

**PART 80—[AMENDED]**

1. The authority citation for part 80 continues to read as follows:

**Authority:** 42 U.S.C. 7414, 7545 and 7601(a).

2. In § 80.27(a)(2)(ii), the table is amended by revising the entry for Colorado and footnote 2 to read as follows:

**§ 80.27 Controls and prohibitions on gasoline volatility.**

- (a) \* \* \*
- (2) \* \* \*
- (ii) \* \* \*

**APPLICABLE STANDARDS<sup>1</sup> 1992 AND SUBSEQUENT YEARS**

State	May	June	July	August	September
Colorado <sup>2</sup> .....	9.0	7.8	7.8	7.8	7.8

<sup>1</sup> Standards are expressed in pounds per square inch (psi).

<sup>2</sup> The Colorado Covered Area encompasses the Denver-Boulder-Greeley-Ft. Collins-Loveland, CO, 8-hour ozone nonattainment area (see 40 CFR part 81).

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 372**

[EPA-HQ-TRI-2009-0602; FRL-8948-3]

**RIN 2025-AA24**

**Toxics Release Inventory Articles Exemption Clarification Proposed Rule**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to take two actions relating to the articles exemption under the Toxics Release Inventory (TRI) program. First, EPA proposes to formally remove a paragraph of guidance dealing with releases due to natural weathering of products that appeared in the Reporting Forms and Instructions (RF&I) from 1988 to 2001. This guidance was absent from the Reporting Forms and Instructions after 2001, but formal notice of its removal was never issued. EPA here provides notice that this language has been removed and may not be relied on by reporting facilities. Second, EPA is proposing an interpretation of how the articles exemption applies to the Wood Treating Industry, specifically to treated wood that has completed the treatment process. We are requesting comment on both of these actions.

**DATES:** Comments, identified by Docket ID No. EPA-HQ-TRI-2009-0602, must be received by EPA on or before October 23, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-

TRI-2009-0602, by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.

- *E-mail: oei.docket@epa.gov*
- *Mail:* OEI Docket, Environmental Protection Agency, Mailcode 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

- *Hand Delivery:* EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-HQ-TRI-2009-0602. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information for which disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any

disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Electronic files should avoid the use of special characters or any form of encryption and must be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

**Docket:** All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information for which disclosure is restricted by statute. Certain other materials, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the OEI Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Public Reading Room is open Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OEI Docket is (202) 566-1752.

**FOR FURTHER INFORMATION CONTACT:** For general information on TRI, contact the Emergency Planning and Community Right-to-Know Hotline at (800) 424-9346 or (703) 412-9810, TDD (800) 553-7672, *http://www.epa.gov/epaoswer/hotline/*. For specific information on this rulemaking contact: Steven DeBord, Toxics Release Inventory Program Division, Mailcode 2844T, OEI,

Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460; Telephone: (202) 566-0731; E-mail: *DeBord.Steven@epa.gov*.

#### SUPPLEMENTARY INFORMATION:

### I. Why Is EPA Issuing This Proposed Rule?

EPA has learned that there is some confusion in the regulated community regarding a paragraph discussing the articles exemption that appeared in the Reporting Forms and Instructions (RF&I) between 1988 and 2001. This paragraph paraphrased guidance issued in an October 24, 1988, letter to a specific facility. In 2001, we determined that the paragraph could be misinterpreted as indicating that the exemption has a broader scope than intended, and therefore the paragraph was not included in subsequent Reporting Forms and Instructions. Removal of the paragraph occurred without public notice or opportunity for comment. We are now providing notice of the removal and an opportunity for comment.

We are aware that the Wood Treating Industry has relied upon a misinterpretation of the RF&I paragraph in determining the amount of releases reportable from their facilities. We are proposing an explanation of how the articles exemption applies to the Wood Treating Industry.

### II. Does This Action Apply to Me?

This action applies to facilities that submit annual reports under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) and section 6607 of the Pollution Prevention Act (PPA). To determine whether your facility would be affected by this action, you should carefully examine the applicability criteria in part 372, subpart B, of Title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the individuals listed in the preceding

#### FOR FURTHER INFORMATION CONTACT

section. This action is also relevant to those who utilize EPA's TRI information, including State agencies, local governments, communities, environmental groups and other non-governmental organizations, as well as members of the general public.

