



Department of Energy
Washington, DC 20585

January 2, 2002

U.S. Environmental Protection Agency
Enforcement and Compliance Docket
and Information Center
Ariel Rios Building
(Mail Code 2201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Docket Number EC-2000-0007

Dear Sir or Madam:

Re: 66 FR 46162, "Establishment of Electronic Reporting; Electronic Records"

On August 31, 2001, the Environmental Protection Agency (EPA) published a notice of proposed rulemaking (NPRM), in which EPA suggests regulatory changes that would allow electronic reports and records to satisfy Federal environmental reporting and record-keeping requirements.

The Department of Energy (DOE) appreciates the opportunity to comment on the proposed rule. In general, DOE agrees that an electronic reporting and record-keeping system has potential to eventually reduce regulatory burden, improve data quality, and improve data accessibility in comparison to the existing paper-based system.

Enclosed are the Department's comments on the proposed rule. For clarity, each comment is preceded by a reference to the section of the NPRM to which it applies and a brief description of the issue is provided in boldface type. If you have any questions or need further clarification of our comments, please call Sharon Brown of my staff on (202) 586-6377. You may also contact Ms. Brown via e-mail at sharon.brown@eh.doe.gov.

Sincerely,

A handwritten signature in black ink that reads "Andy Lawrence".

Andy Lawrence
Director
Office of Environmental Policy and Guidance

**UNITED STATES
DEPARTMENT OF ENERGY**



**COMMENTS ON
PROPOSED ESTABLISHMENT OF ELECTRONIC
REPORTING: ELECTRONIC RECORDS**

**NOTICE OF PROPOSED RULEMAKING
(66 FR 46162 - 46195)**

SPECIFIC COMMENTS

II. Background

II.B “How Would Today’s Proposal Change EPA’s Current Electronic Reporting Policy?”

1. **p. 46165, col. 2 & p. 46182, col. 3 –The preamble explains that one goal of the Central Data Exchange (CDX) is flexibility because organizations that might want to submit electronic documents apply information technologies in many ways. To accommodate this spectrum of needs, EPA is designing the COX to support data transfer via a variety of transfer mechanisms in a variety of formats, ranging from Internet File Transfer Protocol submission of spread-sheet files to standards-based electronic data interchange transmissions via private value-added networks. The proposed CDX will also provide options involving user-friendly “smart” electronic forms to be filled out on-line, on the Internet, or downloaded for completion off-line at the user's personal computer.**

DOE supports EPA’s vision of a flexible approach to designing the CDX. In particular, DOE encourages EPA to design a CDX comprising several electronic reporting systems to accommodate varying levels of computerization in the regulated community, as well as varying levels of security to meet the needs of different types of reports. However, as is further explained in Specific comment III.C, item 2.a, DOE believes that EPA should consider an option whereby the Agency, rather than regulated entities, would assume the burden of security for these reports.

III. “Scope of Today's Proposal”

III.A “Who May Submit Electronic Documents and Maintain Electronic Records?”

1. **p. 46167, col. 1 – The preamble states that regulated entities who are eligible to use electronic reporting and record-keeping are not required to do so. They may still submit paper documents directly to EPA and use them for keeping records, if they so choose.**

As is further discussed in Specific Comment IV.B.1, item 1, DOE believes that the proposed regulations may indirectly require many regulated entities currently using computer systems for creating, modifying, maintaining, or transferring electronic records onto magnetic media or paper to significantly modify their systems. Accordingly, DOE requests clarification of the status of such legacy reporting and record-keeping systems after the Central Data Exchange (CDX) becomes operational. Specifically, DOE suggests that EPA classify data maintained in these legacy computers, as well as the magnetic media records and paper documents produced from such data, as “paper” records for purposes of this rule. Otherwise, although EPA may intend the proposed regulations to be voluntary, regulated entities could effectively be forced to upgrade their legacy computer systems in order to comply with the requirements for acceptable electronic record-keeping systems.

III.C “Which Documents Could Be Filed”

1. **p. 46167, col. 3 – The preamble indicates that, before implementing CDX to accommodate confidential business information (CBI), EPA plans to take the time to explore CBI security issues with companies that submit confidential data.**

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DOE requests that EPA clarify whether “sensitive information” (e.g., unclassified government information, such as drawings or photos of a DOE facility, which could reasonably be used to advance a terrorist attempt to shut down operation’s at the facility or spread contamination widely) would be handled in the same manner as confidential business information. Specifically, DOE requests the opportunity to explore with EPA national security issues surrounding electronic submission of classified as well as sensitive information before the CDX system is implemented.

