

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 68**

[FRL-6214-9]

RIN 2050-AE46

**Accidental Release Prevention Requirements; Risk Management Programs Under Clean Air Act Section 112(r)(7); Amendments****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** This action modifies the chemical accident prevention rule codified in 40 CFR Part 68. The chemical accident prevention rule requires owners and operators of stationary sources subject to the rule to submit a risk management plan (RMP) by June 21, 1999, to a central location specified by EPA. In this action, EPA is

amending the rule to: add four mandatory and five optional RMP data elements, establish specific procedures for protecting confidential business information when submitting RMPs, adopt the government's use of a new industry classification system, and make technical corrections and clarifications to Part 68. However, as stated in the proposed rule for these amendments, this action does not address issues concerning public access to offsite consequence analysis data in the RMP.

**DATES:** The rule is effective February 5, 1999.

**ADDRESSES:** Supporting material used in developing the proposed rule and final rule is contained in Docket A-98-08. The docket is available for public inspection and copying between 8:00 a.m. and 5:30 p.m., Monday through Friday (except government holidays) at Room 1500, 401 M Street SW, Washington, DC 20460. A reasonable fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT:** Sicy Jacob or John Ferris, Chemical Emergency Preparedness and Prevention Office, Environmental Protection Agency (5104), 401 M Street SW, Washington, DC 20460, (202) 260-7249 or (202) 260-4043, respectively; or the Emergency Planning and Community Right-to-Know Hotline at 800-424-9346 (in the Washington, DC metropolitan area, (703) 412-9810). You may wish to visit the Chemical Emergency Preparedness and Prevention Office (CEPPO) Internet site, at [www.epa.gov/ceppo](http://www.epa.gov/ceppo).

**SUPPLEMENTARY INFORMATION:****Regulated Entities**

Entities potentially regulated by this action are those stationary sources that have more than a threshold quantity of a regulated substance in a process. Regulated categories and entities include:

| Category                     | Examples of regulated entities   |
|------------------------------|--|
| Chemical Manufacturers ..... | Basic chemical manufacturing, petrochemicals, resins, agricultural chemicals, pharmaceuticals, paints, cleaning compounds. |
| Petroleum .....              | Refineries.  |
| Other Manufacturing .....    | Paper, electronics, semiconductors, fabricated metals, industrial machinery, food processors.                              |
| Agriculture .....            | Agricultural retailers.  |
| Public Sources .....         | Drinking water and waste water treatment systems.  |
| Utilities .....              | Electric utilities.  |
| Other .....                  | Propane retailers and users, cold storage, warehousing, and wholesalers.   |
| Federal Sources .....        | Military and energy installations.   |

This table is not meant to be exhaustive, but rather provides a guide for readers to indicate those entities likely to be regulated by this action. The table lists entities EPA is aware of that could potentially be regulated by this action. Other entities not listed in the table could also be regulated. To determine whether a stationary source is regulated by this action, carefully examine the provisions associated with the list of substances and thresholds under § 68.130 and the applicability criteria under § 68.10. If you have questions regarding applicability of this action to a particular entity, consult the hotline or persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

**Table of Contents**

- I. Introduction and Background
  - A. Statutory Authority
  - B. Background
- II. Summary of the Final Rule
- III. Discussion of Issues
  - A. NAICS Codes
  - B. RMP Data Elements
  - C. Prevention Program Reporting
  - D. Confidential Business Information
  - E. Other Issues

- F. Technical Corrections
- IV. Section-by-Section Discussion of the Final Rule
- V. Judicial Review
- VI. Administrative Requirements
  - A. Docket
  - B. Executive Order 12866
  - C. Executive Order 12875
  - D. Executive Order 13045
  - E. Executive Order 13084
  - F. Regulatory Flexibility
  - G. Paperwork Reduction
  - H. Unfunded Mandates Reform Act
  - I. National Technology Transfer and Advancement Act
  - J. Congressional Review Act

**I. Introduction and Background****A. Statutory Authority**

These amendments are being promulgated under sections 112(r) and 301(a)(1) of the Clean Air Act (CAA) as amended (42 U.S.C. 7412(r), 7601(a)(1)).

**B. Background**

The 1990 CAA Amendments added section 112(r) to provide for the prevention and mitigation of accidental chemical releases. Section 112(r) mandates that EPA promulgate a list of "regulated substances," with threshold

quantities. Processes at stationary sources that contain a threshold quantity of a regulated substance are subject to accidental release prevention regulations promulgated under CAA section 112(r)(7). EPA promulgated the list of regulated substances on January 31, 1994 (59 FR 4478) (the "List Rule") and the accidental release prevention regulations creating the risk management program requirements on June 20, 1996 (61 FR 31668) (the "RMP Rule"). Together, these two rules are codified as 40 CFR Part 68. EPA amended the List Rule on August 25, 1997 (62 FR 45132), to change the listed concentration of hydrochloric acid. On January 6, 1998 (63 FR 640), EPA amended the List Rule to delist Division 1.1 explosives (classified by DOT), to clarify certain provisions related to regulated flammable substances and to clarify the transportation exemption.

Part 68 requires that sources with more than a threshold quantity of a regulated substance in a process develop and implement a risk management program that includes a five-year accident history, offsite consequence analyses, a prevention

program, and an emergency response program. In Part 68, processes are divided into three categories (Programs 1 through 3). Processes that have no potential impact on the public in the case of accidental releases have minimal requirements (Program 1). Processes in Programs 2 and 3 have additional requirements based on the potential for offsite consequences associated with the worst-case accidental release and their accident history. Program 3 is also triggered if the processes are subject to OSHA's Process Safety Management (PSM) Standard. By June 21, 1999, sources must submit to a location designated by EPA, a risk management plan (RMP) that summarizes their implementation of the risk management program.

When EPA promulgated the risk management program regulations, it stated that it intended to work toward electronic submission of RMPs. The Accident Prevention Subcommittee of the CAA Advisory Committee convened an Electronic Submission Workgroup to examine technical and practical issues associated with creating a national electronic repository for RMPs. Based on workgroup recommendations, EPA is in the process of developing two systems, a user-friendly PC-based submission system (RMP\*Submit) and a database of RMPs (RMP\*Info).

The Electronic Submission Workgroup also recommended that EPA add some mandatory and optional data elements to the RMP and asked EPA to clarify how confidential business information (CBI) submitted in the RMP would be handled. Based on these recommendations and requests for clarifications, EPA proposed amendments to Part 68 on April 17, 1998 (63 FR 19216). These amendments proposed to replace the use of Standard Industrial Classification (SIC) codes with the North American Industry Classification System (NAICS) codes, add four mandatory data elements to the RMP, add five optional data elements to the RMP, establish specific requirements for submission of information claimed CBI, and make technical corrections and clarifications to the rule. EPA received 47 written comments on the proposed rule. Today's rule reflects EPA's consideration of all comments; major issues raised by commenters and EPA's responses are discussed in Section III of this preamble. A summary of all comments submitted and EPA's responses can be found in a document entitled, *Accidental Release Prevention Requirements; Risk Management Programs Under Clean Air Act Section 112(r)(7); Amendments: Summary and*

*Response to Comments*, in the Docket (see **ADDRESSES**).

