



Department of Energy
Washington, DC 20585
September 4, 1998

Docket Coordinator
Headquarters
U.S. Environmental Protection Agency
CERCLA Docket Office
401 M St., SW, Mail Code 5201G
Washington, DC 20460

Docket Control Number 300RR-IF1

Re: 63 FR 31267, "Emergency Planning and Community Right-to-Know Programs;
Amendments to Hazardous Chemical Reporting Thresholds, Streamlining Requirements"

Dear Sir/Madam:

The Department of Energy (DOE) would like to submit the enclosed comments in response to the notice of proposed rule on "Emergency Planning and Community Right-to-Know Programs; Amendments to Hazardous Chemical Reporting Thresholds, Streamlining Requirements" issued on June 8, 1998 (63 FR 31267).

Also, attached is a separate [letter](#) which brings to the Agency's attention omissions and discrepancies in Table 40 CFR 302.4, "List of Hazardous Substances and Reportable Quantities."

The enclosed comments represent the combined viewpoints of both DOE Program Offices and Field Organizations. If you have any questions, please contact Jerry DiCerbo of my staff at (202) 586-5047 or e-mail at gerald.dicerbo@eh.doe.gov.

Sincerely,

Raymond P. Berube
Acting Director
Office of Environmental Policy and Assistance

Enclosure

cc: M. Victor, EPA

US Department of Energy (DOE)
Comments on Emergency Planning and Community Right-to-Know Programs;
Amendments to Hazardous Chemical Reporting Thresholds, Streamlining Requirements”
63 FR 31267; June 8, 1998

GENERAL COMMENTS

1) DOE supports the intent of EPA's proposed rule which addresses several ways intended to reduce the burden of complying with the reporting requirements of EPCRA, Sections 311 and 312. A number of additional recommendations for reporting relief are included in this Departmental response. The recommendations to eliminate the need for continued reporting of hazardous chemicals with minimal risks and minimal hazards could offer the greatest benefit to DOE facilities. However, DOE is concerned that the proposed relief in reporting requirements is partially offset by the need for a one-time reporting notification plus the need to continue tracking the chemical to ensure that changing conditions do not trigger chemical reporting requirements. After weighing these factors, it is not readily apparent that this proposal offers any significant reduction in the reporting burden for DOE facilities.

2) DOE commends EPA's efforts to develop guidance on electronic submittal for sections 311 and 312 reporting. However, to provide burden reduction EPA needs to improve electronic data transfer and reduce or eliminate the need to mail diskettes, hard copies, and certification statements.

3) Although DOE supports EPA's effort to reduce the burden of regulatory reporting, these proposals could have the unintended effect of reducing overall data quality. For example, allowing an additional number of reporting options such as use of underground storage tank (UST) forms, establishing higher reporting thresholds for some additional substances, and identifying some conditions under which chemicals are not required to be reported could possibly diminish the SERC, LEPC, the local fire department's, and the public's understanding of what is actually present at a facility. Further, the various options for reporting might result in an increased record keeping burden on the SERC, LEPC, and fire department due to the increase in forms and form types they have to file.

SPECIFIC COMMENTS

I. PRINCIPAL REGULATORY CHANGES

1) Section IV.A.1. Higher Threshold Levels for Gasoline and Diesel Fuel at Retail Gas Stations (63 FR 31269)

DOE supports the EPA's proposal to establish higher reporting thresholds for gasoline and diesel fuel stored underground at retail gas stations. DOE suggests that this revision be expanded to include government agencies' on-site diesel and gasoline underground storage tanks (USTs) that service their vehicle fleets. In the proposal, EPA presents four factors that the agency has considered in setting forth this change. In explaining why they did not extend this change to motor pools, van and bus lines, rental car facilities, and other vehicle fleets, EPA indicated that public and local emergency officials may not be aware of the presence of gasoline or diesel fuel at these types

of facilities (Factor 1). Agencies can address Factor 1 by making an initial, one-time notification to the LEPC(s) and local fire department similar to the one-time notification for those substances with minimal hazards and minimal risks addressed in the proposed rule. In effect, this one-time notification would make reporting of these diesel and gasoline inventories very similar to the proposal being set forth by EPA for reporting of hazardous chemicals with minimal risks and minimal hazards. Further, many of the federal facilities also have their own fire departments which would be the first responder to the scene of an emergency. These on-site fire departments would be aware of the fuel storage tanks and would consider the tanks in the facility's emergency plans. This proposal could be restricted to government agencies that maintain some form of refueling capability, or possibly to those facilities with their own facility fire department.

