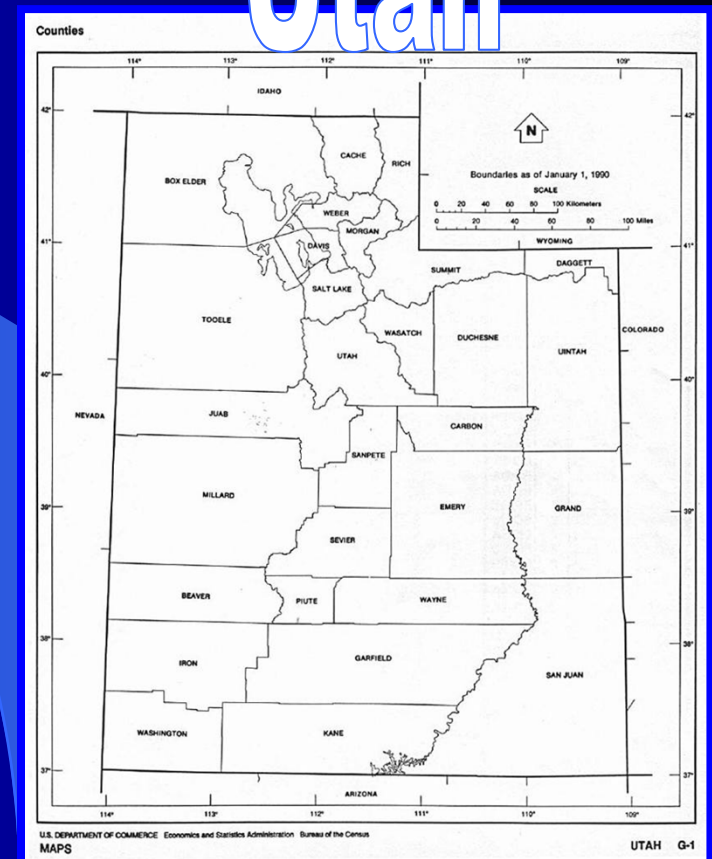


Release Reporting Requirements

By
Stoel Rives LLP

Utah



I. INTRODUCTION

Unexpected Problems
Scope of Remarks

Unexpected Problems

– Scenarios

- **Unexpected Release** - Your plant operator calls you in the middle of the night to let you know that there has been a release of hazardous substances at the plant
- **Failure of Equipment** - One of your plant workers informs you that the secondary containment system has a significant crack in it and some hazardous waste may have leaked out through the crack
- **Discovery of contamination during operation** - You are constructing a new facility on your property and your contractor informs you that the excavation crew has just discovered a black, smelly, tar-like substance several feet below the surface

Unexpected Problems

– Scenarios

- **Discovery of contamination in anticipation of transaction -**
In anticipation of selling a parcel of property, the potential purchaser hires an environmental engineer to conduct a Phase 1 or Phase 2 Assessment, and it discovers contamination in the groundwater

– Plan in Advance - Have a plan in place ahead of time



Scope of Remarks

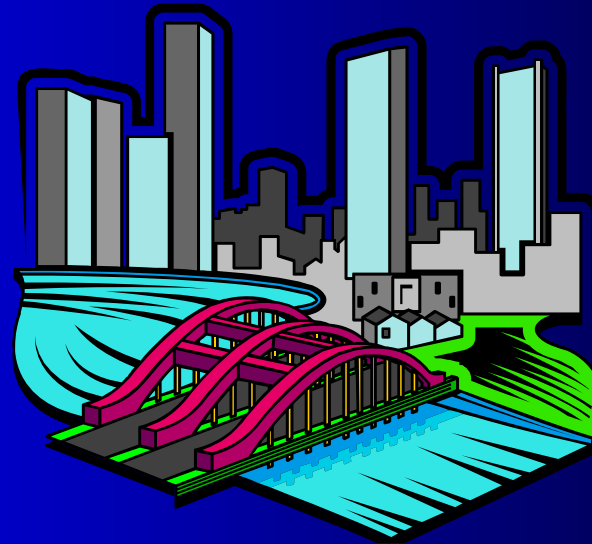
- Traditional Releases from Facilities
 - Other release reporting requirements in other contexts
 - FAA Regulations
 - Hazardous Materials Transportation Act
 - OSHA
 - Historical releases briefly

