United States Environmental Protection Agency
Office of Solid Waste and Emergency Response (5104)
February 1999

EMERGENCY PREPAREDNESS AND COMMUNITY RIGHT-TO-KNOW (EPCRA)
311/312 - LETTERS IN RESPONSE TO FREQUENTLY ASKED QUESTIONS
1987-1991

August 11, 1987

Mr. Richard V. Houpt
Vice President/General Counsel
Waste Management of North America, Inc.
3003 Butterfield Road
Oak Brook, IL 60521

Dear Mr. Houpt:

Thank you for your letter of May 15, 1987, requesting a determination that landfills are not subject to Subtitle A of Title III of the Superfund Amendments and Reauthorization Act of 1986. We have very carefully reviewed the concerns and legal considerations raised in your letter and have determined that landfills are potentially subject to Subtitle A requirements. We do not believe that Title III was intended to cover only chemical manufacturing plants and chemical storage areas. Subtitle A is intended to identify facilities which present a potential hazard for a chemical emergency and to provide a process for local emergency planning committees to engage with such facilities in determining the significance of the release hazard and developing emergency response plans to facilitate timely and appropriate response in the event of a chemical release.

While we agree that conditions at some facilities (including landfills) may not pose significant chemical hazards even though extremely hazardous substance(s) are present in excess of the threshold planning quantity, in other such facilities conditions will exist which do present a significant hazard. Such assessments must be made on a site specific basis. We believe that leaving such decisions to the local planning committees is consistent with the purpose of Subtitle A. Communities must know which facilities may present a potential for chemical emergencies so they can determine the nature of the risk to the public and to emergency responders. We also recognize the practical problems presented for landfills in complying with the Title III requirements. Nevertheless, we believe that landfill facility owners or operators must determine, based on reasonably available information, whether any of the extremely hazardous substances are present at the facility in excess of the threshold planning quantity, and if so make a notification to the applicable State emergency response commission. However in making such a determination, owners and operators of landfills should apply the one percent exclusion (see enclosed revised final rule §355.30(a) and (e)(1)). We believe that the one percent exclusion is applicable to the contents of the entire landfill based on the assumption that such containers will degrade in the landfill environment. Therefore, if the total weight of an extremely hazardous

substance were greater than one percent of the total weight of the landfill waste and equaled or exceeded the threshold planning quantity for that substance, the landfill would be subject to Section 302 notification requirements. If no extremely hazardous substance exceeded this level, the landfill would not be subject to emergency planning requirements under Title III unless designated by the Governor or State emergency response commission under Section 302 (b)(2). Following any resulting notification to the State Commission and designation of a facility emergency coordinator (Section 303(d)(1)), the local committee may, depending on their site specific assessment of the hazard posed by the particular facility, request participation of the facility in the Title III planning process. Even though many landfills may not be required to provide planning notification based on the one percent exclusion cited above, the landfill owner/operator and the local emergency planning committee should work cooperatively to ensure that potential chemical emergencies are addressed.

Regarding the legal, issues you raised, Section 329 generally defines "facility" to mean "all building, equipment, structures, and other stationary items which arc located on a... site." We believe that the straight forward reading of this definition includes landfills, which are "structures" located "on a site." The distinction which you suggest between portions of a facility located "on a site" and those located "beneath the ground" is not reasonable in our view because underground storage, such as in underground storage tanks or pipelines, may present potential dangers to the surrounding community. In addition, as you note, Section 329 does not specifically include landfills within the definition of "facility," unlike the definition of the same term under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA). However, the Title III definition does not include other items specifically listed as facilities, under Section 101 (a) of CERCLA such as "storage container," "pipe," and "installation," which are subject to Title III requirements. Moreover, the definition of "facility" under Title III includes the general category of "other stationary items." We also recognize that Resource Conservation and Recovery Act (RCRA) regulations already address many of the goals of Subtitle A of Title III. However, it is important that the facility contingency plan and local coordination required by RCRA be coordinated with any new State and local planning structure or community planning process established under Title III. Full compliance with the RCRA requirements should minimize additional planning activities with local committees under Title III. Therefore, we do not see these requirements as duplicative. We would appreciate hearing of any specific problems you encounter. We will be available to work with you through both our Headquarters and Regional offices in addressing any specific questions or problems.

J. Winston Porter
Assistant Administrator

September 15, 1987

Mr. John C. Datt
Executive Director, American Farm Bureau Federation
600 Maryland Avenue, S.W. Suite 800
Washington, D.C. 20024

Dear Mr. Datt:

Thank you for your letter of July 1, 1987, regarding the requirements under Title III of the Superfund Amendments and Reauthorization Act (SARA) of 1986 as they pertain to farmers and ranchers. The Environmental Protection Agency shares your concern for regulatory burdens placed upon farmers, ranchers, States, and local communities. As a result, we have been working diligently with other Federal agencies, State and local officials, and trade associations; such as, the National Agricultural Chemicals Association (NACA), the National Governors Association, the National League of Cities, and the National Association of Counties to lay the foundations for this program in a manner which avoids confusion and duplication of effort to the greatest extent consistent with our statutory responsibilities. We will continue to work with your organization and other representatives of the farming community to address Title III requirements affecting farms. I have enclosed a Title III Fact Sheet and a general discussion of Title III requirements and how they apply to farm (or ranch) owners and operators in a question and answer format for your reference and use.

Following is our specific response to each of the eight areas of concern under Title III for which you requested clarification.

1. "Does section [sic] of Title III of SARA of 1986 apply to routine farming operations? It is our interpretation that farmers and ranchers are generally exempt from current Superfund reporting requirements in connection with a routine release of a pesticide used in agriculture."

   There is no general exemption under Title III for routine farming operations. However, not all sections of Title III are currently applicable to farms or ranches. Subtitle B of Title III (Section 311-313), for instance, which includes all of the general community "right-to-know" reporting, currently applies only to the manufacturing sector, Standard Industrial Classification (SIC) Codes 20-39.

   Even if Sections 311 and 312 become applicable to other business sectors as a result of any expansion of the Occupational Safety and Health Administration (OSHA) hazard communication standard, chemicals used in routine agricultural operations will not be subject to these reporting requirements. Chemicals used for such purposes are excluded under Section 311(e)(5).

   With respect to release reporting requirements under Section 304 of Title III and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA" or "Superfund"), routine releases of fertilizers and

pesticides as part of agricultural operations are generally not subject to reporting under these provisions. Under CERCLA Sections 1 01(22) and 103(e), the normal application of fertilizer and the application of a Federal Insecticide, Fungicide, and Rodenticide Act-registered pesticide are exempted from release reporting. As indicated in the April 22, 1987 final rule we have interpreted those exclusions to also apply to release reporting under Section 304 of Title III and incorporated those exclusions in the final regulations.

In addition, Section 304 contains two additional limitations which are not present in CERCLA Section 103. First, Section 304 release reporting is only applicable at facilities which produce, use, or store a "hazardous chemical." Because the definition of "hazardous chemical" in Section 311(e) specifically excludes substances used in routine agricultural operations and household or consumer products, some farms or ranches will not be subject to Section 304. Secondly, releases reportable under Section 304 include only those releases which have potential for off-site exposure (and also equal or exceed the applicable reportable quantity for that substance). Thus, spills of pesticides, which would not be excluded from release reporting under Section 103(e) of CERCLA, would not be subject to local and State reporting under Section 304 unless there were a potential for off-site exposure.

2. "Are farms and ranches covered under the Agency's interpretation of a "facility" in Section 302(b)? If so, what additional requirements of farmers and ranchers will be triggered by this provision?"

Section 302(b) defines the facilities which are subject to Subtitle A of Title III, the emergency planning provisions of the Act. Under Section 302(b), a facility is generally subject to the emergency planning requirements if an "extremely hazardous substance" is present at the facility in excess of the applicable threshold planning quantity (TPQ). The one exception provided in Section 302(b) concerns Section 304 which, as indicated above, has a more specific applicability; Section 304 applies to facilities which produce, use, or store a "hazardous chemical."

Because there are no other general exemptions from Subtitle A applicability under Section 302(b), farms and ranches are subject to Subtitle A, including, the emergency planning requirements of Section 302, if an extremely hazardous substance is present at the farm or ranch in excess of its TPQ.

The requirements triggered by Subtitle A applicability, however, are not burdensome. Under Section 302(c), the owner or operator of any covered facility as defined by Section 302(b) must provide a one-time notification to the State Emergency Response Commission (SERC) for the State in which the farm or ranch is located. Within 30 days following the establishment of the local emergency planning committee for the emergency planning district in which the farm or ranch is located (or by September 17, 1987, whichever is earlier) the farmer/rancher must designate a representative to work with the committee in the planning process. The committee may, depending on its site-specific assessment of the hazards posed by the substances present at the particular farm or ranch, request additional participation of the facility in the Title III emergency

planning process.

3. "Are farms and ranches subject to the requirements of reporting a release under Section 313(c) if the identified substance is routinely used in agricultural productions?"

   Because Section 313 of Title III, which involves annual reporting of the releases of certain toxic chemicals, applies only to owners and operators of certain facilities in the manufacturing sector (SIC Codes 20-39) with ten or more full time employees, farms and ranches will not generally be subject to reporting under that Section even if a statutorily-designated "toxic chemical" is present on-site. However, a manufacturing operation in SIC Codes 20-39 on-site may make the facility subject.

4. "If a farmer purchases a listed substance, such as anhydrous ammonia, or a pesticide with an active ingredient on the list of 402 hazardous substances, does he have to report to the State Emergency Response Coordinator the existence of that substance if he intends to apply it during the immediate growing season? How long can a farmer hold a substance intended for application before he becomes subject to this provision?"

   If a farmer has present on-site an amount of an extremely hazardous substance equal to or in excess of its TPQ, the farmer must notify the SERC. Thus, if a farmer has present on-site at least 500 pounds of anhydrous ammonia, he or she must provide the one-time notification to the SERC, even if the ammonia is applied during the immediate growing season. The emergency planning notification regulations do not incorporate an exemption for short-term storage since substances held for short periods of time create the same release hazard during the period in which they are present. However, the fact that a substance is on-site for short periods of time may be a very relevant consideration to local committees in determining the nature and extent of planning necessary for such sites.

5. "How does the Agency intend to notify farmers of revisions to the list of hazardous substances?"

   EPA will publish revisions of the list of extremely hazardous substances in the Federal Register. To the extent that such revisions affect farm and ranch operations, we will work with the United States Department of Agriculture (USDA) to ensure notification to farmers and ranchers.

6. "Which of the 402 hazardous substances are used in agricultural production? How can farmers and ranchers who are generally more familiar with the trade name than the chemical name and identify the existence of such substances among their stocks? Could the Agency prepare a reference list of those substances used in Agriculture with associated trade names? With the active ingredient representing a fraction of the brand product, how should calculations be made to determine whether the Threshold Planning Quantity (TPQ) has been exceeded?"

   Enclosed is a list of agricultural chemicals which was developed by the NACA which we

believe is a good representation of extremely hazardous substances likely to be present in agricultural operations. However, farmers and ranchers may use chemicals for other purposes on their property which are on the list of 406 extremely hazardous substances and which may trigger the one-time notice under Section 302 of Title III. Several States and other groups are preparing a list of associated trade names for extremely hazardous substances. We will work with these States and organizations to ensure this information is broadly distributed within the agricultural community.

If the extremely hazardous substance is part of a mixture or solution, then the amount is calculated by multiplying its percent by weight times the total weight of the mixture or solution. If the percent by weight is less than one percent, the calculation is not required. See Section 355.30(e)(a) of the April 22, 1987 revised final rule (enclosed).

7. "If agricultural producers are subject to these requirements, the low TPQs will cause it to affect most all farms and ranches. Are local emergency personnel prepared to deal with the paperwork, burden and site assessment requirements? Is the farmer responsible for developing an emergency plan?"

The Section 302 emergency planning notification should not be burdensome either for individual farmers/ranchers who are subject or for the SERC and the local emergency planning committees. The farmer/rancher simply has to notify the SERC, which in turn will notify the appropriate local emergency planning committee (as described in 2 above). The farmer/rancher must follow-up by designating a representative to work with the local emergency planning committee to address the need for emergency planning around their farm. There is no requirement for facility owners and operators (farmers) to develop a facility (farm) emergency plan. The Section 303 requirement is for a comprehensive emergency response plan to be developed by the local emergency planning committee for the local emergency planning district it covers. These plans should address, to the extent possible, all potential chemical release hazards in the district including, where appropriate, chemicals on farms.

8. "If farms and ranches are subject to the reporting requirements of 302, would it be acceptable for a state for county Farm Bureau to file en masse the names and addresses of its members?"

While the law places the responsibility for notification on facility owners and operators, farmers or ranchers could elect for a third party (e.g., County Farm Bureau) to make the notification on their behalf. However, the farmers or ranchers, as owners and operators, would still be responsible for the notification. Also, the en masse notification indicated in your letter could present problems for some farmers/ranchers and local emergency planning committees. Such en masse notification could include farm owners or operators who did not have extremely hazardous substances present in excess of the TPQ. Any such unnecessary notifications would add to the workload of the committee and the SERC and may burden such farmers or ranchers with unnecessary follow-up activities.

We recognize that Title III requires certain groups to submit information for planning

and

response purposes that have previously not considered themselves to be part of the "regulated community" (e.g., farmers, small businesses, State, and local public facilities). It is not our intent to place undue burdens on any of these groups in making notifications. Instead, the law and regulations are designed to provide local officials with the information necessary to develop the comprehensive emergency response plans that Title III requires. Certainly, an added benefit is that first responders will have access to information about hazardous materials that will enable them better to protect themselves in the event of a chemical emergency.

We appreciate this opportunity to respond to your request. Please contact me or Jim Makris, Director, Preparedness Staff (475-8600) if you have any additional questions or concerns.

Sincerely,
J. Winston Porter
Assistant Administrator

January 11, 1988

SUBJECT: Title III Emergency Planning Requirements Application to Hydrogen Sulfide Areas

FROM: Cheryl Mack, Attorney State Programs and General Law Branch (6C-G)

TO: Charles A Gazda, Chief Emergency Response Branch (6E-E)

I have reviewed the Texas Railroad Commission's proposal to recommend to the SERC's that the LEPC's use Rule 30 contingency plans for oil and gas production facilities that are subject to Title III planning requirements. From a legal perspective, there is no problem with an LEPC using the facility prepared contingency plan as part of the LEPC's Section 303 emergency plan. However, the LEPC is required to develop an emergency plan which meets the standards enumerated in Section 303(c). The LEPC would need to review the Rule 36 facility prepared contingency plans to assure that they meet the requirements of Section 303 of Title III before integrating the plan into the 303 emergency plan.

A comparison of the Rule 36 contingency plan requirements (3.36(c)(9)) with the requirements of Title III emergency plans (Section 303(c)) reveals areas which may require additional work by the LEPC. These areas are briefly discussed below.

1. Section 303(c)(1) requires the emergency plan to identify additional facilities which may contribute to or be subjected to additional risk due to their proximity to the Section 302 facility. The Texas Rule 36 contingency plan requires a map of the area of exposure for the purpose of identifying public which may be expected within the area (3.36(c)(9)(H)). This map would satisfy the Section 303 requirements concerning facilities subjected to risk, but may not identify facilities contributing to the risk as required by Section 303.

2. Section 303(c)(3) requires the emergency plan to designate an emergency coordinator for each facility. There is no provision in Rule 36 requiring the contingency plan to designate such a person.

3. Section 303(c)(4) requires the emergency plan to establish procedures for the notification of persons specified in the plan and the public. The Rule 36 contingency plan requirements contain adequate provisions for notification of emergency personnel and the public (3.36(c)(9)(E), (G), (I), (J) and (K(v)); however, notification of the LEPC community emergency coordinator and the SERC as required by Title III is not specified. The LEPC should assure that the emergency plan includes the required notification procedures.

4. Section 303(c)(5) requires that the emergency plan include methods for determining the occupance of a release. This information is not specifically required in a Rule 36 contingency plan.

5. Section 303(c)(6) requires that emergency equipment and persons responsible for such

equipment both on and off the Section 302 facility be identified. The Rule 36 contingency plan requires that safety equipment be identified "if applicable" ((9)(M)(ii)).

6. Section 303(c)(7) requires evacuation plans (including precautionary and alternate traffic routes) as part of the emergency plan. The Rule 36 contingency plan requires evacuation plans "if applicable" ((9)(M)(I)).

7. Sections 303 (8 and 9) requires training programs and methods and schedules-for exercising the plan be included in the emergency plan. These items may require the input and integration of information provided by the Rule 36 contingency plan into the emergency plan.

8. In certain instances, a Rule 36 contingency plan is not required to follow the provisions outlined in Rule 36 (9) (e.g. (9)(L) and (9)(P)). In these instances, the LEPC would need to assure that all the provisions required by Section 303 are addressed.

The LEPC is required under Title III to prepare an emergency plan. Provisions required in the emergency plan are enumerated in the law Section 303(c)). The LEPC may request and use information from individual facilities in preparation of the emergency plan. The LEPC may use the Rule 36 contingency plans as part of the Section 303 emergency plan; but in doing so, the LEPC (and the SERC in reviewing the emergency plan) has the responsibility to assure that the requirements of Section 303 are met.

January 25, 1988

Lawrence C. Tropea
Director, Corporate Environmental Control
Corporate Environmental Control Department
Reynolds Aluminum, Reynolds Metals Company
Richmond, Virginia 23261

Dear Mr. Tropea:

Thank you for your November 24, 1987 letter regarding the Emergency and Hazardous Chemical Inventory Forms and Community Right-to-Know Reporting Requirements. You requested an interpretation concerning the exemption of products characterized as "indirect food additives" under 40 CFR 370.2. Exempted from the definition of hazardous chemical is "any food, food additive, color additive, drug or cosmetic regulated by the Food and Drug Administration."

Following receipt of your letter, we consulted with staff of the Food and Drug Administration. We were informed that an important aspect of the definition of a food additive pertains to the "use" or reasonably expected" use of the substance. A careful review of 21 CFR 174-184 reveals that every indirect food additive is limited to a specific use. Thus, substances characterized as indirect food additives are only considered to be regulated by FDA when they are being used in a manner consistent with these regulations. Therefore, substances are exempt from Community Right-to-Know reporting only when they are being used in a manner consistent with these FDA regulations.

I realize that is a further clarification of the answer which was provided to you by our hotline staff. They have been informed of the further development. I hope this information is helpful. Please contact Kathleen Brody of my staff at (202) 475-8353 if you have additional questions on this matter.

Sincerely,
Jim Makris, Director, Preparedness Staff

January 26, 1988

Mr. Joseph A. DeMarco
Chairman, State Emergency Response Commission
Emergency Management Agency State House
Providence, R.I. 02903

Dear Mr. DeMarco:

This letter is in response to your letter of December 10, 1987 to the Administrator of the U.S. Environmental Protection Agency (EPA) regarding Section 326 of Title III of the Superfund Amendments and Reauthorization Act (SARA).

One of the concerns expressed in your letter involves possible hesitation on the part of potential local emergency planning committee (LEPC) members because of possible liability arising out of LEPC responsibilities. The concern that Section 326 allows for a cause of action against LEPC members is a misconception. Section 326 does not provide for a cause of action against LEPC or State emergency response commission (SERC) members for actions these individuals take with regard to contingency planning. Rather, Section 326(a)(1)(C) states that the EPA Administrator, State Governors, or SERCs may be civilly liable to any person (defined in Section 329 to mean "any individual, trust, firm, joint stock company, corporation ((including a government corporation)), partnership, association, State, municipality, commission, political subdivision of a State, or interstate body") for failure to provide a public availability mechanism in accordance with Section 324(a). Section 326(a)(1)(D) provides that State Governors or SERCs may be liable for failure to respond to a request for Section 312 Tier II information within 120 days after the date of receipt of the request. Furthermore, Section 326 only allows injunctive relief to require the EPA Administrator, State Governors, or SERCs to take the actions above.

It is also important to recognize with regard to LEPC member liability under Title III, that Section 326(g) enumerates the categories of individuals or entities who are liable under the Law and we believe that this enumeration is exclusive. Expansion of these categories does not appear to be warranted. With regard to the issue of liability arising from SERC or LEPC membership generally, it is also important to note the general rule that persons who serve on government committees have no liability for their actions except for gross negligence. It is important to state however, that this issue varies from State to State. SERCs who desire an answer to the question of potential liability arising out of SERC membership should therefore check with their individual State Attorney General. With regard to potential liability as an LEPC member, LEPCs should check with their individual local government counsel. This area is complicated and in a state of flux and most local governments have done a great deal of work on it. With regard to personal liability associated with SERC or LEPC membership, it would be necessary to assess what authority the member is acting under in order to determine what defenses and immunities are operating. Again, I suggest that interested SERCs and LEPCs discuss this issue with their respective State Attorney General and local government counsel and advise their prospective members.

With regard to the liability of facility owners or operators, Section 326(a)(1)(A) states that facility owners or operators may be civilly liable, i.e., in injunctive and monetary damage proceedings, for failure to submit certain required submittals under Sections 304, 311, 312, and 313 of Title III. Section 325 (Enforcement) specifies the amount of damages that can be imposed against owners or operators for violations of the above Sections.

I think you will also be interested to know that Ray DiNardo, Preparedness Coordinator for Region I, informed me that the Region is setting up a meeting with all of the Region's SERCs to be held the first or second week in March. Liability is on the agenda for that meeting.

I hope that this letter has clarified the issues you raised. Please do not hesitate to contact Laurie Solomon of my staff (202-475-8942) should you have any further questions on these issues.

Sincerely,
Jim Makris, Director, Preparedness Staff

February 3, 1988

Honorable Steven Gunderson
House of Representatives
Washington, DC 20515

Dear Mr. Gunderson:

I am writing in response to your inquiry of January 5, 1988, regarding concerns of your constituent, Mr. R. C. Longwell, Sr. about the Environmental Protection Agency's (EPA) listing of bacitracin under Title III, the "Emergency Planning and Community Right-to-Know Act of 1986," of the Superfund Amendments and Reauthorization Act (SARA) of 1986.

Under Section 302(a)(2) of Title III, Congress required EPA to publish a list of "extremely hazardous substances" within 30 days of the enactment of SARA. This list was required to be the same as the list of acutely toxic chemicals compiled by the Agency in November, 1985 as part of its Chemical Emergency Preparedness Program. Section 302(a)(4) of Title III also specified the manner in which the list could be revised.

On November 17, 1986, EPA published this list of "extremely hazardous substances" as an interim final rule, as required by the statute. The substance "bacitracin" was on that list. On November 17, 1986, EPA also proposed to revive the list to remove 40 substances that EPA believed did not meet the acute lethality criteria. Bacitracin was one of those substances. However, in promulgating a revised final rulemaking on Section 302 on April 22, 1987, we deferred our proposed deletion of the 40 chemicals because the statute required EPA to consider the long-term, as well as the acute effects of short-term exposure to releases of these substances prior to delisting. We did not believe we had the statutory authority to revise errors in the original list which had been mandated by Congress.

A. L. Laboratories, manufacturers of bacitracin, petitioned EPA to delist bacitracin and also filed a lawsuit in the District Court for the District of Columbia challenging the listing of bacitracin. Before the Agency could make a final decision to remove bacitracin from the list, using the criteria authorized by statute, the suit referred to by your constituent was decided against EPA.

This decision mandated that EPA remove bacitracin from the list and on December 17, 1987, EPA complied by removing it. An additional 39 chemicals were removed or will shortly be removed, based upon the rationale of the legal decision that EPA could revise the list to cure errors. The Agency declined to recommend appeal of the decision. No further action is anticipated.

While we understand your constituent's concern about Agency process, EPA was attempting to follow the direction of Congress in its actions to revise the list. We hope this information responds to Mr. Longwell's letter. Please contact me or Jim Makris, Director, Preparedness Staff at 475-8600 if you have any additional questions or concerns.

Sincerely

J. Winston Porter
Assistant Administrator

February 10, 1988

SUBJECT: Section 311/312 Storage Codes - Clarification
FROM: Cathy Fehrenbacher, Industrial Hygienist, Chemical Engineering Branch (TS-779)
TO: Kathy Brody, Preparedness Staff (WH-548A)

I was asked to clarify the definitions of several storage type codes used in the 311/312 Tier II form. The clarifications are as follows:

1. A carboy is a large bottle or jug which ranges in size from about 2 to 10 gallons. It may have carrying handles or a spigot or other features to aid in storing and dispensing of materials.

2. A tote bin is a rectangular storage container made of stainless steel, aluminum or carbon steel. It can have a side door or a flop gate and a valve on the bottom. It can be tagged and tested as a DOT 56 storage container and has a storage capacity of 42 to 110 cubic feet.

3. A tank wagon is simply a tank truck such as the type used to store and transport gasoline and other chemicals by way of roads and/or highways.

February 11, 1988

Dave H. Fore, Supervisor
Occupational Health and Safety, A.H. Robins Company
1407 Cummings Drive, P.O. Box 26609
Richmond, Virginia 23261-6609

Dear Mr. Fore:

This is in response to your recent letter requesting clarification of the definition of "hazardous chemical" under Sections 311 and 312 of Title 111 of the Superfund Amendments and Reauthorization Act (SARA) (otherwise known as the Emergency Planning and Community Right-to-Know Act) and the Environmental Protection Agency's (EPA) implementing regulations (40 CAR Part 370.21, 370.25).

EPA does not agree with your interpretation that all chemicals Intended for use in drugs are exempt from Material Safety Data Sheet (MODS) and Inventory reporting under Section 311's definition of "hazardous chemical." As you correctly noted, Section 311(e)(1) of SABRA excludes from the definition of "hazardous chemicals" subject to Section 311 and 312 reporting requirements "Any food, food additive, color additive, drug or cosmetic regulated by the Food and Drug Administration (FDA)." However, your interpretation did not consider that the provision does not exempt all substances defined as "drugs" under the Federal Food, Drug, and Cosmetic Act In any form or use, but only those drugs that are "regulated" by FDA. FDA's regulations pertaining to drugs are contained In 21 CAR.

In view of this specific language, we interpret the exemption contained in Section 311(e)(1) to apply only to those drugs that are being used in a manner consistent with current FDA regulations. To qualify for the exemption, therefore, the drug must be in a use or form that is regulated by the FDA. Consequently, the exemption would not apply to unprocessed chemicals intended for eventual use in or as a drug, except to the extent that those unprocessed chemicals are regulated by FDA in their unprocessed state.

We hope that this explanation answers any questions you may have regarding the application of Title Ill's MODS and Inventory reporting requirements to your business. Should you have any remaining questions, please call me at (202) 475-8353.

Sincerely,
Kathleen Brody, Program Analyst, Preparedness Staff, OSWER

February 11, 1988

SUBJECT: Sections 311/312 Reporting - Ambient Temperature
FROM: Michael H. Shapiro, Director, Economics and Technology Division (TS-779)
TO: James L. Makris, Director, Preparedness Staff (WH-548A)

We were asked to respond to a question raised by Dow Chemical on the temperature reporting requirements for outdoor storage tanks (see attached letter). We recommend responding to Dow with the following information:

Storage code 4 (ambient temperature) on the Tier II reporting form should be interpreted to mean that the material is stored at a temperature that is within the range of temperatures of the surrounding area. Either daily average low and high temperature (e.g. average low for January 21 is 10°F, average high for August 8 is 85°F) or a defined temperature range (e.g. 40°F to 80°F defined as ambient) could be used to clarify our intent. The three scenarios presented by DOW in their letter of February 1, 1988 fit this interpretation; we recommend reporting the temperature as ambient for each of these situations.