EPA requested comment on setting the proposed threshold in gallons instead of pounds. DOE believes this is reasonable since as stated, retail outlets likely use gallons as the unit of measurement. Also, EPA should clarify whether the Section 312 submittal will still be reported in pounds (instead of gallons) on the Tier II report.

Additionally, EPA should define "retail gas station" in the regulations (40 CFR 355.62) at the same level of detail as the definition of "retail gas station" discussed in the preamble of the proposed rule. Most users will not reference the preamble for this definition after the rule is final.

2) Section IV.A.2, Relief From Routine Requirements for Substances With Minimal Hazards and Minimal Risks Under EPCRA Sections 311 and 312 (63 FR 31273)

EPA proposes to establish infinite threshold levels to accomplish relief from routine reporting for substances with minimal hazards and risks. EPA proposed three criteria to identify chemicals that pose a minimal hazard and risk: (1) the chemical has a minimal inherent hazard and presents a minimal physical or health risk to people, (2) the chemical has a minimal inherent hazard and presents a minimal risk to the environment, and (3) the SERC, LEPC, and fire department have been notified of the facility's assessment of a chemical's minimal inherent hazard and minimal risk. DOE suggests that EPA consider additional options for determining what materials would meet the criteria for minimal inherent hazards and minimal risks. One option would be to utilize the National Fire Protection Agency (NFPA) hazard classification. The NFPA ranks hazards for fire, instability and reactivity on a scale of 0 to 4 (0 being stable/ not combustible, and 4 being "danger"). A material with a fire/instability/reactivity rating of 0 or 1 would be considered a material with minimal hazard and risk. Another option would be any material with a "nonhazardous" Department of Transportation (DOT) hazard classification as listed on the Material Data Safety Sheet (MSDS).

However, the relief from having to annually report on chemicals that pose a minimal hazard and risk is partially offset in the proposal by: (1) a requirement for an initial notification and (2) the continued requirement to report when "conditions" change. The final rule should clearly define "a change in conditions"; e.g., a change in inventory, a change in the way the substance is used, a change in the locations of the substance at the facility, etc.

Comments on Notification Options:

DOE supports EPA's proposed notification option that the decision to adopt the infinite reporting threshold is the facility owner's/operator's decision and no acceptance or rejection is required from the SERC, LEPC, or local fire department. This is consistent with the present application by the facility owner or operator of taking advantage of existing reporting exemptions; i.e., no formal

acceptance or rejection is required from the SERC, LEPA, or local fire department.

EPA requested comment on whether notification should be made in writing. DOE supports written notification to the SERC, LEPC, and fire department, with no response required unless there is an objection. DOE believes that written notification would facilitate documentation of the notification.

In the preamble, EPA acknowledges that one of the entities (SERC, LEPC, or local fire department) may agree with the facility owner or operator that the threshold properly applies yet another entity may disagree. However, EPA does not discuss methods to resolve disagreements. DOE suggests that EPA clarify how disagreements are to be resolved. In the notification option where an acceptance must be obtained from the SERC, LEPC, or local fire department of the decision to apply the infinite thresholds, EPA does not provide a time frame by which these entities must provide the facility owner or operator with the rejection. If the rejection of the facility's intent to adopt an infinite threshold arrives after the reporting deadline, the facility may be in non-compliance with the EPCRA reporting requirements and therefore subject to civil penalty action. EPA should consider a timeframe by which the SERC, LEPC, and local fire department must provide the facility owner with a notice of objection of the reporting threshold. Lack of such a notice should constitute acceptance.

Also, EPA requested comment on the contents of the notification. DOE believes that the notification should identify the chemicals and describe the facility-specific conditions that influenced the determination.

Proposed Alternative Approach:

DOE opposes EPA's proposed alternative approach to provide routine reporting relief for substances that have minimal inherent hazards and risks. This proposed approach consists of establishing a list of "Type 2" chemicals for which broader ranges would be used to report maximum and average quantities on the Tier I/II form. DOE believes that this approach could cause a great deal of confusion for both the reporting facilities and the report recipients because range code criteria would be inconsistent within a single Tier I/II report. DOE recognizes that this proposal reduces the volume of information reported but not necessarily the facility's overall effort. Inventory information about these chemicals still needs to be available to respond to special requests.