Scope of Remarks

- Various Reporting Requirements Vary Depending Upon the Following
 - Medium
 - Nature of the contaminant
 - Hazardous substance
 - Hazardous waste
 - Acute hazardous waste
 - PCBs
 - **Pollution:** “any man-made or man-induced alteration of the chemical, physical, biological, or radio-logical integrity of any waters of the state”
 - “which may endanger human health or the environment

Scope of Remarks

- Various Reporting Requirements Vary Depending Upon the Following
 - Quantity
 - RQs
 - Any quantity
 - Subjective
 - Type of facility



Scope of Remarks

- Type of Requirement Varies
 - Emergency notification (oral)
 - Emergency notification (written)
 - Narrative report
 - Government forms



II. FEDERAL REPORTING REQUIREMENTS

CERCLA

EPCRA

TSCA

CERCLA

(Comprehensive Env'l Response, Compensation & Liability Act)

- **Reporting Obligation:** Report to the National Response Center (“NRC”) the release of any hazardous substance that exceeds a threshold quantity referred to as a reportable quantity or “RQ.” 42 U.S.C. §9603(a) (attached as Exhibit A).
 - **Owner or Operator Obligation:** Reporting obligations rest with the owner and operator of the facility that is contaminated or from which contamination originated.

CERCLA

(Comprehensive Env'l Response, Compensation & Liability Act)

- Hazardous substances list - 40 C.F.R. Table 302.4
 - Comprehensive list of pollutants referenced in other laws
 - Water Pollution Control Act
 - RCRA
 - Clean Air Act
 - TSCA
 - Petroleum excluded

CERCLA

(Comprehensive Env'l Response, Compensation & Liability Act)

– RQs

- 24-hour period

- Mixtures:

- How do you determine an RQ if you spill a mixture of hazardous substances?
 - Releases of different hazardous substances should not be combined to arrive at an RQ
- State reporting statutes vary
- Written report not required

CERCLA

(Comprehensive Env'l Response, Compensation & Liability Act)

– Exempt Releases

- **Federally permitted releases - 42 U.S.C. §9601(10)**
 - NPDES permit
 - Air permit
- **Continuous releases - 42 U.S.C. §9603(f)(2)**
- **RCRA required or exempted releases - RCRA Subtitle C**
- **Pesticide applications**
- **Releases that do not reach the environment**

CERCLA

(Comprehensive Env'l Response, Compensation & Liability Act)

– Penalties

- Civil

- Amounts

- Up to \$25,000 per day for reporting violations
 - Up to \$75,000 per day for subsequent violations



CERCLA

(Comprehensive Env'l Response, Compensation & Liability Act)

– Penalties

• Criminal

- Against any person who fails to report, or knowingly provides false or misleading information**
- May include imprisonment**
- EPA is authorized to pay up to \$10,000 to any individual who provides information leading to the arrest and conviction of any person subject to a criminal penalty**

CERCLA

(Comprehensive Env'l Response, Compensation & Liability Act)

– Historical Releases

- **Very ambiguous**
 - **The CERCLA reporting obligation applies to the discovery of pre-existing contamination only when one or more spill events can be identified as the source and one or more spill exceed the RQ.**
- **Hard to attribute to a particular spill**
- **RQ hard to quantify**
- **Whether the release occurred within 24-hour period**

CERCLA

(Comprehensive Env'l Response, Compensation & Liability Act)

