**Docket No. TRI-2005-0073**

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**on the**

**Toxics Release Inventory Burden Reduction Proposed Rule,**
**70 Fed. Reg. 57822 (Oct. 4, 2005)**

**and the**

**Toxics Release Inventory 2006 Burden Reduction,**
**70 Fed. Reg. 57871 (Oct. 4, 2005)**

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**January 12, 2006**

## I. INTRODUCTION

The Attorneys General of New York, California, Connecticut, Illinois, Iowa, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, Vermont and Wisconsin (the "States") respectfully submit these comments concerning the Toxics Release Inventory Burden Reduction Proposed Rule, 70 Fed. Reg. 57822 (Oct. 4, 2005) (the "proposed rule") and the Toxics Release Inventory 2006 Burden Reduction, 70 Fed. Reg. 57871 (Oct. 4, 2005) (the "notice").

The changes to the Toxics Release Inventory ("TRI") program set forth in the proposed rule and the notice violate the old saying: "if it ain't broke, don't fix it." Rather than repair any problems with the TRI program, the contemplated changes harm it by raising the reporting thresholds for nearly all chemicals currently subject to TRI requirements. The changes would significantly reduce the amount of information about releases of toxic chemicals available to the public and as a result would impair efforts by federal, state and local governments, workers, firefighters and citizens to protect Americans and their environment from the harm caused by discharges of toxic chemicals to the air, water and land. In addition to being contrary to the public interest and sound policy, the proposed changes would violate the Emergency Planning and Community Right-to-Know Act ("EPCRA")[1] the Pollution Prevention Act ("PPA")[2] and the Administrative Procedure Act ("APA")[3].

## II. SUMMARY

Since Congress established TRI nearly two decades ago, it has been an important tool for business, federal, state and local governments, emergency first responders such as firefighters, workers, and other Americans. In general, TRI requires facilities that use and dispose of a wide variety of toxic chemicals in excess of certain threshold levels to file an annual report on, among other things, the maximum amount of the chemicals on site and the amounts of the chemicals released to the air, water and land.

Information made available under TRI has provided critical assistance in dealing with hazardous emergency situations such as along the Gulf Coast after Hurricane Katrina. TRI is also at the heart of one of our nation's most successful voluntary efforts. Due to TRI, many companies have dramatically reduced their chemical use and release, often by 30-50 percent or more. Just between 1998 and 2003, companies reduced chemical releases by 2.8 billion pounds. Thus, TRI works and should be strengthened, not rolled back.

EPA, however, is proposing changes that would significantly weaken the TRI program.

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[1] 42 U.S.C. §§ 11001-11050.

[2] 42 U.S.C. §§ 13101-13109.

[3] 5 U.S.C. § 706.

First, for most TRI chemicals, EPA proposes raising the annual reportable amount ten-fold, from 500 pounds to 5000 pounds. Based on current reporting patterns, EPA itself estimates that this change could eliminate all reporting for 26 chemicals, and would eliminate half or more of the reporting for another 30 chemicals. This proposed change fails to meet the statutory requirement that a "substantial majority" of releases of each TRI chemical be reported. The proposed change would also remove a powerful incentive to minimize the release of toxic chemicals, as companies that previously kept their releases to less than 500 pounds to avoid detailed reporting could now release much greater amounts without reporting those amounts. In the proposed rule, EPA only provides nationwide analyses of how much reporting on releases could be discontinued, not local or regional analyses, but the States are concerned about each one of their communities, not just national averages.

Second, EPA proposes allowing reduced reporting for one of the most dangerous categories of toxic chemicals, the persistent, bioaccumulative and toxic (PBT) compounds. This would reduce citizens' ability to understand, for example, how much lead and mercury were present, and how much lead and mercury wastes were generated, in their communities. For example, up to 3,700 pounds of mercury waste generated at facilities across the nation could be exempted from detailed reporting. Six years ago, EPA itself found that reduced reporting similar to that proposed here was "virtually useless" for communities interested in assessing risk from waste management of PBT chemicals.

EPA's justification for these first two changes is a purported need to reduce the reporting burden for business. However, EPA's own analysis of the changes indicates that the estimated burden reductions for a given reporting facility are minimal: about $430 for each non-PBT chemical and $790 for each PBT chemical. Even these low figures, however, likely overestimate the burden reduction. Indeed, according to EPA, 46 percent of the companies already potentially eligible to use reduced reporting requirements do not do so, indicating that business itself often finds full reporting beneficial rather than onerous. In light of the danger that the use and release of these toxic substances poses to human health and the environment, the benefits to public knowledge and safety that full reporting provides, as well as the strong incentive that it provides for voluntary reductions in use of toxic chemicals, far exceed the minimal benefit of any burden reduction that would result from the proposed changes. The history of TRI demonstrates that it is disclosure of toxic chemicals amounts, not concealment, that serves as a powerful incentive to reduce toxic chemical use and release.

In addition to the two changes outlined above, EPA intends to propose regulations that would change TRI reporting from annual reporting to alternate-year reporting. EPA acknowledges that this proposal raises "legitimate concerns about data loss during the non-reporting years." The proposal would in fact appear to allow releases of unlimited amounts of toxic chemicals in alternate years with no reporting.

Because all of these changes work contrary to the purpose of TRI – providing comprehensive information about toxic releases across the United States – they are arbitrary and capricious, an abuse of discretion, and otherwise contrary to law.

## III. BACKGROUND

### A. TRI: A Success Story

Ever since Congress enacted the TRI in 1987, companies, states, citizens, the federal government and others have successfully used TRI data to address health, safety and environmental issues.[4] Companies use TRI data to achieve enormous reductions in pollution. Once companies – and the public – learn exactly how much pollution the companies release, the companies often strive to reduce that amount to avoid embarrassment, to save money, or for other purposes. In the earliest years of the TRI program, between 1988 and 1994, nationwide releases of TRI chemicals declined by 44 percent.[5] Similarly, between 1998 and 2003, companies reduced chemical releases by 2.8 billion pounds.[6] For example, the Boeing Company reports that it reduced its toxic chemical releases by over 82 percent since 1991.[7] The chemical giant Monsanto reports that it reduced its toxic air emissions by over 90 percent between 1988 and 1992.[8] The Eastman Chemical Company of Kingsport, Tennessee, reports that it reduced its releases of TRI chemicals by 83 percent since 1988.[9] Dow Chemical has saved more than $10 million because of TRI-inspired efficiencies in chemical use or release.[10]

States use TRI data in a wide variety of ways:

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[4] Citations to "Tab __" refer to the Appendix of Sources (in three volumes) submitted with these comments. A copy of each source of information referenced in this comment is included in the Appendix, other than statutes, legislative history, regulations, Federal Register publications, judicial decisions, and sources already in the administrative record for docket number EPA-HQ-TRI-2005-0073. Volume 1 of the Appendix contains Tabs 1-5; Volume 2 contains Tabs 6-25; and Volume 3 contains Tabs 26-35.

[5] Focus: Now That You Know, 105(1) Environmental Health Perspectives (Jan. 1997), available at http://ehp.niehs.nih.gov/docs/1997/105-1/focusnow.html (hereinafter, "Focus") (Tab 1)

[6] OMBWatch, TRI Data 1998-2003 and The Effect of Proposed EPA Rule Changes, (undated), available at http://www.ombwatch.org/tricenter/TRI_State_Data.pdf (Tab 2).

[7] EPA, Office of Information Analysis and Access, How Are the Toxics Release Inventory Data Used? (EPA-260-R-002-004) at 10 (May 2003), available at http://www.epa.gov/tri/guide_docs/ 2003_datausepaper.pdf (hereinafter, "TRI Data Use Report") (Tab 3).

[8] Focus (Tab 1).

[9] Comments of the Eastman Chemical Company on the Toxics Release Inventory Burden Reduction Proposed Rule (Docket No. EPA-HQ-TRI-2005-0073-0760) at 2 (Oct. 4, 2005).

[10] K. Blankenship, "Toxics inventory faces challenges in Congress and in court," Chesapeake Bay Journal, available at http://www.bayjournal.com/article.cfm?article=1438 (Tab 4).

- to improve and strengthen permitting programs;
- to identify enforcement targets;
- to aid in emergency prevention planning;
- to undertake environmental justice projects;
- to analyze toxic releases and risks;
- to spur state pollution control legislation and regulation; and
- to target technical assistance to TRI facilities.[11]

In Delaware, for example, TRI reporting identified a major dioxin disposal problem at a DuPont factory; the state ultimately negotiated remediation efforts which include a commitment by the plant to cut dioxin formation by 90 percent by 2007.[12] The New York State Department of Environmental Conservation used TRI data to identify 400 facilities generating 95 percent of the state's toxic pollution, and then designated those facilities for priority in inspection, enforcement, monitoring and pollution-prevention planning.[13]

Firefighters and local governments use TRI data. The president of the New Jersey Fireman's Mutual Benevolent Association says that firefighters "use the inventory to prepare for accidents or fires at chemical plants, refineries and other sites" and "need more information, not less," about the toxic chemicals found at local business facilities.[14] The Louisville, Kentucky Metro Air Pollution Control Board unanimously adopted a far-ranging plan to reduce toxic air emissions based on TRI and other data.[15]

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[11] Sidney M. Wolf, "Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-To-Know Act," 11 J. Land Use & Envtl. L. 217, 305-06 (1996) (Tab 5) (hereinafter, "Wolf"); EPA, 1999 State TRI Program Assessment Summary at 2 (undated), at http://www.epa.gov/tri/programs/tri99_summary.pdf (Tab 6); EPA, Office of Environmental Information, Economic Analysis of the Proposed Toxics Release Inventory Phase II Burden Reduction Rule 5-2 (Docket No. EPA-HQ-TRI-2005-0073-0002 through -0010) (Sept. 19, 2005) (hereinafter, "Economic Analysis") (stating that information regarding the maximum amount of PBT chemicals on site has, in the past, been useful in emergency planning and response, environmental data analyses and compliance targeting analysis).

[12] TRI Data Use Report at 11-12.

[13] Id. at 41.

[14] A. Nussbaum, "N.J. blasts changes in emissions reporting," at http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjczN2Y3dnFlZUVFeXk2MDYmZmdiZWw3Zjd2cWVlRUV5eTY4NDYzMDImeXJpcnk3ZjcxN2Y3dnFlZUVFeXky (Tab 7).

[15] G. Hall, "Pollution control board approves toxic air plan," Courier-Journal (June 22, 2005), available at http://www.courier-journal.com/apps/pbcs.dll/article?Date=20050621&Category=NEWS01&ArtNo=50621010&SectionCat=&Template=printart (Tab 8); OMBWatch, TRI Success Stories, at http://www.ombwatch.org/tricenter/TRIsuccess.html (Tab 9).

Community groups and average citizens use TRI data. In Richmond, California, for example, a citizens group teamed up with a statewide environmental organization to use TRI information to identify the area's 20 largest polluters, then negotiated with the largest polluter, a Chevron oil refinery, to achieve zero net toxic chemical releases on a new project and to close down older portions of the facility.[16] In Minnesota, citizens used TRI information to convince a company to reduce its 130,000 pounds of toluene emissions by 98 percent.[17] In Ohio, citizen groups used TRI information to obtain a commitment from B.F. Goodrich that it would reduce its toxic air emissions by 70 percent.[18] Ms. Wilma Subra of Louisiana has used TRI information for years to educate Louisiana residents about toxic chemical releases, to work for change in regulations and policies in the state concerning toxic pollution and otherwise to reduce toxic releases.[19]

Scientists use TRI data to evaluate health impacts of toxic chemical releases.[20] Labor unions use TRI data: the United Auto Workers accesses and analyzes TRI and other environmental data to assess industrial emergency response capabilities at various plants.[21] Investment funds use TRI data to evaluate the environmental performance of companies so that they can target their investments to support companies that have strong environmental records.[22]

The federal government also uses TRI data. The National Institutes of Health, for example, have used TRI data to establish a website that provides information for assessing the environmental hazards caused by Hurricane Katrina.[23] EPA's Office of Health Research published

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[16] TRI Data Use Report at 6-7.

