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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OSWER # 9841.1

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MEMORANDUM

SUBJECT: Interim Guidance on Use of Administrative Penalty Provisions of Section 109 of CERCLA and Section 325 of SARA

FROM: Thomas L. Adams, Jr. by *CLSR*
Assistant Administrator

TO: Regional Administrators
Regional Counsels
Directors, Regional Waste Management Divisions

This memorandum provides interim guidance on the use of the new administrative penalty provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 et seq. and the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499. Section 109 of SARA amended CERCLA by adding civil penalties for violations of certain provisions of CERCLA or agreements entered into pursuant to the Act. The penalties may be assessed in an administrative action or in a judicial action. SARA also created the Emergency Planning and Community Right-to-Know Act of 1986. Section 325 of Title III provides for civil and criminal penalties for violations of the notification and planning requirements of that Title.

Background

Section 109 and Section 325(b) established two classes of administrative penalties. Those classes differ from each other with respect to procedures for assessing and collecting penalties and the maximum penalty available. EPA may assess Class I administrative penalties of not more than \$25,000 per violation for violations of the provisions specified in Section 109(a) and Section 325(b). In determining the amount of the Class I penalty, EPA must consider the factors specified in Section 109(a)(3) or Section 325(b)(1)(C). EPA may assess Class II administrative penalties of not more than \$25,000 per day for each day the violation continues for violations of provisions specified in Section 109(b) or Section 325(b). For subsequent Class II violations, the penalty may be not more than \$75,000 for each day of violation.

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Section 109 and Section 325(b) also established different procedures for the two classes of penalties. For Class I penalties under Section 109 or Section 325 EPA must provide notice and opportunity for a hearing but the proceedings are not subject to the Administrative Procedure Act (APA). EPA may subpoena witnesses and documents for Class I proceedings. The person aggrieved by the penalty action may seek judicial review in a United States District Court. In such a case, EPA must file in the court a certified copy of the record on which the penalty was based. OECM-Waste Division is developing Class I penalty procedures, and expect to issue these procedures shortly.

For Class II penalties under Section 109 and Section 325, EPA must provide notice and opportunity for a hearing in compliance with Section 554 of the APA, 5 U.S.C. 554. For Section 109 penalties, the person aggrieved by the penalty action may seek judicial review in a United States Court of Appeals. For Class II penalties under Section 325, the person aggrieved by the penalty action may seek judicial review in a United States District Court.

Class II proceedings are similar to formal adjudicatory penalty proceedings conducted by the Agency under other environmental statutes. The Consolidated Rules of Practice, promulgated by EPA at 40 CFR Part 22, govern the administrative assessment under the APA of penalties available under other statutes. To make these rules applicable to Class II proceedings under Section 109 and Section 325, OECM-Waste Division will promulgate a rule providing that the Consolidated Rules shall govern proceedings for the assessment of Class II administrative penalties under those provisions.

The United States may also bring a civil action in a district court to collect penalties of not more than \$25,000 per day for each day of violation for violations of those provisions specified in Section 109(c) and in Section 325(b). For subsequent violations, EPA may seek penalties of up to \$75,000 for each day of violation. In addition to the Class I and Class II penalties for violations specified in Section 325(b), Sections 325(a), (c), and (d) provide for civil and administrative penalties for violating the requirements specified in those provisions. The United States may also seek criminal sanctions under Section 103 of CERCLA for violations of the release notification requirement. SARA amended Section 103 of CERCLA by increasing the maximum penalties for such criminal violations. Sections 325(b) and (d) also provide for criminal penalties.

Current Procedures

Prior to completion of the procedures for Class I penalties and the promulgation of the rule amending the Consolidated Rules,

EPA may seek civil penalties under Section 109 or Section 325 under one of two approaches. First, the Regions may file administrative actions assessing the Class I or Class II penalties of Sections 109 or 325(b) or the administrative penalties in Sections 325(c) and 325(d). In filing such actions, the Region on an interim basis should comply with the Consolidated Rules, 40 CFR Part 22. After the Class I penalty procedures are completed, Class I administrative penalties should be assessed in compliance with those procedures. The Regions may also prepare a judicial referral for civil action or a judicial referral for criminal action. Orders under Section 325(a) may be enforced after a judicial referral.