## II. Summary of the Final Rule

### NAICS Codes

On January 1, 1997, the U.S. Government, in cooperation with the governments of Canada and Mexico, adopted a new industry classification system, the North American Industry Classification System (NAICS), to replace the Standard Industrial Classification (SIC) codes (April 9, 1997, 62 FR 17288). The applicability of some Part 68 requirements (i.e., Program 3 prevention requirements) is determined, in part, by SIC codes, and Part 68 also requires the reporting of SIC codes in the RMP. Therefore, EPA is revising Part 68 to replace all references to "SIC code" with "NAICS code." In addition, EPA is replacing, as proposed, the nine SIC codes subject to Program 3 prevention program requirements with ten NAICS codes, as follows:

| NAICS  | Sector  |
|--------|---|
| 32211  | Pulp mills  |
| 32411  | Petroleum refineries                              |
| 32511  | Petrochemical manufacturing                       |
| 325181 | Alkalies and chlorine                             |
| 325188 | All other inorganic chemical manufacturing        |
| 325192 | Other cyclic crude and intermediate manufacturing |
| 325199 | All other basic organic chemical manufacturing    |
| 325211 | Plastics and resins                               |
| 325311 | Nitrogen fertilizer                               |
| 32532  | Pesticide and other agricultural chemicals        |

NAICS codes are either five or six digits, depending on the degree to which the sector is subdivided.

### RMP Data Elements

As proposed, EPA is adding four new data elements to the RMP: latitude/longitude method and description, CAA Title V permit number, percentage weight of a toxic substance in a liquid mixture, and NAICS code for each process that had an accidental release reported in the five-year accident history. EPA is also adding five optional data elements: local emergency planning committee (LEPC) name, source or parent company e-mail address, source homepage address, phone number at the source for public inquiries, and status under OSHA's Voluntary Protection Program (VPP).

### Prevention Program Reporting

EPA is not revising Sections 68.170 and 68.175 as proposed. Prevention program reporting, therefore, will not be changed to require a prevention program for each portion of a process for which a Process Hazard Analysis (PHA)

or hazard review was conducted. Instead, EPA plans to create functions within RMP\*Submit to provide stationary sources with a flexible way of explaining the scope and content of each prevention program they implement at their facility.

### Confidential Business Information

EPA is clarifying how confidential business information (CBI) submitted in the RMP will be handled. EPA has determined that the information required by certain RMP data elements does not meet the criteria for CBI and therefore may not be claimed as such. The Agency is also requiring submission of substantiation at the time a CBI claim is filed.

Finally, EPA is promulgating several of the technical corrections and clarifications, as proposed in the **Federal Register**, April 17, 1998 (63 FR 19216).

## III. Discussion of Issues

EPA received 47 comments on the proposed rule. The commenters included chemical manufacturers, petroleum refineries, environmental groups, trade associations, a state agency, and members of the public. The major issues raised by commenters are addressed briefly below. The Agency's complete response to comments received on this rulemaking is available in the docket (see **ADDRESSES**). The document is titled *Accidental Release Prevention Requirements; Risk Management Programs Under Clean Air Act Section 112(r)(7); Amendments: Summary and Response to Comments*.

### A. NAICS Codes

Two commenters asked that sources be given the option to use either SIC codes or NAICS codes, or both, in their initial RMP because the NAICS system is new and may not be familiar to sources. EPA disagrees with this suggestion. EPA intends to provide several outreach mechanisms to assist sources in identifying their new NAICS code. RMP\*Submit will provide a "pick list" that will make it easier for sources to find the appropriate code. Also, selected NAICS codes are included in the General Guidance for Risk Management Programs (July 1998) and in the industry-specific guidance documents that EPA is developing. EPA will also utilize the Emergency Planning and Community Right-to-Know Hotline at 800-424-9346 (or 703-412-9810) and its web site at [www.epa.gov/ceppo/](http://www.epa.gov/ceppo/), to assist sources in determining the source's NAICS codes. EPA also notes that the Internal Revenue Service is planning to require businesses to

provide NAICS-based activity codes on their 1998 tax returns, so many sources will have become familiar with their NAICS codes by the June 1999 RMP deadline.

EPA believes it is necessary and appropriate to change from SIC codes to NAICS codes at this time. EPA recognizes that NAICS codes were developed for statistical purposes by the Office of Management and Budget (OMB). In the notice of April 9, 1997 (62 FR 17288) OMB stated that the "[u]se of NAICS for nonstatistical purposes (e.g., administrative, regulatory, or taxation) will be determined by the agency or agencies that have chosen to use the SIC for nonstatistical purposes." EPA has determined that NAICS is appropriate in this rule for several reasons. First, the reason the SIC codes were replaced by NAICS codes is because the SIC codes no longer accurately represent today's industries. The SIC codes will become more obsolete over time because OMB will no longer be supporting the SIC codes; therefore, no new or modified SIC codes will be developed to reflect future changes in industries. Second, as the SIC codes become obsolete, most users of SIC codes will likely change to NAICS codes over time, so future data sharing and consistency will be enhanced by use of NAICS codes in the RMP program. Third, through this rulemaking process, EPA has analyzed specific conversions of SIC codes to NAICS codes for the RMP program and was able to identify NAICS codes that were applicable to fulfilling the purposes of this rule. Finally, because the RMP reporting requirement is new, it is reasonable to begin the program with NAICS codes now rather than converting to them later.

Three commenters expressed support for the ten NAICS codes that EPA proposed to use in place of the nine SIC codes referenced in section 68.10(d)(1) of Part 68 and one commenter partially objected. Section 68.10(d)(1) provides that processes in the referenced codes are subject to Program 3 requirements (if not eligible for Program 1). One commenter objected to EPA's proposal to replace the SIC code for pulp and paper mills with only the NAICS code for pulp mills that do not also produce paper or paperboard. The commenter asked EPA to reexamine the accident history of paper and paperboard mills. As discussed in the preamble of the proposed rule, EPA reviewed the accident history data prior to proposing the new NAICS codes. Neither facilities that classify themselves as paper mills (NAICS Code 322121) nor paperboard mills (NAICS code 32213) met the accident history criteria that EPA used

to select industrial sectors for Program 3.

EPA notes that a pulp process at a paper or a paperboard mill may still be subject to Program 3 as long as the process contains more than a threshold quantity of a regulated substance and is not eligible for Program 1. Section 68.10(d)(1) uses industrial codes to classify processes, not facilities as a whole. Since section 68.10(d)(1) will continue to list the code for pulp mills, pulpmaking processes will continue to be subject to Program 3. In addition, under section 68.10(d)(2), paper processes will be in Program 3 (unless eligible for Program 1) if they are subject to OSHA's Process Safety Management (PSM) standard. Most pulp and paper processes are, in fact, subject to this standard.

One commenter objected to assigning NAICS codes to a process rather than the source as a whole. EPA first notes that the requirement to assign a SIC code to a process was adopted in the original RMP rulemaking two years ago. Today's rule does not change that requirement except to substitute NAICS for SIC codes. In any event, EPA is today modifying Part 68 to clarify that sources provide the NAICS code that "most closely corresponds to the process." EPA believes that assigning an industry code to a process will help implementing agencies and the public understand what the covered process does; using the code makes it possible to provide this information without requiring a detailed explanation from the source. In addition, the primary NAICS code for a source as a whole may not reflect the activity of the covered process.

