



Advocacy: the voice of small business in government

June 8, 2007

The Honorable Barbara Boxer, Chairman
The Honorable James M. Inhofe, Ranking Member
U. S. Senate Committee on Environment and Public Works
Washington, DC 20510-6175

Dear Chairman Boxer and Senator Inhofe:

Thank you for giving me the opportunity to appear before the Committee on Environment and Public Works on February 6, 2007. I appreciate the time and effort the Committee is devoting to understanding the small business perspective on regulatory relief.

Enclosed, please find our answers to your questions which were sent to me on May 18, 2007. In addition, I am submitting these documents electronically, as you requested. Please do not hesitate to contact me or Kevin Bromberg of my staff at (202) 205-6964, Kevin.Bromberg@sba.gov if you have any questions.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Enclosures

Questions for Thomas Sullivan, US Small Business Administration

1. *The Small Business Administration Office of Advocacy is charged with advocating on behalf of small business. However, EPA's reforms to the TRI program have been described as helping large industrial companies, not small businesses. Please explain the disproportionate impact of federal regulations on small businesses and the relevance to TRI reform and how EPA's reforms to the Toxics Release Inventory program benefit small business.*

Many thousands of small businesses will benefit from the December 2006 TRI reform. We estimate that about half of the new relief goes to small businesses.

The 2005 Advocacy-funded study by W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, found that small businesses are disproportionately affected by the total Federal regulatory burden.¹ This overall regulatory burden was estimated by Crain to exceed \$1.1 trillion in 2004.² For firms employing fewer than 20 employees, the annual regulatory burden was estimated to be \$7,647 per employee – nearly 1.5 times greater than the \$5,282 burden estimated for firms with 500 or more employees.³ Looking specifically at compliance with federal environmental rules, the difference between small and large firms is even more dramatic. Small firms generally have to spend 4½ times more per employee for environmental compliance than large businesses do.⁴ Environmental requirements, including TRI paperwork requirements, can constitute up to 72% of small manufacturers' total regulatory costs.⁵ Therefore, the Federal government is properly concerned with environmental regulatory costs on small firms, and particularly those that fall on the manufacturing sector.

Small businesses need regulatory relief and this TRI rule is a small but significant step in that direction.

2. *In your testimony, you described how EPA's December 2006 TRI rule will help small business and strengthen environmental protections. Please describe why you believe that this new rule improves EPA's ability to protect the environment.*

In addition to assisting small businesses via reduced recordkeeping/reporting requirements, EPA's TRI reporting burden reduction rule also provides TRI reporters with incentives to protect the environment. In order to qualify for the benefits associated with

¹ W. Mark Crain, *The Impact of Regulatory Costs on Small Firms* (September 2005) available at <http://www.sba.gov/advo/research/rs264tot.pdf>.

² *Id.* at p. v.

³ *Id.* at page 55, Table 18.

⁴ *Id.*

⁵ *Id.*

the short Form A, many facilities will need to reduce their emissions into the environment and perform more pollution prevention.

By limiting persistent, bioaccumulative and toxic chemicals (PBT) Form A eligibility to facilities with zero releases and 500 pounds or less (Annual Reportable Amount, or ARA)⁶ of other waste management (i.e., recycling, energy recovery, and treatment for destruction), EPA is encouraging facilities to eliminate releases of PBT chemicals and reduce other waste management quantities to 500 pounds or less. Facilities that currently dispose of wastes, such as mercury, would be encouraged to recycle the mercury instead to achieve zero emissions into the environment. This new provision is especially important to the environment because it drives those releases of chemicals of “special concern” (PBTs) to zero.

For non-PBTs, EPA has designed the Form A eligibility criteria in such a way as to create an incentive for facilities to move away from disposal and other releases toward treatment and recycling. This incentive is created by raising the recycling, treatment, and energy recovery portions of the ARA to a 5,000-pound maximum, while capping releases at 2,000 pounds. This approach promotes pollution prevention, recycling, energy recovery, and treatment over releases. In addition, by including all waste management activities in the Form A eligibility criteria, EPA will be newly encouraging facilities above the 5,000-pound ARA to reduce their total waste management in order to qualify for Form A eligibility.

Through expanded Form A eligibility, EPA’s burden reduction rule provides a major incentive for firms to bolster their reputations as environmentally responsible companies.

