

SEJ comments on Toxics Release Inventory

January 13, 2006

**TO:**

Office of Environmental Information (OEI) Docket

U.S. Environmental Protection Agency

*Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>.*

Attention Docket ID No. EPA-HQ-TRI-2005-0073.

[Mailing Address: U.S. EPA, Mail Code: 28221T, 1200 Pennsylvania Ave., NW.  
Washington, DC 20460. Physical Location: EPA West, Room B102,  
1301 Constitution Ave., NW., Washington, DC 20004. Fax: 202-566-0741. Voice: 202-  
566-0676. E-mail: [oei.docket@epa.gov](mailto:oei.docket@epa.gov).]

**FROM:**

The Society of Environmental Journalists

P.O. Box 2492, Jenkintown, PA 19046

Telephone: (215) 884-8174 Fax: (215) 884-8175

[sej@sej.org](mailto:sej@sej.org)

**RE:** EPA Toxics Release Inventory Burden Reduction Proposed Rule

Docket ID No. TRI-2005-0073

[Federal Register: October 4, 2005 (Volume 70, Number 191), pp. 57822-57847]

The Society of Environmental Journalists submits these comments to the Environmental Protection Agency in response to its "Toxics Release Inventory Burden Reduction Proposed Rule," published in the *Federal Register* on October 4, 2005 (70 FR pp. 57822-57847).

Our understanding is that the deadline for submitting comments in response to this proposal has been extended until January 13, 2006. (*Federal Register*: November 29, 2005, p. 71448).

Our comments focus specifically on EPA's Oct. 4 proposal for expanded Form A eligibility, but we want to place this proposal in the context of EPA's simultaneous announcement of intent to reduce TRI reporting frequency and the pattern of continuous erosion of the Toxics Release Inventory program over the last 5 years.

The Society of Environmental Journalists (SEJ) is the world's largest and oldest organization of individual working journalists covering environmental issues. Founded in 1990 and based in Jenkintown, Penn., SEJ consists of more than 1,400 journalists, educators, and students dedicated to improving the quality, accuracy and visibility of environmental reporting. SEJ's programs include annual and regional conferences; a daily environmental news service; a quarterly magazine; a biweekly story tip sheet; an annual

journalism contest; a comprehensive Web site; eight e-mail listserves; a diversity program; and a mentoring program.

Working through its First Amendment Task Force and WatchDog Program, SEJ addresses freedom of information, right-to-know, and other news-gathering issues of concern to journalists reporting on environmental topics.

## **GENERAL COMMENTS**

The Toxics Release Inventory (TRI) and the related complex of environmental information programs are one of the greatest historical successes among all the federal government's efforts to protect the public's health from toxic releases to the environment.

The TRI is not "broken" -- and there is no need to "fix" it. EPA's current proposal on Form A eligibility would inflict a critical injury to the TRI's effectiveness, robbing the public of vital information it has a right to know. The proposed regulation threatens to destroy or impair a TRI program that has succeeded in reducing toxic emissions *without* the burden to industry of far more costly regulations.

We urge EPA to withdraw and abandon this ill-conceived proposal. In proposing it, EPA has not met the minimum legal requirements for justifying it under Executive Order 12866 and the Administrative Procedures Act. The lack of any coherent justification for the action in the Notice of Proposed Rulemaking convinces us that it is arbitrary and capricious.

The TRI is one of the best bargains U.S. industry ever received. Faced with ballooning public demands after the 1984 Bhopal disaster for more federal regulation of toxic releases and chemical safety, industry avoided greater regulation by agreeing to give the U.S. public more information. There is no less need for that information today, yet that agreement -- a solemn compact which many in Congress and the media still remember and take very seriously -- is now in danger of being unilaterally broken by the government simply because industry claims the reporting is an undue burden.

The entire TRI program itself is already, at its core, a huge burden reduction for industry.

Compared to the potential regulatory burden it supplanted, the TRI reporting burden is minor. Yet EPA's policy analysis does not take into account the enormous burden that would be imposed on industry if the federal government were to regulate facility safety, storage, uses, and releases more stringently in order to reduce the health and safety hazards that chemical facilities present to surrounding communities. That is exactly what the public might well demand if the less expensive, surrogate protection offered by the TRI accountability is eliminated.

