

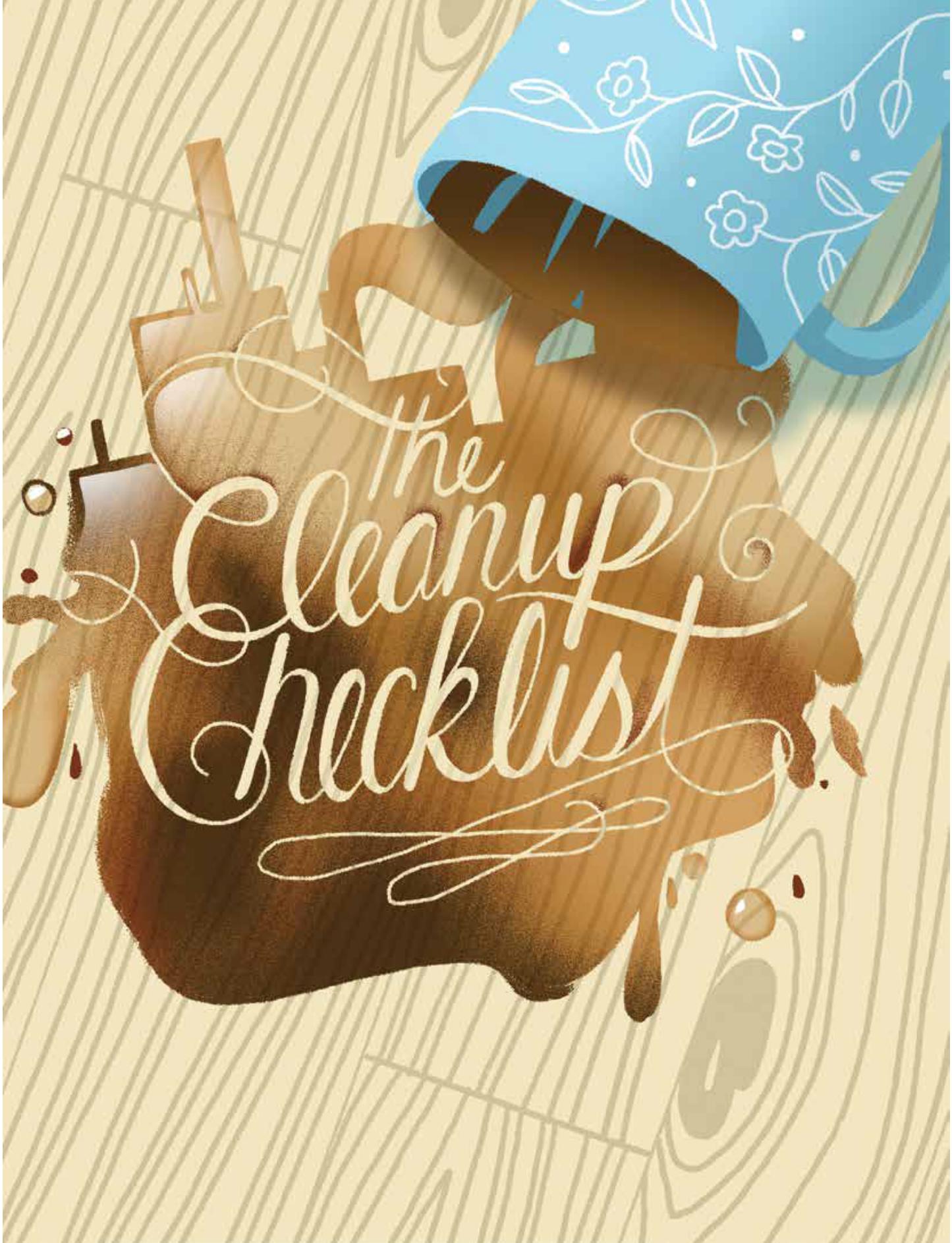


## **The Cleanup Checklist: Meeting Your Spill Reporting Obligations**

**Compliance and Ethics**

**Environmental**





# the Cleanup Checklist

# CHEAT SHEET

- **First steps.** In the event of an incident, ask: What substance is involved? Was there a release into the environment? Was there sufficient knowledge of a release?
- **Be proactive.** Spotting and reporting potential releases can help prevent accidental releases from occurring.
- **Voluntary reporting.** Companies are counseled to report even if a release is under a reportable quantity or threshold to prevent future allegations of failure to disclose releases.
- **Necessary info.** Provide the following information when reporting an incident: purpose of report, potential hazards, location of release, corporate name, hazardous material involved, estimated amount of release, and when the release was discovered (if asked).

Almost every industrial facility has a hazardous material somewhere on site. Small spills or emissions of that material can trigger immediate reporting obligations. In-house counsel of companies that do business in multiple states face the dual challenge of understanding not only federal release reporting laws, but also state laws that could impose additional requirements. For emergency events, or even routine spills, the most valuable compliance tool is a practical checklist of key regulatory requirements that will help simplify reporting and simultaneously provide general legal guidance when accidents occur. This article provides that checklist, addresses five frequently asked questions and offers recommended responses, and compares US law to related laws and regulations in Canada.

The EPA has taken the position that reports are due within 15 minutes.

## I. Matrix of US federal requirements

Facilities operating within the United States are subject to the following set of federal reporting requirements, as well as additional state and local requirements. The requirements below stem from the Emergency Planning and Community Right-to-Know Act (EPCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the federal Clean Water Act (CWA), the federal Spill Prevention Countermeasure and Control Plan (SPCC) program, the National Pollutant Discharge Elimination System (NPDES), the Underground Storage Tank (UST) law, the Toxic Substances Control Act (TSCA), and other similar laws. Not summarized are worker-safety laws that arise under the federal Occupational Safety and Health Act, requirements for Polychlorinated Biphenyls (PCBs), or requirements of the Accidental Release Prevention Program and Risk Management Plans.