### III. What Is EPA's Statutory Authority for Taking This Action?

These actions are proposed under sections 313(g), 313(h), and 328 of EPCRA, 42 U.S.C. 11023(g), 11023(h) and 11048, and section 6607 of the Pollution Prevention Act (PPA), 42 U.S.C. 13106.

In addition, Congress granted EPA broad rulemaking authority. EPCRA section 328 provides that the "Administrator may prescribe such regulations as may be necessary to carry out this chapter" (28 U.S.C. 11048).

### IV. Background Information

#### A. What Are the Toxics Release Inventory Reporting Requirements and Who Do They Affect?

Pursuant to section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), certain facilities that manufacture, process, or otherwise use specified toxic chemicals in amounts above reporting threshold levels must submit annually to EPA and to designated State officials toxic chemical release forms containing information specified by EPA. 42 U.S.C. 11023. In addition, pursuant to section 6607 of the Pollution Prevention Act (PPA), facilities reporting under section 313 of EPCRA must also report pollution prevention and waste management data, including recycling information, for such chemicals. 42 U.S.C. 13106. These reports are compiled and stored in EPA's database known as the Toxics Release Inventory (TRI).

Regulations at 40 CFR part 372, subpart B, require facilities that meet all of the following criteria to report:

- The facility has 10 or more full-time employee equivalents (*i.e.*, a total of 20,000 hours worked per year or greater; see 40 CFR 372.3); and
- The facility is included in a North American Industry Classification System (NAICS) Code listed at 40 CFR 372.23 or under Executive Order 13148, Federal facilities regardless of their industry classification; and
- The facility manufactures (defined to include importing), processes, or otherwise uses any EPCRA section 313 (TRI) chemical in quantities greater than the established thresholds for the specific chemical in the course of a calendar year.

Facilities that meet the criteria must file a Form R report or, in some cases, may submit a Form A Certification Statement, for each listed toxic chemical for which the criteria are met. As specified in EPCRA section 313(a), the report for any calendar year must be submitted on or before July 1 of the following year. For example, reporting year 2004 data should have been postmarked on or before July 1, 2005.

The list of toxic chemicals subject to TRI reporting can be found at 40 CFR 372.65. This list is also published every year as Table II in the current version of the Toxics Release Inventory Reporting

Forms and Instructions. The current TRI chemical list contains 581 chemicals and 30 chemical categories.

The manufacturing, processing, or otherwise use of a toxic chemical are threshold activities that trigger reporting to the TRI program. After a regulated facility determines it has performed a threshold activity with a listed chemical, that facility then calculates quantities of the chemical that are manufactured, processed, or otherwise used at the facility to determine if the threshold quantity has been exceeded and reporting is required. In 1988, EPA promulgated an articles exemption from threshold quantity calculations and reporting requirements for manufactured items that contain toxic chemicals. (53 FR 4500, February 16, 1988)

#### B. Definition of Article

The term "article" is defined in the TRI regulations at 40 CFR 372.3:

"Article" means a manufactured item: (1) Which is formed to a specific shape or design during manufacture; (2) which has end use functions dependent in whole or in part upon its shape or design during end use; and (3) which does not release a toxic chemical under normal conditions of processing or use of that item at the facility or establishments.

#### C. Articles Exemption

The articles exemption at 40 CFR 372.38(b) states:

*Articles.* If a toxic chemical is present in an article at a covered facility, a person is not required to consider the quantity of the toxic chemical present in such article when determining whether an applicable threshold has been met under § 372.25, § 372.27, or § 372.28 or determining the amount of release to be reported under § 372.30. This exemption applies whether the person received the article from another person or the person produced the article. However, this exemption applies only to the quantity of the toxic chemical present in the article. If the toxic chemical is manufactured (including imported), processed, or otherwise used at the covered facility other than as part of the article, in excess of an applicable threshold quantity set forth in § 372.25, § 372.27, or § 372.28, the person is required to report under § 372.30. Persons potentially subject to this exemption should carefully review the definitions of article and release in § 372.3. If a release of a toxic chemical occurs as a result of the processing or use of an item at the facility, that item does not meet the definition of article.