3. *Please explain why small businesses with fewer than 10 employees are exempt from TRI reporting and why small businesses still need the additional burden reductions from EPA’s December 2006 TRI rule.*

Congress originally set the employee and chemical throughput thresholds, based on data from New Jersey’s right-to-know program, in order to capture the substantial majority of releases from industrial facilities. The original 10-employee statutory exemption was not established as a small business standard, but as a practical method of excluding facilities that were unlikely to pose a significant risk to the community. Now that EPA has nearly twenty years of TRI data, we know that additional burden reductions can be achieved without posing a significant risk to the community.

⁶ The annual reportable amount (ARA) is defined in the final rule as the sum of the quantities reported in sections 8.1 to 8.8 of the Form R, which reflect chemical disposal or other releases (8.1), energy recovery (8.2 and 8.3), recycling activity (8.4 and 8.5), treatment (8.6 and 8.7), and quantities associated with one-time events (8.8). In the pre-2006 version of the ARA, the ARA was defined as the sum of sections 8.1-8.7. The addition of 8.8 represented wastes generated from one-time events.

4. *In your written statement you referred to EPA's action in 1994 to create Form A, as a simpler form for reporting chemical use under TRI than the more complicated Form R. You also referred to "principles that governed the 1994 TRI paperwork reform....." Please explain what you meant by "principles" that governed the creation of Form A, and please describe how those same principles apply to EPA's December 2006 TRI rule.*

As we discussed in our January 2006 comments on the proposal,⁷ EPA proposed to expand the Form A non-persistent, bioaccumulative, and toxic (non-PBT) annual reportable amount (ARA) threshold from 500 pounds to 5,000 pounds. EPA's choice of the proposed 5,000 pound non-PBT ARA threshold was based on several considerations that were first identified in the determinations made in the 1994 final rule establishing the Form A and the 500 pound ARA threshold (59 Fed. Reg. 61488, November 30, 1994). As such, EPA was only recalibrating the 1994 ARA to a higher threshold, based on a review of more current data (2002, instead of 1992). Below are the three principles that I referred to in my statement that underlie the proposal and the final rule:

In 1994, the Form A, and the 500 pound threshold, were justified on the following three findings:

(1) Chemical reporting on a substantial majority of the releases is maintained with the Form A;

(2) Little production-related waste information (approximately 0.1%) will be excluded from Form Rs; and

(3) Each Form A would provide the public with a range report that informs the public that total releases as well as total production-related waste is below a certain threshold.⁸

EPA used the same three criteria in determining and justifying the new 5,000 pound threshold in the December 2006 final rule. EPA asserts a strong factual and legal foundation for the new revisions by using the 1994 approach. An examination of how the above three findings apply to the new 5,000 pound threshold indicates the following. With regard to the first finding, chemical reporting on a substantial majority of releases is maintained by requiring the Form A as part of the reporting, just as in 1994. With regard to the second finding on the new threshold, Table 3 of the preamble to EPA's proposal shows that 99.9 percent of total production-related wastes will still be reported via Form R, even if all the eligible Form R non-PBT reporters switch to use of Form A.⁹ The 5,000 pound threshold is simply a recalibration of the 500 pound threshold from 1994, based on the

⁷ www.sba.gov/advo/laws/comments/epa06_0113.pdf

⁸ 1994 EPA Response to Comments Document, Establishment of Alternate Threshold, November 1994, EPA Docket No. OPPTS-400087A, at page 52.

⁹ 70 Fed. Reg. 57822, 57843 (October 4, 2005).

large number of new chemical reports introduced since 1994 and the continuing reduction in wastes handled by facilities. With regard to the third finding, Form A provides the identical range report information that the total production-related waste is below a certain threshold. The findings for the 2005 proposal are equally applicable to the 2006 final rule because the final rule only increased the number of forms subject to the Form R requirements relative to the proposed rule. See the Table below for a comparison of the 1994 final rule and the 2006 final rule.

Comparison of 1994 Form A Final Rule and 2006 Form A Final Rule

EPA Criteria - ARA	2006 Final 5,000 lbs Non-PBT	2006 Final 500 lbs PBT	1994 Final Rule 500 lbs Non- PBT
Substantial Majority of Releases Captured	Yes	Yes	Yes
99.9 percent of Waste Data on Form R	Yes	Yes	Yes
Form A – Range Report between Zero and Threshold Amount	Yes	Yes	Yes

5. *The SBA Office of Advocacy has contracted with research firms to document the impact EPA’s December 2006 TRI rule will have on small businesses and local communities. Please explain how EPA’s rule will impact communities based on research procured by your agency.*

To evaluate claims of EPA rule impacts, Advocacy requested that E.H. Pechan & Associates, Inc. (Pechan) review information describing how TRI data are currently used, and to evaluate the impact of EPA’s proposed reporting burden relief on these current uses.¹⁰ Pechan’s review focused on comments submitted to EPA in opposition to the proposed reporting revisions.

