

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[TRI-2009-0216; FRL]

Toxics Release Inventory Form A Eligibility Revisions Implementing the 2009 Omnibus Appropriations Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is today amending its regulations on the eligibility criteria for submitting a Form A Certification Statement in lieu of the more detailed Form R submitted by facilities subject to TRI reporting under section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) and section 6607 of the Pollution Prevention Act of 1990 (PPA). This action is being taken to comply with the “Omnibus Appropriations Act of 2009” enacted on March 11, 2009. As this action is being taken to conform the regulations to a Congressional legislative mandate, notice and comment rulemaking is unnecessary, and this rule is effective immediately. Upon publication to the Federal Register, the provisions of the Toxics Release Inventory Burden Reduction Final Rule will be removed and the regulations in place prior to its implementation will be restored as described below.

DATES: This final rule is effective on [*Insert date of publication in the Federal Register*].

ADDRESSES: EPA has established a docket for this action under Docket ID No. TRI-2009-0216. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other

material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the OEI Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., 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: Cory J. Wagner, Toxics Release Inventory Program Division, Office of Information Analysis and Access (2844T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202-566-1555; fax number: 202-566-0741; e-mail: wagner.cory@epa.gov, for specific information on this proposed rule, or for more information on EPCRA section 313, the Emergency Planning and Community Right-to-Know Hotline, Environmental Protection Agency, Mail Code 5101, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Toll free: 1-800-424-9346, in Virginia and Alaska: 703-412-9810 or Toll free TDD: 1-800-553-7672.

SUPPLEMENTARY INFORMATION:

I. General Information

A. 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). It specifically applies to those that submit the TRI Form R or

Form A Certification Statement. (See <http://www.epa.gov/tri/report/index.htm#forms> for detailed information about EPA's TRI reporting forms.) 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.

II. Background and Rationale for Action

In the Federal Register of December 22, 2006 (71 FR 76932), EPA issued the Toxics Release Inventory Burden Reduction Final Rule expanding Form A eligibility for non-PBT chemicals and allowing for the first time, and in limited circumstances, Form A eligibility for PBT chemicals. Specifically, the December 2006 final rule allowed facilities to use Form A in lieu of Form R for TRI-listed PBT chemicals (except dioxin and dioxin-like compounds) when there were no annual releases of the PBT chemical, the facility's total annual amount of the chemical recycled, combusted for energy recovery, and/or treated for destruction did not exceed 500 pounds, and the facility did not manufacture, process, or otherwise use more than one million pounds of the PBT chemical. As it related to the Form R data elements, the December 2006 final rule allowed a facility to use Form A instead of Form R for a specific PBT chemical (other than dioxin and dioxin-like compounds) when zero or not applicable (NA) was reported for items a, b, c, and d of Section 8.1 (Total Disposal or Other Releases), the facility did not have any non-production-related releases of the PBT chemical included in Section 8.8 (quantity

released to the environment as a result of remedial actions, catastrophic events, or one-time events not associated with production processes), and the total amount reported for recycling, energy recovery, and/or treatment for destruction in Section 8.2 through and including Section 8.8 did not exceed 500 pounds.

The December 2006 final rule also expanded non-PBT chemical eligibility for Form A by raising the annual reportable amount (ARA) eligibility criterion to 5,000 pounds for total annual waste management (i.e., releases, recycling, energy recovery, and treatment for destruction) provided total annual releases of the non-PBT chemical comprised no more than 2,000 pounds of the 5,000-pound total waste management limit. In other words, the December 2006 final rule allowed facilities to use Form A in lieu of Form R for a non-PBT chemical when the facility's total annual reportable amount of the chemical released, recycled, combusted for energy recovery, and/or treated for destruction did not exceed 5,000 pounds, the facility's total annual releases of the chemical did not exceed 2,000 pounds, and the facility did not manufacture, process, or otherwise use more than one million pounds of the non-PBT chemical. As it related to the Form R data elements, the December 2006 final rule allowed a facility to consider Form A for a non-PBT chemical when the sum of Section 8.1 through and including Section 8.8 did not exceed 5,000 pounds and the sum of amounts reported for items a, b, c, and d of Section 8.1 (Total Disposal or Other Releases) and any non-production-related releases reported in Section 8.8 (Quantity released to the environment as a result of remedial actions, catastrophic events, or one-time events not associated with production processes) did not exceed 2,000 pounds. For more information about the December 2006 final rule and to obtain the rule's supporting materials visit the TRI website at www.epa.gov/tri and the docket for the December 2006 rule at www.regulations.gov under docket TRI-2005-0073.