Among the biggest users of TRI data are states and -- yes -- industry itself. States use the TRI for many purposes, especially enforcing environmental regulations (a "burden

reduction" for EPA) and checking the accuracy of information reported by industry to state-mandated programs similar to TRI.

Real estate brokers and property buyers may use TRI to appraise the values of properties near a facility. Stockholders and stock analysts may use TRI to assess environmental liabilities that may affect a company's share value. Analysts (and even a company's competitors) may use TRI information to determine whether a company is efficient in its use of feedstocks or process design, or whether it qualifies for inclusion in a "socially responsible" mutual fund. For all these business users, EPA's proposal would amount to a burden increase, not a burden reduction.

By their single-minded incantation of the term "burden reduction," EPA and OMB may mean to suggest that they think they have found some kind of a mandate for this action in the "burden reduction" language of Executive Order 12866. But any such suggestion is the most twisted and inaccurate interpretation of the EO we can imagine. It altogether ignores most of the other major mandates and purposes of EO 12866, which also states: "The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy... ."

TRI, EPCRA, the Pollution Prevention Act, and related programs were in many ways a conceptual breakthrough in avoiding the top-down, command-and-control regulatory approach to protecting public health from toxic threats. The premise was that an informed citizenry could make the best choices without coercive government intervention. Free markets only work well when fueled by good information, and plenty of it. Congress, EPA, the states, industry, environmentalists, and the public bet that if the public were informed about toxic releases, that facilities would clean up their act to avoid the unfavorable publicity, or in response to public pressure.

It worked, by all accounts. Nobody wanted to be on the top ten (or top 100) polluters list, and toxic emissions and inventories dropped immediately and drastically. Emissions went down by 9 percent in the TRI program's second reporting year, and they have continued to decline steadily. Since the program began, disposals or releases of the 299 original chemicals have gone down 60 percent. In the last 5 years, an expanded set of about 600 chemicals has gone down about 42 percent.

All along, the news media played a key role in the TRI program's success -- and the TRI helped make possible professional advances in environmental journalism, where statements about risk could at last be based on hard data rather than mere anecdote and speculation. TRI, it can be argued, helped spawn the "computer-assisted reporting" revolution that swept through American journalism starting in the late 1980s. Although the news media rarely involve themselves in regulatory matters, we are in truth a key stakeholder in the decision currently before EPA. When news media do their job better, the public benefits from being better informed.

We need a transparent, robust, and informative TRI to do our job of informing the American public about the decisions their government is making, and about the choices they face as a democratic electorate. To weaken the TRI is to weaken the mechanism of Jeffersonian democracy envisioned by the framers of the U.S. Constitution.

Sadly, the current proposal is but one in a lengthening series of actions that have weakened the TRI in the last five or ten years. The general outline of this series of measures is fairly accurately presented in the Dec. 1, 2005, report by OMB Watch entitled "Dismantling the Public's Right to Know" ([http://www.ombwatch.org/pdfs/TRI\\_Report.pdf](http://www.ombwatch.org/pdfs/TRI_Report.pdf)). These include not only the currently and soon-to-be proposed TRI reporting cutbacks, but:

- limited and ineffective defense of the program against court challenges from industry
- reduction to almost nothing the once-extensive analysis that accompanied the annual Public Data Release
- emphasis on good-news-only and national numbers that obscure the often troubling picture TRI data present of the situation at particular facilities and in particular communities
- an increasing trend toward "stealth release" of TRI data, with minimal notice to the news media and little assistance to them in accessing and interpreting the data, resulting in minimal media coverage of the stories TRI data contain
- a historical inability to get accurate TRI data out in a timely manner (a problem for which industry bears equal responsibility).

It is hard to understand how destructive the current proposal is to the integrity of the TRI program without first understanding how much damage has cumulatively already been wrought -- and what additional destruction of the public's right to know is scheduled to follow it. It is time to arrest and reverse this long erosion of the public's right to know about the health threats they face. The way to do that is to withdraw the proposal entirely and not re-propose it.