Longer term, it may be useful to replace this reporting element by asking:
is the tank ever heated;
is the tank ever cooled;
is the tank ever cooled sufficiently to liquefy a material that would otherwise be a gas at standard temperature and pressure.

This would appear to be a better indication of whether a responder to a facility accident would need to consider loss of cooling or heating as a hazard. A high and low temperature could be added (say "heated above 80°F" or "cooled below 40°F").

February 24, 1988

David J. Burch
National Screw Machine Products Association
6700 West Snowville Road
Brecksville, OH 44141-3292

Dear Mr. Burch:

This is in response to your letter to the Administrator requesting clarification of whether metal bar stock is exempt from the reporting provisions of sections 311 and 312 of the Emergency Planning and Community Right-to-Know Act.

As you are aware, the reporting and inventory requirements of sections 311 and 312 apply to the owner or operator of any facility that is required, under the Occupational Safety and Health Act of 1970 and its implementing regulations, to prepare or have available a material safety data sheet (MSDS) for a "hazardous chemical." Thus items exempt from OSHA's Hazard Communication Standard (HCS) are likewise exempt from the reporting requirements of sections 311 and 312. One of these items is "articles" as that term is defined under the OSHA regulations. In addition to the OSHA exemptions, 311(e) lists certain exemptions applicable only to sections 311 and 312's reporting requirements. Among these are section 311(e)(2)'s exemption for "any substance present as a solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions or use."

Despite similarities in language, EPA interprets section 311(e)(a)'s exemption for solids in any manufactured item to be broader than OSHA's exemption for "articles". OSHA defines "articles" as manufactured items which have end use functions dependent upon the specific shape or design into which the item is formed during manufacture and "which does not release, or otherwise result in exposure to, a hazardous chemical under normal conditions of use." OSHA interprets the phrase "under normal conditions of use" to include all uses of the item as the item is moved from facility to facility in a particular processing chain. Thus if the use of an item has the potential to expose downstream employees in a different facility to a hazardous chemical, the manufacturer must prepare and have available an MSDS for that item, even if the manufacturer's own use of the item in its own facility does not have the potential to expose its own employees to hazardous chemicals.

Although the phrase "under normal conditions of use" is also employed in subsection 311(e)(2)'s additional exemption to sections 311 and 312's reporting requirements, EPA does not interpret the phrase to have the same expanded meaning as it is given by the OSHA definition of "article." EPA intends to limit the term "use" to use of the item within a particular facility. The term "facility" is defined in section 329 of the Emergency Planning and Community Right-to-Know Act. Thus, under this interpretation of subsection 311(e)(2), substances present as a solid in any manufactured item are exempt from sections 311 and 312's reporting requirements if the normal use of the substance within the facility does not result in exposure to a hazardous chemical. This is so, even if the owner or operator is not eligible for the article exemption to OSHA's HCS because downstream users of the item are potentially subject to exposure to a hazardous

chemical during their normal use of the item.

The difference between EPA's and OSHA's interpretation of the phrase "under normal conditions of use" is explained by the specific purpose of OSHA's HCS in the field of occupational safety. OSHA adopted an expanded interpretation of the term "use" to encompass the operations of downstream users at different facilities in order to ensure that downstream employees are informed of the hazardous chemical contents of manufactured products of which they may otherwise not be aware. In rejecting OSHA's expanded interpretation of term "use" in subsection 311(e)(2), EPA believes that Congress did not directly incorporate in sections 311 and 312 this occupational safety objective of passing on to downstream employees valuable information concerning chemical contents. Under sections 311 and 312, hazardous chemicals at the worksite are reported to state and local government officials and the information made available to the public. The purposes of sections 311 and 312 reporting are to inform the local community of the presence of chemicals that could potentially cause a release and that thus merit public concern. Considering this purpose, EPA does not believe that Congress intended local communities to be notified of the presence of hazardous chemicals that raise no potential for release as they are used in that particular community.

In your letter to the Administrator, you indicated that metal bar stock, as used in your members' operations, is not exempt from OSHA's HCS under the article exemption. We were not able to determine, however, whether this was because the normal use of bar stock in your members' facilities offers the potential for exposure to a potentially harmful chemical or because downstream employees (i.e. employees of scrap metal reprocessing/remelting operations) of your members' operations could be exposed to potentially harmful fumes during remelt of the metal bar stock chips. If the former, these members would be subject to the reporting requirements of sections 311 and 312. EPA interprets the term "exposure" in subsection 311(e)(2) to have the same scope as the term "exposure" in OSHA's article definition. Should some of your members not be eligible for the article exemption because the item results in exposure to a hazardous chemical during use at their facility, they would also be ineligible for subsection 311(e)(2)'s exemption to section 311 and 312's reporting requirements.

If, however, some of your members are ineligible for the article exemption solely because they manufacture items that may potentially expose the employees of a downstream user to a hazardous chemical, these members may be exempt from sections 311 and 312's reporting requirements under section 311(e) (2). As discussed above, EPA interprets section 311(e) (2) to exempt from reporting those facilities whose normal use of the manufactured item within their facility does not result in exposure to a hazardous chemical. Note that these facilities are exempt from section 311 and 312 reporting only if no aspect of their facilities' use of the item could potentially result in exposure to a hazardous chemical. Thus an operator who inventories bar stock as part of its operations would not be eligible for subsection 311(e) (2)'s exemption if he also conducted, at the same facility, machining operations on the bar stock (or items formed from the bar stock) which could potentially expose his own employees to hazardous chemicals.

We hope that this clarification of the Emergency Planning and Community Right-to-Know Act is helpful to your members. If you have additional questions regarding this interpretation please call Kathy Brody of my staff at (202) 475-8353 or the Chemical Emergency Response Hotline at

1-(800)-535-0202.

Sincerely,
J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response (WH-562A)

February 24, 1988

Honorable Dennis Hastert
House of Representatives
Washington, DC 20515

Dear Mr. Hastert:

Thank you for your letter of January 27, 1988. In October, 1986, Congress enacted the Emergency Planning and Community Right-to-Know Act, also known as Title III of the Superfund Amendments and Reauthorization Act (SARA) of 1986. The purpose of this legislation was to provide State and local planning officials and the public with information on hazardous chemicals in their community and to establish emergency planning and notification requirements to protect the public.

There are four major reporting requirements under Title III: emergency planning notification (Section 302); emergency release notification (Sec. 304); community right-to-know (Sec, 311 material safety data sheets and (Sec. 312) emergency and hazardous chemical inventory forms); and toxic chemical release forms (Sec. 313 "emissions inventory"). Each reporting provision has different statutory requirements for chemicals and facilities covered. Due to this complexity in the statute itself, each section must be read carefully to understand the chemicals covered and the facilities to which the section applies.

While Title III does apply by statute to farms and farmers, the requirements are in most cases minimal. Enclosed is a Question and Answer Fact Sheet, which answers in detail many of the questions asked about Title 111 and farmers. Section 302 requires that owners or operators of any facility, including farms, which have Extremely Hazardous Substances present in excess of the Threshold Planning Quantities must notify the State Emergency Response Commission (SERC) that they are subject to the Act. They must also provide the Local Emergency Planning Committee (LEPC) with a name of a person the Committee may contact in regard to planning issues related to these hazardous substances. Once the SERC and the LEPC have been notified that the facility is subject to the Act because of the presence of these substances, there are no further requirements under this section of the Act unless the LEPC determines there is a need for the community's plan to address a potential release. If the LEPC does not include farms as a priority, then there will be little or no additional involvement required of affected farmers.

There is no statutory basis for administratively excluding farmers, or any other class of facility from Section 302. This section covers all facilities which have present quantities of Extremely Hazardous Substances in excess of the Threshold Planning Quantities (TPQs) established in the Title III regulations. But as noted above, any burden associated with compliance with Section 302 is minimal for many facilities.

Other sections of the Act also have minimal effects on farm facilities. Section 304 is written so as to minimize its impact on normal farming operations because releases must have the potential for off-site exposure and the normal application of fertilizers and the application of pesticides in accordance with their intended purpose are not reportable releases. Further, many farms are not

covered under Section 304 because they are generally not facilities which store, produce or use "hazardous chemicals." The definition of "hazardous chemical" which is contained in Section 311(e) and referenced in this section, excludes any substance to the extent it is used in routine agricultural operations. Section 311 and 312 do not generally impact on many agricultural facilities because of the exclusion of chemicals to the extent they are used in routine agricultural operations or are fertilizers held for sale by retailers, from the definition of hazardous chemicals in that section. Section 313 excludes facilities which have less than 10 full-time employees and facilities which do not fall within the Standard Industrial Classification (SIC) codes 20-39 (manufacturing sector). These provisions will result in exclusion of small farmers and many large farmers from toxic inventory coverage, even where the quantities of chemicals used at the farm might otherwise subject farmers to coverage.

Finally, it is true that ammonia is a common chemical in use on many farms and thus has the potential for bringing many farmers under the purview of Title III. However, ammonia was added to the list of Extremely Hazardous Substances with a 500 lb. Threshold Planning Quantity because it is highly toxic, has known health and safety risks and is present in large quantities in commerce, potentially exposing large segments of the population to risk of releases. Thus, local communities need to be aware of the existence of significant quantities of this chemical in their community, even for short and specific periods during the year, so that they can determine their priorities for emergency planning. Only in the event of a local determination that this or other farm chemicals are a priority in their community, would additional farmer involvement be necessary. Further, because this is a local decision, farmers can influence local priorities by becoming involved with the Local Emergency Planning Committee.

I hope this information is responsive to your concerns. Please feel free to contact me or Jim Makris, Director of the Preparedness Staff at 475-8600, if you need additional assistance or information.

Sincerely,
J. Winston Porter, Assistant Administrator

February 24, 1988

Honorable Claudine Schneider
House of Representatives
Washington, DC 20515

Dear Ms. Schneider:

This is in response to your letter of February 2, 1988, to the Administrator of the U.S. Environmental Protection Agency (EPA) regarding Joseph DeMarco's recent letters to you and to the Agency concerning clarification of Section 326 of Title III of the Superfund Amendments and Reauthorization Act (SARA). Enclosed is a copy of the letter sent to Mr. DeMarco on January 26, 1988.

One of the concerns expressed in his letter involves possible hesitation on the part of potential local emergency planning committee (LEPC) members because of possible liability arising out of LEPC responsibilities. The concern that Section 326 allows for a cause of cause of action against LEPC members is a misconception. Section 326 does not provide for a cause of action against LEPC or State emergency response commission (SERC) members for actions these individuals take with regard to contingency planning. Rather, Section 326 states that the EPA Administrator, State Governors, or SERCs may be civilly liable if they fail to provide a public availability mechanism in accordance with Section 324(a). The Section also states that State Governors or SERCs may be liable for failure to respond to a request for Section 312 Tier II information within a certain number of days after the date of receipt of the request.

With regard to the issue of liability arising from SERC or LEPC membership, generally, the general rule is that persons who serve on government committees have no liability for their actions except for gross negligence. This issue varies from State to State however.

I hope that this letter has clarified the issues you raised. If I can be of further assistance, do not hesitate to contact me.

Sincerely,
J. Winston Porter, Assistant Administrator

February 24, 1988

Gregory D. Taylor
Government Affairs Manager, Precision Metalforming Association
27027 Chardon Road
Richmond Heights, Ohio 44143

Dear Mr. Taylor:

This is in response to your letter to the Administrator requesting clarification of whether sheet metal, as it is used by metalforming companies, is exempt from the reporting provisions of sections 311 and 312 of the Emergency Planning and Community Right-to-Know Act.

According to your letter, some of your members perform only traditional primary metalforming operations which do not cause a release of, or otherwise result in exposure to, a hazardous substance within the sheet metal. Your letter also stated, however, that other companies within your association perform secondary operations that may cause a release of, or otherwise result in exposure to, a hazardous substance within the sheet metal.

We understand that neither primary nor secondary metalforming operations are exempt from OSHA's Hazard Communication Standard (HCS). Sections 311 and 312's reporting requirements apply to any owner or operator required to prepare or have available a material safety data sheet (MSDS) under the Occupational Safety and Health Act of 1970 or its implementing regulations. Thus because sections 311 and 312 incorporate the OSHA regulations unchanged, if your members are not eligible for the articles exemption to the HCS, they are likewise ineligible to use that same exemption to excuse themselves from the section 311 and 312 reporting requirements. However, section 311(e) contains a list of additional exemptions applicable to section 311 and 312 reporting requirements only. Subsection 311(e)(2), which should apply to your members' traditional primary metalforming operations, exempts "any substance present as a solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions of use."

Despite similarities in language, EPA interprets section 311(e) (2)'s exemption for solids in any manufactured item to be broader than OSHA's exemption for "articles." OSHA defines "articles" as manufactured items which have end use functions dependent upon the specific shape or design into which the item is formed during manufacture and "which does not release, or otherwise result in exposure to, a hazardous chemical under normal conditions of use." OSHA interprets the phrase "under normal conditions of use" to include all uses of the item as the item is moved from facility to facility in a particular processing chain. Thus if the use of an item has the potential to expose downstream employees in a different facility to a hazardous chemical, the manufacturer must prepare or have available an MSDS for that item, even if the manufacturer's own use of the item in its own facility does not have the potential to expose it own employees to hazardous chemicals.

Although the phrase "under normal conditions of use" is also employed in subsection 311(e) (2)'s additional exemption to sections 311 and 312's reporting requirements, EPA does not intend

to interpret the phrase to have the same expanded meaning as it is given by the OSHA definition of "article." EPA intends to limit the term "use" to use of the item within a particular facility. The term "facility" is defined in section 329 of the Emergency Planning and Community Right-to-Know Act. Thus under this interpretation of subsection 311(e) (2), substances present as a solid in any manufactured item are exempt from sections 311 and 312's reporting requirements if the normal use of the substance within the facility does not result in exposure to a hazardous chemical. This is so, even if the owner or operator is not eligible for the article exemption to OSHA's HCS because downstream users of the item are potentially subject to exposure to a hazardous chemical during their normal uses of the item.

The difference between EPA's and OSHA's interpretation of the phrase "under normal conditions of use" is explained by the specific purpose of OSHA's HCS in the field of occupational safety. OSHA adopted an expanded interpretation of the term "use" to encompass the operations of downstream users at different facilities in order to ensure that downstream employees are informed of the hazardous chemical contents of manufactured products of which they may otherwise not be aware. In rejecting OSHA's expanded interpretation of the term "use" in subsection 311(e) (2), EPA believes that Congress did not directly incorporate in sections 311 and 312 this occupational safety objective of passing on to downstream employees valuable information concerning chemical contents. Under sections 311 and 312, hazardous chemicals at the worksite are reported to state and local government officials and the information made available to the public. The purposes of sections 311 and 312 reporting are to inform the local community of the presence of chemicals that could potentially cause a release and that thus merit public concern. Considering this purpose, EPA does not believe that Congress intended local communities to be notified of the presence of hazardous chemicals that raise no potential for release as they are used in that particular community.

According to your description, those of your members performing traditional metalforming operations should be exempt from sections 311 and 312's reporting requirements under subsections 311(e) (2)'s exemption. This is because, within their facilities, these members' use of sheet metal does not cause a release of, or otherwise result in exposure to, a hazardous chemical within the sheet metal. These members' would be exempt from section 311 and 312 reporting, whether or not they are required to prepare or have available an MSDS under the HCS due to the fact customers or downstream employees in other facilities perform operations that have the potential to result in exposure to a hazardous chemical within the sheet metal.

Those of your members who perform secondary operations would not, however, be exempt from sections 311 and 312's reporting requirements. As you describe them, the use of sheet metal within these members' facilities may cause a release of, or otherwise result in exposure to, a hazardous substance. This potential for exposure renders these members ineligible for subsection 311(e) (2)'s exemption to sections 311 and 312's reporting requirements.

We hope that this clarification of the Emergency Planning and Community Right-to-Know Act is helpful to your members. If you have additional questions regarding this interpretation, please call Kathy Brody of my staff at (202) 475-8353 or the Chemical Emergency Response Hotline at 1-(800) 535-0202.

Sincerely,
J. Winston Porter , Assistant Administrator for Solid Waste and Emergency Response (WH-562A)

February 24, 1988

Mr. David J. Burch
National Screw Machine Products Association
6700 West Snowville Road
Brecksville, OH 44141-3292

Dear Mr. Burch:

This is in response to your September 10, 1997, letter regarding reporting under Section 311 and 312 of Title III of the Superfund Amendments and Reauthorization Act.

You requested a clarification concerning whether or not metal bar stock is exempt from Section 311 and 312 reporting. I refer you to an exemption in Section 311 (e)(2) of Title III regarding "any substance present as a solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions of use." Regardless of the Occupational Safety and Health Administration (OSHA) exemption/interpretation, this exemption appears to apply to your members. However, as with the OSHA exemption, where potential for exposure exists because of the use, downstream users would not be exempt.

If you need further clarification, please contact the Chemical Emergency Preparedness Hotline at 1-800-535-0202.

Sincerely,
J. Winston Porter, Assistant Administrator

February 26, 1988

Honorable Thomas Daschle
United States Senate
Washington, DC 20510

Dear Senator Daschle:

Thank you for your letter of January 29, 1988, requesting information on Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA) regarding farms and farming operations.

There are four major reporting requirements under Title III: emergency planning notification (Section 302); emergency release notification (Sec. 304); community right-to-know (Sec. 311 material safety data sheets and (Sec. 312) emergency and hazardous chemical inventory forms); and toxic chemical release forms (Sec. 313 "emissions inventory"). Each reporting provision has different requirements for chemicals and facilities covered. Due to this complexity in the statute itself, each section must be read carefully to understand the chemicals covered and the facilities to which the section applies.

Agricultural facilities maybe subject to some of the requirements of Title III, however there are also exemptions which will minimize the impact on these facilities. A Question and Answer Fact Sheet is enclosed to answer some common questions regarding the implications of Title III for farm operations.

The notification requirement which most often applies to farmers is found in Section 302. Section 302 requires that owners or operators of any facility, including farms, which have Extremely Hazardous Substances present in excess of the Threshold Planning Quantities must notify the State Emergency Response Commission (SERC) that they are subject to the Act. They must also provide the Local Emergency Planning Committee (LEPC) with a name of a person the Committee may contact in regard to planning, issues related to these hazardous substances. Once the SERC and the LEPC have been notified that the facility is subject to the Act because of the presence of these substances, there are no further requirements under this section of the Act unless the LEPC determines there is a need to plan for an emergency response to a release at the farm. If the LEPC does not include farms as a priority, there will be little or no additional involvement required of affected farmers. There are no federally required reports or forms to fill out, nor is the farmer required to develop a plan for his farm under this section. Further, because Title III is a decentralized program where
priorities are set by the local committee, farmers can influence these priorities by becoming involved with the LEPC.

As you have noted, there are legitimate reasons for the community to know where chemicals are stored. We believe these reasons are valid even when the chemicals are stored for short periods, especially when stored on a re-occurring basis. Further, the minimal reporting requirements for farmers under Title III address these concerns without imposing an undue burden.

For assistance regarding any of the requirements under Title III, the public may contact our Emergency Planning and Community Right-to-Know Information Hotline at 1-800-535-0202. I have also enclosed a Fact Sheet on Title III, and a copy of the rulemaking on emergency planning and release notification (Secs. 302-304) which includes the list of extremely hazardous substances.

We appreciate this opportunity to respond to your inquiry. Please contact me or Jim Makris, Director, Preparedness Staff at 475-8600 if you have any additional questions or concerns.

Sincerely,
J. Winston Porter
Assistant Administrator

March 1, 1988

Ronald B Outen, Ph.D., Senior Associate
Jellinek, Schwartz, Connolly and Freshman, Inc.
Suite 400, 1350 New York Avenue, NW
Washington, DC 20005

Dear Ron:

This is in response to your February 24, 1988 letter requesting verification of your interpretation of several issues under Sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986. I am in total agreement with the interpretations as stated in your letter.

In general, only information which is required to be on the Material Safety Data Sheet (MSDS) under the Occupational Safety and Health Administration's Hazard Communication Standard must be submitted under Section 311. Therefore, information such as product formula and percentage composition welch is appropriately claimed proprietary under the OSHA regulations need not be disclosed. Trade Secret claims under Title 111 must be filed only when the chemical name is being withheld. The claim must be filed only by the originator of the claim and not by the facility owner or operator who is the recipient of an MSDS for which a trade secret claim has already been made.

Please do not hesitate to contact me if you have additional questions.

Sincerely,
Kathleen M. Brody, Program Analyst

March 14, 1988

Marty Simpson
Smoot Grain Co.
P.O. Box 320
Salina, KS 67402-0320

Dear Mr. Simpson:

This is in response to your February 19, 1988 letter requesting a clarification concerning the exemption to the definition of hazardous chemical under 40 CFR 370.2 concerning a "fertilizer held for sale by a retailer to the ultimate Customer."

Your question was directed at whether or not anhydrous ammonia held for sale as a fertilizer in a small country elevator is exempt, since it is classified as an "extremely hazardous substance." Under 370.2 the exemptions to the definition of hazardous chemical apply to extremely hazardous substances. Therefore, under these regulations, anhydrous ammonia to be used as a fertilizer and held for sale to the ultimate customer is exempt from reporting under Sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986 (SARA).

You mention that the Colorado Department of Health contends that extremely hazardous substances should be reported regardless of the exemptions. Under Title III of SARA, if a State or local government desires additional information, it may require such information to be submitted under State or local law. A member of the Environmental Protection Agency (EPA)-Regional Office Staff consulted with the Colorado Department of Health and learned that this information is desired under State law. While the information is not required by federal regulation, I encourage you to cooperate with the Colorado request in order to make the State program successful.

I hope this information is helpful to you. Please do not hesitate to contact me again if I can be of further assistance.

Sincerely,
Kathleen Brody, Program Analyst

March 24, 1988

Karl F. Birns, Program Manager
Right-to-Know Program
Bureau of Air Quality and Radiation Control Department of Health and Environment
Topeka, Kansas 66620-0001

Dear Karl:

This is in response to your March 9, 1988 letter requesting clarification regarding the exemption in Section 311(e) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) for substances "used in routine agricultural" operations.

With regard to any hazardous chemicals used directly in routine agricultural operations, your letter correctly states that the end user is exempt from reporting. However, fuels for driving farm equipment or heating buildings associated with agricultural operations are also considered to be covered by this exemption.

I realize that the second interpretation represents a change from information which was provided to you by the Hotline staff. This policy clarification has been concurred in by EPA's Office of General Counsel and the Hotline staff have been informed.

Please call me at (202) 260-8353 if I can be of further assistance.

Sincerely,
Kathy Brody, Program Analyst

March 28, 1988

Mr. John J. Shay, Director
McHenry County Emergency Services and Disaster Agency
2200 N. Seminary Avenue
Woodstock, IL 60098-2639

Dear John:

In response to your letter of March 9, 1988, requesting information on applicability of the Emergency Planning and Community Right-to-Know Act, (Title III) to State and local government facilities, I offer the following:

- State and local government facilities are covered by the various provisions of Title III to the same extend that private facilities are covered.
- State and local government facilities are subject to the same enforcement remedies as private facilities, including fines and penalties.
- State and local government facilities which have extremely hazardous substances present at the facility in amounts in excess of the threshold planning quantities which have not already reported should report to the State Emergency Response Commission (SERC) and the Local Emergency Planning Committee (LEPC) that they are subject to the Act and they should identify a facility coordinator as quickly as possible.
- Most State and local government facilities are not part of the manufacturing sector, therefore they are not subject to the current reporting requirements in Section 311 and 312.

However, if they become subject to the Occupational Safety and Health Administration (OSHA) hazard communication standard when it expands in May, they would also be subject to these Title III reporting requirements as of August, 1988.

Since Section 313 covers facilities in the Standard Industrial Classification Codes 20-39, State and local government facilities would not be subject to that section of the Act at this time.

I hope this information responds to your concerns. If you have additional questions on these matters contact Kathy Bishop of my staff at (202) 382-7912 or for general Title III matters, our hotline at 800-535-0202.

Sincerely,
Jim Makris, Director, Preparedness Staff

March 29, 1988

Ms. Barbette Steiner
Wisconsin Furniture Industries, Inc.
P.O. Box 127
Ixonia, Wisconsin 53036

Dear Ms. Steiner:

This is in response to your February 12, 1988, letter regarding reporting requirements under Section 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986 (SARA). Most of your questions refer to issues which are under the jurisdiction of the Occupational Health and Safety Administration (OSHA). It is my understanding that they are responding to you through Senator Proxmire's office concerning those issues.

I have been informed by OSHA that wood dust is not exempt under their exemption for "wood or wood products," which is included on the instructions for the Tier I and Tier ll forms. Therefore, wood dust is reportable under Section 311 and 312 of SARA. Since, it is not included on the list of extremely hazardous substances, the applicable threshold is 10,000 pounds.

I hope this information is helpful to you.

Sincerely,
Jim Makris, Director, Preparedness Staff

April 4, 1988

Mr. Toby A. Threet
Legal Department, The Dow Chemical Company
Willard H. Dow Center
Midland, Michigan 48674

This is in response to your letter to Cathy Fehrenbacher requesting written confirmation of your telephone conversation regarding interpretation of "ambient temperature" as used in the storage codes on the Tier II form for reporting under Section 312 of the Superfund Amendments and Reauthorization Act of 1986 (SARA).

In general "ambient temperature" is interpreted to mean that the material is stored at a temperature that is within the range of temperatures of the surrounding area. The three scenarios which you describe in your letter would be appropriately categorized as "ambient temperature."

I hope this information is helpful to you. Please contact Kathy Brody of my staff at (202) 475-8353 if you have additional questions.

Sincerely,
Jim Makris, Director, Preparedness Staff

April 11, 1988

SUBJECT: Transportation Exemption and Title III
FROM: Cheryl Mack, 6C-G
THRU: Harless R. Benthul, Chief State Programs and General Law Branch, 6C-G
TO: Rosemary Henderson, Contingency Planning Group, 6E-EP

This memo responds to your memo of March 21, 1988, and confirms the information we discussed on March 24. You asked for answers to four questions concerning the Section 327 transportation exemption in Title III of SARA, 42 U.S.C. §§ 11047. Each of the questions is repeated below with the response following.

Will the exemption under Section 327 cover transportation terminals under Sections 311 and 312 provisions after the OSHA expansion?

The Section 311 and 312 reporting requirements apply to those facilities required to have available an MSDS for a hazardous chemical under OSHA regulations, 42 U.S.C. §§11021, 11022. Presently those facilities are limited to the manufacturing sector, SIC Codes 20-39 (see 29 CFR 1910. 1200(b) (1987)). On August 24, 1987, OSHA published a final rule amending its regulations to require all employers, both in the manufacturing and non-manufacturing sectors, to comply with the MSDS requirements, 52 Fed. Reg. 31,852 (1987). The effective date of this requirement is May 23, 1988. Transportation terminals are included in SIC Codes 40-49 and will be required to comply with the OSHA MSDS standards and therefore the Section 311 and 312 reporting requirements.