## II. First steps in compliance

The federal laws in Section I prompt several key issues that must be investigated for every incident in order to help determine the reporting path that is required.

- **Determine what substance is involved.** EPA's List of Lists provides a quick resource that summarizes listed chemicals. It was last updated in 2015, so it is important to refer to the

listed substances under each statute. Remember that CERCLA excludes petroleum (and all its constituents) from the definition of “hazardous substances.” EPCRA, however, does not exclude petroleum from the definition of “extremely hazardous substances.” Therefore, releases of petroleum and petroleum-contaminated media are reportable under EPCRA when they contain a reportable quantity or more of an EPCRA extremely hazardous substance, such as hydrogen sulfide. But, hazardous substances contained in petroleum do not trigger an EPCRA report. For this reason, the hazardous substances released during the BP Deepwater Horizon crude oil spill were not reportable under CERCLA, but EPCRA reporting required analysis.

- **Determine if there was a release into the environment.** In *Fertilizer Institute v. US EPA*, 935 F.2d 1303, 1310 (D.C. Cir. 1991), the DC Circuit stated, “nothing less than an actual release of a hazardous material into the environment triggers the reporting requirement [under CERCLA].” Nonetheless, release is defined broadly, and includes abandoned barrels. Also, discharges that reach storm drains have been considered discharges to navigable waters for permitting purposes. Thus, generally, a release is construed broadly but must involve actual impact on the environment. However, some laws, like the UST law or California’s hazardous material law, require reporting before a release occurs at the point when monitoring or other circumstances show the potential that a release is occurring or about to occur. Spotting and reporting potential releases prevent accidental releases from occurring.
- **Determine if there was sufficient knowledge of a release.** The “duty to immediately report a release under EPCRA, as well as CERCLA, arises as soon as the facility personnel have knowledge … or should know of such a release,” and not necessarily the exact quantity released. The EPA has taken the position that reports are due within 15 minutes.