#### *B. RMP Data Elements*

EPA proposed to add, as optional RMP data elements: local emergency planning committee (LEPC), source (or parent company) E-mail address, source homepage address, phone number at the source for public inquiries, and OSHA Voluntary Protection Program (VPP) status. EPA also proposed to add, as mandatory data elements: method and description of latitude/longitude, Title V permit number, percent weight of a toxic substance in a liquid mixture, and NAICS code (only in the five-year accident history section).

Commenters generally supported the new optional data elements. One commenter requested that the optional elements be made mandatory. EPA disagrees with this comment. While the elements are useful, many sources covered by this rule will not have e-mail addresses or home pages. The RMP will provide both addresses and phone

numbers so that the public will have methods to reach the source. EPA has learned that in some areas there are no functioning LEPCs, therefore, at this time, EPA will not add this as a mandatory data element. However, in most cases, the LEPC for an area can be determined by contacting the local government or the State Emergency Response Commission (SERC) for which the area is located. Therefore, reporting these data elements will remain optional at this time.

One commenter supported adding the listing of local emergency planning committee in the RMP data elements as an optional data element. The commenter stated that, although it is an optional data element, this listing will enhance the ability of local responders and emergency planners to adequately prepare and train for emergency events.

Of the data elements that were proposed to be mandatory, one commenter objected to the addition of latitude/longitude method and description. The commenter stated that it was not clear in the proposal why the method and description information is needed. EPA is seeking latitude/longitude method and description in accordance with its Locational Data Policy. Several EPA regulations require sources to provide their latitude and longitude, so that EPA can more readily locate facilities and communicate data between Agency offices. Sharing of data between EPA offices reduces duplication of information. Latitude/longitude method and description provides information needed by EPA offices, and other users of the data, to rectify discrepancies that may appear in the latitude and longitude information provided by the source under various EPA requirements. Documentation of the method by which the latitude and longitude are determined and a description of the location point referenced by the latitude and longitude (e.g., administration building) will permit data users to evaluate the accuracy of those coordinates, thus addressing EPA data sharing and integration objectives.

EPA believes this information will also facilitate EPA-State coordination of environmental programs, including the chemical accident prevention rule. The State/EPA Data Management Program is a successful multi-year initiative linking State environmental regulatory agencies and EPA in cooperative action. The Program's goals include improvements in data quality and data integration based on location identification. Therefore, as proposed, the latitude/longitude method and description will be added to the existing RMP data

elements. RMP\*Submit will provide a list of methods and descriptions from which sources may choose.

EPA also proposed to require that sources report the percentage weight (weight percent) of a toxic substance in a mixture in the offsite consequence analysis (OCA) and the accident history sections of the RMP. This information is necessary for users of RMP data to understand how worst case and alternative release scenarios have been modeled. EPA has decided to require reporting of the weight percent of toxic substance in a liquid mixture because this information is necessary to understand the volatilization rate, which determines the downwind dispersion distance of the substance. The volatilization rate is affected by the vapor pressure of the substance in the mixture. For example, a spill of 70 percent hydrofluoric acid (HF) will volatilize more quickly than a spill of the same quantity of HF in a 50 percent solution; consequently, over a 10-minute period, the 70 percent solution will travel further. Reviewers of the RMP data, including local emergency planning committees, need to know the weight percent to be able to evaluate the results reported in the offsite consequence analysis and the impacts reported in the accident history. Without knowing the weight percent of the substance in the mixture, users of the data may compare scenarios or incidents that appear to involve the same chemical in the same physical state, but in fact involve the same chemical held in a different physical state.

One commenter stated that for gas mixtures, percentage by volume (or volume percent) should be required to be reported rather than weight percent. In this final rule, EPA does not require reporting of the weight percent (or volume percent) of a regulated substance in a gas mixture. If a source handles regulated substances in a gaseous mixture (e.g., chlorine with hydrogen chloride), the quantity of a particular regulated substance in the mixture is what is reported in the RMP, since that is what would be released into the air. Its percentage weight in the mixture is irrelevant.

Another commenter objected to this data element, claiming that it could result in reverse engineering and create a competitive disadvantage. EPA does not believe that this requirement would create a competitive disadvantage, since similar information is available to the public under Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986. Even so, if it were to have such an effect, sources can claim this element

as CBI if it can meet the criteria for CBI claims in 40 CFR Part 2. Another commenter stated that the public would be concerned if the percentages did not add to 100, in the event that the source handles both regulated and non-regulated substances. EPA believes that because a source must model only one substance in a release scenario, the source need not report the percentages of the other substances in the mixture. Therefore, it is expected that the weight percent for mixtures would not always add up to 100, because the mixture could contain non-regulated substances.

A third commenter suggested that requiring sources to report percentage weight of a toxic substance in a liquid mixture would create confusion with the reporting of mixtures containing flammable regulated substances.

In the January 6, 1998 rule (63 FR 640), EPA clarified that flammable regulated substances in mixtures are only covered by the RMP rule if the entire mixture meets the National Fire Protection Association (NFPA) criteria of 4, thus the entire mixture becomes the regulated substance. As a result, the percentage of flammables in a mixture is not relevant under the rule and the requirement to report the percentage weight will only apply to toxic substances in a liquid mixture.

Finally, in the **Federal Register** notice of June 20, 1996 (61 FR 31688), EPA clarified the relationship between the risk management program and the air permit program under Title V of the CAA for sources subject to both requirements. Under section 502(b)(5)(A), permitting authorities must have the authority to assure compliance by all covered sources with each applicable CAA standard, regulation or requirement, including the regulations implementing section 112(r)(7). Requiring sources covered by Title V and section 112(r) to provide their Title V permit number will help Title V permitting authorities assure that each source is complying with the RMP rule.

In summary, with the exception of adding the phrase "that most closely corresponds to the process" in sections 68.42(b)(4), 68.160(b)(7), 68.170(b), and 68.175(b), EPA has decided to finalize the optional and mandatory data elements as they were proposed.

#### *C. Prevention Program Reporting*

The final RMP rule, issued June 20, 1996 (61 FR 31668), requires sources to report their prevention program for each "process." Because the applicable definition of "process" is broad, multiple production and storage units might be a single, complex "process."

However, the Agency realizes that some elements of a source's prevention program for a process may not be applicable to every portion of the process. In such a situation, reporting prevention program information for the process as a whole could be misleading without an explanation of which prevention program element applies to which part of the process. In order to get more specific information on which prevention program practices apply to different production and storage units within a process, EPA proposed to revise the rule to require prevention program reporting for each part of the process for which a separate process hazard analysis (PHA) or hazard review was conducted. EPA further proposed deleting the second sentence from both sections 68.170(a) and 68.175(a), which presently states that, "[i]f the same information applies to more than one covered process, the owner or operator may provide the information only once, but shall indicate to which process the information applies."