The transportation exemption in Section 327 applies to substances being transported and not to particular facilities. Therefore transportation facilities would not be exempt from the 311 and 312 reporting requirements. However, substances present at a terminal which are being transported or stored incident to transportation would be exempt from Title III reporting requirements under Section 327. Chemicals used or stored at the terminal in excess of the threshold quantities established pursuant to Sections 311(b) and 312(b) which are not in the stream of transportation would require Section 311 and 312 reporting.

Although materials in pipelines are excluded from reporting requirements under Section 327, are not pipelines themselves required to be reported under Section 301?

Section 303 requires the local emergency planning committee (LEPC) to prepare a comprehensive emergency response plan, 42 U.S.C. § 11003. The plan must identify likely transportation routes for extremely hazardous substances. The LEPC must, therefore, identify and consider pipelines used for the transportation of extremely hazardous substances when preparing the emergency response plan. The transportation exemption in Section 327 does not apply to this Section 303 requirements because Section 327 applies to the substances being transported, not transportation routes or facilities (i.e. a pipeline) and because Section 303 explicitly requires identification of transportation routes in the emergency response plan.

Section 302 requires an owner or operator of a facility with an extremely hazardous substance present in excess of the threshold planning quantity to notify the State emergency response commission (SERC) that the facility is subject to the emergency planning requirements of Title III, 44 U.S.C. § 11002. Section 303 requires the facility to notify the LEPC of a facility representative and of any relevant changes at the facility. Sections 302 and 303 do not require the facility to notify/report pipeline routes to the LEPC or SERC. However, Section 303 requires the owner or operator to provide information for preparation of the emergency plan to the LEPC upon request. Therefore, the facility, if requested, would be required to report pipeline routes to the LEPC.

Are all hazardous materials exempt from reporting while in transit trucks pipelines, railcars, warehouses, etc?

Yes, Section 327 exempts any substance which is in transportation, including storage incident to transportation, from the requirements of Title III (excepting the emergency notification requirement of Section 304, 42 U.S.C. § 11004). There are hazardous materials while transported by trucks, pipelines, and railcars are clear exempt from the reporting requirements of Sections 311, 312, and 313. A substance stored incident to transportation in a warehouse also falls within the Section 32 exemption.

Title III does not define the term storage incident to transportation used in Section 327. Where a statute is ambiguous or unclear, consideration of the legislative history to determine legislative intent is permissible. The legislative history of Title III gives clear indication of Congress' intent when using the phrase:

The exemption relating to storage [incidental to transportation] is limited to the storage of materials which are still moving under active shipping papers and which have not reached the ultimate consignee. . . For example, storage of materials in railcars or in motor carrier warehouses would be exempt from the requirements of Title III (other than emergency notification) if the materials were under active shipping papers.

H.R. Conference Rep. No. 962, 99th Cong., 2d Sess. 307, reprinted in 1986 U.S. Code Cong. & Ad. News 3276. Therefore, warehoused substances which are under active shipping papers and which have not reached the consignee are exempt from Title III reporting requirements. (The Section 304 emergency notification requirement is not included in the exemption.)

Are transporters ever required to report their cargo to the towns through which they pass?

Under Title III, transporters are only required to report their cargo in the case of a release. These notification requirements are found in Section 304. Individual states may have transporter reporting requirements which are beyond the scope of Title III.

April 14, 1988

Lawrence M. Sontoski
Safety & Health Advisor, Radian Corporation
5101 W. Beloit Road
Milwaukee, Wisconsin 5321

Dear Mr. Sontoski:

This is in response to your recent inquiry concerning reporting under Sections 311-312 of the Superfund Amendments and Reauthorization Act of 1986 (SARA).

Your letter mentions the term "article" which is actually defined under the OSHA Hazard Communication Standard. The reporting and inventory requirements of Sections 311 and 312 apply to the owner or operator of any facility that is required, under the Occupational Safety and Health Act of 1970 and its implementing regulations, to prepare or have available a material safety data sheet (MSDS) for a "hazardous chemical." Thus, items exempt from OSHA's Hazard Communication Standard (HCS) are likewise exempt from the reporting requirements of Section 311 (e)(2)'s exemption for "any substance present as a solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions of use."

Despite similarities in language, EPA interprets Section 311(e)(2)'s exemption for solids in any manufactured item to be broader than OSHA's exemption for "articles." OSHA defines "articles" as manufactured items which have end use functions dependent upon the specific shape or design into which the item is formed during manufacture and "which does not release, or otherwise result in exposure to a hazardous chemical under normal conditions of use." OSHA interprets the phrase "under normal conditions of use" to include all uses of the item as the item is moved from facility to facility in a particular processing chain. Thus if the use of an item has the potential to expose downstream employees in a different facility to a hazardous chemical, the manufacturer must prepare and have available in MSDS for that item, even if the manufacturer's own use of the item in its own facility does not have the potential to expose its own employees to hazardous chemicals.

Although the phrase "under normal conditions of use" is also employed in subsection 311(e)(2)'s additional exemption to Sections 311 and 312's reporting requirements, EPA does not interpret the phrase to have the same expanded meaning as it is given by the OSHA definition of "article." EPA intends to limit the term "use" to use of the item within a particular facility. The term "facility" is defined in Section 329 of the Emergency Planning and Community Right-to-Know Act. Thus, under this interpretation of subsection 311(e)(2), substances present as a solid in any manufactured item are exempt from Sections 311 and 312's reporting requirements if the normal use of the substance within the facility does not result in exposure to a hazardous chemical. This is so, even if the owner or operator is not eligible for the article exemption to OSHA's HCs because downstream users of the item are potentially subject to exposure to a hazardous chemical during their normal use of the item.

The difference between EPA's and OSHA's interpretation of the phrase "under normal conditions

of use" is explained by the specific purpose of OSHA's HCS in the field of occupational safety. OSHA adopted an expanded interpretation of the term "use" to encompass the operations of downstream users at different facilities in order to ensure that downstream employees are informed of the hazardous chemical contents of manufactured products of which they may otherwise not be aware. In rejecting OSHA's expanded interpretation of term "use" in subsection 311(e)(2), EPA believes that Congress did not directly incorporate in Sections 311 and 312 this occupational safety objective of passing on to downstream employees valuable information concerning chemical contents. Under Sections 311 and 312, hazardous chemicals at the worksite are reported to state and local government officials and the information made available to the public. The purposes of Sections 311 and 312 reporting are to inform the local community of the presence of chemicals that could potentially cause a release and that thus merit public concern. Considering this purpose, EPA does not believe that Congress intended local communities to be notified of the presence of hazardous chemicals that raise no potential for release as they are used In that particular community.

With this introduction in mind, following are the answers to your questions concerning reporting under Sections 311 and 312. The answers assume that you are required to prepare or have available an MSDS under the OSHA standard.

(1) Steel, brass and other metals which are present at a facility and exposure to the hazardous chemical does not occur under normal conditions of use do not need to be reported.

(2) Only the portions of the metal stock which are cut, welded, brazed so as to present exposure to hazardous chemicals need be reported. For example, if there are 12,000 pounds of steel present at one time at a facility but only half of this steel undergoes a welding process at any time, the reportable portion is below the 10,000 pound threshold established for the first two years of reporting and would not be reported.

(3) The portion of stock metals material which is modified and exceeds 10,000 pounds at any time must be reported.

(4) The gaseous or particulate emission created by cutting, welding, or brazing is covered by reporting of the metal as indicated above.

(5) In determination of quantity for threshold purposes, a facility is required to include total quantity of a hazardous chemical at any time.

(6) With regard to reporting of metal stock, a facility has the choice of reporting by mixture or hazardous components. If the latter is chosen, you should aggregate the quantity of hazardous components present in all mixtures.

(7) & (8) Your questions concerning interpretation of the article definition as it relates to plastics and rubbers must be answered based on "exposure" information. The general remarks in this letter should assist in these determinations.

I hope this information is helpful to you.

Sincerely,
Jim Makris, Director, Preparedness Staff

April 19, 1988

Clifford M. Cantrell
Salient Corporation, Management Consultants
Suite 257, 3277B Roswell Road NE
Atlanta, Georgia 30305

Dear Mr. Cantrell:

This is in response to your March 7, 1988 letter requesting a policy clarification under Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA).

I am enclosing a Title III Fact Sheet which outlines criteria for industry reporting requirements. In answer to your question about an importer's reporting requirements, there is no specific exemption for "importers." However, I can clarify that the hazardous chemicals which you describe as being under "active shipping orders" are considered to be exempt, except under Section 304 of Title III. This is an interpretation of the transportation exemption included in Section 327 of the law. We would be happy to provide additional clarification and respond to any specific questions you have about the reporting requirements.

Kathy Brody of my staff at (202-475-8353) will be happy to assist you.

Sincerely,
Jim Makris, Director, Preparedness Staff

May 11, 1988

Karl Birns
Director of Community Right-to-Know
Kansas Department of Health and Environment, Forbes Field
Topeka, Kansas 66620-0001

Dear Karl:

Thanks for your letter of March 23, 1988. Again, I must apologize for the delay to responding. Our response reflects our common sense position with regard to the questions you have raised. As I am sure you realize, the twists on this piece of legislation can be endless and the answers are often not clearly apparent from a narrow legalistic approach. Many of these types of questions can be better addressed in a discussion of the issues rather than in response to a set of black and white questions. I hope you feel free to contact me or my staff at any time to discuss these types of Issues.

In response to the question about ammonia tanks, please note that tanks of ammonia while in transit on the highways and byways of the community from the supplier to the farm facility are in transportation and no reporting is required. However, Local Emergency Planning Committees (LEPC) would likely benefit from information on such common transportation routes and we encourage the kind of information sharing and planning for potential incidents that you mentioned occurs in Kansas. However, once the tank arrives at the facility (its destination), it is no longer in transportation and becomes present at a facility. Only if the tanks were under "active shipping papers" (the requirement laid out in the preamble to the regulations published in April, 1987) might the presence of the tank at the site be storage incident to transportation, and thus exempt from the reporting requirement.

When the LEPC is notified about the identity of the facility coordinator, the facility owner or operator may wish to note that the chemical which subjects them to this reporting provision is ammonia and that it is present at the facility only for short periods of time, at certain times of the year. This information may reduce the need for the LEPC to contact the farmer and to expend resources to determine how important the facility is from an emergency planning standpoint. This one notification is all that is required of the owner or operator of the farm by this section of the Act. As previously stated, it is then up to the local committee to determine whether this facility is a priority for emergency planning activities. This determination is fully within the control of the LEPC, but this does not mean that the LEPC is determining what chemicals and what quantities must be reported, nor are they interpreting time frames for reporting purposes. It is around this issue that we suspect that the confusion arose from Mr. Tuggle's conversation with Mr. Rob Costa of the Environmental Protection Agency (EPA) Hotline.

With regard to the question raised about the effect of the statutory (not regulatory) definition of a facility on farms or farm operations, we would suggest a common sense approach to this provision. A literal reading of the definition requires that the parcels being farmed must be either a single site, a contiguous (touching) site or adjacent (next to with no other intervening farming field) site. This could be interpreted to mean that outlying farm fields would be

separate facilities with separate reporting thresholds and requirements. This reading could not serve the purposes of the statute. A farmer using Extremely Hazardous Substances (EHS) in farming operations should report once for all sites under the farmer's control. As the statute does not specify a format for the notification, a single notification identifying any noncontiguous or nonadjacent parcels under the farmer's control where EHSs are present would constitute full notification under the statute.

As for the ammonia applicator, he or she would have to provide notice to the SERC and LEPC if the facility operated by the applicator (e.g., the local agriculture chemical supply store) has present Threshold Planning Quantities of Extremely Hazardous Substances. As in the farm situation mentioned above, it is up to the LEPC to determine the need for additional information from the facility and the priority for emergency planning.

As we have stated in the past, we do not believe these reporting requirements are onerous, nor do we believe that substances such ammonia can be completely ignored In the planning process. However, as planning is a local responsibility, the priority which is placed upon planning for a release of ammonia is a local decision to be determined by the LEPC, once the covered facilities have provided the LEPC with the required information. It is the State's Job, with EPA and other Federal agency support, to provide training and technical assistance to the LEPCs to enable them to make thoughtful and appropriate decisions about planning priorities in order to further public health and safety and the protection of the environment.

With regard to Sections 311 and 312, the key to these sections is whether or not a Material Safety Data Sheet (MSDS) is required to be available under the expanded Occupational Safety and Health Administration (OSHA) Hazard Communication Standard. Since your questions are primarily directed at the OSHA expansion, I believe that it 15 best that you discuss with OSHA any farm exemptions under the Hazard Communication Standard. It is our understanding that OSHA has an exemption from the Standard for farms with 10 or fewer employees, and that less than 40,000 out of a potential universe of 2.2 million farms will be covered by the expansion. With regard to hazardous chemicals for which a Material Safety Data Sheet (MSDS) may be required but which are not used in routine agricultural operations, the definition of hazardous chemical in CFR 370.2 excludes "any substance to the extent it is used for personal, family, or household purpose..." It would appear that propane for home heating and other such chemicals used in nonroutine agricultural uses could be excluded from Title III's definition of hazardous chemicals under this exemption. Propane used for barn heating would be considered an agricultural use.

I hope this responds to the concerns you have raised. Again, if you need further clarification of these issues, please do not hesitate to call.

Sincerely,
Jim Makris, Director, Preparedness Staff

May 13, 1988

Mr. Jorge H. Berkowitz, Ph.D.
Director, Department of Environmental Protection
State of New Jersey, Division of Environmental Quality
CN 027, Trenton, New Jersey 08625

Dear Jorge:

Thank you for your letter regarding the Impact of the Emergency Planning and Community Right-to-Know Act (Title III of SARA) and the Occupational Safety and Health Administration (OSHA) Hazard Communication Standard expansion on farmers. Your understanding of the Act with regard to farmers after the OSHA expansion takes effect is essentially correct, with the following clarifications.

Complying with the emergency notification requirement (Section 302) is simply a matter of notifying the State Emergency Response Commission (SERC) that the farmer is covered by this provision. In addition, he must identify a representative who can be contacted, if needed, for further information regarding Extremely Hazardous Substances and other chemicals used at the facility for use in emergency planning.

Section 304 requires State and local reporting of CERCLA (Superfund) hazardous substances or Extremely Hazardous Substances (EHS) unless the release results in exposure to persons solely within the boundaries of the facility. In order to fully and completely comply with this provision, we recommend that a report be made whenever there is the potential for off-site exposure, rather than waiting to determine whether anyone off-site has in fact been exposed. Further, releases under this Section specifically exclude the normal application of fertilizer and the application of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) registered pesticides when used in accordance with its intended purpose. Thus, for farmers, releases would generally be spills, leaks or other accidental or unintended releases of farm chemicals. However, you may wish to note that the separate requirement for reporting under Section 103 of CERCLA does not have an exemption for on-site releases. Releases of substances above the Reportable Quantity (RQ) and listed as hazardous substances under that Act must be reported to the National Response Center (NRC). Currently, about one-third of the EHSs are also listed as CERCLA hazardous substances. The remainder are to be listed in the near future.

With regard to Sections 311 and 312, your letter is essentially correct. The "Key" to these sections is whether or not an MSDS is required to be available under the OSHA Hazard Communication Standard. With the recent changes in the standard, I believe it is best if you contact OSHA to ensure complete understanding of any exemptions which apply to farms and hazardous chemicals typically used at farms. The definition of hazardous chemical in CFR 370.2 excludes "any substance to the extent It is used in routine agricultural operations." With regard to an interpretation of "routine agricultural operations" the following excerpts are from the preamble to the final rule on Sections 311 and 312. The term "agricultural" is a broad term encompassing a wide range of growing operations, not just farms and includes nurseries and other horticultural operations. The exemption applies only to substances stored or used by the

agricultural user.

Enclosed is a Question and Answer Fact Sheet which specifically addresses the farm issue in the context of all of Title III and provides further clarification of applicability of Title III to farmers. I hope this information assists you in explaining the requirements of Title III to New Jersey farmers. If we can provide any further information or assistance, please let me or Kathleen Bishop of my staff (202-382-7912) know. You may also contact Bruce Sprague, Regional Preparedness Coordinator in Region II at 201-321-6656 for technical assistance regarding the applicability of Title III.

Thank you for your interest and support in this program.

Sincerely,
Jim Makris, Director, Preparedness Staff

May 24, 1988

Gregory S. Vogel
Radian Corporation
5101 W. Beloit Road
Milwaukee, Wisconsin 53214

Dear Mr. Vogel:

This is in response to your May 2, 1988 letter regarding record keeping requirements under Sections 311, 312, and 313 of the Superfund Amendments and Reauthorization Act of 1986 (SARA). At the present time, there are no federally regulated record keeping periods for Sections 311, 312, and 313 information which apply to the State Emergency Response Commission, the Local Emergency Planning Committee and consultants. However, record keeping requirements are subject to State and/or local law.

I would like to call your attention to record keeping requirements established for persons subject to Section 313 of SARA at 40 CFR Part 372, Section 372.10, February 16, 1988. The retention period is three years from the date of report submission.

Please do not hesitate to call the Title III hotline at 1-800-535-0202 if you need further clarification.

Sincerely
Jim Makris, Director, Preparedness Staff

May 24, 1988

Honorable Hal Daub
House of Representatives
Washington, DC 20515

Dear Mr. Daub:

Thank you for your inquiry of April 29, 1988 requesting information on the Emergency Planning and Community Right-to-Know Act (Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA)) pertaining to reporting requirements related to agricultural activities.

There are four major reporting requirements under Title III: emergency planning notification (Section 302); emergency release notification (Sec. 304); community right-to-know (Sec. 311 material safety data sheets and Sec. 312 emergency and hazardous chemical inventory forms), and toxic chemical release forms (Sec. 313 "emissions inventory"). Each reporting provision has different requirements for chemicals and facilities covered. Due to this complexity in the statute itself, each section must be read carefully to understand the chemicals covered and the facilities to which each section applies.

Agricultural facilities may be subject to some of the requirements of Title III, however, there are also exemptions which will minimize the impact on these facilities. We have enclosed a Question and Answer Fact Sheet to answer common questions regarding the implications of Title III for farm operations. This Fact Sheet is designed to answer the type of question raised by your constituent regarding the impact of Title III. A review of this document, we believe, will show that the actual reporting requirements under Title III pose a minimal burden for farmers, and that this burden addresses the very worthwhile goals of achieving community preparedness and awareness of chemical hazards.

We recognize that Title III requires certain groups that have previously not considered themselves to be part of the "regulated community," to submit information for planning and response purposes (e.g., farmers, small businesses, State and local public facilities). It is not our intent to place undue burdens on any of these groups in making notifications. Instead, the law and regulations are designed to provide local officials with the minimum amount of information necessary to develop the comprehensive emergency response plans that table III requires, and to provide the public access to information on toxic chemicals used in their community. An added benefit is that first responders will have access to information about hazardous materials that will enable them better to protect themselves, and the community in the event of a chemical emergency.

Please note that we are unaware of any video prepared by the Environmental Protection Agency (EPA) which places the responsibility for establishing local emergency planning committees on local agricultural chemical dealers. The statute clearly places the responsibility on the State Emergency Response Commission to designate planning districts and appoint, supervise and coordinate local planning committees. Of course, the success of these committees will depend to

large degree on broad-based community participation in the planning process.

For assistance regarding any of these requirements, the public may contact EPA's Emergency Planning and Community Right-To-Know Information Hotline at 1-800-535-0202 (in Washington, DC at (202) 479-2449). I am also enclosing a general Fact Sheet on Title III, and a copy of the rulemaking on emergency planning and release notification (Secs. 302-304) which includes the list of extremely hazardous substances.

We appreciate this opportunity to respond to your request. Please contact me or Jim Makris, Director, Preparedness Staff (475-8600) if you have any additional questions or concerns.

Sincerely,
J. Winston Porter, Assistant Administrator

May 27, 1988

Ann B. Wall
Director, Right To Know Division, Department of Labor
214 West Jones Street
Raleigh, N.C. 27603

Dear Ms. Wall:

This is in response to your May 16, 1988 letter and to confirm our recent telephone conversation regarding coverage of nonmanufacturing facilities under Sections 311 and 312 of Title III of Superfund Amendments and Reauthorization Act of 1986 (SARA).

As we discussed, nonmanufacturing facilities were not required to comply with the requirements of Sections 311 and 312 of SARA in October, 1987 and March, 1988. Even in States where an Occupational Safety and Health Administration (OSHA) State plan has expanded coverage to the nonmanufacturing sectors, Title III is not affected. According to representatives of OSHA, the State standards do not become Federal standards when the plan is approved. Thus, Sections 311 and 312 did not apply to nonmanufacturing facilities because the Occupational and Safety and Health Act and its implementing regulations did not apply.

Please feel free to call me at 202-475-8353 if you have additional questions. I would also be happy to arrange a conference call with my counterparts at OSHA and you, if you wish.

Sincerely,
Kathleen Brody, Program Analyst

June 6, 1988

Mr. Len Lenard, President
Environmental Consultation and Training, Inc.
2100 Hwy. 360, Suite 1500 A
Gran Prairie, TX 75050

Dear Mr. Lenard:

Thank you for your letter with regard to the reporting requirements under The Emergency Planning and Community Right-to-Know Act (Title III). The law provides an exemption from inventory reporting by transportation facilities and from storage incident to transportation, if the shipment is under active shipping papers. This exemption applies to all of Title III, except for emergency release notifications under Section 304. However, it would not apply to tank car storage which is not under active shipping papers. While this provision may exempt the railyard from procedural requirements, it is not intended to exempt transportation from involvement with the planning process. Indeed the law requires that transportation be represented on the Local Emergency Planning Committee (LEPC) and that routes likely to be used for transportation of extremely hazardous substances be identified in the local emergency response plan.

While you indicate that all requests from the LEPC have been denied by the railroad, it may be that the requests have not been received by appropriate parties or that they have not understood the scope of your request. Title III clearly contemplates that the local emergency response plan should include consideration of transportation emergencies. We would recommend that the LEPC make contact with the manager of the facility to try to discuss the mutual benefit that can be obtained by cooperation. Clearly, the railroad would expect the locality to respond in the event of an emergency. In that event, the facility needs to provide the LEPC with sufficient information to enable them to plan for a response. While the facility may not be able to provide accurate, daily amounts of chemicals stored or moving through the community, they should be able to advise the committee on the types and estimated amounts of chemicals handled through the yard and to assist the LEPC in developing an emergency plan for those types of chemicals. If the local facility is not willing to meet and discuss these types of issues with the LEPC, then it may be advisable to contact the railroad headquarter's office of government relations to try to obtain more cooperation. Given the potential tort liability of a facility in the event of an accident, they may be most interested in such cooperation to reduce the risk of injuries and damages in the community.

Finally, I would note that under Section 302(b)(2) of Title III, the Governor of a state or the State Emergency Response Commission (SERC) has authority to designate additional facilities which would be subject to the emergency planning provisions of the Act. If the efforts suggested above do not prove successful, you could contact the Texas SERC to discuss the possibility of such a designation.

I hope this information is helpful. If you need further assistance, you may contact Minnie Rojo, the EPA Regional Preparedness Coordinator in Dallas, Texas at (214) 655-2270 or Robert Lansford, the state coordinator for the Texas Division of Emergency Management (for the Texas

SERC) at (512) 465-2138.

Sincerely,
J. Winston Porter, Assistant Administrator

June 10, 1988

Ms. Pat Castillo
Councilmember, City of Sunnyvale
456 West Olive Avenue
Sunnyvale, California 94086

Dear Ms. Castillo:

Lee Thomas has asked me to respond to your recent letter of May 23, 1988. As Director of the Preparedness Staff which has responsibilities for coordinating the Emergency Planning and Community Right-To-Know program implementation, I have been keenly aware of the issue of equivalency of State ant local laws with the specific requirements under this Federal statute.

I would like to commend Santa Clara County for recognizing early the need to ensure effective planning for and prevention of chemical accidents and for establishing a comprehensive ordinance. This ordinance addresses the necessity for all affected parties--emergency and environmental personnel, health and medical officials, public interest groups, as well as business and industry officials--to work together. Your program has served as a model for other local communities as well as the development of State laws and programs.

It is clear that Congress intended the Emergency Planning and Community Right-To-Know Act (Title III) to establish a uniform set of national standards to ensure adequate protection of human health and the environment from chemical accidents across the United States. Many States, including California, had chemical emergency right-to-know programs, but they differed widely in quality and content. Because of this diversity, Congress believed the national standards should be regarded as minimum standards upon which the States and localities could build. These States had similar concern over conflicting requirements, but like California, they have been working diligently to accommodate the Federal requirements. In most cases, they have been successful.

As you know, the Environmental Protection Agency's Regional Title III Staff, under the direction of Kathleen Shimmin, are most active in working with the State of California as well as local and regional officials to adjust State sent local programs to ensure effective implementation of Title III. Evelyn Wachtel has been instrumental in keeping us informed of activities in California and the Region has provided technical assistance to Santa Clara County in assessing gaps and overlaps of Title III with your ordinance, as well as facilitating the County's effort in conducting a simulation exercise.

I am concerned, however, that based on your comparison of Federal, State and local requirements related to chemical emergency right-to-know requirements, it is clear there is still duplication and overlap of these requirements which have not yet been resolved. We want to work with you to resolve each issue you have highlighted.

I have provided Kathleen with your letter and have asked her to develop recommendations for solving the problems you raised. I have also suggested that we meet with you and with the State

of California at the earliest convenience to discuss these issues more fully and to offer our recommendations to Santa Clara and to the State.

I am concerned that this be resolved as quickly and as effectively as possible in order that we all may continue the difficult work involved in our efforts at all levels of government. Clearly, we share a common goal to provide adequate protection of our citizenry and the environment from chemical accidents. We must now continue to work toward ensuring that this goal is attained in a timely and effective manner.

Sincerely yours,
Jim Makris, Director, Preparedness Staff

June 16, 1988
Major Joseph J. Craparotta
Deputy State Director, Office of Emergency Management
Department of Law and Public Safety
West Trenton, NJ 08628-0068

Dear Major Craparotta:

Your inquiry to Region II of the Environmental Protection Agency (EPA) regarding membership in the Local Emergency Planning Committee (LEPC) has been referred to my office for response. With regard to this issue, there are no hard and fast rules. The statute does require, at a minimum, that representatives of the groups listed in your letter be included. However these groups are not delineated in the statute in the manner you have listed them. The Congress clearly intended broad-based representation on LEPCs and each individual category should be represented. There are at least twelve and perhaps as many as fifteen categories of groups who should be represented on an LEPC, not the five groups that your letter assumes. Federal guidance on this issue was provided in March, 1987 as part of the Hazardous Materials Emergency Planning Guide (NRT-1), see page 13.

In determining who will meet the requirements of the statute, the first priority should be in meeting the purpose of the statute: that the LEPC represent a broad cross-section of the community. Each representative of the listed categories can bring unique and valuable perspectives to the planning process. Without this variety of cooperation and dialogue, the planning process will be inhibited and less likely to be comprehensive and complete. While single individuals may represent more than one category, they must have the relevant background because of experience, training or other unique qualification that would make them appropriate for each category they would be representing.