In the near term, EPA will be using Section 109 most frequently to seek administrative penalties for violations of the notice requirements of Section 103(a) and (b). Until further guidance is available, we have attached for your use a chart showing the elements needed to prove a violation of Section 103(a) or (b), background information in the reportable quantities provisions, and a sample certification by a person at the National Response Center that no notice was received. More detailed guidance on the assessment of administrative penalties under Sections 109 and 325 is now being developed by OECM-Waste Division and the Office of Waste Programs Enforcement. For further information contact Frances McChesney at FTS 475-9437.

Attachments

cc: Lisa K. Friedman
Gene A. Lucero
Regional Counsel Hazardous Waste Branch Chiefs

PRIMA FACIE CASE
SECTION 103(b) CERCLA, 42 U.S.C. SECTION 9603(b)
NOTIFICATION

<u>FACT TO BE PROVED</u>	<u>STATUTORY BASIS</u>	<u>COMMENTS</u>
PERSON IN CHARGE OF VESSEL OR FACILITY	103(A). (B)	EVIDENCE SHOWING PERSON IS IN CHARGE
HAS KNOWLEDGE OF	103(A). (B)	KNOWLEDGE OF RELEASE MAY BE INFERRED ; STANDARD IN CIVIL CASES LESS THAN IN CRIMINAL CASES
RELEASE OF	103(A). (B)	EVIDENCE OF RELEASE
HAZARDOUS SUBSTANCE	103(A). (B)	EVIDENCE THAT SUBSTANCE RELEASED IS HAZARDOUS

PRIMA FACIE CASE
SECTION 103(b) CERCLA, 42 U.S.C. SECTION 9603(b)
NOTIFICATION
(CONTINUED)

<u>FACT TO BE PROVED</u>	<u>STATUTORY BASIS</u>	<u>COMMENTS</u>
IN REPORTABLE QUANTITY	103(A), (B)	EVIDENCE THAT RELEASE WAS EQUAL TO OR EXCEEDED REPORTABLE QUANTITY
WHO FAILS TO REPORT THE RELEASE	103(B)	CERTIFICATION BY NRC THAT IT WAS NOT NOTIFIED

BRIEFING ON

REPORTABLE QUANTITIES IMPLEMENTATION

BY

**EMERGENCY RESPONSE DIVISION
OFFICE OF EMERGENCY AND REMEDIAL RESPONSE
OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE**

TOPICS

- STATUTORY AUTHORITY
- PURPOSE OF REPORTABLE QUANTITIES
- RQ ADJUSTMENTS
- RQ ADJUSTMENT METHODOLOGY
- RELATIONSHIP BETWEEN CERCLA AND CWA
- REPORTING REQUIREMENTS
- DETERMINING WHEN AN RQ HAS BEEN RELEASED
- FEDERALLY PERMITTED AND CONTINUOUS RELEASE REPORTING EXEMPTIONS

STATUTORY AUTHORITY

- CERCLA SECTION 101(14) DEFINES "HAZARDOUS SUBSTANCE" BY REFERENCE TO OTHER ENVIRONMENTAL STATUTES, INCLUDING:
 - CLEAN WATER ACT (CWA) SECTIONS 311 AND 307;
 - CLEAN AIR ACT (CAA) SECTION 112;
 - RESOURCE CONSERVATION AND RECOVERY ACT (RCRA) SECTION 3001; AND
 - TOXIC SUBSTANCES CONTROL ACT (TSCA) SECTION 7.
- IN ADDITION, THE ADMINISTRATOR HAS THE AUTHORITY UNDER SECTION 102 TO DESIGNATE ADDITIONAL HAZARDOUS SUBSTANCES THAT "WHEN RELEASED INTO THE ENVIRONMENT MAY PRESENT SUBSTANTIAL DANGER TO THE PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT." EPA IS IN THE PROCESS OF DESIGNATING EXTREMELY HAZAROUS SUBSTANCES OF TITLE III OF SARA AS HAZAROUS SUBSTANCES AND SETTING RQS.
- THERE ARE CURRENTLY 705 HAZARDOUS SUBSTANCES, INCLUDING INDIVIDUAL CHEMICALS AND WASTE STREAMS. THE SUBSTANCES ARE LISTED AT 40 CFR PART 302.