A number of industry commenters objected to the proposed revisions as wrongly assuming that a one-to-one relationship exists between a prevention program and a PHA. The commenters asserted that EPA's proposed revision did not reflect how facilities conduct PHAs or implement prevention measures and would cause significant duplicate reporting, creating unnecessary extra work for facility personnel. One commenter explained that depending on a source's circumstances, it might conduct a PHA for each production line, including all of its different units, or it might conduct a PHA for each common element of its different production lines. Accordingly, the commenters claimed that EPA's proposal to require the owner/operator to submit separate prevention program information for every portion of a process covered by a PHA would result in multiple submissions of much of the same material, and would add no value to process safety or accidental release prevention. Commenters also opposed the deletion of the second sentence in sections 68.170(a) and 68.175(a). One commenter noted that many of the elements of the prevention program will not only be common to a process, but will be common to an entire stationary source. Thus commenters argued that EPA's proposals would result in redundant submittals and place an unjustified burden on the regulated community.

EPA acknowledges that PHAs do not necessarily determine the scope of prevention program measures. Moreover, EPA agrees that duplicative

reporting should be reduced as much as possible. At the same time, EPA, implementing agencies, and other users of RMP data need to have information that is detailed enough to understand the hazards posed by, and the safety practices used for, particular parts of processes and equipment. EPA recognizes that some aspects of prevention programs are likely to be implemented facility-wide, rather than on a process or unit basis, whereas other aspects may apply to a particular process or only to particular units within a process. For example, most sources are likely to develop an employee participation plan and a system for hot work permits facility-wide, rather than on a process or unit basis. For sources having processes that include several units (e.g., multiple reactors or purification systems), the hazards, process controls, and mitigation systems may vary among the individual units. For example, one may have a deluge fire control system while another may have a runaway reaction quench system.

EPA has concluded that its proposed changes to prevention program reporting would not lead sources to prepare RMPs that accurately and efficiently communicate the hazards posed by different aspects of covered processes and the safety practices used to address those hazards. The Agency now believes that no rule changes are necessary to ensure that RMPs convey that information. The current rule already requires prevention program reporting, and the issue has been how to efficiently convey that information in sufficient detail. EPA believes that its electronic program for submitting RMPs can be designed to provide for sufficient specificity in prevention program reporting without requiring duplicative reporting. In particular, the Agency plans to create a comment/text field in RMP\*Submit for specifying which parts of a prevention program apply to which portions of a particular process. For example, if a deluge system only applies to a certain part of the overall process, the source would indicate in the comment/text screen the portions of the process to which the deluge system applies.

To reduce the burden of reporting, EPA also plans to create a function in RMP\*Submit which will allow a source to automatically copy prevention program data previously entered for one process to fill blank fields in another process's prevention program. The source could then edit any of the data elements that are different. For example, where the prevention programs for two processes are identical (e.g., two

identical storage tanks that are considered separate processes), the source could copy the data entered for one to fill in the blank field for the other. If some of the data elements vary between the prevention programs, the source will be able to autofill and change only those items that vary among processes or units.

Although the autofill option will minimize the burden of reporting common data elements for those sources filing electronically, EPA has decided not to delete the sentence, in both sections 68.170(a) and 68.175(a), which states, "[i]f the same information applies to more than one covered process, the owner or operator may provide the information only once, but shall indicate to which processes the information applies", as proposed.

#### *D. Confidential Business Information (CBI)*

##### **1. Background**

A central element of the chemical accident prevention program as established by the Clean Air Act and implemented by Part 68 is providing state and local governments and the public with information about the risk of chemical accidents in their communities and what stationary sources are doing to prevent such accidents. As explained in the preamble to the final RMP rule (61 FR 31668, June 20, 1996), every covered stationary source is required to develop and implement a risk management program and provide information about that program in its RMP. Under CAA section 112(r)(7)(B)(iii), a source's RMP must be registered with EPA and also submitted to the Federal Chemical Safety and Hazard Investigation Board ("the Board"), the state in which the source is located, and any local entity responsible for emergency response or planning. That section also provides that RMPs "shall be available to the public under section 114(c)" of the CAA. Section 114(c) gives the public access to information obtained under the Clean Air Act except for information (other than emission data) that would divulge trade secrets.

As noted previously, in the final RMP rule EPA announced its plan to develop a centralized system for submitting electronic versions of RMPs that would reduce the paperwork burden on both industry and receiving agencies and provide ready public access to RMP data. Under the system, a covered source would submit its RMP on computer diskette, which would be entered into a central database that all interested parties could access

electronically. The system would thus make it possible for a single RMP submission to reach all interested parties, including those identified in section 112(r)(7)(B)(iii).<sup>1</sup>

An important assumption underlying the Agency's central submission plan was that RMPs would rarely, if ever, contain confidential business information (CBI). Following publication of the final rule, concerns were raised that at least some of the information required to be reported in RMPs could be CBI in the case of particular sources. While the June 20, 1996 rule provided for protection of CBI under section 114(c) (see section 68.210(a)), EPA was asked to address how CBI would be protected in the context of the electronic programs being developed for RMP submission and public access.

In the April 17, 1998 proposal to revise the RMP rule, EPA made several proposals concerning protection of CBI. It first reviewed the information requirements for RMPs (sections 68.155–185) and proposed to find that certain required data elements would not entail divulging information that could meet the test for CBI set forth in the Agency's comprehensive CBI regulations at 40 CFR Part 2.<sup>2</sup> Information provided in response to those requirements could not be claimed CBI. EPA also requested comment on whether some information that might be claimed as CBI (e.g., worst-case release rate or duration) would be "emission data" and thus publicly available under section 114(c) even if CBI.

EPA administers a variety of statutes pertaining to the protection of the environment, each with its own data collection requirements and requirements for disclosure of information to the public. In the implementation of these statutes, the Agency collects emission, chemical, process, waste stream, financial, and other data from facilities in many, if not most, sectors of American business. Companies may consider some of this information vital to their competitive

<sup>1</sup> It is important to note that, as discussed in Section III. E of this preamble, this rule does not address issues concerning public access to offsite consequence analysis data in the RMP.

<sup>2</sup> Information is CBI if (1) the business has asserted a claim which has not expired, been waived, or been withdrawn; (2) the business has shown that it has taken and will continue to take reasonable steps to protect the information from disclosure; (3) the information is not and has not been reasonably obtainable by the public (other than governmental bodies) by use of legitimate means; (4) no statute requires disclosure of the information; and (5) disclosure of the information is likely to cause substantial harm to the business' competitive position. 40 CFR section 2.208.

position, and claim it as confidential business information (CBI).

In the course of implementing statutes, the Agency may have a need to communicate some or all of the information it collects to the public as the basis for a rulemaking, to its contractors, or in response to requests pursuant to the Freedom of Information Act (FOIA). Information found to be CBI is exempt from disclosure under FOIA. To manage both CBI claims and FOIA requests, EPA has promulgated in 40 CFR Part 2, Subpart B a set of procedures for reviewing CBI claims, releasing information found not to be CBI, and where authorized, disclosing CBI. Subpart B lists the criteria that information must meet in order to be considered CBI, as well as the special handling requirements the Agency must follow when disclosing CBI to authorized representatives.

