



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

MAY 12 1998

OFFICE OF
PREVENTION, PESTICIDES AND
TOXIC SUBSTANCES

Mark S. Morgan
Executive Director
Petroleum Transportation and Storage Association
Suite 106
Washington D.C. 20016

Dear Mr. Morgan,

This letter is in response to your August 20, 1997, correspondence as well as your January 7, 1998, faxed letter in which you ask many questions concerning the employee threshold determination at petroleum bulk terminals and stations under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA). Although you submitted two separate letters, because the issue is a common one, the Agency is responding in one return letter. Please note that EPA has recently made available to the regulated public the Emergency Planning and Community Right-To-Know Act Section 313 Addendum to the Guidance Documents for the Newly Added Industries (EPA 745-B-98-001, February 1998) (hereafter referred to as the New Industry Addendum Document) in which many questions pertinent to newly added industries are addressed.

The letter submitted to EPA in August of 1997 asked the following three sets of questions. Please see EPA responses immediately below each set of questions.

“10 EMPLOYEE EXEMPTION OR HOURLY EQUIVALENT: How will drivers, who do not park their trucks on site be treated regarding the hourly exemption? To what extent will other employees who are not on site be treated in the count, such as accountants, sales staff, corporate support staff, maintenance contractors engineers drafting SPCC plans, etc.? How do owners and operators count divided employee time and how should those records be kept? What about contractors constructing dikes? How will those contractors who clean tanks be counted? What about inventory control activities conducted off site, will the hours tracking inventory be calculated? How do independent contractors fit into the calculations? What defines an independent contractor? How are employees counted at mixed use facilities? If a mixed use facility with a dominant use other than a TRI listed facility exists, is the facility exempted from TRI or will the fact that there are over 10 employees facility wide make TRI applicable?”

EPA has addressed the issue of employee threshold determination in past guidance including the 1997 EPCRA Section 313 Questions and Answers document (EPA 745-B-97-008, November 1997) (hereafter referred to as the EPCRA Section 313 Q&A Document). Drivers who do not park their trucks on-site may still be counted toward the facility's employee threshold. In the answer to question and answer number 19 of the EPCRA Section 313 Q&A Document, EPA states that:

“If the truck drivers are employed by the facility or the facility's parent company, and paid by the facility or the parent company, then they are employees of the facility and would be factored into the employee threshold. If they are based at the covered facility all of the hours worked by the truck drivers are counted towards the employee threshold. If the truck drivers are not based at the facility, then only their time spent servicing the facility is considered towards the employee threshold. However, facilities are not required to count hours worked by contract drivers.”

Hours worked by accountants, sales staff, corporate support staff, maintenance contractors, and engineers who are not on-site may still be applied toward the facility's employee threshold. Hours worked by the employee in support of the facility and that are trackable to the covered facility through the company's timekeeping system, should be counted towards the employee threshold for the facility. EPA has clarified this point in question and answer number 13 of the EPCRA Section 313 Q&A Document. In this question and answer, an engineer spends most of her time at a headquarters location and some of her time at a covered facility. As explained in the answer, hours worked for the covered facility at the headquarters location and hours worked on-site at the covered facility should both be included in the employee threshold determination. Question and answer number 24 of the New Industry Addendum Document further clarifies the time keeping issue.

Q24. A covered facility that is part of a larger corporate entity has corporate employees located on-site. These employees do not directly support the activities that are conducted at the facility where they are located; rather, their time is spent working for other facilities that are part of the same corporate entity. Does the facility where these employees are located have to count the hours worked by these employees toward its employee threshold?

A24. Yes. The facility where these employees are located should count the hours worked by them toward its employee threshold, unless the facility's time keeping system allows it to track the time worked by these employees according to the actual facility for which they were working. If a facility can demonstrate through time keeping records that the time worked by these employees was in support of another facility within the same corporate entity, it does not have to count the hours worked by these employees towards its employee threshold. The facility which these employees directly support would have to count the hours toward its employee threshold.

Contractors who construct dikes, clean tanks and perform inventory control activities conducted off-site are all performing process related activities in support of the covered facility

and should therefore, be included in employee threshold determinations. As EPA states in question and answer number 24 of the EPCRA Section 313 Q&A Document, “[t]he hours any contract employee works on-site or off-site for the facility must be counted toward the 20,000 hour threshold.” Facilities should keep records which identify all hours employees or contract employees work in support of the facilities’ activities on or off-site. Factors considered in the identification of a contract employee include, the hiring party’s right to control the manner and means by which the product is accomplished, the skill required, the source of the instrumentalities and tools, the party responsible for maintaining the vehicle and the party who carries the liability and property damage insurance. In the answer to question and answer number 24 of the EPCRA Section 313 Q&A document, EPA describes a contract employee as “a person working on-site or off-site for the facility under a specific contractual agreement performing specific tasks or services for the facility, except intermittent trash pick-up.”

