



ASSISTANT ADMINISTRATOR FOR CHEMICAL SAFETY AND POLLUTION PREVENTION
WASHINGTON, D.C. 20460

Michael Ewall, Esq.
Energy Justice Network
1434 Elbridge Street
Philadelphia, PA 19149
mike@energyjustice.net

Timothy Whitehouse
Public Employees for Environmental
Responsibility (PEER)
962 Wayne Avenue, Suite 610
Silver Spring, MD 20910
twhitehouse@peer.org

Re: PET-001757: Petition for Rulemaking Pursuant to the Administrative Procedure Act and the Emergency Planning and Community Right-to-Know Act, Requiring that Waste Incinerators Report to the Toxics Release Inventory

EPA Closeout of the Petition

Dear Mr. Ewall and Mr. Whitehouse:

Under to the Administrative Procedure Act, the Energy Justice Network and the Public Employees for Environmental Responsibility (PEER) submitted a Petition to the U.S. Environmental Protection Agency, dated April 3, 2023, seeking the addition of large and small municipal waste combustors, hospital/medical/infectious waste incinerators, sewage sludge incineration units, commercial and industrial solid waste incineration units, other solid waste incinerators, and pyrolysis and gasification units to the scope of industrial sectors covered by the reporting requirements of section 313 of the Emergency Planning and Community Right-to-Know Act, commonly known as the Toxics Release Inventory (or "TRI").

After considering the Petition, the EPA is granting the Petition in part and denying the Petition in part. I have enclosed our formal response. If you have any questions regarding this response, please feel free to email the OCSPP petitions response team at petitions-ocspp@epa.gov. Please include the petition number identified above in any subsequent correspondence.

The agency appreciates your interest in these issues and in ensuring that the public has access to information about toxic chemical releases and pollution prevention activities.

Sincerely,

Michal Freedhoff

ENCLOSURE

Formal Response to April 3, 2023, Petition for Rulemaking Pursuant to the Administrative Procedure Act and the Emergency Planning and Community Right-to-Know Act and Pollution Prevention Act, Requesting that Waste Incinerators Report to the Toxics Release Inventory

By a letter dated April 3, 2023, the Energy Justice Network and Public Employees for Environmental Responsibility (PEER) submitted a petition to the U.S. Environmental Protection Agency (EPA, or “the Agency”) pursuant to section 553(e) of the Administrative Procedure Act (APA) to add Large and Small Municipal Waste Combustors, Hospital/Medical/Infectious Waste Incinerators, Sewage Sludge Incineration Units, Commercial and Industrial Solid Waste Incineration Units, Other Solid Waste Incinerators, and Pyrolysis and Gasification Units (collectively referred to in this document as “waste incinerators”) to the scope of industrial sectors covered by the reporting requirements of section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11023, commonly known as the Toxics Release Inventory (TRI).

This document constitutes the EPA's response to the Petition. As explained below, the Agency hereby GRANTS in part and DENIES in part the Petition. More specifically, and as described below, EPA grants, in part, the Petition by agreeing to commence the rulemaking process to expand the TRI-covered “Solid Waste Combustors and Incinerators” industry sector [North American Industry Classification System (NAICS) 562213] by removing the existing Resource Conservation and Recovery Act (RCRA) subtitle C qualifier, and to add a qualifier to the TRI-covered “Other Nonhazardous Waste Treatment and Disposal” industry sector (NAICS 562219) to include facilities that incinerate waste. EPA denies the remainder of the Petition insofar as it requests that EPA extend TRI reporting beyond facilities classified under NAICS 562213 and 562219.

I. Background

A. General

A facility must annually file TRI reports with EPA for each year in which the facility meets three criteria:

1. The facility manufactures, processes, or otherwise uses a TRI-listed chemical or chemical category in excess of the applicable reporting thresholds; and
2. The facility has 10 or more full-time employees (or equivalent); and
3. The facility is in a TRI-covered industry sector.

The Petition requests that EPA modify the scope of the third criterion: the industry sectors to which the TRI reporting requirements apply.

Congress established the original scope of TRI sectors subject to EPCRA Section 313 reporting, requiring reporting by facilities in the manufacturing sectors covered by Standard Industrial Classification (SIC) codes 20 through 39. Congress also granted the EPA Administrator the discretionary authority to add or remove sectors to/from the scope of TRI. The Petition requests that EPA exercise its discretionary TRI sector addition authority to commence a rulemaking to add to the list of TRI-covered industry sectors “Large Municipal Waste Combustors, Small Municipal Waste Combustors, Hospital/Medical/Infectious Waste Incinerators, Sewage Sludge Incineration Units, Commercial and

Industrial Solid Waste Incinerators, Other Solid Waste Incinerators, and Pyrolysis and Gasification Units regulated under Section 129 of the Clean Air Act (CAA), 42 U.S.C. § 7429.” Petition at 8.