Knowledge by a mid-level employee to his supervisor may be imputed; therefore, knowledge does not mean the point at which environmental personnel learned of information.

Knowledge depends on when there is “enough information that it could reasonably be said that [a facility] knew that the releases were at or above reportable quantities even though it did not know the exact quantities released.” Further, “EPCRA does not require reporting before a facility has some degree of certainty that a reportable release has occurred … ”

#### Figure 7: Leads for verticals (practice/subject matter areas)

SECTION / DESCRIPTION	FEDERAL REQUIREMENT
EPCRA 42 USC § 11004 40 CFR §§ 355.40, 355.60	Owners or operators of facilities where hazardous chemicals are produced, used, or stored must report to their state and local authorities releases of a reportable quantity (RQ) or more of a CERCLA hazardous substance or an EPCRA extremely hazardous substance.
CERCLA 42 USC § 9603 40 CFR § 302.6	A person in charge of a facility or vessel must report to the National Response Center (NRC) (800) 424-8802 if an RQ or more of a hazardous substance is released into the environment as soon as the person has knowledge of the release.
CWA	Facilities must report (1) a discharge of an

33 U.S.C. § 1321 40 CFR § 110.3	RQ or more of a hazardous substance, or (2) a discharge of any petroleum — including oil mixed with wastes — that causes a sheen on a water surface or violates any water quality standard.
SPCC 40 C.F.R. § 112.4	A facility that has an SPCC plan must submit written reports of spills to EPA within 60 days if more than 1,000 gallons of oil was spilled, or in the past 12-month period the facility has had two spills of 42 gallons or more of oil.
USTs 40 CFR §§ 280.50, 280.53.	A UST owner or operator must report to the state implementing agency (or EPA if there is no state implementing agency) a release or threatened release from the UST where the UST operator knows or has reason to know the UST system has experienced a leak or a condition that indicates a leak.
NPDES 40 CFR § 122.42(a).	A facility with an NPDES permit must report certain instances of noncompliance if the operator knows, or has reason to know, the incidents have occurred or will occur and would result in a discharge of a toxic pollutant above regulatory notification levels.
Transport 49 CFR § 171.15	Persons engaged in transportation on land or water who carry a hazardous material must report spills and other emergency incidents to NRC or to <a href="http://www.nrc.uscg.mil">www.nrc.uscg.mil</a> .
Pipelines 49 USC §§ 60101-60310 49 CFR §§ 195.50, 195.52, 195.54	An operator of an interstate common carrier pipeline system must report to NRC or to <a href="http://www.nrc.uscg.mil">www.nrc.uscg.mil</a> certain significant pipeline failures that result in a release, including releases that impact a waterway.
CAA 42 U.S.C. § 7661c(c). 40 C.F.R. § 70.6(a)(3)(iii)	A facility with a federally enforceable Title V permit must promptly report to the agency with permit authority each deviation from a permit condition, including upset conditions. The permit must contain this requirement.
TSCA 15 U.S.C. § 2607(e)	Manufacturers of chemical substances or mixtures must report to EPA if they obtain information that the substance presents a substantial risk of injury to health or the environment.