3) IV.A.3 Relief From Routine Reporting for Sand, Gravel, and Rock Salt Under EPCRA Sections 311 and 312 (63 FR 31276)

EPA requested comments on its proposal to exclude sand, gravel, and rock salt from routine reporting under EPCRA Sections 311 and 312. DOE supports this proposal because this will reduce the burden of reporting. Inclusion of these materials in the proposed rule clarifies whether these materials are presently subject to the Sections 311 and 312 reporting requirements.

DOE believes that EPA should consider expanding the list of materials which need not be reported under Sections 311 and 312. Some examples of substances DOE believes would have the same minimal inherent hazard and risk as sand, rock salt and gravel, include but are not limited to: graphite carbon, diatomaceous earth, helium, Portland cement, sodium chloride, vermiculite, and possibly coal, fuel oil, and coal ash. Although these materials would likely qualify for the proposed

relief from routine reporting for materials which have minimal hazards and minimal risks, regulated facilities would still have to track inventories of the materials to ensure that the reporting status did not change. DOE believes that substances listed by EPA for infinite thresholds should not require facilities to notify emergency responders that a minimal risk is associated with the material. Most industries and major utilities maintain large inventories of these materials that emergency responders are familiar with.

II. OTHER REGULATORY CHANGES

4) IV.B.1. Reporting of Mixtures (63 FR 31277)

The proposed language in section 370.14(b) states that when determining total quantity of an extremely hazardous substance (EHS) present at a facility, the quantity present as a component in a mixture must be included, even if that particular mixture is also being applied as a whole toward the threshold level for that mixture (63 FR 31278). DOE opposes the proposed language because this may change the way in which mixtures are currently reported.

The proposed language indicates that EPA will require facilities to calculate chemical quantities as chemical components and then evaluate chemical products as mixtures. In this case if the components exceed a threshold and the product mixture exceeds a threshold both will be reported even though both may contain some of the same material. This method of evaluating for thresholds may include some double counting and requires facilities with large chemical inventories to assume the burden of maintaining computer databases with chemical component information. Product mixtures often do not exhibit the hazard properties of individual components when present in the mixture at low concentrations. DOE believes that reporting components of mixtures that are generally in low concentrations, but contained in numerous products throughout a facility, does not provide useful information to emergency responders. The Department believes that facilities should be able to evaluate for threshold quantities of trade name products across the board without having to add components. For example, if a facility chooses to report chemical mixtures and the facility exceeds a threshold for a trade name mixture containing methyl alcohol and the facility also has less than a threshold quantity of pure methyl alcohol in a tank, the facility should only file one report for the mixture. The facility should not be required to add the quantity of methyl alcohol in various product mixtures with the quantity of the methyl alcohol in tank storage and file another report if the combination exceeds a threshold.

Plain English Format of Mixtures Section:

EPA requested comment on the plain English format in which this section of the proposed regulation is written. DOE believes that EPA's proposed revision does not make the reporting requirements for mixtures easier to understand. The revised paragraph (into "plain English") is longer and more confusing. Two suggestions for making the Section 370.14 easier to understand are as follows:

- a. In Sections 370.14(a)(1), 370.14(a)(2), and in the right column of the table in 370.14(b) remove the phrase, "...in reference to..." Especially in the table, this phrase seems to be unnecessary and would make the table easier to read.
- b. The center and right columns of the table in Section 370.14(b) each discuss two

alternative forms of reporting. However, in each of the paragraphs, there is no punctuation which separates the two alternatives. It is suggested that a semi-colon be inserted in each of the four paragraphs separating the reporting of individual hazardous chemicals or the option of reporting the mixture.

In the discussion of the first substantive revision in the preamble (63 FR 31278), EPA indicates that the revision does not include the reference to reporting “the total quantity of the mixture.” EPA states that the agency believes the reference is unnecessary since the table in Section 370.14(b) directs the reader to proposed sections 370.30 and 370.40. However, neither of these two sections adequately address how the quantity of mixtures will be reported. It is recommended that the language relating to the reporting of quantities be retained.

