

April 9, 2001

The Honorable Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Subject: EPA Review of Lead Toxic Release Inventory Reporting Rule

Dear Administrator Whitman:

We are writing regarding the Environmental Protection Agency's (EPA) designation of lead as a highly persistent bioaccumulative toxic (PBT) chemical and lowering of the lead reporting threshold for the Toxic Release Inventory (TRI), pursuant to § 313 of the Emergency Planning and Community Right-to-Know Act in the rule published on January 17, 2001. The Office of Advocacy of the U.S. Small Business Administration was established by Congress pursuant to Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. One of the primary functions of the office is to measure the costs and other effects of Government regulation on small businesses and make recommendations for eliminating excessive or unnecessary regulation of small businesses.

Advocacy disagrees with EPA's certification of this final rule under the Regulatory Flexibility Act that this rule does not impose a significant economic impact on a substantial number of small businesses. We are convinced that the agency has not established an adequate factual basis either for designating lead as a highly persistent bioaccumulative toxic chemical, or for lowering the reporting threshold for lead to 100 pounds under the TRI reporting requirement.

This rule would impose substantial compliance costs on thousands of small businesses and other entities. EPA estimates the rule costs at \$80 million in the first year, although others believe that the reporting costs alone would be much higher. Reporters also face related regulatory costs, such as state stormwater regulations and state TRI filing fees, which could considerably exceed the reporting costs.

EPA has not demonstrated any significant right-to-know value for lowering the reporting threshold for lead to 100 pounds per year under the TRI reporting requirement.

Such reports are unlikely to lead to any hazard reductions at any of the sites that would need to report under the rule, unlike the 2000 TRI reports that are based on the current 10,000 and 25,000 pound reporting thresholds. However, the agency might be able to justify a 1,000 pound reporting threshold based on the greater right-to-know significance of releases at such a level of this substance, which we believe is more toxic than most reported TRI chemicals. We and others suggested about ten years ago that the agency explore a two tier system of reporting, but EPA never acted on the suggestion. Such a common sense solution would significantly ameliorate the small business costs, and would be an appropriate threshold for lead right-to-know reporting. However, because the underlying basis for designating lead as a PBT chemical and lowering the reporting threshold are not supported or justified by the scientific information supporting the rule, we strongly recommend that the scientific analyses, on which this rule is based, be peer reviewed by the EPA Science Advisory Board (SAB), while the effective date of the rule is stayed pending review of the SAB advice.

A. The Agency Did Not Establish a Proper Scientific Basis for the Lead PBT Finding

Unlike the arsenic drinking water final rule, which does have a significant, but contested, scientific regulatory basis, we cannot recall, in more than two decades of reviewing environmental regulations, a more egregious example of a total disregard of the science. In this case, despite the overwhelming scientific consensus on this issue, EPA failed to develop a PBT methodology that could be properly applied to metals, such as lead, in order to make the appropriate threshold determination for TRI reporting.

The 1998 EPA Peer Review Handbook specifically requires peer review of all “major scientific and technical products,” including products used to support major rulemakings. EPA apparently did not take the time to peer review the relevant regulatory documents in its haste to finalize this regulation for reporting year 2001. Indeed, as one EPA scientist told my staff, EPA did not send the EPA PBT/metals approach to the SAB because, “we [knew] that we would receive a ‘no’ from the SAB,” which would have precluded EPA from issuing the lead rule. When my staff later attempted to verify the EPA scientific findings, we were unable to find any support in the published literature, peer-reviewed or otherwise for these findings. When we checked with other scientists from three different Federal agencies, they provided written statements contrary to the EPA views. The EPA Science Advisory Board and international scientific bodies have indicated that the PBT scheme, derived originally solely for organic compounds, not metals, would not be easily applied to metals. The EPA/Industry sponsored workshop on the issue in January 2000 offered only contrary views. No EPA scientist even attempted to defend its own approach. Even the World Wildlife Federation, a leading environmental organization, has indicated that the “PTB [PBT] concept . . . is not fully applicable to metals. All metals are persistent, can accumulate and cause toxic effects. However, they are part of nature and many of them - but not all - are essential for living organisms. Thus the PTB concept does not really

allow for priority setting....”¹ More astonishing, EPA offices do not appear to be in agreement with each other. In the most recent preceding EPA metals/PBT regulatory determination, which involved the Great Lakes in 1995, using the same or virtually the identical lead data, the EPA Office of Water found that no metals (including lead) were PBTs. We are forced to conclude that the position taken by the EPA Office of Environmental Information was driven by policy, and not science, and it is now time to correct this error.

Finally, even EPA acknowledged in the final rule preamble itself that it was deciding the issue of whether lead was a PBT before an “*external peer review [would address] the issue of how lead and other, as yet, unclassified metals such as cadmium, should be evaluated using the PBT chemical framework, including which types of data (and which species) are most suitable for these determinations.*” 66 Fed. Reg. 4518 (January 17, 2001). EPA expected to send its request for Science Advisory Board review of the science underlying this rule in the near future. Why did it decide these science issues in advance of the peer review that even the agency admits was the appropriate procedure? This letter does not address the entire list of scientific criticisms, but this list should suffice to demonstrate that the rule should not go forward. Good public policy dictates that the scientific work inform the regulatory decision, and not that the regulatory agenda overwhelm the science.