**Figure 7: Leads for verticals (practice/subject matter areas)**

**SECTION / DESCRIPTION**

**CALIFORNIA REQUIREMENT**

Hazardous Materials Cal. H&SC § 2551	Persons who handle hazardous materials must report releases that pose a present or potential hazard to health and safety, property, or the environment to OES and the CUPA.
Hazardous Substances Cal. Health & Safety Code § 25359.4	A person who releases or “allows or causes the unpermitted release” of a hazardous substance must notify the Department of Toxic Substances Control (DTSC) within 30 days of discovering a release (occurring after 1994) if the release exceeds a federal RQ or poses a significant threat to public health and safety or the environment. Landowners who discover a release that requires regulatory clean-up or impedes use of the property must report to the oversight agency identified in the statute, which can be the DTSC or the Regional Water Quality Control Board.
Hazardous Substances Civil Code §§ 850-855	
Water or Groundwater Water Code §§13271-2; §13050; Gov. Code § 8670.25.5	Persons causing a release or threatened release to surface or groundwater must report such a release. Under these statutes, any discharge of oil or petroleum must be reported if it reaches or has the potential to reach state waters or marine waters and the quantity spilled exceeds 42 gallons, or a more restrictive standard set by the state.
Underground tanks H&SC § 25295 23 CCR § 2652	Owners or operators of an underground storage tank must report to OES and the CUPA any unauthorized release or threatened release from a UST where the UST operator knows or has reason to know the UST system has experienced a leak or a condition that indicates a leak.
Above-ground tanks H&SC §§ 25270.8	Owners or operators of an above-ground storage tank must report to OES and the CUPA any unauthorized release of 42 gallons or more of oil.
Pipelines Cal. Gov. Code § 51018(a)	Operators of intrastate pipelines (including flowlines and other lines exempt under federal law) must report to the fire department and OES every rupture (including leaks), explosion, or fire involving the pipeline
VOC-impacted soil	Soil impacted with volatile organic compounds (VOCs) must be reported to the local air district. See South Coast Air Quality Management District (SCAQMD) Rule 1166.
Breakdown reports	Persons who hold air quality permits are required to report equipment breakdowns that result in a violation of an air quality rule or permit condition to the local air district. See e.g., SCAQMD Rule 430.
Deviation reports	Title V permits require reports of any non-compliance to the local air district where excess

emissions or other similar incidents arise. See e.g., SCAQMD Rule 3004(a)(5). Section K of permits usually require reports with 72 hours. Emission exceedances detected by monitoring equipment must be reported within 96 hours to the local air pollution control district.

### **III. Penalties, liabilities, and other concerns**

Penalties and liabilities for failures to report are significant, as are other concerns that companies face during spill incidents. The CWA provides a good example. The CWA civil penalties are up to US\$25,000 per day or US\$1,000 per barrel of oil discharged, or, where gross negligence or willful misconduct is involved, up to US\$100,000 and not more than US\$3,000 per barrel of oil. Other penalties could arise as well.

The CWA imposes criminal penalties of up to US\$50,000 per day of violation or by imprisonment of not more than three years, or both, for knowing violations and up to US\$1,000,000, or imprisonment for up to 15 years, or both, for violations involving knowing endangerment. Establishing criminal liability under the CWA does not require showing intent. The CWA is interpreted as a public welfare law under which a person may be subject to criminal liability for his or her ordinary negligence. Thus, the government does not need to prove that a facility knew that its acts violated legal standards. Precedent was established in a 1994 case when two managers of a sewage treatment plant operating under an NPDES permit were convicted of knowingly discharging pollutants into a navigable water and in a 1999 case when a railroad operator should have been aware of the possibility of strict regulation where high-pressure petroleum products pipelines were nearby and could be punctured.

In addition to the recovery of civil or criminal penalties, the owner or operator of a facility is also liable under the CWA for up to US\$50,000,000 of the actual costs of removal associated with the spill. A spill to navigable waters can trigger liability under the federal Oil Pollution Act of 1990 (OPA), which imposes liability for removal costs upon owners or operators of onshore facilities that cause — or pose a threat of causing — a release to navigable waters.

Other federal schemes impose penalties and liabilities similar to the CWA; therefore, companies that handle regulated hazardous materials, hazardous substances, and extremely hazardous substances must train facility personnel to fully comply with each applicable standard.

