
memorandum

DATE: September 23, 1996

REPLY TO
ATTN OF: Office of Environmental Policy and Assistance(EH-413):Powers:6-7301

SUBJECT: CONSOLIDATED DEPARTMENTAL RESPONSE TO ADDITION OF FACILITIES IN
CERTAIN INDUSTRY SECTORS; TOXIC CHEMICAL RELEASE REPORTING;
COMMUNITY RIGHT-TO-KNOW - NOTICE OF PROPOSED RULEMAKING (NPRM)

TO: Distribution

PURPOSE The purpose of this memorandum is to notify Program Offices and Field Organizations of the availability of the consolidated Departmental response to a request from the Environmental Protection Agency (EPA) for comments on the subject NPRM on toxic chemical release reporting.

BACKGROUND On June 27, 1996, the Environmental Protection Agency (EPA) published the subject NPRM in the Federal Register (61 FR 33588). EPA proposed adding seven industry groups, including hazardous waste treatment and solvent recovery services, to the current list of groups subject to the reporting requirements under section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) and section 6607 of the Pollution Prevention Act of 1990 (PPA).

EPA stated that the addition of these industry groups to EPCRA section 313 will significantly add to the public's right-to-know about releases and other waste management activities of toxic chemicals in their communities. Reporting for these sectors will be required for the first full year following publication of the final rule.

EPA also proposed revising its interpretive guidance to broaden the definition of "otherwise use," as it applies to reporting thresholds, to include treatment for destruction, disposal and waste stabilization.

On July 3, 1996, EH-413 notified Program Offices and Field Organizations of the availability of the subject NPRM and requested comments on the potential impacts of the proposed rule on DOE programs and operations.¹

¹EH-413 Memorandum dated July 3, 1996, subject: Addition of Facilities in Certain Industry Sectors; Toxic Chemical Release Reporting; Community Right-to-Know - Notice of Proposed Rulemaking (NPRM).

RESPONSE
ISSUES

The Departmental consolidated response included comments from the Offices of Environmental Management (EM) and General Counsel (GC), Oak Ridge Operations Office, Oakland Operations Office, Savannah River Operations Office, Nevada Operations Office, and an internal EH-413 review. In its consolidated response, DOE voiced several concerns:

- The handling of radioactive materials and wastes is unique and not amenable to the characterization required under the proposed rule;
- Communities near DOE sites already have access to release data under various environmental statutes regulating waste management and cleanup; and
- Reporting on waste management activities that might not have the TRI-constituent level of detailed characterization data may mislead the public regarding the human health and environmental risks posed by such activities.

AVAILABILITY
OF RESPONSE

A copy of the consolidated Departmental response submitted to EPA is available on EH-41 World Wide Website for viewing/ downloading at <http://www.eh.doe.gov/oeqa> under the "DOE Comments" section.

ADDITIONAL
INFORMATION

If you have any questions regarding the subject NPRM or the Departmental response, please contact Jane Powers of my staff by...

- calling (202) 586-7301
- faxing messages to (202) 586-0955
- communicating electronically, via Internet, to jane.powers@hq.doe.gov



Thomas J. Traceski
Director, RCRA/CERCLA Division
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Department of Energy

Washington, DC 20585

August 26, 1996

The Honorable Dr. Lynn Goldman
Assistant Administrator
for Prevention, Pesticides, and Toxic Substances
Environmental Protection Agency
401 M Street, S. W.
Washington, D.C. 20460

Dear Dr. Goldman:

The U.S. Department of Energy (DOE) is pleased to provide comments regarding the Proposed Rule for the Addition of Facilities in Certain Industry Sectors; Toxic Chemical Release Reporting; Community Right-to-Know (61 FR 33588; June 27, 1996).