[17] Minnesota Dept. of Public Safety, Emergency Response Commission Comments on the Toxic Chemical Release Reporting; Community Right-to-Know; Notice of On-Line Dialogue (Dkt. No. EPA-HQ-TRI-2003-0001-0101) at 2 (Tab 10).

[18] Wolf at 288 (citing A. MacLean & P. Orum, Progress Report: Community Right-to-Know at 5, 22 (July 1992)).

[19] TRI Data Use Report at 4.

[20] Id. at 16 (citing A.L. Dent et al., "Using GIS to Study the Health Impacts of Air Emissions," 23(1) Drug & Chem. Toxicology 161 (Feb. 2000)).

[21] Id. at 6.

[22] See, e.g., Comment of Walden Asset Management (Dkt. No. EPA-HQ-TRI-2005-0073-0695) (undated); Comments from Neuberger Berman's Socially Responsive Investment Group on EPA's Toxics Release Inventory Burden Reduction Proposed Rule (Dkt. No. EPA-HQ-TRI-2005-0073-0870.1) (undated).

[23] National Institute of Environmental Health Sciences, "News Release: NIEHS Launches Website with Geographic Information System for Assessing Environmental Hazards from Hurricane Katrina" (Sept. 9, 2005), available at http://www.niehs.nih.gov/oc/news/katrina.htm (Tab 11).

a study of national and regional differences in TRI chemical releases according to race and income.[24] EPA's Office of Enforcement and Compliance Assurance uses TRI data as part of its Online Tracking Information System, a collection of online search engines used for enforcement targeting, facility review prior to inspections, and general enforcement and compliance program planning.[25] Even the Internal Revenue Service has used TRI data to enforce a tax on releases of chlorofluorocarbons, a potent contributor to the destruction of the ozone layer.[26]

TRI data has also been used in the effort to address environmental justice issues. EPA has explained that TRI data is an "important tool in environmental justice. Communities that were once uninformed about the toxic chemical releases in their area now have access to that information."[27] In December 2005, the Associated Press announced the results of a study – based on TRI data and EPA's Risk Screening Environmental Indicators Project – that quantified the extent to which black Americans are more likely to live in neighborhoods exposed to toxic pollutants than are white Americans and the extent to which residents in polluted neighborhoods tend to be less educated and poorer than residents of other neighborhoods.[28] TRI data is the tool that proves the need for environmental justice at the national and local level.

While some data reported through the TRI program are available elsewhere, such as in discharge monitoring reports required under the Clean Water Act, other data is available only through TRI. In addition, TRI organizes the data in a single, searchable database, so that all citizens and other users who seek information about use and releases of a particular chemical, or at a particular plant, or in a particular ZIP code, county or state, can easily find the exact information they are looking for.[29]

In sum, TRI has been a uniquely effective tool for assisting citizens, government and business in learning about, and ultimately reducing, the amount of toxic chemicals used and released across the United States. All of the States signing these comments find TRI data valuable for a wide range of purposes. Former EPA administrator Carol Browner has called it "among our most potent environmental weapons."[30] The Sierra Club has characterized TRI as

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[24] TRI Data Use Report at 13.

[25] Id. at 12.

[26] Id. at 14.

[27] Id. at 8.

[28] David Pace, "Blacks, poor more likely to breathe most unhealthy air," Associated Press (Dec. 13, 2005), available at http://www.signonsandiego.com/news/health/20051213-1039-unhealthyair.html (Tab 12).

[29] See EPA, TRI Explorer, at http://www.epa.gov/triexplorer/ (web access page for EPA TRI database) (Tab 13).

[30] Wolf at 221.

"one of the most effective tools of grassroots democracy ever."[31] The chemical giant Monsanto is "convinced that [compliance with TRI] will ultimately result in cost savings for the company and a competitive advantage."[32] Any program that the States, EPA, the Sierra Club and Monsanto can all praise is no doubt a true environmental success story.

### B. Current TRI Requirements

TRI requires that facilities make annual disclosures regarding their use and releases of toxic chemicals. A facility is subject to TRI disclosure requirements if during a given year it (1) operated in one of numerous specific industrial sectors, (2) employed ten or more full-time employees or their equivalent, and (3) manufactured, processed or otherwise used a TRI chemical in an amount exceeding the reporting criteria for that chemical.[33] The TRI requirements only cover 666 of the tens of thousands of chemicals used today.[34] A facility meeting these three criteria for a TRI chemical uses Form R to report, among other things, the following information for that chemical:

- the maximum amount on site (in ranges);
- the amounts released to air, water and land ("releases"), which include separate reporting of releases generated in the normal course of production activities at the facility ("production-related releases") and other releases that arise from catastrophic events, remedial action or other one-time events ("nonproduction-related releases"); and
- the amounts of production-related waste other than releases, which includes amounts that are used in energy recovery, are recycled, or are treated for destruction ("other production-related waste," and together with production-related releases, "production-related waste").[35]

To determine whether a facility needs to report for a particular chemical, the TRI regulations currently use two independent types of threshold criteria: use-based thresholds and waste-based thresholds. Use-based thresholds, generally known as "reporting thresholds," apply to the amount of the chemical that is manufactured, processed or otherwise used at the facility during the course of the year. Waste-based thresholds, on the other hand, apply to the amount of releases and other production-related waste generated at the facility during the course of the year. The primary waste-based threshold currently in use is the "annual reporting amount" ("ARA"), which is the aggregate amount of production-related waste of a given chemical generated at the facility.

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[31] See EPA Region 9, A Citizen's Guide to Reducing Toxic Risks, at http://www.epa.gov/region09/toxic/broch-toxic.html (Tab 14).

[32] Id.

[33] 42 U.S.C. § 11023(b)(1)(A).

[34] EPA, TRI Chemicals, at http://www.epa.gov/tri/chemical/ (Tab 15).

[35] See 42 U.S.C. § 11023(g); 42 U.S.C. § 13106(b); see also 70 Fed. Reg. at 57828-29.

The TRI regulations currently establish different reporting criteria for two broad categories of chemicals: (1) persistent, bioaccumulative and toxic chemicals ("PBT chemicals"), and (2) the remaining non-PBT chemicals. PBT chemicals are subject to reporting thresholds (based on use) of 100 pounds or 10 pounds, depending on how persistent and bioaccumulative the particular chemical is.[36] One PBT category, dioxin and dioxin-like compounds, is subject to a reporting threshold of 0.1 gram.[37] No waste-based threshold currently applies to PBT chemicals. Thus, whether or not a facility generates any releases or other production-related waste of a PBT chemical, it must file a Form R if it manufactures, processes or uses a PBT chemical in amounts exceeding the relevant reporting threshold (100 pounds, 10 pounds or 0.1 gram).

For non-PBT chemicals, there are two sets of reporting criteria. The baseline set of reporting criteria consists of use-based reporting thresholds of (1) 25,000 pounds for a facility that manufactures or processes the TRI chemical or (2) 10,000 pounds for a facility that otherwise uses the chemical.[38] For this baseline set of criteria, no waste-based threshold applies. Thus, whether or not a facility generates any releases or other production-related waste, if it manufactures, processes or otherwise uses a non-PBT chemical in an amount exceeding either of these reporting thresholds, it must file a Form R.

The alternative set of reporting criteria for non-PBT chemicals involves both use-based and waste-based thresholds: a reporting threshold of 1 million pounds or less, and an ARA of 500 pounds or less.[39] If a facility meets both of these criteria, it can file the shorter Form A rather than Form R. Form A does not provide the Form R information listed above but instead requires the facility to certify that it does not exceed the alternative criteria. Accordingly, a facility's decision to file Form A informs the public that the facility manufactured, produced or used 1 million pounds or less of the chemical and generated 500 pounds or less of production-related waste of the chemical.

Table 1 below summarizes these criteria:

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[36] 40 C.F.R. § 372.28(a)(1) & (2).

[37] 40 C.F.R. § 372.28(a)(2).

[38] 40 C.F.R. § 372.25(a) & (b).

[39] 40 C.F.R. § 372.27(a).

Table 1: Current TRI Reporting Criteria

| Type of Chemical | Use-Based Reporting Threshold | Waste-Based ARA | Reporting Requirement |
|---|---|---|---|
| PBT | 100 lbs. (persistent and bioaccumulative chemicals)<br><br>10 lbs. (highly persistent and bioaccumulative chemicals)<br><br>0.1 g. (dioxins and dioxin-like compounds) | none | If facility manufactures, processes or uses more than the relevant reporting threshold, it must file Form R. |
| Non-PBT (baseline) | 25,000 lbs. (manufactured or processed)<br><br>10,000 lbs. (otherwise used) | none | If facility manufactures, processes or uses more than the relevant reporting threshold, it must file Form R, unless it qualifies under the alternative set of criteria below. |
| Non-PBT (alternative) | 1,000,000 lbs. | 500 lbs. | If facility manufactures, processes or uses less than or equal to 1,000,000 lbs. and has an ARA of less than or equal to 500 pounds, it may file Form A rather than Form R. |

C. The Proposed Changes

The proposed rule and the notice would change the current reporting requirements in three ways. First, with regard to non-PBT chemicals, the proposed rule expands the universe of facilities entitled to use Form A by increasing ten-fold the ARA for the alternative set of reporting criteria. Under the proposed rule, a facility could use Form A rather than Form R if it (1) manufactured, processed or otherwise used 1 million pounds or less of the chemical, and (2) had an ARA of 5,000 pounds or less.

Second, the proposed rule extends the availability of the Form A certification statement to PBT chemicals other than dioxins or dioxin-like compounds ("non-dioxin PBT chemicals"). A facility could use Form A for a non-dioxin PBT chemical if it (1) manufactured, processed or otherwise used less than the reporting threshold of 1 million pounds; (2) had no releases; and (3) had a PBT reportable amount ("PRA") of 500 pounds or less. The PRA is another waste-based reporting criterion, consisting of the sum of nonproduction-related releases and other production-related wastes. Thus the PRA differs from the ARA because it excludes production-related

releases and includes nonproduction-related releases. Since a facility would only be able to take advantage of this proposed alternative set of criteria if its releases (both production-related and nonproduction-related) were zero, the PRA is for practical purposes equal to the amount of other production-related waste (amounts that are recycled, used for energy recovery, or treated for destruction).

The separate Federal Register notice does not include a proposed rule, but instead notifies Congress that EPA is considering a rulemaking to change TRI reporting from annual reporting to alternate-year reporting. EPA says that it has provided this notice to meet the requirements of EPCRA section 313(i)(5),[40] which requires one years' notice to Congress if EPA contemplates a rulemaking to change TRI reporting frequency.

The contemplated alternate-year reporting would apparently require that facilities gather and report TRI information every other year, but not in the off years, so that no TRI data at all would ever be available for those off-years. Although rulemaking on this proposal has not yet begun, the States preliminarily note that this concept is unlawful and bad policy for a number of reasons. Not only is alternate-year reporting contrary to EPCRA, for example, but it also would create an incentive to shift releases and other waste disposal activities into the off-years that could render TRI reports submitted in the reporting years largely useless as a measure of actual toxic chemical releases to American communities.