### **IV. Voluntary reporting of incidents that are under a reportable threshold**

**In light of significant penalties, companies frequently are counseled to voluntarily report even if a release is under a reportable quantity or threshold.** This serves to prevent allegations later that a company knew of actual or threatened releases and failed to disclose them. A good approach is to provide the following information when reporting:

- **Purpose:** We are calling to report a potential threatened release related to [specify incident, for example: an overflow into the sewer; a mistaken shipment of certain materials to a solid waste landfill; a spill of fuel on our concrete floor; etc.] We are reporting in the abundance of caution while we complete our evaluations related to incident. We do not believe a release has occurred or will occur, but because we are not sure, we are choosing to report.
- **Potential hazards:** We do not believe there are any potential hazards because the vast majority of the material involved was [specify reason, for example: non-hazardous, recovered, etc.] For reasons we do not fully understand yet, we detected the presence of a hazardous material in our initial evaluation.
- **Location:** [Give address where release occurred.]
- **Name:** [Provide corporate name.]
- **Hazardous material involved:** [Listed chemical name] in an amount well below federal reportable quantities.
- **Amount:** [Provide an estimate.]
- **When discovered (if asked):** We have not discovered any release. We discovered on or about [date] that a potential threatened release may exist based on ongoing internal evaluations. We decided it was better to report this potential threatened release now rather than after our internal evaluations are completed.

## V. Five frequently asked questions and responses

In our experience, the federal framework for reporting spills has prompted the following five FAQs that practitioners should become equipped to handle. Each scenario below provides an example and recommended response; however, reporting requirements must be evaluated on a case-by-case basis.

1. **Spills to sewer:** A rise in subsurface groundwater causes a buried pipe to release contaminated groundwater into the storm drain. Sample results detect three parts per million (ppm) or 3,000 parts per billion (ppb) benzene from gasoline when measured at the drainage pipe. No more than 5.9 ppb benzene may be discharged to state waters under the state's water quality control plan, but no data show whether that amount is exceeded at the receiving waters. Further, the property involved is subject to NPDES permitting requirements.

**Response:** Benzene from gasoline is not a reportable substance under CERCLA or EPCRA. CWA reporting requirements, however, are triggered. Normally, a discharge into a storm drain is a discharge into navigable waters if the storm drain flows to navigable waters. However, it is possible that CWA liability would only arise if the discharge reached waterways in a "quantity or concentration which could conceivably be deemed harmful." But if the elevated benzene levels in the discharge at issue exceed the 0.5 ppm hazardous waste toxicity level for benzene under 40 C.F.R. § 261.24(a), it provides evidence of potential environmental harm and would weigh in favor of reporting the release voluntarily.

Also, because the facility holds an NPDES permit, it is subject to 40 C.F.R. § 122.41, which requires that an NPDES permit-holder report "any" non-compliance that "could endanger" health or the environment, including any upset exceeding effluent limitations or any violation of maximum discharge limitations. The flow into the storm drain is not compliant with NPDES permit standards that regulate every discharge into storm drains and would likely be viewed as a discharge that "could endanger" the environment. As a result, a report would be advisable.

In addition to reporting under the NPDES program and CWA, it would be advisable to disclose the

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elevated benzene levels within 21 days of discovery in order to prevent the issuance of a notice of violation for unlawful disposal of a hazardous waste. **EPA has a self-disclosure policy to reduce gravity-based penalties and is currently renewing emphasis through EPA's eDisclosure system.**

2. **Detections of subsurface contaminants:** Test results show perchloroethylene (PCE, sometimes referred to as tetrachloroethylene) in groundwater beneath a company-operated facility that was used for industrial purposes by others in the past. In many cases, PCE originates from spills or leaks; however, facility operators interviewed are not aware of any evidence of leaks or spills at the site. Additionally, it appears that local groundwater in the vicinity of the site is impacted by PCE. The origin of the PCE at the site is not known.

