. EPCRA §303(g), §11003(g).

## **B. Chemical Reporting Requirements**

Besides the requirements for spill and accidental release reporting, EPCRA established various other regular reporting requirements. Pursuant to EPCRA §§311 and 312, 42 U.S.C. §§11021 and 11022, certain facilities which are required to prepare or have available material safety data sheets (“MSDSs”) for hazardous chemicals, as defined by the Occupational Safety and Health Act (“OSHA”), 15 U.S.C. §651, *et seq.*, are required to give certain notifications to officials with regard to hazardous chemicals present in certain threshold quantities. Further, under EPCRA §313, 42 U.S.C. §11023, annual “mass balance” release reporting is required for specified quantities of designated toxic chemicals.

All reports submitted under EPCRA are generally subject to public inspection both pursuant to EPCRA §322, 42 U.S.C. §11042, and federal and state freedom of information laws.

However, a specific procedure is established for protection of trade secrets by facilities. *Id.*; 40 C.F.R. Part 350. Violations of EPCRA are subject to both criminal and civil penalties, which can be up to \$10,000 or \$25,000 per day of noncompliance, and up to \$75,000 per day for subsequent violations, EPCRA §325, 42 U.S.C. §11045. Further, members of the public are allowed to bring “citizen's suits” to enforce EPCRA if the government fails to take enforcement action. EPCRA §326, 42 U.S.C. §11046. However, a citizen may lack standing if the violation is remedied by complying with a reporting requirement. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003 (1998).

### **1. MSDS Reporting**

The requirements under EPCRA §§311 and 312, 42 U.S.C. §§11021 and 11022, are implemented by EPA regulations set forth at 40 C.F.R. Part 370. The requirements generally apply to all facilities that had “present at the facility at any one time” any hazardous chemical at or above the following threshold quantities:

- a. 10,000 lbs. for any hazardous chemical, or
- b. the lesser of 500 lbs. or the threshold planning quantity for any EHS.

40 C.F.R. §370.20(b)(1,4). However, for retail gas stations in compliance with underground storage tank regulations under RCRA, the thresholds are 75,000 gallons of gasoline, and 100,000 gallons of diesel fuel. 40 C.F.R. §370.20(b)(2,3). Note that under OSHA regulations, the term “hazardous chemicals” has a very broad definition. *See* 29 C.F.R. §1910.1200(c).

Pursuant to EPCRA §311, 42 U.S.C. §11021, such facilities were required to submit an MSDS for each hazardous chemical present at any one time at or above the threshold quantities to the:

1. SERC,
2. LEPC, and
3. Local fire department.

40 C.F.R. §370.21(a). Alternatively, instead of submitting MSDSs, a facility could submit a list of (1) the hazardous chemicals, grouped by hazard categories, (2) the chemical or common use of the chemicals as provided on the MSDS, and (3) except for mixtures reported under §370.20(a)(2), the “hazardous component of each hazardous chemical as provided on the MSDS.” 40 C.F.R. §370.21(b).

Within three months of reaching the quantity, or the discovery of “significant new information” concerning a hazardous chemical, supplemental reporting is required. 40 C.F.R. §370.21(c). Furthermore, within 30 days of a request, an MSDS for any hazardous chemical (regardless of quantities present at the facility) must be furnished to a LEPC. 40 C.F.R. §§370.25(a), 370.20(b)(3).

By March 1 of each year, as required by EPCRA §312, 42 U.S.C. §11022, the Tier I inventory form for hazardous chemicals present at any one time during the previous year in at least the threshold quantity specified in 40 C.F.R. §370.20(b)(2) (10,000 lbs., or the lower of the TPQ or 500 lbs for an EHS, but 75,000 gasoline/100,000 gallons of diesel for retail gas stations) to the SERC, LEPC and local fire department. 40 C.F.R. §370.25(a). In lieu of the Tier I form, the more detailed Tier II form can be submitted at the option of the facility, 40 C.F.R. §370.25(b), and must be submitted when requested by the SERC, LEPC or fire department. Each facility subject to these reporting requirements must allow fire department inspections, and

provide information on the location of hazardous chemicals at the request of the fire department. 40 C.F.R. §370.25(d).