For RMP requirements that might entail divulging CBI, EPA proposed that a source be required to substantiate a CBI claim to EPA at the time that it makes the claim. Under EPA's Part 2 regulations, a source claiming CBI generally is required to substantiate the claim only when EPA needs to make the information public as part of some proceeding (e.g., a rulemaking) or EPA receives a request from the public (e.g., under the Freedom of Information Act (FOIA)) for the information. In view of the public information function of RMPs and the interest already expressed by members of the public in them, EPA proposed "up-front substantiation" of CBI claims to ensure that information not meeting CBI criteria would be made available to the public as soon as possible. This approach of requiring up-front substantiation is the same as that used for trade secret claims filed under the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986.<sup>3</sup>

<sup>3</sup> Section 302 of EPCRA (codified in 40 CFR Part 355) requires any facility having more than a threshold planning quantity of an extremely hazardous substance (EHS) to notify its state emergency response commission (SERC) and local emergency planning committee (LEPC) that the facility is subject to emergency planning. The vast majority of toxic substances listed in 40 CFR Section 68.130 were taken from the EHS list. Section 303 of EPCRA requires LEPCs to prepare an emergency response plan for the community that is under their jurisdiction. Section 303 of EPCRA also requires that facilities subject to section 302 shall provide any information required by their LEPC necessary for developing and implementing the emergency plan. Section 304 of EPCRA requires an immediate notification of a release of an EHS or Hazardous Substances listed in 40 CFR Section 302.4 above a reportable quantity to state and local entities. Section 304 also requires a written follow-up which includes among other things, the chemical name, quantity released and any known or anticipated health risks associated with the

In addition, EPA proposed that any source claiming CBI submit two versions of its RMP: (1) a redacted ("sanitized"), electronic version, which would become part of RMP\*Info, and (2) an unsanitized (unredacted) paper copy of the RMP (see proposed section 68.151(c)). The electronic database of RMPs would contain only the redacted version unless and until EPA ruled against all or part of the source's CBI claim, in keeping with the Part 2 procedures. In this way, the public would have access only to the non-CBI elements of sources' RMPs. EPA further stated that state and local agencies could receive the unredacted RMPs by requesting them from EPA under the Part 2 regulations. Those regulations authorize EPA to provide CBI to an agency having implementation responsibilities under the CAA if the agency either demonstrates that it has the authority under state or local law to compel such information directly from the source or that it will "provide adequate protection to the interests of affected businesses" (40 CFR 2.301(h)(3)).

The following sections of this preamble summarize and respond to the comments EPA received on the CBI-related aspects of its proposal. At the outset, however, EPA wants to emphasize that it does not anticipate many CBI claims being made in connection with RMPs. The Agency developed the RMP data elements with the issue of CBI in mind. It sought to define data elements that would provide basic information about a source's risk management program without requiring it to reveal CBI. To have done otherwise would have risked creating RMPs that were largely unavailable to the public. EPA continues to believe that the required RMP data elements will rarely require that a business divulge CBI. The Agency will carefully monitor the CBI claims made. If it appears that the number of claims being made is jeopardizing the public information

release. Sections 311 and 312 of EPCRA (codified in 40 CFR Part 370) require facilities that are subject to OSHA Hazard Communication Standard (HCS), to provide information to its SERC, LEPC and local fire department. This information includes the hazards posed by its chemicals, and inventory information, including average daily amount, maximum quantity and general location. Section 313 of EPCRA (codified in 40 CFR Part 372) requires certain facilities that are in specific industries (including chemical manufacturers) and that manufacture, process, or otherwise use a toxic chemical above specified threshold amounts to report, among other things, the annual quantity of the toxic chemical entering each environmental medium. Most facilities covered by CAA 112(r) are covered by one or more of these sections of EPCRA. Section 322 of EPCRA (codified in Part 350) allows facilities to claim only the chemical identity as trade secret.

objective of the chemical accident prevention program, EPA will consider ways of revising RMPs, including further rulemakings or revising the underlying program, to ensure that important health and safety information is available to the public.

## 2. RMP Data Elements Found Not CBI

Fifteen commenters representing environmental groups and members of the public opposed allowing some or all RMP data to be claimed as CBI in light of the public's interest in the information RMPs will provide. A number of commenters urged EPA not to allow the following RMP data elements (and supporting documents) to be claimed as CBI:

- Mitigation measures considered by the firm in its offsite consequence analysis,
- Major process hazards identified by the firm,
- Process controls in use,
- Mitigation systems in use,
- Monitoring and detection systems in use, and
- Changes since the last hazard review.

In addition, one commenter contended that even chemical identity and quantity should be ineligible for CBI protection, since the requirement to submit an RMP only applies to facilities using a few well-known, extremely hazardous chemicals, and the public's right to know should always outweigh a company's claim to CBI.

Along the same lines, a number of commenters urged EPA to develop a "corporate sunshine rule" that would allow confidentiality concerns to be overridden if the protected information is needed by the public and experts to understand and assess safety issues. Another commenter recommended that a business claiming a chemical's identity as CBI should be required to provide the generic name of the chemical and information about its adverse health effects so the public can determine the potential risks.

One commenter argued that some of the RMP data that EPA suggested could reveal CBI, (e.g., release rate), were not "emission data," because the worst case scenario data are theoretical estimates, and do not represent any real emissions, past or present.

Representatives of the chemical and petroleum industries disagreed with EPA's proposal to list the data elements that EPA believed could not reveal CBI in any case. These commenters asserted that EPA could not anticipate all the ways in which information required by a data element might reveal CBI, and accordingly urged the Agency to make

case-by-case determinations on CBI claims. They also contended that "emission data" under section 114(c) does not extend to data on possible, as opposed to actual, emissions, and thus that RMP information concerning potential accidental releases would not qualify as "emission data," which must be made available to the public.

As pointed out above, an important purpose of the chemical accident prevention program required by section 112(r) is to inform the public of the risk of accidents in their communities and the methods sources are employing to reduce such risks. EPA therefore believes that as much RMP data as possible should be available to the public as soon as possible. However, section 112(r)(7)(B)(iii) requires that RMPs be made "available to the public under section 114(c)," which provides for protection of trade secret information (other than emission data). Given the statute's direction to protect whatever trade secret information is contained in an RMP, EPA is not authorized to release such information even when the public's need for such information arguably outweighs a business' interest in its confidentiality. The Agency also cannot issue a "corporate sunshine rule" that conflicts with existing law requiring EPA (and other agencies) to protect trade secret information.

As explained above (and in more detail in the proposed rule), EPA examined each RMP data element to determine which would require information that might, depending on a business' circumstances, meet the CBI criteria set forth in EPA's regulations implementing section 114(c) and other information-related legal requirements. The point of this exercise was to both protect potential trade secret information and promote the public information purpose of RMPs by identifying which RMP information might reveal CBI in a particular case and by precluding CBI claims for information that could not reveal CBI in any case. EPA presented the results of its analysis and an explanation of why certain data elements could entail the reporting of CBI depending on a business' circumstances and why others could not. No commenter provided any specific examples or explanations that contradicted the Agency's rationale for its determinations of which data elements could or could not result in reporting of CBI.

However, EPA is deleting from the list of 40 CFR Part 68.151(b)(1) the reference to 40 CFR Part 68.160(b)(9), to allow for the possibility of the number of full-time employees at the stationary source to be claimed as CBI. Upon further

review, EPA was unable to determine that providing the number of employees at the stationary source could never entail divulging information that could meet the test for CBI set forth in the Agency's comprehensive CBI regulations at 40 CFR Part 2. Therefore, EPA has removed this element from the list of data elements that can not be claimed CBI in Part 68. With this exception, EPA is promulgating the list of RMP data elements for which CBI claims are precluded, as proposed (Section 68.151(b)).