**Response:** Normally, a discharge of a hazardous substance to “navigable waters” is reportable to NRC where it exceeds a reportable quantity (RQ). Here, PCE is a hazardous substance, but the amounts involved do not appear to exceed the 100-pound RQ. The amounts involved are concentrations of PCE, rather than mass quantities. Given the low concentrations, there would be no reason to believe 100 pounds or more of PCE have been discharged to the environment. **Under CERCLA, a person in charge of a facility must report a release above an RQ of a hazardous substance as soon as such person has knowledge of the discharge.** Here, an RQ or more of PCE is not involved, so a report would not be required.

In California, a report might be required — even if it is below the 100-pound RQ — under Health & Safety Code §§ 25507 or 25359.4 if there is evidence that PCE from the site is posing a significant threat to public health and safety or the environment.

3. **Air emissions “subject to” federally enforceable limit:** A refinery experiences a malfunction that increases the levels of hydrogen sulfide (H<sub>2</sub>S) in fuel gas subject to the New Source Performance Standards in 40 C.F.R. Part 60, Subpart J. This increases emissions of sulfur dioxide (SO<sub>2</sub>) from the refinery equipment burning the fuel gas when other operating parameters could not be adjusted. The emitted chemical — SO<sub>2</sub> — is listed under EPCRA.

**Response:** EPCRA, 40 C.F.R. § 355.31, excludes federally permitted releases from reporting obligations. Here, the malfunction standards in the applicable federal regulation, 40 C.F.R. Part 60, Subpart J, permitted equipment to vent to the atmosphere during a malfunction, but although these emissions are permitted federally, they are not “federally permitted” for purposes of EPCRA. In practice, EPA interprets federally permitted to mean “in compliance with” a specific standard, rather than being exempt from a standard due to an emergency or other condition. As a result, the release would not be considered federally permitted for purposes of EPCRA and a report is required. However, the facility should evaluate whether its emissions remained in compliance with any federally enforceable local rule. For example, no EPCRA report would be required if the amount emitted remained in compliance with the annual allotment of SO<sub>2</sub> emissions for the facility under a federally enforceable local regulation.

4. **Shipments of potentially hazardous waste to a solid waste landfill:** Two 10-yard bins of construction debris were mistakenly sent to a solid waste landfill for disposal. A composite sample of the materials in the bins was later found to exceed 1,2-Dichloroethane (1,2 DCA) levels under 40 C.F.R. § 261.24. These levels render the material a hazardous waste when disposed of, and CERCLA assigns a 100-pound RQ. EPA estimates that a cubic yard of construction and demolition debris weighs between 773 to 999 pounds (see EPA Weight Conversion Factors, 2016); so, the 100-pound RQ is exceeded.

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**Response:** Regulators would likely argue that the disposal of hazardous waste at a solid waste landfill, by definition, is a release that poses a potential for harm because solid waste landfills are not equipped with the same level of safeguards as those that may accept hazardous waste. On the other hand, the company's environmental health and safety professionals may believe, based on experience and knowledge, that the 1,2 DCA will not be released into the environment. In light of the conflicting views on whether the disposal of the bins constitutes a release at the landfill, the more conservative approach is to report the incident under CERCLA and EPCRA.

Another issue to address in this scenario is the potential hazardous waste violations for disposing of the bins with potentially hazardous waste at a solid waste landfill. Federal law requires that generators of waste characterize their waste prior to disposal, transport hazardous waste with a manifest, and dispose of hazardous waste at authorized facilities.

5. **Contractors who cause spills:** A contractor working at a client's facility overfills fuel in a backup generator, causing a release of dozens of gallons. The spill is contained within the facility's concrete basin and has not entered soil or a storm drain.

**Response:** While arguments exist that a company is not vicariously liable for the negligence of a contractor, there are exceptions. **A regulator is likely to take the position that a company has a non-delegable duty to ensure its contractor does not spill fuel in a way that poses risk.** Thus, where a contractor causes a spill, a report by the facility would be advisable in most situations. Here, however, the release has not reached a waterway, therefore, a report is not required.