5) IV.B.2. Tier I and Tier II Inventory Forms and Instructions (63 FR 31280)

Tier I Tier II Removal from Regulations:

DOE supports EPA’s proposal to remove from the regulations the Tier I and Tier II reporting forms and instructions. The TRI Form R and Form A have been successfully distributed to the regulated community since the Form R was removed from the regulation. Similar methods (provide internet access to the forms) should work for the Federal Tier I and Tier II forms. Also, there appears to be an opportunity for EPA to further revise the regulations by the additional removal of proposed Section 370.43 which addresses the weight range codes, the storage type codes, and the storage condition codes. While the statute specifically requires this information to be shown on the reporting forms, the statute does not require that this information be included in the regulations. However, if retained in the regulations, DOE suggests that the “plain English” in Sections 370.43(a), 370.43(b), and 370.43(c) be revised to read,

“... Except as provided in Section 370.43(d), you must use...” This alerts the reader that a subsequent paragraph does provide that there are alternatives available for the use of SERC or LEPC provided forms.

Transition from SIC to NAICS Codes:

EPA seeks comments on appropriate timing to transition from reporting using SIC codes to NAICS codes. DOE believes that EPA should allow facilities the discretion of reporting to either code and should not mandate a time frame for exclusive reporting using NAICS codes. SIC codes have not been phased out by all local regulatory authorities and mandated switches for facilities may cause confusion and unnecessary expense. If both identifiers are retained during a transitional period, it is important to develop separate spaces for each code to avoid confusion between the codes.

Use of CFR to Obtain Reporting Forms:

EPA requested comments on use of the Code of Federal Regulations to obtain reporting forms. DOE has obtained reporting forms from other sources, and many sites would prefer to use an electronic reporting format. DOE believes that for hard copy submittals and electronic submittals, EPA should allow one certification signature by owners/operators or their designees to cover multiple page reports and attachments as long as the entire package is referenced by the signature. The current federal form only allows 3 chemicals per signature page. Also, DOE believes that EPA should move forward with allowing electronic submittals of MSDSs as long as SERC's and LEPC's have the capability of downloading the information.

6) IV.B.3. Penalties for Noncompliance (63 FR 31281)

EPA is proposing to remove the description of potential penalties for noncompliance from the regulation. DOE believes that, considering the brevity of the penalty section, it should be retained in the revision. It is often difficult to connect a regulation with the associated statute. If the penalties are addressed only in the statute, facilities may not fully understand their reporting obligations.

7) IV.B.4. Facility Identifier as a Tier I and Tier II Information Requirement (63 FR 31281)

The Department supports the concept of including a facility identifier, if one is assigned, on the Tier I or Tier II report. This unique identifier will assist federal, state, and local agencies, and the public, in more accurately identifying individual facilities and the hazardous chemicals associated with those facilities. DOE suggests that this rulemaking keep the identifier number optional until such time as the Facility Identification Initiative develops a standard numbering system.

8) IV.B.5. Additional Changes to the Parts 355 and 370 Regulations (63FR 31282)

Use of SERC and LEPC:

The Department supports EPA's proposal of using the abbreviation SERC and LEPC instead of commission and committee. DOE agrees that these two terms are commonplace and more widely used than the other terms.

Emergency Planning Notification:

EPA is proposing that the emergency planning notification be made to the LEPC within 30 days after the establishment of a LEPC. EPA explains that this 30 day time frame makes the emergency planning notification and the facility emergency coordinator requirement consistent. However, the statute provides for a 60 day time frame for making the emergency planning notification to the LEPC (Section 302(c)). DOE agrees with EPA's rationale, but is concerned that EPA's proposed requirement is inconsistent with the statutory requirement.

9) IV.B.6. Definitions (63 FR 31284)

DOE supports EPA in the clarifications being made with most of the definitions and with the placement of the definitions at the end of Section 355. Consolidating the definition sections seems to improve the readability of the rule and provides consistency between the sections.

Also, the Department suggest that EPA consider the merits of revising the definition of "facility" to allow large industrial sites to report individual facilities if the facilities are discrete operations. Federal sites and some industrial complexes are composed of multiple facilities that are separated into discrete operating units. These operating units or facilities are usually located on large tracts of land and generally have different overall hazards. Although this method would require more reports to be filed (one for each facility), the reporting burden would be reduced in that fewer chemicals would meet the threshold and the information reported would be more relevant and useful to emergency responders.