### V. What Led to the Development of This Proposed Rule?

In 2007, members of the wood treating industry ("the wood treaters") contacted EPA for guidance on reporting releases from treated wood after it has left the treatment process and is either sitting on a drip pad or in storage. The wood

treaters cited various past EPA guidance documents including a paragraph found in the Reporting Forms and Instructions (RF&I) from 1988 to 2001 for the contention that they need not report releases from treated wood in storage. EPA responded in an October 15, 2007, letter explaining that the wood treaters had misinterpreted the past guidance and when the guidance is properly applied to their processes, releases from wood post-treatment must be reported to EPA. The wood treaters challenged this letter and, on May 15, 2008, a preliminary injunction was issued by the U.S. District Court for the District of Columbia against EPA enforcing its interpretation. EPA is proposing this rule to clarify past guidance on this issue and to provide an opportunity for public comment on its interpretation. The following is a chronology of relevant guidance that has been issued relating to the articles exemption and how it applies under circumstances of natural weathering.

In 1988, a facility that used plastic wrap to enclose their products posed a question to EPA concerning releases from the plastic. The facility asked how the articles exemption applied to extremely minor releases occurring from the hot-knife cutting of the plastic film. We explained in a letter that even though the releases were extremely small, they were in fact caused by the use of the film. (Oct. 24, 1988, letter from Charles Elkins, Director of Office of Toxic Substances, to Geraldine Cox of Chemical Manufacturers Association; "Elkins letter"). As such, we determined that these releases were not exempt under the articles exemption because they resulted from use of the plastic wrap. To distinguish from these releases that were caused by use of the plastic, we addressed even smaller releases, for instance, releases that the plastic rolls emitted while sitting in storage before use. It is noteworthy that this facility did not manufacture the plastic wrap but had it delivered by an outside supplier. The rolls while sitting in storage had not yet been processed or used at the facility. We explained that certain very low level releases that occur over the life of the product would not disqualify an item from the articles exemption if they were analogous to "weathering" or "natural deterioration." For the plastic film, we said "the normal low-level migration of [toxic chemicals] from the plastic film does not constitute a release reportable under Section 313."

In the 1988 RF&I, we inserted language paraphrasing the rationale of the Elkins letter. The inserted language in the RF&I said:

You are not required to count as a release, quantities of an EPCRA section 313 chemical that are lost due to natural weathering or corrosion, normal/natural degradation of a product, or normal migration of an EPCRA section 313 chemical from a product. For example, amounts of an EPCRA section 313 chemical that migrate from plastic products in storage do not have to be counted in estimates of releases of that EPCRA section 313 chemical from the facility.

When the above-quoted text was reviewed in preparation for release of the 2002 RF&I, we determined that it could cause confusion among reporting facilities because the guidance was to be applied only in limited circumstances that were not clearly explained. The guidance was directed at items that had qualified as articles prior to any natural weathering because these items did not release toxic chemicals due to processing or use at the facility. It did not address how processing or use of an item could change the reportability of releases from the item. EPA, therefore, determined not to include this language in the 2002, and subsequent, RF&I. EPA did not, however, provide formal notice or explanation of the removal of this language.

## VI. Proposed Action

### A. First Proposed Action: Withdrawal of Paragraph From RF&I Guidance

With this proposed rule, we give notice of our intent to formally remove the following language that was found in the Reporting Forms and Instructions (RF&I) from 1988 to 2001:

You are not required to count as a release, quantities of an EPCRA section 313 chemical that are lost due to natural weathering or corrosion, normal/natural degradation of a product, or normal migration of an EPCRA section 313 chemical from a product. For example, amounts of an EPCRA section 313 chemical that migrate from plastic products in storage do not have to be counted in estimates of releases of that EPCRA section 313 chemical from the facility.