## IV. GENERAL COMMENTS ON THE PROPOSED RULE

The proposed rule would significantly weaken the TRI program to the detriment of federal, state and local authorities, firefighters, workers, citizen groups, and ordinary citizens who use TRI to determine what risks toxic chemicals create in their communities.[41] In addition, as explained below, the proposed changes violate EPCRA sections 313(a), (f)(2) and (g) and PPA section 6607.[42] Because the changes in the proposed rule are arbitrary and capricious, an abuse of discretion, and contrary to law, they would also violate the APA.

### A. The Proposed Rule Violates the Emergency Planning and Community Right-to-Know Act and the Pollution Prevention Act

The proposed changes to reporting thresholds for non-PBT chemicals violate the provision authorizing such changes, EPCRA section 313(f)(2)[43] and thus would allow violation of the TRI statutory disclosure requirements found in EPCRA sections 313(a) and (g) and PPA section 6607(a).[44] Section 313(f)(2) authorizes EPA to revise the reporting threshold after

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[40] 42 U.S.C. § 11023(i)(5).

[41] See Part III.A above.

[42] 42 U.S.C. §§ 11023(a), (f)(2) & (g); 42 U.S.C. § 13106.

[43] 42 U.S.C. § 11023(f)(2).

[44] 42 U.S.C. §§ 11023(a) & (g); 42 U.S.C. § 13106(a).

analysis of the impact on individual chemicals, not on the aggregate of all chemicals. The provision states that EPA may revise the threshold "for a toxic chemical" if the revised threshold "shall obtain reporting on a substantial majority of total releases of the chemical at all facilities subject to the requirements of [section 313]."[45]

Notwithstanding the fact that EPCRA requires a finding that the revised reporting requirement will continue to assure that a "substantial majority of total releases" for each chemical be reported, EPA does not indicate whether or not it even followed any specific definition of "substantial majority" in its proposed changes, let alone what that definition was. EPA appears to base its conclusion that the non-PBT chemical reporting changes meet the "substantial majority" standard on figures representing the percentage of releases, taken as an aggregate, of all chemicals that would no longer be reported under the proposed rule.[46] But this is contrary to law, since the plain language of the EPCRA section 313(f)(2) requires an individualized analysis for each chemical.[47]

Though it does not rely on it as a justification for the rule, in fact EPA did conduct a chemical-by-chemical analysis of the proposed rule's effects on reporting. That analysis shows that the proposed rule could result in the loss of disclosure of 100 percent of the releases from at least 26 chemicals or classes of chemicals, amounting to six percent of the chemicals or classes that would be affected by the proposed rule.[48] In New Hampshire, the proposed rule could completely eliminate reporting of at least 49 of the 81 chemicals currently reported.[49] Reporting zero percent of releases for a chemical is clearly not reporting a "substantial majority" of releases, and thus the proposed rule is unlawful for these chemicals under any interpretation of the standard.

For example, among the chemicals for which the proposed rule could eliminate 100 percent of release disclosures is toluene-2,6-diisocyanate ("2,6-TDI"). 2,6-TDI is a highly volatile substance that is reasonably anticipated to be a carcinogen, can irritate and burn the skin and eyes on contact, and can irritate the nose, throat and lungs if inhaled, potentially causing pulmonary edema.[50] Two-thirds of the total nationwide reported 2003 on-site releases of that

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[45] 42 U.S.C. § 11023(f)(2) (emphasis added).

[46] 70 Fed. Reg. at 57842 (noting aggregate amount of releases that would be eligible for Form A under the proposed rule).

[47] 42 U.S.C. § 11023(f)(2).

[48] Economic Analysis at 5-2 & A-16.

[49] New Hampshire Attorney General's Office, Analysis of Lost Reporting in New Hampshire (Jan. 12, 2006) (Tab 16).

[50] Department of Human Health & Services, National Toxicology Program, Report on Carcinogens (11th ed. 2005) at Substance Profiles, Toluene Diisocyanates, available at http://ntp.niehs.nih.gov/ntp/roc/eleventh/profiles/s177tdi.pdf (Tab 17); New Jersey Dept. of Health & Senior Services, Hazardous Substance Fact Sheet for Toluene-2,6-Diisocyanate,

chemical to the air, 967 out of 1,427 pounds, came from the Cytec Olean facility in Olean, New York, which reported a maximum amount of over 10,000 pounds of 2,6-TDI on site.[51] The Cytec Olean facility is within 1.3 miles of four elementary schools.[52] If EPA finalizes the proposed rule, this facility might qualify for Form A with regard to its 2,6-TDI emissions, and if so, 15,000 residents of Olean might no longer have any way of knowing the amount of that dangerous chemical released from the plant near these schools, or the maximum amount of the chemical on the plant site. If it qualifies for Form A, Cytec Olean might be able to increase its releases of this chemical fivefold without disclosure to Olean's residents or first responders, or any governmental authority.

To set an appropriate standard for the chemical-by-chemical "substantial majority" test, EPA should have looked at the purpose of TRI reporting. TRI's purpose is to:

> provide information to the Federal, State, and local governments and the public, including citizens of communities surrounding covered facilities. The release form shall be available . . . to inform persons about releases of toxic chemicals to the environment, to assist government agencies, researchers, and other persons in the conduct of research and data gathering; to aid in the development of appropriate regulations, guidelines and standards; and for other similar purposes.[53]

Thus, TRI is "to provide the public and state and local governments with maximum access to information about potential chemical hazards in their communities."[54] According to EPA, TRI's "overriding purpose . . . is to provide government agencies, researchers, and local

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available at http://www.state.nj.us/health/eoh/rtkweb/1868.pdf (Tab 18).

[51] 2003 Form R Report for Cytec Olean, Inc., at http://oaspub.epa.gov/enviro/tri_formr_partone.get_thisone?rpt_year=2003&dcn_num=1303201495557&ban_flag=Y (Tab 19); EPA, TRI Reporter: Chemical Report, available at http://www.epa.gov/triexplorer/ (select "2003" under "Year of Data;" select "Select Specific Chemical(s)" under "Chemicals Released" and then select "Toluene-2,6-Diisocyanate;" select the check box for "Select 2003 Public Data Release data set;" deselect the three check boxes for "Total Off-site Disposal or Other Releases," "Off-Site Disposal to Underground Injection Wells" and "Other Off-Site Disposal;" and click "Generate Report") (Tab 20).

[52] New York State Attorney General's Office, Cytec Olean Analysis (Jan. 9, 2006) (Tab 21).

[53] 42 U.S.C. § 11023(h); see also 42 U.S.C. § 13101(a)(2) & (5) (purpose is to encourage source reduction and other pollution prevention activities through the gathering of information regarding waste management activities).

[54] National Oilseed Processors Ass'n v. Browner, 924 F. Supp. 1193, 1216 (D.D.C. 1996) (emphasis added) (upholding EPA designation of additional TRI chemicals).

communities, with a comprehensive picture of toxic chemical releases and potential exposures to humans and ecosystems."[55] In particular:

> A significant part of [TRI's] overriding goal is to provide information on releases to local communities so that they can determine if the releases result in potential risks. The entire concept of TRI . . . is founded on a belief that the public has the right to know about chemical use, release, and other waste management in the areas in which they live, as well as the hazards associated with these chemicals.[56]

On the other hand, the relevant statutes do not recognize reduction of reporting burdens as a TRI goal or objective.[57] Indeed, Congress instructed that the TRI reporting requirements "should be construed expansively to require the collection of the most information permitted under the statutory language."[58]

Given this strong bias in favor of disclosure, a reasonable definition of "substantial majority" would be near 100 percent. Taking 95 percent as the minimum acceptable definition of "substantial majority," and using EPA's own figures and methodology, 119 chemicals or classes would fail the statutory test – i.e., would lose reporting for five percent or more of releases – if the proposed rule were finalized.[59]

Although using EPA's figures shows that the proposed rule would violate EPCRA, in fact the matter is even worse because EPA's figures likely underestimate the information that will no longer be required to be reported under the proposed rule. EPA does not explain, in either the proposed rule or the economic analysis, how it calculated the percentage of releases no longer required to be reported on Form R, and for that reason alone EPA's conclusions are arbitrary and capricious and an abuse of discretion.

As best the States can determine, after discussions with EPA staff, the figures were calculated using an improperly limited dataset. For each chemical, EPA started by taking the set

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[55] Lead and Lead Compounds; Lowering of Reporting Thresholds; Community Right-to-Know Toxic Chemical Release Reporting; Final Rule, 66 Fed. Reg. 4500, 4506 (Jan. 17, 2001) (hereinafter, "Lead Rule"); see also 132 Cong. Rec. 29747 (1986) (statement of Representative Edgar, one of EPCRA's principal authors, that TRI reporting requirements "are intended to provide a comprehensive picture of the community's and Nation's exposure to toxic chemicals" (emphasis added)).

[56] Persistent Bioaccumulative Toxic (PBT) Chemicals; Final Rule, 64 Fed. Reg. 58666, 58677 (Oct. 29, 1999) (hereinafter, "PBT Rule").

[57] See PBT Rule, 64 Fed. Reg. at 58676 (EPA acknowledgment that EPCRA does not require consideration of burden in revising thresholds).

[58] 132 Cong. Rec. 29747 (1986) (comments of Rep. Edgar) (emphasis added).

[59] New York State Attorney General's Office, Analysis of Reporting Losses (Jan. 12, 2006) (Tab 22).

of all Form Rs filed and then excluding all Form Rs with ARAs of 500 pounds or less. Using this reduced dataset, EPA then calculated (1) the aggregate amount of the chemical reported on forms with ARAs of 500 to 5000 pounds and (2) the aggregate total amount of the chemical reported on all of the forms, that is, on forms with ARAs from 500 pounds or more. The first of those two figure was reported in the "Pounds of total releases" column of Tables A-1 and A-2 of the Economic Analysis, and the ratio of the two figures was reported in the "Percent of total releases not reported" column of those two tables.

Assuming that the States have properly understood EPA's methodology, EPA's exclusion of the Form Rs with ARAs of less than 500 pounds or less is contrary to section 313(f)(2), and is arbitrary and capricious and an abuse of discretion, because the plain language of the statute requires that the substantial majority test be calculated by reference to "all facilities subject to the requirements of [section 313]." [60] Any statutory interpretation that excluded facilities based on existing reporting thresholds or ARA thresholds, as EPA appears to do, would be illogical as it ultimately could result in very low levels of reporting. For example, EPA might be able to raise the ARA threshold for a particular chemical from 500 to 5,000 pounds if a substantial majority of the releases reported under the then-existing (500 pound) threshold would still be reported for that chemical; several years later, EPA might be able to raise the ARA threshold for that chemical from 5,000 to 20,000 pounds if a substantial majority of releases reported under the revised (5,000 pound) threshold would still be reported for that chemical; and so on. After several such reporting reductions, it could well be the case that a very low percentage of the releases of a particular TRI chemical – or all TRI chemicals – would be reported. Thus, the only lawful and rational interpretation of the statute is that the dataset used to determine whether a particular chemical meets the substantial majority test must include all releases for that chemical, not just those that must be reported under the then-existing reporting thresholds.[61]

EPA may contend that it does not have information regarding releases that currently are not reported on Form R, including releases from facilities filing Form A. EPA does, however, have data regarding at least some of those releases, since, for example, only 54 percent of facilities potentially entitled to use Form A do so. Accordingly, up to 46 percent of the data on releases for facilities with non-PBT ARAs less than or equal to 500 pounds is available to EPA. Using that data, and other TRI data and information regarding chemical use patterns available to EPA, EPA could use statistical means to estimate any data that EPA in fact does not have.

