

# **Federally Permitted Releases: New EPA Guidance On the CERCLA/EPCRA Release Reporting Exemption for Certain Air Emissions**

Louisiana Section  
Air & Waste Management Association  
Environmental Focus 2002  
November 13-14, 2002

James G. Votaw  
Hale and Dorr LLP  
1455 Pennsylvania Avenue, N.W.  
Washington D.C. 20004  
(202) 942-8400  
[james.votaw@haledorr.com](mailto:james.votaw@haledorr.com)

# “Guidance on the CERCLA Section 101(10(H) Federally Permitted Release Definition for Certain Air Emissions”

- The FPR Guidance: 67 FR 18899 (Apr. 17, 2002)
- Replaces an “interim” 1999 FPR Interim Guidance
- Multi-industry coalition challenged the “interim guidance” in 2000
  - *The National Association of Manufacturers, et al. v. U.S. EPA*, No. 00-1111 (D.C. Cir.).
  - Industry coalition voluntarily dismissed its suit as part of a negotiated settlement which included the publication of the revised FPR guidance on April 17, 2002

# Reporting Requirement Under CERCLA §103 and EPCRA §304

- **Report:** Any release of a CERCLA “HS” or an EPCRA “EHS” in excess of the applicable RQ
- **When:** “Immediately” upon knowledge of the release
- **To Whom:** The NRC (CERCLA); and the LEPC and SERC (EPCRA)
- **Follow-Up:** Written report to SERC and LEPC as soon as practicable

# Importance of the Scope of the FPR Exemption

- Defines the Scope of an “Immediate” Reporting Requirement
  - 4 cascading violations
  - Potential criminal penalties
  - Both over-reporting and any enforcement action may trigger difficult community relations issues
- Defines the Scope of CERCLA Cost Recovery Liability
  - CERCLA §107(j) liability exemption
  - Not mentioned in the Guidance

# **CERCLA §101(10)(H)**

## **Statutory Definition of a “FPR”**

The term “federally permitted release” means: (H) any emission into the air subject to a permit or control regulation under § 111, § 112, title I part C, title I part D, or State implementation plans [under] the Clean Air Act ... including any schedule or waiver granted, promulgated, or approved under these sections ....

*CERCLA §101(10)(H), 42 USC §9601(10)(H)*

# Control Requirements

## Air Emissions Are Limited or Controlled in a Variety of Ways

- Express emissions limits for specific pollutants
- Express emissions limits for proxies
- Technology requirements
- Operational requirements
- Work practices
- See Senate Rep. 848, 96th Cong., 2d Sess. 49 (1980)

# FPR Exemption Not Applicable

- CAA Title V Operating Permits Controls†
- CAA Title IV Acid Rain Controls†
- CAA Title VI ODS Controls†
- RCRA Organic Air Emissions Controls (i.e., subparts AA, BB, CC)
- State-only rules†

† *Unless submitted for inclusion in the SIP*

# Legislative History of FPR Exemption

- Intended to prevent overlapping reporting requirements
- Media and source specific reporting under CAA, CWA, RCRA, etc. more carefully tailored to hazards
- To the extent the FPR exemption created reporting “gaps,” EPA was to fill them with rule changes in underlying programs (CAA, CWA, RCRA, etc.)
  - EPA has taken a different approach



# FPR Chronology

- **1980:** FPR Exemption Appears in CERCLA
- **1988:** EPA proposes rule to “clarify” scope of FPR exemption
- **1989:** EPA amends proposed FPR definition
- **1999:** “Interim Guidance” Published
- **2000:** Litigation challenge to Interim Guidance filed  
Interim Guidance “Suspended” pending revisions
- **2002:** Final FPR Guidance published

# The Final FPR Guidance

# The Guidance Is Not a Rule

- Agency emphasizes that the Guidance is not a rule
- Not binding on EPA or the public
- Provides notice of the Agency's views
- The affected public is free to challenge EPA's views on the scope of the FPR exemption in any subsequent enforcement proceeding
- As a practical matter – most companies will conform conduct to the Guidance

