

comments on this issue will be only accepted until December 2, 1999.

Dated: November 30, 1999.

Robert Perciasepe,

Assistant Administrator for Air and Radiation.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[OPPTS-400056A; FRL-6397-3]

RIN 2070-AC00

Phosphoric Acid; Community Right-to-Know Toxic Chemical Release Reporting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On April 15, 1999, the United States District Court for the District of Columbia reversed EPA's denial of a petition that The Fertilizer Institute (TFI) submitted to the Agency to delete phosphoric acid from the Emergency Planning and Community-Right-to-Know (EPCRA) section 313 list of toxic chemicals. In response to the Court's actions, EPA is proposing to delist phosphoric acid from the reporting requirements under EPCRA section 313 and section 6607 of the Pollution Prevention Act of 1990 (PPA).

DATES: Written comments, identified by the docket control number OPPTS-400056, must be received by EPA on or before February 7, 2000.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I. of the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: For technical information on this proposed rule contact: Daniel R. Bushman, Petitions Coordinator, Environmental Protection Agency, Mail Code 7408, 401 M St., SW., Washington, DC 20460; telephone number 202-260-3882, e-mail address: bushman.daniel@epa.gov. For general information on EPCRA section 313, contact the Emergency Planning and Community Right-to-Know Hotline, Environmental Protection Agency, Mail Code 5101, 401 M St., SW., Washington, DC 20460, Toll free: 1-800-535-0202, in Virginia and Alaska: 703-412-9877 or Toll free TDD: 1-800-553-7672.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be affected by this action if you manufacture, process, or otherwise use phosphoric acid. Potentially affected categories and entities may include, but are not limited to:

Category	Examples of Potentially Affected Entities
Industry	SIC major group codes 10 (except 1011, 1081, and 1094), 12 (except 1241), or 20 through 39; industry codes 4911 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce); 4931 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce); or 4939 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce); or 4953 (limited to facilities regulated under the Resource Conservation and Recovery Act, subtitle C, 42 U.S.C. section 6921 <i>et seq.</i>), or 5169, or 5171, or 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis)
Federal Government	Federal facilities

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. 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 (CFR). 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.

B. How Can I Get Additional Information or Copies of this Document or Other Support Documents?

1. *Electronically.* You may obtain electronic copies of this document from the EPA Internet Home Page at <http://www.epa.gov/>. On the Home Page select "Laws and Regulations" then look up the entry for this document under the "Federal Register--Environmental Documents" You can also go directly to

the "Federal Register" listings at <http://www.epa.gov/homepage/fedrgstr/>.

2. *In person.* The Agency has established an official record for this action under docket control number OPPTS-400056. The official record consists of the documents specifically referenced in this action, any public comments received during an applicable comment period, and other information related to this action, including any information claimed as confidential business information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The official record also includes documents associated with EPA's original denial of TFI's petition to delete phosphoric acid from the EPCRA section 313 list of toxic chemicals (63 FR 3566, January 23, 1998), and EPA's request for comments on the creation of a phosphates category (55 FR 25876, June 25, 1990). The public version of the official record does not include any information claimed as

CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period, is available for inspection in the TSCA Nonconfidential Information Center, North East Mall Rm. B-607, Waterside Mall, 401 M St., SW., Washington, DC. The Center is open from noon to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number of the Center is (202) 260-7099.

C. How and to Whom Do I Submit Comments?

You may submit comments through the mail, in person, or electronically. Be sure to identify the appropriate docket control number (i.e., "OPPTS-400056") in your correspondence.

1. *By mail.* Submit written comments to: Document Control Office (7407), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

2. *In person or by courier.* Deliver your comments to: OPPT Document Control Office (DCO) in the East Tower Rm. G-099, Waterside Mall, 401 M St., SW., Washington, DC. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is: 202-260-7093.

3. *Electronically.* Submit your comments electronically by E-mail to: "oppt.ncic@epamail.epa.gov." Please note that you should not submit any information electronically that you consider to be CBI. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on standard computer disks in WordPerfect 6.1/8.0 or ASCII file format. All comments and data in electronic form must be identified by the docket control number OPPTS-400056. Electronic comments on this proposal may also be filed online at many Federal Depository Libraries.

D. How Should I Handle CBI Information That I Want to Submit to the Agency?

You may claim information that you submit in response to this document as CBI by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential will be included in the public docket by EPA without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult with the technical person identified in the "FOR FURTHER INFORMATION CONTACT" section.