The Toxics Release Inventory (TRI) has been an effective tool in environmental policy, and we commend your efforts to improve the TRI by expanding the number of chemicals reported and by enhancing the usefulness of the information made available to the public. We also agree with the Environmental Protection Agency's (EPA) decision to defer action with respect to the oil and gas sector and your continuing dialogue with interested stakeholders such as the Interstate Oil and Gas Compact Commission and the American Petroleum Institute in order to obtain solid information regarding what constitutes a facility.

The Department is concerned, however, that EPA may not have considered the special nature of our federal facilities in the proposed addition of the hazardous waste treatment industry. Our concerns, detailed in the enclosure, are that the handling of radioactive materials and wastes is unique to the Department and not amenable to the characterization required under this proposed rule. In addition, communities near our sites already have access to release data under various environmental statutes regulating waste management and cleanup. Thus, section 313 reporting is duplicative and would impose an additional burden on the taxpayer. Finally, reporting on waste management activities that may not have detailed characterization data may mislead the public regarding the human health and environmental risks posed by these waste management activities.

We hope these comments are useful to you. For additional clarification on our concerns, please contact Ray Pelletier (586-8505).

Sincerely,

A handwritten signature in cursive script that reads "Marc W. Chupka".

Marc W. Chupka
Acting Assistant Secretary for Policy
and International Affairs

Enclosure

cc: OPPT Docket Clerk

ADDITION OF FACILITIES IN CERTAIN INDUSTRY SECTORS
TOXIC CHEMICAL RELEASE REPORTING

PROPOSED RULE (61 FR 33588)

GENERAL COMMENTS

The Environmental Protection Agency (EPA) is modifying its interpretation of activities considered "otherwise used" as it applies to activity thresholds under section 313 to include treatment for destruction, disposal and waste stabilization when the EPCRA section 313 facility engaged in these activities receives materials containing any chemical (not limited to EPCRA section 313 listed toxic chemicals) from one or more other facilities (regardless of whether the generating and receiving facilities have common ownership) for the purposes of further waste management activities.

The Department of Energy (DOE) is concerned that reporting of releases from waste management activities will be misinterpreted by the public. This proposed interpretative modification goes beyond an extension of existing TRI reporting, which is based on chemical use, inventories of chemicals onsite, and tracking of chemicals throughout a facility. As such, reporting on the toxic chemicals in wastes that are already subject to and undergoing management is a reversal of current EPA guidance and may require new waste tracking and characterization mechanisms. Waste management facilities generally do not have these specific TRI mechanisms in place so it is unlikely that EPA will get credible data and this may mislead the public as to the risk these waste management activities pose.

Further, EPA has based this rule on common industrial standards that do not address or take into account unique situations at many DOE facilities that handle radioactive materials and wastes. For example, application of the proposed rule to radioactive mixed wastes, i.e., wastes that are both radioactive and hazardous, being managed could result in greater exposure to workers from re-characterization of mixed waste for section 313 toxic chemicals and potentially increase the amount of mixed waste being generated.

The Department is also concerned that section 313 reporting of waste management activities currently regulated by other environmental statutes is duplicative and an additional burden on the taxpayers. For instance, DOE facilities are undergoing cleanup under the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). These statutes provide levels of worker safety and risk reduction to human health and the environment for the waste management activities taken. Additionally, facilities that ship CERCLA wastes off-site are required by the National Contingency Plan to certify that the off-site facilities comply with applicable requirements. Under current laws, the public has access to information regarding the classes or categories of chemicals that are released or present a threat of release, e.g., heavy metals. It is unclear what additional benefit to the public is derived from the TRI reporting of the specific TRI metals such as mercury, lead,

chromium. Also, under these laws, the public is actively involved with DOE and the regulatory authorities in cleanup decisions and associated waste management activities, ranging from recommendations on site budget priorities to selection of treatment technologies and treatment levels. This is accomplished through existing mechanisms such as the establishment of citizen advisory boards at DOE sites undergoing cleanup that participate in the cleanup decisionmaking process. The "community" surrounding DOE sites has access to a multitude of data which DOE believes meets the "right-to-know" concerns expressed under EPCRA.