STATUTORY AUTHORITY
(CONTINUED)

- UNDER THE REGULATIONS IMPLEMENTING SECTION 103, RELEASES OF A HAZARDOUS SUBSTANCE WITHIN A 24-HOUR PERIOD IN A QUANTITY EQUAL TO OR GREATER THAN ITS "REPORTABLE QUANTITY" MUST BE REPORTED IMMEDIATELY TO THE NATIONAL RESPONSE CENTER (NRC). CRIMINAL PENALTIES MAY BE IMPOSED FOR FAILURE TO REPORT PROPERLY.
- REPORTABLE QUANTITIES (RQs) ARE STATUTORILY SET AT 1 POUND OR AT THE RQ ESTABLISHED UNDER CWA SECTION 311.
- THE ADMINISTRATOR HAS THE AUTHORITY UNDER SECTION 102 TO ADJUST BY REGULATION STATUTORY RQs.

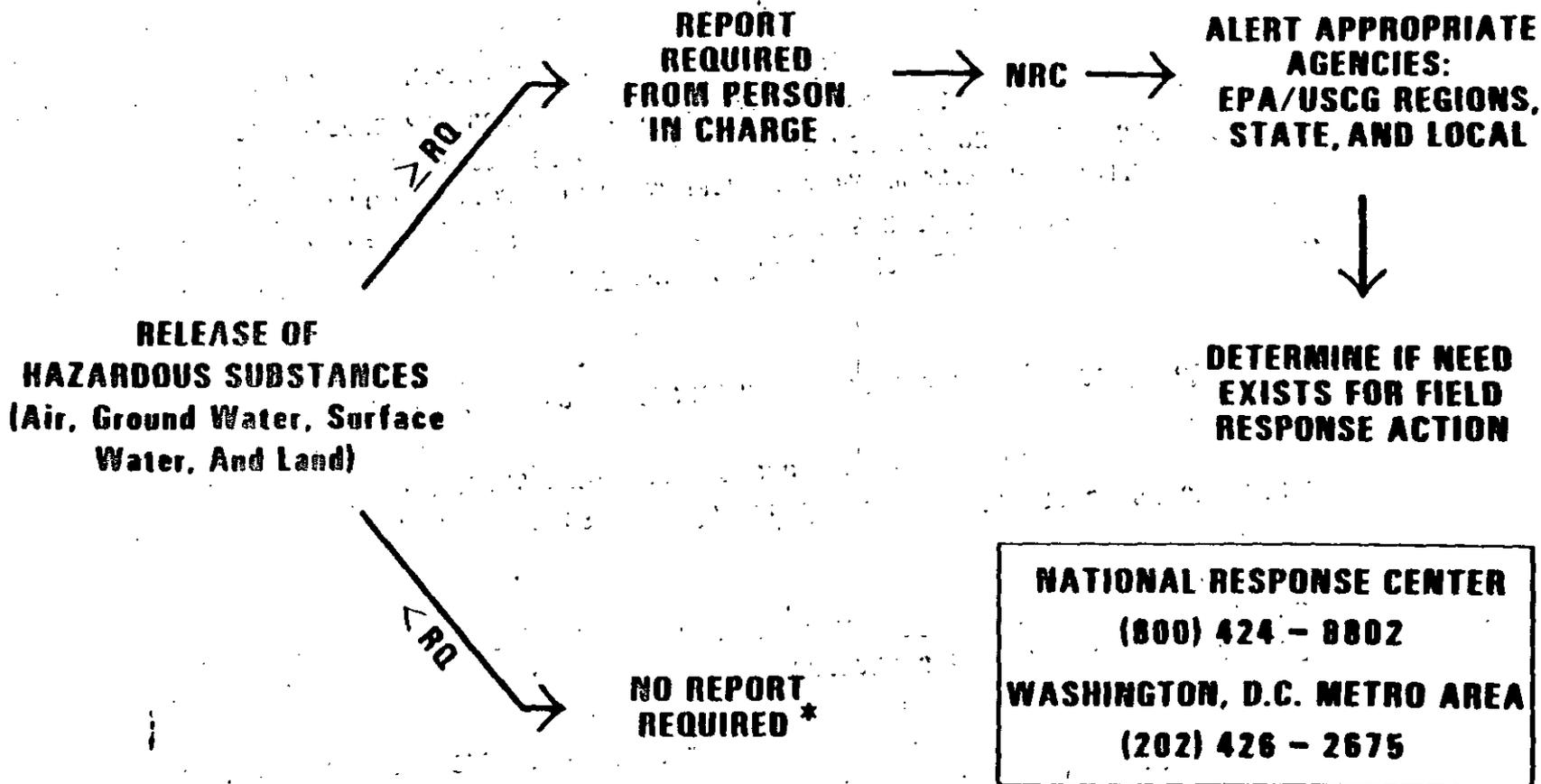
PURPOSE OF REPORTABLE QUANTITIES

- RQS SERVE AS A TRIGGER FOR NOTIFICATION TO THE FEDERAL GOVERNMENT OF A HAZARDOUS SUBSTANCE RELEASE.
- RQS DO NOT NECESSARILY REFLECT THE DEGREE OF RISK POSED BY HAZARDOUS SUBSTANCES.
- ONCE A RELEASE IS REPORTED, EPA DETERMINES WHETHER A FEDERAL FIELD RESPONSE IS WARRANTED.
- NOT ALL REPORTABLE RELEASES NECESSITATE A FIELD RESPONSE; CONVERSELY, SITUATIONS CAN OCCUR WHERE A RELEASE OF LESS THAN AN RQ CAN RESULT IN RISKS TO PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT.
- EXCEPT FOR FEDERALLY PERMITTED RELEASES, RELEASERS ARE LIABLE FOR RESPONSE COSTS AND NATURAL RESOURCE DAMAGES RESULTING FROM A HAZARDOUS SUBSTANCE RELEASE, REGARDLESS OF THE QUANTITY RELEASED.

RQ ADJUSTMENTS

- RQ ADJUSTMENTS ALLOW GOVERNMENT OFFICIALS TO FOCUS ATTENTION ON THOSE RELEASES THAT MAY POSE THE GREATEST THREAT TO PUBLIC HEALTH AND WELFARE AND THE ENVIRONMENT.