## **SPECIFIC COMMENTS**

### **Importance of TRI to Public Interest Environmental Journalism**

The Toxics Release Inventory has been, and continues to be, an essential tool for environmental journalists in the U.S. who are trying to inform the American public about the toxic risks they face, company actions that may worsen or mitigate them, and the effectiveness of government in addressing the problems and protecting the public. Without it, we would be flying blind; to impair the TRI is to impair our vision.

Since its earliest days, the TRI program has been an important tool for environmental journalists trying to obtain and convey the best available statistical information about toxic pollution in their communities. In the late 1980s, for instance, before the ready availability of TRI data online, the *Houston Chronicle* annually assessed the performance

of local industries that were the largest emitters of TRI-covered materials to the air. In an article published Sept. 3, 1990, the *Chronicle* reported that three of the five companies it examined had reported higher emissions during 1989 than in 1988, and that three of the five discovered they had “substantially underestimated” air releases in 1987 and 1988, the first two years covered by the TRI reporting requirements. Company officials acknowledged that those requirements were “prompting a continuing search for ways to reduce pollution voluntarily,” the newspaper reported. Typical was the comment of one Dow official: “At first, there were some in Dow who would say (the reporting requirement) was worthless and just a pain. But in reflection, it’s helping us do what we need to do anyway.”

Over the years, journalists armed with new computer technology and computer-assisted methodology have been able to refine and greatly expand upon early journalistic appraisals using TRI. The *Louisville Courier-Journal* in 2003 published a major investigative project that employed statistics from the inventory as a crucial component. When neighborhood monitoring of air contaminants first analyzed by the newspaper showed levels of some chemicals in the air that were hundreds of times as high as what the EPA itself would consider safe, reporter Jim Bruggers used TRI data to find the industrial sources of those chemicals and then to look more closely at those sources. As public pressure mounted on some of these companies, they began to take steps to reduce their emissions. TRI has allowed journalists and others to track their progress. Bruggers has observed that TRI is “an essential tool – not only for me, but for citizens, regulators and even the industries themselves, who report their yearly progress to public advisory groups.”

Indeed, besides their own enterprising uses of TRI data, journalists frequently report on the important uses that others find for the information, thereby extending the public’s knowledge and understanding of toxic substances being released into the environment. The State of Texas, for example, employed the TRI data as a yardstick in one of the essential requirements in its Clean Industries 2000 program, an effort launched in 1992 that Texas officials said was the first and largest state-initiated voluntary pollution-prevention program in the nation. Members, including many of the state’s largest industrial facilities, pledged as a condition of membership to reduce generation of hazardous waste and/or chemical releases reported under TRI by 50 percent by the year 2000.

Similarly, the American Chemistry Council, the leading trade organization of the chemical manufacturing industry, says of its Responsible Care program for members: “One way to measure our achievements is to track emissions to the environment....Tracking TRI emissions over time provides an important look at performance trends. TRI data are widely recognized as a key measure of environmental performance. Since 1988, core Responsible Care companies have reduced emissions of core TRI chemicals by 75 percent.” For their part, scientific researchers at universities and in other settings continuously use TRI data to aid their investigations, using the statistics in such activities as the placement of monitoring devices and the performance of exposure assessments. All of these non-journalistic uses of TRI data are covered by journalists.

There is no more current and vital example of how important a robust TRI is to journalism than the Associated Press series which started running on December 13, 2005, under the rubric "Unhealthy Air." The overall story was about how African Americans and other minority groups are disproportionately exposed to toxics. The major analytical tool used in the series was EPA's own Risk-Screening Environmental Indicators (RSEI) model -- which is founded on TRI data. Without TRI, the series would have been impossible; if TRI data were poorer, the series would have done a poorer job.

The series had a huge impact on media all over the country. There were stories in the *Chicago Tribune*, *Newsday*, *Forbes* magazine, MSNBC, the *Washington Post*, ABC News, the *Arizona Republic*, the *Knoxville News Sentinel*, WBAY (WI), WQAD (IL), the *Grand Forks (ND) Herald*, the *Marietta (OH) Times*, WIBW (KS), WECT (NC), WXXA (NY), the *Helena (MT) Independent Record*, KPVI-TV (ID), the *Decatur (IL) Herald and Review*, the *Detroit News*, the *Corvallis (OR) Gazette Times*, KUTV (UT), the *Wilmington (DE) News Journal*, BlackNews.com, *Charlotte Observer*, WDEF (TN), the *Seaford (DE) News Journal*, the *Dayton (OH) Daily News*, the *Albany (OR) Democrat Herald*, and many more. We were unable to count all the newspapers and TV stations that based stories on it, but believe the number to be several hundred.

