WILMERHALE

Grace Period for CERCLA/EPCRA Release Reporting of Certain Air Emissions Expires September 17, 2002

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EPA Guidance on the Scope of the Federally Permitted Release Exemption for Certain Air Emissions

September 17, 2002 marks the end of EPA's self-imposed enforcement moratorium for required release reporting of certain air emissions under §103 of the Comprehensive Environmental Response, Compensation, and Liability Act ("*CERCLA*") and §304 of the Emergency Planning and Community Right-to-know Act ("*EPCRA*"). This so-called "enforcement discretion period" was announced in February 2000 after EPA issued guidance about the scope of the federally permitted release ("*FPR*") exemption for certain air emissions, and was extended beyond its original six month period in connection with administrative litigation challenging the initial FPR guidance. The enforcement discretion period was extended for a final six months (i.e., through September 17, 2002) in connection with Agency's April 17, 2002 formal withdrawal of the initial FPR guidance and publication of a revised FPR guidance (the "*Guidance*").[1] The Guidance and related background are discussed in greater detail below.

A. Action Items. With the conclusion of the FPR enforcement discretion period, companies may see renewed interest by EPA's regional offices in requesting documentation and other information demonstrating compliance with CERCLA release reporting requirements for air emissions.[2] Firms that rely on the FPR exemption in lieu of episodic or continuous release reporting, if they have not already done so, should review their exempt emissions and their control requirements in light of the statute and the Guidance, and be prepared to defend their

entitlement to the FPR exemption. Alternatively, firms may opt to begin submitting continuous release reports for emissions that are "stable in quantity and rate" pursuant to regulations at 40 CFR 302.8 and 355.40(a)(2)(iii).[3]

B. Background of the Exemption. Section 103 of CERCLA and §304 of EPCRA require immediate reporting of a hazardous substance release that exceeds a reportable quantity ("RQ") threshold for that substance. However, both CERCLA and EPCRA exempt "federally permitted releases" from that reporting requirement.[4] With respect to air emissions, CERCLA defines a "federally permitted release" as,

> any emission into the air subject to a permit or control regulation under section 111 [NSPS], section 112 [NESHAPS], Title I part C [NSR], Title I part D [PSD], or State implementation plans submitted in accordance with section 110 of the Clean Air Act ... including any schedule or waiver granted, promulgated or approved under these sections[.]

CERCLA §101(10)(H), 42 U.S.C. §9601(10)(H).[5] The Agency has never promulgated regulations further interpreting this 1980 statutory exemption. The Guidance was intended to notify the regulated community of EPA's current interpretation of that statutory language.

C. The FPR Guidance. Presented in a question and answer format, the Guidance addresses several particular release scenarios and discusses whether the example releases may be entitled to the FPR exemption. The key aspects of the exemption addressed by the Guidance are summarized below. The Guidance does not discuss all aspects of the exemption.

- No Bright Line Test. As a preliminary matter, EPA acknowledges that whether a particular air release meets the statutory FPR definition is a complex question; that there are no "bright line" tests, and that a determination must be made on a case-by-case basis. The Agency specifically acknowledges the myriad ways in which air emissions may be controlled, including express emissions limitations, technology requirements, operational requirements, and work practices. The touchstones, in EPA's view, are 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 that, considered together, have the effect of limiting or eliminating emissions of the hazardous substance at issue. In this regard, among other circumstances, EPA says it will consider permits and permit applications,

regulations, preambles and related agency background information documents.

- NOx Releases and the NOx Administrative Reporting Exemption. Strict compliance with release reporting for NOx emissions was identified by the regulated a community as a significant problem because the RQ for NOx is so low (10 lbs.). In the Guidance, the Agency announced that (i) it would begin rulemaking to create an administrative CERCLA/EPCRA reporting exemption for NOx air releases as soon as resources are available, and (ii), in the interim, or until further notice, it will not enforce most CERCLA NOx release reporting requirements.

- Compliance as a Prerequisite to FPR Exemption. EPA asserts that a source must be in compliance with the applicable permit or control regulation relied upon to avail itself of the FPR exemption. This limitation is not contained in the statutory definition of federally permitted air releases (although it does appear with respect to other kinds of potentially exempt releases). As authority, the Agency cites the 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).

- FPR Exemption Based on VOC and PM Control Requirements. Air releases of hazardous substances that also constitute (or are constituents of) VOCs or regulated particulate matter ("PM") may be considered FPRs if the release is subject to VOC or PM control requirements with conditions that, when viewed together, have the effect of limiting or eliminating emissions of the constituent hazardous substance.

