



National Environmental Trust

Mr. Stephen L. Johnson, Administrator
U.S. Environmental Protection Agency (MC 1101A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Toxics Release Inventory Burden Reduction Proposal (TRI-2005-0073)

January 11, 2006

Dear Administrator Johnson:

I am writing on behalf of National Environmental Trust to express our strong objections to EPA's proposal to collect less information under the Toxics Release Inventory (TRI). We believe that the proposed changes to TRI reporting would adversely impact the use of the data by the public, states, and EPA and other federal agencies. We know, for example, that TRI data were extremely useful in determining possible water contamination after hurricanes Katrina and Rita, and there are countless other ways these data are used every day. Quite often, these are ways that none of us would have predicted, especially when the TRI program began nearly 20 years ago.

Since its inception, the scope of the TRI program has expanded significantly: adding the Pollution Prevention Act data, expanding the list of substances reported, broadening the range of reporting industries, and lowering thresholds for PBT chemicals. Accordingly, we are deeply concerned that the current proposals will undo these gains in available information, particularly at the community level.

Certification Threshold Changes

In the October 4, 2005 Federal Register notice, EPA proposes to raise the alternate reporting certification threshold from 500 to 5,000 pounds for non-PBT chemicals. This proposal calls the certification statement "Form A" even though it does not meet the statutory requirements for information required on a TRI reporting form. The certification statement requires no numerical information from reporting facilities, only the chemical name. Strictly speaking, it cannot actually be called a "form" for TRI reporting purposes.

The Agency's proposal claims both significant burden reduction for industry and preservation of 99% of the volume of release data collected. Even if this is true for the U.S. as a whole, it is certainly not true on the state and local level. There are 8,927 communities across the country with at least one facility reporting to TRI. If the certification threshold were raised to 5,000 pounds, 3,849 facilities would likely no longer be required to submit any data on releases to the environment, off-site transfers, or on-site waste management:

- This means that 922 communities, or more than 10% of the nation, would receive no numerical data from the reporting facilities, and 1,608 communities (18%) would lose numerical data from 50% of the reporting facilities in their zip codes.
- This is a significant loss of data on releases to the environment. There are 1,150 communities (13%) that would lose information on at least 50% of the releases to the environment from local facilities, and 1,435 communities (16%) that would lose at least 25% of data on releases. By any count, these are large numbers and not insignificant.

The proposal discusses the certification threshold in terms of burden reduction for the reporting facilities, but the underlying contention is that 5,000 pounds of production-related waste is a small amount, and therefore the change won't really matter. The Agency has not given any indication of why this would be so, and no justification for selecting a 5,000 pound threshold for certification (or the 1,000 or 2,000 pound level included in the request for comments). The original 500 pound certification threshold was devised in part to reward facility efficiency. If EPA has decided that ten times more production-related waste is acceptable in terms of facility operation efficiency, the Agency should be clear about it and say so.

However, there is plenty of evidence showing that "small" facilities producing less than 5,000 pounds of production related waste do not necessarily operate efficiently, and exempting these facilities will hinder efforts to promote pollution prevention and could lead to non-reporting of significant releases:

1. We know that these small facilities tend to have a larger percentage of their production-related waste as releases to the environment than larger facilities. Releases constitute 15% of production-related waste nationwide. However, releases constitute 80% of production-related waste for facilities that would no longer report numerical data under the certification statement proposal. These facilities are not practicing pollution prevention and are not even managing waste either on- or off-site. They clearly need more scrutiny, not less.
2. According to the North American Commission for Environmental Cooperation (CEC), which analyzed data from TRI and its Canadian counterpart, the annual reduction in releases to the environment is entirely driven by large facilities, and masks continuous increases in releases from smaller facilities. Raising the certification statement threshold will potentially allow for even greater increases

that will not have to be reported by facilities that are under the threshold, particularly since the vast majority of their production-related waste is released to the environment. (The EPA Administrator also has signed at least two CEC resolutions promoting greater data comparability among North American countries, so this proposal represents a retreat from those formal commitments.)