- RQ ADJUSTMENTS FOR 387 HAZARDOUS SUBSTANCES WERE PROPOSED IN AN NPRM PUBLISHED IN THE FEDERAL REGISTER ON MAY 25, 1983. ON APRIL 4, 1985, EPA PUBLISHED:
 - A FINAL RULE ADJUSTING RQS FOR 340 OF THE HAZARDOUS SUBSTANCES FOR WHICH RQ ADJUSTMENTS WERE PROPOSED IN MAY 1983; AND
 - AN NPRM PROPOSING RQ ADJUSTMENTS FOR 105 ADDITIONAL CERCLA HAZARDOUS SUBSTANCES.
- RQS OF THE REMAINING 260 SUBSTANCES (PRIMARYLY POTENTIAL CARCINOGENS) ARE BEING ADJUSTED AND WILL FORM THE BASIS OF A THIRD NPRM. RQS FOR POTENTIAL CARCINOGENS AND RADIONUCLIDES WILL BE PROMULGATED IN 1987.
- FUTURE RQ RULEMAKINGS WILL PROVIDE CLARIFICATION OF THE REPORTING EXEMPTIONS FOR CONTINUOUS RELEASES AND FEDERALLY PERMITTED RELEASES. THOSE RULEMAKINGS WILL BE PROMULGATED IN 1987.

RQ AS TRIGGER FOR RELEASE NOTIFICATION



* PARTIES MAY BE RESPONSIBLE FOR RESPONSE COSTS OR NATURAL RESOURCE DAMAGES
EVEN IF THE AMOUNT RELEASED IS LESS THAN THE APPLICABLE RQ.

RQ ADJUSTMENT METHODOLOGY

- THE RQ ADJUSTMENT METHODOLOGY IS BASED ON SCIENTIFIC AND TECHNICAL ANALYSIS OF THE CHARACTERISTICS OF THE HAZARDOUS SUBSTANCES.
- THE PROPOSED RQ ADJUSTMENTS USE CRITERIA THAT FOCUS ON A SUBSTANCE'S TOXICITY AND ITS CHEMICAL CHARACTERISTICS:
 - AQUATIC TOXICITY;
 - MAMMALIAN TOXICITY (ORAL, DERMAL, INHALATION);
 - IGNITABILITY;
 - REACTIVITY;
 - CHRONIC TOXICITY; AND
 - CARCINOGENICITY.
- RQs CAN BE ADJUSTED UPWARD ONE LEVEL BASED ON BIODEGRADABILITY, HYDROLYSIS, OR PHOTOLYSIS.
- EACH HAZARDOUS SUBSTANCE IS ASSIGNED ONE RQ APPLICABLE TO RELEASES TO ALL MEDIA (LAND, AIR, WATER).