The Office of Management and Budget (OMB), in 1997, adopted the NAICS to replace the SIC system, and EPA in 2006 finalized a rule to use both SIC and NAICS for TRI-reporting purposes. Accordingly, this response will refer to NAICS codes with regard to the Petition. Any rulemaking associated with this response would incorporate both NAICS codes and the SIC codes to which they correspond.

B. Petition

To support its request that EPA add the identified types of incinerators to TRI, the Petition points to three factors EPA considered when it exercised its discretionary authority to add seven industry sectors to TRI in 1997 (62 FR 23834):

- Chemical Factor – Whether one or more TRI-listed toxic chemicals are reasonably anticipated to be present at facilities within the candidate industry group.
- Activity Factor – Whether facilities within the candidate industry group “manufacture,” “process,” or “otherwise use” these toxic chemicals.
- Information Factor – Whether facilities within the candidate industry group can reasonably be anticipated to increase the information made available pursuant to EPCRA Section 313, or otherwise further the purposes of EPCRA Section 313.
 - Under this factor, EPA may consider information relating to, but not limited to, one or more of the following topics: (1) whether the addition of the candidate industry group would lead to reporting by facilities within that candidate industry group (e.g., whether facilities within the candidate industry group would conduct activities which exceed the reporting thresholds in section 313(f)); (2) whether facilities within the candidate industry group are likely to be subject to an existing statutory or regulatory exemption from the requirement to file a Form R; (3) whether submitted Form R reports from that industry group could be expected to contain release and other waste management data; or (4) whether a significant portion of the facilities in the industry group would be expected to file a Form A. *See, e.g.*, 61 Fed. Reg. 33588, 33594 (1996).

The Petition argues on page 6 that, “because the industry readily meets these three factors, EPA should require Waste Incinerators to report their toxic releases to the TRI.” With respect to the chemical and activity factors, the Petition argues that waste incinerators otherwise use (i.e., incinerate) and release large quantities of TRI-listed chemicals. With respect to the information factor, the Petition contends that adding waste incinerators to the list of TRI-covered industry sectors would increase the information available to the public and further the purposes of EPCRA Section 313 and also argues that no other regulatory system adequately provides communities with information on toxic chemical releases from waste incinerators.

II. EPA Response to Petition

A. General

Congress provided EPA with explicit statutory authority to expand the categories of facilities required to report to TRI beyond those specified in section 313(b)(1)(A), which applies EPCRA section 313

requirements to facilities that are in SIC codes 20 through 39. This authority is provided by EPCRA section 313(b)(1)(B), which states:

“The Administrator may add or delete Standard Industrial Classification Codes for purposes of subparagraph (A), but only to the extent necessary to provide that each Standard Industrial Classification Code to which this section applies is relevant to the purposes of this section.”

This provision grants the Agency broad discretion to add industry groups to the facilities subject to EPCRA section 313 reporting requirements where EPA finds that reporting by these industries is relevant to the purposes of EPCRA section 313.

Thus, the statute directs EPA, when adding industry groups, to consider and be guided by the “purposes” of EPCRA section 313. EPCRA section 313(h) states that:

“The release forms required under this section are intended to provide information to the Federal, State, and local governments and the public, including citizens of communities surrounding covered facilities. The release form shall be available... to inform persons about releases of toxic chemicals to the environment; to assist governmental agencies, researchers, and other persons in the conduct of research and data gathering; to aid in the development of appropriate regulations, guidelines, and standards; and for other similar purposes.”

To determine whether to grant the Petition, in whole or in part, EPA considered each type of waste incinerator described by the Petition and considered the chemical, activity, and information factors applied during EPA's 1997 TRI sectors addition, which “help ensure that the industries selected for inclusion in the program will in fact further the purposes of section 313.” 62 FR 23834, 23842.

After considering these factors, the Petition, and other information available to the Agency,¹ EPA has determined that the appropriate course of action at this time is for EPA to exercise its discretion to commence the rulemaking process to expand TRI's current coverage of the Solid Waste Combustors and Incinerators industry sector (NAICS 562213) (i.e., by removing the qualifier that limits the scope of TRI coverage to facilities also regulated by RCRA Subtitle C) as well as the Waste Treatment and Disposal industry sector (NAICS 562219) (i.e., by expanding the current qualifier to include incineration activities), as explained below. The Agency declines, at this time, to initiate action to add the other types of waste incinerators described in the Petition.