EPA's justifications for its specific CBI findings appear in an appendix to this preamble. A more detailed analysis of all RMP data elements and CBI determinations is available in the docket (see ADDRESSES). The Agency continues to find no reasonable basis for anticipating that the listed elements will in any case require a business to reveal CBI that is not "emission data." The information required by each of the listed data elements either fails to meet the criteria for CBI set forth in EPA's CBI regulations at Part 2 or meets the Part 2 definition of "emission data." In many cases, the information is available to the public through other reports filed with EPA, states, or local agencies (e.g., reports required by Emergency Planning and Community Right-to-Know Act (EPCRA) sections 312 and 313 provide general facility identification information and reports of most accidental releases are available through several Federal databases including EPA's Emergency Release Notification System and Accidental Release Information Program databases).

In order to preclude CBI claims for other data elements, the Agency would have to show that the information required by a data element either was "emission data" under section 114(c) or could not, under any circumstances, reveal CBI. As explained below, EPA does not believe such a showing can be made for any of the data elements not on the list. Therefore, CBI claims made for information required by data elements not on the list will be evaluated on a case-by-case basis according to the procedures contained in 40 CFR Part 2 (except that substantiation will have to accompany the claims, as discussed below).

The Agency agrees with the commenters who argued that information about potential accidental releases is not "emission data" under section 114(c). EPA's existing policy statement (see 56 FR 7042, Feb. 21, 1991) on what information may be considered "emission data" was developed to implement sections 110 and 114(a) of the CAA, which the Agency generally invokes when it seeks

to gather technical data from a source about its actual emissions to the air. While the policy is not explicitly limited in its scope, EPA believes it would be inappropriate to apply it to RMP data elements concerning hypothetical, as opposed to actual, releases to the air. Under the definition of "emission data" contained in Part 2, information is "emission data" if it is (1) "necessary to determine the identity, amount, frequency, concentration, or other characteristics \* \* \* of any emission *which has been emitted* by the source," (2) "necessary to determine the identity, amount, frequency, concentration, or other characteristics \* \* \* of the emissions which, under an applicable standard or limitation, the source *was authorized to emit*," or (3) general facility identification information regarding the source which distinguishes it from other sources (40 CFR section 2.301(a)(2)(i) (emphasis added)). Under these criteria, EPA has concluded that only the RMP data elements relating to source-level registration information (sections 68.160(b)(1)–(6), (8)–(13)) and the five-year accident history (section 68.168) are "emission data." Of the RMP data elements, only the five-year accident history involves actual, past emissions to the environment; the other data elements would not, therefore, qualify as "emission data" under the first prong of the Part 2 definition. Moreover, the data elements relating to a source's offsite consequence analysis, prevention program and emergency response program do not attempt to identify or otherwise reflect "authorized" emissions; the data elements instead reflect the source's *potential* for accidental releases. Accordingly, these data elements would not be "emission data" under the second prong of the definition. As for the third prong, some of the source-level data are "emission data" because they help identify a source. Most other RMP data elements are reported on a process level and are not generally used to distinguish one source from another.

The Agency believes it is unable to show that the remaining data elements could not, under any circumstances, reveal CBI. EPA continues to believe that it is theoretically possible for the remaining data elements (the elements not listed in section 68.151(b)) to reveal CBI either directly or through reverse engineering, depending on the circumstances of a particular case. At the same time, EPA believes that, in practice, the remaining data elements will rarely reveal CBI. The purpose of



the data in the RMP is for a source to articulate its hazards, and the steps it takes to prevent accidental releases. In general, the kinds of information specifying the source's hazards and risk management program are not likely to be competitively sensitive.

In particular, covered processes at the vast majority of stationary sources subject to the RMP rule are too common and well-known to support a CBI claim for information related to such processes. For example, covered public drinking water and wastewater treatment plants generally use common regulated substances in standard processes (i.e., chlorine used for disinfection). Also, covered processes at many sources involve the storage of regulated substances that the sources sell (e.g., propane, ammonia), so the processes are already public knowledge. Other covered processes involve the use of well-known combinations of regulated substances such as refrigerants. RMP information regarding these types of processes should not include CBI.

Even in the case of unusual or unique processes, it is generally unlikely that RMP information could be used to reveal CBI through reverse engineering. To begin with, required RMP information is general enough that it is unlikely to provide a basis for reverse engineering a process. For example, a source must report in its RMP whether overpressurization is a hazard and whether relief valves are used to control pressure, but it is not required to report information on actual pressures used, flow rates, chemical composition, or the configuration of equipment. Moreover, while RMP information may provide some data that could be used in an attempt to discover CBI information through reverse engineering, it typically will not provide enough data for such an attempt to succeed, because the source is not required to provide a detailed description of the chemistry or production volume of the process. Businesses claiming CBI based on the threat of reverse engineering will be required to show how reverse engineering could in fact succeed with the information that the RMP would otherwise make public, together with other publicly available information. A business unable to do so will have its claim denied.

While EPA is requiring that a source claiming a chemical's identity as CBI provide the generic category or class name of the chemical, the RMP does not require sources to provide information about the adverse health effects of the chemical. Chemicals were included in the section 112(r) program because they

are acutely toxic or flammable; health effects related to chronic exposure were not considered because they are addressed by other rules (see List Rule at 59 FR 4481). EPA believes that generic names are sufficient to indicate the general health concerns from short-term exposures. Should a member of the public desire more information, EPA encourages the use of EPCRA section 322(h), which provides a means for the public to obtain information about the adverse health effects of a chemical covered by that statute, where the chemical's identity has been claimed a trade secret. The public will find this provision of EPCRA useful because most sources subject to the RMP rule are also subject to EPCRA.

### 3. Up-front Substantiation of CBI Claims

One commenter supported the proposal to require CBI claims to be substantiated at the time they are made. Another commenter stated that there is no compelling need to require up-front substantiation. The commenter stated that up-front substantiation would place a sizable burden on both industry and EPA and would be in direct conflict with the Paperwork Reduction Act. The commenter claimed that, with the exception of EPCRA, where a submitter is allowed to claim only one data element—chemical identity—as CBI, it is EPA's standard procedure not to require submitters to provide written substantiation unless a record has been requested. Further, the commenter stated that the Agency has not shown any reason for departing from that procedure in this rule.

EPA believes that requiring up-front substantiation of CBI claims made for RMP data has ample precedent, is fully consistent with the Agency's CBI regulations and the Paperwork Reduction Act, and is critical to achieving the public information purposes of the accident prevention program. EPCRA is not the only example of an up-front substantiation requirement. The Agency has also required up-front substantiation in several other regulatory contexts, including those where, like here, providing the public with health and safety information is an important objective [see e.g., 40 CFR section 725.94, 40 CFR section 710.38, and 40 CFR section 720.85 (regulations promulgated under Toxic Substances Control Act)].