With regard to the broadcast and print media representatives, it would of course be preferable to have people actively involved in these media areas. This would not necessarily require reporters or on air personalities, but could include publishers, editors, producers, program managers and other types of individuals involved in the operation of a newspaper, magazine or broadcast facility. The representatives could also include individuals who were formerly involved in this area, or in some cases, public relations or public affairs staff with substantial experience dealing with the media in either government or private firms. However, the individual selected must be able to provide the committee with the perspective and advice that would be relevant to media communication of the issues the LEPC must deal with in the planning process, in the event of a response action, or in communicating and reducing the risks of chemical hazards in the community.

I hope this information is helpful in complying with the requirements for appointing the LEPCs and that it responds to your inquiry.

Sincerely,
Jim Makris, Director, Preparedness Staff

June 17, 1988

Ms. Merriwood Ferguson
LEPC Public Awareness Committee
95 Poinciana, #137
Brownsville, TX 78521

Dear Ms. Ferguson:

Thank you for your letter of May 24, 1988. As the issue you have raised relates to rulemaking under Section 302 of the Emergency Planning and Community Right-to-Know Act (Title III), your letter has been referred by the Office of Pesticides and Toxic Substances to my office for response.

While the Environmental Protection Agency (EPA) did delist pentachlorophenol from its listing of Extremely Hazardous Substances (EHS), this delisting does not indicate that the chemical is not hazardous. Rather, it indicates that the chemical does not meet the criteria for acute toxicity on which the list is based. The Chemical Emergency Preparedness Program (CEPP) was developed as a voluntary program to alert communities to chemical hazards that might require a coordinated and knowledgeable response in the event of an accident. In creating the program, it was determined that a list of chemicals around which communities could focus their attention would assist in emergency planning and preparedness. After identifying acutely toxic criteria, EPA, using data available from the Registry of Toxic Effects of Chemical Substances (RTECS), developed a list of 379 chemicals which met that criteria. In addition, we included twenty-six "other chemicals" because their high production capacity combined with their acute toxicity made them chemicals of concern to emergency preparedness and response. The purpose of the CEPP list was to provide guidance to communities for priorities in planning around hazardous chemicals. The list was not intended to be a definitive list of all hazardous or even very hazardous substances.

In 1986, the U.S. Congress incorporated the CEPP list into Title III. As a result of updated information in RTECS, when EPA published the EHS list in November, 1986 it proposed to delist certain chemicals included in the original CEPP list because of errors in some of the RTECS data. Pentachlorophenol was one of forty chemicals for which scientific evidence showed that it did not in fact meet the acute toxicity criteria for the EHS. While the chemical does not meet these criteria, it is still a hazardous chemical and is included in the list of hazardous substances under the Comprehensive Environmental Response, Compensation~ and Liability act of 1980 (also known as CERCLA or Superfund). As such, releases of the chemical in excess of 10 pounds must be reported to the National Response Center under Section 103 of CERCLA and to the State Emergency Response Commission (SERC) and the Local Emergency Planning Committee as required by Section 304 of Title III. The chemical would also be a hazardous chemical under the definition of the Occupational Safety and Health Administration's Hazard Communication Standard and therefore reportable under Sections 311 and 312 of Title III, if the facility is required to maintain MSDSs under the OSHA requirements and the facility has quantities in excess of 10,000 pounds. Furthermore, the chemical is listed under Section 313 of Title III as a toxic chemical for which annual emissions reporting is required from covered

facilities.

The emergency planning process is not limited to the EHSs. Rather, the Section 302 list is designed to assist the LEPC in establishing priorities for planning. If other chemicals not on the EHS list are of significant concern to a community, based upon either the amounts reported under other sections of the Act or upon information about spills or upon other locally determined criteria, the emergency plan may include planning for such facilities. If the LEPC needs information in order to complete the plan, and the facility is uncooperative, the SERC of the Governor may be asked to designate the facility as a Section 302 covered entity.

Please note that under Title III, there is an exemption for chemicals in transportation or stored incident to transportation (under active shipping papers). Based upon your letter, it is unclear whether this exemption is applicable to the situation about which you are concerned. While the planning process is intended to be comprehensive and is intended to cover transportation routes, the reporting requirements do not include these transportation facilities.

In conclusion, the delisting of pentachlorophenol should not have an adverse effect on the planning activities in your community. I hope this information responds to the questions you have raised.

Sincerely,
Jim Makris, Director, Preparedness Staff

June 22, 1988

Karl Birns
Right-to-Know Program, Bureau of Air Quality and Radiation Control
Department of Health and Environment
Forbes Field
Topeka, Kansas 66620-0001

Dear Karl:

This is in response to your April 29, 1988 letter concerning the reporting obligations of owners and operators of petroleum and gas exploration and drilling companies under Title III of the Superfund Amendments and Reauthorization Act (SARA), otherwise known as the Emergency Planning and Community Right-to-Know Act. Your letter requested our interpretation as to whether a temporary petroleum drilling site constitutes a "facility" for purpose of Section 302, 311, and 312 of the Act, and, if so, whether the reporting requirements of those provisions must be separately applied to each such facility.

First, unless the drilling operations are carried out on a single site or on contiguous or adjacent sites, each operation would be considered a separate facility under the Act and EPA's implementing regulations. Section 329(4) of the Act defines a facility as "all buildings, equipment, structures, and other stationary items which are located on an single site or on contiguous or adjacent sites and which are owned or operated by the same person . . ." 40 CFR 355.20 and 370. 2 incorporate this statutory definition as the regulatory definition of facility. The agency stated in the preamble discussion of an October 15, 1987 final rule that a nonadjacent warehouse would be considered a separate facility because the definition of "facility" includes only adjacent and contiguous property. 52 FR 38344, 38347. Neither the statute nor the Agency's implementing regulations grant an exception to these definitions for temporary drilling activities. Reporting the presence of extremely hazardous substances and hazardous chemicals at transient sites to local officials may be important to short-term contingency planning and to the public's awareness of the use of such substances in the community.

Second, while the owner or operator must comply with the relevant statutory and regulatory reporting requirements for each facility, the Agency does not believe that separate Section 302, 311 and 312 reports must be prepared for each facility owned or operated by one person. Title III does not require separate reporting for each facility. Rather, the statute and EPA's regulations require that local and state officials receive specified information about each facility. Section 302 requires that owners and operators of facilities at which a threshold planning quantity of an extremely hazardous substance exists, notify the State emergency response commission (SERC) and the Local emergency planning committee (LEPC) that the facility is subject to the Title III planning provisions. Similarly, Sections 311 and 312 state only that owner and operators of any facility subject to those provisions must submit their material safety data sheets (or a list of chemicals for which they have material safety data sheets) and inventory forms to the appropriate LEPC, the SERC, and the fire department with jurisdiction over the facility. In promulgating implementing regulations to these provisions, EPA did not elaborate upon the

reporting obligations of owners and operators of multiple facilities, but rather codified these statutory requirements. See 40 CFR Part 355 and 370. Thus Title III and EPA's implementing regulations appear to allow owners and operators to aggregate facilities when complying with the reporting obligations of Sections 302, 311 and 312, so long as these aggregate reports satisfy the informational requirements for each facility.

The statutory and regulatory requirements will necessarily limit the extent to which an owner or operator may prepare duplicate or generic forms or notifications to satisfy the reporting obligations for all of his or her facilities. An owner or operator of multiple facilities must assure that the SERC as well as each LEPC and fire department with jurisdiction over each of the owner or operator's facilities is provided with the emergency planning notification and the appropriate MSDS and inventory forms. Furthermore, the statute and regulations require that owners and operators report information specific to individual facilities. For example, when submitting a Tier I inventory form, the statute and EPA's implementing regulations require that the owner and operator provide the SERC and the appropriate LEPC and fire department with information that accurately reflects the maximum and average daily amount of hazardous chemicals present at a single facility. Unless the amounts are the same at each of the multiple facilities, the owner or operator who sends duplicate Tier I forms to the SERC and all applicable LEPCs and fire departments will not be in compliance with the Act or EPA's regulatory requirements.

In summary, while aggregate reporting by owners and operators of multiple facilities is permissible, it must still provide the relevant state and local authorities with the facility-specific information required by the Act and EPA's implementing regulations. The Agency believes that because of this limitation, generic reporting, (which, according to your description, involves one report containing the relevant information for several facilities with an accompanying list of facility sites and the dates on which they will be in operation), may be useful only to those owners and operators of multiple facilities that use the same hazardous chemicals in approximately the same amounts. From your description, petroleum drilling operations appear to be facilities at which the type of hazardous chemicals and their amounts will be substantially similar. Thus generic reporting may be appropriate and useful to the owners and operators of these facilities.

I hope that this explanation of multiple facility reporting is helpful. Please contact Kathy Brody at (202) 475-8353 if you have any additional questions.

Sincerely,
Jim Makris, Director, Preparedness Staff

July 12, 1988

Thomas L Nestor II
Assistant Director, Governmental and Regulatory Affairs
Florida Gas Transmission Company
P.O. Box 5100
Maitland, Florida 32751-5100

Dear Mr. Nestor

This is in response to your June 13, 1988 letter regarding reporting requirements under Title III of the Superfund Amendments and Reauthorization Act of 1986 for transportation of natural gas by pipeline.

Section 327 indicates that except as provided in Section 304, Title III does not apply to the transportation of any substance, including the transportation and distribution of natural gas. Since natural gas is not included on the list of extremely hazardous substances referred to in Section 302(a) and is not subject to the notification requirements under Section 103(a) of the Comprehensive Environmental Response and Liability Act (CERCLA) of 1980, it is not subject to Section 304 reporting requirements.

While natural gas transportation is not covered by the legal reporting requirements of Title III, we would suggest that your industry still has an important role to play in the planning process. Because of the highly volatile nature of natural gas and the potential catastrophe which might occur in the event of a pipeline leak, it is important for your company and industry to become involved in the planning process at the local level in order to prepare for eventualities which might occur. Notwithstanding the exemption from the reporting requirements, you can participate by naming a facility coordinator to work

with Local Emergency Planning Committees (LEPCs) in the states through which your pipelines flow. This coordinator can then assist the LEPC in making plans which recognize and deal with the potential hazards posed by pipeline ruptures.

Please do not hesitate to contact Kathy Brody of my staff at 202-475-8353 if you have additional questions on this matter.

Sincerely,
Jim Makris, Director, Preparedness Staff

July 15, 1988

Mr. John Gray
Senior Attorney, The Dow Chemical Company
2030 Willard H. Dow Center
Midland, Michigan 48674

Dear Mr. Gray:

This is In response to your letter to Administrator Lee Thomas concerning the Agency's listing of hydrogen chloride gas (HCl gas) as an extremely hazardous substance (EHS) under Title III of the Superfund Amendments and Reauthorization Act (SARA), otherwise known as the Emergency Planning and Community Right to Know Act. In your letter, you claimed that the Agency's listing of HCl gas as an EHS was invalid, or if valid, that the list of EHSs located at 40 CFR Part 355, Appendix A improperly assigned HCl gas a one pound reportable quantity (RQ). You requested that, if invalidly listed, that EPA delist HCl gas from the EHS list, or, if validly listed, that the Agency change the RQ of HCl gas to 5,000 pounds.

As you are aware, Section 302(a) of Title III requires that the list of EHSs used for emergency planning purposes under the Act be the same as the list of substances published in November 1985 by the Administrator of EPA in Appendix A of the "Chemical Emergency Preparedness Program Interim Guidance." This Guidance was developed under the auspices of the EPA's Chemical Emergency Preparedness Program (CEPP), a voluntary program to alert communities to chemical hazards that might require a coordinated and knowledgeable response in the event of a chemical accident. In creating the program, it was determined that a list of chemicals around which communities could focus their attention would assist in emergency planning and preparedness. Using data available from the Registry of Toxic Effects of Chemical Substances, the Agency identified acutely toxic criteria and developed a list of 379 chemicals which met that criteria. In addition, the Agency identified a list of 26 "other chemicals" which, while not meeting the acute toxicity criteria, could represent a substantial risk to the community in the event of a chemical accident because of their large production capacity and their acute lethality values. The 379 chemicals and the 26 "other chemicals" together comprised the list of chemicals in Appendix A of the CEPP Interim Guidance, and subsequently, the list of extremely hazardous substances published pursuant to Section 302(a) of Title III as Appendix A to 40 CFR Part 355.

It is the Agency's position that HCl gas was included in Appendix A of the CEPP Interim Guidance. Hydrochloric Acid was listed in Appendix A of the CEPP Interim Guidance as one of the 26 "other chemicals." Chemical Profiles were prepared for each of the chemicals on Appendix A and were incorporated by reference on page A-3 of Appendix A of the CEPP Interim Guidance. The Chemical Profile for Hydrochloric Acid, incorporated by reference on page A-3 of the Guidance, lists as synonyms for Hydrochloric Acid, "Anhydrous Hydrochloric Acid," "Aqueous Hydrogen Chloride," "Hydrochloric Acid Gas," and "Hydrogen Chloride," and lists the chemical formula for Hydrochloric Acid as "HCl." This formula is identical in the listed synonyms despite their various physical states. Also, the description of the physical/chemical characteristics includes the gaseous form of the chemical. Finally, the Chemical Abstract Services (CAS) number identifying the listed substance is identical for all forms of Hydrochloric

Acid. Thus HCl gas was clearly included under the listing of Hydrochloric Acid in Appendix A of the CEPP Interim Guidance.

Because HCl gas was included in the Appendix A list to the CEPP Interim Guidance, the inclusion of the gas on the list of EHSs promulgated under Section 302(a) of Title III was proper. The Agency determined that of the various forms and states of HCl, only the gaseous form was of high priority to the emergency planning purposes of Title III. Since the purpose of the Title III list is to provide guidance to communities for priorities in planning for hazardous chemical accidents, the Agency determined that listing all forms and states of Hydrochloric Acid would dilute efforts taken to prepare for accidents involving HCl gas. Therefore, rather than generically listing Hydrochloric Acid or HCl on the EHS list, the Agency specifically listed only HCl gas, (51 FR 41570, 41584 (November 17, 1986 Interim Final Rule)); (52 FR 13378, 13400 (April 22, 1987 Revised Final Rule)).

Although the Agency disagrees that HCl gas was improperly listed as an EHS, the Agency agrees that the RQ for HCl gas was improperly listed as one pound for emergency release notification purposes in its revised final rule, (52 FR 13378, 13400 (April 22, 1987)). As you know, under Section 304 of Title III, an owner or operator must notify state and local authorities upon the release of an EHS or a hazardous substance under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Such notification is triggered by the release of an RQ of the substance. RQs are assigned under CERCLA by rulemaking after notice and comment. EHSs which are not also CERCLA hazardous substances have an RQ by statute of one pound. As you noted, Hydrochloric Acid is a listed CERCLA hazardous substance and has been assigned an RQ of 5,000 pounds, (40 CFR Sec. 302.4 (Table 302.4)). It is the Agency's position that this RQ applies to the pure substance, Hydrogen Chloride, or HCl, which bears the same CAS Registry Number as Hydrochloric Acid, 7647-01-0. The RQs apply to all physical states of a given hazardous substance. Thus the 5,000 pound CERCLA RQ for HCl applies to its gaseous form, HCl gas.

Because the Agency incorrectly listed the RQ for HCl gas in its April 22, 1987 revised final rule, we intend to publish a technical correction to Appendix A to 40 CFR Part 355 to change the listed one pound RQ for HCl gas, to 5,000 pounds. I appreciate your bringing this technical error to the Agency's attention. However, you should be aware that, because the 5,000 pound RQ is inconsistent with the 500 pound threshold planning quantity (TPQ), the Agency may revise this RQ in a future rulemaking. EPA stated in the preamble to the April 22, 1987 revised final rule (52 FR 1 3378, 13392) that the TPQ for any given substance should not be lower than the RQ and that the Agency intends to resolve all inconsistencies between TPQs and RQs.

I hope that this explanation and the intention of the Agency to publish a technical correction to revise the RQ for HCl gas satisfies your concerns. If you have any additional questions or comments, please contact Jim Makris, Director of the Preparedness Staff (202) 475-8600.

Sincerely,
J. Winston Porter, Assistant Administrator

August 2, 1988

Mr. Frank S. Swain
Chief Counsel for Advocacy, U.S. Small Business Administration
1441 L Street, N.W.
Washington, D.C. 20416

Dear Mr. Swain:

Thank you for your July 1, 1988, letter which recommended that the Environmental Protection Agency (EPA) grant an exemption from the reporting requirements of Sections 311 and 312 of the Superfund Amendments and Reauthorization Act (SARA) for non-manufacturers whose only reportable chemicals under SARA are petroleum products in underground tanks.

We believe that the decision to grant an exemption should consider both the ramifications for the entities who receive and use Section 311 and 312 information as well as the desirability of reducing paperwork burden and potentially duplicative reporting. Since February, members of the Preparedness Staff have discussed this issue informally with State and local representatives and have received varied responses. Therefore, we believe that the issue deserves careful consideration.

EPA is in the process of initiating a survey of selected States to support the proposal of a permanent threshold for the third year of reporting. We intend to include questions regarding the substitution of the underground storage tank report data for Section 311 and 312 reports. If the results of that survey are positive, we will pursue this issue further with representatives of the local emergency planning committees and fire departments. We expect that a report on the survey will be completed by September 30, 1988.

We will be in contact with members of your staff in the next few weeks to provide them with a copy of the non-manufacturing sector threshold study which is near completion.

Sincerely,
J. Winston Porter, Assistant Administrator

August 2, 1988

Honorable Don Nickles
United States Senate
Washington, DC 20510

Dear Senator Nickles:

In response to the inquiry of your constituent, Eldon Burkett of Tulsa, Oklahoma, we offer the following information.

The Emergency Planning and Community Right to Know Act of 1986 (also known as Title III of the Superfund Amendments and Reauthorization Act) required that the governor of a state establish a State Emergency Response Commission (SERC) for purposes of coordinating emergency planning and community right to know activities within the State. The SERC was required by that law to appoint Local Emergency Planning Committees (LEPC) to undertake the actual planning activities. Title III does not address issues of governmental liability or individual liability of LEPC members. As the LEPCs are appointed by the states, most of the liability issues raised by Mr. Burkett's letter must be addressed by reference to specific state laws and regulations. There is no authority for considering them either contractors, agents or employees of the Environmental Protection Agency. Therefore, we recommend that the LEPC seek from the state Attorney General, through the SERC, an opinion regarding the concerns raised in this letter.

We would note that with regard to unauthorized release of trade secret information, the LEPC member would be subject to the same penalty as any other person under the statute. (Any person who knowingly and willfully divulges or discloses such information is subject to a fine of up to $20,000 or imprisonment up to one year, or both). It should be noted however, that the statute does not provide the LEPC with the authority to obtain trade secret information and therefore there should not be any reason that a member would have access to such information. Health professionals who are authorized to receive trade secret information are also required to sign a confidentiality agreement which stipulates the terms and conditions under which they may release trade secret information. Breach of that agreement may subject the health professional to lawsuits under state law. They also would be subject to the general Title III provision regarding the divulging of trade secret information noted above.

While Section 312 of Title III provides that facilities may request the LEPC and the SERC to keep the location of chemical substances confidential from the public, there is no specific penalty section within the Act for the unauthorized release of this information. However, state law may provide penalties for the release of information collected pursuant to a grant of confidentiality.

We would also note that there are no civil or administrative penalties within the statute which are to be applied to either the state or the LEPC for failure to perform activities required by the statute or for violations of the provisions of the Act. While the SERC may be sued by citizens under the Act, the remedy is one of injunctive relief, not penalties. This does not mean that

there are no liability concerns that arise out of the activities of the LEPCs or the SERCs, but those concerns must be addressed within the context of state law.

As we recognize that the liability issue is of significant concern to many LEPCs and SERCs, my office has taken certain steps to provide some clarification of the issue. We are preparing to distribute to SERCs a publication of the Federal Emergency Management Agency, "Tort Liability of Governmental Units in Emergency Actions and Activities." This publication will elaborate on many of the issues Mr. Burkett has raised in the context of Emergency Management. We have also contracted with the author of that study to develop a monograph which has specific applicability to the Title III context and that will be distributed later this year. This issue was also addressed at a recent Title III conference sponsored by the National Governors Association and EPA for SERCs and LEPCs. However, we wish to reiterate that this is basically a question of state law and within the control of the states administering the program.

We hope this information responds to Mr. Burkett's inquiry. If you need further information, please do not hesitate to contact me.

Sincerely,
Jim Makris, Director, Preparedness Staff

August 4, 1988

Amy R. Graham
Counsel Petroleum Marketers Association of America
1120 Vermont Ave., NW
Washington, DC 20005

Dear Ms. Graham:

Thank you for your July 14, 1988 letter requesting that consideration be given to accepting the Underground Storage Tank (UST) form as a substitute for reporting under Sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986.

While EPA decided not to conduct a separate rulemaking for non-manufacturing facilities, we did conduct an additional analysis of the appropriate threshold for the non-manufacturing sector. The study has been completed and confirms EPA's regulatory decision to apply the same threshold levels applicable to the manufacturing facilities to non-manufacturing facilities.

Also, EPA did not agree with an exemption from Tier I reporting for non-manufacturing facilities since Section 312 of the law applies to all facilities required to comply with OSHA Material Safety Data Sheet requirements.

These comments as well as others which you submitted on August 10, 1987 were considered and responses are available in the docket for the final rule on Sections 311 and 312.

Concerning your support for the exemption requested by the Small Business Administration, we believe that the decision to grant such an exemption should consider ramifications for the entitles who receive and use Sections 311 and 312 information. Informal discussion with State and local representatives have resulted in varied responses. We are pursuing this issue in a more formal manner. However, these actions will not affect the requirement for Section 311 reporting by non-manufacturing facilities by September 24, 1988.

In the event that the UST form is considered to be an acceptable substitute for Sections 311 and 312 reporting, your suggestion regarding alternative reporting by companies with additional hazard chemicals will also be considered.

Thank you again for your comments.

Sincerely.
Jim Makris, Director, Preparedness Staff

August 15, 1988

Ann B. Wall
Director, Right to Know Division, Department of Labor
214 West Jones Street
Raleigh, North Carolina 27603

Dear Ms. Wall:

It was a pleasure to finally meet you in Chapel Hill last month. When I returned from the workshop, I had a conversation with our staff attorney (Kirsten Engel) regarding the exclusion for governmental entities contained in Section 325 of Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA) Kirsten does not agree that this exclusion necessarily indicates that state and local governmental entities are covered by the provisions of Sections 311 and 312 of Title III in state plan states.

We have consulted with Robert Swain in the Solicitor's office at the Department of Labor (202)523-6815 regarding our interpretation that Sections 311 and 312 apply in state plan states only to the extent that the Occupational Safety and Health Administration (OSHA) Hazard Communication Standard applies in non-plan States. Further, our interpretation is that

Sections 311 and 312 do not apply to State and local agencies because the Hazard Communication Standard does not apply to State and local facilities. Mr. Swain is in agreement with these interpretations.

Despite this interpretation, we would encourage state and local facilities to voluntarily comply with Sections 311 and 312 Please let me know if I can be of further assistance.

Sincerely,
Kathy Brody, Program Analyst

September 8, 1988

Ms. Michele Malloy
Senior Corporate Attorney, Tenneco Inc
Tenneco Building, P.O. Box 2511
Houston, Texas 77252-2511

Dear Ms. Malloy

This letter is in response to your July 29, 1988 correspondence concerning reporting requirements of the oil and gas production and exploration industry under Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA). Specifically, two issues of concern were presented for EPA clarification:

- The relationship between the SARA Title III definition of "facility" and a production field
- Generic list and inventory reporting for Sections 311 and 312 regulatory requirements

Facility Definition

The SARA Title III and EPA regulatory definition of "facility" prevents the Agency from interpreting that term to apply to an entire oil or gas field in all instances. The statutory and regulatory definition treats "all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person" as a single facility. However, because oil and gas exploration and production sites located on an oil field are usually not adjacent or contiguous to each other, an oil field may be the location of several different Title III facilities. Nevertheless, the reporting obligations resulting from this definition may be reduced through limited aggregate reporting.

Aggregate reporting, within the confines of certain limitations dictated by SARA Title III and EPA's implementing regulations, is permissible when complying with the reporting obligations of Sections 302, 311, and 312. These aggregate reports, however, must satisfy the informational requirements of the statute for each facility.

When aggregate reporting, an owner or operator of multiple facilities (as may be found in one oil field) must assure that the state emergency response commission (SERC) as well as each local emergency planning committee (LEPC) and fire department with jurisdiction over each facility is provided with the Section 302 emergency planning notification and the appropriate material safety data sheets (or list) and inventory forms under Sections 311 and 312. Furthermore, the statute and regulations require that owners and operators must provide the SERC, LEPC and appropriate fire department with information on the maximum and average daily amounts of hazardous chemicals within certain ranges within each hazard category present at that particular facility during the preceding year. Unless the maximum and daily amounts of these chemicals are within the same ranges at each of the multiple facilities, the owner or operator who submits duplicate Tier I forms to the appropriate state and local officials will not be in compliance with Title III or EPA's implementing regulations.

As a result of the above provisions requiring owners and operators provide state and local authorities with facility specific information, EPA believes that aggregate reporting may be useful only to those owners and operators of multiple facilities that use the same hazardous chemicals in approximately the same ranges.

Generic List and Inventory Reporting

SARA Title III and EPA's implementing regulations require that owners and operators list and inventory the hazardous chemicals actually present at a given facility. Thus, if the list and inventory of hazardous chemicals found on the generic list and inventory forms are an accurate compilation of the hazardous chemicals actually present at the facility, EPA will regard submission of the generic list and inventory as compliance with SARA Sections 311 and 312. Because the owner or operator must certify that the information submitted on the Tier II inventory form is true, accurate and complete, however, the owner or operator will wish to verify that the generic information reflects the hazardous chemicals present at the particular facility for which the form is being submitted.

The generic list does not relieve the owner or operator of the responsibility of updating provisions of Section 311 or of responding to requests for actual MSDSs or for information below the specified thresholds. Similarly, the owner or operator must respond to requests for Tier II information below the specified threshold, when such information is requested.

If you have any further questions or concerns related to oil and gas exploration and production reporting under SARA Title III, please contact Kathy Brody at 202-475-8353.

Sincerely.
Jim Makris, Director, Preparedness Staff

September 12, 1988

Honorable Joel Hefley
United States House of Representatives
Washington, DC 20515

Dear Mr. Hefley:

In response to the inquiry of the Colorado Emergency Response Commission, we offer the following information.

As you may know, the deadlines established in the Emergency Planning and Community Right-To-Know Act (SARA-Title III) were mandated by the Congress. The Administrator of the Environmental Protection Agency (EPA) was not given latitude to extend these deadlines by Congress. EPA is encouraging State Emergency Response Commissions (SERCs) and Local Emergency Planning Committees (LEPCs) to consider the October 17, 1988 planning deadline as only the first round of the planning process. We have adopted the theme, "It's Not Over In October" to express this concept, as well as other major on-going responsibilities of LEPCs. The goal for this October should be to develop the best possible plans given time and other constraints. Title III makes clear that the planning process is iterative and continuous, with updates, revisions and testing each year. EPA and other Federal agencies will assist SERCs and LEPCs to improve the process and the plans during each planning cycle.