– Historical Releases

- **Section 103(c) (separate from regular Section 103(a)) requires reporting to EPA by the owner and operator of a facility at which hazardous substances have been stored, treated or disposed of without a permit**
 - **CERCLA does not define “disposal.” RCRA defines disposal broadly to include spills and releases. By combining these provisions one might conclude that Section 103(c) requires reporting by the owner and operator of any facility where a release or spill has occurred.**

CERCLA

(Comprehensive Env'l Response, Compensation & Liability Act)

– Historical Releases

- This interpretation is, however, controversial and not endorsed by many commentators.**
- Some EPA regions have informally stated that this reporting obligation is not meant to apply to the discovery or pre-existing contamination.**
- Section 103(c) states that the reporting must be done within 180 days of the law's passage (December 11, 1980).**

CERCLA

(Comprehensive Env'l Response, Compensation & Liability Act)

– Historical Releases

- **State reporting statutes vary**
 - **Utah does not require historical disclosures**
 - **Oregon does not**
 - **Idaho does not appear to require historical disclosures**
 - **Washington does**

CERCLA

(Comprehensive Env'l Response, Compensation & Liability Act)

– Historical Releases

- **Practical Rules for Discovery of Historic Contamination**

- **Does the contamination pose an imminent threat or substantial risk to human health or the environment?**
- **Is the contamination something of real interest to the agencies?**
- **Will the contamination likely come to light through other sources?**
- **Would the implementing agency care if the contamination was not reported or if the agency learns about the contamination on its own?**

EPCRA

(Emergency Planning and Community Right-to-Know Act)

- **Reporting Obligation:** Applies to any facility “at which there has been a release of a reportable quantity of an extremely hazardous substance or CERCLA hazardous substance.” 40 C.F.R. §355.40(a) (1999) (attached as Exhibit C).
 - **Obligation is on owner or operator of a facility**
 - **EPA uses a 24-hour time period to measure an RQ under EPCRA just as it does under CERCLA. *See EPA’s Response to Comments on Section 304 Rulemaking, 51 Federal Register 41570.***
 - **Not applicable to releases which result in exposure to persons solely within the boundaries of the facility.**

EPCRA

(Emergency Planning and Community Right-to-Know Act)

- Notification

- Immediate oral notification is required

- Local Emergency Planning Committee, and
- State Emergency Response Program



EPCRA

(Emergency Planning and Community Right-to-Know Act)

- Written Follow-Up Report
 - Required as soon as possible - 42 U.S.C. §11004
 - Actions taken to respond to and contain the release;
 - Any known or anticipated acute or chronic health risks;
 - Medical attention taken or to be taken.

EPCRA

(Emergency Planning and Community Right-to-Know Act)

- Exemptions
 - Federally permitted releases
 - Continuous releases



TSCA

(Toxic Substances Control Act)

- Reporting Obligation:
 - Regulations require notification of spills of PCBs with concentrations of 50 ppm or greater and in a quantity exceeding 10 lbs or in any quantity that directly contaminates surface water, sewers, drinking water supplies, grazing lands or vegetable gardens.

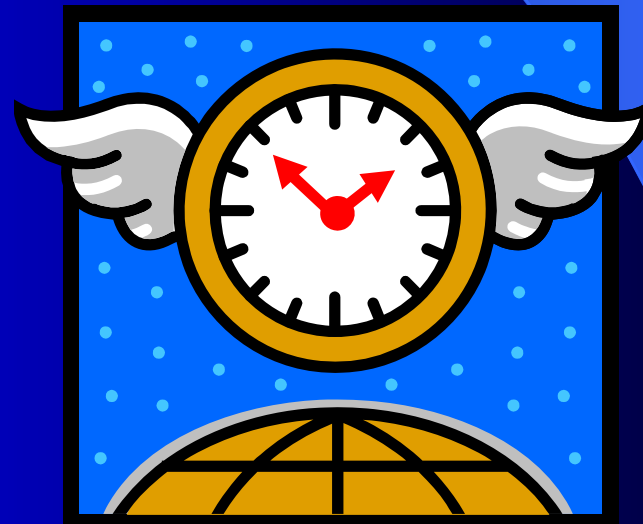


TSCA

(Toxic Substances Control Act)