We do not propose to replace this removed language in the RF&I and we will not rely upon this language in any future determinations. As discussed above, this paragraph was a poor paraphrasing of the 1988 Elkins letter. The interpretation set forth in the Elkins letter still represents Agency policy and is much better stated in that letter than it was in the short paraphrasing that appeared in the RF&I from 1988 to 2001. The Elkins letter, when read in its entirety, presents relevant context and explains clearly what constitutes natural weathering or deterioration and how these are addressed by the articles exemption. Given the ready availability of that guidance, we see no reason to

either reproduce it or attempt to paraphrase it in the RF&I. We are requesting comment on the above interpretation and the corresponding removal of the paragraph in the RF&I.

### B. Second Proposed Action: Application of This Interpretation to the Wood Treating Industry

As mentioned above, in at least one industry (facilities engaged in treating of lumber with preservatives such as creosote), some facilities have improperly used the articles exemption to avoid reporting potentially large releases from items in storage. In the case at hand, lumber had been impregnated with a number of toxic chemicals (as preservatives), and after treatment, the lumber sat in various types of holding areas, or was moved directly to transportation vehicles. In any case, it appeared that some amount of toxic chemicals continued to be emitted to the air (and/or still dripping to pads or the ground) at the facility as a result of the treatment. Several facilities had incorrectly applied the Elkins and RF&I guidance and determined that the releases and off-gassing of toxic chemicals from freshly manufactured treated wood products could be considered "natural weathering" or "low-level migration" releases and thus would be exempt from reporting based on the RF&I paragraph.

We do not dispute the assertion of the trade association representing wood treaters that some ambiguity existed in the various iterations of our past guidance with respect to appropriate treatment of very low levels of releases that are analogous to "weathering" or "natural deterioration," and that further clarification with opportunity to comment would be appropriate. This proposed rule clarifies how the articles exemption applies to the wood treatment industry.

The articles exemption clearly states that an item releasing toxic chemicals *as a result of processing or use of the item*, does not qualify as an article. (40 CFR 372.38(b)) EPA did not intend for the phrase "*as a result of processing or use*" to apply only at the instant of processing or use. That would imply that releases from an item that result from use or processing but occur at a later time could be ignored. When Congress passed EPCRA, the intent was to provide communities and others with as full a view as practicable with respect to releases of toxic chemicals. (42 U.S.C.11023) When EPA crafted the definition of article in 372.3, the Agency expected that the qualifier "does not release a toxic chemical under normal conditions of processing or use" of the

item was sufficient to reduce burden on facilities calculating threshold quantities and still capture important information on toxic releases. We emphasized in the 1988 preamble to the Final Toxic Chemical Release Reporting Rule “that under this definition an item will not qualify as an article if there are releases of toxic chemicals from the normal use or processing of that item” and when applying this definition, facilities “should keep this release factor in mind.” (53 FR 4507, February 16, 1988) The preamble did not specifically define “normal use or processing,” but it provided examples for applying the release factor. For instance, the milling of metals generates fume or dust which would disqualify the metal as an article. As a counterexample, if the only release is the disposal of solid scrap that is recognizable as having the same form as the item, the item can still qualify as an article. In general, the disposal of an item after use is not a release that would disqualify an item from being an article.

The original intent of the articles exemption was to reduce burden on facilities that had articles on their premises by reducing the materials that would have to be evaluated for threshold and release determinations. (53 FR 4507, February 16, 1988) The exemption was not intended to exclude reporting on releases that could lead to exposure to toxic chemicals and the qualifier to the definition of “article” was crafted to ensure those releases would still be reported.

As noted above, we are now aware of instances where items may have exited the production or manufacturing phase and are still releasing toxic chemicals at the facility—a scenario not discussed in the 1988 Final Rule. These items are being held in storage at the facility and despite the fact they are not in that instant being processed or used continue to release toxic chemicals that are due to the item’s earlier processing or use at the facility.

For example, consider a manufacturer of treated lumber products that has finished the processing (*i.e.*, injection) of the lumber items. From the moment of the processing through and including when the lumber is in storage, the lumber continues to release toxic chemicals into the environment due only to the processing. If the chemicals hadn’t been injected during the processing, they wouldn’t be released during storage. So long as the lumber is releasing toxic chemicals as a result of the earlier processing, it will not qualify as an article. When the manufacturer incorrectly applies the articles exemption from the point processing

ends, he or she undercounts facility-wide emissions to the environment.