Even under its general CBI regulations, the Agency need not wait for a request to release data to require businesses to substantiate their CBI claims. When EPA expects to get a request to release data claimed

confidential, the Agency is to initiate "at the earliest practicable time" the regulations' procedures for making CBI determinations (40 CFR section 2.204(a)(3)). Those procedures include calling on affected businesses to substantiate their claims (see 40 CFR section 2.204(e)). Since state and local agencies, environmental groups, academics and others have already indicated their interest in obtaining complete RMP data (see comments received on this rulemaking, available in the DOCKET), EPA fully expects to get requests for RMP data claimed CBI. Consequently, even if EPA did not establish an up-front substantiation requirement in this rule, under the Agency's general CBI regulations it could require businesses claiming CBI for RMP data to substantiate their claims without first receiving a request to release the data. Establishing an up-front requirement in this rule will simply allow EPA to obtain substantiation of CBI claims without having to request it in every instance.

Requiring up-front substantiation for RMP CBI claims is consistent with the Paperwork Reduction Act. Any burden posed by this requirement has already been evaluated as part of the Information Collection Request (ICR) associated with this rulemaking. EPA disagrees that up-front substantiation will impose a substantial or undue burden. As noted above, under EPA's current CBI regulations, a source claiming CBI could and probably would be required to provide substantiation for its claim, in view of the public interest in RMP information. A requirement to submit substantiation with the claim should thus make little difference to the source. Moreover, a source presumably does not make any claim of CBI lightly. Before filing a CBI claim, the source must first determine whether the claim meets the criteria specified in 40 CFR section 2.208. Up-front substantiation only requires that the source document that determination at the time it files its claim. Since it would be sensible for a source to document the basis of its CBI claim for its own purposes (e.g., in the case of a request for substantiation), EPA expects that many sources already prepare documentation for their CBI claims by the time they file them. Also, submitting substantiation at the time of claim reduces any additional burden later, such as reviewing the Agency's request, retrieving the relevant information, etc. Therefore, providing documentation at the time of filing should impose no additional burden.

In view of the public information function of RMPs, EPA believes that up-front substantiation is clearly warranted



for CBI claims made for RMP data. Up-front substantiation will ensure that sources filing claims have carefully considered whether the data they seek to protect in fact meets the criteria for protection. Given the public interest already expressed in RMP data, EPA expects that CBI claims for RMP data will have to be substantiated at some point. Up-front substantiation will save EPA and the public time and resources that would otherwise be required to respond to each CBI claim with a request for substantiation. EPA is therefore promulgating the up-front substantiation requirement as proposed.

#### 4. State and Local Agency Access to Unredacted RMPs

One commenter objected to EPA's statement in the proposal that it would provide unredacted (unsanitized) versions of the RMPs to a state and local agency only upon meeting the criteria required by the EPA's CBI rules at 40 CFR Part 2.<sup>4</sup> The commenter, an association of fire fighters, argued that the Agency's position was inconsistent with CAA section 112(r)(7)(B)(iii), which provides that RMPs "shall . . . be submitted to the Chemical Safety and Hazard Investigation Board [a federal agency], to the State in which the stationary source is located, and to any local agency or entity having responsibility for planning for or responding to accidental releases which may occur at such source . . . ." The commenter claimed that this provision entitles the specified entities, including local fire departments, to receive unredacted RMPs without having to make the showings required by EPA's CBI regulations.

EPA is not resolving this issue today. The Agency has reviewed the relevant statutory text and legislative history, as well as analogous provisions of EPCRA, and believes that arguments can be made on both sides of this issue. While section 112(r)(7)(B)(iii) calls for RMPs to be submitted to states, local entities and the Board, it is not clear that Congress intended CBI contained in RMPs to be provided to those entities without ensuring appropriate protection of CBI.

At stake in resolving this issue are two important interests—local responders' interest in unrestricted access to information that may be critical to their safety and effectiveness in responding to emergencies and businesses' interest in protecting sensitive information from their competitors. Before making a final decision on this issue, EPA believes it would benefit from further public input. Because EPA stated that it would not provide unredacted RMPs to states and local agencies, those interested in protecting CBI may not have considered it necessary to lay out the legal and policy arguments supporting their views. State and local agencies, many of which in the past have expressed concern about the potential administrative burden of receiving RMPs directly from sources, also did not comment on the issue. EPA has therefore decided to accept additional comments on this issue alone. (Additional comments on any other issues addressed in this rulemaking will not be considered or addressed, since the Agency is taking final action on them here.) Comments should be mailed to the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section. In the meantime, unredacted RMPs will be available to states, local agencies and the Board under the terms of the Agency's existing CBI regulations at 40 CFR section 2.301(h)(3) (for state and local agencies) and 40 CFR section 2.209(c) (for the Board).

Section 112(r)(7)(B)(iii) states in relevant part:

[RMPs] shall also be submitted to the Chemical Safety and Hazard Investigation Board, to the State in which the stationary source is located, and to any local agency or entity having responsibility for planning for or responding to accidental releases which may occur at such source, and shall be available to the public under section 114(c) of [the Act].

Section 114(c) provides for the public availability of any information obtained by EPA under the Clean Air Act, except for information (other than emissions data) that would divulge trade secrets.

From a public policy perspective, there are some obvious advantages to reading section 112(r)(7)(B)(iii) in the way the commenter suggests. Local fire departments and other local responders are typically the first to arrive at the scene of chemical accidents in their jurisdictions. RMP information that first responders could find helpful include chemical identity, chemical quantity, and potential source of an accident. Under EPA's regulations, however, any or all of this information could be claimed CBI. In addition, state and local authorities are often in the best position

to assess the adequacy of a source's risk management program and to initiate a dialogue with the facility should its RMP indicate a need for improvement. However, state and local authorities' ability to provide this contribution to community safety would be impeded to the extent a source claimed key information as CBI. While states and local agencies may obtain information claimed CBI under EPA's CBI regulations (assuming they can make the requisite showing), the time required to obtain the necessary authority or findings from state or local and EPA officials could be substantial.

At the same time, there are also public policy reasons for ensuring protection of CBI contained in RMPs. Congress has in many statutes, including the CAA and EPCRA, provided for the protection of trade secrets to safeguard the competitive position of private businesses. Businesses' ability to maintain the confidentiality of trade secrets helps ensure competition in the U.S. economy and U.S. businesses' competitive position in the world economy. Protection of trade secrets also encourages innovation, which is an important contributor to economic growth.

A reading of section 112(r)(7)(B)(iii) that demands submission of unredacted RMPs to states, local entities, and the Board may lead to widespread public access to information claimed CBI. For purposes of section 112(r)(7)(B)(iii), "any local agency or entity having responsibility for planning for or responding to accidental releases" includes local emergency planning committees (LEPCs) established under EPCRA. Section 301(c) of EPCRA provides that LEPCs must include representatives from both the public and private sectors, including the media and facilities subject to EPCRA requirements. Submission of an unredacted RMP to an LEPC would thus entail release of CBI to some members of the public and potentially even competitors.<sup>5</sup> More generally, local agencies may not be subject to any legal requirement to protect CBI and may lack the knowledge and resources to address CBI claims. Arguably, it would be

<sup>4</sup> Section 2.301(h)(3) provides that a State or local government may obtain CBI from EPA under two circumstances: (1) it provides EPA a written opinion from its chief legal officer or counsel stating that the State or local agency has the authority under applicable State or local law to compel the business to disclose the information directly; or (2) the businesses whose information is disclosed are informed and the State or local government has shown to a EPA legal office's satisfaction that its disclosure of the information will be governed by State or local law and by "procedures which will provide adequate protection to the interests of affected businesses."