The shift to alternate-year reporting contemplated in the notice would only compound the problems arising out of EPA's misapplication of the substantial majority test. Not only could there no longer be reporting on a substantial majority of releases for a large number of individual toxic chemicals, but there would be would be no reporting for any chemicals every other year.

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[60] 42 U.S.C. § 11023(f)(2).

[61] The PPA requires that a facility report information regarding toxic chemical source reduction and recycling for a chemical whenever the facility is required to report information regarding that chemical under EPCRA section 313. 42 U.S.C. § 13106(a). Thus, because the proposed rule, if finalized, would violate EPCRA's reporting requirements, it also would violate the PPA.

### B. The Proposed Rule Is Arbitrary and Capricious and an Abuse of Discretion and Thus Violates the Administrative Procedure Act

In addition to the proposed rule being contrary to the plain language of EPCRA, as discussed in Part IV.A above, the proposed rule is contrary to record evidence regarding the benefits of the TRI program and is not based on documented need. For example, EPA has not conducted comprehensive studies for all communities – or apparently any community – potentially affected by the proposed rule to determine the magnitude and scope of effects that the proposed rule may have on the amount of TRI reporting available in those communities. Even the States' preliminary, limited analyses demonstrate, however, that the proposed changes may significantly reduce the amount of TRI reporting available in some communities, including disproportionate impacts on minority or low-income communities. For those reasons and others described below, the proposed changes are arbitrary and capricious and an abuse of discretion, and thus violate the APA.

As noted above, Congress enacted TRI to obtain a maximum amount of information for federal, state, and local governments and the public so that those entities and individuals can better understand, study, regulate and reduce the amount of toxic chemical releases and waste products. Congress explained that "[a]ny determination by EPA regarding the ability of revised thresholds to obtain reporting on a substantial majority of releases, especially if such revised thresholds raise the statutory levels, must be based on verifiable, historical data which presents a convincing case that the statutory levels must be revised."[62]

Because the proposed rule is diametrically opposed to the purpose and structure of the TRI program, it presents no case for change, convincing or otherwise. As described above, TRI has been an outstanding success story, credited with a critical role in reducing the use of toxic chemicals and pollution. Rather than facilitate continued success by increasing – or at least not decreasing – the amount of available TRI information, the proposed rule would reduce the amount of available information by increasing reporting thresholds for both nondioxin PBT chemicals and non-PBT chemicals. As a result, the proposed changes work against the statutory goals and purposes.

In addition, the proposed changes would have a number of unacceptable consequences. As noted above, in the context of non-PBT chemicals, EPA appears to have applied the "substantial majority" test to all chemicals as an aggregate, rather than on a chemical-by-chemical basis.[63] Applying the test in that way could allow a situation where there would be huge percentage losses in reporting for certain chemicals – up to and including the loss of all reporting – while in the aggregate a "substantial majority" of reporting for TRI chemicals might still be obtained. Indeed, that seems to be the situation here. That outcome could arise, for example, if a

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[62] 132 Cong. Rec. 29749 (1986) (emphasis added); see also id. at 29747 ("[a]ny discretion to limit the amount of information reported should be exercised only for compelling reasons"); PBT Rule, 64 Fed. Reg. at 58675 (EPA's recognition of the "convincing case" standard).

[63] See Part IV.A above.

proposed change to reporting requirements cause significant changes for small volume, very harmful chemicals, but little change in reporting for large volume, less harmful chemicals, so that the aggregate figures were heavily weighed in favor of those large volume, less harmful chemicals. These outcomes are inconsistent with providing comprehensive, maximal reporting of toxic chemical releases and waste amounts.

EPA's aggregate approach is also inconsistent with the recognized focus of TRI on providing information about local toxic chemical use to communities. As EPA itself acknowledges, under the proposed changes there would be over 1100 ZIP codes where the amount of non-PBT toxic chemicals would likely be impossible to determine because all TRI reporting would be done on Form A.

In individual states, the proposed rule could have wide ranging impacts. In New Hampshire, most businesses are small, and the proposed changes would allow 119 of the 151 businesses that currently providing full Form R reporting to stop doing so.[64] The loss of this data would affect many programs, both state and local, as suggested in Part III.A above.

In New York, the proposed rule could result in the loss of information concerning approximately 380,000 pounds of chemical releases.[65] More than 3.5 million individuals live in New York ZIP code[66] areas where one or more facilities could avoid reporting releases that they are now obliged to make.[67] More than 130 facilities in New York would be able to stop all quantitative reporting on Form R, and over 165 facilities would be able to stop quantitative reporting on Form R for at least one chemical.[68] Because each of the over 165 facilities potentially covered by the new rule would be able to avoid, on average, reporting on 3.88 chemicals released to the environment, the unreported releases could create almost 14 million

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[64] New Hampshire Attorney General's Office, Analysis of Lost Reporting in New Hampshire (Jan. 12, 2006) (Tab 16).

[65] New York Attorney General's Office, Analysis of Lost Reporting in New York (Jan. 12, 2006) (Tab 23) (hereinafter, "New York Lost Reporting").

[66] The States rely on ZIP code-based analyses here and elsewhere as a rough proxy for local populations that would be affected by the proposed rule. However, because reduced TRI reporting for a particular facility could have effects far beyond the boundaries of the ZIP code where that facility is located, EPA, in performing its studies of local effects of the proposed rule should use more sophisticated methodologies to identify affected populations, for example, all individuals within a fixed radius (1 mile, 3 miles, 10 miles) around each potentially affected facility.

[67] New York Lost Reporting (Tab 23).

[68] National Environmental Trust, Spreadsheet, at http://www.net.org/health/tri_data/NY_Gone.xls (Tab 24).

potential individual exposures to unreported chemical releases in New York alone (3.5 million citizens x 3.88 chemicals = 13.74 million potential chemical exposures).[69]

The proposed rule would hit areas of high population density in New York hard. Quantitative reporting regarding 92 separate releases, totaling 21,774 pounds of chemicals, would no longer be required in extremely high density ZIP code areas (population density greater than 10,000 persons per square mile).[70] Similarly, quantitative reporting regarding 137 separate releases, totaling 31,571 pounds of chemicals, would no longer be required in high density ZIP code areas (population density greater than 5,000 persons per square mile).[71]

Furthermore, as the data in Table 2 below demonstrate, these densely populated neighborhoods, affected by tons of chemicals that could escape reporting, have a disproportionately high proportion of minority and low-income residents.

Table 2: Demographic Characteristics in Extremely Densely Populated ( 10,000 residents/sq. mile) and Densely Populated ( 5,000 residents/sq. mile) ZIP Code Areas in New York State Compared to Total New York State and United States Populations.[72]

| Demographic Characteristic | NYS Zip Codes with $\geq$ 10,000 residents/sq. mi. | NYS Zip Codes with $\geq$ 5,000 residents/sq. mi. | New York State | United States |
|---|---|---|---|---|
| % Nonwhite/Multiracial | 61.2[a] | 58.9[a] | 32.1 | 24.9 |
| % Hispanic/Latino | 30.6[a] | 24.1[a] | 15.1 | 12.5 |
| % Income Below Poverty Level | 23.8[a] | 23.2[a] | 14.6 | 12.4 |
| % Under 18 | 29.0[b] | 29.1[c] | 24.7 | 25.7 |

a. Significantly higher ($p \leq 0.001$ by one sample, one tail T-test) than percentage of general population in New York State and the United States.

b. Significantly higher ($p \leq 0.05$ by one sample, one tail T-test) than percentage of individuals under 18 in general population of New York State.

c. Significantly higher ($p \leq 0.05$ by one sample, one tail T-test) than percentage of individuals under 18 in general populations of New York State and the United States.

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[69] New York Lost Reporting (Tab 23).

[70] Id.

[71] Id.

[72] Id. Analysis based on 2000 United States Census data, available at http://www.census.gov/main/www/cen2000.html.

An area in the town of Tonawanda, New York, offers one particularly striking example of the possible aggregate effects of the rule. TRI chemicals can have a variety of harmful effects: they can cause neurological damage, respiratory problems, blood disorders, and problems in fetal developmental. In Tonawanda's ZIP Code 14150, which includes 45,000 residents, environmental releases of 8,100 pounds of neurotoxic chemicals, 3,100 pounds of chemicals that cause respiratory problems, 650 pounds of hematotoxic chemicals and 2,300 pounds of chemicals that cause developmental problems could go unreported under the proposed rule.[73]

These examples show that the proposed changes to the rule are not consistent with the purpose of TRI – to provide a maximum amount of information regarding toxic chemical use and releases to Americans – but directly contrary to the statutory purpose. EPA, however, has not performed any analyses sufficient to examine the magnitude and scope of these types of reporting problems if the proposed rule were finalized. EPA has not evaluated, but should evaluate, the extent to which the proposed changes to the rule will weaken incentives for companies to reduce releases and use of toxic chemicals. As noted in Part III.A above, TRI reporting requirements have induced companies to reduce their releases and use of toxic chemicals by billions of pounds, but the proposed rule would weaken that incentive by allowing less reporting. For example, companies that previously kept their non-PBT releases to less than 500 pounds to avoid detailed reporting could now release up to 5000 pounds without reporting those amounts. Companies that previously kept their use of nondioxin PBT chemicals to less than the reporting threshold of 10 or 100 pounds to avoid detailed reporting could now begin to use up to 1,000,000 pounds without detailed reporting, so long as they met the 500 pound PRA threshold.

Moreover, EPA has not evaluated, but should evaluate, the effect of the proposed changes on the amount of available TRI information on a community-by-community basis for each community in which facilities that could switch from Form R to Form A are located.[74] In addition, EPA has not evaluated, but should evaluate, any environmental justice issues, such as disproportionate impact on minority or low-income communities.[75] For all these reasons, the proposed rule is arbitrary and capricious and an abuse of discretion in violation of the APA.

### C. EPA's Justification for the Proposed Rule Is Meritless

EPA's stated purpose in proposing the new approaches for nondioxin PBT chemicals and non-PBT chemicals is to provide "burden reduction" for certain reporting entities.[76] As noted in Part IV.A above, however, EPCRA section 313(f)(2) does not require or even suggest that

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[73] New York State Attorney General's Office, Tonawanda Analysis (Jan. 12, 2006) (Tab 25).

[74] See this Part above.

[75] See Part V below (specific comments on section V.J. of the preamble regarding environmental justice).

[76] 70 Fed. Reg. at 57825; see also id. at 57839 (nondioxin PBT chemicals) and 57843 (non-PBT chemicals).

reporting burden is a factor to be considered in revising reporting thresholds.[77] Nor is burden reduction one of the general goals or policies of either EPCRA or PPA.[78]

Furthermore, the amount of burden reduction expected from the proposed rule is minimal at best. EPA calculates that the burden savings per form would amount to $430 for non-PBT chemicals and $790 for nondioxin PBT chemicals, a small amount either way.[79] Applying these per form amounts to its estimate of the number of Form As that would be completed, EPA calculates the aggregate burden reduction as $5.24 million for non-PBT chemicals and $2.14 million for nondioxin PBT chemicals, for a total burden reduction of $7.38 million.[80] Figures as low as this – only 4.3 percent of the total estimated reporting burden[81] – do not justify any change in reporting requirements. Indeed, $7.38 million represents only approximately 0.055 percent of the chemical industry's 2004 profits of $13.5 billion, and thus a vanishingly small portion of the industry's overall costs.[82]

As low as these burden reduction figures are, they likely overestimate the reduction for four reasons. First, as even some businesses have found, there is in fact little difference in burden between Form R and Form A because reporting entities must gather the same data either way.[83] EPA does not explain this inconsistency between these real-world comments and its theoretical burden reduction analysis.