Pechan analyzed 17 national, state, and local TRI data use examples, and determined that, with the possible exception of one example, EPA’s proposal will have insignificant effects on these data uses.¹¹ Pechan found several instances where the commenters either

¹⁰ E.H. Pechan & Associates, Inc., “Review and Analysis of the Effect of EPA’s Toxics Release Inventory (TRI) Phase II Burden Reduction Proposal on TRI Data Uses,” prepared for U.S. Small Business Administration, Office of Advocacy, June 2007. See <http://www.sba.gov/advo/research/chron.html> for research summary and report. The research summary is also appended to this document.

¹¹ In the case of the Louisville, Kentucky, area analysis, the effect of the proposal was to remove 2 of 19 chemicals from the chemical screening process, but the screening analysis relied on a conservative approach, and these low-risk chemicals accounted for a small portion of the overall risk in the area. It is unclear whether these two chemicals warranted attention, and therefore the true effect of the proposal on

misunderstood or misreported the nature of the proposed TRI revisions, and several cases where they misreported the underlying facts. For example, commenters failed to understand that no changes were proposed for PBTs, such as mercury, when the facility has any releases into the environment. Therefore, data users who were concerned about PBT releases going unreported were addressing a nonexistent issue. Additional examples of types of data uses where no impact is anticipated include uses to support chemical emergency planning and to support characterization of dioxin quantities (dioxins are exempt from EPA's proposal). In addition, many of the examples involve the use of TRI data to target facilities with the highest releases and/or total waste quantities for reductions. These uses are minimally (if at all) affected by EPA's proposal because the proposal limited Form A eligibility to small quantity waste reporters. As noted below, Form A eligibility changes implemented in the final rule and actual Form A utilization rates will only serve to strengthen the conclusions in the study.

Pechan's study identified various reasons for the large disconnect between public dissatisfaction with the TRI reform proposals, and the lack of significant impact found in the study. Two common explanations were: (1) ignorance about the specifics of the reporting revisions; and (2) ignorance about how TRI data are actually used. With respect to the first conclusion, many commenters appeared to be unaware that Form A does not represent a complete loss of Form R quantitative chemical information (a more apt characterization is that Form A creates an incentive for facilities to reduce their chemical use/releases by allowing small quantity handling facilities to use range reporting.) Concerning the second reason, commenters often appeared to be unaware that data users understandably focus on large quantity emitters and PBT emitters that are not Form A eligible under EPA's December 2006 rule.

To illustrate assertions made by states and local communities opposing EPA's proposed reporting burden relief rule, Attachment A describes Pechan's evaluation of one claimed TRI data use impact example described by a State of Washington official. This example reflects use of the TRI to enroll companies in Washington's pollution prevention (P2) program. A Washington official claimed that EPA's proposed TRI reporting changes would require 15 percent of the facilities to drop out of their P2 program. The Pechan study concluded that there was nothing in EPCRA or EPA's proposed regulation that prevented the state from requiring Form A reporters to develop P2 plans. In fact, a different Washington official stated that they had chosen to exclude Form A reporters from P2 planning requirements based on degree of risk.

Pechan determined that the State of Washington only requires that facilities' P2 plans cover 95 percent of their total hazardous products used and/or hazardous wastes generated. Pechan estimated that EPA's *proposed* rule would have reduced total Form R reported waste quantity for Washington by 0.31 percent and total release quantity by 0.64 percent. The analyses indicated that current and potential future Form A reporting involves quantities that are significantly less than the state's 5 percent hazardous waste quantity P2 plan exemption.

this use could not be determined without more analysis. However, under the final rule, the impact would be less, given the changes between the proposal and the final rule.

Implications of TRI Reporting Changes Adopted in Final Rule

It should be noted that the above study was performed for EPA's *proposed* rule. EPA's *final* rule differs significantly from the proposed rule in two ways: (1) the non-PBT annual reportable amount (ARA) has been revised to include section 8.8 (one-time event) quantities, and (2) non-PBT Form A eligibility has been narrowed by adding a 2,000-pound limit on releases of non-PBT chemicals that are considered for Form A. Assuming full use of Form A, EPA notes that the second change preserves almost 60 percent of the total release pounds that would no longer have been reported on Form R under the proposed rule.¹² This fact, coupled with the addition of Section 8.8 quantities in the ARA, will serve to further reduce the nominal impacts described in the Pechan study.