EPA believes it is reasonable to limit the applicability of the articles exemption to releases other than those from processing or use of an item because the purpose of the TRI program is to provide comprehensive information on releases. Among other similar purposes, section 313 of EPCRA is intended to inform communities about toxic chemicals in their area and provide information to regulators to aid in the development of regulations. Without collecting information on post-processing releases, communities near lumber yards, and others such as regulators who need to understand facility-wide emissions, would be given a skewed view of the actual emissions from the wood treating operation as a whole.

Further, EPA believes wood treaters are in a unique position to provide information on post-processing releases because they have knowledge of the types and quantities of chemicals used in the treatment and of their likely disposition (*e.g.*, whether they stay in the product). Wood treaters may use the data they have available to them to estimate such releases. Section 313(g)(2) of EPCRA provides “a facility may use readily available data (including monitoring data) collected pursuant to other provisions of law, or, where such data are not readily available, reasonable estimates of the amounts involved.” 42 U.S.C. 11023(g)(2). EPCRA does not require “monitoring or measurement of the quantities, concentration or frequency of any toxic chemical released into the environment beyond that monitoring and measurement required under other provisions of law or regulation.” *Id.* Given this standard for providing information on toxic chemicals, EPA believes that wood treating facilities should be able to use the existing data available to them to estimate releases from treated wood after it has exited the treatment process.

Post-processing releases are distinguishable from low-level releases due to natural weathering of articles because releases due to natural weathering are not the result of any processing or use of the article conducted at a facility. In other words, nothing a facility has done will cause these natural releases from articles to occur. Because the natural weathering occurs regardless of processing or use, the facility may not have any reliable information on how much is being released. Lacking any information of even what chemicals are involved could lead a facility to provide highly

inaccurate information. EPA believes the usefulness of such reporting on releases from natural weathering from articles does not outweigh the burden required to report on such releases.

Based upon the discussion above, our interpretation of how the articles exemption applies to the Wood Treating Industry is:

1. The Elkins guidance concerning “natural weathering”, “natural deterioration”, or “low-level migration” releases of chemicals does not apply to releases that occur due to processing or use even if those releases occur after processing or use has ended;

2. There is a rebuttable presumption that any releases (*e.g.* off-gassing or drippage) of toxic chemicals from treated items at the wood treatment facility are “as a result of processing or use at the facility;”

3. If a release of a toxic chemical occurs as a result of the processing or use of an item at the facility, that item does not meet the definition of article and the releases from the item are not exempt.

We are requesting comment on this interpretation of the TRI regulations.

#### **VII. How will this action affect EPA rules and policies concerning toxic releases from materials held in storage at facilities?**

Finally, we wish to summarize how releases from materials or items in storage that do not qualify as articles must be reported at facilities where a threshold activity has been triggered. Although storage is not a threshold activity, regulated facilities may still be required to report 313 toxic chemical releases from storage if a threshold activity is performed, and threshold quantities are exceeded at the facility. 40 CFR 372.25(c) states that “the facility must report if it exceeds any applicable threshold and must report on all activities at the facility involving the chemical, except as provided in § 372.38.”

We have further explained this requirement when asked: “If a facility has a chemical in storage but does not process or otherwise use it during the reporting year, is the owner/operator subject to reporting?” Our response was:

No. Storage, in itself, would not meet an activity threshold under EPCRA Section 313 (**Note:** the facility may have reporting requirements under other portions of EPCRA such as Sections 311 and 312). However, if the facility exceeds the manufacturing, processing, or otherwise use threshold for the same toxic chemical elsewhere at the facility, the facility must consider releases from the storage of the toxic chemical. The facility must also consider the amount of the Section

313 chemical in storage when calculating the maximum amount on-site during the year. (Question 87 found in the 1998 EPCRA Section 313 Questions and Answers document, December 1998, EPA 745-B-98-004)

With this proposed rule, we are not altering the requirement of reporting releases from items or products in storage when reporting is triggered by threshold activities at the facility.