- Notification

- Notice to EPA required as soon as possible after discovery (not later than 24 hours after discovery)
- No written follow-up notice required



TSCA

(Toxic Substances Control Act)

- Supplemental Requirement:
 - Separate notice requirement for persons who manufacture, produce or distribute chemical substance or mixture upon obtaining information that a chemical substance or mixture presents a substantial risk of injury to human health or the environment

RCRA

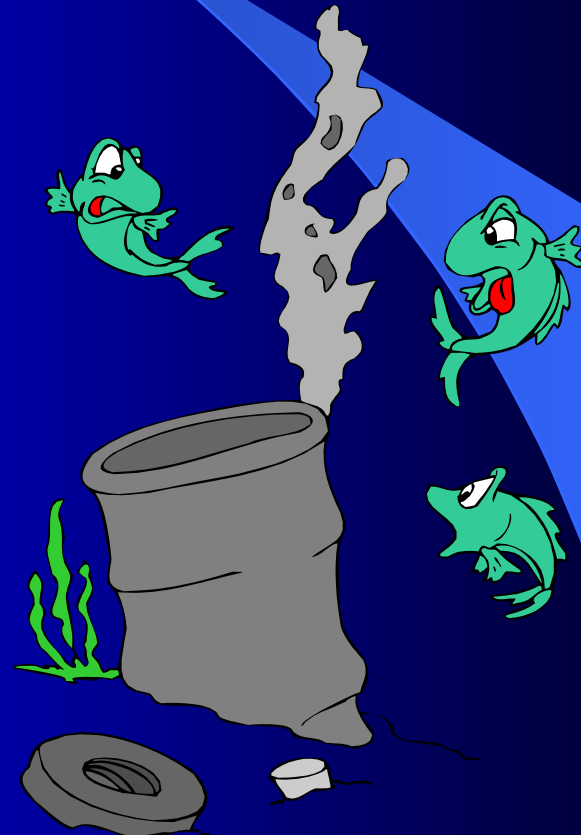
(Resource Conservation Recovery Act)

- RCRA small quantity generators must immediately notify NRC and USHW Control Board of any fire, explosion or other release of hazardous waste which could threaten human health outside the facility

CWA

(Clean Water Act)

- Mirrors CERCLA (but also covers releases of oil)
- Immediate notification to NRC for discharges to navigable waters of the United States in such quantities as may be harmful to the public health or welfare



III. STATE REPORTING REQUIREMENTS

USHWA

UWQA

UEMA

UUSTA

USHWA

(Utah Solid and Hazardous Waste Act)

- Reporting Obligation:
 - The USHWA, and the regulations promulgated thereunder (Utah Admin. Code R315-2-3 et seq. (1997) (attached as Exhibit E)), require certain notification and reporting actions in the event of a spill of “hazardous waste” or material which, when spilled, becomes hazardous waste. Utah Code Ann. § 19-6-101 to 122 (1999) (attached as Exhibit D).

USHWA

(Utah Solid and Hazardous Waste Act)

- Reporting Obligation:
 - Spill is defined as “accidental discharging, spilling . . . into or on any land or water”
 - Hazardous Waste Utah Admin. Code R315-2-3 (Exhibit E)
 - Listed hazardous waste
 - Characteristic hazardous waste

USHWA

(Utah Solid and Hazardous Waste Act)

- 3 Different Categories: The regulations under USHWA address three different reporting requirements for releases of hazardous wastes
 - Facilities permitted by the State to treat, store or dispose of hazardous wastes
 - Required to notify the Utah Solid and Hazardous Waste Control Board within 24 hours of any permit noncompliance which may endanger health or the environment
 - A written follow-up notice is required within 5 days.

