



October 12, 2010

Via Electronic Submission

Document Control Office
7407 M
Office of Pollution Prevention and Toxics
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-001

Re: Proposed Rule TSCA Inventory Update Reporting Modifications
75 Fed. Reg. 49656, August 13, 2010, EPA-HQ-OPPT-2009-0187

Dear Madam or Sir:

The North American Metals Council (NAMC)¹ is pleased to submit these comments on the modifications proposed for the Inventory Update Reporting (IUR) rule under the Toxic Substances Control Act (TSCA) (75 Fed. Reg. 49656, August 13, 2010).

NAMC recognizes EPA's need to have access to relevant and reliable use and exposure data to conduct screening risk evaluations on existing chemicals. With that in mind, NAMC members support certain of the proposed modifications, as described below, that would facilitate this goal. Other proposed changes, however, would impose excessive burdens on reporting companies without providing EPA with data that are usable or reflective of chemicals in commerce. NAMC urges EPA to reconsider these reporting elements, as outlined below.

I. NAMC OPPOSES INFORMATION COLLECTION REQUIREMENTS THAT ARE EXCESSIVELY BURDENSOME WITHOUT CLEAR JUSTIFICATION OF WHY THE INFORMATION IS NEEDED

A. Compliance with By-Products Reporting Policy is Virtually Impossible

NAMC is adamantly opposed to EPA's policy on by-product reporting and urges the Agency to reconsider its position. Despite many meetings and comments on this issue, EPA

¹ NAMC is an unincorporated not-for-profit group of metals-producing and metals-using associations and companies that focuses on science and policy issues that affect metals in a generic way.



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does not seem to appreciate fully the difficulties and complexities to which its by-products reporting policy gives rise. In practice, the policy imposes reporting obligations with which, in many cases, it is essentially impossible to meet.

According to available EPA guidance, a by-product is a chemical substance produced without separate commercial intent. By-products are reportable under the IUR unless the substances are:

- Burned as a fuel;
- Disposed of in a landfill or for enriching soil; or
- Used to extract component chemicals from it for commercial purposes.

EPA further notes that the chemical component substance that is extracted must exist in the by-product in the same chemical form and valence state as when it is extracted. If the process to reclaim a certain component chemical involves breaking chemical bonds or forming chemical bonds, the process does not involve extracting the chemical substance. In other words, the IUR exclusion would not apply if chemical reactions occur during a recycling or reclamation process. But that is precisely what does occur in most cases when metals are reclaimed from secondary materials of mining and manufacturing processes -- *e.g.*, when metal oxide pollution control dusts are reduced to metallic form, or when precipitation is used to recover metals from soluble metal compounds in wastewater. As we understand EPA's policy, these secondary materials would be subject to IUR reporting. But, under EPA's current policy and the proposed modifications, it is essentially impossible for many impacted industry sectors to provide this information.

■ **Most By-Products Are Mixtures**

The vast majority of by-products are mixtures. In fact, EPA acknowledges that by-products are mixtures through its guidance that indicates the existence of "component chemicals." Unfortunately, EPA's acknowledgement that by-products are mixtures does not align with the demands imposed under the proposed reporting requirements.

In its proposed changes, EPA would require that companies provide the unique Chemical Abstract Services registration number (CASRN) for IUR reported substances. Mixtures do not typically have CAS numbers; the individual



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chemical components do. Up until now, even if CAS procedures would allow assignment of CASRNs for mixtures, companies have had no commercial or regulatory reason to request a CASRN for their by-product mixtures. NAMC members note that CASRNs are available for a limited number of by-products, but not all. Thus, because most by-products do not have CASRNs, they cannot be reported in a single IUR submission.

If EPA intends that IUR by-product reporting should occur via one report for the by-product mixture itself, several changes would be needed to accommodate this process. EPA would need to adjust its requirement for a unique CASRN and instead, allow companies to provide a description of the by-product mixture. If EPA continues to require CASRNs, companies would need to initiate thousands of requests to CAS for registration numbers. This would take significant amounts of time and would likely overwhelm CAS' institutional capacity to accommodate in the near future. NAMC believes that the requests would likely not be honored.