## VI. State law — California example

The laws within each state impose additional reporting obligations. California law, for example, includes reporting of not only releases but also threatened releases. Reports under most laws are to the Office of Emergency Services (OES), which is part of the California Emergency Management Agency (Cal-EMA), the local administering agency, which is the Certified Unified Program Agency (CUPA), or both.

## VII. Comparing Canada's reporting requirements

The United States appears to be unique in itemizing various levels of reporting to different agencies under different programs. A similar structure exists in Canada, but release reporting tends to focus on reporting accidental releases, pipeline and marine incidents, workplace safety incidents, and incidents during the transport of dangerous goods (TDG). The Environmental Emergency Regulations under the Canadian Environmental Protection Act, like EPCRA, contains a list of substances that trigger reporting if they enter the environment as a result of an environmental emergency. Unlike CERCLA, the Canadian law lists gasoline in its list of substances. The Canadian list of substances does not explicitly list a reportable quantity, like CERCLA and EPCRA, but Canada's TDG law provides reporting quantities that vary based on the type of incident involved.

Awareness of these spill reporting guidelines and common scenarios will help in-house counsel protect their companies from violations for failures to report. Additionally, early detection and reporting of spill incidents enhance a company's ability to assess necessary follow-up steps that provide appropriate response and remedial actions.

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## Further Reading

1 52 Fed. Reg. 13385, April 22, 1987.

2 Ctr. for Biological Diversity, Inc. v. BP America Production Co. 704 F.3d 413 (5th Cir. 2013) (remanding the case for analysis of EPCRA).

3 42 U.S.C. § 9601(22); *In The Matter of: Lilly Del Caribe, Inc.*, 1999 WL 1206973, at \*13 (finding that “there was a ‘release,’ … when eighteen drums of propionic anhydride were swept away from Respondent’s facility.”)

4 *U.S. v. Granite State Packing Co.*, 343 F. Supp. 57 (D. N. H. 1972) (holding that spills to sewers are spills to navigable waters if the sewer is connected to once-navigable waters under the Rivers and Harbors act) *aff’d* by 470 F.2d 303, 304 (1st Cir. 1972) (“[a]s a matter of simple logic, if a party deposits an impermissible substance in a municipal sewer, knowing that the sewer leads directly into navigable water, it ‘causes, suffers, or procures’ the substance to be discharged into the stream”).

5 *In the Matter of Morton International, Inc.*, 1997 WL 821128, at \*6.

6 See EPA Interim Final Enforcement Response Policy for EPCRA and CERCLA.

7 *In the Matter of Thoro Products Co.*, 1992 WL 143993, at \*9.

8 *Morton Int’l.*

9 33 U.S.C. § 1321(b)(7).

10 33 U.S.C. § 1319(c).

11 United States v. Weitzenhoff, 35 F.3d 1275, 1286 (9th Cir. Haw. 1994).

12 United States v. Hanousek, 176 F.3d 1116, 1122 (9th Cir. Alaska 1999).

13 33 U.S.C. § 1321(f)(2).

14 33 U.S.C. §§ 2701-2760.

15 33 U.S.C. § 2702(a).

16 See e.g., *In re Green Oil Co.*, Docket No. CWA-07-2002-00, 2003 WL 733883, at \*3 (refusing to grant summary judgment where EPA lacked evidence to show that diesel fuel spilled reached a navigable water).

17 40 C.F.R. §122.41.

18 33 U.S.C. § 1321(b)(5); 40 CFR § 117.21, 117.3.

19 40 CFR § 302.6.

20 67 Fed. Reg. 188899, April 17, 2002.