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[77] 42 U.S.C. § 11023(f)(2); see also PBT Rule, 64 Fed. Reg. at 58676 (EPA acknowledgment that EPCRA does not require consideration of burden in revising thresholds); id. (concluding that Congress "never intended [concern with burden reduction] to outweigh the public's need for access to information concerning release and waste management, and thus their potential exposure to toxic chemicals").

[78] See 42 U.S.C. § 11023(h) (EPCRA) & § 13101 (PPA).

[79] 70 Fed. Reg. at 57845.

[80] Id.

[81] Id.

[82] United States Dept. of Commerce, Bureau of Economic Analysis, National Income and Product Accounts Table, Table 6.16D. Corporate Profits by Industry, at http://www.bea.gov/bea/dn/nipaweb/TableView.asp?SelectedTable=228&FirstYear=2004&LastYear=2004&Freq=Ann (Tab 26).

[83] See, e.g., Comments of the Eastman Chemical Company on the Toxics Release Inventory Burden Reduction Proposed Rule (Dkt No. EPA-HQ-TRI-2005-0073-0760) at 3 (Oct. 4, 2005) (reporting "insignificant difference in burden"); United States Dept. of Energy Comments On Toxic Release Inventory (TRI) Burden Reduction Proposed Rule (Dkt. No. EPA-HQ-TRI-2005-0073-0899.1), at 1 (undated) (because the same calculations must be done for both forms, "[t]he only actual burden reduction realized is the time to fill out the Form R versus Form A, which is minimal").

Second, in calculating burden reduction, EPA relied on existing, OMB-approved estimates of the time necessary to complete Form R and Form A. EPA, however, recently commissioned a study that developed an alternate methodology for improving the estimation of the burden of completing these forms (the "alternate burden estimation methodology").[84] Using the alternate methodology, the estimated amount of time saved by each use of Form A would be approximately 25 percent lower than the figures EPA used in deriving the $430 and $790 figures.[85] Applying a 25 percent discount to EPA's figures results in an aggregate burden reduction of $5.54 million, not $7.38 million.

Third, only 54 percent of the forms potentially eligible for Form A under current regulations actually use Form A, and EPA does not believe that the rate of Form A use would be significantly higher under the proposed regulations.[86] This low usage rate may be due to the fact that, as noted above, Form R is just not that much more burdensome to complete than Form A. Applying the 54 percent usage rate to EPA's burden reduction figure, the aggregate burden reduction would be $3.99 million, or only $80,000 per state on average.

Finally, the $430 and $790 figures include approximately $81 in recordkeeping/mailing costs,[87] but since facilities would still have to mail a Form A, and would still need to keep records to determine whether they qualify for Form A, it is not clear why a benefit reduction for recordkeeping/mailing costs of any amount, let alone this full amount, should be attributed to each form.

Even if EPA's $7.38 million burden reduction figure were correct, EPA values a human life at $6.5 million, so rejecting the proposed rule would essentially pay for itself if the continued reporting of the release data that would otherwise have been eliminated under the proposed rule saved just one person from a premature death due to cancer.[88] Moreover, that EPA figure only represents the value of premature death due to cancer, and does not reflect the broader range of health care costs for other mortality and sublethal medical conditions related to releases and use of toxic chemicals. For example, annual health care costs for American children resulting from chemical pollution has been estimated to be $54.9 billion, and that figure is almost certainly an underestimate because it only looks at the costs for four categories of illness: lead poisoning,

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[84] 70 Fed. Reg. at 57827.

[85] Id. at 57842.

[86] Id. at 57843.

[87] See Economic Analysis at 2-5.

[88] See, e.g., Effluent Limitations Guidelines and New Source Performance Standards for the Metal Products and Machinery Point Source Category; Final Rule, 68 Fed. Reg. 25686, 25719 (May 13, 2003) (value of statistical life based on avoiding premature mortality due to cancer).

asthma, cancer and neurobehavioral disorders.[89] In light of the enormous harm that chemical use causes, and the potential benefit of TRI reporting to help combat that harm, EPA's proposed reduction of reporting requirements is wholly unjustified.

In sum, EPA's burden reduction estimates are likely overestimates and are otherwise unreliable. Because the proposed rule does not advance any statutory purposes, because burden reduction is not a statutory goal, and because the burden reduction figures are suspect at best, promulgation of the proposed rule would be bad policy, arbitrary and capricious, an abuse of discretion, and contrary to law.[90]

## V. SPECIFIC COMMENTS ON THE PROPOSED RULE

The comments set out below are organized by section of the preamble to the proposed rule. Because the proposed rule should be rejected in its entirety, no comment on specific proposed regulatory language is provided.

### I. Background and General Information

#### E. Why is EPA Proposing to Reduce Burden Associated With TRI Reporting Requirements?

For the reasons set forth above, the States disagree that the proposed rule will "reduce burden and save resources for regulated entities" to any "meaningful" degree.[91] Moreover, EPA's

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[89] P. Landrigan, et al., "Environmental Pollutants and Disease in American Children: Estimates of Morbidity, Mortality, and Costs for Lead Poisoning, Asthma, Cancer, and Developmental Disabilities," 110(7) Environmental Health Perspectives 721 (July 2002), available at http://ehp.niehs.nih.gov/members/2002/110p721-728landrigan/landrigan-full.html (Tab 27); see also K. Davies, "Economic Costs of Diseases and Disabilities Attributable to Environmental Contaminants in Washington State" at 3 (July 2005), available at http://www.ecy.wa.gov/programs/eap/pbt/rule/docs/rulecomments/Ec_costs.pdf (estimating $2.73 billion annual cost in Washington State of adult and childhood diseases and disabilities attributable to environmental contaminants (asthma, cardiovascular disease, cancer, lead exposure, birth defects and neurobehavioral effects)) (Tab 28).

[90] Although EPA does not address this issue, it is important to note that the changes to TRI reporting that EPA proposes are not required to address national security concerns. Much more detailed chemical- and plant-specific information is often available on the internet from chemical industry marketing websites. Indeed, railcars, pipelines and other means of transporting dangerous chemicals are often openly marked. Neither Form R nor any other TRI form provides photographs or diagrams of the reporting facility or other information about what the facility looks like, how it is laid out, or where the chemicals are in fact stored. Moreover, as explained above, TRI reporting creates a strong incentive to reduce and eliminate use of toxic chemicals, and thus reduces possible hazards arising from use of such chemicals.

[91] 70 Fed. Reg. at 57825.

conclusion that the proposed rule will "continu[e] to provide valuable information to the public that fulfills the purposes of the TRI program,"[92] is misleading, because under the proposed rule TRI data would be less comprehensive and therefore less valuable and less adequate to fulfill TRI purposes. Finally, in light of the "considerable progress" EPA has already made in reducing reporting burden,[93] not to mention the comments discussed above from some reporting entities, there would seem to be no need for additional burden reduction.

G. Burden Reduction Estimation Methodology Used in Today's Proposal

For the reasons set forth above, EPA's analysis of the amount of burden reduction that the proposed rule would provide is unreliable and likely overestimates any actual burden reduction that could be expected from the proposed rule.

EPA asks for comment regarding the alternate burden estimation methodology that it recently commissioned.[94] The States believe that this alternative methodology, which is discussed in Part IV.C above, is more accurate than the existing OMB-approved methodology. We are not convinced that the peer review panel is correct that EPA overestimated the experience and knowledge that a typical TRI reporting facility would have.[95] TRI has been in place for nearly two decades, and anecdotal evidence in many states indicates that TRI reporting facilities have developed sufficient experience and knowledge to make reporting a relatively routine matter.[96] To the extent that this may be a problem for some facilities, the solution is not to spend EPA resources on proposed rules to reduce reporting requirements, but to use those resources for increased compliance assistance to businesses.

II. What is EPA's Statutory Authority for Taking This Action?

The States agree that EPCRA section 328[97] authorizes EPA to promulgate regulations as may be necessary to carry out 42 U.S.C. chapter 116, but emphasize that section 328 does not authorize EPA to take administrative action that is contrary to the language, structure or purpose

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[92] Id.

[93] Id.

[94] Id. at 57827.

[95] Id.

[96] See, e.g., A. Nussbaum, "N.J. blasts changes in emissions reporting," at http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjczN2Y3dnFlZUVFeXk2MDYmZmdiZWw3Zjd2cWVlRUV5eTY4NDYzMDImeXJpcnk3ZjcxN2Y3dnFlZUVFeXky (Tab 7) (small New Jersey company official stating that TRI reporting "is not one of those filings that you really hate to do" and that "[a]fter you're doing it for all these years, you sort of accumulate [information] as you go along and you know what you're going to need").

[97] 42 U.S.C. § 11048.

of EPCRA or PPA. Pursuant to EPCRA section 313(f)(2),[98] EPA may establish revised reporting thresholds for classes of chemicals or categories of facilities. The revised thresholds, however, "shall obtain reporting on a substantial majority of total releases of the chemical," that is, for each TRI chemical or closely-related family of chemicals.[99] Thus, analysis based on whether a category of facilities in the aggregate meets the "substantial majority" standard, or whether a class of chemicals in the aggregate meets that standard, is contrary to the plain language of the statute. For reasons set out throughout this submission, EPA would not be "ensuring" that reporting would continue to meet the "substantial majority" standard should the proposed rule be promulgated as final.[100] Moreover, since the proposed change reduces the amount of information, the benefits of which vastly outweigh the burdens, it is arbitrary and capricious.

III. What Reporting Requirement Changes Are Being Proposed?

B. Background on the Form A Certification Statement

TRI reporting requirements and their purposes are exceedingly important and successful, as discussed above. EPA should reference in this section of the preamble all of TRI's statutory purposes. In addition, EPA should note that the proposed changes are directly contrary to some of the goals of EPCRA and PPA, and do nothing to advance any of the listed goals of those statutes.

C. Form A Eligibility – PBT Chemicals

1. Description of Proposed Change and Considerations

EPA states that it "believes that communities and other users of TRI information are less concerned about small volumes of on-site waste management when a facility is able to achieve zero release of these chemicals."[101] But EPA does not provide any evidence to support that purported belief. In fact, comments from TRI data users already filed in the EPA docket are overwhelmingly to the contrary, and thus EPA should change the statement.[102] Because EPA's current determination that it is appropriate to allow such facilities to use Form A is based on that erroneous belief, that determination is arbitrary and capricious.

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[98] 42 U.S.C. § 11023(f)(2).

[99] Id.

[100] See 70 Fed. Reg. at 57828.

[101] Id. at 57838.

[102] See, e.g., Comments of Rachel Morello-Frosch on the Toxics Release Inventory Burden Reduction Proposed Rule (Docket No. EPA-HQ-TRI-2005-0073-0202) at 1 (Nov. 14, 2005); Comments of Brigid Jastrzebski on the Toxics Release Inventory Burden Reduction Proposed Rule (Docket No. EPA-HQ-TRI-2005-0073-0203) at 1 (Nov. 14, 2005); Comments of Clayton Northouse on the Toxics Release Inventory Burden Reduction Proposed Rule (Docket No. EPA-HQ-TRI-2005-0073-1357) at 1 (Jan. 6, 2006).