Due to public accessibility to information on the management of wastes under other environmental statutes, e.g., RCRA and CERCLA, EPA should consider revising the scope of this proposal to eliminate unnecessary burden on the regulated community, and because of the complexity of these proposed changes to TRI reporting, the Department urges EPA to provide training and guidance on the final requirements under the revised scope at the earliest possible time in 1997 so that facilities will be able to accurately complete the TRI Form Rs.

SPECIFIC COMMENTS

SUMMARY

This section states that reporting for these sectors will be required for the first full year following publication of the final rule (61 FR 33588).

EPA needs to clarify that if the final rule is published in 1996, reporting will be required for 1997 reporting year (rather than 1996 reporting year), with the first report due July 1998.

SECTION IV. D. PROPOSED CHANGES TO INTERPRETIVE GUIDANCE

In this section, EPA proposes to modify its interpretation of activities considered "otherwise used" as it applies to activity thresholds under section 313 to include treatment for destruction, disposal and waste stabilization when the EPCRA section 313 facility engaged in these activities receives materials containing any chemical (not limited to EPCRA section 313 listed toxic chemicals) from one or more other facilities (regardless of whether the generating and receiving facilities have common ownership) for the purposes of further waste management activities (61 FR 33596).

This proposed interpretation says that when a facility receives materials containing any chemical (emphasis added), then it must make a threshold determination. The benefit of triggering the threshold determination when a facility receives material containing a non-EPCRA section 313 toxic chemical is unclear. If there are no section 313 chemicals in the wastes, then there will be no section 313 reporting. DOE believes that a threshold determination should be made only when the receiving facility has a basis for believing that a 313 chemical is contained in the waste.

The implementation aspects of the proposed interpretation are complex. There are numerous issues that need clarification if the scope of the rule is not revised:

- EPA needs to clarify that threshold determinations are triggered by the sum of treatment for destruction, stabilization and disposal at the site, not each of these activities individually.
- EPA needs to clarify that transfer of a waste material between operations within the EPCRA facility will not be affected by the new interpretation of otherwise use. For example, wastes transferred from a separations facility at a site to a RCRA Treatment, Storage and Disposal Facility (TSDF) at the same site for treatment for destruction would not be considered as being received from off-site and would not trigger the "otherwise use" threshold determination.
- EPA should clarify that the EPCRA definition of facility, i.e., the property boundary, will be used in determining "off-site", versus the CERCLA definition which is the areal extent of contamination, so that wastes shipped off the CERCLA site will still be considered "on-site" for EPCRA purposes.
- EPA needs to clarify that when a facility receives both "on-site" and "off-site" wastes, only the "off-site" waste is used in determining reporting thresholds.
- EPA needs to provide guidance on how to prevent duplicative release reporting by waste generating facilities, which may report the waste transferred off-site for treatment, and waste management facilities, which will report on the same waste being treated. Otherwise, the TRI reports will double the releases that are actually taking place and the public may become unduly alarmed.
- EPA needs to clarify that treatment for destruction will not be applicable to toxic chemicals that cannot be destroyed, i.e., heavy metals. When soil contaminated with solvents and heavy metals is incinerated, the fate of the metals should not be reported since they are not destroyed. They can only be reported when the ash containing the metals is disposed.
- EPA needs to clarify that since the intent of the proposed interpretation is to capture commercial RCRA Subtitle C facilities, if the TRI reporting threshold is met at a RCRA Subtitle C facility, it will not trigger TRI reporting of toxic chemicals in wastes at non-RCRA Subtitle C waste management facilities, such as radioactive low level waste disposal areas, municipal solid waste landfills or wastewater treatment facilities permitted under the Clean Water Act, but will only trigger use of chemicals in those activities, as is currently required.
- At a number of DOE sites, operations formerly conducted by DOE are have been privatized, e.g., at the Savannah River Site an electric generating facility is now operated by a private company. EPA needs to clarify that for purposes of TRI reporting, DOE will be considered a landlord only and that this facility will be considered a separate EPCRA facility from the Savannah River Site and will be responsible for TRI reporting of its activities.