2. **p. 46167, col. 3 – The preamble explains that, with the exception of the Hazardous Waste Manifest, the proposed Electronic Reporting rule addresses document submissions required by or permitted under any EPA or authorized State, tribal or local program governed by EPA’s regulations in Title 40 of the Code of Federal Regulations (CFR). However, EPA seeks comments and advice on priorities for electronic reporting implementation. EPA also seeks comments on the proposal’s global approach, and whether specific exclusions should be added to the rule.**

DOE supports EPA’s proposed plan to give priority to implementing the CDX capabilities for receipt of relatively high volume environmental compliance reports, which seem to include standardized self-monitoring compliance reports, such as Discharge Monitoring Reports (under the Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permit program), Hazardous Waste Reports (under the Resource Conservation and Recovery Act (RCRA) program), Toxic Release Inventory reports (under the Emergency Planning and Community Right-to-Know Act (EPCRA)), and Air Emission Inventory reports (under the Clean Air Act).

In addition, DOE suggests that EPA consider an option whereby the Agency, rather than regulated entities, would assume the burden of security for submitting and maintaining these standardized reports. Under such an option, EPA would develop the CDX so that all of the standardized formats are available on-line. Then, when a user needs to file information in a specific format, the user would be able to go to the EPA server, find the appropriate format, begin entering the information, and if necessary, store it in a password-protected area on the EPA server until it is completed. After the user completes the report, it would be electronically signed and submitted to EPA. To accomplish this, the user would simply move the completed report from his/her secure area on the EPA server to EPA’s secure area. Users could be allowed to electronically download completed reports from their designated secure areas for their own record-keeping purposes. Passwords would be generated by the CDX system for each user's account.. In this way, EPA would be able to install and maintain a secure system without placing undue burden on the regulated community. The EPA server and software could be upgraded as necessary without obligating the entire regulated community to make corresponding changes to their systems.

III.E “How Would Today’s Proposal Implement Electronic Reporting and Record-Keeping?”

1. **p. 46168, cols. 1 & 2 below the table – According to the preamble, an entity wishing to determine whether electronic reporting, or record-keeping has been approved for some specific regulation would have to verify that EPA has published a *Federal Register* notice regarding the specific regulation and would have to locate any additional provisions or instructions that may apply. EPA seeks comments on whether the new Part 3 should include specific cross-references to such announcements and instructions to the extent that these are codified elsewhere in Title 40.**

DOE believes it would be helpful to the regulated community for EPA to maintain and make available a current list of cross-references to announcements and instructions concerning approval of electronic reporting and record-keeping for specific regulations. However, DOE believes that incorporating the list into the new Part 3 may be less helpful than simply ensuring its availability via the Internet, or upon request by fax, e-mail, or postal delivery. Even if Part 3 is modified to include a cross-reference each time EPA approves electronic reporting and record-keeping for a set of specific regulations, a regulated entity may still need to search the *Federal Register* because an official updated version of 40 CFR Part 3 is only published once each year. Therefore, the most recently printed version may not reflect all pertinent announcements and instructions. Accordingly, DOE recommends that, whether or not EPA decides to incorporate specific cross-references to announcements and instructions in Part 3, the Agency make available a current list via the Internet and upon request by fax, e-mail, or postal delivery.

IV. “The Requirements in Today's Proposal”

IV.A “What Are the Proposed Requirements for Electronic Reporting to EPA?”

p. 46169, cols. 2 & 3 – The preamble points out that the final rule will not codify any technology-specific or procedural details of the CDX. This approach will allow EPA to make changes without amending the regulations. Nonetheless, EPA recognizes that certain types of changes could be disruptive to regulated entities. Accordingly, EPA has identified four kinds of changes. For two, EPA proposes to provide public notice and the opportunity for comment. For the other two, EPA proposes decide whether to seek public comments on a case-specific basis. EPA, requests comments on this approach.

DOE believes the CDX should comprise a variety of electronic reporting systems that accommodate a variety of reporting needs and formats for users who choose to maintain their own electronic reporting systems. Once an electronic reporting system is included in the CDX, EPA should continue to maintain it until it becomes outdated and is functionally replaced by other systems. The criteria for retiring a system should be that no facility has used it for some specified period of time. After that period of time has passed with no usage, EPA should publish notice of its intention to retire the old system from the CDX. In this way, disruptive system changes that would obligate regulated entities to change the hardware or software they use to submit electronic reports could be largely avoided.

IV.B “What Requirements Must Electronically Maintained Records Satisfy?”

IV.B.1 “General Approach.”