Two things struck us about the Unhealthy Air coverage. First: the intensity of the hunger for this kind of information -- how pollution hits a local area. Second: the degree to which local residents and governments rely on media accounts such as this for even the most basic awareness that localized pollution exists. People do not know of it because there is no outreach from EPA. If newspapers and TV stations do not tell people about TRI and its implications, it might as well be top secret.

Witness, for example, the Dec. 23, 2005, AP follow-up story on the Unhealthy Air series ("Many Officials Caught Off-Guard by EPA Scores"). That story recounts how Michigan's Kent County had 26 neighborhoods in the top 5 percent nationwide for RSEI year 2000 health risks scores. Yet the mayor of Grand Rapids, a major city in that county, was unaware of it. "It caught me completely by surprise, which shouldn't be for a mayor," Mayor George Heartwell told the AP. "That's disturbing," Heartwell said. "We have one of the highest incidences of childhood asthma in this country right here in Kent County."

But the point that should not be lost on EPA as it considers whether to withdraw its proposed rulemaking on the Form A threshold was summed up in a Dec. 14, 2005, AP story by John Heilprin.

"WASHINGTON -- If the Bush administration has its way, some factories won't have to report all the pollution spewed from their smokestacks, making it harder for government scientists to calculate the health risks of the air Americans breathe."

"The Environmental Protection Agency, responding to an AP analysis that found broad inequities in the racial and economic status of those who

breathe the nation's most unhealthy air, says total annual emissions of 188 regulated air toxins have declined 36 percent in the past 15 years."

"But the EPA wants to ease some of the Clean Air Act regulations that have contributed to those results and proposes to exempt some companies from having to tell the government about what it considers to be small releases of toxic pollutants. The EPA also plans to ask Congress for permission to require the accounting every other year instead of annually."

One of the most valuable things about TRI information is its "local-ness." Because it is gathered from almost 24,000 facilities all around the country, the data offer an exceptionally "high-resolution" picture of toxic emissions. That localness is precisely what makes it most useful to journalists and their audiences. People want to know how a particular environmental problem or activity affects them personally, and TRI gives journalists the means to tell those stories. Properly reported and explained, TRI is a key to telling all kinds of environmental stories for local newspapers, radio stations, and television stations.

### **EPA Burden Estimates**

EPA justifies its proposal as a reduction of reporting burdens imposed on industry, yet its entire methodology for estimating those burdens and their reductions is based on the flimsiest of foundations.

After breaking down the tasks involved in preparing and filing a TRI report, EPA proceeds to estimate the amount of time each would take. The time estimates for individual sub-tasks do not appear to have any solid basis. They are, first of all, estimates, not measurements. EPA did not measure the actual time the tasks take for actual people in actual industries. Nor, in this analysis, does EPA report that it asked TRI reporters how much time the tasks took them. No effort seems to have been made to determine whether EPA's time estimates are representative of time actually needed on the average among TRI-reporting industries as a whole. And no effort seems to have been made to determine whether time needed for particular tasks might vary according to industry category. There is, in fact, no real explanation in the supporting materials in EPA's docket of how the estimates were derived. Without an understanding of this, there can be no meaningful assertion by EPA that they are accurate.

All we are told about the derivation of the burden estimates is that they are "OMB-approved."

If the burden estimates were merely dictated by the White House Office of Management and Budget (OMB), then the public could make a rebuttable presumption that they were politically imposed, rather than based on sound science, objective observation, or economic reality. Good rulemaking under the Administrative Procedures Act requires an agency to document on the record the facts and justifications supporting its proposed action. Yet simply saying that burden estimates were handed down by OMB removes this

key and fundamental issue from the rulemaking record altogether. OMB is not bound to follow the transparency requirements of the Administrative Procedures Act as it intervenes in agency rulemaking -- nor is it obligated to disclose the substance or detail of its *ex parte* communications with industry groups who often have a financial interest in the outcome of the rulemaking, and often have also made large campaign contributions to the current occupant of the White House. This is a recipe for the corruption of government, and certainly a reason for concern that the present TRI proposal may be seriously flawed.