RELATIONSHIP BETWEEN CERCLA AND CWA

- THE FOLLOWING ASPECTS OF THE CWA'S APPROACH TO DEALING WITH RELEASES OF HAZARDOUS SUBSTANCES HAVE BEEN ADOPTED UNDER CERCLA:
 - THE FIVE RQ LEVELS OF 1, 10, 100, 1000, AND 5000 POUNDS;
 - THE MIXTURE RULE FOR DETERMINING IF NOTIFICATION IS REQUIRED FOR MIXTURES OR SOLUTIONS CONTAINING HAZARDOUS SUBSTANCES;
 - THE 24-HOUR PERIOD FOR MEASURING WHETHER A REPORTABLE QUANTITY OF A HAZARDOUS SUBSTANCE HAS BEEN RELEASED; AND
 - THE REQUIREMENT THAT RELEASES BE REPORTED IMMEDIATELY TO THE NRC.

RELATIONSHIP BETWEEN CERCLA AND CWA
(CONTINUED)

- THE CWA IS LIMITED IN SCOPE AND DIFFERS FROM CERCLA IN THE FOLLOWING RESPECTS:
 - CERCLA COVERS RELEASES INTO ALL ENVIRONMENTAL MEDIA, UNLIKE THE CWA WHICH COVERS ONLY NAVIGABLE WATERS;
 - CERCLA DOES NOT COVER OIL SPILLS, UNLIKE THE CWA WHICH REQUIRES OIL SHEENS TO BE REPORTED TO THE NRC;
 - CWA SECTION 311 RQS ARE BASED ON AQUATIC TOXICITY, BECAUSE CERCLA APPLIES TO ALL ENVIRONMENTAL MEDIA, RQS BASED SOLELY ON AQUATIC TOXICITY ARE NOT SUFFICIENT FOR THE CERCLA NOTIFICATION AND RESPONSE PROGRAM; AND
 - CWA SECTIONS 311 AND 307 TOGETHER COVER ONLY A PORTION OF THE SUBSTANCES DEFINED AS HAZARDOUS UNDER CERCLA.

REPORTING REQUIREMENTS

- MECHANICS OF NOTIFICATION. AS SOON AS A RELEASER HAS KNOWLEDGE THAT A REPORTABLE RELEASE HAS OCCURRED, THE NRC MUST BE CALLED IMMEDIATELY. SUBPARTS E AND F OF THE PROPOSED NCP ALLOW THE RELEASER TO NOTIFY THE DESIGNATED OSC IN THE APPROPRIATE EPA REGION AND U.S. COAST GUARD DISTRICT IF NOTIFICATION TO THE NRC IS IMPRACTICAL.

- PERSONS COVERED. PERSONS IN CHARGE OF A FACILITY OR VESSEL ARE REQUIRED TO NOTIFY THE NRC OF REPORTABLE RELEASES.
 - "PERSONS IN CHARGE" CAN BE INTERPRETED TO INCLUDE INDIVIDUALS AS WELL AS PUBLIC, PRIVATE, AND GOVERNMENT ENTITIES.

 - "FACILITY" IS BROADLY DEFINED FOR LAND-BASED STATIONARY SOURCES AND VEHICLES.

 - "VESSEL" IS ALSO BROADLY DEFINED TO INCLUDE PRACTICALLY ANYTHING THAT FLOATS.

 - THE MAJOR EXCEPTIONS TO THESE DEFINITIONS ARE CONSUMER PRODUCTS IN CONSUMER USE.