EPA believes that most facilities in SIC codes 20-39 dispose or treat only waste that was already manufactured, processed or otherwise used at their facility, and so the change in guidance will not affect the EPCRA section 313 reporting status of a significant number of facilities within the manufacturing sector. EPA requests comment on the number of facilities within the manufacturing sector that would be affected by this revised interpretation (61 FR 33597).

The Department believes that the change in guidance may have a dramatic effect on the reporting by facilities. The proposed interpretation may require background work and reporting even if only one operation at the facility meets the reporting threshold. For instance, when a facility has a TSD facility that triggers TRI reporting because of chemicals in waste received from off-site, that receiving facility must then track those chemicals and report on any releases of the chemicals from operations throughout the entire facility. At large sites such as Savannah River or the Oak Ridge Reservation, this is a complex and costly task.

Another consequence of this proposed interpretation will be that generating facilities that ship waste off-site for treatment for destruction, solidification or disposal may have to characterize their waste for TRI constituents before the waste management facility will accept the waste, especially if the waste will trigger TRI reporting at the receiving facility.

Further, E.O 12856 directed all Federal agencies to conduct TRI reporting at their facilities, regardless of SIC codes. Thus, DOE sites meeting the established thresholds currently report under EPCRA section 313. At these same DOE sites, activities are underway to perform environmental restoration to cleanup and restore areas contaminated with radioactive and/or other hazardous substances. The Federal Facility Compliance Act requires DOE to prepare site treatment plans for the waste that needs to be treated and/or disposed as a result of environmental restoration activities. While many of the treatment and disposal facilities may only manage on-site wastes, there will be cases where, in the name of efficiency and cost-effectiveness, one DOE site will be responsible for the treatment and/or disposal of certain wastestreams from another DOE site. It appears that this proposed rule could have major impacts to DOE's waste management operations. For example:

- DOE currently has two disposal units that can accept mixed low-level hazardous waste and will be regulated under RCRA Subtitle C requirements. Both sites are interim status and are not currently accepting waste; however, both sites would like to accept off-site waste in the future;
- DOE is trying to obtain a RCRA Subtitle C permit for the Waste Isolation Pilot Plant to accept mixed transuranic (radioactive) waste from several of DOE's facilities;
- DOE is considering constructing additional RCRA Subtitle C disposal facilities (e.g., at Savannah River Site); and
- DOE currently has three incinerators that are accepting off-site mixed waste for treatment.

Under the revised interpretation of "otherwise use," these waste management activities would have to be considered in threshold determinations for TRI reporting.

The Department believes these DOE waste management facilities are not commercial TSDFs in SIC code 4953 which EPA says it is trying to capture under this rule. SIC code 4953 applies to "commercial" waste management facilities, i.e., facilities that offer waste management services "to the general public or to other business enterprises (emphasis added). In discussion of the proposed change of interpretation for "otherwise use", however, EPA makes no distinction between off-site waste from the same business enterprise and waste from unrelated business enterprises. Since the major impetus for the change in "otherwise use" is to facilitate the addition of SIC code 4953 facilities, the definition of "otherwise use" should follow the criteria for SIC code 4953. That is, off-site waste from the same business enterprise should not be considered in determining what waste is "otherwise used".

While a DOE site may receive waste from off-site, it is generally waste from other DOE sites, and the TSDF is acting as a central treatment facility rather than have each DOE site build its own TSDF, thus, saving taxpayer money and reducing the number of treatment facilities nationwide. They are also not commercial in the sense that they are not paid for treating wastes from other DOE sites. Thus, in cases where a DOE treatment or disposal facility receives waste from other DOE sites, the Department will consider this waste as on-site not subject to the revised interpretation of "otherwise use".