II. Introduction

A. What is the Statutory Authority for this Proposed Action?

EPA is proposing this action under EPCRA section 313(d)(3) and (e)(1)(A). 42 U.S.C. 11023.

B. What is the General Background for this Proposed Action?

Section 313 of EPCRA requires certain facilities that manufacture, process, or otherwise use listed toxic chemicals in amounts above reporting threshold levels to report their environmental releases and other waste management of such chemicals annually. Beginning with the 1991 reporting year, such facilities must also report pollution prevention and recycling data for such

chemicals, pursuant to section 6607 of PPA, 42 U.S.C. 13106. EPCRA section 313 established an initial list of toxic chemicals that was comprised of more than 300 chemicals and 20 chemical categories. Phosphoric acid was included on the initial list of chemicals and chemical categories.

EPCRA section 313(d) authorizes EPA to add chemicals to or delete chemicals from the list and sets forth criteria for these actions. Under EPCRA section 313(e)(1), any person may petition EPA to add chemicals to or delete chemicals from the list. EPA has added and deleted chemicals from the original statutory list.

EPCRA section 313(d)(2) states that EPA may add a chemical to the list if any of the listing criteria are met. Therefore, to add a chemical, EPA must demonstrate that at least one criterion is met, but need not determine whether any other criterion is met. Conversely, to remove a chemical from the list, EPA must demonstrate that none of the criteria are met. The EPCRA section 313(d)(2) criteria are:

(A) The chemical is known to cause or can reasonably be anticipated to cause significant adverse acute human health effects at concentration levels that are reasonably likely to exist beyond facility site boundaries as a result of continuous, or frequently recurring, releases.

(B) The chemical is known to cause or can reasonably be anticipated to cause in humans--

- (i) cancer or teratogenic effects, or
- (ii) serious or irreversible--
- (I) reproductive dysfunctions,
- (II) neurological disorders,
- (III) heritable genetic mutations, or
- (IV) other chronic health effects.

(C) The chemical is known to cause or can reasonably be anticipated to cause, because of

- (i) its toxicity,
- (ii) its toxicity and persistence in the environment, or
- (iii) its toxicity and tendency to bioaccumulate in the environment, a significant adverse effect on the environment of sufficient seriousness, in the judgment of the Administrator, to warrant reporting under this section.

EPA refers to the section 313(d)(2)(A) criterion as the "acute human health effects criterion"; the section 313(d)(2)(B) criterion as the "chronic human health effects criterion"; and the section 313(d)(2)(C) criterion as the "environmental effects criterion."

EPA issued a statement of petition policy and guidance in the **Federal Register** of February 4, 1987 (52 FR 3479) to provide guidance regarding the recommended content of petitions to delete individual members of the section 313 metal compound categories. EPA has issued a statement clarifying its

interpretations of the section 313(d)(2) and (3) criteria for adding and deleting chemicals from the section 313 toxic chemical list (59 FR 61432, November 30, 1994) (FRL-4922-2).

III. Description of Petition and Related Proceedings

A. What Petition was Filed and How did EPA Respond?

On November 9, 1990, TFI filed a petition with EPA to delist phosphoric acid from the EPCRA section 313 list of toxic chemicals. Congress had included phosphoric acid on the list when it enacted EPCRA section 313 in 1986. In the petition, TFI argued that EPA should delete phosphoric acid because it did not meet any of the three listing criteria in EPCRA section 313(d)(2): The acute human health effects criterion, the chronic human health effects criterion, or the environmental effects criterion.

On January 23, 1998, EPA denied TFI's petition, finding that phosphoric acid met the environmental effects listing criterion at EPCRA section 313(d)(2)(C), which provides that EPA may add or decline to delete a chemical if it "is known to cause or reasonably can be anticipated to cause, because of its toxicity . . . a significant adverse effect on the environment of sufficient seriousness . . . to warrant reporting" (63 FR 3566) (FRL-5762-2) (Ref. 1). EPA based the denial, among other things, upon phosphoric acid's potential to cause eutrophication when released into certain water bodies.

B. What Other Proceedings Relate to this Petition?

On April 29, 1998, TFI challenged EPA's denial of its petition in the United States District Court for the District of Columbia. *The Fertilizer Institute v. Browner*, No. 98-1067 (D.D.C.) In its challenge, TFI argued that phosphoric acid did not meet the environmental effects listing criterion because it was not toxic. TFI did not dispute that releases of phosphoric acid can cause eutrophication. It argued, however, that the eutrophication did not result "because of" phosphoric acid's toxicity, but "because of" its nutrient value. TFI also argued that phosphoric acid was not toxic because its effects were indirect and that EPA's interpretation of EPCRA section 313(d)(2)(C) read the term "toxicity" out of the statute.