3. The Agency's Risk Screening for Environmental Indicators (RSEI) program was built in large part on the premise that a small amount of releases of a more toxic or hazardous chemical can be more dangerous than a larger release of a less toxic substance -- allowing for more efficient prioritizing of reduction programs or projects with the aim of reducing overall hazard or risk. The RSEI program relies on TRI emissions data and would be considerably less effective with less reporting from some small facilities.
4. Another reason the Agency should be concerned about these small facilities is that some of their releases consist of Hazardous Air Pollutants (HAPs) regulated under the Clean Air Act. The HAPs program came about because of the TRI data on these specific chemicals that had been unavailable before TRI. The national, regional, and local modeling done to predict ambient concentrations of these chemicals uses TRI data and is likely to be affected by sources dropping out -- even sources of 5,000 pounds per year or less could have a significant impact on the modeling. EPA's documentation for this proposal does not indicate that the Agency has considered the impact of collecting less data on releases of HAPs on the Agency's ability to track and potentially regulate those chemicals. Nationwide, 28% of forms for HAPs would contain no data under the proposed certification statement changes.
5. Most importantly, the proposal allows a loophole for non-production-related waste, whether it comes from small or large facilities. One-time or periodic activities such as dismantling refractory furnaces and other maintenance activities can lead to significant releases to the environment, even at small facilities, as can accidental releases. However, these activities are not necessarily considered in calculating production-related waste. Depending on the circumstance, an accidental release might not even be included in the threshold for TRI reporting. Imagine the scenario in which the Bhopal Union Carbide facility were located in the U.S., but did not have to report its well-publicized and deadly accidental 40 ton release (not necessarily counted as production-related waste) to TRI because the rest of its activities were small enough to meet the 5,000 pound production-related waste threshold.

The prospect might sound far-fetched, but the reality is that the proposed change to the certification threshold means that 20% of total non-production-related releases would no longer be reported. According to the 2003 TRI data, 124 facilities would not have to report non-production releases of 1,000 pounds or more; for 10 of those facilities, the amount is more than 100,000 pounds. This reporting is especially important for PBTs, which would now be eligible for a

certification statement under the proposal (see additional comments below). While any releases reported in Section 5 would still have to be zero, significant amounts of off-site waste transfers or on-site waste management of PBTs not associated with production could escape reporting.

The potential loss of data described above is particularly distressing since the Agency has resisted attempts to raise the quality of Section 8 data used to calculate production-related waste, both with simple quality control checks and providing definitions for reporting elements. Not only are there significant discrepancies between Section 8 and Sections 5 and 6 on individual forms – often reporting zero on the relevant lines of Section 8 when there are appropriate data reported in the other sections – but the on-site waste management terms used in Section 8 are undefined. This leads to substantial changes in Section 8 quantities from year to year, particularly for on-site recycling. It is all too easy for a facility to consider on-site recycling as “integral to and necessary for” the process as stated in the Pollution Prevention Act, even if there is no “hard-piped” recycling going on and consequently report no on-site recycling. **On principle, EPA should not even be considering raising the certification statement threshold until it fixes the Section 8 data quality problems.**

Certification Statement Use for PBT Reporting

The proposal would also allow facilities to use the certification statement for PBTs. These particularly toxic and dangerous chemicals should be of greater concern for the Agency, and several EPA program offices use the TRI PBT data to track their own initiatives. PBTs would only be eligible for certification statements with zero releases and production-related waste of less than 500 pounds. But while these facilities appear to have zero releases to the environment, it does not mean that there is not worker exposure or potentially hazardous materials transport. It makes little sense for EPA to deprive its own and states’ reduction programs of this kind of information. Have we really learned enough about these facilities’ use of PBT chemicals to justify allowing them not to report?

Reducing Industry Reporting Burden

According to the *Washington Post*, the American Chemistry Council agrees that “the cost of reporting is in the calculations, not filling out the forms.” (“Chemical-Data Plan Catalyzes Opposition,” January 3, 2006, page D1) The need for many of those calculations will not disappear if this proposal is adopted because facilities will have to be able to document that they meet the new certification threshold anyway, and by the ACC’s own admission, the process of making these calculations boosts efficiency.

The proposal does not contain any indication that EPA has considered an alternative that would significantly reduce industry reporting burden: working with industry associations to provide comprehensive reporting guidance for the industries most likely to be eligible

for an expanded certification threshold. Developing simple and accurate calculation methods would eliminate most of the work of reporting, and the public, states, and EPA would still get the data on waste management and releases to the environment. It is likely that the industry associations have already done most of the work, and the Agency's involvement would add greater credibility to the effort.