Among the reasons why communities remain interested in TRI data even when there are no releases is for emergency planning. Form R information concerning the maximum amount of a chemical on site during the year, or the amount of chemical waste that may be retained on site for recycling, energy recovery or destruction, helps communities understand what amounts of toxic chemicals could be released from local facilities in the event of spills, accidents and natural disasters like Hurricane Katrina so that they can prepare adequate response measures in advance, or react knowledgeably afterward.[103]

EPA contends that the proposed changes to PBT reporting will "encourag[e] facilities that are already not releasing any chemicals to accomplish further source reduction so that their other waste management totals are low enough to use this option (500 pounds or less)."[104] But EPA provides no economic analysis demonstrating any such incentive effect.[105] As explained in Part IV.C above, the proposed rule is likely to provide minimal burden reduction, if any. As a result, it is it is likely that any incentive effect arising out of that burden saving would in fact be de minimis.

Moreover, the history of TRI demonstrates that it is disclosure of toxic chemicals amounts, not concealment, that serves as a powerful incentive to reduce toxic chemical use and release.[106] The proposed rule, by allowing facilities to conceal the amount of waste PBT chemicals on site, would thus weaken, not strengthen, the pollution-reduction incentive. Companies that are currently reporting low amounts of other production-related waste would be able to increase those amounts by orders of magnitude – for example, from 10 pounds to 450 pounds – without disclosing that increase. Accordingly, EPA's finding that the proposed change would create pollution-reduction incentives lacks a basis in reason or the record. In addition, EPA's conclusion that balancing the minimal benefits, if any, of the proposed changes regarding PBT chemicals with the needs of TRI data users weighs in favor of the reductions is wrong: the opposite is true.

a. What Is This Approach to Burden Reduction?

EPA asks whether nonproduction-related releases currently reported in section 8.8 of Form R should be included in the definition of PRA.[107] It appears to make no difference as the proposed rule is currently structured. Companies would only be able to use Form A for nondioxin PBT chemicals if nonproduction-related releases were zero, so under those

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[103] See, e.g., M. Keller, "Tidal surge may have had dioxin," Sun Herald (Dec. 3, 2005) at A1, available at http://www.sunherald.com/mld/sunherald/13317843.htm (community facing risk of contamination from Mississippi's largest producer of toxic chemicals in the wake of Katrina) (Tab 29).

[104] 70 Fed. Reg. at 57838.

[105] Economic Analysis at 4-1.

[106] See Part III.A above.

[107] 70 Fed. Reg. at 57839.

circumstances the facility's PRA will be the same whether the zero value for nonproduction-related releases are included or not. What is important is that EPA not extend the use of Form A to nondioxin PBT chemicals so that this information continues to be reported.

EPA asks whether the ARA for non-PBT chemicals should be modified to include section 8.8 amounts.[108] For the reasons set forth in Part IV.A above, this would be a good idea (even if the proposed rule is rejected, as it should be) because it would restrict the use of Form A for those chemicals.

EPA notes that using a different basis for reportable (waste-based) thresholds for PBT chemicals – the ARA – and for nondioxin PBT chemicals – the PRA – poses a risk of confusion among reporting entities. EPA is correct on this point. EPA justifies the proposed changes to TRI reporting on the basis of burden reduction, but the confusion arising from adding a new, different threshold could result in increased burden. In any event, as set out throughout these comments, because the proposed changes to reporting on nondioxin PBTs are otherwise unjustified, there is no reason to add confusion by promulgating those changes in a final rule.

EPA asks for comment on the specific types of nonproduction-related releases reported in section 8.8.[109] The answer is simple: all nonproduction-related releases of any sort should be reported there, and if the current regulations do not so provide clearly enough, they should be revised to do so.

c. Why Is This Approach Being Considered for PBT Chemicals?

EPA's proposed changes for nondioxin PBT reporting are particularly egregious, as EPA's current proposal is directly contrary to its findings and conclusions six years ago. In 1999 and 2001, EPA rejected use of Form A for PBT chemicals and instead set more stringent, lower reporting thresholds.[110] In doing so, EPA noted that "[t]oxic chemicals that persist and bioaccumulate are of particular concern because they remain in the environment for significant periods of time and concentrate in the organisms exposed to them."[111] "[E]ven minimal releases of persistent bioaccumulative chemicals may result in significant adverse effects. . . ."[112]

In 1999, EPA concluded that "[t]he general information provided in the Form A on the quantities of the chemical that the facility manages as waste is insufficient for conducting analyses on PBT chemicals and would be virtually useless for communities interested in assessing risk from

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[108] Id.

[109] Id.

[110] PBT Rule, 64 Fed. Reg. at 58670, 58672; Lead Rule, 66 Fed. Reg. at 4504-05.

[111] PBT Rule, 64 Fed. Reg. at 58668.

[112] Id. at 58670.

releases and other waste management of PBT chemicals."[113] In particular, EPA considered and rejected the proposal at issue here that facilities with zero releases be allowed to use Form A to report 500 pounds or less of other production-related waste. EPA explained:

> This additional waste management information on PBT chemicals is very important to communities because it helps them understand the quantities of EPCRA section 313 chemicals that are being transported through their communities, the destination of these . . . chemicals, as well as the reported waste management activity at the receiving facility.[114]

Also in 1999, EPA considered the argument that "range reporting" should be allowed for PBT chemicals, as would essentially be the case if EPA adopted the proposed rule.[115] EPA determined, however, that "use of ranges could misrepresent data accuracy for PBT chemicals because the low or the high end range numbers may not really be that close to the estimated value, even taking into account its inherent error (i.e, errors in measurements and developing estimates)."[116] "EPA believed this uncertainty would severely limit the applicability of release information where the majority of releases, particularly for PBT chemicals, are expected to be within the amounts eligible for range reporting."[117] EPA noted that under the original, statutory reporting thresholds, EPA only received 6 reports for PCBs, a subcategory of PBTs, and concluded that "[u]nder no interpretation [of section 313] can six reports be characterized as obtaining a comprehensive view of toxic chemical exposure."[118]

In the proposed rule, EPA has turned 180 degrees and now seeks to allow Form A to be used for nondioxin PBT chemicals, but does so without any adequate explanation of its reversal. EPA "believes" that there would be minimal data loss from moving to Form A,[119] but does not explain this change of position, since in 1999 it determined that use of Form A would produce "virtually useless" data. EPA nowhere explains why reporting about other production-waste activities that it found to be "very important to communities" can now be eliminated through use of Form A. EPA admits that under the proposed rule, Form A would serve as a "range report" for nondioxin PBT chemicals,[120] but again does not explain its apparent change of position as to the adequacy of range reports for PBT chemicals. Moreover, EPA never provides a chemical-by-

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[113] Id.

[114] Id. at 58732-33.

[115] Id. at 58670.

[116] Id.

[117] Id.

[118] Id. at 58673.

[119] 70 Fed. Reg. at 57839.

[120] Id. at 57838.

chemical analysis of the effect that Form A reporting would have on the availability of information regarding nondioxin PBT chemicals, so it is impossible for EPA to know whether the proposed rule would reduce reporting to even less than the six reports that EPA previously concluded were inadequate. To the extent that EPA's arguments in subsections III.C.1.c.i-iii of the preamble to the proposed rule are intended to provide these explanations, they fail for the reasons set out in the discussion of those subsections below.

EPA notes that the bulk of the forms eligible for revised reporting of nondioxin PBT chemicals under the proposed rule – 2,085 forms out of 2,703, or approximately 77 percent – report zero quantities of releases and zero quantities of other production-related waste.[121] As a result, the burden relief from the proposed rule for these reporting entities would be minimal, since, as EPA admits, "the burden of completing Form R for such facilities is small."[122] EPA also believes that many of these facilities would continue to use Form R for the same reason.[123] Since EPA provides no convincing justification for its reversal in position, and since by EPA's own admission most of the facilities in this category would receive little benefit from the proposed change, EPA should withdraw the proposed rule.

EPA has calculated that 98 percent of the forms that would qualify for Form A under the proposed rule and which reported positive amounts of production-related waste other than releases were for (1) lead and lead compounds, (2) polycyclic aromatic compound ("PACs"), and (3) mercury and mercury compounds.[124] As set forth below, given the well-documented and widespread health impacts, both local and regional, of these chemicals, reduced reporting cannot be justified. In addition, EPA needs to identify the relevant chemicals for the remaining two percent of forms that would qualify for Form A and perform analyses regarding those forms and chemicals to address both the national, regional and local effects of eliminating Form R reporting for those forms and the extent to which any material burden reduction would occur. For example, it appears that these remaining forms could include forms for polychlorinated biphenyls, or PCBs, a group of chemicals that are probable carcinogens and can cause skin conditions, irritation of the nose and lungs, changes in the blood and liver, and other health problems for adults and children.[125]

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[121] Id. at 57839.

[122] Id.

[123] Id.; see also Part IV.C above (noting minimal difference in burden between completing Form R and Form A).

[124] Id.

[125] See, e.g., EPA, TRI Total Releases, 2000: PBT Chemicals, at http://www.epa.gov/triinter/tridata/tri00/press/chart_pie_pbt_releases_all_industries_2000.pdf (showing that PCBs accounted for 12 percent of all PBT releases in 2000) (Tab 30); Agency for Toxic Substances and Disease Registry, Public Health Statement for Polychlorinated Biphenyls (PCBs) at 5-9 (undated), available at http://www.atsdr.cdc.gov/toxprofiles/tp17-c1.pdf (health effects) (Tab 31).

### i. Lead and Lead Compounds

Lead is a potent neurotoxin.[126] Many children are affected by lead paint exposure in their homes. TRI provides a means to identify other ways that citizens may be exposed. Health departments across the nation are working to eliminate all lead exposures, especially for children. To accomplish this worthy goal, doctors, medical researchers and citizens need to know where lead is used, where lead releases are coming from and where other lead waste is generated.

In the 2001 TRI rulemaking on lead and lead compounds, EPA found that:

> [t]he nature of PBT chemicals, including lead and lead compounds, indicates that small quantities of such chemicals are of concern, which provides strong support for setting lower reporting thresholds than the current section 313 thresholds of 10,000 and 25,000 pounds.[127]

EPA also found that:

> [the] 100 pound threshold achieves the appropriate balance of the various factors laid out in the preamble to the final PBT rule. EPA therefore finds that establishing the [reporting] threshold at 100 pounds will not be unduly burdensome and ensures that the resulting reporting will provide the public with information from a range of covered industry sectors, and that the information will contribute significantly to providing the public with a comprehensive picture of toxic chemical releases and potential exposures to humans and ecosystems.[128]

EPA has not explained the inconsistency between the 2001 Lead Rule, which enhanced TRI for the purpose of furthering the statute's structure and purpose, and the reduced reporting requirements for lead set out in the proposed rule, which are contrary to the statute's structure and purpose. Nor has it explained why if reporting thresholds of 10,000 or 25,000 pounds were too high in 2001, a reporting threshold of 1,000,000 pounds is acceptable in 2006.

EPA contends that the "most common scenario" for lead reporters with zero releases but positive amounts of other waste management quantities is that the reporters "send lead waste off-site to a recycler."[129] EPA discusses no other "scenario" for this category of reporters, and its analysis for this category of reporters relies on the assumption that all of these reporters follow this scenario. EPA needs either to confirm that all of these facilities send their lead waste to off-site recyclers or to add a discussion regarding what facilities do with their lead waste if they do

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[126] See, e.g., Agency for Toxic Substances and Disease Registry, Public Health Statement for Lead §§ 1.5 & 1.6, available at http://www.atsdr.cdc.gov/toxprofiles/tp13-c1-b.pdf (Tab 32).

[127] Lead Rule, 66 Fed. Reg. at 4504.

[128] Id. at 4530.

