

## EPA Issues Release Reporting Exemption for Oxides of Nitrogen

by [SEAN M. SULLIVAN](#)<sup>1</sup>  
[Williams Mullen](#), Washington DC

EPA recently issued a final rule exempting certain releases of nitrogen oxide and nitrogen dioxide from the release reporting requirements under [Section 103](#) of the Comprehensive Environmental Response Compensation and Liability Act<sup>2</sup> and [Section 304](#) of the Emergency Planning and Community Right-to-Know Act.<sup>3</sup> These statutes require the owner or operator of a facility to report releases of hazardous substances to the National Response Center if the amount released within a twenty-four hour period exceeds the substance's Reportable Quantity. Effective November 3, 2006, facilities are not required to report releases of less than 1,000 pounds of nitrogen oxide and/or 1,000 pounds of nitrogen dioxide, collectively NOx, to the air within a 24 hour period due to "combustion, or combustion related activities." Releases of NOx that are unrelated to combustion, however, are still subject to the 10 pound Reportable Quantity ("RQ") found in [40 C.F.R. Parts 302 and 355](#).

Although EPA did not define the term "combustion related," it did provide several examples of the types of NOx emissions that it intended to exempt. These include emissions from blasting or detonations at construction and mining sites, emissions from nitric acid plants, and emissions from internal combustion engines.<sup>4</sup> Without this new provision, a facility could exceed the RQ for NOx and be required to report by operating equipment for just a short period of time. EPA noted that emissions from a 100 horsepower engine would exceed the NOx RQ in a little over five hours.<sup>5</sup>

In setting the new reporting level for combustion-related NOx releases, EPA listed several reasons for its conclusion that releases of less than 1,000 pounds over a 24-hour period should be exempt. First, the agency said it was unaware of any data suggesting that emissions at this level would affect human health. Second, it noted that a CERCLA-based response to the exempted releases is unlikely because (1) the [Clean Air Act](#) does not regulate emissions of NOx at or below this level, and (2) EPA has not responded to these releases in the past.

The final exemption contains one substantial deviation from the proposal. Initially, EPA proposed to include a caveat to this provision whereby releases of NOx due to an accident or malfunction would still be subject to CERCLA and EPCRA reporting requirements.<sup>6</sup> EPA deleted this caveat from the final rule, however,

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<sup>1</sup> Sean Sullivan is an associate in the Washington DC office of Williams Mullen. His practice involves compliance counseling and auditing regarding statutes such as the Clean Water Act, the Clean Air Act, the Emergency Planning and Community Right to Know Act, and the Resource Conservation and Recovery Act. Mr. Sullivan has significant experience with judicial review of U.S. Environmental Protection Agency regulations issued under the Safe Drinking Water Act and the Clean Air Act.

<sup>2</sup> 42 U.S.C. § 9603.

<sup>3</sup> 42 U.S.C. § 11004 (EPCRA Section 304). See [71 Fed. Reg. 58525](#) (Oct. 4, 2006) (exemption for NOx releases), codified at [40 C.F.R. §§ 302.6\(e\) & 355.40\(a\)\(2\)\(vii\)](#).

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<sup>4</sup> See 71 Fed. Reg. at [58527](#).

<sup>5</sup> See *id.*

<sup>6</sup> See [70 Fed. Reg. 57813](#) (Oct. 4, 2005) (notice of proposed rulemaking).

reasoning that if normal emissions of less than 1,000 pounds of NOx over a 24 hour period do not pose a threat to human health, then releases of NOx below that level from accidents or malfunctions also would not pose a threat. EPA further explained that, “to the extent that start-up, shutdown, and up-sets are part of ... combustion, or combustion related activity, they are eligible for the [exemption], provided such releases are below the 1,000 pound level per 24 hours.”<sup>7</sup>

### **Comment**

It is important to remember that releases unrelated to combustion (including accidents or malfunctions) do not qualify for this reporting exemption. For example, EPA stated that releases of NOx due to a storage tank failure would not qualify for this exclusion because there is a higher likelihood that the agency would need to perform a CERCLA response to such a release. Thus, before deciding that no report is required, regulated entities should be sure that the release is truly due to combustion or combustion-related activity.

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<sup>7</sup> 71 Fed. Reg. at 58530.