OMB itself has no original expertise in this area. OMB officials do not fill out TRI forms. They do not report publicly having ever done research on how much time it takes industry to fill out the forms. The EPA docket includes no information on how OMB's prescribed estimates were derived. In fact, the EPA docket does not even try to assert that the burden estimates are accurate or justified by a factual record. It simply reflects the reality that EPA used the estimates because OMB told it to, and that OMB has the power to dictate agency actions. In other words, the regulatory record shows on its face that the burden estimates are arbitrary and capricious.

Furthermore, information in the docket for this rulemaking actually suggests that OMB imposed inaccurate or unrealistic burden estimates on EPA. The July 16, 2004, memo from Abt Associates to Paul Borst at EPA (EPA-HQ-TRI-2005-0073-0011) states that OMB imposed higher burden estimates than EPA originally proposed. Overestimating the burden, of course, overstates the case for EPA's proposed data cutbacks, without following the rules of transparency and offering the factual justifications that are supposed to make fair rulemaking possible.

### **Reasons for Thinking the Burden Estimates May Be Inaccurate**

We notice that the reporting burden estimates tend to include very roughly an hour of management time for every two hours of technical time. That seems like a very large amount of management overhead -- hardly the hallmark of an efficient or competitive corporation. No explanation is given of why it is necessary. Reported TRI estimates should largely be derived from documented information about chemical handling. Heavy time involvement by administrators suggests that they might be revising the technically documentable release estimates, and possibly compromising their validity.

It is our observation that much of the information gathered for use in TRI reporting is also gathered for other purposes. The purposes may be many -- process engineering, materials purchase, product sales, waste disposal tracking, leak detection, and most importantly, other pollution control permits. Much of this information gathering would be required even if EPCRA were completely repealed -- so it seems invalid to count it all as "burden reduction."

These duplicate information gathering and reporting requirements are quite real. For example, a group of journalists during SEJ's annual conference on Sept. 29, 2005, asked a representative of Texas Petrochemicals in Houston whether TRI was an extra burden.

He said the company would be measuring and accounting for all its fugitive 1,3-butadiene emissions anyway, and that putting the data into one more form amounted to little extra burden. We realize, of course, that this case is merely a single anecdote, although similar comments have been offered by industry in newspaper stories about the TRI rulemaking. And we see no effort in EPA's estimates of "burden reduction" to account for such duplication -- whether it be large or negligible in actuality. Without considering it, EPA's estimates of burden reduction can not be methodologically valid.

There is one other serious methodological flaw in EPA's burden reduction analysis. Even facilities that qualify to use Form A (whether under existing rules or the proposed one) must do a certain amount of information gathering and analysis merely to determine whether they qualify. They must calculate the amount of a release anyway to determine whether it is above or below the threshold. Thus, facilities likely have this information anyway, and the rule merely encourages them to throw it away and deprive the public of it. EPA's analysis makes no mention of this likely source of error, and includes no effort to account for it. As a result, EPA's analysis is likely to be invalid.

Given these glaring flaws in EPA's burden reduction analysis, it does little good to be told by EPA that the analysis has been "peer reviewed" (Docket items EPA-HQ-TRI-2005-0073-0013 and EPA-HQ-TRI-2005-0073-0014). In this case, the peer review was done under a contract paid for by EPA, so there is at least the appearance of a fundamental conflict of interest. We mean no reflection on the integrity of any of the firms or individuals that conducted the review; but where there is a direct financial interest, there can be no independence, and where there is no true independence, there can be no valid peer review.

The peer review does not in any case address the validity of the key assumptions of the burden or burden reduction estimates. The main qualification presented for the reviewers is that they are external to EPA and experienced at filling out TRI forms. Not being EPA employees, however, is hardly tantamount to independence or disinterestedness. The proposed Form A threshold change is not something that arises from the interests of EPA itself, but from the desires and interests of reporting industries. The individuals doing the "peer" review, it must be noted, all come from the business sector. The assertion that the group is "diverse" isn't accurate. It represents only business interests, not public interests or environmental health interests. It represents only the interests of TRI reporters, not the interests of TRI data users.