On March 11, 2009, the Omnibus Appropriations Act of 2009 (“the Act”) was enacted.

The Act reads, in pertinent part:

(1) none of the funds made available by this or any other Act may, hereafter, be used to implement the final rule promulgated by the Administrator of the Environmental Protection Agency entitled 'Toxics Release Inventory Burden Reduction Final Rule' (71 Fed. Reg. 76932); and (2) the final rule described in paragraph (1) shall have no force or effect. The affected regulatory text shall revert to what it was before the final rule described in paragraph (1) became effective, until any future action taken by the Administrator.

Accordingly, EPA is issuing today’s final rule revising Form A eligibility for both PBT and non-PBT chemicals to the thresholds established prior to the 2006 TRI Burden Reduction Final Rule. Under 5 U.S.C. 553(b)(3)(B), the notice-and-comment requirements of the Federal Administrative Procedure Act (5 U.S.C. 551-706) do not apply where the Agency “for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” Because this action is being taken to comply with an Act of Congress and EPA has no discretion as to the outcome of this rule, EPA hereby finds that notice and comment on this action are unnecessary.

Accordingly, today’s rule modifies Form A eligibility provided for at 40 C.F.R. section 372.27 (Alternate thresholds and certifications). For PBT chemicals, this final rule eliminates Form A eligibility for those chemicals listed at 40 C.F.R. section 372.28. For non-PBT chemicals, today’s final rule reinstates the 500-pound annual reporting amount (the total of releases and other waste management) and 1,000,000 pounds manufactured, processed or otherwise used Form A eligibility threshold in effect prior to December 22, 2006. This includes releases and waste management activities (Section 8.1 through and including Section 8.7) which are counted against the 500 pound threshold criterion.

Today's rule is effective immediately upon publication in the Federal Register and affects reports filed for RY2008 (due July 1, 2009) forward. Under 5 U.S.C. 553(d)(3), this rule is effective immediately for good cause because the Omnibus Appropriations Act prohibits the Agency from expending any funds to implement the former reporting requirements and mandated that the regulations revert to the prior version.

If a facility submitted a TRI Form A for RY 2008 *on or after* March 11, 2009, and still used the 2006 TRI Burden Reduction Final Rule to determine its eligibility for Form A, then the facility *must* determine whether it is still eligible to file Form A. The Omnibus Appropriation Act set back the Form A criteria to previous levels as of March 11. If the facility determines that it is no longer eligible to file Form A, then EPA *requires* the facility to revise and resubmit its RY 2008 report on Form R. Facilities are not permitted to submit a Form A for PBT chemicals.

EPA recognizes that this change is occurring after 2008 reporting year during which the data collected for the Reporting Year 2008 filing, due on July 1, 2009, was collected. EPCRA requires facilities to make their best estimates based on the available data (See EPCRA § 313(g)(2)). Facilities can seek further advice from EPA regions and the states about this rule change.

III. References

1. Omnibus Appropriations Act of 2009, Pub.L.No. 111-8 (March 11, 2009).

IV. What Are the Statutory and Executive Order Reviews Associated With This Action?

A. Executive Order 12866, Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order (EO)12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO. EPA prepared a brief analysis of the potential costs and benefits associated with this action.

This analysis is contained here.

1. Methodology

To estimate the incremental costs, economic impacts, and benefits of this rule, the Agency estimated both the cost and burden of completing Form R and Form A as well as the number of affected entities. The Agency has used Reporting Year (RY) 2007 for TRI data. The Agency identified the number of potentially affected respondents currently completing Form As or eligible to complete Form A due to the Phase 2 Burden Reduction Rule that may be required to complete Form R as a result of today's final rule. The Agency compared the baseline burden associated with completing Form A with the burden associated with completing Form R. The total burden and cost associated with this rule is the difference between the unit burden and cost of filing a Form R rather than a Form A for those respondents that were eligible to file a Form A as a result of the Burden Reduction Rule times the number of respondents affected. There are also a few filers who had filed Form As before the Burden Reduction Rule, who were subsequently required to file Form Rs after the Burden Reduction Rule, because the final rule stated that Section 8.8 releases must be included in the calculation of the releases for determining eligibility for using Form A. After this revision of the Form A eligibility, Section 8.8 releases no longer apply to the calculation of releases for determining eligibility for Form A, and these respondents may return to eligibility to file Form As. For these forms, the Agency has calculated the burden and cost reduction of returning to Form A eligibility for these particular Form R respondents.