■ **Individual Components of By-Products Are Not Known**

Conceivably, there could be hundreds of individual chemical components in a byproduct mixture and the concentrations of those components can and do vary from batch to batch. Companies have no commercial need to identify each component; nor do they need to measure concentrations or volumes. In other words, it is not reasonable to expect companies to have specific or detailed information on the individual components of the by-product mixture, much less the volumes of each component. EPA requires certain information to be reported on the IUR, and for by-product components, that information may simply not be available.

■ **Not All Components Require Reporting**

Even if components could be identified, not all would require IUR reporting. While it is true that companies may know for certain that a primary metal component of a particular by-product will be processed to recover the metal values and thus be subject to IUR reporting, they may not know which, if any, of the other components of the by-product will be recovered for recycling or reuse as well. This may depend on factors such as treatment facilities' technologies and market incentives (which can vary from week to week). The manufacturer of the by-product mixture may have no reason to be aware of this information and thus



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will not know whether these secondary components will simply be disposed of (in which case, they are not subject to IUR reporting) or will be subject to recovery in a process involving a chemical reaction (in which case, they would be subject to reporting under EPA's by-products reporting policy).

In summary, it is virtually impossible for companies to adhere to EPA's by-products policy because

- By-products are mixtures, most of which do not have CASRNs and EPA requires CASRNs in its reporting elements
- Companies do not have the required information for IUR reporting for each individual component in the by-product.

Furthermore, there is little need to require reporting of by-product mixtures even when they are to be further processed for recovery of chemical components -- because, in such cases, by-products are essentially non-isolated intermediates with a very limited potential for exposure to the general public. Any significant exposure to the general public would involve the extracted components, which are reportable by the treatment/recovery facility.

For the reasons outlined above, NAMC urges EPA to withdraw its current requirements for by-products reporting and engage in constructive dialogue with industry on how best to create a reporting system. Careful consideration must be given to what information relating to by-products EPA really needs for risk screening and how that information can reasonably be collected and reported to EPA. One option would be for EPA to set up an entirely separate reporting scheme for by-products, which allows the mixture to be reported as a single entity -- with description of the anticipated components, recognizing that those components and their relative percentage volumes in the by-product mixture may vary. The by-product manufacturer could then report the total production volume of the by-product mixture.

On a related note, EPA should provide additional guidance related to the reporting element on whether a substance is recycled, remanufactured, reprocessed, reused or reworked. It is unclear whether this information element applies only to by-products or to all IUR reported substances. Clarification is also needed on how reporting should occur for existing chemicals or naturally occurring substances that are purified.



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B. The Deadline for 2011 IUR Report Submissions Must Be Adjusted

NAMC is extremely concerned that its members will not have sufficient time to comply with the new reporting obligations that EPA intends to implement for the 2011 IUR reporting cycle. Industry should not be penalized because of EPA's delayed schedule in issuing its proposed IUR modifications and anticipated delay in issuing a final rule. Indeed, given EPA's optimistic estimate of issuing a final rule in Spring 2011, companies would have six months or less to comply with the reporting deadline of September 30, 2011.

At this time, companies are unaware of what the final reporting obligations will be. Once that final rule is issued, companies must have time to train employees on any new reporting obligations, validate modified information collection systems, collect required reporting information and register for and become acquainted with the required electronic reporting system.

NAMC member companies have set up their information collection systems based on guidance provided by EPA in 2002. At that time, EPA indicated that inorganic chemical manufacturers would not have to report process and use information in 2006, but would be obligated to do so on inorganic substances produced in quantities over 300,000 pounds per facility in 2011. With EPA's proposed changes in the threshold for process and use reporting, specific categories and other information elements, the current systems will need to be retooled.

When EPA promulgated its 2005 amendments to the TSCA IUR, which extended the reporting frequency from four to five years, it recognized as a benefit of the one-year extension that inorganic chemical manufacturers would be afforded additional time to become familiar with processing and use reporting and the level of inquiry required (70 Fed. Reg. 75,059, 75,065 (Dec. 19, 2005)). Now, EPA is proposing to radically change IUR reporting, in general, and the processing and use component, in particular, and only afford companies a few months to decipher the changes and implement retroactive systems to capture and report the required data.

NAMC urges EPA to revoke the currently scheduled reporting deadline of September 30, 2011, and establish a new deadline that is keyed to the date on which the final IUR rule is issued. NAMC recommends that the IUR reports for the 2010 reporting year should be submitted within 12 to 15 months after the final rule is published. EPA's goal of obtaining reliable, useful, and accurate data should not be compromised by a hastened reporting period. Additional time is necessary for the regulated community to understand the changes that are



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issued in final, train their employees, and set required systems in place for the additional data collection. .