### **Lack of Cost-Benefit Justification**

Whatever the validity of EPA's burden reduction estimates, they do not provide a justification for changing the Form A eligibility thresholds. The burden reduction to industry is very small, and the cost to data users is very large.

EPA's weighing of this issue is completely one-sided. The costs (or savings) to industry are "calculated" with a great show of pseudo-precision. But no comparable effort is made

to calculate the benefits of TRI, or the costs to the public of mutilating it. Only one side of the equation is quantified -- so EPA's justification amounts to a stacked deck.

We would argue that even without valid cost-benefit calculations by EPA, the benefits of EPA's proposal are far outweighed by the costs. It flunks the basic test OMB has subjected regulatory proposals to for decades.

It's worth noting first of all that the "costs" of TRI accrue mostly to industry, while the benefits accrue mostly to the public at large. (Or the "benefits" of "burden reduction" accrue to industry, while the "costs" accrue to the public.) Either way, the point is that costs and benefits accrue to two largely different parties. It should not be necessary to point out that a benefit to industry is not the same as a benefit to the U.S. voters and taxpayers.

In any case, we think it should be possible to estimate quantitatively the benefits which the TRI program provides to U.S. society. It is possible to estimate the amount of reductions in the various "releases" indicated by TRI over the years, and to estimate the portion of that reduction attributable to TRI itself. It is possible to estimate the amount of risk-weighted toxic exposures thereby reduced, and to account for the vulnerability of the various populations exposed. EPA in fact does something like this with its Risk-Screening Environmental Indicators (RSEI) model.

Estimating the health consequences of those exposures (or reductions in exposures), of course, is more difficult, but still something that could be attempted. It is arguably something EPA should be doing anyway as part of its core mission of protecting public health -- not just for purposes of this rulemaking. Whether we are measuring lost workdays and schooldays from asthma, the lifetime costs of caring for people with birth defects, the medical costs of a case of cancer, or the incalculable cost of a human life, these costs are doubtless large and real.

Nor, we observe, does EPA attempt to estimate the benefits to industry from reducing releases, greater recycling, and improved pollution prevention.

EPA's analysis lacks even the most basic validity or credibility, because it has not even attempted this basic calculus.

But looking at the analysis that *does* accompany EPA's current proposal, and taking it at face value, we do not think the case for the proposed Form A threshold changes has been successfully made. As a bottom line, EPA estimates that the total cost-reductions to facilities would be 164,432 work hours, which translates to \$7,381,022 (about 4.3% of the total reporting burden).

How much is \$7 million -- spread among 6,400 facilities? It is not much at all in the context of what U.S. companies, EPA, or U.S. consumers spend on other things.

-- \$7 million is about the amount that the chemical industry spent on campaign contributions in the 2004 election cycle, according to the Center for Responsive Politics (<http://www.opensecrets.org/industries/indus.asp?Ind=N13>).

-- \$7 million was the amount that Chevron U.S.A. paid in a settlement in the year 2000 with EPA over charges that it had violated the Clean Air Act at a single facility, its offshore loading terminal near El Segundo, Calif. (<http://yosemite.epa.gov/opa/admpress.nsf/0/d75b5968e2874d7c85256944006b76b8?OpenDocument>).

-- \$7 million is roughly the mean initial treatment costs of 700 cases of cancer, according to EPA's own Cost of Illness Handbook. This is only a fraction of the total real cost of a case of cancer, given in 1984 dollars. (Table II.1-3, [http://www.epa.gov/oppt/coi/pubs/II\\_1.pdf](http://www.epa.gov/oppt/coi/pubs/II_1.pdf)).

-- \$7 million is roughly the lifetime costs of 70 cases of asthma (undiscounted 1999 dollars), according to the EPA Cost of Illness Handbook (Table IV.2-19, [http://www.epa.gov/oppt/coi/pubs/IV\\_2.pdf](http://www.epa.gov/oppt/coi/pubs/IV_2.pdf)).