B. There are Unlikely to Be any Significant Right-to-Know Benefits to Reporting Releases of Lead at a One Hundred Pound Threshold.

We strongly agree with EPA that the right-to-know is now a critical foundation of modern day environmental protection. We have seen it work. However, we part company with the agency because we would not spend hundreds of millions of dollars annually simply to report releases that are unlikely to pose significant environmental risks anywhere in America. This is in stark contrast to the same EPA that recently eliminated right-to-know reporting from hundreds of thousands of gasoline stations (under sections 311 and 312 of the Emergency Planning and Community Right-to-Know Act). In this rulemaking, the agency places no practical limit on its ability to require information because it failed to evaluate the benefits of receiving the required information in any meaningful fashion. EPA’s position is not consistent with good public policy or common sense, let alone Executive Order 12866 (requiring consideration of costs and benefits), or the Regulatory Flexibility Act (requiring consideration of regulatory alternatives minimizing small business impacts).

It is unlikely that more than a few of the nearly 10,000 new lead reports (EPA estimate) that would result from using a hundred pound reporting threshold, would have any environmental significance. EPA has indicated on several occasions that it is “unable” to make statements about either the environmental significance, or the quantity of the releases. The agency relies on its statements in the final PBT rule that it is not

¹ World Wildlife Fund, Views on the List of Priority Substances for Pollution Reduction and on the Procedure for the Selection of Priority Hazardous Substances for Phase-out Under the EU Water Framework Directive (Oct. 6, 2000)

required to make any estimates or evaluations of these new reports. However, in the case of lead, we do know a substantial amount about this substance, which undermines the EPA's policy regarding this particular chemical.

Based on an examination of the current reporting industries, it is clear that thousands of the new reporters will be reporting releases well under ten, or even one pound per year into the air and water. In contrast, the total annual lead air releases are estimated at 7.8 million pounds annually. (EPA Table A-2, October 2000 Final Economic Analysis). Mobile sources, alone (not in TRI), accounted for over 1.0 million pounds/year. Hundreds of millions of pounds of lead annually wash into streams from natural sources such as soil and rocks. In this context, releases in the order of ten, or even 100, pounds of lead per year are highly unlikely to have any environmental significance (although this is widely misunderstood, releases are almost always a very small fraction of the reporting thresholds, which are based on chemical usage, not releases).

Here are two typical examples. Using EPA data, we estimate that approximately 900 printed circuit board manufacturers (almost entirely small businesses) would report an average of five pounds released into the air annually, at a reporting cost of approximately \$5 million in the first reporting year. In addition, 1,000 or more petroleum wholesalers would report virtually no releases of lead at their fuel depots, at a cost of \$4 million in the first year, because lead is only incidentally released when the fuel is combusted by homes, vehicles, and airplanes. Thus, all these reports involve no releases at the reporting depot.

Is there any basis for a belief that lead releases at the hundred pound threshold can be significant anywhere in the country? Historically, we have not observed anyone, including EPA, using data involving such small quantities of TRI chemicals as part of a risk reduction exercise. Logically, that is the expected result because there is no significant hazard to address. EPA declines to answer the questions posed above, relying on the community's apparently unlimited "right-to-know."

In contrast, to the credit of the agency and other Federal partners, EPA has already identified the significant lead hazards, and these are being addressed today. These actions include consideration of a reduction in the lead content of aviation gas, the reduction of lead-based paint hazards, and the identification of lead-based hazard levels. These plans were made with the knowledge of the national and local use of lead. New TRI reports for lead based on a 100-pound threshold are not designed to lead to any consideration of meaningful risk reductions.

We suggest that a threshold in the neighborhood of 1,000 pounds, or higher, per year, could be a more defensible reporting threshold. A 1,000 pound threshold likely would capture far more than 80% of the remaining releases (not already covered by the current 10,000/25,000 pound thresholds). EPA included a request for comment on the 1,000-pound threshold in its proposal, and such a threshold may be appropriate.

Thus, we support, as an alternative, that EPA examine the establishment of an alternate non-PBT based threshold of 1,000 pounds.

C. Conclusion

Advocacy recognizes that EPA faces two very unpopular courses of action here. On the one hand, EPA could stay the rule, send these science issues for review to the Science Advisory Board, and subject itself to criticism by environmental groups who are unlikely to examine these complex scientific issues here. Alternatively, the agency could do the right thing and admit that its staff failed to adhere to its own standards of scientific integrity in promulgating a rule that did not undergo the appropriate peer review, was not properly grounded in science and posed a considerable burden on small firms. The proper course is clear. This rule should not stand.

We welcome discussion of this issue with your staff. Kevin Bromberg of my staff can be reached at 202-205-6964.

Sincerely,

Susan M. Walthall
Acting Chief Counsel for Advocacy