In responding to the next set of questions, I will assume that a mixed use facility means a multi-establishment facility. All facilities must make threshold determinations, including the determination as to which SIC code best describes their activities. In general, if the sum of the value of services provided and/or products shipped and/or produced from those establishments that have primary SIC major group or industry codes in the list of covered SIC codes is greater than 50 percent of the total value of all services provided and/or products shipped from and/or produced by all establishments at the facility, or, if one establishment having a primary SIC major group or industry code in the above list contributes more in terms of sale of services provided and/or products shipped from and/or provided at the facility than any other establishment within the facility, the facility meets the EPCRA section 313 SIC code criterion. If a facility has 10 or more full time employees but does not fall within a covered SIC code, that facility does not have to report under the EPCRA section 313 reporting requirements.

Your next set of questions relate to multi-establishment facilities. They are as follows:

“MULTI-ESTABLISHMENT FACILITIES: What happens in the case where there is a small bulk plant on the same site as a grain elevator, where the grain elevator pulls in more value than the bulk plant? What if there are three establishments at the facility, a bulk plant, grain elevator and corporate headquarters, where the corporate headquarters, a separate SIC code, takes in more value than either the grain elevator or the small bulk plant? Is it necessary for the dominant use in the multi-establishment facility to take in more than 50% of the product value or is the fact that it brings in more than the bulk plant sufficient? What if the bulk plant takes in 20% of the product value, the grain elevator takes in 31% and the corporate headquarters the remaining 40%? How do you define product value? Wholesale, retail, profits, net or gross? Where does state and federal taxes fit into the calculation of value? Is pre-tax or after tax value that is counted? Over what period of time is value calculated?”

EPA originally finalized regulations regarding multi-establishment facilities in the final rule promulgating the EPCRA section 313 reporting requirements (53 FR 4501; February 16, 1988). EPA further clarified the multi-establishment facility determination in the regulatory text

of the recent Industry Expansion final rule (62 FR 23834; May 1, 1997). In that regulation, EPA states that a facility is in a covered SIC code if it meets one of the following criteria:

- (1) The facility is an establishment with a primary SIC major group or industry code.
 - (2) The facility is a multi-establishment complex where all establishments have primary SIC major groups or industry codes.
 - (3) The facility is a multi-establishment complex in which one of the following is true:
 - (I) the sum of the value of services provided and/or products shipped and/or produced from those establishments that have primary SIC major group or industry codes in the above list is greater than 50 percent of the total value of all services provided and/or products shipped from and/or produced by all establishments at the facility.
 - (ii) One establishment having a primary SIC major group or industry code in the above list contributes more in terms of sale of services provided and/or products shipped from and/or provided at the facility than any other establishment within the facility.
- (62 FR 23834 at 23892; May 1, 1997)

Product value should be based on the total sales before taxes at a facility, not profits. Total product value includes the value of services provided, products shipped, and/or products produced. This includes a fair market value for intercompany transfers, including a reasonable proportion of overhead and profits. If the facility transports the products itself (instead of paying an outside firm), the value of the transportation services should be part of the calculation of the total value of all production, shipments and/or services. To make a determination under 40 CFR § 372.22(b)(3)(I), the facility should calculate product value from petroleum wholesaling, and compare it to total product value (where total value encompasses petroleum wholesale sales, and any non-petroleum wholesale sales, retail sales, or other economic activity). To make a determination under 40 CFR § 372.22(b)(3)(ii), a facility would compare the product value from petroleum wholesaling to the product value from every other economic activity in which the facility is engaged.

Taxes collected from customers and forwarded to local, state or Federal taxing authorities should be excluded from the calculation of product value. Taxes that are paid by manufacturers, wholesalers, or retailers upstream of the facility and passed on to the facility in the price of goods or services it purchases should be included in the calculation of product value. The time period for calculating product value should be the reporting year in question (*i.e.*, January 1 to December 31).

The last set of questions raised in the August 1997 letter relate to making release reporting calculations. They are as follows:

“REPORTING: Will mathematical models be allowed to calculate emissions? If so which models? What are the final chemicals listed as requiring reports and what are their throughput thresholds? Where facilities handle the same amount of chemicals each year, with the same emissions, is there and [sic] abbreviated reporting form that can be used? (*i.e.*, or status change form) Would it be possible to simply change the date on the previous years TRI report, photocopy and send the altered document in where no information but the date has changed? For this facility not required to report, is there any form that is available to report that TRI does not pertain to their facility? (a lot of folks are asking this question, they want a degree of certainty).”