-- \$7 million is just slightly more than the \$6 million EPA proposed on May 26, 2005, to spend on a contract with a PR firm to "enhance the development of ORD's corporate image" (Solicitation No. 05262005: [http://www.peer.org/docs/epa/05\\_18\\_7\\_communicationsmemo.pdf](http://www.peer.org/docs/epa/05_18_7_communicationsmemo.pdf) . See also "Public Relations Campaign for Research Office at E.P.A. Includes Ghostwriting Articles," *New York Times*, July 17, 2005, by Felicity Barringer).

In short, \$7 million worth of possible benefit to industry is a very small amount -- compared to the very large damages to the public welfare that will result from the proposed rule. There is not, in this proposal, or the others in EPA's "burden reduction" campaign, any effort to define just how much burden reduction is justified. The assumption seems to be that no matter how much burden reduction has already been granted to industries, more is always desirable. There is no metric for determining how much is enough.

In trying to justify its current proposal, EPA makes no effort to account for all the "burden reduction" that has already occurred in the last decade or more (i.e., since the introduction of Form A in 1994). Form A itself was a burden reduction. EPA recites the list of these in Sections I.E and I.F of the current proposal, notably including various streamlinings of requirements, compliance assistance and training programs, the electronic TRI-ME submittal mechanism, the July 2005 Reporting Forms Modification Rule, etc. Whether or not companies appreciate it, the burden reduction EPA has already given them is appreciable. We think that the burden has already been reduced more than enough. There is no justification for efforts to reduce it further, with no apparent end in sight (at least none defined by EPA).

### **Negative Public Impacts of the Proposal**

According to analysis by the National Environmental Trust (NET) and other right-to-know groups, EPA's proposed changes in Form A eligibility thresholds would cause people living in 922 zip codes to lose *all* numerical information about local TRI releases. NET says "people in 1,608 zip codes would lose at least *half* of the information to which they currently have access" (emphasis added).

According to computer analysis by RTK-Net, a non-profit which has helped disseminate TRI data since TRI began, about 10% of communities with TRI facilities would lose all of their numerical data if the proposal were adopted. About 25% of communities would lose at least 25% of their numerical data, the group has said.

Combined with other data blackouts -- such as EPA's simultaneously proposed cutback to biennial reporting -- this would mean a big drop in hard numbers about toxic emissions in a great many U.S. communities. While EPA may take the position that it does not have to consider anything beyond the Form A threshold changes in this rulemaking, that seems to us falsely ingenuous -- since the two proposals were announced simultaneously, and are obviously both parts of a unified and coherent strategy on EPA's part.

TRI sets a benchmark that allows the public and news media to get a better idea of how much of the total toxic burden on health and environment still remains unregulated or uncontrolled. This is important because it allows press and public to gauge how good a job EPA and the states are doing, and whether further regulation or legislation may be necessary. Loss of TRI information leaves the press, public, states, and Congress with diminished means for overseeing the EPA.

Finally, however good a job government does of protecting people, a robust TRI empowers people to protect themselves. Parents can seek medical help for lead or mercury poisoning. Asthmatics can understand better what triggers their attacks, buy air cleaners, or move away. People can get better warnings of where they might be threatened by contaminated soil or fish, unswimmable water, questionable wells, etc., and adjust their own practices. Again, loss of any TRI information diminishes their ability to protect themselves.

EPA's argument that the total amount of emissions that would go numerically unreported under its proposal is small (compared to the overall total) lacks persuasiveness or validity. Much of the total amount of TRI emissions by weight comes from a few industries or plants. What matters to people is information about emissions *near them*, and the fine-grained local information is exactly what would be lost under this proposal.

EPA's statement in its Oct. 4 *Federal Register* Notice of Proposed Rulemaking minimizes the impact of its proposed action on data users without offering any evidence, support, or justification for its assertions. Section III.C.2.b. ("What Are the Potential Impacts to Data Users?" -- for PBT chemicals), for example, blithely states "the Agency feels" its action "will have negligible impacts on the utility of the TRI data," without even trying to document or support its statement. Certainly, an APA rulemaking should be based on

something less subjective, less arbitrary, and less capricious than merely an agency's "feeling." The impacts are "negligible" only to those who are neglecting them.