III. DRAFT GUIDANCE

10) V.A.1. UST Forms to Fulfill Request for Tier I Information under EPCRA Section 312 (63 FR 31285)

The Department believes that while the flexibility of using the UST form to meet the Tier I reporting requirements may reduce the burden of having to complete another reporting form, there are some disadvantages to this optional reporting form. The Department believes that allowing the use of another form (UST forms) to fulfill Tier I requirements could create inconsistent and fragmented inventory information. Also, the use of separate reporting forms may be inconsistent with the EPCRA Section 312(g) requirements for a uniform format. Although EPA discounts this in the preamble (63 FR 31286) by stating that EPCRA does not require the use of a uniform format for submission of the Section 312 information, the last sentence of Section 312(g) clearly indicates that the intent of the uniform format is for the submittal of information. Additionally, in order for the UST form to reduce the reporting burden, all three of the recipients (SERC, LEPC, and the fire department) must accept the form in lieu of the Tier I report.

11) V.A.2. Partnership Programs for Joint Access to Information and Streamlined Submission of EPCRA Section 311 and 312 Reporting (63 FR 31287)

DOE believes that the partnership identified by EPA is an excellent idea and the concept should be further explored by the agency. The idea, as presented in the preamble, would appear to reduce the burden on the regulated community and would go far in making inventory information more readily available to the public, possibly via the world wide web. If promulgated, the partnership should be voluntary in order to accommodate those regulated facilities that may not have an electronic database capability or to accommodate the different levels of funding available to the state and local authorities for establishing and maintaining a database.

One option to a jointly accessed data base would be to define a standard file format. The file could then be imported into the data management tool of each organizations choice. The recipients of the information (SERC, LEPC, and fire department) could make relevant decisions regarding what information is important for their specific needs. If properly developed, with the participation of all involved organizations (i.e., a joint partnership), comprehensive inventory and hazard information would be available in an easily managed format. The partnership could establish and refine the format for the electronic data, and provide ongoing support with development of data management tools.

12) V.A.3. Electronic Submittal for EPCRA Sections 311 and 312 Reporting (63 FR 31289)

The Department generally believes that electronic submittal of information would improve the accuracy and timeliness of data collection and submittal, but would not necessarily result in any significant reduction in reporting burden upon regulated facilities. The facility would need to complete the form via a computer, then either forward it electronically or copy it to a disk, complete a hard copy certification, and finally, mail this entire package. Additionally, the number of SERCs, LEPCs, and local fire departments which have the capability to receive an electronic submission is probably very small, at least at this time. EPA's partnership program discussed in the preamble could stimulate progress on the part of these entities in enhancing electronic data transfer.

EPA is seeking comments on the certification statement related to the electronic submission. The need to certify electronic submissions is a common element associated with other forms of

electronic submissions. In recent years, the Internal Revenue Service (IRS) has allowed individuals to submit annual Federal income tax reports electronically. The IRS requires the submission of a signed certification statement (IRS Form 8453-0L). To avoid the need for this certification submittal, EPA might consider:

- requiring the facility to retain a signed certification at the facility with other documentation supporting the report. This certification statement would be available for review by federal, state, or local authorities; or alternatively,
- deleting the requirement altogether for the certification statement. The certification statement appears to be a regulatory requirement and not specifically required by the statute. It would appear to be within EPA's authority to delete this regulatory requirement and allow the report submitted by the facility to stand on its own. Lack of a certification statement would not appear to have an effect upon an enforcement action taken for failure to provide the required information.

13) V.A. 4. Incorporation of Previous Submissions into EPCRA Section 312 Reporting (63 FR 31290)

EPA is seeking comments on proposed reporting options under section 312. DOE believes that EPA's proposed option of only having to report on those chemicals for which the information has changed does not offer much relief for the regulated community or for the SERC, LEPC, or fire departments receiving the information. Assessing whether any of the conditions (e.g., number of days on site, storage locations, maximum quantities, etc.) have changed is still required. Additionally, this option would require the facility to retain records of all reportable hazardous chemicals from the time that they were first reported. It would also require the SERC, LEPC, and local fire department to maintain an extensive history on each of the reporting facilities which may be beyond the capabilities of those organizations with limited budgets and resources. The idea of "incorporation by reference" puts additional burden on the SERC, LEPC and fire department to track the most current information for a particular facility. Unless the entire Tier I or Tier II report remains exactly the same as the previous year, this practice could fragment a facility's inventory data. DOE believes that EPA should retain the requirement for the facility to report annually on all of the hazardous chemicals which exceed the reporting threshold and which do not fall within one or more of the reporting exemptions.