[129] 70 Fed. Reg. at 57839.

not send it to off-site recyclers. EPA also needs to address the fact that even if all facilities do follow this practice today, they may not do so in the future, undermining the support for the proposed rule. Even if there are zero releases, information about the amount of lead on site at a facility, or the amount being transported from one facility to another, is important to know so that facilities and communities can prepare for spills, accidents and other ways in which workers and neighbors might be exposed to the chemicals.

EPA calculates that, based on the 2002 TRI filings, 67,000 pounds of lead recycling, or 0.0084% of all lead recycling, would no longer be reported.[130] Though this is a small percentage nationwide, TRI is meant to benefit individual citizens and local governments and first responders, and the national figure says nothing about whether these lost pounds are unevenly distributed, creating "blind spots" where reporting on significant amounts of lead in a particular community would disappear. Nor does the national figure indicate whether the rule would create any "black holes" where all or nearly all reporting of lead waste quantities in a particular community would disappear. The States are concerned about each one of their communities, not just national averages.

EPA's failure to perform analyses to ensure that no such "blind spots" or "black holes" would be created renders its conclusion that implementing the proposed rule "will not significantly impact the use of TRI data,"[131] arbitrary and capricious.[132] This is particularly so since the proposed changes would eliminate disclosure of a wide variety of lead-related information for these facilities: the maximum amount on site, and amount of the specific on- and off-site waste streams (recycling, energy recovery or treatment for destruction). Even if there are in the ordinary course zero releases of lead from these facilities, local community members, workers and first responders in particular may have use for this type of information in anticipating and preparing for possible future emergencies at the facilities. In addition, the information regarding the amounts in specific waste streams is necessary to determine how lead and lead waste is being dealt with.

ii. PACs and Benzo(g,h,i)perylene

EPA notes that "many" combustion units that may be used to burn PACs may be subject to the Resource Conservation and Recovery Act or the Clean Air Act, but does not claim that all are.[133] Unless EPA either states unambiguously that all of these combustion units are covered by these statutes or performs an analysis showing that incineration at these units will not result in the release of PACs or benzo(g,h,i)perylene, it should not promulgate the proposed rule. Even if so, however, reporting under other statutes is less easily available to the public and often less usable.

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[130] Id.

[131] Id. at 57840.

[132] This point is true not only for the proposed changes for nondioxin PBT chemicals, but also for the proposed changes for non-PBT chemicals.

[133] 70 Fed. Reg. at 57840.

Otherwise, the comments for this category of chemicals are the same as for lead and lead compounds above. EPA needs to perform localized analyses to determine whether the proposed rule will create any "blind spots" or "black holes" with regard to PACs. PACs include polycyclic aromatic hydrocarbons, a category of substances that include probable and possible carcinogens.[134] Thus, communities, facilities and workers need access to the information about the amount manufactured, processed or otherwise used, the maximum amount on site, and amount of the specific on- and off-site waste streams (recycling or other) to plan for possible future emergencies at the facility, for example, if something goes wrong in the incineration process and excessive quantities of PACs are emitted. In addition, in situations where, as EPA admits is the case here, users of the chemical have two possible means of waste disposal – incineration or treatment for destruction – communities need access to that information as well, but the proposed rule would eliminate disclosure of the means of waste disposal.

iii. Mercury and Mercury Compounds

The comments for this category of chemicals are the same as for lead and lead compounds. As EPA is well aware, mercury is an extremely toxic substance.[135] As a result, it is critical that communities and their first responders know about the use and disposal of mercury at facilities near them for emergency planning purposes.

f. Do My Recordkeeping Requirements Change?

Whether or not the proposed rule or any other change is promulgated, existing recordkeeping requirements should not be relaxed in any way.

2. Estimates of Potential Impacts

a. What Are the Potential Impacts of Reducing Reporting Burden?

See the general comments on the proposed rule in Part IV above.

EPA contends that facilities reporting on Form A would save 17.5 hours per form because they would no longer need to determine the maximum amount of the TRI chemical on site and would not need to calculate the production ratio.[136] The States doubt that these two activities are

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[134] See, e.g., Agency for Toxic Substances and Disease Registry, Public Health Statement for Polycyclic Aromatic Hydrocarbons (PAHs) at 6-7 (undated), available at http://www.atsdr.cdc.gov/toxprofiles/tp69-c1.pdf (Tab 33).

[135] See, e.g., Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units; Proposed Rule, 69 Fed. Reg. 4652, 4657-58 (Jan. 30, 2004); Agency for Toxic Substances and Disease Registry, Public Health Statement for Mercury at 12-19 (undated), available at http://www.atsdr.cdc.gov/toxprofiles/tp46-c1.pdf (Tab 34).

[136] 70 Fed. Reg. at 57841.

responsible for approximately one-third of the Form R reporting burden (17.5 of 52.1 hours), and thus believe that this 17.5 hour figure overestimates the burden reduction.[137]

b. What Are the Potential Impacts to Data Users?

See the general comments on the proposed rule in Part IV above.

The States do not agree that the proposed rule will have a "minimal impact" on TRI reporting simply because in the aggregate, across all TRI chemicals and the entire nation, the proportion of lost reporting may be small.[138] As noted above, one of the principal purposes of TRI reporting is to help communities address local problems with toxic chemicals. EPA has not done sufficient analysis to demonstrate that the proposed rule would not create local "black holes" and "blind spots" that would interfere with achievement of this purpose. EPA itself has noted that over 1100 ZIP codes would lose all TRI reporting, and the Cytec Olean example from New York State given above[139] suggests that the loss of TRI data in those and other areas could significantly impede a community's ability to protect schoolchildren and others from possible emergencies arising out of toxic chemical use. EPA has not demonstrated that range reporting for PBT chemicals[140] is any more appropriate now than when EPA rejected it several years ago.

c. Are There Other Potential Impacts?

EPA asserts that this option will "provide an incentive to TRI facilities to eliminate releases and reduce the need for other waste management by allowing certification in lieu of reporting for facilities that manage to eliminate all releases and reduce their other waste management activities to a level of 500 pounds or less."[141] For the reasons noted in the specific comments on preamble section III.C.1 above, the States disagree.

3. Rationale for Expanding Form A Eligibility to PBT Chemicals

As explained in the specific comments on preamble section I.E, above, the States do not agree that the continued availability of range volume data – that is, an indication that a facility has a PRA somewhere between zero and 500 pounds – for a given nondioxin PBT chemical under the proposed rule constitutes "valuable information,"[142] especially given the loss of information about the maximum amount of the chemical on site, the total quantity of the chemical waste, and the quantities of specific waste streams under the proposed rule.

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[137] See Part IV.C above (minimal difference in effort to complete Form R and Form A).

[138] 70 Fed. Reg. at 57841.

[139] See Part IV.A above.

[140] 70 Fed. Reg. at 57838.

[141] Id. at 57841.

[142] Id.

EPA asks whether any of the nondioxin PBT chemicals are of sufficient concern so as to justify excluding them from eligibility for Form A.[143] For the reasons outlined above, all of the nondioxin PBT chemicals should be excluded from Form A eligibility, and the proposed rule should be withdrawn.

D. Expanding Form A Eligibility – Non-PBT Chemicals

1. Description of Proposed Change

e. Do My Record Keeping Requirements Change?

Whether or not the proposed rule or any other change is promulgated, existing recordkeeping requirements should not be relaxed in any way.

2. Estimates of Potential Impacts

a. What Are the Potential Impacts for Reducing Burden?

See the general comments on the proposed rule in Part IV, above.

EPA itself estimates that allowing use of Form A would only save an estimated 9.6 hours per form.[144] As noted in Part IV.C above, even this small amount of time is likely to be an overestimate.

b. What Are the Potential Impacts to Data Users?

See the general comments on the proposed rule in Part IV, above.

The substantial majority test for revising reporting thresholds is not measured by the aggregate percentage reduction in chemical reporting volume over all chemicals over the entire nation, so EPA's statement that the percentage, should the proposed rule be promulgated, would be less than 1 percent,[145] is irrelevant. For the same reason, the last two columns in Table 3,[146] are also irrelevant. The aggregate amount of chemical releases for which reporting would no longer be required – 14 million pounds – and the aggregate amount of chemical waste management quantities for which reporting would no longer be required – 25 million pounds – are enormous amounts, even if relatively small as a percentage.

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[143] Id.

[144] Id. at 57842.

[145] Id.

[146] Id. at 57843.

EPA's use of a ZIP code analysis to evaluate the potential local impacts of reporting reductions resulting from the proposed rule[147] is somewhat useful, but inadequate, because it fails to perform a thorough analysis of the possible effects of the proposed rule. According to analyses prepared by the National Environmental Trust, 922 ZIP codes across the country – over 10 percent of the ZIP codes currently reporting data on Form R – could lose all TRI reporting.[148] In New York State alone, 57 ZIP codes – or over 15 percent of the ZIP codes currently reporting data on Form R – could lose all TRI reporting.[149]

Even if the proposed regulations would still require reporting of some releases in a ZIP code, there could still be an unacceptable loss of information about chemicals released to the local environment. For example, as noted in Part IV.B above, for the 45,000 residents of ZIP code 14150 in the town of Tonawanda, New York, environmental releases of 8,100 pounds of neurotoxic chemicals, 3,100 pounds of chemicals that cause respiratory problems, 650 pounds of hematotoxic chemicals and 2,300 pounds of chemicals that cause developmental problems could go unreported if the proposed rule is finalized.

Because the impact from use of toxic chemicals – releases and transport of hazardous chemicals for recycling, for example – may extend beyond the ZIP code in which the reporting facility is located, EPA should do a county-by-county analysis, as apparently was done in the 1994 Form A rulemaking, and should also do analyses based on the population within a fixed radius (1 mile, 3 miles, 10 miles) of the facilities for which reporting would be lost under the proposed rule. These analyses should also include evaluation of possibility of disproportionate impacts on minority and low-income individuals, pursuant to EPA's obligations under the Executive Order 12898 on environmental justice.

Nonetheless, even EPA's analysis showing that the proposed rule would potentially double the number of ZIP codes for which all reporting could be done on Form A – an additional 655 ZIP codes – demonstrates that the proposed rule could have significant impacts on local communities.[150]

3. Rationale for Expanding Form A Eligibility for Non-PBT Chemicals

See the general comments on the proposed rule in Part IV, above.

EPA contends that a data user "may" be able to predict what waste management activity is likely to be used at a facility for non-PBT chemicals.[151] EPA provides no support for this

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[147] Id.

[148] National Environmental Trust, Spreadsheet, at http://www.net.org/health/tri_data/States.xls (Tab 35).

[149] Id.

[150] 70 Fed. Reg. at 57843.

[151] Id.

proposition, and it seems unlikely to be true as a general matter since non-PBT chemicals are so numerous and waste quantities of a particular chemical may be dealt with in multiple ways.

For the reasons set out in Part IV, above, the proposed rule will affect significant amounts of data on releases and waste management activities, contrary to EPA's statement.[152] Moreover, for the reasons set out above, "range reporting" is inadequate, contrary to EPA's statements.[153]

In addition to comment on the proposed 5,000-pound ARA threshold, EPA asks for specific comment on alternative ARA thresholds of 1,000 or 2,000 pounds.[154] These alternative reporting thresholds, or indeed any reporting thresholds greater than the current one, are unlawful and bad policy for the same reasons as the 5,000-pound threshold. As Table 3 demonstrates, either of these alternative thresholds would create numerous chemicals for which the substantial majority standard would not be met given the minimal reasonable definition of the term.