B. GRANT, in part

The EPA will commence a rulemaking process to expand TRI's coverage to include facilities classified under NAICS codes 562213 and 562219 that incinerate waste. The EPA notes that such facilities are all

¹ Such other information includes but is not limited to: the U.S. Census Statistics of U.S. Businesses (SUSB) datasets, Title V operating permits, Internal EPA sources such as the Integrated Compliance Information System - Air (ICIS), TRI data from facilities that currently perform incineration activities, AP-42 emissions factors as quantified in the Web Factors and Information Retrieval System, as well as additional external sources such as state Clean Air Act (CAA) monitoring data (as applicable), auditing programs (as applicable), and local ordinances.

regulated under the same Clean Air Act requirements for their incineration activities, regardless of their NAICS code.

The rulemaking would expand coverage of the TRI-covered Solid Waste Combustors and Incinerators (NAICS 562213) industry sector by removing the existing RCRA subtitle C qualifier. The existing qualifier requires those facilities with primary NAICS code 562213 to report to TRI only if they are also regulated under RCRA subtitle C, 42 U.S.C. 6921 et seq. Removing this qualifier would expand the coverage of this sector to include all facilities in the industry sector that meet TRI-reporting thresholds (i.e., any facility that is in the industry sector, has 10 or more full-time employees, and manufactures, processes, or otherwise uses a TRI-listed chemical at or above its applicable threshold quantity). EPA notes that facilities in NAICS 562213 include Municipal Waste Combustors (MWCs) as identified in the Petition, as well as a portion of medical waste incinerators, commercial and industrial incinerators, and pyrolysis and gasification facilities that the Petition identified.

With regard to NAICS 562219, EPA understands that this sector includes facilities that incinerate solid waste. These facilities classify under NAICS 562219 rather than under NAICS 562213 because they generate more revenue from non-incineration activities (e.g., waste collection or hauling) than from incineration activities.^{2,3} Where a facility performs activities classified under different NAICS codes, the facility's NAICS code is determined based on its principal product or group of products produced or distributed, or services rendered.⁴ The activity that provides the greatest contribution to such products or services is the facility's primary NAICS code and is the NAICS code that the facility considers with regard to TRI reporting requirements. Thus, facilities that classify under NAICS 562219 and incinerate waste are similar to facilities classified under NAICS 562213 in that they generally perform the same types of incineration services on waste as facilities under NAICS 562213 and are also generally subject to the same Clean Air Act requirements; the difference in NAICS codes between these facilities is based on the amount of revenue derived from such activities.

TRI currently covers only facilities classified under NAICS 562219 that are also regulated pursuant to RCRA subtitle C. In response to this petition, EPA plans to commence a rulemaking process to modify the existing qualifier for NAICS 562219 to expand its coverage to include facilities subject to either or both of RCRA Subtitle C and Clean Air Act section 129. Specifically, the rulemaking would modify the language of the qualifier so that facilities in NAICS 562219 that are subject to the Clean Air Act (CAA) (for activities associated with incineration; that is, the same requirements that apply under the CAA to facilities that classify themselves under NAICS 562213) would be covered by TRI.

EPA's review of information (e.g., EPA databases, U.S. Census Statistics of U.S. Businesses (SUSB) datasets, etc.) suggests that expanding TRI's coverage of these two industry sectors (i.e., NAICS 562213 and 562219) as described above would cause an estimated 60 additional facilities to submit TRI

² A facility classifies itself under NAICS code 562219 if it derives its greatest revenue contribution from (1) nonhazardous waste treatment and disposal activities (except landfills, combustors, incinerators, and sewer systems or sewage treatment facilities) and/or (2) collecting and/or hauling of nonhazardous waste materials within a local area.

³ TRI currently covers facilities classified under NAICS 562219 only if they are also regulated pursuant to Subtitle C of RCRA.

⁴ See https://www.census.gov/naics/reference_files_tools/2022_NAICS_Manual.pdf, page 91.

reporting forms. AP-42 emissions factors, Title V permits, and other data sources (e.g., Integrated Compliance Information System - Air (ICIS), TRI data from facilities that currently perform incineration activities, CAA data (including State data)) indicate that these facilities would likely report on several TRI chemicals including hydrogen chloride, cadmium, lead, mercury, and polychlorinated dibenzo-p-dioxins, and polychlorinated dibenzofurans. Additionally, use of emissions factors, monitoring data (as applicable), and other sources of information (e.g., auditing programs, local ordinances, etc.) support EPA's understanding that these facilities would have readily available information to support TRI-reporting requirements.