Zip Code Analysis

One of the most oft-cited EPA estimates of impact from the proposed rule is that over 650 zip codes would lose all Form R information (i.e., approximately 7 percent of all zip codes with Form R data). Advocacy requested that Pechan evaluate the significance of EPA's zip code finding with respect to the local community right-to-know. As described below, Pechan determined that these zip codes account for only 0.01 percent of nationwide releases, and the median release for the "all Form A eligible" zip codes is 2 pounds, while the median release for all other zip codes is 6,800 times higher (13,600 pounds).

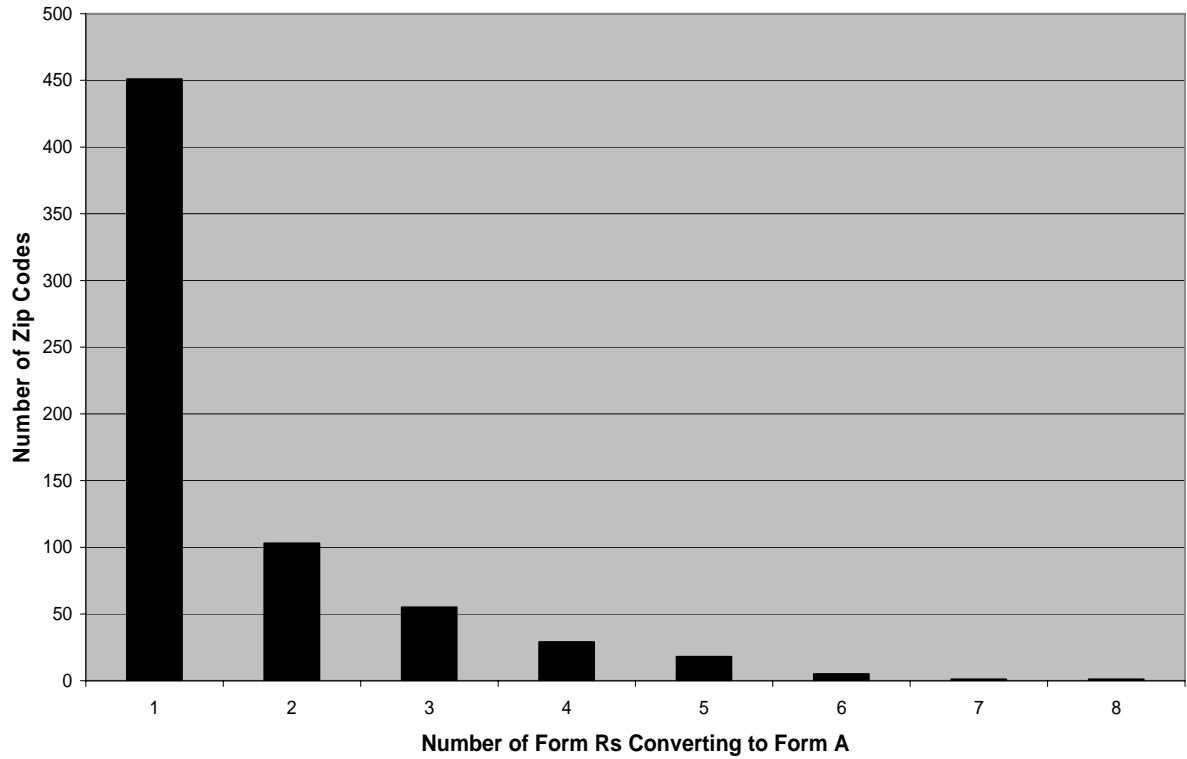
Using 2002 TRI data, Pechan identified 663 additional zip codes for which all current Form Rs will become Form A eligible at the 5,000 pound ARA threshold.¹³ The results are displayed in Figure 1 below. Pechan estimates that 554 of these zip codes have one or two Form Rs. Therefore, the large number of zip codes that can convert entirely to Form A is a function of the fact that a large number of zip codes have one or two reports.

It should be noted that the Figure 1 values reflect EPA's *proposed* rule. As noted above, EPA's *final* rule differs significantly from the proposed rule in such a way that will further reduce the impacts identified in Figure 1.

¹² U.S. Environmental Protection Agency, "Response to Comments, Toxics Release Inventory Phase 2 Burden Reduction Rule," Office of Information Analysis and Access, Office of Environmental Information, December 18, 2006.