Another category of wastes that could be affected by the revised interpretation of "otherwise use" is legacy waste. This is the backlog of stored waste remaining from the development and production of U.S. nuclear weapons, about which a permanent disposal determination remains to be made, i.e., waste that is currently in storage, retrievable storage on bermed pads, or disposed in trenches. However, when this waste is permanently disposed, it will not be characterized to the TRI constituent level due to its radioactive nature. DOE will not be able to estimate the quantity of TRI constituent in the material based on engineering judgment or process knowledge because, in many cases, the origin of the waste (some of which is 20 to 40 years old) is unknown. Thus, the Department will consider all of the legacy waste as on-site waste not subject to the revised interpretation.

EPA requests comment on whether the regulatory definition of "otherwise use" should be amended (61 FR 33598).

The Department sees no need to amend the regulatory definition. We will continue to comply with applicable regulations and will implement EPA's interpretative guidance to meet our unique needs. As this interpretative guidance changes, it should be subject to public review and comment, such as this change has been.

IV. E. RELATIONSHIP AMONG MANUFACTURE, PROCESS, AND OTHERWISE USE (61 FR 33598)

This section states, in part: "In the case where a facility receives a chemical

that is contained in a "waste", and the facility recovers the chemical from the "waste" and distributes the chemical in commerce, EPA believes the facility is processing the chemical."

EPA appears to be classifying recovery/recycling of materials containing toxic chemicals as "processing" of those chemicals, so that the quantity of those chemicals would be included in determining whether the threshold for processing was exceeded. The Department believes this interpretation of the term "processing" to include toxic chemicals contained in materials being recovered/recycled and subsequently distributed in commerce is new and that this interpretation raises issues needing clarification. First, it is not clear whether EPA intended for this interpretation to apply only to wastes received from off-site or to all recovery/recycle operations. The EPCRA section 313 definition of "process" does not make the distinction of where the material comes from, and it may apply to all recovery/recycle operations. Such an interpretation could significantly impact DOE's decontamination, decommissioning and dismantlement (DD&D) of buildings, equipment and weapons systems. To the extent that the DOE DD&D programs are attempting to recover, recycle and reuse significant amounts of materials that contain some level of listed toxic chemicals, i.e., metals such as lead, classifying those operations as "processing" chemicals for threshold determination purposes would be a new and significant burden. DD&D materials are generally not characterized to the level of specific TRI constituents.

Second, the process of recovering and using useful materials from DD&D operations is expected to occur over a period of several years. It is not clear during what year the chemicals being "processed" would apply toward thresholds. DOE has interpreted "distributed in commerce" for EPCRA purposes as meaning being used at other DOE or federal facilities, or free release to the public. For example, DOE is considering the recovery and reuse of radioactively contaminated stainless steel which contains EPCRA listed toxic chemicals for the purposes of fabricating radioactive waste disposal containers for use at DOE sites. This approach would convert otherwise waste stainless steel into a product and eliminate the need to use and contaminate new stainless steel. The recovery of contaminated stainless steel and fabrication of waste containers will be a multi-year and multi-step process, potentially involving stockpiling, classifying by size, transport off-site for melting and final fabrication. DOE's only on-site activities may be to stockpile used steel, from both on-site and off-site sources, for later use by a private off-site vendor for waste container fabrication. Under these circumstances, it is not clear what or when activities would constitute "processing" for threshold purposes.

DOE does not believe the term "processing" should apply to its DD&D activities for the purposes of threshold determinations under EPCRA. The Department believes that the policy on decommissioning DOE facilities under CERCLA, which was jointly issued by EPA and DOE on May 22, 1995, establishes an approach to DD&D that ensures protection of worker and public health and the environment, that is consistent with CERCLA, that provides for stakeholder involvement, and that achieves risk reduction without unnecessary delay or expense. The recovery of materials containing listed toxic chemicals during DD&D operations that are subsequently used on-site or are stockpiled and later sold or used off-site, should not be considered as "processing" toxic chemicals at that site. However, if those materials are used to manufacture an item on-site, such as the example stainless steel waste containers, and those items

were used at other sites, listed toxic chemicals contained in those items would be considered as processed during the year they left the site as manufactured items.