USHWA

(Utah Solid and Hazardous Waste Act)

- Facilities permitted by the State to store or treat hazardous waste using tank systems
 - Required to notify the Utah Solid and Hazardous Waste Control Board within 24 hours of the detection of a release of more than one pound of hazardous waste to the environment (or one pound or less if not immediately contained and cleaned up).
 - Notice is not required if the release has been reported under CERCLA
 - Written follow-up notice is required within 30 days.

USHWA

(Utah Solid and Hazardous Waste Act)

– All facilities

- Take appropriate action to minimize the threat to human health and the environment.
- Notify the Utah State Department of Environmental Quality, 24-hour answering service, 801-536-4123 if [] [certain] spill quantities are exceeded

USHWA

(Utah Solid and Hazardous Waste Act)

- Immediate Action - Utah Admin. R. 315-9-1(b)
 - “In the event of a spill of hazardous waste or material which, when spilled, becomes hazardous waste, the person responsible for the material at the time of the spill is required to immediately
 - take appropriate action to minimize the threat to human health and the environment

USHWA

(Utah Solid and Hazardous Waste Act)

- notify the DEQ's 24-hour answering service, 801-536-4123 if the following quantities are exceeded:
 - One kilogram of material listed in paragraph R315-2-10(e), which includes F999 and incorporates by reference 40 C.F.R. 261.31 (attached as Exhibit F), and which is an acute hazardous waste identified with a hazard code of (H), or in R315-2-11(e) (attached as Exhibit E), which incorporates by reference 40 C.F.R. 261.33(e). Notify for a spill of a lesser quantity **if there is a potential threat to human health or the environment**; or

USHWA

(Utah Solid and Hazardous Waste Act)

- One hundred kilograms of hazardous waste or material which, when spilled, becomes hazardous waste, other than that listed in R315-2-11(e) (Exhibit E), which incorporates by reference 40 C.F.R. 261.33(e) (Exhibit F). **Notify for a spill of a lesser quantity if there is a potential threat to human health or the environment.** Utah Admin. Code R315-9-1 (attached as Exhibit E).
- “immediate” usually means within 24 hours

USHWA

(Utah Solid and Hazardous Waste Act)

- Information to be disclosed:
 - name, phone, and address of person responsible for spill;
 - name, title, and phone number of individual reporting;
 - time and date of spill
 - location of spill - as specific as possible including nearest town, city, highway or waterway;
 - description contained on manifest and amount spilled; 6) cause of spill; and
 - the emergency action taken to minimize the threat to human health and the environment.

USHWA

(Utah Solid and Hazardous Waste Act)

- Written Report - Utah Admin. R. 315-9-4
 - If the spill had triggered the immediate notification requirement, the person responsible for the material would have also been required to follow up with a written report to the DEQ.



USHWA

(Utah Solid and Hazardous Waste Act)

- “Within 15 days after any spill of hazardous waste or material which, when spilled, becomes hazardous waste, and is reported under R315-9-1(b), the person responsible for the material at the time of the spill shall submit to the Board or the Executive Secretary a written report which contains the following information:

USHWA

(Utah Solid and Hazardous Waste Act)

- the person's name, address, and telephone number;
- date, time, location, and nature of the incident;
- name and quantity of materials(s) involved;
- the extent of injuries, if any;
- an assessment of actual or potential hazards to human health or the environment, where this is applicable; and
- estimated quantity and disposition of recovered material.” Utah Admin. Code R314-8-10.