EPCRA section 313 requires that covered facilities use all readily available information to the Agency to satisfy its reporting requirements. Mass balance, emission factors, and/or engineering judgements are allowable means of calculating emissions when relevant (representative) monitoring data on emissions and other waste management quantities of EPCRA section 313 chemicals are not available or are unreliable. As explained on page 28 of the 1996 EPCRA section 313 Reporting Form R and Instructions:

... [Y]ou must use all readily available data (including relevant monitoring data and emissions measurements) collected at your facility to meet other regulatory requirements or as part of routine plant operations, to the extent you have such data for the toxic chemical.

When relevant monitoring data or emission measurements are not readily available, reasonable estimates of the amounts released must be made using published emission factors, material balance calculations, or engineering calculations. You may not use emissions factors or calculations to estimate releases if more accurate data are available.

No additional monitoring or measurement of the quantities or concentrations of any toxic chemical released into the environment, or of the frequency of such releases, beyond that which is required under other provisions of law or regulation or as part of routine plant operations, is required for the purposes of completing Form R.

The final list of EPCRA section 313 listed toxic chemicals is made available in the current year's Form R and reporting instructions, and on the Internet at <http://www.epa.gov/opptintr/tri/chemical.htm>. Under EPCRA section 313, thresholds are based on amounts manufactured (imported), processed, or otherwise used. See the most current reporting form instructions for a discussion of these terms (attached).

EPA allows facilities to photocopy certain portions of a prior year's reporting form; however, EPA requires original signatures on each year's report. Of course, prior year reports can and should be used as a basis or gauge for current year reporting. If a facility meets thresholds, but does not release or otherwise manage the listed toxic chemical as a waste during

the reporting year, the facility would still be required to submit a Form R. The facility would simply report zero (0) pounds of the toxic chemical released or otherwise managed as a waste in the appropriate spaces. If the facility does not exceed 500 pounds for the total annual reportable amount for a TRI listed chemical, and the amounts manufactured, processed, or otherwise used do not exceed one million pounds, the facility may submit the Form A certification statement instead of the Form R. There is no negative declaration form available to facilities not covered by EPCRA section 313.

Also, in your January 7, 1998, fax you present the following scenario involving facility SIC code determinations under the EPCRA section 313 reporting requirements. You state that members in your association include bulk plants which sell directly to the end users and have long considered their business to be retail, not wholesale, as defined under SIC code 5171. You also, by implication, question whether these types of facilities would likely fall under the SIC code 5171 and therefore be required to make threshold and release reporting determinations. In fact, this questions was added to the New Industry Addendum Document as question and answer number 118. The published question and answer reads as follows:

Q118. Many bulk petroleum stations operating in some Midwestern states sell their petroleum products directly to end users. These plants typically sell to farmers and construction companies, as well as state and local governments. Generally, quantities are transferred to the customer in quantities of 500 gallons or less. For these facilities, distribution to retail facilities may make up approximately 5 percent of their overall customer business. Are these facilities considered bulk wholesale distributors of petroleum products, or are they more appropriately classified in retail trade and therefore not covered under EPCRA section 313?

A118. Based on the facts provided in the question, these facilities are properly classified in SIC code 5171 (bulk petroleum stations and terminals) and not SIC code 5541 (gasoline service stations). Therefore, these facilities must comply with the reporting requirements of EPCRA section 313. According to the SIC code Manual (1987 ed) "...establishments or places of business primarily engaged in selling merchandise to retailers; to industrial, commercial, institutional, farm, construction contractors, or professional business users; or other wholesalers; or acting as agents or brokers in buying or selling merchandise to such persons or companies" are properly classified in Division F, Wholesale Trade, and are therefore covered under EPCRA section 313, beginning with the reporting year 1998. EPA believes that the facilities described in the above question are appropriately classified in the Wholesale Division as defined in the SIC code manual.

I hope this information is helpful to you and your constituents in making EPCRA section 313 threshold and release determinations. If you have any other questions please call me at 202.260.9592, or Tim Crawford of my staff at 202.260.1715.

Sincerely,

A handwritten signature in cursive script, appearing to read "Maria J. Doa".

Maria J. Doa PhD., Chief
Toxics Release Inventory Branch

enc.

cc: IG system
Tim Crawford