2. Cost and Burden Results

Table 1 summarize the potential annual cost and burden increase of this final rule for filers who would have been eligible to file Form A under the Burden Reduction Rule and who will now be required to file Form Rs. Table 2 summarizes the decrease in Cost and Burden due to this rule for a small number of respondents who were required to file form Rs as a result of the Burden Reduction Rule, but who are now eligible to file Form As. The net cost and burden of the rule is the total increase from Table 1 minus the total decrease in Table 2.

Table 1- Potential Annual Cost and Burden Increase of the Toxics Release Inventory Form A Eligibility Revisions Implementing the 2009 Omnibus Appropriations Act: Respondents filing Form Rs who were eligible to file Form As under the Burden Reduction Rule.

Option Type	Number of Forms	Total Burden Hour Increase	Total Burden Hour Increase per Form R	Total Cost Increase	Average Cost Increase per Form	Percent of Total Cost/Burden
PBT	2,462	38,020	15.4	\$2,004,470	\$814	27%
non-PBT	11,246	102,846	9.1	\$5,368,519	\$477	73%
PBT & non-PBT Combined	13,708	140,867	10.3	\$7,372,988	\$538	100%

Table 2- Potential Annual Cost and Burden Decrease of the Toxics Release Inventory Form A Eligibility Revisions Implementing the 2009 Omnibus Appropriations Act: Respondents who are now eligible to file Form As who would have been required to file Form Rs under the Burden Reduction Rule.

Option Type	Number of Forms	Total Burden Hour Decrease	Total Burden Hour Decrease per Form A	Total Cost Decrease	Average Cost Decrease per Form	Percent of Total Cost/Burden
PBT	0	0	0.0	\$0	\$0	0%
non-PBT	33	302	9.1	\$15,753	\$477	100%
PBT & non-PBT Combined	33	302	9.1	\$15,753	\$477	100%

The cost and burden is the increased burden due to respondents who now must file Form Rs who were formerly eligible for Form A, \$7,372,988, minus the decrease in burden due to the return to Form A eligibility of some Form R filers, \$15,753, yielding the increase in cost and burden of this rule as \$7,357,235.00.

3. Impacts to Data When EPA promulgated the Burden Reduction Rule in December 2006, it calculated the impact of the data that would be lost if all respondents who were eligible to use Form A as a result of the rule did so. One analysis looked at the number of pounds of releases and wastes that might not be reported on Form Rs.

**TABLE 1
PERCENTAGE OF TOTAL RELEASES AND OTHER WASTE MANAGEMENT POUNDS NOT REPORTED DUE TO NEW AND EXPANDED FORM A ELIGIBILITY**

	Total Releases Not Reported Lbs	Total Production Related Waste Not Reported on Form R Lbs	Total Non-Production Related Waste Not Reported on Form R Lbs
New Eligibility for Form A: PBT Chemicals Option	0	83,129	283
Expanded Eligibility for Form A: Non-PBT Chemicals Option	5,713,104	16,052,663	83,832

As a result of the Toxics Release Inventory Form A Eligibility Revisions Implementing the 2009 Omnibus Appropriations Act, all releases and wastes will be reported on Form Rs and the local communities will be aware of them.

EPA also examined the potential impact on zip codes if all the Form Rs that indicated eligibility for Form A, reported on Form As.

**TABLE 2
ZIP CODES ELIGIBLE FOR FORM A REPORTING
(PBT AND NON-PBT OPTIONS)**

	Number of Zip Codes	Percent of Total Zip Codes Containing Form Rs	Average Number of Form Rs per Zip Code
Zip codes with at least one Form R newly eligible for Form A	4,246	47.4%	13.55
Zip codes with all Form Rs newly eligible for Form A	557	6.2%	2.04
<i>Note: Based on the RY2004 Frozen TRI data, there are 8,961 five-digit zip codes with TRI Form R data. Source: Frozen RY2004 TRI data.</i>			

As shown on the chart above, nearly half of all zip codes would lose some release information and 557 zip codes would lose all the release information that would have been available before the Burden Reduction Rule. This information will now be restored to those communities.

B. Paperwork Reduction Act –

The reversal of the 2006 TRI Burden Reduction Rule will increase the overall reporting and recordkeeping burden estimate provided for EPCRA section 313, but this action has been approved as a change request by OMB under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq. This action is being taken as a result of a congressional mandate and without any discretion on the part of EPA. Because of this reversal, burden is being shifted from the Form A Information Collection Request (OMB No. 2070-0143) back to the Form R Information

Collection Request (OMB No. 2070-0093). Based on Reporting Year (RY) 2005 data, the shifted burden is estimated to be 140,565 hours and a cost of \$7,357,235.