- Minor Sources. Air releases that are exempt from NESHAP, SIP or other CAA permitting or control requirements due to their small annual volume may be FPRs if they are subject to an enforceable threshold, beyond which permit or other control requirements would attach – the theory being that the threshold functions as an emission limitation. For example, air releases of HAPs from a minor HAP source (or "area source") otherwise exempt from NESHAP or MACT standards would be FPRs and exempt from reporting requirements provided that the control requirements of the NESHAP or MACT would attach if the source's HAP emissions exceed the minor source threshold.

- FPR Exemption Based on Waivers. The Agency affirms that emissions in compliance with an NSPS innovative technology waiver are FPRs. It does not address whether, in its view, releases in compliance with other kinds of "waivers" (e.g., site- or source-specific "waivers" styled as exemptions) constitute FPRs. Except for threshold limits (as described above), EPA takes the position that releases that are "exempt" from a

permit or control requirement are not FPRs.

- FPR Exemption Based on Start-Up, Shutdown and Malfunction Plans. The Guidance states air releases occurring in compliance with an approved start-up/ shut-down plan that contains federally enforceable procedures which effectively limit or control the releases during start-up or shut-down (e.g., certain work practices) generally qualify as FPRs. However, if the releases are simply exempt from controls during start-up and shut-down, the Agency contends, they are not FPRs.

- Grandfathered Sources. The Agency likens "grandfathered" sources to exempt sources, and takes the position that emissions in compliance with a "grandfathering" exemption, considered alone, are not FPRs. However, the Agency acknowledges that a source that is "grandfathered" (i.e., exempt) with respect to some requirements may nevertheless be subject to other permit or control regulations, and its air releases may qualify as FPRs on the basis of those other requirements.[6]

- Accidents and Malfunctions. Relying on a passage from the legislative history, the Agency contends that any unanticipated air releases resulting from accidents, "fires, ruptures[,] wrecks" and malfunctions generally are not FPRs, even if they do not represent a violation of law. EPA cites as an example, the EAB's decision in In *re Borden Chemicals & Plastics, Co.*, [CERCLA]EPCRA 003–1992 (Order Granting Partial Accelerated Decision Concerning Liability, Feb. 18, 1993), holding that a release can be an FPR only if the permit or control regulation imposes an emission limit or otherwise controls the release. Accordingly, the ALJ found that a discharge 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. Rather, the NESHAP made the facility where such a release occurred immune from an enforcement action. EPA concedes the "unusual" possibility that if such releases occur in compliance with an enforceable accident or malfunction plan that was designed to limit or eliminate HAP or criteria pollutant emissions and which had the effect of limiting or eliminating such emissions, the unanticipated release could be an FPR.

- Not a Rule. The Agency emphasizes that the Guidance is not a rule, that it is not binding on EPA or the public, and that the affected public is free to challenge its views on the scope of the FPR exemption in any subsequent enforcement proceeding.

[1] "*Guidance on the CERCLA Section 101(10(H) Federally Permitted Release Definition for Certain Air Emissions*," 67 Fed. Reg. 18899 (Apr. 17, 2002). This guidance replaces an

"interim" 1999 FPR guidance which EPA effectively withdrew in May 2000 following an industry challenge filed in the U.S. Court of Appeals for the D.C. Circuit. Hale and Dorr represented the multi-industry coalition that challenged the interim guidance. *The National Association of Manufacturers, et al. v. U.S. EPA*, No. 00-1111 (D.C. Cir.). The industry coalition voluntarily dismissed its suit as part of a negotiated settlement, which included the publication of the revised FPR guidance on April 17.

[2] The initial FPR guidance arose from wide-spread industry complaints stemming from a series of EPA Region V information requests seeking air release information and related release reporting documentation. That initiative was stayed in response to complaints that many of the releases covered by the requests were in fact "federally permitted releases," and therefore exempt from reporting under CERCLA.

[3] The Agency has developed a guidance document, "Reporting Requirements for Continuous Releases of Hazardous Substances - A Guide for Facilities on Compliance," which provides background information on this reporting option and detailed instructions on how to prepare continuous release reports.

[4] In addition, persons who otherwise would be liable under CERCLA for a hazardous substance release are immune from such liability to the extent the release is a FPR. CERCLA §107(j); 42 U.S.C. §9607(j).

[5] FPRs also include certain releases authorized by environmental laws other than the Clean Air Act, as specified elsewhere in CERCLA §101(10).

[6] EPA published separately its guidance on the FPR exemption as applied to grandfathered sources, "*Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Clean Air Act "Grandfathered" Sources*," 67 FR 19750 (Apr. 23, 2002).