**VIII. Regulatory Assessment Requirements**

*A. Executive Order 12866, Regulatory Planning and Review*

OMB has determined this action is not a “significant regulatory action” under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and therefore is not subject to review under the EO. EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in the “Economic Analysis of the Toxics Release Inventory Articles Exemption Clarification Proposed Rule.” A copy of the analysis, which is available in the docket for this action, is described below.

1. Methodology

This proposed rule is expected to create additional burden for only the Wood Preservation industry. No additional facilities will be brought under TRI jurisdiction through this rule.

This industry (NAICS 321114) consists of “establishments primarily

engaged in (1) treating wood sawed, planed, or shaped in other establishments with creosote or other preservatives such as chromated copper arsenate to prevent decay and to protect against fire and insects and/or (2) sawing round wood poles, pilings, and posts and treating them with preservatives (US Census Bureau, 2003).” At issue in the proposed rule is the potential release (during storage) and subsequent reporting of TRI chemicals found in wood preservation. Clarification of the articles exemption rule as it applies to the correct reporting of these chemical releases will only apply to current TRI reporters as it does not affect reporting threshold calculations. It will not change the number of facilities reporting to TRI or the number of reports filed.

Since the proposed rule simply removes certain language and clarifies other language in the TRI Reporting Forms and Instructions document, facilities are only expected to incur burden due to rule familiarization. The current OMB-approved TRI reporting burden estimates assume that facilities have made all required calculations as a part of form completion. Therefore, any calculations that wood preservation facilities might incur to revise their release estimates to include quantities they currently do not include in release amounts are not attributable to the proposed rule given that they should already have been made.

Under the proposed rule, EPA expects that 252 Wood Preservation facilities (NAICS 321114) would incur rule familiarization burden. The incremental burden estimates associated with rule familiarization consist of time to read and interpret the clarified language outlined in the proposed rule and are based on the following assumptions:

- The first-year management burden includes 15 minutes to be briefed regarding the clarified language. It is assumed that facilities will fully comprehend the clarified language by the subsequent year of reporting; therefore, no rule familiarization burden is required in subsequent years.
- The first-year technical burden includes 30 minutes to read and interpret the clarified language. An additional 15 minutes will be required to brief management regarding the clarified language. It is assumed that facilities will fully comprehend the clarified language by the subsequent year of reporting; therefore, no rule familiarization burden is required in subsequent years.
- There is no first or subsequent-year burden on clerical staff associated with rule familiarization.

2. Cost and Burden Results

Unit and Total incremental reporting burden and costs associated with the proposed rule are presented in Tables 1 and 2 below.

TABLE 1—ESTIMATED FIRST AND SUBSEQUENT YEAR BURDEN ASSOCIATED WITH THE PROPOSED RULE

Activity	Labor category			Total unit burden	Number of facilities	Total burden
	Managerial	Technical	Clerical			
<b>Incremental First-Year Burden (hours)</b>						
Rule Familiarization .....	0.25	0.75	0.00	1.00	252	252
Total .....	0.25	0.75	0.00	1.00	252	252
<b>Incremental Subsequent-Year Burden (hours)</b>						
Form Completion .....	0.00	0.00	0.00	0.00	0	0
Total .....	0.00	0.00	0.00	0.00	0	0

TABLE 2—ESTIMATED INCREMENTAL COSTS ASSOCIATED WITH THE PROPOSED RULE

Activity	Unit cost	Number of facilities	Total cost
<b>First Year</b>			
Rule Familiarization .....	\$55.07	252	\$13,877
Annual Total .....			13,877

TABLE 2—ESTIMATED INCREMENTAL COSTS ASSOCIATED WITH THE PROPOSED RULE—Continued

Activity	Unit cost	Number of facilities	Total cost
<b>Subsequent Years</b>			
Rule Familiarization .....	\$0.00	0	0.00
Annual Total .....			0.00

This proposed rule is estimated to result in one-time compliance burden of 252 hours with an associated cost of \$13,877.00 to subject facilities in the first year that the rule takes affect.