### **Non-Compliance With Executive Orders Regarding Rulemaking**

As EPA notes in Section V.A. of the proposal, it has determined that this is a "significant regulatory action" under the terms of Executive Order 12866. We certainly agree with this determination, if only on the grounds that it is likely to result in a rule that adversely affects the public health and the news media sector of the economy. As a "significant regulatory action," it is subject to formal OMB review, and the Oct. 4 Notice states that "Changes made in response to OMB suggestions or recommendations are documented in the docket to today's proposal." Yet the Notice contains no specific citation of any document in the docket detailing EPA's dialogue with OMB (other than reference in the Economic Analysis to OMB-dictated burden estimates), and we are unable to find any such document in the docket. It is of utmost importance, if the public is to have any confidence in the integrity of regulatory decisions, that all transactions between EPA and OMB on this matter be made public with complete transparency. These disclosure requirements are all laid out in detail in EO 12866. We urge EPA to enter the complete, detailed documentary record of all its interactions with OMB (as well as all of OMB's interactions with interested parties) on this rulemaking into the docket so that it will be available to the public and news media.

EO 12866 also requires cost-benefit analyses, of course, which EPA in this case has failed to perform, as we note above.

As a significant regulatory action, the proposal must comply with Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks). EPA states, in its Oct. 4 Notice, that it has determined that EO 13045 does not apply. We think this determination is in error. For one thing, the proposed rulemaking does indeed "concern an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children." Parents who may want to protect their children from toxic emissions that trigger life-threatening asthma attacks, or who want to protect kids from emissions of known carcinogens that could be a cause of childhood leukemia would often lose, under this rule, their first line of defense: information warning them of dangers. What puzzles us most, however, is the reason EPA gives for determining that EO 13045 does not apply; namely, that the proposed rule is not a "significant" regulatory action. This seems to us to be in flat contradiction to EPA's assertion, only a few paragraphs earlier, that it is indeed a significant regulatory action. We see nothing in EO 12866 that says that some significant regulatory actions are more significant than others, or that they are significant only when an agency wants them to be.

EPA also asserts, in Section V.J. of the Oct. 4 Notice, that its proposal is in compliance with Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." We believe, most emphatically, that it is not in compliance with this Executive Order -- and that if there was ever a federal action that had a major adverse impact on minority and low-income populations, this is it.

It is specious to argue, as EPA does, that TRI does not count toward the government's environmental justice goals because its action is not directly regulatory. The failure of Union Carbide to give adequate information or warning to tens of thousands of poor, minority Bhopal residents in 1984 was not directly regulatory, either. But it killed and maimed them.

Information does matter. EPA acknowledges in its Notice that "The principal consequence of finalizing today's action would be to reduce the level of detail available on some toxic chemical releases or management." Yet EPA dismisses this consequence as "small," without quantifying it. We offer as evidence to the contrary the Associated Press' Dec. 13, 2005, "Unhealthy Air" series cited above. It uses TRI data to illuminate the fact that "black Americans are 79 percent more likely than whites to live in neighborhoods where industrial pollution is suspected of posing the greatest health danger." To compromise the completeness or availability of TRI data in any way is to help hide this truth. AP further concludes that "Residents in neighborhoods with the highest pollution scores also tend to be poorer, less educated and more often unemployed than those elsewhere in the country." EPA justifies its neglect of the environmental justice consequences of its proposal by asserting "the impacts will be very small." But EPA does not state what amount of environmental injustice it considers small enough to disregard. We believe this proposal fails to comply with EO 12898.

## **CONCLUSION**

We are grateful for the opportunity to comment on this proposed rule, and urge you to withdraw the proposal entirely in order to protect the American public's vital need to know about the potential health risks they are exposed to by the release of toxic substances into the environment.

Respectfully submitted,

Joseph A. Davis, Ph.D.  
Director, SEJ Watchdog Program

for the Society of Environmental Journalists on behalf of himself and

Ken Ward Jr.  
First Amendment Task Force Chair

Robert McClure  
SEJ Board Liaison

Perry Beeman  
President

The Society of Environmental Journalists

P.O. Box 2492 Jenkintown, PA 19046  
Telephone: (215) 884-8174 Fax: (215) 884-8175  
[sej@sej.org](mailto:sej@sej.org)