SECTION V. F. 6. RCRA SUBTITLE C HAZARDOUS WASTE FACILITIES. REPORTING CONSIDERATIONS.

The Agency is mindful of the concern that TRI release information involving hazardous waste management activities not be misleading. For example, the public should not construe a release into a landfill reported under EPCRA section 313 to mean that the landfill has failed. In developing the final rule, EPA will consider approaches to assist the public in understanding the proper meaning of reporting data from the hazardous waste management industry (61 FR 33606).

DOE believes these concerns about misperception of data are valid. Currently, reporting of releases in Sections 5 and 6 of the Form R duplicates some release reporting in Section 8 of the Form. DOE believes that the public is not knowledgeable of these duplications and, thus, incorrectly adds up the releases from all sections of the Form R, resulting in misleading data. DOE believes that if hazardous waste management activities are to be reported at all, they must be reported as separate categories, either by revising the Form R or with a separate report. Section 8 of the Form R could be revised so that reporting of fugitive or accidental releases is a separate category from reporting on legal, permitted releases. Also, since disposal of a waste containing toxic chemicals is currently reported as a release, EPA should add a specific category to Section 8 for permitted, legal disposal on and off-site.

EPA requests comment on the quantity of constituents, difficulty and costs of reporting, and ways to aid facilities in reporting under EPCRA section 313, in the least burdensome manner, on those constituents that are EPCRA section 313 listed toxic chemicals (61 FR 33607).

Currently, a section 313 chemical does not have to be considered for threshold determinations if the chemical is present in a mixture at a concentration below a specified de minimis level, i.e. either 1.0 percent or 0.1 percent if the toxic chemical meets the OSHA carcinogen standard. EPA included this exemption as a burden-reducing step, primarily because facilities are not likely to have information on the presence of a toxic chemical in a mixture or trade name beyond that available in the product's material safety data sheet. This exemption does not apply to waste treatment. DOE suggests that one way to reduce the reporting burden is to apply a de minimis level for section 313 chemicals present in waste being treated for destruction, disposal and waste stabilization. This is because TSDFs are not likely to have information on the presence of a toxic chemical beyond that needed for permitting the facility and compliant management of the waste. For example, an incinerator at a site permitted under the Toxic Substances Control Act might receive waste from a non-DOE facility in the form of 55-gallon drums of soil contaminated with PCBs. However, there might be small amounts of other waste constituents in the soil. For purposes of incineration, the waste only has to be characterized for its PCB constituent. However, under the revised interpretation of "otherwise used", the waste would have to undergo

additional characterization for TRI constituents since the quantities are cumulative for the entire calendar year (i.e., small quantities throughout the year might exceed the 10,000 pound threshold).

Further, the facility would have to potentially look for all 600+ TRI chemicals since, in DOE's case, it might not have process information on the waste. Another suggestion for burden reduction would be to limit the TRI reporting at waste management facilities to only those TRI chemicals that are also RCRA Subtitle C hazardous waste. That way, they are more likely to be included in the current waste characterization.

If the intent of EPA in this rulemaking is to provide information to the public on the types of chemicals being managed by a facility in a format that is easily accessible and interpreted by the public, EPA could require owners/operations of TSD facilities to provide the same information already required by its RCRA permit in a format similar to TRI.

The proposed interpretation may require background work and reporting even if only one operation at the facility meets the reporting threshold. At large DOE sites, this is a complex and costly task. EPA could reduce the reporting burden by having waste management activities reported separately and not trigger reporting for those chemicals at other operations.

SECTION IX. ECONOMIC ANALYSIS.

It does not appear that EPA took into account the potential impact of this rule on Federal facilities. EPA should rework its regulatory impact analysis to include the potential cost impacts to Federal facilities.