

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 68

[FRL-5881-8]

List of Regulated Substances and Thresholds for Accidental Release Prevention

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to modify the list of regulated substances and threshold quantities authorized by section 112(r) of the Clean Air Act as amended. EPA is vacating the listing and related threshold for hydrochloric acid solutions with less than 37% concentrations of hydrogen chloride. The current listing and threshold for all other regulated substances, including hydrochloric acid solutions with 37% or greater concentrations and the listing and threshold for anhydrous hydrogen chloride, are unaffected by today's rulemaking. Today's action implements, in part, a settlement agreement between EPA and the General Electric Company (GE) to resolve GE's petition for review of the rulemaking listing regulated substances and establishing thresholds under the accidental release prevention regulations.

DATES: This rule is effective August 25, 1997.

ADDRESSES: Docket: The docket for this rulemaking is A-97-28. This rule amends a final rule, the docket for which is A-91-74. The docket may be inspected between 8:00 a.m. and 5:30 p.m., Monday through Friday, at EPA's Air Docket, Room M1500, Waterside Mall, 401 M St., SW, Washington, DC 20460; telephone (202) 260-7548. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Sicy Jacob, Chemical Engineer, Chemical Emergency Preparedness and Prevention Office, Environmental Protection Agency, MC 5104, 401 M St., SW, Washington, DC 20460, (202) 260-7249.

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities potentially affected by this action include the following types of facilities if the facility has more than the 15,000-pound threshold quantity of hydrochloric acid solutions with concentrations of less than 37% hydrogen chloride.

Category	Example of regulated entities
Chemical manufacturers.	Industrial inorganics.
Petrochemical Other manufacturers.	Plastics and resins. Pulp and paper mills, primary metal production, fabricated metal products, electronic and other electric equipment, transportation equipment, industrial machinery and equipment, food processors.
Wholesalers .. Federal sources.	Chemical distributors. Defense and energy installations.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists types of entities that the EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could be affected. To determine whether your facility is affected by this action, you should carefully examine today's notice. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **For Further Information Contact** section.

The following outline is provided to aid in reading this preamble to the rule:

Table of Contents

- I. Introduction and Background
 - A. Statutory Authority
 - B. Regulatory History
 - C. List Rule Litigation
- II. Discussion of the Final Rule and Public Comments
- III. Judicial Review
- IV. Required Analyses
 - A. Executive Order 12866
 - B. Regulatory Flexibility
 - C. Paperwork Reduction
 - D. Unfunded Mandates Reform Act
 - E. Submission to Congress and the General Accounting Office

I. Introduction and Background

A. Statutory Authority

This final rule is being issued under sections 112(r) and 301 of the Clean Air Act (Act) as amended.

B. Regulatory History

The Clean Air Act (CAA or Act), section 112(r), requires EPA to promulgate an initial list of at least 100 substances ("regulated substances") that, in the event of an accidental release, are known to cause or may be reasonably expected to cause death, injury, or serious adverse effects to human health and the environment. The CAA also requires EPA to establish a threshold quantity for each chemical at the time of listing. Stationary sources

that have more than a threshold quantity of a regulated substance are subject to accident prevention regulations promulgated under CAA section 112(r)(7), including the requirement to develop risk management plans.

On January 31, 1994, EPA promulgated the list of regulated substances and thresholds that identify stationary sources subject to the accidental release prevention regulations (59 FR 4478) (the "List Rule"). This list included hydrochloric acid solutions with concentrations of 30% or greater. Such solutions were assigned a threshold quantity of 15,000 pounds. EPA subsequently promulgated a rule requiring owners and operators of stationary sources with listed substances above their threshold quantities to develop programs addressing accidental releases and to make publicly available risk management plans ("RMPs") summarizing these programs. (61 FR 31668, June 20, 1996) (the "RMP Rule"). For further information on these regulations, section 112(r), and related statutory provisions, see these notices. These rules can be found in 40 CFR part 68, "Chemical Accident Prevention Provisions," and collectively are referred to as the accidental release prevention regulations.