While funding has been a major concern to many states and localities as they grapple with implementing the Title III program, many states have moved forward to implement a vital and assertive program using existing resources, obtaining additional revenues from the state legislatures and establishing fee programs directed at the regulated community. For example, the state of Kansas adopted a statewide system of fees supplemented by general revenue funding. The state of North Carolina has delegated authority to LEPCs to imposed limited fees, while funding the state programs with general revenues. Many of these efforts are already bearing fruit and many will come to fruition in the coming months. As Title III is fundamentally a state and local program, addressing state and local responsibilities for the public safety and health, most states recognize the need to provide funding for this activity. Even if federal funds were available, it is unlikely that they would ever provide more than seed money for innovative local programs or supplemental funds to improve the effectiveness of other established activities. Finally, we would note that Congress has considered the issue of state and local funding on several occasions and has declined to make such funds available. Congress did, however, make training grants in the amount of $5 million per year for Fiscal Years 1987 and 1988 available and those funds were distributed through the Federal Emergency Management Agency to SERCs for use in furthering the goals of this program.

Title III does not address issues of governmental liability of individual liability of SERCs, LEPCs or their individual members. As these entities are creatures of the states, most liability issues raised by Mr. Byrne and Mr. Shelton's letter can be addressed by reference to specific state laws and regulations. State law addresses many issues related to indemnification and compensation in emergencies as well as other liability subjects. Where state law is unclear or

does not provide protection, states can take action to clarify the liability exposure of LEPCs and their members and provide protection where necessary. For example, Kansas considers the LEPC members acting in their Title III capacity as state employees, thus bringing them within the umbrella of state immunity and other tort protection laws.
We would also note that there are no civil or administrative penalties within the statute which are to be applied to either the state or the LEPC for failure to perform activities required by the statute or for violations of the provisions of the Act. While the SERC may be sued by citizens under the Act, the remedy is one of injunctive relief, not penalties. This does not mean that there are no liability concerns that arise out of the activities of the LEPCs or the SERCs, but those concerns should be addressed within the context of state law.

As we recognize that the liability issue is of significant concern to many LEPCs and SERCs, we have taken certain steps to provide some clarification of the issue. We are preparing to distribute to SERCs a publication of the Federal Emergency Management Agency, "Tort Liability of Governmental Units in Emergency Actions and Activities." This publication will elaborate on many of the issues raised in the context of emergency management. We have also contracted with the author of that study to develop a monograph which has specific applicability to the Title III context, and that will be distributed later this year. This issue was also addressed at a recent Title III conference sponsored by the National Governors Association and EPA for SERCs and LEPCs. However, we wish to reiterate that this is basically a question of state law, and within the control of the states administering the program.

We hope this information satisfactorily responds to your inquiry. If you need further information, please do not hesitate to contact me.

Sincerely,
Jim Makris, Director, Preparedness Staff

September 30, 1988

Honorable John S. Herrington
Secretary, Department of Energy
7A-257 Main Energy Building, 1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Secretary:

The U.S. Environmental Protection Agency (EPA) has promulgated regulations to implement the Emergency Planning and Community Right-to-Know Act of 1986 (also referred to as Title III of the Superfund Amendments and Reauthorization Act). This statute, which provides an innovative new approach to environmental protection, encourages and supports emergency planning efforts at the State and local level and provides residents and local governments with information concerning potential chemical hazards present in their communities. Title III was enacted to ensure that we could properly respond to incidents similar to the release of methyl isocyanate in Bhopal, India in 1985.

The requirements of the Emergency Planning and Community Right-to-Know Act constitute a comprehensive mandate for emergency planning and an assurance that citizens have the information necessary to understand and assess chemical hazards in their communities. It is the responsibility of all sectors of society, including Federal agencies, to work together to prevent, prepare for and respond to potential chemical hazards. Only through this "cooperative spirit" can we achieve the goal of protecting the health and safety of all citizens.

Federal agencies are not legally obligated to comply with the requirements of Title III, as Federal agencies are not included in the statute's definition of "person" contained in section 329(7). However, EPA is encouraging your agency's voluntary compliance with the emergency planning and notification efforts that are underway and strongly urges your facilities to comply with all of the community right-to-know reporting requirements outlined in Enclosure 1. Although several of the statutory reporting deadlines have passed, it is important that Federal agencies attempt to fulfill all applicable requirements of the statute as soon as practicable. EPA is aware of several Federal agencies that have established or initiated programs to address implementation of Title III at their facilities. We commend these efforts and encourage all Federal agencies to pursue such action.

Every agency should be aware that contract operators of government-owned, contractor-operated (GOCO) facilities are subject to Title III to the same extent as any other operator and, therefore, are statutorily required to comply with the full range of planning, notification and reporting requirements of the Emergency Planning and Community Right-to-Know Act. Federal Agencies that have GOCO facilities may wish to determine whether their contractors know of and are complying with all applicable provisions of Title III described in Enclosure 1.

EPA realizes that the disclosure of certain information relating to Federal facilities or activities may be prohibited under various statutes governing national security. However, facilities that withhold information because of national security concerns should, to the extent possible,

provide other information to assist communities in planning for and responding to emergency situations. EPA is currently examining alternatives for reporting "classified" information concerning chemical hazards that will not compromise national security.

We strongly recommend that all Federal agencies develop internal policies to address all the major provisions of Title III, in particular the facility requirements under:

° Sections 301 - 303: Report the presence of extremely hazardous substances in excess of the Threshold Planning Quantities (TPQ) to the applicable State emergency response commission (SERC) and local emergency planning committee (LEPC).
° Section 304: Provide emergency release notification for extremely hazardous substances and all CERCLA hazardous substances to the LEPC and SERC of any area likely to be affected by the release.
° Sections 311 and 312: Submit a material safety data sheet (MSDS) for each chemical for which d MSDS must be prepared under the Occupational Safety and Health Act of 1970 and its implementing regulations or a list of such substances and a Tier I or Tier II inventory form to the appropriate LEPC, SERC and fire department.
° Section 313: Report annually on the amounts of chemicals released to each environmental medium. The purpose of this reporting requirement is to inform the public and government officials about routine releases of toxic chemicals into the environment.

ln order to assist each Federal agency in developing a comprehensive Title III program, we would like to extend an invitation to your staff to attend a workshop on the Emergency Planning and Community Right-to-Know Act on October 6, 1988. The purpose of this workshop is to provide Federal agencies with a thorough understanding of the Title III provisions and provide technical assistance to enable your agency to design and implement an efficient voluntary program that, were the Federal agency considered a private facility, would satisfy the requirements of the statute. Additional information concerning the workshop is provided in Enclosure 2. Representatives from your agency that attend the EPA Federal Agency Environmental Roundtable have been informed about the upcoming workshop.

We would like to request information from each agency on the current status of your Title III program, policies and guidance as outlined in Enclosure 3. This information will enable EPA to provide Federal agencies with technical assistance necessary to develop their voluntary Title III programs, enhance those that are already established, identify the universe of Federal installations that would be affected by Title III were they private installations and possibly develop guidance for Federal Agencies concerning various aspects of Title III.

As stated previously, it is important that Federal agencies initiate appropriate actions to meet the requirements of the Emergency Planning and Community Right-to-Know Act. A Federal Facilities Title III Workgroup has been established at EPA to examine various approaches to promote the voluntary compliance by Federal agencies with the statute and we welcome your agency's participation in the workgroup. As the workgroup considers and develops various approaches, we will be seeking your comments and assistance through agency representatives on the National Response Team and the EPA Federal Agency Environmental Roundtable.

Finally, it is critical that Federal agencies contribute to the "cooperative spirit" of the Emergency Planning and Community Right-to-Know Act so that all citizens can benefit from the full implementation of this statute. Only by ensuring that communities and States have a complete picture of all potential chemical hazards can they succeed in meeting the important goals of Title III.

Please submit, as soon as possible, the name of a contact person for the October 6 workshop to Ms. Kathy Hutson, Office of Federal Activities (A-104), US Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, (202) 475-8789. In addition, your response to Enclosure 3 would be appreciated no later than November 4, 1988.

Thank you for your time and cooperation in this matter. Together we can make Title III a real success story.

Sincerely,
Lee M. Thomas

February 27, 1989

Burt McKee, Senior Planner
Central Florida Regional Planning Council
P.0. Box 2089, 490 East Davidson
Bartow, Florida 33830

Dear Mr. McKee

I am writing in response to your February 7, 1989 letter and to confirm our recent telephone conversation concerning interpretation of the exemption under Section 311(e) of Title III of the Superfund Amendments and Reauthorization Act of 1986 concerning "any substance to the extent it is used in routine agricultural operations...".

This exemption is intended primarily to cover hazardous chemicals used or stored at the farm facility. Therefore, in response to your questions concerning citrus farm servicing agencies, the only aspect of such service agencies' operations covered by this exemption is the actual application of the pesticide by the servicing agency at the citrus farm. With regard to the storage of pesticides, diesel fuel, and any other hazardous chemicals at the service facility, this must be reported.

Similarly, fuel used by a harvesting service to transport crops to market would not be covered by this exemption since the fuel is stored at the harvesting service facility and not on the farm. However, fuel stored at a farm itself, which is used on the farm as well as to transport crops to market, is covered by the exemption in keeping with the primary intent stated above.

I enjoyed speaking with you and hope that this answers all of your questions. If not, please feel free to call me at (202) 475-8353.

Sincerely,
Kathy Brody, Program Analyst

February 27, 1989

Robert Bradley
Department of Environmental Protection
2358 Municipal Building
New York, NY 10007

Dear Mr. Bradley:

This is in response to your February 3, 1989 letter regarding an interpretation of the exemption in Section 311(e) of Title III of the Superfund Amendments and Reauthorization Act of 1986 concerning any food, food additive, color additive, drug, or cosmetic regulated by the Food and Drug Administration."

As we discussed during our telephone conversation, the Food and Drug Administration (FDA) regulates types of substances differently. For example, an indirect food additive is only "regulated" by FDA when it is used in a manner consistent with FDA regulations. Therefore, the same substance used as a food additive consistent with FDA regulations by one manufacturer and therefore exempt under Section 311, would be reportable under Section 311 by another manufacturer who is using the substance in a manner inconsistent with the FDA regulations. FDA regulations on cosmetics focus on these substances in their marketed state. Therefore the exemption would only apply to raw materials that the manufacturer can show it will use as components of the finished cosmetics it manufactures.

I would be pleased to respond to specific questions which you may have concerning this exemption. Because of the intricacies of the FDA regulations, I usually need to coordinate interpretations with FDA staff. I attempted to call last week to see if you have specific issues to be addressed. However, I had some difficulty locating your correct number and I am not sure that my message reached you. As I recall, you were reviewing a list of chemicals for possible deletions. I believe it would not be advisable to delete any chemicals based on an interpretation of this exemption.

I hope this clarification is of some help. Please call me at (202) 475-8353 if you have specific issues to raise.

Sincerely,
Kathleen Brody, Program Analyst

March 2, 1989

Brian Finder
Safety/Industrial Hygiene Representative
Jerome Foods
34 North Seventh Street, P.O. Box 70
Barron, WI 54812-0070

Dear Mr. Finder:

This is in response to your February 15,1989 letter regarding an interpretation of the exemption for "any substance to the extent it is used in routine agricultural operations", under Section 311 (e) of the Superfund Amendments and Reauthorization Act of 1986 (SARA).

This exemption is intended primarily to cover hazardous chemicals used or stored at the farm facility which are used in agricultural operations. EPA interprets the term "agricultural operations" in Section 311(e) to include livestock operations such as the growing and breeding of turkeys for commercial-sale. Referring to this exemption, the Agency stated in a final rule promulgated October 15, 1987 that "Because the general public is familiar with the application of agricultural chemicals as part of common farm, nursery, or livestock production activities, and the retail sale of fertilizers, there is no community need for reporting of the presence of these chemicals." (52 F.R. 38344, 38349). Your letter indicates that the propane is stored at the farm facility and is used for the heating of the turkey buildings. Therefore, Jerome Foods would not have to report the propane under Section 312 of SARA.

Please feel free to contact me at (202)475-8353 if you have additional questions.

Sincerely,
Kathleen Brody, Program Analyst

March 14, 1988

Marty Simpson
Smoot Grain Co.
P.O. Box 320
Salina, KS 67402-0320

Dear Mr. Simpson:

This is in response to your February 19, 1988 letter requesting a clarification concerning the exemption to the definition of hazardous chemical under 40 CFR 370.2 concerning a "fertilizer held for sale by a retailer to the ultimate customer."

Your question was directed at whether or not anhydrous ammonia held for sale as a fertilizer in a small country elevator is exempt, since it is classified as an "extremely hazardous substance." Under 370.2 the exemptions to the definition of hazardous chemical apply to extremely hazardous substances. Therefore, under these regulations, anhydrous ammonia to be used as a fertilizer and held for sale to the ultimate customer is exempt from reporting under Sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986 (SARA).

You mention that the Colorado Department of Health contends that extremely hazardous substances should be reported regardless of the exemptions. Under Title III of SARA, if a State or local government desires additional information, it may require such information to be submitted under State or local law. A member of the Environmental Protection Agency (EPA) Regional Office Staff consulted with the Colorado Department of Health and learned that this information is desired

under State law. While the information is not required by federal regulation, I encourage you to cooperate with the Colorado request in order to make the State program successful.

I hope this information is helpful to you. Please do not hesitate to contact me again if I can be of further assistance.

Sincerely,
Kathleen Brody, Program Analyst

March 17, 1989

MEMORANDUM

SUBJECT: Questions and Answers about Service Station Compliance with Sections 311 and 312

FROM: Kathy Brody

TO: Regional Preparedness Coordinators

Attached are the q&a's which I mentioned on the last conference call. You may want to provide a copy to State Emergency Response Commissions for their information. Please call me at 475-8353 if you want to discuss further.

Attachment

Questions & Answers About Gasoline Service Station Compliance With Sections 311 and 312

Q: Must a Material Safety Data Sheet (MSDS) be submitted for each type of gasoline present at service stations or may Section 311 requirements be satisfied by a single MSDS for gasoline or a MSDS for leaded gasoline and one for unleaded gasoline?
A: Section 311 of SARA Title III and Section 370.2100 EPA's implementing regulations require owners and operators of facilities to submit to State and local authorities a MSDS for each hazardous chemical present at the facility. Under Section 311(e) of the statute and Section 370.2 of the regulations, "hazardous chemical" is defined to mean "any hazardous chemical as defined under Section 1910.1200 of Title 29 of the Code of Federal Regulations, with certain exceptions. "Hazardous chemical" is in turn defined under Section 1910.1200 as "any chemical which is a physical hazard or a health hazard." The OSHA Hazard Communication Standard specifies that where "complex mixtures have similar hazards and contents (i.e. the chemical ingredients are essentially the same, but the specific composition varies from mixture to mixture), the chemical manufacturer, importer, or employer may prepare one material safety data sheet to apply to all of these similar mixtures." 29 CFR Section 1910.1200(g)(4). OSHA interprets this provision to permit the preparation of a single MSDS to cover all blends of leaded and unleaded gasoline provided that different hazards associated with leaded gasoline, if different from that of unleaded gasoline, are identified separately on the MSDS. It is also possible that service stations may have an MSDS on each type of gasoline. Since section 311 follows the HCS, service stations may meet the requirements by submitting different MSDS for each type or blend of gasoline, or submitting one MSDS for all gasoline blends or types in accordance with 29 CFR Section 1910.1200(g)(4).

Q: Is it possible for a service station to elect to report by hazardous component and thus avoid reporting under Sections 311 and 312 reporting because of established thresholds?
A: Facilities have the choice of reporting by mixture or by hazardous components. Some service stations may have difficulty producing MSDS on all hazardous components and therefore may prefer the option of reporting on the mixture as a whole. Reporting by hazard component should

not, however, enable a service station to avoid 311/312 reporting on the theory that the components are not present at threshold levels. If a service station maintains a quantity of 10,000 gallons, a hazardous component greater than 15% would exceed the 10,000 pound 311/312 reporting.

March 29, 1989

James E. Fleer
Environmental and Safety Specialist
Farmland Industries, Inc.
P.O. Box 7305
Kansas City, Missouri 64116

Dear Mr. Fleer:

I am writing in response to your March 13, 1989 letter requesting an interpretation of the applicability of Sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986 (SARA) to anhydrous ammonia when stored for retail sale as a fertilizer to an agricultural entity.

Your letter presents two interpretations. The first interpretation is correct. Section 311(e) of SARA defines hazardous chemical and by definition excludes "Any substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer." The scope of the federal regulatory requirements for Section 311 and 312 reporting is linked to this definition of hazardous chemical and the U.S. Environmental Protection Agency (EPA) does not have the authority to expand this definition. The statutory definition of "hazardous chemical" is found in the Title III regulations at 40 CFR Section 370.2.

In the second interpretation stated in your letter, the regulation addressing the threshold was not quoted exactly. Section 370.20 requires the reporting of "all hazardous chemicals present at the facility during the preceding calendar year in amounts equal to or greater than 10,000 pounds, or that are extremely hazardous substances present at the facility in an amount greater than or equal to 500 pounds (or 55 gallons) or the TPQ, whichever is less" (emphasis added). The word "that" refers back to hazardous chemicals which are defined as stated above. Only those extremely hazardous substances which also meet the definition of hazardous chemicals must be reported at the specified thresholds under Sections 311 and 312. Therefore, if anhydrous ammonia is being held for sale by a retailer to the ultimate customer, it is not required to be reported under Sections 311 and 312 of the SARA.

In this letter, I have explained the federal reporting requirements. Under Title III of SARA, state or local laws are not preempted. Therefore, it is possible for state and local governments to expand the scope of this reporting through their own community right-to-know laws.

I hope this information is helpful to you. Please contact me at (202) 475-8353 if you have additional questions.

Sincerely,
Kathy Brody, Program Analyst

April 5, 1989

Frank S. Swain
Chief, Counsel of Advocacy
U.S. Small Business Administration
Washington, DC 20416

Dear Mr. Swain:

I am writing in response to your February 13, 1989 letter to the Administrator requesting a suspension of the reporting requirements of Sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986 for nonmanufacturers whose only reportable chemicals are petroleum products in underground storage tanks.

The Environmental Protection Agency does not have the legal authority to suspend the reporting requirements as they are required by law. However, we are interested in learning about the views of State and local officials on this proposal. If the majority of these officials believe that the proposal has merit, we will consider methods to achieve the desired collection of information most efficiently.

Regarding the response to the Office of Management and Budget's Federal Register notice which requested comment from users of the information, only fourteen of these entities responded by the end of the comment period. Of these commenters, only four indicated support for the proposal. Because of the limited response from users of this information, we will indicate in our Notice of Proposed Rulemaking regarding the Sections 311-312 reporting threshold that commenters may continue to comment on the underground storage tank notification proposal during the sixty day comment period on the threshold.

We disagree that it is wasteful for facilities to file Section 312 reports this year. It is important for all businesses to be familiar with these reports. It is likely that there are hazardous chemicals which are present at the subject facilities in quantities below the current thresholds. Information on these hazardous chemicals has to be provided when requested.

I will keep your staff informed on further developments on this issue. We continue to search for ways to inform small businesses on Title III and would appreciate any assistance that the U.S. Small Business Administration can provide. Also, we are looking forward to working with SBA in our prevention program activities with small businesses. Thank you for your continued support and cooperation on Title III.

Sincerely,
Jim Makris, Director, Chemical Emergency, Preparedness and Prevention Office

April 6, 1989

Kerry L. Malone
Regulatory Specialist, Dome Pipeline Corporation
P.O. Box 1430, Plaza Centre One
Iowa City, Iowa 52244

Dear Mr. Malone:

I am writing in response to your request for an interpretation of Section 327 of Title III of the Superfund Amendments and Reauthorization Act of 1986 with regard to storage of propane at terminals.

The information which you received from the Emergency Planning and Community Right-To-Know Hotline is correct. Section 327 of SARA indicates that Title III "does not apply to the transportation, including the storage incident to such transportation, of any substance or chemical subject to the requirements of this title, including the transportation and distribution of natural gas." In a final rule promulgated on April 22,1988 (52 FR 13378) the Agency interpreted this provision to exempt from Title III reporting the transportation of any substance or chemical, including transportation by pipeline, except as provided in Section 304.

Since pipeline is not defined under Title III, the U.S. Environmental Protection Agency refers to the definition found in regulations implementing the Hazardous Materials Transportation Act (HMTA) and promulgated by the U.S. Department of Transportation. EPA believes the HMTA to be appropriate as a reference because of Congress' explicit reference to that Act in the legislative history referring to the Section 327 transportation exemption. In the Conference Report, Congress stated that limiting the exemption for storage incident to transportation to those chemicals under active shipping orders was consistent with the HMTA.

Department of Transportation regulations implementing the HMTA define "pipeline" as "all parts of a pipeline facility through which a hazardous liquid moves in transportation, including, but not limited to, line pipe, valves and other appurtenances connected to line pipe, pumping units, fabricated assemblies associated with pumping units, metering and delivery stations and fabricated assemblies therein, and breakout tanks."

Because your terminal does not meet the definition of pipeline, the propane stored in the terminal is not covered by the Section 327 transportation exemption.

I hope this information is helpful to you. Please call me at (202) 475-8353 if you have additional questions.

Sincerely,
Kathleen Brody

April 6, 1989

William J. Miner
Environmental Emergency Coordinator
New York State Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233-3510

Dear Mr. Miner:

I am writing in response to your March 15, 1989 letter regarding the reporting of sulfuric acid in batteries under Sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986 (SARA).

There has been no determination by the U.S. Environmental Protection Agency regarding the exemption of sulfuric acid in batteries from reporting under Sections 311 and 312 of SARA. I believe that Mr. Montague may be referring to the exemption under the Occupational Safety and Health Administration's Hazard Communication Standard for articles. Section 1910.12009(b) of the OSHA regulations provides an exemption for articles. An article is defined under these regulations as a manufactured item:

- -which is formed to a specific shape or design during manufacture;
- -which has end use function(s) dependent in whole or in part upon the shape or design during end use;
- -which does not release or otherwise result in exposure to a hazardous chemical under normal conditions of use.

I understand from conversations with OSHA staff that a battery could be considered to meet this definition of article when it is sealed and does not need to be serviced. In circumstances where a battery is serviced, exposure to the sulfuric acid could occur. In instances where a battery meets the definition of an article, a Material Safety Data Sheet (MSDS) is not required by OSHA. Section 311 and 312 of SARA requires reporting only on hazardous chemicals for which MSDSs are required by the OSHA Hazard Communication Standard. Using this logic, there is potential for batteries to be excluded from reporting under Sections 311 and 312 of SARA, under certain circumstances.

I hope this information is helpful. Please call me at (202) 475-8353 if you have additional questions.

Sincerely,
Kathleen Brody, Program Analyst

April 11, 1989

Stephen C. Crooker
Laboratory Manager, Holometrix, Inc.
99 Erie Street
Cambridge, MA 02139

Dear Mr. Crooker:

This is in response to your March 3, 1989 letter regarding whether No. 2 fuel oil is exempt from reporting under Section 311 and 312 of Title III of the Superfund Amendments and Reauthorization Act of 1986 and EPA's implementing regulations under the definition of "hazardous chemical." Section 311(e) of the statute and 40 CFR 370.2 (3), exempts from this definition, "Any substance to the extent it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public." The above household product exemption does not appear to apply to your use of No. 2 fuel oil at business buildings for heating purposes. As both the language of the exemption and the preamble discussion to the final Section 311 and 312 regulations indicate, this exemption was intended by Congress and EPA to apply to packaged products, as opposed to substances transported in bulk, that are distributed to the general public in a form with which the general public is familiar. In rejecting a commenter's argument that EPA interpret the term "form" to apply to the physical state of the substance rather than its packaging, the agency stated in the preamble to the final regulations, "Thus, a substance may be packaged in small containers when distributed as a household product but transported or stored in bulk quantities when used for other purposes. Even though in the same concentration as the household product, a substance may pose much greater hazards when present in significantly larger quantities. In addition, while the general public may be familiar with the hazards posed by small packages of hazardous materials, they may not be as aware of the hazards posed by or likely locations of the same substances when transported or stored in bulk." 52 FR 38344, 38348 (October 15, 1987).

Fuel oil used for heating business buildings is not transported or distributed in small containers with which the general public is familiar. Rather, the fuel oil is transported in bulk by truck and dispensed into storage tanks at the business address. Just as the fuel oil is not "packaged" when being transported in bulk by truck, it is not "packaged" when dispensed into a storage tank at the business site. Although fuel oil is present in the same concentration and used for the same purposes at both a household and a business, only fuel oil used at a household would be exempt and only under the first clause of the exemption ("any substance to the extent it is used for personal, family, or household purposes". I hope that I have provided you with the information that you need. I realize that the reason stated here differs slightly from our phone conversation in that I indicated earlier that the exemption did not apply to your facility because of the size of the tank. After further consideration however, it was decided that this interpretation is more precise. Please call me at (202) 475-8353 if you have additional questions.

Sincerely,
Kathy Brody, Program Analyst

April 14, 1989

Karl F. Birns
Manager, Right-to-Know Program, Bureau of Air Quality and Radiation Control
Department of Health and Environment
Topeka, Kansas 66620-0001

Dear Mr. Birns:

This is in response to your February 27, 1989 letter to me concerning the reporting of grain dust from oats, wheat and barley under Sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986. Our understanding of grain dust, after a conversation with Occupational Safety and Health Administration (OSHA) staff, is that it has been considered to be hazardous for some time because of its explosivity characteristic. The purpose of the revision of 29 CFR Part 1910.1000 was to assign a permissible exposure limit as an air contaminant. Because of these physical and health hazards, a Material Safety Data Sheet (MSDS) is required for grain dust. OSHA staff further indicated that the MSDS would be appropriately prepared for grain dust, not grain. Therefore, it would not be appropriate to consider grain a mixture with the grain dust a percent of grain by weight.

The reporting threshold for grain dust is 10,000 pounds, because it is not an extremely hazardous substance. Regarding a method of calculation of the quantity of grain dust present at a facility, Kathy Brody spoke with Ralph Regan of the Federal Grain Inspection Service. Mr. Regan indicated that this is a fairly complex issue. However, calculation of the quantity of grain dust which is separated from the grain is normally packaged in bushel barrels which can be weighed easily and the calculation of quantity is straightforward. He did not agree with the method mentioned in your letter which uses one-tenth of one percent of grain by weight. Apparently, the calculation of quantity is related to the particle size of the dust.

Kathy tried, but was unable to arrange a conversation among you, herself and Mr. Regan to discuss other possibilities. She is available to work with you on additional issues. However, I would appreciate if you would provide specific questions to Mr. Regan. He can be contacted at:

Federal Grain Inspection Service
U.S. Department of Agriculture, Safety and Health Staff
P.O. Box 96454, Room 1636-S
Washington D.C. 20090-6454
(202) 382-0244

Kathy can be reached at (202) 475-8353.

Sincerely,
Jim Makris, Director, Chemical Emergency Preparedness and Prevention Office

April 26, 1989

David E. Nagle
Environmental Engineer, Right-to-Know Program
Bureau of Air Quality & Radiation Control, Department of Health and Environment
Forbes Field
Topeka, Kansas 66620-0001

Dear Mr. Nagle:

This is in response to your March 20, 1989 letter to me requesting an interpretation or the exemption under Section 311(e) which applies to "any substance to the extent it is used in routine agricultural operations."