¹³ E.H. Pechan & Associates, Inc., "Additional Analysis of TRI Phase II Proposal, Technical Memorandum," prepared for U.S. Small Business Administration, Office of Advocacy, January 12, 2006. http://www.sba.gov/advo/laws/comments/epa06_0113.pdf.

Figure 1. Number of Zip Codes Where All Form Rs Become Form A Eligible



Pechan conducted an additional analysis of EPA’s *proposed* rule that utilized reporting year (RY) 2004 TRI data.¹⁴ This analysis compared release information for zip codes for which all Form Rs become Form A eligible with release information for other zip codes. Table 1 illustrates the very different release characteristics of the zip codes that would have all Form Rs become Form A eligible under EPA’s proposed rule. Although more than 5 percent of RY 2004 zip codes would have all Form Rs become Form A eligible under EPA’s proposed rule, these zip codes cumulatively account for 0.01 percent of total releases. The median release for the “all Form A eligible” zip codes is 2 pounds, while the median release for all other zip codes is 6,800 times higher (13,600 pounds). In other words, for 50 percent of the hundreds of zip codes with only Form A eligible facilities, Form R required reporting would account for 2 pounds or less in annual emissions to the environment. This simply reconfirms the point that a Form A is a mark of superior environmental stewardship, and not a cause for concern about missing data.

¹⁴ Pechan data analysis (March 2007) using RY 2004 TRI data.

Table 1. Comparison Between Zip Codes where All Form Rs Become Eligible For Form A with Zip Codes where One or More Form Rs Are Not Form A Eligible: Reporting Year 2004

Item	All Form Rs Eligible	All/Some Form Rs Not Eligible	Total (All Form Rs)	All Form Rs Eligible as % of Total
Number of Zip Codes	569	10,122	10,691	5.32%
Total Releases	278,067	4,333,771,149	4,334,049,216	0.01%
Mean Releases/Zip Code	489	428,196	405,430	0.12%
Median Releases/Zip Code	2	13,600	10,922	0.02%
Maximum Releases/Zip Code	5,627	458,177,056	458,177,056	0.00%

6. *Is it not true that the original journey towards changes to TRI forms was more substantial in scope and that what EPA is doing is finally delivering on a promise made by the Clinton Administration?*

EPA’s efforts at TRI burden reduction started in 1991 and have spanned both Republican and Democratic Administrations. In 1994, EPA Administrator Carol Browner approved the adoption of the original Form A.¹⁵ In 1997, when EPA expanded the scope of TRI reporting requirements, EPA promised that it would seek additional reductions in the TRI paperwork burden.¹⁶ EPA administrators have spent over 15 years working with the public to develop a new TRI paperwork reduction approach. This effort has included forming a Federal Advisory Committee, conducting an online dialogue with interested parties, holding stakeholder meetings, and going through the notice and comment rulemaking process. The TRI Burden Reduction rule signed in December 2006 is the result of this process.

¹⁵ 59 Fed. Reg. 61488, November 30, 1994.

¹⁶ U.S. Environmental Protection Agency, Final Rule, “Addition of Facilities of Certain Industry Sectors; Revised Interpretation of Otherwise Use; Toxic Release Inventory Reporting, Community Right-to-Know” 62 Fed. Reg. 23,834, 23,887 (May 1, 1997) (“EPA believes that [Form R and Form A] can be revised to make it simpler and less costly for businesses to meet their recordkeeping and reporting obligations . . . EPA is initiating an intensive stakeholder process – involving citizens groups, industry, small businesses and states – to conduct comprehensive evaluation of the current TRI reporting forms and reporting practices with the explicit goal of identifying opportunities, consistent with community right-to-know and the relevant law, to simplify and/or reduce the cost of TRI reporting.”).

The Office of Advocacy's involvement started with our initial comments on the TRI rule in August 1987, suggesting an exemption for all facilities with fewer than 100 employees. This was followed by a formal Advocacy petition in August 1991 to exempt all releases of less than 5,000 pounds per year. EPA responded in 1994 with the original Form A, based on an annual reporting amount (ARA) of 500 pounds. In October 2005, EPA proposed an ARA of 5,000 pounds for non-PBT chemicals, with no additional restriction on releases. In balancing the right-to-know and burdens on reporters, EPA crafted its final relief in December 2006, by introducing a 2,000-pound release restriction on the newly eligible short forms. Thus, in the end, EPA responded to critics on both sides of the issue in fashioning the final rule, and reduced the scale of the proposed relief.