C. List Rule Litigation

The General Electric Company (GE) filed a petition for judicial review of the List Rule regarding EPA's listing criteria under the List Rule, the listing of certain substances in the List Rule, the setting of threshold quantities for certain substances in particular and all regulated toxic substances generally, and the petition process for adding and deleting regulated substances to the list. Recognizing that the public's interest would best be served by settlement of all issues raised in this litigation, GE and EPA agreed to a settlement on April 7, 1997. Under the terms of the settlement agreement, on May 22, 1997 (62 FR 27992), EPA proposed to vacate the listing and related threshold for hydrochloric acid solutions with less than 37% concentrations of hydrogen chloride. EPA is today taking final action on this proposal.

II. Discussion of the Final Rule and Public Comments

Today's final rule adopts without modification the May 22, 1997 (62 FR 27992), proposal to vacate provisions of the accidental release prevention regulations that specifically address hydrochloric acid solutions with less than 37% hydrogen chloride. The basis

and purpose of this rulemaking is set out in the above referenced proposal. As discussed in the proposal, this action addresses the essential element of the dispute between EPA and GE while eliminating the collateral uncertainty that would exist about the regulatory status of the remaining chemicals if the litigation proceeded. EPA has vigorously advocated responsible accident prevention efforts by industry even before enactment of section 112(r). The Agency is concerned that prolonging this dispute may encourage owners and operators of sources who are solely concerned about regulatory compliance to defer engaging in responsible accident prevention activities. By implementing the settlement agreement with GE and by implementing the settlement agreements reached in the other two challenges to the List Rule, EPA will be able to retain on the list of regulated substances nearly all of the chemicals originally listed and eliminate uncertainty about their regulatory status. As also discussed in the proposal, the general duty clause of section 112(r)(1) and the retention on the list of solutions with concentrations of 37% or greater ensures that today's rule is protective of public health in several respects.

EPA received 11 letters commenting on the proposed rule. All of the comments were from industry and trade associations. All commenters supported vacating the listing of hydrochloric acid in concentration below 37%. Several of them specifically supported EPA's stated position that this proposal is protective of public health in several respects and that this action will eliminate uncertainty in the regulated community regarding RMP compliance for hydrochloric acid solutions.

Several commenters brought up technical issues regarding the basis for listing hydrochloric acid in aqueous solution. EPA stated in the proposed rule that it was not reopening the rulemaking record on the listing of hydrochloric acid within the range of 30% to 37%. Any technical issues related to the listing of hydrochloric acid solutions will be addressed if EPA undertakes future regulatory actions regarding such solutions. In agreeing to the settlement with GE and in this related rulemaking, EPA has not conceded or acknowledged any technical deficiencies in its original listing of HCl solutions with less than 37% concentration.

One commenter said that solutions at 37%, as well as those below 37%, should be delisted. EPA considers this issue outside the scope of the current rulemaking. The listing of solutions at

37% and above was decided in the original List Rule and was not reopened by this rulemaking; objections to the listing of 37% solutions should have been made by seeking review of the original List Rule and are now untimely. To the extent that the commenter wishes to reopen the technical merits of listing solutions that are precisely 37% HCl, EPA would address that issue along with other technical issues if EPA were to take further action on hydrochloric acid solutions.

Two commenters referred to comments submitted on the original proposal to list hydrochloric acid solution. EPA addressed comments on the proposed List Rule when it promulgated the final rule (January 31, 1994).

Several commenters questioned the accident history of hydrochloric acid solutions and stated that EPA's accident database does not support listing hydrochloric acid solutions. To the extent to which it is relevant, EPA will consider the up-to-date accident history if it takes any further regulatory actions on the listing of hydrochloric acid solutions.

One commenter stated that EPA overestimated the number of regulated sources that would not have to comply with the List rule as a result of this vacatur. EPA's estimate of 800 sources was based on preliminary, conservative assumptions that EPA used to determine that a regulatory impact analysis was not required and was not related to the basis for the proposal. The number and type of sources that are affected by a listing are irrelevant under sections 112(r)(3) and (4). The Agency recognizes that this estimate may represent a conservative picture of the effect of the rule on the regulated community.