- 1. p. 46169, col. 3 – The preamble states that regulated entities that use electronic systems to create, modify, maintain, or transmit electronic records will need to employ procedures and controls designed to meet certain minimum criteria.**

DOE is concerned about whether the procedures and controls applicable to electronic systems under the final rule (see proposed §3.100, p. 46190) would apply to a computer system used to create, modify, maintain, and transfer records onto either magnetic media or paper for submission in those forms to EPA or an authorized state. The proposed rule broadly defines the term “electronic record” as “any combination of text, graphics, data, audio, pictorial, or other information represented in digital form that is created, modified, maintained, archived, retrieved or distributed by a computer system” (proposed §§3.3, p. 46189).

This broad definition appears to encompass *both* records created, maintained and stored on a computer system and submitted to EPA or an authorized state via a telecommunication network *and* records created on a computer system and transferred onto either magnetic media or paper for storage and/or submission to EPA or an authorized state. If the definition in fact encompasses both groups of records, then a regulated entity managing records in the latter group would have to replace its legacy record retention system in order to meet the provisions in proposed §3.100. DOE submits that such a result would be contrary to EPA's claims that compliance with the proposed rule is intended to be voluntary.

EPA's own cost-benefit analysis assumes that companies would be unlikely to invest in hardware or software changes for the sole purpose of submitting data to EPA. Regarding electronic record-keeping, EPA concludes that the costs of compliance would exceed the benefits. In the preamble, EPA summarized the findings of the cost-benefit analysis by saying (p. 46178):

The average annual cost to implement a new electronic record-keeping system is \$40,000 for each facility, and the net average annual cost savings for operating the record-keeping system is \$23,000. . . . Therefore, our estimates indicate that . . . facilities may not find it cost-effective to develop an electronic records system unless it addresses both EPA and non-EPA business purposes.

Accordingly, DOE requests that EPA clarify that, for purposes of compliance with §3.100 of this rule, data maintained on magnetic media or transferred from a legacy computer onto either magnetic media or paper, as well as the magnetic media records and paper documents produced from such data, would be classified as "paper" records.

IV.B.2 EPA's Proposed Criteria for Electronic Record-Retention Systems

- 1. pp. 46169-46170 –The preamble states that to be trustworthy and reliable, among other things, an "electronic record-retention system must: . . . (4) ensure that any record bearing an electronic signature contains the name of the signatory, the date and *time* of signature, and any information that explains the meaning affixed to the signature; . . ."** (emphasis added)

DOE notes that elsewhere in the preamble, EPA states that its proposal "will not amend compliance requirements under existing regulations and statutes and will not affect whether a document must be created, submitted, or retained under the existing provisions of Title 40 of the Code of Federal Regulations. Similarly, today's proposal will not affect the period of required record-retention, whether the stored electronic document must be signed, who is entitled to receive copies of the record, the number of copies that must be maintained, or any other requirements imposed by the underlying EPA, State, tribal or local program. regulations." (p. 46163, col. 3) This statement implies that EPA intends applicable business rules for signing and/or authenticating a record to apply to the use of electronic signatures. However, there is not usually a business requirement to record the "time" when signing a document. Accordingly, although many electronic systems and software are capable of recording the time at which a signature is attached to a record, DOE believes that this should not be a regulatory requirement for a trustworthy and reliable system.

Proposed PART 3 – [NEW] ELECTRONIC REPORTING; ELECTRONIC RECORDS

1. **p. 46190, col. 3 – The proposed regulatory text for §3.100 includes a list of nine criteria that define an acceptable electronic record-retention system for purposes of maintaining electronic records that satisfy record-keeping requirements under Title 40 of the Code of Federal Regulations.**

Proposed §3.100(a)(2) states clearly that an electronic record-retention system must maintain all electronic records and electronic documents *without alteration* for the entirety of the required period of record retention. Proposed §3.100(a)(1), however, implies that electronic records and electronic documents may be modified, as long as any change is detectable. Proposed §3.100(a)(6) indicates that the system must use secure audit trails to track modifications of electronic records and documents. DOE believes that, as written, these three criteria are inconsistent because proposed §3.100(a)(2) precludes all changes to electronic records, while proposed §§3.100(a)(1) and (6) seem to allow changes.

DOE notes that environmental records generated by regulated entities may occasionally warrant modification after their point of generation as a result of quality assurance checks. For this reason, DOE assumes that EPA did not intend for proposed §3.100(a)(2) to preclude all changes to electronic records, but rather to ensure that no change to an electronic record is the result of tampering. This interpretation seems to be supported by proposed §§3.100(a)(1) and (6) which require record-keeping systems to be capable of detecting and tracking changes to records. Accordingly, DOE requests that the final rule resolve the inconsistency by appropriately modifying §§3.100(a)(1), (2), and (6).