EPA disagreed and argued, among other things, that: (1) Many chemicals that are nutrients are also toxic; (2) the number of steps between exposure and effect does not determine whether something is toxic; and (3) it was not

reading "toxicity" out of the statute because there were situations in which a chemical could cause a significant adverse effect upon the environment for reasons other than inherent toxicity.

The Court ruled in TFI's favor, granting TFI's motion for summary judgment on the toxicity issue and reversing EPA's denial of TFI's petition to delete phosphoric acid from the EPCRA section 313 toxic chemical list (Ref. 2). Notwithstanding its ruling, the Court agreed that phosphoric acid "can reasonably be anticipated to cause . . . a significant adverse effect on the environment" and that a listing decision under EPCRA section 313 could be based upon toxic effects that manifest indirectly. The Court, however, found that the "significant adverse effect" that phosphoric acid causes is not "because of its toxicity," but because of its nutrient value. The government did not appeal the Court's decision.

EPA is issuing this proposed rule in response to the Court's decision. EPA, is proposing to amend 40 CFR 372.65 by deleting phosphoric acid.

IV. What was EPA's Technical Review of the Environmental Effects of Phosphoric Acid?

As discussed in EPA's original denial of TFI's petition (63 FR 3566), phosphoric acid, as a source of phosphates, causes eutrophication (Ref. 3). Eutrophication is the nutrient enrichment of waters resulting in stimulation of an array of undesirable symptomatic changes. Therefore, phosphoric acid can reasonably be anticipated to cause significant adverse effects on the environment.

Phosphoric acid, as well as other phosphates have the potential to cause increased algal growth leading to eutrophication in the aquatic environment (Ref. 3). Eutrophication may result when nutrients, especially phosphates, enter into an aquatic ecosystem in the presence of sunlight and nitrogen. The phosphate ion is a plant nutrient and it can be a major limiting factor for plant growth in freshwater environments. In excess, phosphoric acid can cause extreme algal blooms. Toxic effects result from oxygen depletion as the algae die and decay. Toxic effects have also been related to the release of decay products or direct excretion of toxic substances from sources such as blue-green algae. In addition, phosphates in aquatic environments may encourage the growth of introduced plants to the detriment of native plants and thereby change plant distribution (Refs. 3 and 4).

V. What is the Explanation of the Proposed Delisting of Phosphoric Acid?

EPA has authority to delete a chemical from the EPCRA section 313 list of toxic chemicals only if it fails to meet any of the EPCRA section 313(d)(2) criteria: The acute human health effects criterion (313(d)(2)(A)), the chronic human health effects criterion (313(d)(2)(B)), or the environmental effects criterion (313(d)(2)(C)). EPA's original denial of the petition to delist phosphoric acid was based on the finding that phosphoric acid met the EPCRA section 313(d)(2)(C) criterion for listing. Although phosphoric acid can reasonably be anticipated to cause significant adverse effects on the environment, the United States District Court for the District of Columbia reversed EPA's denial of the petition based upon the Court's assessment that these effects are not caused by phosphoric acid's toxicity, but by its nutrient value. Thus, the court determined that phosphoric acid does not meet the EPCRA section 313(d)(2)(C) listing criterion. In response to the Court's decision, EPA is proposing to delete phosphoric acid from the EPCRA section 313 list of toxic chemicals.

VI. What Issues is EPA Requesting Comment On?

EPA requests comment on its proposal to delete phosphoric acid from the EPCRA section 313 list of toxic chemicals. Specifically, EPA requests comment on whether phosphoric acid produces any toxic effects that meet the EPCRA section 313(d)(2)(A), (B), or (C) listing criteria. Such effects could include acute and chronic human health effects or environmental effects. Additional hazard information on phosphoric acid can be found in EPA's original petition denial and the record supporting that decision (63 FR 3566).