This exemption is intended primarily to cover hazardous chemicals used or stored at the farm facility. Therefore, hazardous chemicals used by a contracted agricultural service agent are only exempt while being used at the farm facility. The storage of these hazardous chemicals by the agricultural service at a location other than the farm are subject to reporting unless the hazardous chemical is a fertilizer which is covered by the second part of the agricultural exemption--- "a fertilizer held for sale by the retailer to the ultimate customer."

I hope this information clarifies the exemption. Please call Kathy Brody of my staff at (202) 475-8353 if you have additional questions.

Sincerely,
Jim Makris, Director, Chemical Emergency Preparedness and Prevention Office

May 22, 1989

Jon A. Curtis
Plant Engineer, Tambrands Inc.
Rutland, VT 05701

Dear Mr. Curtis:

I am writing in response to your April 30, 1989 letter to me regarding the reporting of sulfuric acid in batteries under Title III of the Superfund Amendments and Reauthorization Act of 1986. Reference is made to an April 20, 1988 letter from me to Mr. Lajeunesse of Tambrands on the same subject. I am enclosing a copy of that letter as well as the copy of the letter which I received from Mr. Lajeunesse for your reference.

Regarding Sections 302 and 304 of Title III, my earlier letter states that there are no exemptions which would cover the reporting of batteries. Therefore, under Section 302, if the amount of sulfuric acid present at a facility exceeds the threshold planning quantity for sulfuric acid, the facility is subject to the emergency planning requirements detailed in Sections 302 and 303 of Title III. Under Section 304, if there is a release of sulfuric acid which exceeds the reportable quantity, the release must be reported.

With regard to Sections 311 and 312, my letter also correctly states that if batteries meet the definition of "article" under the Occupational Safety and Health Administration's regulations at 29 CFR 1910.1200, they are not required to have Material Safety Data Sheets (MSDS). Under these circumstances, they would not need to be reported under Sections 311 and 312 since only hazardous chemicals for which MSDS are required are subject to reporting.

Your letter states that you have MSDS for the sulfuric acid in these batteries. I presume that this is because exposure to the sulfuric acid could result during maintenance of the batteries. If this is true, then it is my understanding that they are not covered by the article definition. I encourage you to consult with an OSHA representative if you have any further questions regarding the requirement of an MSDS. Hazardous chemicals for which MSDS are required must be reported under Sections 311 and 312 if they are present in quantities above established thresholds.

I hope this letter clarifies the reporting requirements under Title III. Again, I encourage you to address any unresolved issues involving interpretation of the definition of article to an OSHA representative. It is my understanding from a recent telephone call with you that you have consulted OSHA. If I can be of further assistance, please do not hesitate to call me at (202) 475-8353.

Sincerely,
Kathleen Brody

May 22, 1989

Ken Yager
Supervisor, Regulatory Compliance & Environmental Affairs
Williams Natural Gas Company
One Williams Center, P.O. Box 3288
Tulsa, Oklahoma 74101

Dear Mr. Yager:

I am writing in response to your April 20, 1989, letter regarding reporting of components of mixtures under Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA).

For purposes of reporting under Sections 302, 304, 311 and 312, a facility is not required to request information of the supplier which is not contained on the Material Safety Data Sheet. The preamble discussion to the final rule on Sections 302 and 304 (52 FR 77, p. 13385) states: "If the facility which produces, uses or stores mixtures knows or reasonably should know the components of the mixture, the facility owner or operator must notify under Section 302 if the extremely hazardous substance component is more than one percent and more than the TPQ. The facility owner or operator is not under an obligation, however, to inquire of the manufacturer the components of the mixture." The same guidance would apply to reporting of releases under Section 304. The preamble to the final rule on Sections 311 and 312 (52 FR 199, p.38354) states that "where mixtures have unknown composition, facilities should report the mixture as a whole."

With regard to Section 313, as of January 1, 1989, suppliers must notify customers in Standard Industrial Classification codes 20-39 if a toxic chemical subject to reporting under Section 313 is contained in a mixture. It does not appear that your facility is in SIC 20-39 and therefore would not be subject to reporting under Section 313, at this time. However, if my assumption is incorrect, you can receive additional information on this supplier notification requirement by calling the Emergency Planning and Community Right-to -Know Information Hotline at 1-800-535-0202.

I hope this information is helpful to you. If you have additional questions, please call me at 202-475-8353.

Sincerely,
Kathleen Brody

June 8, 1989
Ms. Tammy F. Hobbs
Staff Engineer, Engineering, Design & Geosciences Group, Inc.
3325 Perimeter Hill Drive
Nashville, TN 37211

Dear Ms Hobbs:

In response to your recent letter regarding sodium hypochlorite, please note that the Extremely Hazardous Substance (EHS) list under Section 302 of the Emergency Planning and Community Right to Know Act, also known as Title III, is defined by reference to the Chemical Abstract Service registry number. The chemical chlorine, CAS No. 7782-50-5 is considered an EHS. If you have present threshold planning quantities of chlorine in any form, including solutions or mixtures, you are required to notify your Local Emergency Planning Committee (LEPC) and identify a facility coordinator. However, if you have chemicals with unique CAS Nos. present, other than EHSs, then these chemicals are not considered mixtures or solutions of another chemical such as chlorine, and thus would not subject you to coverage under the emergency planning

provisions of the law. Therefore, sodium hypochlorite (CAS Nos. 1 0022-70-5 and 7681-52-9) is not a chlorine mixture or solution and is not reportable under Section 302.

However, a somewhat different situation applies when considering whether sodium hypochlorite is reportable under either the release reporting provisions of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Title III. Because the reporting requirements under both Title III and CERCLA apply to releases of a reportable quantity of either an EHS or a CERCLA hazardous substance, two reportable quantities may apply. First, a release of 100 lbs. of the chemical sodium hypochlorite (which is a listed CERCLA hazardous substance) must be reported under CERCLA to the National Response Center and under Title III to the State Emergency Response Commission (SERC) and the LEPC. For example, to release a reportable quantity of sodium hypochlorite from a twelve and one-half percent solution of sodium hypochlorite, one would have to release eight hundred pounds of the solution in order to have released a reportable quantity of sodium hypochlorite. However, if the circumstances of the release of the sodium hypochlorite of a reportable quantity of chlorine (10 lbs), then this release of chlorine must be reported, even though the 100 lbs of sodium hypochlorite might not be considered to have been released. This type of release recently occurred as a result of an sodium hypochlorite in a warehouse, causing a fire. A cloud of chlorine was released, sending numerous firemen for medical assistance and resulting in an evacuation of several thousand people.

I hope this information responds to your request. If we can provide further assistance, please let us know.

Sincerely,
Kathleen Bishop, Chemical Emergency Preparedness and Prevention Office

June 12, 1989

James E. Szofer
Manager, Emergency Response and Community Awareness
Borden, Inc.
960 Kingsmill Parkway
Columbus, Ohio 43229

Dear Mr. Szofer:

I am writing in response to your March 17, 1989 letter regarding reporting under section 312 of the Superfund Amendments and Reauthorization Act of 1986 (SARA Title III). In this letter, you requested confirmation of an interpretation given to you by the Emergency Preparedness Hotline staff, that it was permissible for Borden, Inc. to group products for reporting on single Tier II inventory form. Although it is not completely clear from your letter, we are assuming that Borden Inc. wishes to submit single Tier II forms for groups of products and that Borden Inc. does not have one material data safety sheet (MSDS) for any one of these groups of products. We assume that Borden, Inc. intends to essentially treat the group of products as one "hazardous chemical" and to submit the information requested on the Tier II form in terms of the group of products as a whole.

Unfortunately, we cannot confirm the interpretation given you by the Emergency Preparedness Hotline staff because we believe it to have been in error. For the reasons discussed below, it is not permissible to group products for reporting on single Tier II inventory form unless the company has available one MSDS for that same group of products.

Under section 312(d) of SARA Title III and 40 CFR 370.25, owners and operators must submit a Tier II inventory form to state and local officials upon request. Under 370.28, EPA specifically allows owners and operators to prepare Tier II forms on mixtures. However, both the statute and EPA's implementing regulations require that the Tier II form prepared be specific to the hazardous chemical that is reported on a material safety data sheet. This requirement is found in the statutory language of 312 and in EPA's regulatory requirement that the reporting of mixtures under sections 311 and 312 be consistent.

Under section 312(d)(2)(A), a Tier II inventory form must provide "the chemical name or the common name of the chemical as provided on the material safety data sheet." In addition, 370.28 of the regulations and the instructions to the Tier II inventory form require that the reporting of mixtures be consistent under sections 311 and 312. Because 311 requires submission, upon request, of an MSDS for any hazardous chemical reported under 311, owners and operators who satisfy the 311 requirement by submitting a list of chemicals may list only mixtures for which they have available an MSDS.

As a result of these provisions, EPA interprets the statute and its regulations to allow reporting under 311 and the submission of Tier II inventory forms on mixtures or groups of products only where the owner or operator has available an MSDS for that same mixture or group of products. Thus it would not be permissible for Borden to prepare Tier II reports on groups of products for

which Borden has not prepared a MSDS.

I hope that this information is helpful and apologize for not conveying it to you sooner. Please call me at (202) 475-8353 or Kirsten Engel in the EPA Office of General Counsel at (202) 382-7706 if you have additional questions.

Sincerely,
Kathleen Brody

June 12, 1989

Mr. Max D. Michael
Chief, Prevention Section
Indiana Emergency Response Commission
5500 W. Bradbury Ave.
Indianapolis, IN 46241

Dear Mr. Michael:

This is in response to your April 14, 1989 letter requesting written confirmation of an interpretation of SARA Title III in a telephone conversation. Specifically, you requested confirmation that EPA interprets Sections 311 and 312 of SARA Title III not to apply to state and local government agencies.

EPA interprets Sections 311 and 312 not to apply to state and local government agencies in states subject to the federal occupational health and safety standards. Title III states that Sections 311 and 312 apply to the "owner or operator of any facility which is required to prepare or have available a material safety data sheet ["MSDS"] for a hazardous chemical under the Occupational Safety and Health Act of 1970 ["OSH Act"] and regulations promulgated under that Act." EPA interprets the explicit reference to MSDS as a demonstration of Congress' intent that Title III apply to those employers subject to the hazard communication standard (HCS) promulgated by the Occupational Safety and Health Administration (OSHA) or who would be subject to the MSDS requirement if located in a state subject to the HCS. Because the OSH Act excludes states from its definition of "employer" (29 U.S.C. 652(4)), the OSHA HCS requirement to prepare or have available an MSDS cannot apply to state agencies. As a result, EPA interprets Sections 311 and 312 not to apply to state and local government agencies in states subject to the federal HCS.

EPA also interprets Sections 311 and 312 not to apply to state and local government agencies in states with approved occupational safety and health plans. Under Section 667 of the OSH Act, a state that develops state standards as effective as the federal standards promulgated by OSHA for certain employers under Section 655 of the Act, may, upon approval of the Secretary of Labor, administer its own occupational safety and health program under its own state law. Although the federal OSH Act conditions federal approval upon the incorporation in a state plan of an occupational safety and health program that covers state employees (29 U.S.C. 667 (c)(6)), the standards so developed are not effective in state plan states in lieu of federal standards promulgated by OSHA pursuant to the OSH Act. As explained above, the OSH Act excludes states from its definition of "employer" and EPA interprets Sections 311 and 312 to apply only to those employers that are subject to the requirement to prepare or have available an MSDS. Thus the Agency interprets Sections 311 and 312 to apply only to those employers in states with approved state plans that would be required to prepare or have available an MSDS were they located in a state subject to the federal occupational safety and health requirements, a category of employers that excludes state and local government agencies.

I hope that this interpretation is helpful. Should you have any further questions, please feel free

to call me at (202) 475-8353 or Kirsten Engel at (202) 382-7706.

Sincerely,
Kathleen Brody, Program Analyst

June 29, 1989

SUBJECT: Clarification of Research Laboratory Exemption Under Sections 311 and 312 or Title III of the Superfund Amendments and Reauthorization Act of 1986
FROM: Kathleen Brody, Program Analyst
TO: Howard Wilson, Manager, Environmental Compliance Program
Office of Administration and Resources Management

This is in response to your June 2, 1989, memorandum to me requesting applicability of the research laboratory exemption under Sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986 to EPA facilities. Section 311(e) of the law exempts from the definition of hazardous chemical, "any substance to the extent it is used in a research laboratory or a hospital under the direct supervision of a technically qualified individual." The preamble to the final rule, 52 F 199, October 15, 1987, P.38347 provides some clarification of the intent of this exemption.

Additionally, it should be noted that analytical laboratories are considered to be included in the definition of laboratories. With regard to a definition of "technically qualified individual," the Agency considers that the term is intended to be applied to individuals with any type of qualifications pertaining to the research which is being conducted. This would exclude, for example, the substances that are being used by cleaning personnel to clean the laboratory.

Having clarified the issues pertaining to the exemption, I would like to address the issue of most importance to EPA facilities. In keeping with the spirit of working cooperatively to identify potential chemical hazards and to develop emergency response procedures to protect public health and safety, I believe that EPA facilities should contact local emergency planning committees to offer information on these chemicals. In my office, we frequently hear that even during emergency response instances, there is difficulty encountered in obtaining information from federal facilities. Further, there are some emergency planners and responders who are in disagreement with this exemption.

Thank you for your cooperation on this matter.

September 8, 1989

Ms, Michele Malloy
Senior Corporate Attorney
Tenneco Inc
Tenneco Building, P.O. Box 2511
Houston, Texas 77252-2511

Dear Ms. Malloy:

This letter is in response to your July 29, 1988 correspondence concerning reporting requirements of the oil and gas production and exploration industry under Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA). Specifically, two issues of concern were presented for EPA clarification:

- The relationship between the SARA Title III definition of "facility" and a production field
- Generic list and inventory reporting for Sections 311 and 312 regulatory requirements

Facility Definition

The SARA Title III and EPA regulatory definition of "facility" prevents the Agency from interpreting that term to apply to an entire oil or gas field in all instances. The statutory and regulatory definition treats all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person at a single facility. However, because oil and gas exploration and production sites located on an oil field are usually not adjacent or contiguous to each other, an oil field may be the location of several different Title III facilities. Nevertheless, the reporting obligations resulting from this definition may be reduced through limited aggregate reporting.

Aggregate reporting, within the confines of certain limitations dictated by SARA Title III and EPA's implementing regulations, is permissible when complying with the reporting obligations of Sections 302, 311, and 312. These aggregate reports, however, must satisfy the informational requirements of the statute for each facility.

When aggregate reporting, an owner or operator of multiple facilities (as may be found in one oil field) must assure that the state emergency response commission (SERC) as well as each local emergency planning committee (LEPC) and fire department with jurisdiction over each facility is provided with the Section 302 emergency planning notification and the appropriate material safety data sheets (or list) and inventory forms under Sections 311 and 312. Furthermore, the statute and regulations require that owners and operators must provide the SEC, LEPC and appropriate fire department with information on the maximum and average daily amounts of hazardous chemicals within certain ranges within each hazard category present at that particular facility during the preceding year. Unless the maximum and daily amounts of these chemicals are within the same ranges at each of the multiple facilities, the owner or operator who submits duplicate Tier I forms to the appropriate state and local officials will not be in compliance with Title III or EPA's implementing regulations.

As a result of the above provisions requiring owners and operators provide state and local authorities with facility-specific information, EPA believes that aggregate reporting may be useful only to those owners and operators of multiple facilities that use the same hazardous chemicals in approximately the same ranges.

Generic List and Inventory Reporting

SARA Title III and EPA's implementing regulations require that owners and operators list and inventory the hazardous chemicals actually present at a given facility. Thus, if the list and inventory of hazardous chemicals found on the generic list and inventory forms are an accurate compilation of the hazardous chemicals actually present at the facility, EPA will regard submission of the generic list and inventory as compliance with SARA Sections 311 and 312. Because the owner or operator must certify that the information submitted on the Tier II inventory form is true, accurate and complete, however, the owner or operator will wish to verify that the generic information reflects the hazardous chemicals present at the particular facility for which the form is being submitted.

The generic list does not relieve the owner or operator of the responsibility of updating provisions of Section 311 or of responding to requests for actual MSDSs or for information below the specified thresholds. Similarly, the owner or operator must respond to requests for Tier II information below the specified threshold, when such information is requested.

If you have any further questions or concerns related to oil and gas exploration and production reporting under SARA Title III, please contact Kathy Brody at 202-475-8353.

Sincerely,
Jim Makris, Director, Preparedness Staff

September 12, 1989

David L Vance, CSP
M & M Protection Consultants
One Cleveland Center, 1375 East Ninth Street
Cleveland, OH 44114

Dear Mr. Vance:

This letter is in regard to your inquiry of August 18, 1989 concerning the reportability of industrial/commercial batteries under Title III of SARA. The following approach must be taken to comply with the law and its implementing regulations.

Section 302 of SARA (codified at 40 CFR part 355) requires any covered facility owner/operator to report the presence of any extremely hazardous substance (EHS) which is present above its threshold planning quantity (TPQ) at any one time. Basically, there are no exemptions under Section 302, therefore the sulfuric acid would be reported at 1000 pounds (its TPQ). This includes all sulfuric acid on site including any in the batteries.

Section 311 of SARA requires any covered facility owner/operator to submit copies of MSDSs or a list of hazardous chemicals to state and local officials. Section 312 of SARA requires the submission of either a Tier I or Tier II inventory report to these same officials. The chemicals which need to be reported are the ones which require MSDSs and are present at the facility in a quantity of 10,000 pounds or are EHSs present at the facility in a quantity of 500 pounds or their TPQ, whichever is less. These sections are codified at 40 CFR part 370. The reportability of a substance under sections 311 and 312 of SARA depends primarily upon the OSHA requirement to prepare or have available on MSDS for that material.

Section 1910.1200(2)(b) of the OSHA regulations provides on exemption for an article which is defined as a manufactured item:

- -which is formed to a specific shape of design during manufacture,
- -which as end use function(s) dependent in whole or in part upon the shape or design during and use, and
- -which does not release or otherwise result in exposure to a hazardous chemical under normal conditions of use.

I understand from conversation with OSHA staff that a battery could be considered to meet this definition of an article when it is sealed and does not need to be serviced. In circumstances where a battery is serviced, exposure to the sulfuric acid could occur, which would negate the article status of the battery. In instances where a battery meets the definition of an article, an MSDS is not required by OSHA. Using this logic, there is a potential for batteries to be excluded form reporting under Section 311 and 312 of SARA, under certain circumstances. In your situation, it would seem that the workers do service the batteries, which leads to exposure. Because of this, an MSDS would be required and the facility owner or operator would need to report the sulfuric acid at 500 pounds, the lead at 10,000 pounds, and any other chemicals to which the worker is exposed to at the applicable threshold.

Section 313 of SARA requires certain manufacturing facilities to submit a Form R annually for any toxic chemicals used above an applicable threshold. Section 313 of SARA is codified at 40 CFR part 372. For SARA Section 313 purposes on article is defined similarly to OSHA's definition. The only difference is that the third criteria is changed to: "which does not release a toxic chemical under normal condition of processing or use of that item at the facility." For SARA, Section 313 purposes the batteries would be considered article, and therefore be exempt from threshold determinations, unless there is a release of a covered toxic chemical during normal use of the battery. If there is a release, then the battery is considered to be similar to a recycle/reuse system and the amount of any toxic chemical added to the battery during the year counts to an applicable threshold. Therefore, in excess of 10,000 lbs per year of Sulfuric Acid would have to be added to batteries in order for the facility to meet the "otherwise use" threshold for reporting under section 313.

I hope that this answers your questions about the reportability of industrial/commercial batteries under Title III of SARA. In the future, please direct written inquiries on Sections 301-304 to Kathy Bishop (Mail Code OS-120) and written inquiries on Sections 311 and 312 to Kathy Brody (Mail Code OS-120). Future written inquiries regarding Section 313 can be directed to me, and of course, any inquiries regarding the Title III program can be addressed verbally by the Emergency Planning and Community Right-to-Know Information Hotline at 1-800-535-0202.

Sincerely,
Sam K. Sasnett, Deputy Project Director

November 14, 1989

Gary Roberts
Safety Representative
Williams Telecommunications Group

P.O. Box 21348
Tulsa, Oklahoma 74121

Dear Mr. Roberts:

I am writing in response to your October 5, 1989, letter to Sam Sasnett concerning the reporting of electrolyte in batteries under Sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986.

You specifically refer to an exemption based on "packaged form." Under Section 311(e), there is an exemption for "Any substance to the extent it is used for personal, family, or household purposes, or is present in the same form and concentration as a product "packaged for distribution and use by the general public." It does not appear that this exemption covers the batteries used at your facility.

Under Sections 311 and 312, reporting is required only for hazardous chemicals for which Material Safety Data Sheets (MSDS) are required to be prepared or made available under the Occupational Safety and Health Administration's Hazard Communication Standard. Section 1910.1200 (b) (6) (iv) of the OSHA regulations provide an exemption for an article which is defined as a manufactured item:

- which is formed to a specific shape or design during manufacture,
- which has end use function(s) dependent in whole or in part upon the shape or design during use,
- and which does not release or otherwise result in exposure to a hazardous chemical under normal conditions of use.

I understand that a battery could be considered to meet this definition when it is sealed and does not need to be serviced. In circumstances where a battery is serviced, exposure to the sulfuric acid could occur. In instances where a battery meets the OSHA definition of an article, a MSDS is not required by OSHA. Therefore, reporting would not be required under Sections 311 and 312.

I hope this clarifies reporting. However, please call me at (202) 475-8353 if you have additional questions.

Sincerely,
Kathleen Brody,

January 17, 1990
Karl G. Brown
Director, Ag Employers Programs
Pennsylvania Farmer's Association
P.O. Box 8736

Camp Hill, PA 17991-8736

Dear Mr. Brown:

This letter is in response to your December 28, 1989, request for an interpretation of the agricultural exemption under Section 311(e)(5) of SARA with respect to the definition of "hazardous chemical."

Section 311(e)(5) exempts from the definition of hazardous chemical "any substance to the extent that it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer." Under the Occupational Safety and Health Act (OSHA) Hazard Communication Standard (HCS) a "hazardous chemical" is defined as any chemical that is a physical or health hazard (29 CFR 1910.1200[c]). Further, the HCS requires these chemicals to have Material Safety Data Sheets (MSDS) prepared for them.

Any facility that is required to prepare or have available a MSDS for a hazardous chemical under OSHA is subject to the requirements of Section 311 and the corresponding regulations at 40 CFR 370.20. Under this subpart the requirements for the minimum threshold level state: for all hazardous chemicals present at the facility in amounts equal to or greater than 10,000 pounds, or that are extremely hazardous substances present at the facility in an amount greater than or equal to 500 pounds (or 55 gallons) or the TPQ, whichever is less (40 CFR 370.20[b][1]). The word "that" refers back to hazardous chemicals. Therefore, the Extremely Hazardous Substances (EHS) are a subset of hazardous chemicals (i.e. they all require MSDS's). The only reason that they are specifically named is because they are the priority chemicals for emergency planning and, as such, are subject to a lower threshold than non-EHS hazardous chemicals. Thus, since the agricultural exemption covers all hazardous chemicals, any EHS used in routine agricultural operations or is part of a fertilizer held for sale to the ultimate customer is exempt from reporting under Sections 311/312 of SARA.

Be aware, however, that this letter explains the Federal reporting requirements only. Under Title III of SARA, state or local laws are not preempted. Therefore, it is possible for state and local governments to expand the scope of this reporting requirement through their own community right-to-know laws.

I hope this response is helpful to you. If you have any further questions on Sections 311/312, or any other aspect of Title III, please feel free to contact the Emergency Planning and Community Right-to-Know Information Hotline at 1-800-535-0202.

Sincerely,
Kathy Jones, Program Analyst, Chemical Emergency Preparedness and Prevention Office

January 19, 1990

Willis J. Goldsmith
Jones, Day, Reavis & Pogue
Metropolitan Square, 1450 G Street, N.W.
Washington, D.C. 20005-2088

Dear Mr. Goldsmith:

In reply to your letter of October 30, 1989, I am responding to your request for information related to EPA's position regarding certain industrial gas storage tanks and bulk gas trailers and the applicability thereto of SARA Title III Section 312. In specific, you requested an opinion on the following points (and I quote from your letter):

(1) if located at a customer's facility, a Linde liquefied gas storage tank or bulk gas trailer constitutes, by itself, a "facility" for those purposes;
(2) when more than one liquefied gas storage tank or bulk gas trailer is located at a customer's facility, each such tank or trailer, by itself, constitutes a separate facility;
(3) when the owner and operator of such a tank or trailer are separate entities, the owner of the tank is required to file the Section 312 annual inventory form and can be held liable if neither it nor the operator files the form; and
(4) submission of an inaccurate or incomplete Section 312 annual inventory form leaves the owner of such a tank or trailer liable, even when it does not possess the correct or missing information. [End quote.]

In response to queries 1-4 above, I have the following comments:

When located at a customer's place of business, a Linde owned liquefied gas storage tank or bulk gas trailer (which is neither in motion nor under active shipping papers) could be construed to be a Linde owned facility given the statutory definition of "facility" [SARA Section 329(4)]. It also follows from this definition that if more than one liquefied gas storage tank and/or bulk gas trailer is located at a customer's place of business, all such tanks and/or trailers could be construed to be one Linde owned facility if they are on a single site or on contiguous or adjacent sites. Such tanks and/or trailers would be separate Linde owned facilities if they are not on a single site or on contiguous or adjacent sites. In addition, these same tanks and trailers are also, in this scenario, components of a larger, customer owned and/or operated facility.

Since it is the customer who uses the material in and has daily control over the Linde owned tanks and/or trailers, generally the customer, and not Linde (or its distributors), would be the person who would have the information necessary to prepare SARA Section 312 reports in an accurate and precise manner. The customer should, therefore, report under Section 312 for the material he/she receives from Linde or its distributors. (Linde's current practice of submitting a Section 312 form for many of the tanks and trailers that it owns may, in some instances, complicate SARA Title III implementation in that State and local officials and local fire departments may receive incomplete and possibly duplicate information.)

However, given the definition of "facility" in the statute, some responsibility is clearly implied, on the behalf of Linde, for the submission and accuracy of Section 312 reports for material that has been delivered to a customer's facility into Linde owned tanks (or delivered to a customer's facility in Linde owned trailers). The statute imposes a legal duty on at least Linde and the customers. My suggestion therefore is that Linde and its distributors, in their contractual arrangements with their customers, stipulate that the customer agrees to report under Section 312 for the material in the Linde owned tanks and trailers in a timely and accurate manner. Such arrangements would not necessarily relieve Linde of liability, but would serve to demonstrate that Linde and its distributors take an active role in encouraging any necessary Section 312 regulatory compliance with regard to the material that they deliver to their customers.

Finally, you noted in your letter that Linde "maintains" the tanks that it owns at its customers' facilities. Depending on the level of control Linde exerts over the tanks and/or trailers at a customer's facility, Linde may be considered an "operator" of the customer's facility. In such case, the potential of Linde being liable if reporting under Section 312 for the customer's facility is not submitted or is inaccurate or incomplete may increase.

I hope this discussion clarifies your questions. If there is any further information I can provide, please let me know.

Sincerely,
Kathy Jones, Program Analyst, Chemical Emergency Preparedness and Prevention Office

February 15, 1990

Janet Joseph
Chemical and Pharmaceutical Press
John Wiley & Sons, Inc.
605 Third Avenue
New York, N.Y. 10158-0012
Attn: Janet Joseph, Managing Editor

Dear Janet:

I am writing in response to you questions on the "turf and ornamentals" industry regarding compliance with Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA).

