

Mr. Robert Van Voorhees
Ms. Carol Lynn Green
Bryan Cave LLP
700 Thirteenth St., NW
Washington, D.C. 20005-3960

Dear Mr. Van Voorhees and Ms. Green:

This is in response to your request for clarification of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Section 103(a) reporting requirement for releases of hazardous substances (specifically ethylene glycol) during deicing operations at airports in quantities equal to or in excess of Reportable Quantities (RQs). This also provides a more specific response to your inquiries about releases of hazardous substances to waters of the United States and applicability of the "federally permitted release" exemption for discharges to waters of the U.S. We have reviewed regulations at 40 CFR parts 117 and 302, and the preambles of these and related rules. We have also coordinated this response with the Office of Solid Waste and Emergency Response, the Office of Water, and the Office of General Counsel.

CERCLA Release Reporting

CERCLA Section 103(a) and the implementing regulations require any person in charge of a vessel or facility to immediately notify the National Response Center (NRC) of a release of a hazardous substance from such vessel or facility if, in a 24-hour period, the release is of a quantity equal to or greater than the quantity specified in 40 CFR 302.¹ With regard to the obligation to report releases of ethylene glycol being used for aircraft deicing at airports, the "facility" may include the truck applying the deicer, the airplane to which the deicer is applied, or the entire airport.² Currently, the person in charge of any one of these facilities from which a release into the environment of 5,000 pounds or more of ethylene glycol in any 24-hour period occurs (if not exempted as a federally permitted release) must report that release to the NRC. In addition, all releases subject to reporting under CERCLA Section 103(a) are also reportable under Section 304 of the Emergency Planning and Community Right-to-Know Act to the state emergency planning commission and the local emergency planning committee for any area likely to be affected by the release. See 60 Fed. Reg. 30926, 30928 (June 12, 1995); 40 CFR 302.6(a); 40 CFR 355.40.

Persons in charge of these different facilities, *i.e.*, the trucks, airplanes, and airports, may coordinate their actions to ensure that releases of ethylene glycol into the environment in quantities equal to or exceeding the RQ are reported. For example, the person or entity in charge of the airport could coordinate and aggregate the ethylene glycol releases which occur during

¹ See 42 U.S.C. 9603(a); 40 CFR 302.6(a).

² See CERCLA Section 101(9), 42 U.S.C. 9601(9)(broad definition of the term "facility").

airport deicing operations, and be responsible for reporting to the NRC releases to the environment that equal or exceed the RQ in any 24-hour period (that are not otherwise exempted from reporting requirements as discussed below).

However, each person in charge of a facility, including those in charge of the deicing trucks and airplanes, still would bear the burden of ensuring that releases from those facilities are reported properly and accurately, either on their own or as aggregated and reported by the airport. Finally, releases of ethylene glycol as a result of deicing operations at airports in quantities that equal or exceed the RQ in a 24-hour period (and that are not otherwise federally permitted as discussed below) may qualify for reduced release reporting under the continuous release reporting regulation. See 40 CFR 302.8.

Federally Permitted Release Exemption

CERCLA Section 103(a) exempts those persons in charge of vessels and facilities from reporting releases that are federally permitted. The federally permitted release exemptions under CERCLA Section 101(10) could potentially apply to releases of hazardous substances to all environmental media, though different parts of these exemptions apply for releases to different media. See 42 U.S.C. Section 9601(10).

Federally Permitted Release Exemption for CWA Discharges

Such "federally permitted releases" are defined in CERCLA Section 101(10) to include three types of point source discharges covered or pertaining in specified ways to permits under Section 402 of the Clean Water Act (CWA). See 42 U.S.C. Section 9601(10)(A)-(C). This statutory language of CERCLA Section 101(10)(A)-(C) is taken directly from the CWA Section 311 definition of "discharge."³ Although the EPA has not provided a final interpretation of the meaning of "federally permitted release" under CERCLA Section 101(10), EPA has provided its interpretation of CWA Section 311(a)(2)(A)-(C) in 40 CFR 117.12, and is using those regulatory provisions to respond to your inquiry.