# EPA's FPR Guidance

## *There is no Bright Line Test*

- Whether a particular Release is a FPR is a complex question
  - There are no “bright line” tests
  - Determinations must be made on a case-by-case basis
  - EPA will consider permits and permit applications, regulations, preambles and related agency background information documents
- *D from Interim Guidance: No longer written like a rule; Q&A format*

# Aspects of the FPR Exemption Addressed by the Guidance

- Applicability Issues Only
  - Characteristics of the Release
  - Characteristics of the underlying “Permit or Control Requirement”

# Aspects of the FPR Exemption Addressed by the Guidance

- Compliance with underlying control requirement
- Actual limitation or control of emissions
- Treatment of NOx emissions
- Treatment Accidents and Malfunctions
- Treatment of VOC/PM Control requirements
- Treatment of Minor Source thresholds
- Grandfathered and other exempt sources
- Treatment of Waivers

# ***EPA's Interpretation of the Statutory Definition of a "FPR"***

The term "federally permitted release" means: (H) only those certain emissions into the air that are anticipated and do not result from an accident or malfunction, and are (i) subject to, (ii) in compliance with, and (iii) at the time of the release, actually being controlled by (whether or not the release is compliant) a permit or control regulation under § 111, § 112, title I part C, title I part D, or State implementation plans [under] the Clean Air Act, including any schedule or waiver (but not an exemption) granted, promulgated, or approved under these sections ....

*CERCLA §101(10)(H), 42 USC §9601(10)(H)*

# EPA's FPR Guidance

## *NOx Administrative Reporting Exemption*

- RQs for NOx (*NO and NO<sub>2</sub>*) are too low (10 lbs.)
- In public comments, LEPCs and regulated community identified the low NOx RQ as a significant problem
- Agency to create an administrative CERCLA/EPCRA reporting exemption for NOx air releases as soon as resources are available
- In the interim, EPA will not enforce most CERCLA/EPCRA NOx release reporting requirements
- *D from Interim Guidance*



# EPA's FPR Guidance

## *"In Compliance with" a Prerequisite*

- To rely on the FPR exemption, a release must be "in compliance with" the relevant permit or control regulation
- Environmental Appeals Board's 1994 decision in *In re Mobil Oil Corp.*, EPCRA Appeal No. 94-2, 5 EAB 490, 508, 1994 WL 544260 (EAB, Sept. 29, 1994)
- Requirement does not appear in the statutory FPR definition for air releases

# EPA's FPR Guidance

## *Accidents and Malfunctions*

- **Generally:** any unanticipated releases (resulting from accidents, fires, ruptures, wrecks or malfunctions) are not FPRs.
  - Even if the release does not constitute a violation of law
  - *In re Borden Chemicals & Plastics, Co. (1993 ALJ decision)*
- **Exception:** If the “accidental” release is addressed in conformance with an *enforceable* accident or malfunction plan that:
  - designed to limit HAP or criteria pollutant emissions
  - had actual effect of limiting the “accidental” emissions
- *D from Interim Guidance*

# EPA's FPR Guidance

## *In re Borden Chemicals & Plastics, Co.*<sup>†</sup>

- A release can be an FPR only if the permit or control regulation imposes an *emission limit* or *otherwise controls* the release.
- ALJ found that an “unpreventable” vinyl chloride release from an emergency relief valve was not a FPR (regardless of whether the discharge violated the CAA), because the release was not “controlled” by the NESHAP regulation, but only made immune from an enforcement action

<sup>†</sup> [CERCLA] EPCRA 003–1992 (Order Granting Partial Accelerated Decision Concerning Liability (Feb. 18, 1993))

# EPA's Core Test of a FPR

- Whether the particular release is subject to permit limits and/or control regulations that:
  - Were specifically designed to limit or eliminate *criteria* or *hazardous air pollutant* emissions; and
  - Considered together, have the *effect* of limiting or eliminating emissions of the hazardous substance at issue.