7. There has been a lot of criticism that the switch to Form A will impact right to know at a local level. Can you comment on what you found and if information availability will be curtailed?

The answer to this question is the same as the answer to question #5 and is repeated here for ease of reference.

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exempt from EPA's proposal). In addition, many of the examples involve the use of TRI data to target facilities with the highest releases and/or total waste quantities for reductions. These uses are minimally (if at all) affected by EPA's proposal because the proposal limited Form A eligibility to small quantity waste reporters. As noted below, Form A eligibility changes implemented in the final rule and actual Form A utilization rates will only serve to strengthen the conclusions in the study.

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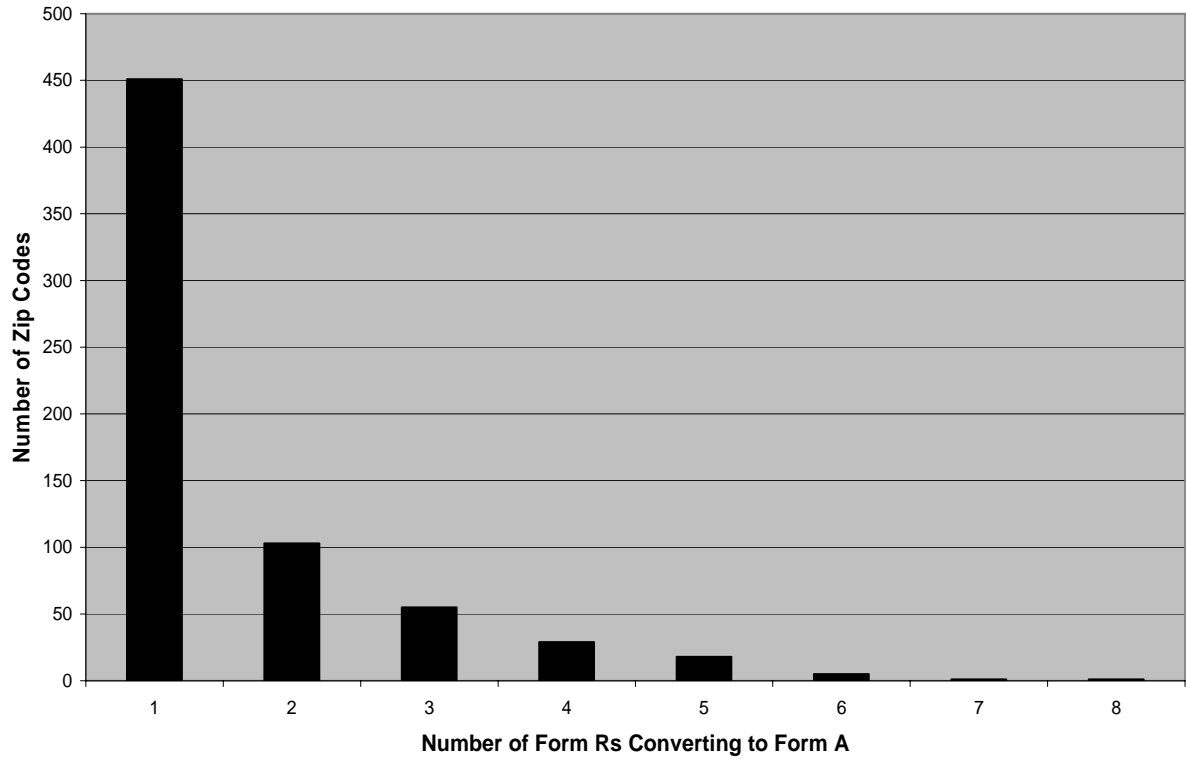
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8. *Is there any clarification that you would like to make to comments made during the Question and Answer period?*

We were disappointed that the testimony offered by John Stephenson of GAO did not reflect our extensive discussions with them on this subject. In particular, I was surprised that the GAO would state that the new Form A would contain “no quantitative information” when it is very clear that all PBT Form As, by definition, mean that there are no releases to air, water and land. Zero releases is a key piece of quantitative information. GAO also declined to mention the fact that each non-PBT Form A is in itself a range report between zero and the relevant threshold quantity, and that the total information preserved on the Form R represented 99.9 percent of the quantitative information currently reported on the Form R. Nor did GAO mention that our October 2004 report conclusion indicated that 99 percent of all 3142 counties in the United States would not be significantly affected by a change in the non-PBT threshold from 500 to either 2,000 or 5,000 pounds.