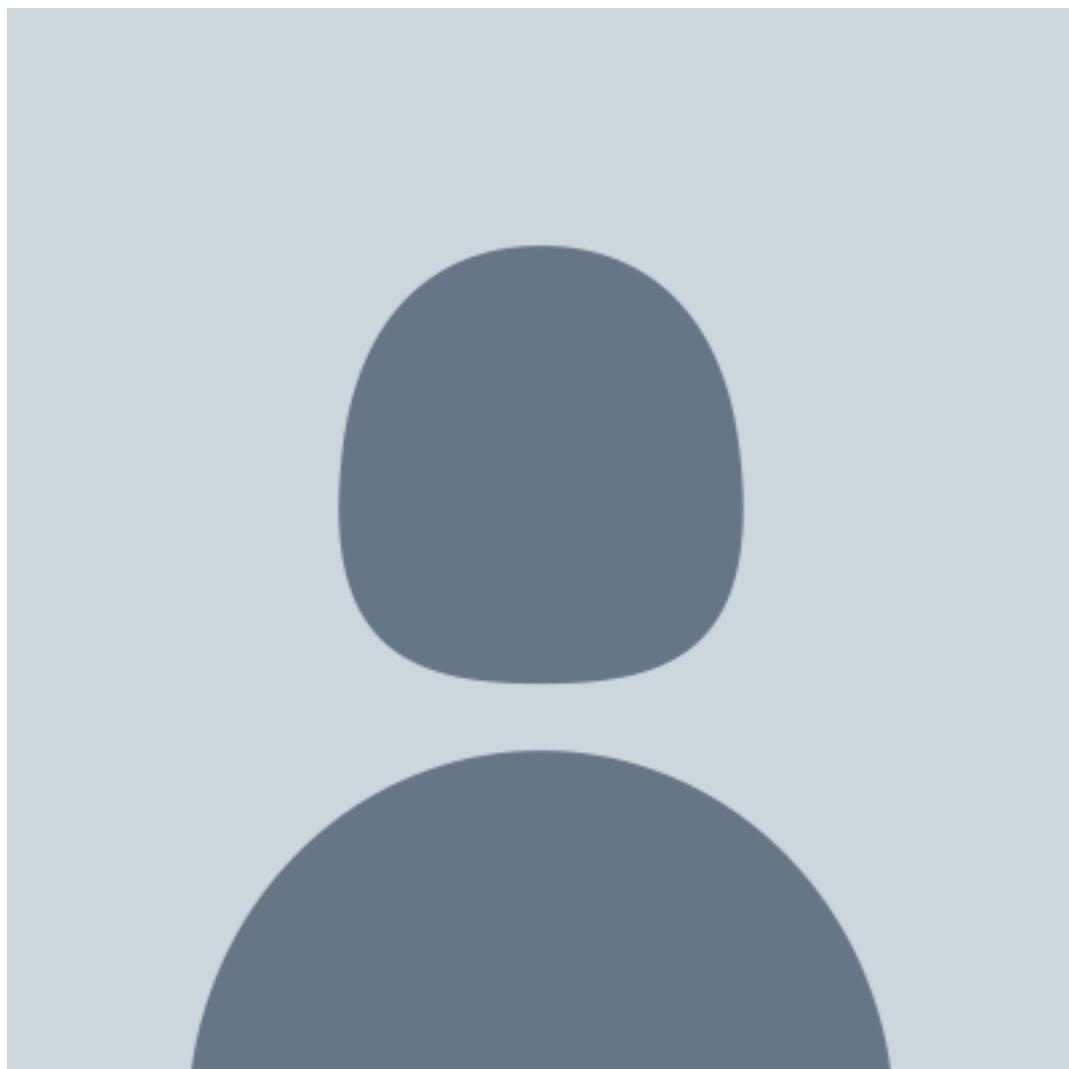
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21 40 C.F.R. § 262.11 (characterization), § 262.20 (manifest); and Part 268 (disposal).

22 See e.g., Government of Canada Pollution Emergencies web page “Environmental emergencies: regulations.”

23 Also see e.g., “A Guide to Release Reporting” by the Government of Alberta.

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