One commenter stated his understanding that hydrochloric acid solutions of 36.94% would not be covered by the RMP rule. EPA confirms that all solutions that can be accurately measured at less than 37% are excluded.

EPA also proposed on May 22, 1997, to extend the RMP rule compliance deadline for hydrochloric acid solutions with concentrations of 30% to 37% if EPA did not take final action to vacate the hydrochloric acid listing as proposed. Because EPA is vacating the listing of such solutions by the final action today, no action is necessary on this alternative proposal. If EPA were to relist these solutions in the future, then sources would have three years from the new listing to comply with the RMP rule.

Finally, as stated in the proposal, EPA wishes to clarify that this rule will not

affect in any way the listing of anhydrous hydrogen chloride. Anhydrous hydrogen chloride will retain its 5000-pound threshold. Threshold determination provisions for regulated toxic substances would apply to anhydrous hydrogen chloride. Anhydrous mixtures of hydrogen chloride would be subject to the mixture provisions for regulated toxic substances. Aqueous mixtures of hydrochloric acid would be affected to the extent that the minimum concentration cutoff would be revised.

Based on the reasons discussed above, EPA is vacating the listing in part 68 of hydrochloric acid solutions at concentrations of less than 37% (from 30% up to 37%) hydrogen chloride. Solutions of 37% or greater will not be affected by today's rule and remain on the list. In addition, EPA is vacating other provisions of the accidental release prevention regulations insofar as they apply to hydrochloric acid solutions at concentrations less than 37% hydrogen chloride. For example, the reference to "hydrochloric acid (conc 30% or greater)" in the toxic endpoint table for 40 CFR part 68 will be revised to refer to concentrations of 37% or greater.

III. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of the actions taken by this final rule is available only on the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of this action. Under section 307(b)(2) of the CAA, the requirements that are subject to today's notice may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

IV. Required Analyses

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must judge whether the regulatory action is "significant," and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal government or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and, therefore, is not subject to OMB review.

B. Regulatory Flexibility

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has also determined that this rule will not have a significant negative economic impact on a substantial number of small entities. This final rule will not have a significant negative impact on a substantial number of small entities because it will reduce the range of hydrochloric acid solutions listed under part 68 and thus reduce the number of stationary sources subject to part 68.

C. Paperwork Reduction

This rule does not include any information collection requirements for OMB to review under the provisions of the Paperwork Reduction Act.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to

identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Today's rule will reduce the number of sources subject to part 68. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reason, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of the rule in

today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 68

Environmental protection, Chemicals, Chemical accident prevention, Extremely hazardous substances, Incorporation by reference, Intergovernmental relations, Hazardous substances, Reporting and recordkeeping requirements.

Dated: August 19, 1997.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, title 40, chapter I, subchapter C, part 68 of the Code of Federal Regulations is amended as follows:

PART 68—CHEMICAL ACCIDENT PREVENTION PROVISIONS

1. The authority citation for part 68 continues to read as follows:

Authority: 42 U.S.C. 7412(r), 7601(a)(1), 7661-7661f.

§ 68.130 Tables 1 and 2 [Amended]

2. In § 68.130 List of substances, Table 1 is amended by revising the listing in the column "Chemical name" from "Hydrochloric acid (conc 30% or greater)" to "Hydrochloric acid (conc 37% or greater)."

3. In § 68.130 List of substances, Table 2 is amended by revising the listing in the column "Chemical name" from "Hydrochloric acid (conc 30% or greater)" to "Hydrochloric acid (conc 37% or greater)," and by adding a note "d" between note "c" and "e" at the end of the table to read as follows:

"d Toxicity of hydrogen chloride, potential to release hydrogen chloride, and history of accidents."

Appendix A of Part 68 [Amended]

4. Appendix A of Part 68 is amended by revising the listing in the column "Chemical name" from "Hydrochloric acid (conc 30% or greater)" to "Hydrochloric acid (conc 37% or greater)."

[FR Doc. 97-22511 Filed 8-22-97; 8:45 am]

BILLING CODE 6560-50-P