UWQA

(Utah Water Quality Act)

- 3 Different Categories with Different Requirements
 - Facilities with UPDES permits
 - Must report permit noncompliance which may endanger human health or the environment within 24 hours
 - Written report required within 5 days

UWQA

(Utah Water Quality Act)

- Facilities with ground water discharge permits
 - Must immediately notify DWQ of any permitted ground water discharge due to an accidental release
 - Written report required within 5 days



III. State Reporting Requirements - UWQA

UWQA

(Utah Water Quality Act)

– Nonpermitted facilities

- “Any person who spills or discharges any **oil or other substance which may cause the pollution of the waters of the state** shall **immediately notify** the executive secretary [of the Utah Water Quality Board] of the spill or discharge, any containment procedures undertaken, and a proposed procedure for cleanup and disposal, in accordance with rules of the board.” §19-5-114 (attached as Exhibit G).

UWQA

(Utah Water Quality Act)

– Nonpermitted facilities

- Pollution is defined as “any **man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of any waters** of the state . . .” Utah Code Ann. § 19-5-102 (1998) (Exhibit G).
- A spill not resulting in the exceedance of a Maximum Contaminant Level (“MCL”) is generally not a spill which may cause the pollution of the waters of the state.

UWQA

(Utah Water Quality Act)

- Any reporting requirement under UWQA would ordinarily be “immediate,” i.e., usually within 24 hours, reporting.
 - Even if the opportunity for immediate reporting has lapsed, reporting at a later stage may nevertheless mitigate the likelihood of any enforcement proceeding for an unpermitted discharge.

UWQA

(Utah Water Quality Act)

- Penalties

- \$10,000 per day of violation
- \$25,000 per day for willful violations/gross negligence
- \$50,000 per day for second conviction
- False reporting can result in \$10,000 fine and six months prison

UEMA

(Utah Emergency Management Act)

- Mini-EPCRAs: Some states have their own mini-EPCRA type statutes that have similar emergency and community notification requirements.
- Adoption by Reference: In lieu of a separate statute, Utah has simply adopted the federal EPCRA statute as part of its state regime.

UEMA

(Utah Emergency Management Act)

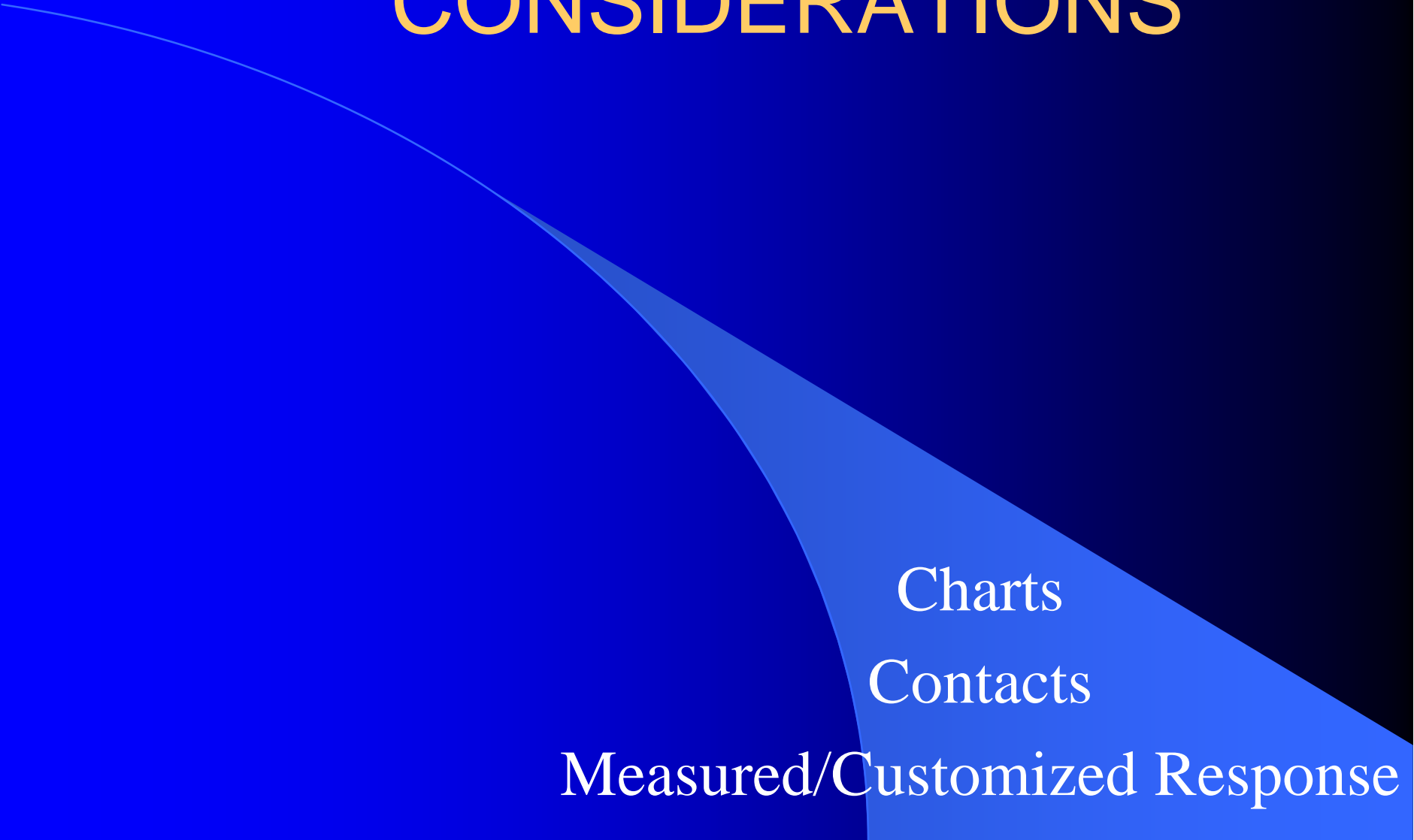
- “Requirements of the federal Emergency Planning and Community Right-To-Know Act of 1986 pertaining to the notification and submission of information are the law of this state” Utah Code Ann. § 63-5-5(6) (1997) (Exhibit I).
- DEQ has primary responsibility for receiving, processing, and managing hazardous chemical information and notifications under EPCRA. Utah Code Ann. § 63-5-5(3) (1997) (Exhibit I).