As noted above, the regulations at 40 CFR 117.12 define three types of federally permitted releases of hazardous substances to waters of the U.S. A release is federally permitted, and therefore exempt from both the CWA Section 311(b)(5) and CERCLA reporting requirement, only if the circumstances of the release meet all the criteria under any one of these three definitions. This determination must be made on a case by case basis for each release of a hazardous substance in quantities equal to or in excess of the RQ. To determine whether a release is federally permitted, the discharger must review the National Pollutant Discharge Elimination System (NPDES) permit requirements, the permit application and record for final

³ See 42 U.S.C. Section 1321(a)(2)(A)-(C).

permit, the specific circumstances relating to the release, and the criteria for the three exemptions under 40 CFR 117.12. Under these definitions, the discharger must have an NPDES permit [or State Pollutant Discharge Elimination System (SPDES) permit from an authorized state] or, under the third definition, have submitted a permit application.

The first federally permitted release definition applies to discharges in compliance with an NPDES permit. A discharge is “in compliance” if the permit contains an effluent limitation specifically applicable to the substance discharged, or an effluent limitation applicable to another waste parameter which has specifically been identified in the permit as intended to limit such substance (i.e., an indicator pollutant), and the discharge is in compliance with the effluent limitation. See 40 CFR 117.12(b).

Under the second definition, the substance and its amount, origin, source, and treatment must be identified in the public record (i.e., the permit, permit application or other document contained in the record for final permit); the identified treatment system must be in place and must be capable of treating the identified amount of the identified substance; and the NPDES permit must require the identified substance to be treated in the event of an onsite release. This second exclusion will not exempt a discharge resulting from an onsite release of the identified substance which exceeds the quantity or concentration contemplated in the public record. See 40 CFR 117.12(c).

The third definition addresses continuous or anticipated intermittent discharges of hazardous substances from a point source, identified in an NPDES permit or permit application, which occur within the scope of the relevant operating or treatment systems. A release meets this definition if the hazardous substance is discharged from a point source for which a valid permit exists or for which a permit application has been submitted, and the discharge of the hazardous substance results from:

- the contamination of storm water or noncontact cooling water, provided that the storm water or cooling water is not contaminated by an onsite spill; or,
- a continuous or anticipated intermittent discharge of process waste water, and the discharge originates within the manufacturing or treatment systems; or,
- an upset or failure of a treatment system or of a process producing a continuous or anticipated intermittent discharge where the upset or failure results from a control problem, an operator error, a system failure or malfunction, an equipment or system start-up or shutdown, an equipment wash, or a production schedule change, provided that such upset or failure is not caused by an onsite spill of a hazardous substance. See 40 CFR 117.12(d).

In summary, discharges of hazardous substances to waters of the U.S. which are not subject to and in compliance with an effluent limitation in an NPDES permit, and which are not covered by the second or third exemption, will be subject to the CERCLA reporting requirement.

For airport deicing operators covered by one of the EPA's NPDES storm water general permits (either the Baseline General Permit or the Multisector General Permit⁴), the exemption for an "anticipated intermittent discharge" is potentially applicable to releases of ethylene glycol during routine deicing operations. Such releases in quantities equal to or exceeding the RQ are exempt from the reporting requirement under CERCLA Section 103 only if the release meets all of the following:

- the discharge occurs through a storm water outfall identified to receive deicing operation discharges in the permittee's Storm Water Pollution Prevention Plan (SWPPP)(the SWPPP would be considered either part of the NPDES permit or part of the NPDES permit application)⁵;

- the ethylene glycol released to waters of the U.S. is a component of storm water. Storm water is defined as storm water runoff, snow melt runoff, and surface runoff and drainage. Dry weather discharges of ethylene glycol (i.e., discharges generated by processes other than those included in the definition of storm water) to waters of the U.S. are not authorized by the storm water NPDES permits and are not exempt from the CERCLA reporting requirement;

- the SWPPP identifies the use of ethylene glycol during deicing operations and the areas of the airport where it will be used;

- it is not the first such release of the calendar year in a quantity equal to or in excess of the RQ (see next paragraph); and,

- the contamination of storm water with ethylene glycol is not the result of a spill.

Although the discharge of ethylene glycol in storm water to a water of the U.S. may meet the 40 CFR Part 117 criteria for federally permitted releases, it is important to note that for discharges covered under either the EPA's Baseline General Permit or Multisector General Permit, these permits contain independent reporting and prevention requirements for releases of hazardous substances equal to or in excess of RQs. For releases of ethylene glycol-contaminated storm water that occur as a result of routine deicing operations, both general permits require the

⁴ "Final NPDES General Permits for Storm Water Discharges Associated with Industrial Activity," dated September 9, 1992, and September 25, 1992, or "Final National Pollutant Discharge Elimination System Storm Water Multisector General Permit for Industrial Activities," dated September 29, 1995, and February 9, 1996.