Thus, EPA anticipates that facilities that incinerate waste that would be added to the scope of TRI reporting per the rulemaking process described in this response (i.e., the portion of facilities that classify under NAICS 562213 that are not currently covered by TRI and the portion of facilities that classify under NAICS 562219 that incinerate waste) would be relevant to the purposes of TRI reporting as required by Section 313(b)(1)(B) of EPCRA.

C. DENY, in part

Beyond requesting that EPA extend TRI reporting requirements to facilities that incinerate waste that classify under NAICS 562213 and 562219, the Petition requests addition of various types of facilities that conduct incineration activities across a spectrum of industry classifications, such as sewage sludge incinerators, pyrolysis and gasification units, and other solid waste incineration units (including air curtain incinerators). EPA denies the remainder of the Petition insofar as it requests that EPA extend TRI reporting beyond facilities classified under NAICS 562213 and 562219.

EPA has limited resources and has other priorities for the TRI program that, at this moment in time, do not include expanding TRI coverage to include the additional industry sectors requested by the Petition. The other types of facilities the Petition identified present additional complexities for reporting to TRI that would consume additional resources for EPA to address. For example, a minority of the facilities in the identified sectors conduct incineration activities (e.g., sewage sludge incineration generally occurs at publicly owned treatment works (POTWs), but most POTWs do not incinerate sewage sludge).⁵ Further, incineration activities that may occur at a facility are a minor aspect of the overall activities taking place at the facility (e.g., treating water is the primary activity of a POTW and the majority of these activities do not involve incineration). This POTW example is applicable to the other types of incinerators identified by the Petition (e.g., Hospital/Medical/Infectious Waste Incinerators other than those classifying under NAICS 562213 or 562219 are generally located at facilities that primarily conduct medical activities). Thus, expanding TRI coverage to include these types of facilities identified by the petition would result in significantly more reporting by facilities that do not conduct incineration, and a majority of the reporting information would be on non-waste incineration activities rather than on waste incineration activities.

⁵ There are over 17,000 POTWs in the US of which approximately 86 have sewage sludge incineration capabilities. See 2022 Clean Watersheds Needs Survey Report to Congress (<https://www.epa.gov/system/files/documents/2024-05/2022-cwns-report-to-congress.pdf>) and AP-42, Vol. I, CH 2.2: Sewage Sludge Incineration (<https://www3.epa.gov/ttnchie1/ap42/ch02/final/c02s02.pdf>).

Further, many of the Commercial and Industrial Solid Waste Incinerators (i.e., facilities that primarily incinerate industrial waste as opposed to municipal waste) and Other Solid Waste Incinerators (i.e., facilities that incinerate that do not fit within the other types of incinerators as described by the Petition) are already in a TRI-covered sector and would report pursuant to expanded TRI coverage of NAICS codes 562213 and 562219. Additionally, certain Commercial and Industrial Solid Waste Incinerators conduct incineration activities via air curtain incinerators (ACIs). ACIs are often used to burn untreated lumber, wood, and yard waste (“clean wood”), but can also be used at remediation sites and to combust municipal waste and other wastes. ACIs are often portable, though some are operated indefinitely at a specific location. Some ACIs are used at landfills, which, similar to POTWs as described above, primarily conduct land disposal activities rather than incineration activities. ACIs are not subject to the CAA requirements that apply to incinerators that classify under NAICS codes 562213 and 562219, and incineration at facilities that use ACIs is typically an ancillary activity for the facility as compared with facilities that classify under NAICS codes 562213 and 562219, which typically focus their activities on incineration. Thus, incineration constitutes a proportionally small portion of the activities that some, but not most, of these facilities undertake. At this time, EPA is focusing its grant of the Petition on industry sectors where incineration is the primary activity of the facilities and where the majority of the facilities in a given industry sector incinerate and do so pursuant to the same, or similar, CAA requirements applicable to facilities engaged in incineration.

The Agency is not foreclosing the possibility that it might propose expanding TRI to include any or all of these other types of facilities in the future. EPA welcomes additional information concerning these types of facilities with regard to potential TRI reporting; however, at this time the Agency is focusing its partial grant of the Petition on facilities that are regulated pursuant to the same, or similar, Clean Air Act requirements applicable to facilities engaged in incineration and are in covered TRI sectors that are currently qualified through reference to subtitle C of RCRA.

III. Conclusion

For the reasons discussed above, EPA hereby GRANTS, in part, the Petition insofar as it requests that EPA commence a rulemaking process to expand its current coverage of facilities classified under Solid Waste Combustors and Incinerators (NAICS 562213) and Other Nonhazardous Waste Treatment and Disposal (NAICS 562219) facilities. For the reasons discussed above, EPA hereby DENIES the remainder of the Petition.