Biennial TRI Reporting

The Agency has stated its intent to review the possibility of changing TRI to biennial reporting. The stated rationale for this examination is the leveling-off of decreases in TRI releases – which apparently leads the Agency to speculate that alternate-year reporting would be sufficient. While the rate of decrease in emissions may have slowed for the U.S. as a whole, it is clear that there are very large and significant changes in reporting from year-to-year on individual forms and for individual facilities that would not be predicted simply by examining forms in alternate years. For example, if the Agency's theory is correct, then averaging 2001 and 2003 data for every form should yield a good predictor for 2002. This is definitely not the case, however, for individual forms or facilities, nationwide or at the state level:

- 56% of forms and 51% of facilities have releases to the environment 50% higher or lower than would be predicted from the average of 2001 and 2003
- 81% of forms and 77% of facilities have releases to the environment 20% higher or lower than would be predicted from the average of 2001 and 2003
- Adding the absolute value of overestimates (855 million pounds) to the absolute value of underestimates (1.1 billion pounds), the result is 1.96 billion pounds different than would have been predicted. Considering that total TRI releases to the environment in 2002 were 4.2 billion pounds, this means that 47% of the total of that year's releases to the environment were not what would have been predicted by averaging 2001 and 2003 data.

Aside from the year-to-year variability, any facility operator will figure out that activities increasing releases or waste generation should be done in years when the facility does not have to report to TRI. It also seems conceivable that the alternate-year reporting and certification statement changes could work in concert to produce even less data in the years when facilities would have to report. Not only would facilities be tempted to schedule their periodic activities that result in significant amounts of releases, off-site transfers, and waste management to years when they would not have to report, but these same facilities could also defer some off-site shipments of waste or batch production to the non-reporting years in order to make themselves eligible for certification statements in the actual reporting years. This is likely not a consequence the Agency intended, but it is not far-fetched, either. Any facility representative experienced enough to complete a TRI Form R is smart enough to game the system, and EPA is (however inadvertently) providing those facilities with the perfect opportunity to do so.

Final Comments

NET objected to putting the TRI program in the Office of Environmental Information when that office was created. We felt that OEI management would not have the commitment to the program and experience dealing with industry's constant pressure that OPPTS had, and also because it seemed like a bad idea to divorce the TRI program from the people in OPPTS who actually use the data. It seems clear that this proposal came about because the leadership of OEI allowed it to – exactly as we had feared when TRI became part of OEI. (See *Inside EPA Weekly*, December 9, 2005.)

While the TRI staff continued to shepherd the PBT rule through the regulatory process begun under OPPTS, almost all of the original OPPTS and even original OEI TRI staff has since left the program, leaving us all to revisit the same proposals, but without the EPA institutional memory. The idea of expanding certification statement eligibility is not new – it first surfaced back in 1997, but was rejected by OPPTS and a multi-stakeholder TRI work group because of the significant loss of data. The potential loss has increased since then because of the additional industries reporting to TRI. It appears that there is also an increase in the Agency's willingness to trade public data for what it perceives as industry burden reduction. The idea that EPA would even consider alternate-year reporting only bolsters the idea that the program is no longer valued as much by OEI.

This is particularly disappointing, because even though OEI has done less and less with TRI (next to no public analysis, no studies, no evidence of increased OEI use of the data), NET was under the impression that the staff at least wanted to preserve the integrity and expand the use of the data. That does not now appear to be the case -- especially since OEI claims to be surprised at the vehemence of opposition to the proposed changes (according to the *Inside EPA* article cited above).

I have also been distressed by two public comments from OEI that seem disingenuous at best. Reporters covering the TRI changes tell me that OEI officials have been saying that the certification statement is akin to the IRS 1040EZ. Everyone knows that the 1040EZ still requires you to report your income, while the certification statement only requires names and no numerical information (not to mention that employers and banks still send the IRS information about you, even if you file incorrectly). The second is OEI's contention that more than half of facilities report less than a 10% change in releases per year (*Environmental Science and Technology*, November 15, 2005). The NET analysis described above (available, as are all the applicable data, at www.net.org/health/tri_data.vtml) shows something very different. When I asked in late November to see the analysis for this claim, I was told by Mike Petruska of the TRI program that it might be released in the future, but that he wouldn't give it to me then, even though it was already available. Reasonable people can disagree on analyses, but only if those analyses are out in the open.

With new leadership in OEI, I hope that the Agency will reconsider and not move forward with the proposed changes when there are other ways to reduce reporting burden

and improve data quality at the same time. I also hope that Ms. Nelson's successor will look on us as an ally – after all, this isn't NET's first TRI analysis, only the first one that emphatically criticized something that EPA was trying to do with the program. (Previously, the Agency had expressed both public and private approval and appreciation for NET's work on TRI.) No doubt our interests coincide more often than not, and I look forward to continuing the process. Please contact me by phone or e-mail (tnatan@net.org) if I can answer any questions about these comments.

Sincerely,

Thomas E. Natan, Jr.
Research Director