UUSTA

(Utah Underground Storage Tank Act)

- Owners and operators required to report suspected and known spills of regulated substances
 - CERCLA hazardous substances and petroleum
- Report (within 24 hours) to the USHW Control Board.

IV. PRACTICAL CONSIDERATIONS



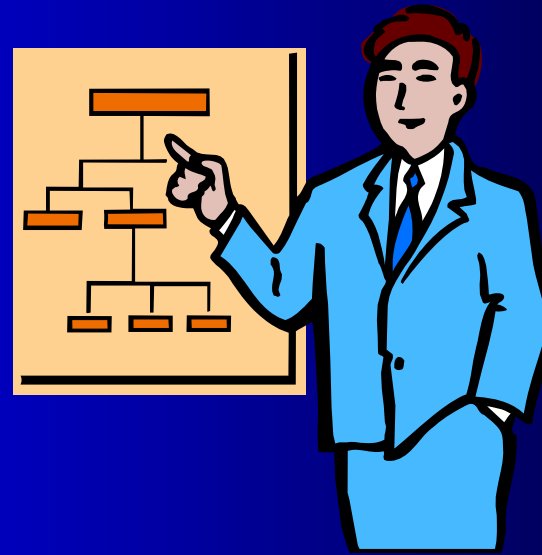
Charts

Contacts

Measured/Customized Response

Practice Considerations

- Charts: Workplace flow charts to assess need for reporting
- Contacts: Workplace posting of immediate notice contacts



Practice Considerations

- Measured/Customized Response
 - Over reporting to unnecessary agencies may trigger unwarranted inquiry
 - Under reporting to all the necessary agencies may leave you in violation
 - Proactive Reporting: Reporting decisions often are based on a variety of business as well as legal considerations. An organization may elect to report or informally inform even though very good arguments can be made that there is no obligation to do so.