1. Your example is correct. The growing of turf by a nursery would be covered by the agricultural exemption found in Section 311 (e) of the law. However, maintenance and even the "growing" of turf by a golf course would not be covered by the exemption. The distinction is that the golf course is not a "growing" operation.
2. Under Section 311 (e), substances sold as fertilizers do not need to be reported by retail sellers regardless of the use by the ultimate customer. The customer does not need to report the fertilizer if it is being used in routine agricultural operations. However, if the fertilizer is being used in nonagricultural operations, the user must report the fertilizer if the quantity exceeds the threshold.
3. This question which deals with the requirement for the preparation of a Material Safety Data Sheet is really a matter of Occupational Safety and Health Administration policy. I'm sure that Jennifer Silk would be able to help you on this.
4. Again, you are correct that the agricultural exemption does not apply to a fertilizer wholesaler. However, I would caution against using your second sentence which states that fertilizer retailers and end-users of fertilizers are exempt since the exemption really applies to the hazardous chemicals. There may be other hazardous chemicals present at the facilities which are not exempt.
5. Regarding transportation vehicles, Section 327 indicates that except for Section 304, the reporting provisions of Title III do not apply to the transportation, or storage incident to transportation, of any substance. Section 329 defines facility to include equipment and stationary items. Transportation vehicles can be considered to be a covered part of a facility and the substances carried on these vehicles can be subject to reporting when they are not under active shipping orders. This interpretation applies to all sections of Title III, except for Section 304.
6. I believe that this question really has significance only with regard to Section 313. Under this section, the addition of water to dilute a listed chemical would be considered processing and thus subject to a threshold determination if the concentration of the chemical before dilution is greater than 1 percent or greater than .1 percent for OSHA carcinogens (40 CFR 372.38 [a]).

I apologize for the delay in my response. Please call me if you need more information.

Sincerely,
Kathy Jones (Brody)

February 23. 1990

Mr. Robert Dorzback
Project Engineer - Environmental
Courtlands Coatings Inc.
400 South 13th Street, Post Office Box 1439
Louisville, KY 40201-1439

Dear Mr. Dorzback:

This is in response to your request for an interpretation of facility reporting responsibility under the Emergency Planning and Community Right-To-Know Act (EPCRA) also known as Title III of SARA.

Your question has to do with the reporting responsibility relating to space in a warehouse your company intends to sublease to another company. That company plans to use the space for solvent blending. If your company has no business interest in the company subleasing the space (other than this real estate interest), then that business operation can be considered a separate facility and the operator of that facility will be responsible for compliance with EPCRA.

I hope this sufficiently answers your questions. Please contact me at (202) 383-3821 if you have any further questions although please be advised that I will be out of town until March 6.

Sincerely,
Sam Sasnett, Deputy Project Manager

March 1, 1990

Deborah A. Chadbourne
NCH Corporation
Environmental and Regulatory Affairs Department
2727 Chemsearch Blvd.
Irving, Texas 75062

Dear Ms. Chadbourne

This is in response to your inquiries regarding the permissibility of a certification statement in lieu of a signature on each page of Tier II reports submitted under Section 312 of Title III of the Superfund Amendments and Reauthorization Act of 1986. As we discussed in a recent telephone conversation, there are several acceptable alternatives to the original signature on every page. In each instance, at least the first page of each submission must include an original signature, date of signature and a certification statement indicating the number of report pages. Your proposed certification statement is acceptable. Also, subsequent pages must be numbered "page - of -" and must include the date the report was signed and a stamped or photocopied signature. It is acknowledged that this represents a change in interpretation and we intend to clarify this form design change in the final rule regarding reporting thresholds later this year.

If you have additional questions on this matter, please call Kathy Jones of my staff at (202) 475-8353.

Sincerely,
Jim Makris, Director, Chemical Emergency Preparedness and Prevention Office

March 2, 1990

Mr. Carl Johnson, President
Compressed gas Association
1235 Jefferson Davis Highway
Arlington, VA 22202

Dear Mr. Johnson:

Your February 13, 1990 letter, which was addressed to Mr. Don Clay, Assistant Administrator of the Office of Solid Waste and Emergency Response has been referred to my office. In your letter you requested EPA to reconsider its position regarding application of the Emergency Planning and Community Right-to-Know Act (EPCRA, also commonly known as Title III of the Superfund Amendments and Reauthorization Act of 1986 (Sara Title III)) § 312 to industrial gas suppliers who retain ownership of gas storage tanks or bulk trailers located on the premises of their customers. EPA recognizes that the Compressed Gas Association's position is that the owners of these tanks are not subject to the EPCRA reporting provisions for the reasons set forth in your February 13th letter, including that these tanks are not encompassed by the EPCRA § 329(4) definition of "facility." EPA does not agree with the Compressed Gas Association on the applicability of these reporting provisions.

EPA recognizes that the industrial gas suppliers have available to them significant information that can assist their customers in meeting their EPCRA reporting obligations and assist SERCs, LEPCs, and local fire departments in preparing for and responding to emergency situations. For example, an industrial gas supplier of extremely hazardous substances (EHSs) would know the identity of the EHS, quantity supplied to the customer, and locations of its tanks. This is information that SERCs, LEPCs, and fire departments would need in the absence of reports from the gas customer. However, EPA recognizes that, in some instances, reports from industrial gas suppliers concerning chemicals stored in tanks may be duplicative and less complete than reports filed by other parties. From your letter and conversations with your legal counsel it appears that the greatest concerns to the members of your association are the burden of reporting and the potential liability arising from failure to file EPCRA § 312 reports for tanks at their customers' sites. For instance in the event:

1. an industrial gas supplier owns one or more industrial gas storage tanks or bulk gas trailers at the site; and
2. none of the parties responsible for meeting the EPCRA § 312 reporting obligation have properly compiled with the reporting requirement;

then the industrial gas supplier would be one of several parties potentially liable for civil penalties under EPCRA § 325. EPA has formed an Agency workgroup to address the issues raised by the Compressed Gas Association and other related issues.

At the present, the Agency has decided to address CGA's concerns in the context of an EPA enforcement policy. EPA enforcement action against an industrial gas supplier for failure to submit an EPCRA § 312 report that was required to be submitted by March 1, 1990, will customarily be reserved for those circumstances in which the gas supplier fails to adequately demonstrate that it has made good faith efforts to encourage or verify compliance of its

customers. As evidence of good faith effort, the Agency will look toward compliance with the following five criteria:

1. Contract Language: as of the date of this letter, gas supply agreements must contain language similar to that quoted in footnote 1 of your February 13, 1990 letter ("Current Language"). Within two weeks of the date of this letter new, reopened, renewed or modified gas supply agreements shall provide explicitly that "it is a responsibility of the Buyer to comply with all relevant reporting obligations under the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001-11049 (EPCRA, also commonly known as Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA Title III)) resulting from the presence of the chemicals supplied under the agreement. Further, it is a responsibility of the Buyer to warn and protect its employees and protect its employees and others exposed to the hazards posed by the Buyer's storage and use of the product." ("New Language") Industrial gas suppliers with agreements that now lack the "Current Language" or that contain the "Current Language" but do not timely incorporate the "New Language" must comply with item number 4 for all hazardous chemicals supplied, not just those gases which are extremely hazardous substances.
2. Customer Notification: by March 30, 1990, industrial gas suppliers must notify their customers by separate mailing of the EPCRA reporting obligations the customer may incur from the presence of the chemicals supplied under the agreement, and provide in the notification a source of EPCRA compliance information such as the EPCRA Hotline (1-800-535-0202).
3. Inquiry Responsibilities: In the event a representative of a SERC, LEPC, or fire department makes a request for information concerning chemicals stored in a supplier owned tank at a customer's site, the industrial gas supplier must promptly and in good faith respond to these requests.
4. Extremely Hazardous Substance Identification: by April 30, 1990, for those substances listed in 40 C.F.R. Part 35 (Appendix A and B), the industrial gas supplier must identify for appropriate SERCs and LEPCs, the location(s) and chemical contents of its tanks.
5. Documentation of the aforementioned good faith efforts, as well as any others which would be relevant in a given case, must be maintained in the gas supplier's files.

Sincerely,
James M. Strock , Assistant Administrator

March 6, 1990

W.A. Sikele
Environmental Specialist
Facilities Engineering, Chrysler Motors Corporation
26311 Lawrence Ave.
Center Line, MI 48288-1718

Dear W.A. Sikele,

This letter is in response to your letter on February 8, 1990, requesting a written clarification of the "household products" exemption under Sections 311/312 of SARA Title III (also known as the Emergency Planning and Community Right-to-Know Act). Section 311(e)(3) of SARA Title III, excludes from the definition of hazardous chemical "any substance to the extent it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public." This exclusion would apply to any substance that is a hazardous chemical (including those hazardous chemicals that are also extremely hazardous substances or toxic chemicals) either in use by the general public or in commercial or industrial use when in the same form and concentration as the product intended for use by the general public. This exclusion is intended to cover ordinary household products stored in a home, on a retailer's shelf, or products purchased in larger quantities by industrial facilities if packaged in substantially the same form as the consumer product and present in the same concentration. For purposes of this exclusion, under Sections 311/312 of SARA Title III, EPA has determined the term "form" to refer to the packaging rather than the physical state of the substance.

Therefore, the substances covered under this exemption would not require reporting under Sections 311/312 of SARA Title III. I hope this response clarifies matters for you. If you have any further questions on this or any other aspect of SARA Title III, please feel free to call the Emergency Planning and Community Right-to-Know Information Hotline at (800) 535-0202.

Sincerely,
Kathy Jones, Program Analyst

March 7, 1990

Alan B. Shanks, Director

Bureau of Field Services & Disaster Resources
Wisconsin Division of Emergency Government
4802 Sheboygan Avenue, Room 99A, Post Office Box 7865
Madison, WI 53707-7865

Dear Mr. Shanks:

Thank you for your letter concerning the presence of sulfuric acid in car batteries located at automotive dealerships. This question has also recently been raised by an industry trade association. Under Section 302 of Title III, the Congress provided no exemptions from the emergency planning notification by facilities. If the extremely Hazardous Substance is present in excess of its threshold planning quantity, the facility must notify the LEPC of that fact and provide a contact who can provide additional information, if needed.

We do not believe coverage of facilities such as you have described go beyond the intent of the legislation. The important result of coverage under Section 302 is that the LEPC has information with which it can make a determination about how much emphasis should be place upon planning around such a facility. The presence of sulfuric acid in hundreds of batteries may not represent the highest priority for planning in the community. However, the LEPC may wish to advise the fire departments of the presence of such substances so that if an accident occurs, the fire department will be on notice. This may be the only action taken by the LEPC with regard to these facilities. Or there may be special concerns which are raised because of the location, type or size of the facility which the LEPC may wish to address. The law provides the LEPC with such flexibility. lt does not provide the facility with an exemption.

With regard to sulfuric acid in batteries, the threshold quantity would be dependent upon the concentration of the acid in the batteries. If the concentration were 33% (according to our understanding the concentration of sulfuric acid in batteries range from 30 to 35%) then 3,000 pounds of the mixture would equal the TPQ of 1,000 pounds.
According to a representative of an industry trade association between 200 and 300 car or truck batteries will equal the TPQ, depending upon the size of the battery. While you did not request information regarding Sections 311 and 312, we would note that car and truck batteries as normally stored at a car dealership would be considered to be exempt under the household product exemption and therefore annual reporting would not be required. This exemption would not apply to large commercial type batteries for facilities such as telephone switching stations, nor to the type of batteries normally contained ln electric forklift vehicles, if the threshold requirements are met.

I hope this satisfactorily responds to your concern.

Sincerely,
Kathleen Bishop, Chemical Emergency Preparedness Staff

April 19, 1990

Subject: Clarification of Hazardous Chemical Exemption Concerning Medical Facilities
From: Kathy Jones
To: Regional Preparedness Coordinators

The hotline has received a number of recent inquiries concerning the storage of oxygen and other substances at hospitals. I am enclosing a copy of the response which the hotline has been instructed to provide to callers. Please share this information with the appropriate SERC contacts as soon as possible. I am sure that States are receiving similar calls. As with many of the other exempt substances, there has been concern expressed that this information would be useful to emergency planners and responders. I suggest that callers also be encouraged to work with their SERC or LEPC to find out if they would like this information to be reported and to respond accordingly.

If you have additional questions or would like to discuss this issue further, please do not hesitate to call me at (202) 475-8353.

Section 311 (e)(4) of Title III and 370.2 of the regulations exclude from the definition of "hazardous chemical " any substance to the extent it is used in a research laboratory or a hospital or other medical facility under the direct supervision of a technically qualified individual. EPA believes that this exemption is intended to include substances which are used or will be used in the medical and research fields at these facilities under the direct supervision of technically qualified individuals in the medical or research fields. The exemption would include the storage of the substances at these facilities prior to the use of the substance. Further, the term "technically qualified" is interpreted to refer to individuals who are adequately trained in the research or medical fields, as appropriate. (For example, doctors, nurses, research professionals).

Therefore, this exemption would not apply to building cleaning supplies used at research or medical facilities even though they may be used under the supervision of qualified individuals. It is important to note that the exemption applies to the substances rather than the facility. Under Section 302 of the law, there are no exceptions. Under Sections 311 and 312, only those substances which are used for medical or research purposes in medical or research facilities are exempt. Medical or research facilities may have other hazardous chemicals which are subject to reporting. These medical and research facilities may also be subject to reporting under Section 304 if there are any of these other hazardous chemicals present at the facilities in any amount.

April 19, 1990

Paul Revere
Honigman, Miller, Schwartz and Cohn
2290 First National Building
Detroit, Michigan 48226-3583

Dear Mr. Revere:

I am writing in response to your September 11, 1989 letter to Kathleen Brody concerning reporting under the Emergency Planning and Community Right-To-Know Act (EPCRA), also known as Title III of the Superfund Amendments and Reauthorization Act of 1989 (SARA).

You requested that we address certain "factual situations" set forth in questions to me. Without a description of material facts such as the relationship of the parties and the intent and structure of the transactions you described, it is difficult to determine who EPA will hold responsible for filing and failing to file EPCRA reports.

However, following are general answers to your questions:

1. When a facility is purchased, both the purchaser and seller are responsible for ensuring that Section 311/312 reports covering the facility are filed for the year of the purchase. Section 312 requires the owner or operator of a facility to file inventory forms for a covered facility for a calendar year. The statute does not assign the duty to file forms to only one of the parties who own or operate a facility sold during a year.

   EPA's regulatory requirement may be satisfied by the submission of a single report for a facility to each appropriate report recipient for a reporting year. This coordinated report approach is most suitable when the activities at the facility are similar before and after the sale. Otherwise, separate reports would be more appropriate. As a matter of business practice, a purchaser and seller should agree among themselves as to which of them will actually prepare the reports. Generally, the owner/operator of the facility on the last day of the calendar year should submit the report unless the sales or transfer agreement states that the seller will assume this responsibility (Section 312 requirements apply to whoever is required to prepare or have available Material Safety Data Sheets under the Occupational Safety and Health Administration's Hazard Communication Standard for hazardous chemicals which are present in applicable reporting threshold quantities).

2. Same as 1 above. For example, if a company is purchased on January 10, 1990, both the seller and purchaser would be obligated to ensure that reports are filed by March 1, 1990 for calendar year 1989. The seller would be an owner in calendar year 1989. The purchaser would be an owner at the time reports are due for 1989. Furthermore, depending upon the facts and general law, there are situations in which a purchaser or a seller may be held responsible for obligations of the other party regardless of when the purchase occurred. Again, EPA expects that only one coordinated report will be submitted to each appropriate recipient.

3. Same answer as 1 above, for Sections 312, and 313. The dissolution of a company or cessation of its operations does not change the requirement that reports covering the facility's reporting year be timely filed. This is an obligation borne by both the purchaser and seller of the facility. Although EPA is not bound by a sales agreement, the purchaser and seller should address the reporting obligations in the sales agreement. Regarding Section 302, the purchaser becomes obligated to notify the SERC and LEPC within 60 days after purchase of the facility or after an EHS in a threshold planning quantity (TPQ) becomes present at the facility, whichever is later. The seller prior to the sale had an on-going responsibility to report the presence of threshold planning quantities of EHS's. While not required by the statute, the seller should advise the SERC and LEPC of the change of ownership so that future contacts will be made with the purchaser. The seller would not be liable for Section 302 reporting obligations that are due to a TPQ being exceeded after the date of sale. The section 304 telephone notification and subsequent written follow-up reports are the responsibility of the party who is the owner or operator on the day which the release occurs.

4. The approach outlined in this letter is EPA's general approach to Title III reporting obligations.

EPA has not developed other policies concerning the effect of a transfer (or a purport-d transfer) on an entity's EPCRA obligation's because any such obligations depend upon the interplay of the facts surrounding the transaction and the relevant statutes, regulations, and case law.

I hope that this information is helpful to you. Please feel free to contact me, at (202) 475-8353 if I can be of further assistance.

Sincerely,
Jim Makris, Director, Chemical Emergency Preparedness and Prevention Office

April 3, 1990

Mr. Edward Peterson, Project Engineer
General Motors Technical Center
30400 Mound Road
Warren, MI 48090-9015

Dear Mr. Peterson:

This is in response to your February 14, 1990, letter regarding annual reporting requirements under Section 312 of SARA Title III.

In your letter, you presented the following scenario: the AC Rochester Division ("AC") of General Motors Corporation owns a property in Flint, Michigan (the "Flint property"), a portion of which is leased to Delco Electronics Corporation ("Delco"), a wholly owned subsidiary of GMHE, which is wholly owned by General Motors Corporation. You requested confirmation that a combined single submittal will meet the requirements of Section 312 of SARA Title III and that EPA does not require the submittal of separate Section 312 chemical inventory forms for both the AC and Delco operations.

The reporting requirements under Section 312 of SARA Title III (40 CFR 370.25) state that the owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under OSHA shall prepare and submit an inventory form to the State Emergency Response Commission, the Local Emergency Planning Committee, and the fire department with jurisdiction over the facility. A "facility" is defined as "all buildings, equipment, structures and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person)" (40 CFR 370.2). Also, "person" is defined as "any individual, trust, firm, joint stock company, corporation, partnership, association, State, municipality, commission, political subdivision of a State or interstate body". (40 CFR 370.2)

This letter confirms that the Section 312 reporting requirements can be met by the submittal of inventory forms for the Flint property as a whole. AC, as owner of the Flint property, may file inventory forms for the Flint property as a facility, provided that its threshold calculations for each hazardous chemical are based on the amount at the facility as a whole. If no inventory forms are received from AC for the entire Flint property, or if the inventory forms are inaccurate or incomplete, then each of the owners and the operators of all or part of the Flint property may be held liable for violating Section 312.

I hope that this clarifies the issue for you. If you need any further clarification, please contact the Emergency Planning and Community Right-to-Know Information Hotline at (800) 535-0202.

Sincerely,
Kathy Jones, Program Analyst

April 26, 1990

Ruth Macdonald, R.N.
Right-to-Know Coordinator, Department of Human Resources
Quincy Hospital
114 Whitwell Street
Quincy, Massachusetts 02169

Dear Ms. Macdonald:

I am writing in response to your April 3, 1990 letter concerning the reporting of liquid oxygen which is used for medical purposes, under Title III of the Superfund Amendments and Reauthorization Act of 1986. Section 311 (e) (4) and 370.2 of the regulations exclude from the definition of "hazardous chemical" any substance to the extent it is used in a research laboratory under the direct supervision of a technically qualified individual. EPA believes that this exemption is intended to include substances which are used or will be used at these facilities under the direct supervision of technically qualified individuals in the medical or research fields. The exemption would include the storage of the substances at these facilities prior to the use of the substance. Further, the term "technically qualified" is interpreted to refer to individuals in the research or medical fields, as appropriate. (For example, doctors, nurses, research professionals). Therefore, this exemption would not apply to building cleaning supplies used at medical or research facilities even though they may be used under the supervision of qualified individuals.

It is important to note that the exemption applies to the substances rather than the facility. Under Section 302 of the law, there are no exemptions. Under Sections 311 and 312, only those substances which are used for medical or research purposes are exempt. Medical or research facilities may have other hazardous chemicals which are subject to reporting. These medical and research facilities may also be subject to reporting under Section 304 if there are any of these other hazardous chemicals which are present at the facilities in any amount. It appears that liquid oxygen used at your facility for medical purposes does not need to be reported since lt is exempt from Section 311 and 312 reporting. Further, it is not covered under Section 302 or 304 because it is not a listed hazardous substance or extremely hazardous substance.

I hope this information is helpful to you. Should you have any additional questions, please do not hesitate to contact me at (202) 475-8353 or the Hotline staff at 1-800-535-0202.

Sincerely,
Kathleen Jones,

May 15, 1990

Richard Colantuno
Limestone Springs, Fishing Preserve
930 Tulpehocken Road
Richland, PA 17087

Dear Mr. Colantuno:

I am writing in response to your recent letter concerning the exemption under Section 311 (e) of Title III of the Superfund Amendments and Reauthorization Act of 1986 which is codified at 40 CFR 370.2 and addresses "any substance to the extent it is used in routine agricultural operations...".

In your letter you ask specifically whether this exemption to the definition of hazardous chemical applies to oxygen used to raise fish at your fish farm. This letter confirms our recent conversation at which time I answered that the oxygen would be covered by the exemption since its use is considered part of routine agricultural operations. Therefore, your use of oxygen does not need to be reported under Section 311 and 312 of Title III. Further, it is not covered under Section 302 Or 304 because it is not a listed hazardous substance or extremely hazardous substance.

Please let me know if you have any additional questions.

Sincerely,
Kathleen Jones

June 22, 1990

Karl F. Birns
Kansas Right-to-Know Program, Department of Health and Environment
Mills Building, Suite 501, 109 SW 9th Street
Topeka, KS 66012-1215

Dear Karl:

I am writing in response to your April 23, 1990 letter concerning facility definition relative to reporting for the oil production industry under Title III of the Superfund Amendments and Reauthorization Act of 1986, also known as the Emergency Planning and Community Right-to-Know Act. This should also confirm the interpretation which was provided to you by Kathy Jones during her conversation with you, Connie Ericson, and Randy Pitrie during the recent National Association of State Title III Program Officials conference in New Orleans. EPA understands that a common business arrangement in the oil and gas industry is for a producer to lease the right to extract subsurface oil and gas from an owner of surface property. With each lease of subsurface rights, the oil producer acquires a right to use a portion of the surface to extract oil and gas. On these portions of the surface property, the producer locates its wells and batteries.

In your letter, you ask whether the definition of a facility is derived from the surficial structures (tanks, wellheads, pipes, etc.) or from the underground ore body or mineral right (field or lease). The definition of "facility" in Section 329 (4) of the Act and regulations in 40 CFR 355.20 and 370.2 contains three elements: a stationary item element ("all buildings, equipment, structures, and other stationary items"), a location element ("which are located on a single site or on contiguous or adjacent sites"), and a control element ("which are owned or operated by the same person ..."). The definition applies equally to surface and subsurface rights. As you know, in March of last year we proposed a clarification on subsurface reporting which has not yet been finalized. However, that should not affect the issue at hand.

EPA believes that all three elements of the above definition are relevant in determining the appropriate reporting facility in general and in clarifying reporting obligations for oil and gas production areas in particular. The relevant stationary items are the tank batteries and associated wells, and it is undisputed that OXY USA has the necessary control interest in the batteries. Based upon EPA's understanding of the typical exploration arrangement, EPA views each lease to be a separate site. The subsurface lease gives the lessee a property interest that is broader than the surface operation. EPA believes that this reporting meets the needs of emergency planners in an efficient manner. In order to maximize benefits, the submittal of a location plat of the facility with Tier II reporting is encouraged by EPA.

Therefore, with regard to the Section 312 submission from OXY USA, it appears appropriate that facility identification be made by reviewing the location of the leases and batteries. When aggregate (representative) reporting is used for multiple facilities, it is necessary to identify the facilities for which the aggregate report is being filed. The above interpretation reflects current Agency policy. However, please be advised EPA has formed an agency workgroup which is

currently reviewing this and other related issues.

Please feel free to contact Kathy on (202) 475-8353 if additional questions on this matter arise.

Sincerely,
Jim Makris, Director, Chemical Emergency Preparedness and Prevention Office

June 25, 1990

Lupe Caballerno
Valley Baptist Medical Center
2101 Pease Street, P.O. Drawer 2588
Harlingen, Texas 78550

Dear Mr. Caballerno:

I am writing in response to your May 22, 1990 letter concerning the exemption under Title III of the Superfund Amendments and Reauthorization Act of 1986, for substances used in hospitals.

Section 311 (e) (4) and 370.2 of the regulations exclude from the definition of "hazardous chemical" any substance to the extent it is used in a research laboratory or a hospital or other medical facility under the direct supervision of a technically qualified individual. EPA believes that this exemption is intended to include substances which are used or will be used at these facilities under the direct supervision of technically qualified individuals in the medical or research fields. The exemption would include the storage of the substances at these facilities prior to the use of the substance. Further, the term "technically qualified" is interpreted to refer to individuals in the research or medical fields, as appropriate. (For example, doctors, nurses, research professionals). Therefore, while this exemption would cover oxygen used for medical purposes at a hospital, it would not apply to building cleaning supplies used at medical or research facilities even though they may be used under the supervision of qualified individuals.

It is important to note that the medical-use exemption applies to the substances rather than the facility and is limited to Sections 311 and 312. There are no exemptions under the emergency planning notification provisions of the law, Section 302. Any hospital that has more than the "threshold planning quantity" (TPQ) of an "extremely hazardous substance" (EHS) must notify the State's emergency response commission. Notification procedures, TPQs, and EHSs may be found in 40 CFR Part 355 and its appendices. Note that oxygen, for example, would not need to be reported since it is not a "listed EHS specified for reporting under Section 302. Under Sections 311 and 312, only those substances which are used for medical or research purposes are exempt. Medical or research facilities may have other hazardous chemicals which are subject to reporting. These medical and research facilities may also be subject to reporting under Section 304 if there are any of these other hazardous chemicals which are present at the facilities in any amount.

I hope this information is helpful to you. Should you have any additional questions, please do not hesitate to contact me at (202) 475-8353 or the Hotline staff at 1-800-535-0202.

Sincerely,
Kathleen Jones

June 29, 1990

John A. Knoll
Natural Gas Odorizing, Inc., Plant and General Services
3601 Decker Drive, P.O. Box 1429
Baytow, Texas 77522-1429

Dear Mr. Knoll:

I am writing in response to your June 18 letter concerning the reporting of malodorant stored in propane tanks at pipeline facilities. Although your letter does not specify Title III of the Superfund Amendments and Reauthorization Act of 1986, I recall from our recent telephone conversation that this legislation was your concern. Section 327 of Title III exempts from any Title III reporting requirements other than the emergency release notification, the transportation, including the storage incident to such transportation, of any substance or chemical subject to the requirements, including the transportation and distribution of natural gas. EPA has interpreted this exemption to apply to the transportation of any substance or chemical by pipeline.