VII. What are the References Cited in this Proposed Rule?

1. Phosphoric Acid; Toxic Chemical Release Reporting; Community Right-to-Know; Denial of Petition, 63 FR 3566, January 23, 1998.
2. *The Fertilizer Institute v. Browner*, No. 98-1067, Slip op. (D.D.C. April 15, 1999).
3. USEPA, OPPT. Memorandum from Ossi Meyn, Environmental Effects Branch, Health and Environmental Review Division. Re: Petition to Delist Phosphoric Acid - Ecological Hazard. (February 27, 1990).
4. USEPA. South Florida Ecosystem Assessment. Monitoring for Adaptive Management: Implications for Ecosystem Restoration. (Interim Report). December 1996. EPA 904-R-96-008.

VIII. What are the Regulatory Assessment Requirements for this Proposed Action?

A. Executive Order 12866

This action, which proposes to delete a chemical from the list of chemicals subject to reporting under EPCRA section 313 and PPA section 6607, would eliminate an existing requirement to report and does not contain any new or modified requirements. As such, this action does not require review by the Office of Management and Budget (OMB) under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), because OMB has determined that the complete elimination of an existing requirement is not a "significant regulatory action" subject to review by OMB under Executive Order 12866.

B. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that this proposed rule will not have a significant impact on a substantial number of small entities. This determination is based on the fact that the complete elimination of the existing requirement will also eliminate the corresponding burden and costs associated with that requirement. This proposed action will not, therefore, result in any adverse economic impacts on the facilities subject to reporting under EPCRA section 313, regardless of the size of the facility.

C. Paperwork Reduction Act

The deletion of this chemical from the EPCRA section 313 toxic chemical list would reduce the overall reporting and recordkeeping burden estimate provided for the Toxics Release Inventory (TRI) program, but this action does not require any review or approval by OMB under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* In conjunction with the final rule, EPA will determine the total TRI burden associated with the chemical being proposed for deletion, and will complete the required Information Collection Worksheet to adjust the total TRI burden estimate approved by OMB.

The reporting and recordkeeping burdens associated with TRI are approved by OMB under OMB No. 2070-0093 (Form R, EPA ICR No. 1363) and under OMB No. 2070-0145 (Form A, EPA ICR No. 1704). The current public reporting burden for TRI is estimated to average 52.1 hours for a Form R submitter and 34.6 hours for a Form A submitter. These estimates

include the time needed for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this information collection appears above. In addition, the OMB control number for EPA's regulations, after initial display in the final rule, are displayed on the collection instruments and are also listed in 40 CFR part 9. Send any comments you have about the provided burden estimates according to the instructions provided in Unit I.C.

D. Unfunded Mandates Reform Act and Executive Orders 13084 and 13132

Since this action involves the proposed elimination of an existing requirement, it does not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4). For the same reason, it is not subject to the requirement for prior consultation with Indian tribal governments as specified in Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19, 1998). Nor will this action have a substantial direct effect on 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, entitled *Federalism* (64 FR 43255, August 10, 1999).

E. Executive Order 12898

Pursuant to Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994), the Agency must consider

environmental justice related issues with regard to the potential impacts of this action on environmental and health conditions in low-income populations and minority populations. The Agency has determined that deleting this chemical from the EPCRA section 313 toxic chemical list, which would eliminate the availability of the TRI information on this chemical that is made available to communities through the TRI Community Right-to-Know Program, will not result in environmental justice related issues.

F. Executive Order 13045

Pursuant to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), if an action is economically significant under Executive Order 12866, the Agency must, to the extent permitted by law and consistent with the Agency's mission, identify and assess the environmental health risks and safety risks that may disproportionately affect children. Since this action is not economically significant under Executive Order 12866, this action is not subject to Executive Order 13045.

G. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, etc.) 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 action does not involve technical standards, nor did EPA consider the use

of any voluntary consensus standards. In general, EPCRA does not prescribe technical standards to be used for threshold determinations or completion of EPCRA section 313 reports. EPCRA section 313(g)(2) states that "In order to provide the information required under this section, the owner or operator of 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. Nothing in this section requires the 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."

List of Subjects in 40 CFR Part 372

Environmental protection, Community right-to-know, Intergovernmental relations, Reporting and recordkeeping requirements, Superfund, Toxic chemicals.

Dated: November 30, 1999.

Carol M. Browner,
Administrator.

Therefore, it is proposed that 40 CFR part 372 be amended as follows:

PART 372—[AMENDED]

1. The authority citation for part 372 would continue to read as follows:

Authority: 42 U.S.C. 11013 and 11028.

§ 372.65 [Amended]

2. Section 372.65 is amended by removing the entry for phosphoric acid under the table in paragraph (a) and removing the entire CAS number entry for 7664-38-2 under the table in paragraph (b).

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