3. Data Impacts

The impact of this action should be primarily the inclusion to the reportable emissions totals of any releases from treated lumber items that some facilities may have previously considered exempt as articles.

For more information, see the Economic Analysis of the Toxics Release Inventory Articles Exemption Clarification Proposed Rule.

*B. Paperwork Reduction Act*

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, an agency may not conduct or sponsor, and a person is not required to respond, to a collection of information that requires Office of Management and Budget (OMB) approval under the PRA, unless it has been approved by OMB and displays a valid OMB control number. The information collection requirements related to the Toxic Release Inventory are already approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* That Information Collection Requests (ICRs) documents have been approved under OMB control numbers 2070–0093 and 2070–0143 (EPA ICR numbers 1363 and 1704 respectively). This rule does not impose any new requirements that require additional OMB approval.

The Paperwork Reduction Act mandates that federal agencies estimate the record keeping and reporting burden of a proposed rule. In this context, the term “burden” is interpreted as the total time, effort, or financial resources expended by people to generate, maintain, retain, disclose, or provide information to or for a federal agency. This includes the time needed by regulated entities to review instructions and to develop, acquire, install, and use technology and systems to collect, validate, verify, and disclose information. Time taken to adjust existing ways to comply with any previously applicable instructions and requirements and to train personnel to respond to the information collection task is also included. In this section, burden hours for both the industry respondents and the government are estimated.

*C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 USC 601 et seq.*

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business that is primarily engaged in (1) treating wood sawed, planed, or shaped in other establishments with creosote or other preservatives such as chromated copper arsenate to prevent decay and to protect against fire and insects and/or (2) sawing round wood poles, pilings, and posts and treating them with preservatives as defined by NAICS code 321114 with annual receipts less than 10 million dollars (based on Small Business Administration size standards); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The estimated impacts to small companies under the proposed rule are presented in Table 3 below. The 252 facilities are owned by 158 parent companies. Of the 158 affected parent companies, 148 are small businesses. Of the affected small businesses, all 148 have cost impacts of less than 1%. No small businesses are projected to have a cost impact of 1% or greater. Of the 148 estimated cost impacts, there is a maximum impact of .089% and a minimum impact of 0.000001% each affecting one small business. The mean and median impacts are estimated to be 0.003% and 0.001% respectively.

TABLE 3—SUMMARY OF IMPACTS ON SMALL ENTITIES

	Estimated number of affected entities	Estimated number of affected small entities	Estimated number of small entities with impacts of 3 percent or greater	Estimated number of small entities with impacts between 1 and 3 percent	Estimated number of small entities with impacts less than 1 percent
First Year .....	158	148	0	0	148
% of Small Entities .....			0	0	100
Subsequent Years .....	0	0	0	0	0
% of Small Entities .....			0	0	0

After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

#### *D. Unfunded Mandates Reform Act*

EPA has determined that this proposed 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. This proposed rule is estimated to result in one-time compliance costs of \$13,877.00 to the private sector. In addition, this rule does not create any additional federally enforceable duty for State, local and tribal governments. Thus, this proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### *E. Executive Order 13132, Federalism*

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

#### *F. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations

that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes." This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175.

#### *G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks*

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

#### *H. Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This proposed rule does not establish technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment.

This proposed rule does not relax the control measures on sources regulated by the rule and therefore will not cause emissions increases from these sources.

#### **List of Subjects in 40 CFR Part 372**

Environmental protection, Community right-to-know, Reporting and recordkeeping requirements, Toxic chemicals, Articles Exemption.

Dated: August 17, 2009.

**Lisa P. Jackson,**  
Administrator.

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## **FEDERAL COMMUNICATIONS COMMISSION**

### **47 CFR Part 15**

[ET Docket Nos. 04-37 and 03-104; FCC 09-60]

#### **Broadband Over Power Line Systems**

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document addresses certain issues from the Commission's Report and Order on rules for broadband over power line systems and devices (*BPL Order*) that was remanded by the United States Court of Appeals for the District of Columbia. In the *BPL Order*, the Commission established technical standards, operating restrictions and measurement guidelines for Access Broadband over Power Line (Access BPL) systems to promote the