⁵ For the Baseline General Permit, see 57 Fed. Reg. 41308 (September 9, 1992), or 57 Fed. Reg. 44446 (September 25, 1992). For the Multisector General Permit, see 60 Fed. Reg. 51215 (September 29, 1995).

permittee to report to the NRC the first such release that equals or exceeds the RQ each calendar year. In addition, these permits require the permittee to provide a written description in the SWPPP of the dates on which all such releases occurred, the type and estimate of the amount of material released, and the circumstances leading to such releases. Moreover, the SWPPP must be reviewed by the permittee to identify possible additional measures to prevent or minimize such releases, and the SWPPP must be modified where appropriate.

Where a permitted storm water discharge contains a hazardous substance in an amount equal to or in excess of the RQ, but does not meet the 40 CFR 117.12(d) criteria for anticipated intermittent discharges, the EPA storm water general permits require the permittee to take several actions. First, the discharger must notify the NRC immediately after becoming knowledgeable of the release. In addition, the permittee must modify the SWPPP for the facility within 14 days of knowledge of the release to provide a description of the release, an account of the circumstances leading to the release, and the date of the release. The SWPPP must also be reviewed by the permittee and appropriately modified to identify measures to prevent the recurrence of such releases and to respond to such releases. Finally, the permittee must submit to EPA within 14 days a written description of the release, the date that such release occurred, the circumstances leading to the release, and the steps to be taken to modify the SWPPP.⁶

The EPA storm water general permits also clarify that releases of hazardous substances caused by non-storm water discharges, such as onsite spills of ethylene glycol, are not authorized by these permits, and the discharger must report all such discharges in excess of RQs as required by CERCLA Section 103. In addition, all unauthorized discharges of pollutants to waters of the U.S. are a violation of the CWA regardless of the quantity discharged.

It is also important to stress that, regardless of whether a release is exempt from the CERCLA reporting requirement, the permittee is still required to comply with all conditions and limitations of its NPDES permit. For permittees covered by one of the EPA's storm water general permits, the permittee must develop an SWPPP that identifies potential sources of pollution that may reasonably be expected to affect the quality of storm water discharges associated with industrial activity from the facility. In addition, the SWPPP shall describe and ensure the implementation of practices that are to be used to reduce the pollutants in these storm water discharges. Failure to comply with all conditions of the NPDES permit, including the SWPPP and the reporting requirements described above, could subject the permittee to an enforcement action under the CWA which can include penalties of up to \$25,000 per day per violation.

The federally permitted release exemptions under CERCLA Section 101(10)(A)-(C) apply only to those portions of releases of hazardous substances that are ultimately discharged through

⁶ For the Baseline General Permit, see 57 Fed. Reg. 41263 and 41307 (September 9, 1992) or 57 Fed. Reg. 44445 (September 25, 1992). For the Multisector General Permit, see 60 Fed. Reg. 50813 and 51114 (September 29, 1995).

the permitted outfall to a water of the U.S. Therefore, if any of the ethylene glycol released during routine deicing operations is not collected by the storm water collection or drainage system and discharged through the permitted outfall, but is released to the land surface, air, water or other environmental media as defined by CERCLA Section 101(8), the permittee would normally have to report all remaining nonpermitted portions of such releases where the total of the nonpermitted portions equals or exceeds the RQ. Of course, if any of these remaining portions are federally permitted under other provisions of CERCLA Section 101(10) that relate to other media, those federally permitted portions are also exempt. Currently, however, there are no federal permits that address releases of ethylene glycol to the air or land surface. Therefore, all releases of ethylene glycol to these environmental media that collectively, along with any non-federally permitted releases to water, equal or exceed the RQ must be reported to the NRC.

I hope this letter clarifies the CERCLA reporting requirements for releases of ethylene glycol from deicing operations at airports. If you have additional CERCLA-related questions, please call Beth Crowley of my staff at 202-564-4177. If you have additional NPDES-related questions, please call Susan Johnson at 202-564-8329.

Sincerely,

Robert I. Van Heuvelen, Director
Office of Regulatory Enforcement

cc: Andrew Gordon, OGC
Stephen Sweeney, OGC
Bill Zobel, OERR
Bill Swietlik, OWM
Nancy Cunningham, OWM