# EPA's FPR Guidance

## *Exemptions Based on VOC and PM Control Requirements*

- Controls on VOCs or PM (generically) are also controls on any specific hazardous substances that are constituents of the “controlled” VOC or PM emission; provided that...
- The controls have the *effect* of limiting or eliminating emissions of the constituent hazardous substance.
- ***D*** from *Interim Guidance*
  - *Permits/Controls for VOCs/PM no longer required to be “specifically designed” to control hazardous impacts of specific constituent hazardous substances to be an FPR*

# EPA's FPR Guidance

## *Minor Sources*

- Air releases from source exempt from NSPS, NESHAP, SIP or other CAA permitting or control requirements due to their small annual volume may be FPRs -- if the releases are subject to an enforceable threshold, which, if exceeded, would trigger permit or other control requirements
- **Example:** Releases of HAP from a minor HAP source (an “area source”) that is exempt from otherwise applicable MACT or NESHAP requirements due to low potential to emit
- *D from Interim Guidance*

# EPA's FPR Guidance

## *Start-Up, Shutdown and Malfunction Plans*

- Air releases occurring in compliance with an approved start-up/ shut-down plan can qualify as FPRs, *provided*:
  - The Plan that contains federally enforceable procedures; and
  - The required procedures effectively limit or control the releases during start-up or shut-down (e.g., certain work practices)
- If air releases are simply *exempt* from controls during start-up and shut-down, in the Agency's view, they are not FPRs

# EPA's FPR Guidance

## *FPR Exemptions Based on "Waivers"*

- **The Statute:** FPR “Permit or control requirements” include “*schedule[s] or waiver[s] granted, promulgated, or approved under [CAA §§ 111, 112 or SIPs]*”
- **FPR Guidance:**
  - NSPS innovative technology waivers are FPRs
  - Does not address any other “waivers” (e.g., site- or source-specific “waivers” styled as exemptions)
  - An *exemption* from a control requirement cannot form basis for a FPR



# EPA's FPR Guidance

## *"Grandfathered" Sources*

- Releases in compliance with “grandfathering” exemptions from control requirements are not (on that basis) FPRs
- Generally, exemptions cannot form the basis for a FPR
- Agency now acknowledges that “grandfathered” sources may be subject to *other* air permit or control requirements, and emission may qualify as FPRs with respect to those other control requirements.
- Note: FPR Guidance on grandfathered sources published separately. *“Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Clean Air Act “Grandfathered” Sources,”* 67 FR 19750 (Apr. 23, 2002).

**Response to the FPR Guidance:**

***Compliance Strategies***

# FPR Compliance Strategies

- Assess Liability Exposure
  - Inventory emissions streams containing HS or EHS
  - Focus on (1) routine emissions and (2) foreseeable non-routine emissions
  - Assess whether FPR applicable
- Where Appropriate, Prepare to Claim FPR Exemption
  - As an exemption, burden of proof likely on company
  - Consider how to document conformance with Guidance and statute (*e.g., compliance and actual control*)
  - Consider changes to procedures, permits, SSM plans and recordkeeping to buttress claim

# FPR Compliance Strategies

- Alternatives:
  - “Continuous Release” Reporting
  - Continue usual “Emergency” reporting
- Balance risks and costs to select strategy
  - Prioritize action based on risk of triggering arguably reportable release
  - Different emission streams may merit different approaches

# Commentary on Guidance

- Effective in giving notice of Agency's generalized interpretations
- Ineffective as compliance assistance guidance in the context of an immediate reporting requirement
- Many specifics not addressed
- Agency positions (1) not entitled to deference from courts, and (2) subject to substantial challenge on the merits

# Future Developments

- Challenges to EPA's interpretations in enforcement contexts
- Case-by-case resolution of open issues left by Guidance
- Further rulemaking unlikely due to 1994 D.C. Circuit decision in *Kelley v. EPA*<sup>†</sup>

<sup>†</sup> *Kelley v. EPA*, 15 F.3d 1100, reh'g denied, 25 F.3d 1088 (D.C. Cir 1994); cert, denied, 513 U.S. 1110 (1995).