Table 3: Analysis of Alternative Reporting Thresholds[155]

| Alternate ARA | Number of Chemicals Not Meeting a Substantial Majority Threshold of 95 Percent | Number of Chemicals for Which 100 Percent of Reporting Could Be Lost |
|---|---|---|
| 2,000 lbs. | 71 | 16 |
| 1,000 lbs. | 29 | 7 |

Thus, these proposed alternative ARA thresholds also violate the substantial majority standard, and there is no statutorily-recognized reason to reduce reporting on these chemicals.

EPA asks for specific comment on whether changes to the ARA would adversely impact chemical specific or local community uses of TRI information.[156] As set forth in Part III.A above, TRI data is used by communities to protect themselves against threats arising from the use and disposal of toxic chemicals. This rule would impede the ability of many communities to continue to do so for the simple reason that a great deal of information relevant to those local communities

[152] Id.

[153] Id.

[154] Id. at 57844.

[155] New York State Attorney General's Office, Analysis of Reporting Losses (Jan. 12, 2006) (Tab 22).

[156] 70 Fed. Reg. at 57844.

would no longer be available.[157] This is one of the principal reasons why the proposed rule should be rejected, and, as noted above, EPA should itself perform studies to evaluate this issue in depth.

## IV. Requests for Public Comment

As noted in the specific comments on preamble section III.C.3 above, none of the nondioxin PBT chemicals should be eligible for Form A.

As noted in the specific comments on preamble section III.C.1.a above, reporting of data regarding nonproduction-related releases should be required on Form A, both as part of the ARA and as a separate line item.

As noted in the specific comments on preamble section I.G above, the alternate burden estimation methodology likely produces a more accurate measure of burden reduction.

As noted in the specific comments on preamble section III.D.3 above, the proposed 1,000 and 2,000 pound thresholds are no more lawful or appropriate than the 5,000 pound threshold.

As noted in Part IV and elsewhere in these comments, extending Form A availability to any PBT chemical is unlawful and bad policy.

As noted in the specific comments on preamble section III.C.1.a above, under the proposed rule as now structured, it makes no difference whether section 8.8 management amounts should be included in the PRA, and the States support the inclusion of data regarding Form R section 8.8 nonproduction-related releases in the ARA for Form A.

As noted in the Part IV and elsewhere in these comments, EPA's analyses of cost savings, incremental costs, economic impacts and benefits relating to the proposed rule, as set forth in the rule and in the Economic Analysis, are flawed in several ways and as a result do not provide support for promulgation of the proposed rule.

## V. What Are the Statutory and Executive Order Reviews Associated With This Action?

### A. Executive Order 12866, Regulatory Planning and Review

There was no legal authority for review of the proposed rule by the Office of Management and Budget ("OMB"). The only legal authority EPA cites is Executive Order 12866. That order requires that OMB review "significant regulatory actions," which are defined as regulatory actions that may:

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[157] See, e.g., National Environmental Trust, Spreadsheet, at http://www.net.org/health/tri_data/States.xls (determining that 922 ZIP codes could lose all TRI reporting) (Tab 35).

> (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.[158]

EPA's determination that the proposed rule meets this standard is arbitrary and capricious because EPA never in fact provided an explanation for that determination. Moreover, the proposed rule itself suggests that the standard is not met, as (1) the annual effect of the rule, under EPA's own calculations, is only approximately $7.38 million,[159] and EPA does not suggest that the proposed rule would affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;[160] (2) EPA identifies no serious inconsistency or interference with action by any other agency; (3) EPA identifies no impact on entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients; and (4) EPA identifies no novel legal or policy issues.

EPA cites no authority for OMB review other than the executive order. Thus, in the absence of a reasoned determination by EPA that the standard set out in the executive order is met, and in the absence of any grounds for such a determination, there was no legal authority for OMB review of this rule.

B. Paperwork Reduction Act

EPA appears to have made a mistake: this section of the preamble refers to total burden reduction of 202,000 hours or $9.2 million, while section V.A.2 of the preamble, and the chart contained therein, refers to a total burden reduction of 164,000 hours or $7.4 million.[161] EPA should correct or explain the discrepancy. In any event, as set forth in Part IV.C above, EPA's burden reduction estimates overstate the actual burden reduction impact of the proposed rule.

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[158] 70 Fed. Reg. at 57844.

[159] Id. at 57845.

[160] For the reasons set out in this submission, the proposed rule would have significant negative effects on the environment, public health and safety, and state and local governments or communities. Because, however, the proposed rule would have no countervailing positive benefits of any significant merit, the States contend that if such negative effects were in fact the basis for OMB review, then the proposed rule should simply have been rejected before any OMB review.

[161] 70 Fed. Reg. at 57845.

E. Executive Order 13132, Federalism

As noted in Part III.A, above, States rely on TRI data for a variety of important purposes. Thus, contrary to EPA's conclusion,[162] the proposed rule would have a substantial direct effect on States because it would interfere with their ability to rely on TRI as a comprehensive source of data to analyze, legislate, regulate and undertake enforcement with respect to hazards from toxic chemicals.

Under Executive Order 13132, Federalism,[163] when a federal policy has a substantial direct effect on the states, one of the fundamental principles of federalism EPA is to apply is that "[p]olicies of the national government should recognize the responsibilities of – and should encourage opportunities for – individuals, families, neighborhoods, local governments and private associations to achieve their personal, social, and economic objectives through cooperative effort."[164] The proposed rule is contrary to that principle, as it reduces the ability of individuals and entities to achieve personal security and environmental protection by reducing the amount of publicly available information regarding toxic chemicals in their communities. Thus, because the proposed rule is contrary to the executive order, EPA should not promulgate it.

H. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

The States agree that the proposed rule is not formally subject to Executive Order 13045. Nonetheless, EPA could and should have analyzed whether the reduction of information regarding release and waste management of toxic chemicals set forth in the proposed rule has any effect on the ability of communities, first responders and governments to protect children from environmental health and safety risks.

J. Environmental Justice

EPA acknowledges that its goal is "to ensure that no segment of the population, regardless of race, color, national origin, or income, bears disproportionately high and adverse human health and environmental effects as a result of EPA's policies, programs, and activities."[165] EPA nowhere indicates in the proposed rule, however, that it has performed any studies or made any other efforts to determine whether the proposed rule would have any such disproportionate impacts. EPA instead merely states that it has "no indication" that the proposed rule "will disproportionately impact minority or low-income communities."[166] In minority or low-income communities, health and emergency preparedness projects could be disproportionately hampered

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[162] Id. at 57846.

[163] 64 Fed. Reg. 43255 (Aug. 10, 1999).

[164] Id. at 43256 (§ 2(h)).

[165] 70 Fed. Reg. at 57846 (emphasis added).

[166] Id. at 57847.

by the proposed rule, but EPA has failed to evaluate such impacts. As set forth in Part IV.B, above, analysis of the situation in New York State indicates a potential for disproportionate impact for minority and low-income residents in high density areas. EPA should perform its own minority and low-income impact analyses for each affected area across the nation. In the absence of any EPA effort to analyze the effect of the proposed rule on minority or low-income communities, EPA has not met its duty to "ensure" that the proposed rule would have no disproportionate impacts on those communities, and thus EPA's conclusion that the proposed rule has no such impact is contrary to Executive Order 12898.

## VI. COMMENTS ON THE CONTEMPLATED CHANGE TO ALTERNATE-YEAR REPORTING

The contemplated change to alternate-year reporting identified in the notice would violate EPCRA section 313(i)[167] and the APA. As a preliminary matter, the plain language of section 313(i) authorizes EPA to change the "frequency" of reporting, but makes no provision for excluding reporting for alternate periods of time. Thus, if the statutory conditions discussed below were met, EPA perhaps could make the reporting requirements biannual – that is, require that reports containing data for two successive years be filed at the end of every second year, although such a change would still be bad policy and would likely be arbitrary and capricious and an abuse of discretion. The statutory language does not, however, permit EPA to require that data be provided only for alternate years.

Section 313(i) imposes several conditions on EPA's authority to modify reporting frequency, none of which can be met here. That section requires that EPA must make a finding that the modification is consistent with the purposes of the TRI reporting requirements, as set out in 42 U.S.C. § 11023(h).[168] The finding must be based on experience from previously submitted TRI forms.[169] The finding must also be based on three determinations: (a) the extent to which the information at issue in the proposed modification has been used by federal, state and local governments and the public; (b) the extent to which the information is readily available to potential users from other sources and provided to EPA under other federal law or through a state program; and (c) the extent to which the modification would impose additional or unreasonable burdens on facilities subject to TRI reporting requirements.[170]

Based on experience from TRI submissions to date, alternate-year reporting would not be consistent with the purpose of TRI reporting. EPA itself acknowledges that alternate-year reporting raises "legitimate concerns about data loss during the non-reporting years."[171] Alternate-year reporting would not constitute "comprehensive" reporting and would not provide

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[167] 42 U.S.C. § 11023(i).

[168] See Part IV.A above (citing TRI reporting purposes).

[169] 42 U.S.C. § 11023(i)(2)(A)(i).

[170] 42 U.S.C. § 11023(i)(2)(A)(ii) & (3).

[171] 70 Fed. Reg. at 57872.

the "maximum" of information regarding toxic chemical releases and waste management.[172] As noted above, a wide variety of governmental officials and the public use TRI information to protect public health and safety and the environment from catastrophic and other risks. Elimination of every other year's data could result in gaps in information that would prevent communities from continuing and expanding those efforts. Reporting companies could and no doubt do vary their chemical use and disposal practices from year to year, and thus data for one year may not be representative of data for the next year. In particular, alternate-year reporting would create an incentive for companies to shift their releases or other waste management activities into the off-years so as to avoid reporting requirements in the reporting years. This incentive could be particularly strong if EPA implements the changes in the proposed rule. A company might, for example, choose to make all of its releases of mercury or other nondioxin PBT chemicals in the off years so that it could file Form A in the reporting years. Thus, alternate-year forms showing no releases could be completely unreliable as a source of information about the risk the facility creates for the community.

The States are also unaware of state reporting programs or other sources that would be able to provide the lost information to potential users on a nationwide basis. Nor does any other federal or state law or program provide the same information to EPA on a nationwide basis. Lastly, it is possible that the change to alternate-year reporting would impose additional and unreasonable burdens on reporting entities because regular, annual reporting provides information useful to the company and because institutional memory and familiarity regarding the requirements of the law and the steps necessary to file TRI forms would be harder to maintain if not used each year. EPA should investigate this possibility in the event that it chooses to move forward with the contemplated alternate-year rulemaking.[173]

## VII. CONCLUSION

The changes set out in the proposed rule and the notice violate the law in several serious ways, and would significantly damage TRI, one of the most effective environmental programs in the nation's history. For all the reasons set forth in this comment, EPA should not promulgate the proposed rule and should not begin rulemaking proceedings regarding alternate-year reporting. If the States can be of any assistance as EPA further examines these issues, please contact Peter Lehner, Chief of the Environmental Protection Bureau, New York State Attorney General's Office, at (212) 416-8450, Michael Surgan, Ph.D., Chief Scientist of that bureau, at (212) 416-8480, or Andrew Frank, an Assistant Attorney General in that bureau, at (212) 416-8271.

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[172] See Part IV.A above (discussion of statutory purposes).

[173] These are the States' initial comments based on the skeletal description of the contemplated alternate-year reporting proposal described in the notice. In the event that EPA moves ahead with the alternate-year reporting concept, the States reserve their right to submit these and additional comments during the notice-and-comment process for the rulemaking.

Thank you for EPA's consideration of these comments.

Dated: January 12, 2006

Respectfully submitted,

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