14) V.B. Electronic Access to Facilities' Databases of MSDSs (63 FR 31291)

EPA seeks comment on electronic access to facility MSDS data bases. Several DOE field sites supported this reporting option, but some expressed concern that providing public access to facilities data bases is beyond the scope of the regulatory requirements and may pose confidentiality/security concerns. Many of those who do have the capability may not be willing to provide access for fear of unauthorized personnel circumventing the firewall and gaining access into the company's internal computer system.

However, some DOE sites believe that this might be an acceptable means of complying with the Section 311 reporting requirement. MSDSs could be maintained on an external web page with built in firewalls preventing access into other company files, databases, etc. But, there are probably not a large number of facilities with this capability. Additionally, as stated in the preamble, if this arrangement is intended to satisfy the Section 311 reporting requirements, there should be

uninterrupted 24-hour per day access to the information. If there were an emergency at the facility (e.g., a fire), the emergency itself could result in a lack of access to the database, possibly at a time when access is most needed.

DOE believes that it could be extremely burdensome for SERC's, LEPC's, and fire departments to access multiple systems to get needed information. In addition, a facility's MSDS database could potentially include MSDS's for materials no longer present at the facility and would not necessarily identify which chemicals are present above minimum threshold levels.

15) V.C. Interpretation of the Exemptions for Solids (63 FR 31291)

DOE supports the proposed modification on the interpretation of the exemption for solids so that only the amount of fume or dust given off a piece of metal or other manufactured solid that is being modified be subject to EPCRA section 311 and 312. The change could result in a reduction in reporting for some facilities.

16) V.D. EPCRA Section 312 Reporting to Fulfill Reporting Requirements under Section 311 (63 FR 31291)

DOE supports EPA guidance on this subject. The preamble (63 FR 31291 and 31292) mentions that because of the 3 month reporting window under Section 311, the Section 312 report can only suffice for those facilities that become subject to reporting under Section 311, or discover significant new information concerning a hazardous chemical between October 1 and December 31. However, the time frame is probably much shorter than this since it is unlikely that most facilities will submit their Section 312 report on January 1 of the following year. Those facilities which submit their Section 312 report closer to the March 1 deadline will find this option providing little relief from having to submit a separate Section 311 report. However, where the reporting time frames do overlap, facilities should be able to make use of the Section 312 report in order to reduce the reporting burden.

17) V.E. Emergency Planning Notification (63 FR 31292)

While the Department agrees that the guidance being suggested by EPA to define "promptly" (as 10-20 days) is reasonable, DOE believes that defining "promptly" as 30 days would make it consistent with the other 30-day notifications in the table proposed in Section 355.20. Because this is an important definition, DOE believes that this particular definition should be codified in the regulations. It would also be consistent with the proposed 30-day guidance to define "as soon as practicable" for the written release follow-up notification. Notifications of some changes relevant to a facility's emergency planning (e.g., naming of a new facility emergency coordinator) would be relatively straightforward and notification could be expected within 10-20 days while other notifications might take longer. This could especially be the case in responding to a request for information from an LEPC where the information is not readily available in a content and/or format suitable for the response. Additionally, DOE suggests that EPA clarify that the 10-20 days are intended to be "working days" not "calendar days."

18) V.F. Emergency Release Notification (63 FR 31292)

DOE supports the 30-day guidance being suggested by EPA. The Department believes that this is a sufficient time for a regulated facility to make the follow-up release notification.

19) VI. A. Plain English Format (63 FR 31292)

EPA seeks comment on whether the proposed plain English format makes the rule clear and easier to use. The Department does not find that the use of plain English has improved the rules clarity or usability. The regulations are still complex and have a number of reporting exemptions, reporting options, and cross references which together contribute to a very complex set of requirements. Notwithstanding, DOE believes that the proposed tables in sections 355.20, 355.60, and 370.14 provide some increase in clarity to users.