C. EPA Should Not Require 2006-2009 Production/Import Volume Reporting

NAMC strongly opposes EPA's proposed requirement for production volume reporting for 2006 through 2010. Instead, EPA should implement the new reporting obligation starting in 2015.

NAMC members have been preparing to report on 2010 volumes, and were surprised by EPA's proposal to require retroactive collection of information from 2006 to 2009. There was no commercial or regulatory requirement to collect production or import information in 2006, 2007, 2008, or 2009; accordingly, NAMC members did not have information collection systems in place.

NAMC members are willing and able to set up annual production/import information collection systems from this point forward, but obtaining information from past years will be extremely difficult and time-consuming, and the reliability of the information may be questionable. Moreover, it seems doubtful that the 2006-2009 data would have any utility for EPA, given the vast amounts of information that will be submitted with the other IUR reporting elements in 2011. EPA will be receiving and processing reports on tens of thousands of chemical substances. If EPA determines that 2006-2009 production volume data are needed on certain chemicals, EPA can issue a Section 8 rulemaking to require those data. But requiring such retroactive data submissions for all IUR reportable chemicals is inappropriate and unfair, particularly with the significant resource burden for industry.

As noted, NAMC urges EPA to remove the requirement for production volume reporting for 2006 through 2009. Instead, EPA should implement the new reporting obligation starting in 2015.

D. EPA Should Not Lower the Processing and Use Information Threshold for Inorganic Chemicals in 2011

As inorganic chemical manufacturers, NAMC members were not required to submit processing and use information during the 2006 IUR reporting cycle. At the time, EPA acknowledged that IUR reporting obligations were new for the inorganic chemicals sector and that impacted manufacturers would need reduced reporting requirements to become acquainted with IUR regulations. Thus, in 2006, inorganic chemical manufacturers only had to report on



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Parts I and II of Form U, which includes site identification information and manufacturing information). As an industry sector, inorganic manufacturers and importers have no experience with the processing and use reporting elements in Form U, Part III.

Based on past guidance from EPA, the inorganic sector was prepared to submit – for the first time - processing and use information for inorganic substances produced or imported in volumes exceeding 300,000 pounds in 2011. Now EPA is proposing to significantly lower that reporting threshold to 25,000 pounds. NAMC suggests that rather than implementing a reduced reporting threshold for an industry sector that is still inexperienced with Part III reporting, EPA should maintain its original threshold of 300,000 pounds for inorganics, and implement the reduced threshold for the next reporting cycle.

E. EPA Should Defer Removal of Reporting Threshold Volume for Certain Chemicals

In the August 13, 2010, notice, EPA proposed to eliminate the 25,000 pound reporting threshold for chemical substances that are the subject of a rule promulgated under TSCA Sections 5(a)(2), 5(b)(4), or 6; the subject of an order issued under TSCA Sections 5(e) or 5(f), or the subject of relief that has been granted under a civil action under TSCA Sections 5 or 7. NAMC anticipates that many companies were not expecting this significant change and will be unprepared to gather needed information. At this time, EPA has not provided a specific list of impacted chemicals, so companies may not even know whether they are impacted or not.

NAMC urges EPA not to implement this change for 2011. In addition, when the change is implemented in 2015, EPA must provide a list of the chemical substances impacted at the beginning of the information collection year (2014) to ensure more accurate and complete reporting. EPA should also consider *de minimis* reporting thresholds for those listed chemicals.

F. EPA Should Remove Upfront Substantiation for Confidential Business Information

NAMC appreciates EPA's desire to address inappropriate claims of confidential business information (CBI) on IUR reports. EPA's proposed restrictions, however, are overly burdensome and will negatively impact U.S. business' ability to remain competitive.

Given the specific, detailed information required by TSCA, including that required in the IUR reporting, it is crucial that EPA remain cognizant of the critical importance of protecting legitimate proprietary information. EPA's apparent movement to make CBI claims



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more difficult for U.S. industry is especially concerning given the increase in sophistication of corporate espionage tools. The ability to gain market advantages through new uses is essential for continuing innovations. NAMC believes EPA's proposed requirement for upfront substantiation for CBI protection of process and use information will erode the drive for innovation as it unnecessarily complicates industry's ability to maintain such information as proprietary.