Any person may receive a copy of an MSDS for a specific facility upon request to the LEPC. 40 C.F.R. §370.30(a)(1). If the LEPC does not have a copy, it must request one. 40 C.F.R. §370.30(a)(2). Further, any person may request and obtain a copy of a Tier II form for a facility from a SERC or LEPC. §370.30(b)(1). If the form has not been filed, the SERC and LEPC may request a Tier II form from a facility, and it must do so if the request is from a state or local official with regard to a hazardous chemical stored in excess of 10,000 lbs. at the facility. §370.30(b)(2,3). While all information obtained by a SERC or LEPC pursuant to Part 370 is generally available for public review, the specific location of a chemical at the facility can be withheld upon request of the facility. §370.31.

Special provisions apply to mixtures. Mixtures may be reported under Part 370 either by providing the required information for each hazardous constituent, or else by providing the required information for the mixture itself. §370.28(a). If the reporting is on the component quantity of hazardous constituents of the mixture, only the weight of the constituent is included in determining the quantity of a hazardous chemical present at the facility. §370.28(b)(1). However, if the reporting is for the mixture itself, the total weight of the mixture is used. §370.28(b)(2). In determining whether the threshold quantity of an EHS is present, a facility must aggregate the quantity of an EHS as a component in all mixtures with all other quantities of the EHS. §370.28(c).

## **2. Toxic Chemical Release Reporting**

The toxic chemical release reporting requirements of EPCRA §313, 42 U.S.C. §11023, have been implemented by 40 C.F.R. Part 372. These regulations require reporting for facilities which either, in the previous year:

- (1) manufacture or process 25,000 lbs. of a toxic chemical, or
- (2) use 10,000 lbs. of a toxic chemical.

40 C.F.R. §372.25. The list of toxic chemicals to which Part 372 applies is set forth at §372.65. However, the requirements only apply to a facility with 10 or more employees which conducts activities in Standard Industrial Classification (“SIC”) Codes 20 through 39 (generally industrial operations) SIC and NAICS codes specified at 40 C.F.R. §372.25.

Lower thresholds apply to certain specified chemicals of “special concern,” which are listed in 40 C.F.R. §372.28, including lead (100 lbs.) and mercury (10 lbs.). Furthermore, an “alternate threshold” of 1 million pounds per year manufactured, processed, or used applies if less than 500 lbs. per year is released, treated, recycled, combusted, or disposed of at the facility or transferred off-site for those processes. 40 C.F.R. §372.27(a). In order to take advantage of the alternate threshold, an alternate threshold certification statement must be filed on Form A. 40 C.F.R. §§372.27(b), 372.95. The alternate threshold does not apply to the chemicals of special concern specified at 40 C.F.R. §372.28. 40 C.F.R. §372.27(e).

Exceptions are provided for “de minimis concentrations of a toxic chemical in a mixture,” 40 C.F.R. §372.38(a), “articles” (products manufactured into a specific shape, such as furniture), §372.38(b), certain owners and operators of leased facilities, §372.38(e,f), certain laboratory uses, §372.38(d), and other specific uses, including use within structural components,



janitorial, grounds or motor vehicle maintenance uses, personal usage by employees, and contaminants present in air or water when drawn from the environment. §372.38(c).

Those facilities subject to Part 372 must submit “Form R” to EPA and the state by July 1 of each year. 40 C.F.R. §372.30(a). The form basically requires a mass-balance for each toxic chemical present in the threshold quantity, including all supplies, emissions and uses. Each facility subject to Part 372 is required to maintain a copy of its Form R, and various other supporting materials and documentation for 3 years from the date of submission of the report. §372.10. Form R is available through the RCRA/CERCLA/EPCRA Hotline at (800) 424-9346 or on the EPA website. The information on Form R is used to compile the EPA Toxic Release Inventory.

Each manufacturer or supplier to a facility subject to Part 372 must give certain information regarding mixtures or tradename products containing toxic chemicals, generally through the MSDS, including (1) a statement that the product contains a toxic chemical subject to EPCRA §313, (2) the chemical name and associated CAS number of each toxic chemical, and (3) the percentage by weight of each toxic chemical. §372.45.