Since Title III does not define pipeline, the Agency refers to the definition found in Department of Transportation regulations implementing the Hazardous Materials Transportation Act (HMTA). These regulations allow that "breakout tanks" are included in the definition of pipeline. From the information in Mr. Tenley's December 15, 1989 letter to you, it appears that the tanks in question could be considered break out tanks. Under HMTA regulations, "breakout tanks" are defined as "a tank used to (a) relieve surges in a hazardous liquid pipeline system or (b) receive and store hazardous liquid transported by pipeline for reinjection and continued transportation by pipelines".

Therefore, it appears that the odorant is covered by the exemption in Section 327. With regard to the emergency release notification under Section 304 of Title III, a release must be reported if the odorant is a covered hazardous substance or extremely hazardous substance under this section. I think that this should answer your question concerning Title III reporting. I am also enclosing a Title III Fact Sheet and a copy of the Title III lists. However, please let me know if I have incorrectly characterized the tank as a breakout tank. If this is the case, reporting under Title III may be required. I can be reached at (202) 475-8353.

Sincerely,
Kathy Jones

July 11, 1990

Barbara E. Williams
Sr. Supply Analyst
General Telephone Company of Florida
8800 East Adamo Drive, MC
Tampa, Florida 33619

Dear Ms. Williams:

I am writing to you at the request of Jan Vorhees of the Tampa Regional Planning Council to correct information in a letter from me to you dated July 12, 1988. In that letter, I was responding to your inquiry about whether or not batteries were covered by the article exemption under the Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard. I am enclosing copies of this correspondence for your reference.

At that time, I did not understand that the batteries utilized by telephone companies are opened for maintenance, thereby presenting hazardous exposure to the employee. Since that time, I have had several conversations with representatives of telephone companies as well as with OSHA staff concerning the batteries. While some sealed batteries are exempt as articles, those which need such maintenance are not. Since this is an interpretation of OSHA regulations, I suggest that you address any follow-up correspondence to OSHA staff. I am sure that Jan can direct you to the appropriate local OSHA office.

Since the batteries are not covered by the article exemption, they are reportable under Sections 304, 311 and 312 of Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA). I apologize for the confusion my letter has caused. Also, please note there are no exemptions under Section 302 of Title III of SARA. Therefore, if sulfuric acid (which is a listed extremely hazardous substance) is present in excess of the threshold planning quantity, the facility is subject to the emergency planning requirements detailed in Sections 302 and 303 of Title III.

Sincerely,
Kathy Jones (Brody)

July 20, 1990

Richard I. Braund
Department of Military Affairs, Division of Emergency Government
4802 Sheboygan Avenue, Room 99A, P.O. Box 7865
Madison, Wisconsin 53707-7865

Dear Mr. Braund:

Thank you for your April 27 letter to Kathleen Jones of my staff, requesting a written determination as to whether sand used for highway purposes, road salt, gravel, and dirt, etc., are considered to be hazardous chemicals that need to be reported under Sections 311 and 312 of Title III of the Superfund Amendments and Reauthorization Act of 1986, if applicable thresholds are met. The reporting of sand, road salt, gravel and dirt was not a major intent of the Federal legislation and clearly is not a priority for emergency planning and emergency response; however, they are covered under the broad coverage of the right-to-know requirements. LEPCs are in the best position to evaluate and set priorities among community hazards for emergency planning identified through Sections 311 and 312. There are a few similar anomalies which have been brought to our attention and we believe that they may be best addressed in legislative change. Specifically, you mention the potential applicability of the "article" exemption. This exemption comes under the Occupational Safety and Health Administration (OSHA) Hazard Communication Standard and allows that the requirement for Material Safety Data Sheets (MSDS) does apply to an article defined at 1910.1200 as "a manufactured item: (I) which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use: and (iii) which does not release or otherwise result in exposure to a hazardous chemical under normal conditions of use." In conversation with Jennifer Silk of OSHA, we were informed that these substances do not meet the definition of article since there is hazardous exposure to the worker. Similarly, there is no exemption under Section 311 (e) of Title III which would apply to the described use of these substances. At the present, you may be able to minimize the paperwork and cost associated with reporting of these substances with your State right-to-know legislation. Even though EPA encourages voluntary compliance by State and local agencies, they are not legally subject to the Federal reporting requirements under Sections 311 and 312 because they are not required by the Federal OSHA Hazard Communication Standard to prepare or have available MSDS. Therefore, if you were to address the reporting of these substances by county agencies in Wisconsin, there would be no conflict with the Federal law.

Thank you again for bringing this issue to our attention. Please don't hesitate to contact me if you have additional questions.

Sincerely,
Jim Makris, Director, Chemical Emergency Preparedness and Prevention Office

July 3, 1990

Dennis A. DeSilvey
Facilities Engineer, R.D. Werner Co., Inc.
Box 580
Greenville, PA 16125

Dear Mr. DeSilvey:

Thank you for your May 31 letter concerning reporting under Sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986, also known as the Emergency Planning and Community Right-to-Know Act. In your letter, you mention that you have read that only aluminum oxide, or aluminum fume or dust need be reported. It appears that you may be referring to reporting under Section 313 of the law where the listed toxic chemicals are aluminum oxide and aluminum fume or dust.

The reporting requirements under Sections 311 and 312 are different. These sections cover all hazardous chemicals since they are targeted at community right-to-know. The hazardous chemicals subject to reporting are those for which you are required to prepare or have available a Material Safety Data Sheet (MSDS) under the Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard. Assuming that you are required to maintain a MSDS for aluminum, it is subject to reporting if the quantity present at your facility exceeds 10,000 pounds.

However, Section 311(e) of the legislation exempts from the definition of hazardous chemical "any substance present as a solid in a manufactured item to the extent exposure does not occur under normal conditions of use". Since, as you indicate in your letter, normal condition of use at your facility which permits hazardous exposure involves welding or cutting, the reportable amount of the aluminum is based on the amount that is undergoing these processes at one time. Large blocks of aluminum which are not undergoing a process which would allow hazardous exposure are not reportable. It is therefore possible that in the past you have been reporting larger quantities of aluminum than was necessary.

I hope that this information assists you in future reporting under Sections 312. Please feel free to contact me at (202) 475-8353 or the Emergency Planning and Community Right-To-Know Hotline at 1-800-535-0202, if you have additional questions.

Sincerely,
Kathy Jones

October 11, 1990

Mr. Parker Adams
Environmental Consultant
Datagraphics, Inc.
Post Office Box 10369
Pittsburgh, PA 15234

Dear Mr. Adams,

This letter is in response to your September 5, 1990 request for clarification regarding reporting of mixtures under the Superfund Amendments and Reauthorization Act of 1986 (SARA) sections 311 and 312. Sections 311 and 312 of SARA Title III (and 40 CFR 370.21 and 370.25 of EPA's implementing regulations) require the owners/operators of facilities to submit to State and local authorities a Material Safety Data Sheet (MSDS) and emergency and hazardous chemical inventory forms for each hazardous chemical present at the facility at or above the reporting thresholds. Under section 311(e) of the statute and 40 CFR Section 370.2 of the regulations, "hazardous chemical" is defined to mean "...any hazardous chemical as defined under section 1910.1200 of Title 29 of the Code of Federal Regulations...", with certain exceptions. "Hazardous chemical" is in turn defined under the OSHA regulations (29 CFR 1910.1200) as "...any chemical which is a physical hazard or a health hazard".

A facility is subject to sections 311 and 312 of SARA Title III if a hazardous chemical that requires a MSDS under OSHA regulations is present at the facility in amounts equal to or greater than 10,000 lbs. If the hazardous chemical is also an extremely hazardous substance (EHS), the reporting threshold for SARA sections 311 and 312 is the threshold planning quantity (TPQ) or 500 pounds, whichever amount is less. Facilities have the option of reporting hazardous chemicals that are mixtures by hazardous component or by the entire mixture. With respect to hazardous chemicals about which the facility owner/operator has no knowledge of the composition, the October 15, 1987 Federal Register (52 FR 38344) states that "... where mixtures have unknown composition, facilities should report the mixture as a whole". In your example of diesel fuel (for which no composition information is available), the owner/operator should treat the material as a whole when determining whether to report and the 10,000 pound threshold would apply.

If you have any further questions related to the reporting of mixtures under SARA Title III, please feel free to contact me at 202-475-8353 or the Emergency Planning and Community Right-to-Know Hotline at (800) 535-0202 or (202) 479-2449 between the hours of 8:30 am to 7:30 pm Eastern Time Zone.

Sincerely,
Kathy Jones

October 25, 1990

C. T. Sawyer
Vice President, American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005

Dear Mr. Sawyer:

This letter responds to questions you and other individuals associated with the American Petroleum Institute have raised concerning whether, in the Agency's view, the emergency planning, release notification, material safety data sheet, and annual inventory provisions of the Emergency Planning and Community Right to Know Act of 1986 (commonly referred to as "EPCRA," "SARA Title III" or "Title III") apply to subsurface naturally occurring deposits of crude oil and substances contained in such deposits ("oil deposits"). These questions arise from your reading of the recent clarifying amendments to the regulatory definition of "facility" contained in 55 Fed. Reg. 30632 (July 26, 1990).

The Agency understands that you believe that oil deposits are not "structures" as the term is used in Title III and therefore cannot be a facility. In your letter of September 26, 1990, you point out that ordinary use of the terms "facility" and "structure" would not seem to describe uncontained naturally occurring oil deposits. You note that an oil deposit from which an operator may draw oil may extend beyond the limits of the surface tract of land on which the operator conducts his or her activities. You explain that an oil deposit does not have readily definable physical limits and that mapping such limits is dependent upon data that may vary in quality and other technical limitations. In addition, you inform us that data on the types and quantities of hazardous chemicals located in each stratum through which one drills is not customarily available for a number of years. Furthermore, you question the value of oil deposit quantity data to emergency responders because most oil wells in this country are not free-flowing and because such data would obscure data on surface storage of chemicals when aggregated. Other concerns not germane to the statutory framework (e.g., confidentiality of reserves, other regulatory schemes, certain assumptions about burden, etc.) are expressed but are not material to the questions you have raised.

In determining the applicability of Title III's reporting provisions to any situation, the Agency takes as a starting point the statutory definition of a facility, which is set forth in Section 329(4) of the Act. 42 U.S.C. 11049(4). The definition contains three elements: a stationary item element ("all buildings, equipment, structures, and other stationary items"), a location element ("which are located on a single site or on contiguous or adjacent sites"), and a control element ("and which are owned or operated by the same person...."). For purposes of this letter, it is assumed that each oil lease constitutes a site and the company conducting exploration or extraction is the relevant operator. The modifications to 40 C.F.R. Secs. 355.20 and 370.2 in the July 26 Federal Register were intended to clarify the Agency's interpretation that the term "structures" in the statutory definition of facility is not limited to surface structures or man-made structures. In the preamble to the regulations finalized on July 26, the Agency noted that the purpose of the revisions was to include only those subsurface structures that are man-made or

natural structures into which hazardous chemicals are purposefully placed or removed through human means such that the structures function as a containment structure. If an activity or facility is exempt from certain title III requirements, today's regulatory definition of "facility" does not alter that exemption. 55 Fed. Reg. 30639 (July 26, 1990). The July 26 revisions indicate that the Agency does not believe that Title III distinguishes hazardous chemicals stored in tanks and buildings from hazardous chemicals stored in salt domes and caves.

The Agency's discussion of oil deposits in the preamble to the proposed rule (54 Fed. Reg. 12992 (March 29, 1989)), the preamble to the final rule, and the Response to Comment document generally suggests that Title III would apply to oil deposits to the extent that such deposits function as containment structures. For example, in the preamble to the proposed rule, the Agency listed a "geological stratum" as an example of a structure if such stratum functions as a containment structure. 54 Fed. Reg. 12999. Similarly, the Response to Comment document notes that there is no exemption for petroleum substances from Title III and that there is no statutory basis for distinguishing "product" stored at a facility and other hazardous chemicals. However, nowhere in the three documents referenced in this paragraph does the Agency express a view that oil deposits function as containment structures. Therefore, while these documents generally talk about Title III applying to oil deposits or "reserves," these documents do not express an Agency conclusion on whether oil deposits are structures under Title III.

Based on the Agency's understanding of the nature of oil deposits and the terms of Title III and the regulations thereunder, the Agency takes the position that oil deposits are not structures under Title III.1 The indefinite boundaries of strata with oil deposits contrast with the more definite boundaries of other items that are called natural structures, such as a cave or a salt dome. The difficulty in estimating the quantities of hazardous chemicals present in each strata through which an operator drills would make such a broad interpretation of the term "structure" difficult to implement in a way that promotes the goals of Title III. 2 The Agency in the past has interpreted the location element to set the geographic boundaries of a facility; to the extent that oil deposit boundaries are indefinite and may extend beyond an oil lease or contiguous or adjacent leases, such a "structure" may extend beyond the geographic limits of the facility. Such an arrangement would be inconsistent with the Agency's statutory implementation scheme.

The preamble to the July 26 rule emphasized that the Agency was interested in obtaining reports on natural structures that function as containment structures. While human intervention may increase the risk associated with an oil deposit, see 54 Fed. Reg. 12999, it is difficult to conclude that the simple act of drilling through a stratum is enough use to convert a stratum to something that is used for containment purposes. This may be especially true in the oil industry, where a suspected deposit may be left undrilled until it appears economic to drill it. Such a deposit would be used for containment before drilling but would not be a "structure" under the preamble to the proposed rule. Human intervention in the form of drilling would not convert the deposit to a containment structure. Interpreting oil deposits to be "structures" under Title III upon human intervention but not prior to such intervention would appear to be inconsistent with the purposes of modifying the regulatory definition of facility.

1 In your letter of September 26, 1990, you also ask us to address the applicability of Title III to deposits of gas. This letter discusses oil deposits in particular. However, in your

letter and in our discussions with Mark Rubin of your staff and with Rosemary Stein of Exxon, API has represented to us that the geological characteristics of gas deposits are identical to those characteristics of oil deposits we have referred to in this letter. Thus, the geological, programmatic and legal factors that have led the Agency to conclude that oil deposits are not structures also are true for gas deposits. Therefore, based on your representations, the conclusions expressed in this letter also would apply to gas deposits.

2 For example, the current reporting scheme accomplishes right-to-know purposes by alerting a community of the existence of oil operations and the presence of quantities of hazardous chemicals that pass through or are used in its area. The Agency is not aware of new oil operations that would, for the first time, have to inform communities of their existence as a result of classifying oil deposits as structures. While the quantities of hazardous chemicals that would be reported would increase if oil deposits were interpreted to be structures, such information would be inaccurate and tend to obscure the data on surface chemicals. In general, the Agency believes chemicals that pass through or are used in a community are of greater concern to a community than those contained in oil deposits.

The previously expressed interpretation that oil deposits are not structures under Title III also requires the conclusion that oil deposits are not facilities under Title III. If you wish to discuss any of the issues mentioned in this letter, please contact Kathy Jones of my staff at (202) 475-8353.

Sincerely,
Jim Makris, Director, Chemical Emergency Preparedness and Prevention Office

March 4, 1991

Mr. Carl Johnson, President
Compressed Gas Association
1235 Jefferson Davis Highway
Arlington, VA. 22202

Dear Mr. Johnson:

On January 25, 1991, you requested EPA to extend for the March 1, l991 Section 312 reporting deadline an EPA enforcement policy regarding application of the Emergency Planning and Community Right-to-Know Act (EPCRA) Section 312 to industrial gas suppliers who retain ownership of gas storage tanks or bulk trailers located on the premises of their customers. The enforcement policy was set forth in a March 2, 1990, letter to you from James M. Strock, Assistant Administrator for the Office of Enforcement. EPA recognizes that the Compressed Gas Association's position is that the owners of these tanks are not subject to the EPCRA reporting provisions for the reasons set forth in your February 13, 1990 letter, including that these tanks are not encompassed by the EPCRA 329(4) definition of "facility." EPA does not agree with the Compressed Gas Association's (CGA) interpretation of the statutory term "facility" or the applicability of the EPCRA reporting Provisions

Further, EPA believes strongly that industrial gas suppliers have available to them significant information that can assist the industrial gas supplier's customers in meeting their EPCRA reporting obligations and assist SERCs, LEPCs, and local fire departments in preparing for and responding to emergency situations. For instance, an industrial gas supplier of extremely hazardous substances (EHSs) would know the identity of the EHS, quantity supplied to the customer, and locations of their tanks. This is information that SERCs, LEPCs, and fire departments would need absent any report from the gas customer. However, EPA also recognizes that, in many instances, reports from industrial gas suppliers concerning chemicals stored in tanks will be duplicative and less complete than reports filed by other responsible parties.

As you are aware, over the past year an EPA workgroup has been addressing the issues raised by CGA and other related issues, and their nation-wide policy implications. EPA intends to publish interpretative guidance that addresses the strict, joint, and several liability standards of EPCRA and the potential for adverse reporting consequences (e.g., flooding the SERCs, LEPCs, and fire departments with duplicative and incomplete reports on hazardous substances; see 55 FR 30632, at 33). Publication in the Federal Register is scheduled for this summer. At this time and in anticipation of forthcoming EPA final guidance, I believe that it is appropriate to continue to address CGA's concerns in the context of an EPA enforcement policy. Therefore, last year's policy has been extended and modified to read as follows:

EPA enforcement action against an industrial gas supplier for failure to submit an EPCRA 312 report customarily will be reserved for those circumstances in which the gas supplier fails to demonstrate adequately that it has made good faith efforts to encourage or verify compliance of its customers. As evidence of good faith efforts, the Agency will look toward compliance with

the following six criteria:

l. Contract Language: As of March 14, 1990, all new, reopened, renewed, or modified gas supply agreements shall explicitly provide the following new language: "it is a responsibility of the Buyer to comply with all relevant reporting obligations under the Emergency Planning and Community Right-to-know Act of 1986, 42 U.S.C. 11001-11049 (EPCRA, also commonly known as Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA Title III)) resulting from the presence of the chemicals supplied under the agreement. Further, it is a responsibility of the Buyer to warn and protect its employees and others exposed to the hazards posed by the Buyer's storage and use of the product." Industrial gas suppliers with agreements that now lack the "current language"' or that contain the "current language" but do not timely incorporate the "new language" must comply with item number 4 for all chemicals supplied, not just those gases which are extremely hazardous substances.

2. Customer Notification: Industrial gas suppliers must remind their customers by separate mail of the EPCRA reporting obligations the customer may incur from the presence of the chemicals supplied under the agreement, and provide in the reminder a source of EPCRA compliance information such as the EPCRA Hotline ((1-800-535-0202) or (703) 920-9877 in Washington, D.C. and Alaska). This reminder shall be provided to an appropriate customer representative.

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1. "Current language" is the contract language quoted in footnote 1 of your February 13, 1990 letter to Don R. Clay, Assistant Administrator of the Office of Solid Waste and Emergency Response.

2. Such reminder shall include the enclosed sheet which summarizes the major EPCRA reporting requirements.

3. Inquiry Responsibilities: In the event a representative of a SERC, LEPC, or fire department makes a request for information concerning chemicals stored in a supplier owned tank at a customer's site, the industrial gas supplier must promptly and in good faith respond to these requests.

4. Extremely Hazardous Substance Identification: For those substances listed in 40 C.F.R. Part 355 (Appendix A and B), the industrial gas supplier must identify for appropriate ERCs and LEPCs, the location(s) and chemical contents of its tanks. This is a one-time reporting requirement, and applies to only those tanks which were not already identified by April 30, 1990. Those tanks which were not identified under last year's policy by April 30, 1990, must be identified for the appropriate SERCs and LEPCs no later than April 30, 1991. Tanks fitting the above description and brought into service after April 30, 1991, shall be reported pursuant to paragraph 6 (ii) below.

5. Recordkeeping: Documentation of the aforementioned good faith efforts, as well as any others which would be relevant in a given case, must be maintained in the gas supplier's files.

6. Completion Dates: Except as specifically provided above, (I) all good faith efforts must be completed by March 30, 1991, for the 1990 reporting period, (ii) Thereafter, all good

faith efforts must be completed by February 15th of each year.

Sincerely,
Raymond B. Ludwiszewski, Acting Assistant Administrator

EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA) - REPORTING REQUIREMENTS

EPCRA 302:

Owners and operators are required to notify the State Emergency Response Commission (SERC) regarding the presence of extremely hazardous substances (EHSs) at their facilities. EHS are designated pursuant to EPCRA 302 and are listed in 40 Code of Federal Regulations (CFR) Part 355, Appendices A and B.

EPCRA 303:

Owners and operators subject to EPCRA 302 are required to designate a facility emergency coordinator and provide any information necessary for emergency planning to the local emergency planning committee (LEPC) upon request.

EPCRA 304:

Owners and operators of facilities are required to report releases of CERCLA hazardous substances and EPCRA EHSs to the SERC and LEPC immediately after the facility has knowledge that a reportable quantity has been released. The immediate notification must be followed by a written report as soon as practicable after the release.

EPCRA 311:

Owners and operators that are required to prepare or have available Material Safety Data Sheets (MSDSs) under OSHA's Hazard Communication Standard must submit these MSDSs or a list to the SERC, LEPC, and local fire department with jurisdiction over the facility.

EPCRA 312:

Owners and operators that are required to prepare or have available Material Safety Data Sheets (MSDSs) under OSHA's Hazard Communication Standard must submit hazardous chemical inventory forms to the SERC, LEPC, and local fire department annually on March 1st.

EPCRA 313:

Owners and operators of certain facilities are required to submit annual reports of routine and accidental releases to EPA and designated State agencies. Facilities are subject to this requirement if they are in Standard Industrial Classification (SIC) Codes 20-39, employ l0 or more employees full time, and manufacture, import, process, or use any of 300 toxic chemicals at greater than the designated threshold amounts. Reports are due annually on July 1st.

Any questions owners or operators may have regarding the EPCRA reporting requirements may be directed to your local emergency planning committee, your State emergency response commission or to EPA's EPCRA Hotline at (800) 535-0202 or (703) 920-9877 in Washington, D.C. and Alaska.

August 23, 1991

Robert S. Taylor
Swidler & Berlin
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-3841

Dear Mr. Taylor:

This is in response to your letters of February 6, 1991, and June 18, 1991, requesting clarification of reporting requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in light of the recent Clean Air Act (CAA) Amendments. Specifically, you asked whether the new "hazardous air pollutants" listed in section 112 of the amended CAA are "hazardous substances" under CERCLA. For the reasons explained below, we believe that the new hazardous air pollutants automatically became CERCLA hazardous substances pursuant to section 101(14)(E) and, thus, are subject to CERCLA reporting requirements and liability. CERCLA reporting and liability provisions are triggered by the release (and, for liability, threatened release) of "hazardous substances." The term "hazardous substance" is defined in section 101(14) of CERCLA by reference to listings of substances under a number of environmental statutes, including the CAA. Specifically, with respect to the CAA, section 101(14) provides that "'hazardous substance' means ... (E) any hazardous air pollutant listed under section 112 of the Clean Air Act,..." In revising the CAA last year, Congress incorporated within section 112 a list of 189 hazardous air pollutants. Section 112(a)(6) of the CAA defines "hazardous air pollutant" to mean any air pollutant contained in the list of 189 and revisions to that list. Under CERCLA section 101(14)(E) these Congressionally designated hazardous air pollutants became CERCLA hazardous substances and, thus, subject to CERCLA authorities and requirements.

You suggest that because the new hazardous air pollutants are listed in section 112 they are not "hazardous substances" under CERCLA since section 101(14)(E) of CERCLA defines hazardous substances as hazardous air pollutants "listed under" section 112, not listed in that section. The Agency believes that the new hazardous air pollutants are listed "under" section 112. Under CERCLA section 101(14)(E), the "hazardous air pollutants" under CAA section 112 are CERCLA hazardous substances, regardless of whether they are listed by Congress or the Administrator. By specifically listing these substances in the statute, Congress merely shortened the process for bringing hazardous air pollutants under regulation. As a result, we also disagree with your suggestion that a listing "under" implies the need for affirmative administrative action with notice and comment. As indicated above, CERCLA section 101(14) defines "hazardous substance" by reference to listings under environmental statutes; it is not limited to those substances listed by notice and comment rulemaking or even by the Administrator.

You have also raised several questions about the CERCLA reporting requirements that apply to releases of the new hazardous air pollutants. As you indicated, many of these substances already have reportable quantities (RQs) established under 40 CFR section 302 and, thus, no further RQ rulemaking is necessary. For those substances for which there are no regulatory RQs established, CERCLA section 102 establishes an interim RQ of one pound until revised by

regulation. Thus, releases of any new hazardous air pollutants, which do not already have RQs established under CERCLA section 102, must be reported when the releases equal or exceed one pound. We are developing a rulemaking to revise the RQs for these new hazardous substances.

We disagree with your suggestion that the statute is unclear concerning whether the statutory one pound RQ applies to new hazardous substances. CERCLA section 102(b) provides that "[u]nless and until superseded by regulations establishing a reportable quantity... for any hazardous substance as defined in section 101(14)...a quantity of one pound" shall be the RQ for that substance (emphasis added). You suggest that, because the deadlines for RQ rulemakings provided in CERCLA section 102(a) applied to those substances already defined as "hazardous substances" Congress did not intend the statutory RQ to apply to any new hazardous substances. However, CERCLA section 102(b) clearly applies to any CERCLA section 101(14) hazardous substance, and is not limited in any way by the deadlines in CERCLA section 102(a). Your June 18, 1991, letter cites several questions that might be raised because of the new list hazardous substances. First, you ask whether "the category 'polycyclic organic matter' includes plastics?" The Agency is aware of the ambiguity of the definition provided in CAA section 112 for this category and is carefully considering this issue as it applies to CERCLA.

Second, you ask whether the "listing in section 112 of 'chromium compounds' means that the disposal of dirt containing normal background levels of chromium must be reported to the National Response Center if the total amount of chromium compounds contained in the dirt exceeds one pound." "Chromium and compounds" have been hazardous substances since 1980 and have had special reporting requirements since 1985. (See enclosed 50 FR 13456, April 4, 1985, and 54 FR 33454, August 14, 1989.) Only releases of those substances that are specific CERCLA hazardous substances within this category must be reported to the National Response Center (pursuant to CERCLA section 102), or the State Emergency Response Commission and Local Emergency Planning Committee pursuant to section 304 of the Emergency Planning and Community Right-To-Know Act (EPCRA). In addition, chromium metal is not reportable when the diameter of the pieces of the solid metal released is equal to or exceeds 100 micrometers. Substances not specifically listed as a CERCLA hazardous substances remain subject to other applicable Superfund requirements.

Last, you ask whether the "regulations regarding the reporting of continuous releases apply to the substances listed in section 112 not otherwise listed as hazardous substances." The continuous release reporting provisions are not directly applicable to these newly listed CAA section 112 hazardous substances because, these substances have not yet been added to the list of substances set forth in 40 CFR 302.4. The continuous release provision in CERCLA section 103 (f), however, (in contrast to the regulations at 40 CFR section 302.8) is not limited to the substances listed in 40 CFR section 302.4. Therefore, we recommend that persons wishing to qualify for reduced reporting under CERCLA section 103 (f) follow the procedures set forth in 40 CFR section 302.8.

I hope this letter clarifies the obligations of your clients under CERCLA with respect to the new hazardous substances. If you have additional questions on this subject, please contact Stephen D. Luftig, Director of the Emergency Response Division, at 475-8720.

Sincerely,
Henry L. Longest II, Director, Office of Emergency and Remedial Response