REPORTING REQUIREMENTS

(CONTINUED)

- SUBSTANCES COVERED. ALL 705 HAZARDOUS SUBSTANCES LISTED IN THE APRIL 4, 1985 FINAL RULE ARE COVERED; ADDITIONAL SUBSTANCES MAY BE ADDED. (OSW INTENDS TO ADD ABOUT 120 MORE HAZARDOUS WASTES TO THE RCRA SECTION 3001 LIST IN THE NEAR FUTURE.) SUBSTANCES THAT ARE NOT LISTED IN THE FINAL RULE ALSO MAY BE HAZARDOUS:
 - SUBSTANCES ARE NOT LISTED UNDER ALL POSSIBLE NAMES; AND
 - WASTES WITH ICRE CHARACTERISTICS ARE HAZARDOUS (IF NOT SPECIFICALLY LISTED THESE WASTES HAVE AN RQ OF 100 POUNDS).

- RELEASES COVERED. THE DEFINITION OF RELEASE COVERS VIRTUALLY ALL WAYS THAT SUBSTANCES MAY ENTER THE ENVIRONMENT. HOWEVER, FOUR EXEMPTIONS ARE PROVIDED UNDER SECTION 101(22):
 - RELEASES WHOLLY CONTAINED WITHIN A BUILDING OR STRUCTURE;
 - MOBILE SOURCES OF AIR EMISSIONS;
 - SOURCE, BY-PRODUCT, AND SPECIAL NUCLEAR MATERIAL; AND
 - NORMAL APPLICATION OF FERTILIZERS.

DETERMINING WHEN AN RQ HAS BEEN RELEASED

- REPORTING PERIOD. CERCLA ADOPTS 24-HOURS AS THE PERIOD TO DETERMINE, FOR NOTIFICATION PURPOSES, WHETHER AN RQ HAS BEEN RELEASED.
- MIXTURE RULE. RELEASES OF MIXTURES OR SOLUTIONS MUST BE REPORTED IF A COMPONENT HAZARDOUS SUBSTANCE OF THE MIXTURE IS SPILLED IN AN AMOUNT EQUAL TO OR GREATER THAN ITS RQ.
 - RQs OF DIFFERENT SUBSTANCES IN A MIXTURE ARE NOT ADDITIVE, SO THAT SPILLING A MIXTURE CONTAINING HALF AN RQ OF ONE SUBSTANCE AND HALF AN RQ OF ANOTHER SUBSTANCE DOES NOT REQUIRE A REPORT.
 - WHEN THE IDENTITIES AND CONCENTRATIONS OF ALL SUBSTANCES IN A MIXTURE ARE NOT KNOWN, THE RQ THAT APPLIES TO THE MIXTURE IS THE LOWEST RQ OF THE COMPONENT SUBSTANCES.
- MULTIPLE RELEASES. WHEN REPORTABLE RELEASES OF THE SAME HAZARDOUS SUBSTANCE ARE OCCURRING AT SEVERAL LOCATIONS IN A FACILITY AT THE SAME TIME, ONLY ONE REPORT IS REQUIRED RATHER THAN MULTIPLE REPORTS.

FEDERALLY PERMITTED AND CONTINUOUS RELEASE REPORTING EXEMPTIONS

- SECTION 103 PROVIDES A COMPLETE REPORTING EXEMPTION FOR FEDERALLY PERMITTED RELEASES AND A LIMITED REPORTING EXEMPTION FOR CONTINUOUS RELEASES. THE RULEMAKING WILL BE PUBLISHED IN 1987.
- THE LIMITED EXEMPTION FOR CONTINUOUS RELEASES APPLIES TO RELEASES THAT ARE "CONTINUOUS" AND "STABLE IN QUANTITY AND RATE," AND FOR WHICH THE APPROPRIATE INITIAL REPORTS HAVE BEEN SUBMITTED.
- RELEASES THAT MEET THESE CONTINUOUS RELEASE CRITERIA NEED ONLY BE REPORTED ANNUALLY, OR WHEN A "STATISTICALLY SIGNIFICANT" INCREASE IN THE AMOUNT RELEASED OCCURS.
- SECTION 101(10) OF CERCLA DEFINES RELEASES THAT ARE "FEDERALLY PERMITTED." THESE RELEASES ARE COVERED BY SPECIFIED PERMITS OR REGULATIONS UNDER CWA, RCRA, CAA, THE MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT, THE SAFE DRINKING WATER ACT, AND THE ATOMIC ENERGY ACT.