NAMC supports EPA's proposal to prohibit claims of confidentiality for information designated as "not readily obtainable" and "known to or reasonably ascertainable by" the submitter.

G. EPA Should Allow for Multiple Technical Contacts

NAMC does not agree with EPA's proposal that the IUR technical contact be located at the production facility. In many circumstance, information on process or use information may reside at the corporate headquarters, perhaps as part of sales and marketing units. In fact, for some companies, it is unlikely that one person will be equipped to directly respond to every question from EPA. To accommodate for this, EPA should set up a process that allows for more than one technical contact per report. In addition, the Agency must appreciate that the technical contact may not be able to directly respond to the inquiry. At a minimum, a listed technical contact should be able to determine where to obtain requested information within his/her company.

H. EPA Should Defer Mandatory Requirement for Electronic Submissions

NAMC is concerned with EPA's proposal to require electronic submission of all IUR reports via EPA's Central Data Exchange (CDX). Although NAMC supports EPA's proposal to require reports to be submitted in an electronic format, we are apprehensive about the electronic submission process. Several NAMC members attempted to use the reporting software offered by EPA in 2006 and were wholly unable to get the process to work. If similar circumstances occur with the new system or if the system itself suffers a fatal error, we believe there could be serious liability ramifications for NAMC members if reports are not submitted by the established deadline.

Industry will need sufficient time to test the software and verify it is workable within individual companies. Such review time will likely take many months. For that reason, EPA should delay the mandatory electronic submission requirement until the 2015 reporting cycle.



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I. EPA Should Not Reduce Report Frequency to Less than 4 Year Intervals

NAMC believes the current reporting frequency of five years is appropriate, but is willing to support a change to a four-year cycle. Shorter intervals are not necessary, particularly with the reporting of production volumes for in-between years.

II. NAMC SUPPORTS IUR MODIFICATIONS THAT PROVIDE EPA WITH RELEVANT DATA FOR RISK ASSESSMENT PURPOSES

NAMC members can support those changes that we believe provide EPA with relevant data, do not impose excessive burdens on industry and can be used by EPA in risk evaluation efforts.

A. NAMC Supports Reporting Production/Import Volumes Starting in 2015

As noted above, NAMC members are willing to set up annual production/import information collection systems for purposes of IUR reporting. It will take time to establish these systems, however, so reporting should not be required until the 2015 reporting cycle.

B. NAMC Supports Submission of IUR Reports in Electronic Format

NAMC appreciates EPA's frustrations with having to hand-enter data from paper copies of 2006 IUR report submissions into the EPA database. We can support a proposal that starting in 2011, all IUR submissions must be reported only in an electronic format. EPA must, however, provide some contingency if its e-IUR reporting software is not compatible with or otherwise not usable by industry stakeholders. EPA should provide specific guidance as to how IUR submissions should be processed and in what computer program, so it can be easily transferred into the EPA database.

C. NAMC Supports Expansion of Use Reporting Codes

NAMC supports EPA's proposal to modify reporting codes for industrial application, industrial sector and commercial/consumer uses. We appreciate the Agency's attempt to harmonize these codes with Environment Canada and Health Canada. This is expected to facilitate future reporting obligations for some NAMC members.



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D. NAMC Supports Applying the Reporting Threshold to Production/Import Volumes in Any Year Since the Last Principal Reporting Year.

NAMC supports EPA's proposal to require IUR reporting starting in 2015 if production or import volumes of a chemical met or exceeded the 25,000 pound reporting threshold in any calendar year since the last principal reporting year.

E. NAMC Supports Use of CASRN/TSCA Accession Numbers for Chemical Identity

With the exception of the issues discussed above related to by-product reporting, NAMC supports EPA's proposal that only CASRNs or TSCA Accession Numbers be used for chemical identify.

F. Export Volumes

NAMC members can support EPA's proposal to include reporting on export volumes.

CONCLUSION

Thank you for the opportunity to provide these comments. If you have any questions, please contact NAMC's Executive Director, Kathleen M. Roberts, at (443) 964-4653 or kroberts@namc.org.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "W. J. Adams", is written over a light-colored rectangular background.

William J. Adams, Ph.D., Chair
North American Metals Council