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

Today's proposed rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because although the rule is subject to the APA, the Agency has invoked the "good cause" exemption under 5 USC 553(b), therefore it is not subject to the notice and comment requirement.

D. Unfunded Mandates Reform Act

Because the agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute [see Section II above], it is not subject to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (Pub.L.104-4).

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 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 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 rule is not a “significant energy action” as defined in Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Today’s rule increases only recordkeeping and reporting burden for TRI reporters. It will not cause reductions in supply or production of oil, fuel, coal, or electricity. Nor will it result in increased energy prices, increased cost of energy distribution, or an increased dependence on foreign supplies of energy.

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 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 final 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. The principal consequence of today's action will be to increase the amount of *detailed* information available on toxic chemical releases or management and therefore, EPA does not have any evidence that this rule will have a direct effect on human health or environmental conditions.

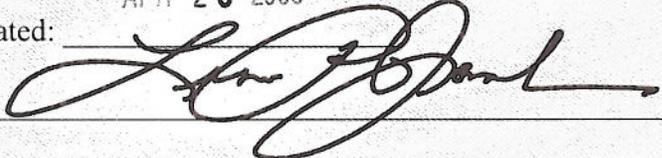
K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take

effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. Section 808 of the Congressional Review Act provides that any rule for which the issuing agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rule) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the agency promulgating the rule determines (5 U.S.C. 808(2)). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of March 23, 2009. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 372

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

APR 20 2009
Dated: 

Lisa P. Jackson,

Administrator.

Therefore, 40 CFR part 372 is amended as follows:

PART 372-[AMENDED]

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

Authority: 42 U.S.C. 11023 and 11048.

Subpart A – [Amended]

2. Revise § 372.10(d) introductory text to read as follows:

§ 372.10 Recordkeeping.

* * * * *

(d) Each owner or operator who determines that the owner operator may apply the alternate threshold as specified under Sec. 372.27(a) must retain the following records for a period of 3 years from the date of the submission of the certification statement as required under Sec. 372.27(b). * * * * *

Subpart B - [Amended]

3. Section 372.27 is amended as follows:

- i. Revise section heading.
- ii. Revise paragraph (a).
- iii. Revise paragraph (b).
- iv. Revise paragraph (e).

§ Sec. 372.27 Alternate threshold and certification.

(a) Except as provided in paragraph (e) of this section:

With respect to the manufacture, process, or otherwise use of a toxic chemical, the owner or operator of a facility may apply an alternate threshold of 1 million pounds per year to that chemical if the owner or operator calculates that the facility would have an annual

reportable amount of that toxic chemical not exceeding 500 pounds for the combined total quantities released at the facility, disposed within the facility, treated at the facility (as represented by amounts destroyed or converted by treatment processes), recovered at the facility as a result of recycle operations, combusted for the purpose of energy recovery at the facility, and amounts transferred from the facility to off-site locations for the purpose of recycle, energy recovery, treatment, and/or disposal. These volumes correspond to the sum of amounts reportable for data elements on EPA Form R (EPA Form 9350-1; Rev. 12/4/93) as Part II column B or sections 8.1 (quantity released), 8.2 (quantity used for energy recovery on-site), 8.3 (quantity used for energy recovery off-site), 8.4 (quantity recycled on-site), 8.5 (quantity recycled off-site), 8.6 (quantity treated on-site), and 8.7 (quantity treated off-site).

* * * * *

(b) If an owner or operator of a facility determines that the owner or operator may apply the alternate reporting threshold specified in paragraph (a) of this section for a specific toxic chemical, the owner or operator is not required to submit a report for that chemical under Sec. 372.30, but must submit a certification statement that contains the information required in Sec. 372.95. The owner or operator of the facility must also keep records as specified in Sec. 372.10(d).

* * * * *

(e) The provisions of this section do not apply to any chemicals listed in Sec. 372.28.

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Subpart E – [Amended]

4. Section 372.95 is amended as follows:

- i. Revise section heading.
- ii. Revise paragraph (b) introductory text.
- iii. Revise paragraph (b)(4).

§ 372.95 Alternate threshold certification and instructions.

* * * * *

(b) Alternate threshold certification statement elements. The following information must be reported on an alternate threshold certification statement pursuant to Sec. 372.27(b):

* * * * *

(4) Signature of a senior management official certifying the following: pursuant to 40 CFR 372.27, "I hereby certify that to the best of my knowledge and belief for the toxic chemical listed in this statement, the annual reportable amount, as defined in 40 CFR 372.27(a), did not exceed 500 pounds for this reporting year and that the chemical was manufactured, or processed, or otherwise used in an amount not exceeding 1 million pounds during this reporting year."

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