<sup>5</sup> EPA does not believe that submission of an RMP containing CBI to the statutorily specified entities would defeat a source's ability to claim information as CBI for purposes of section 114(c) and EPA's CBI regulations. Under those regulations, information that has been released to the public cannot be claimed CBI. Release of a RMP containing CBI to the entities specified by section 112(r)(7)(B)(iii), including LEPCs, would not constitute such a release. EPCRA similarly provides that disclosure of trade secret information to an LEPC does not prevent a facility from claiming the information confidential (see EPCRA section 322(b)(1)).

anomalous for Congress to require EPA to protect trade secrets contained in RMPs against release to the public only to risk divulging the same information by requiring submission of unredacted RMPs to a broad range of entities that may not have the need or capacity to protect CBI themselves. It would also appear inconsistent with the approach Congress took to protecting trade secrets in EPCRA, where Congress did not provide for release of trade secret chemical identity information to local agencies.

Relatedly, many state and local agencies objected to EPA's original proposal in the RMP proposed rulemaking (58 FR 54190, October 20, 1993) that sources submit RMPs directly to States, local agencies, and the Board, as well as EPA. They noted that managing the information contained in RMPs would be difficult without a significant expenditure of typically scarce resources. Many states and local agencies thus supported EPA's final decision to develop an electronic submission and distribution system that would allow covered sources to submit their RMPs to EPA, which would make them available to states, local agencies, and the Board, as well as the general public. If the statute is read to require submission of RMP information to state and local agencies, and the Board, to the extent it is claimed as CBI, the resource concerns raised by State and local agencies commenters likely would be raised to that extent again.

EPA also questions the extent to which states, local entities and the Board would be disadvantaged if they did not receive unredacted RMPs without making the showings required by EPA's CBI regulations. As noted earlier, EPA expects that relatively little RMP information will be CBI. RMP data will only rarely contain CBI, and the up-front substantiation will minimize the number of CBI claims it receives by ensuring that sources carefully examine the basis for any claims before submitting them. Consequently, the Agency believes that a state or local agency will rarely confront a redacted RMP.

Moreover, EPCRA provides state and local entities, including fire departments, with access to much of the pertinent data already. EPA's regulations under EPCRA cover a universe of sources and chemicals that includes most, if not all, the sources and substances covered by the RMP rule. The EPCRA regulations require reporting of some of the same information required by the RMP rule, including chemical identity. EPCRA withholds from public release only

chemical identities that are trade secrets and the location of specific chemicals where a facility so requests. In practice, relatively few facilities have requested trade secret protection for a chemical's identity.

Additionally, EPCRA section 312(f) empowers local fire departments to conduct on-site inspections at facilities subject to EPCRA section 312(a) and obtain information on chemical location. Most facilities subject to EPCRA section 312(a) are also subject to the RMP rule. On-site inspections could also provide information on hazards and mitigation measures. In addition, EPCRA section 303(d)(3) authorizes LEPCs, which include representatives of fire departments, to request from facilities covered by EPCRA section 302(b) such information as may be necessary to prepare an emergency response plan and to include such information in the plan as appropriate. Some sources subject to the RMP rule are also covered by EPCRA section 302(b).

In light of the points made above, EPA questions whether section 112(r)(7)(B)(iii) should be interpreted to require submission of unredacted RMPs containing CBI to the statutorily specified entities without provision being made for protecting CBI. EPA invites the public to provide any additional comment or information relevant to interpreting the submission requirement of section 112(r)(7)(B)(iii).

#### 5. Other CBI Issues

Two commenters disagreed with EPA's statement that a source cannot make a CBI claim for information available to the public under EPCRA or another statute. They claimed that a request for information under EPCRA cannot supersede the CBI provisions applicable to data collected under the authorities of the CAA or Toxic Substances Control Act or any other regulatory program.

EPA does not agree with this comment. Claims of CBI may not be upheld if the information is properly obtainable or made public under other statutes or authorities. For example, chemical quantity on site is available to the public under EPCRA Tier II reporting. In addition, under EPCRA section 303(d)(3), LEPCs have the authority to request any information they need to develop and implement community emergency response plans. If information obtained through such a request is included in the community plan, it will become available to the public under EPCRA section 324. Information obtainable or made public under EPCRA would not be eligible for

CBI protection under 40 CFR section 2.208, which specifically excludes from CBI protection information already available to the public. Filing a CBI claim under the CAA or another statute does not protect information if it is legitimately requested and made public under other federal, state, or local law. Information obtainable or made public (through proper means) under existing statutes cannot be CBI under EPA's CBI regulations.

#### 6. Actions Taken

In summary, the Agency is adding two sections (68.151 and 68.152) to Part 68. Section 68.151 sets forth the procedures for a source to follow when asserting a CBI claim and lists data elements that can not be claimed as CBI. This section also requires sources filing CBI claims to provide the information claimed confidential, in a format to be specified by EPA, instead of the unsanitized paper copy of the RMP as discussed in the proposal. Section 68.152 sets forth the procedures for substantiating CBI claims. Sources claiming CBI are required to submit their substantiation of their claims at the same time they submit their RMPs.

#### E. Other Issues

Two commenters asked why EPA had proposed to drop the phrase "if used" in section 68.165(b)(3) where the rule asks for the basis of the offsite consequence analysis results. EPA has decided to retain the language, since sources will have a choice of using either EPA's RMP guidance documents or a model. Where a model is used, the source will have to provide the name of the model. These commenters also asked why EPA proposed to drop (alternative releases only) from section 68.165(b)(13). EPA has also decided to retain the parenthetical language.

One commenter stated that EPA should allow sources to submit RMPs either electronically or in hard copy. The commenter stated that not allowing hard copy submissions will be burdensome on many sources who have never filed an electronic report to the government before. As stated in the April proposal, EPA is allowing sources to submit RMPs on paper. Paper submitters are asked to fill out a simple paper form to tell EPA why they are unable to file electronically.

Two commenters objected to placing offsite consequence analysis (OCA) data, particularly worst-case release scenarios, on the Internet, for security reasons. Issues related to public access to OCA data are beyond the scope of this rulemaking, as this action is limited to the issues discussed above. It does

not include decisions regarding how the public will access the OCA data elements of the RMPs. Statements in the preamble about EPA providing public access to RMP data are not intended to address which portions of the RMP data will be electronically available.

A number of commenters were concerned about a statement EPA made in the preamble to the proposed rule regarding the definition of "process", and stated that EPA's interpretation of "process" is not consistent with the interpretation the Occupational Safety and Health Administration (OSHA) uses in its process safety management (PSM) standard (29 CFR 1910.119). In this rulemaking, EPA did not propose any changes to the definition of process nor is it adopting any changes to the definition. As EPA stated in the preamble to the final RMP rule, it will interpret "process" consistently with OSHA's interpretation of that term (29 CFR 1910.119). Therefore, if a source is subject to the PSM rule, the limits of its process(es) for purposes of OSHA PSM will be the limits of its process(es) for purposes of RMP (except in cases involving atmospheric storage tanks containing flammable regulated substances, which are exempt from PSM but not RMP). If a source is not covered by OSHA PSM and is complicated from an engineering perspective, it should consider contacting its implementing agency for advice on determining process boundaries. EPA and OSHA are coordinating the agencies' approach to common issues, such as the interpretation of "process".

#### F. Technical Corrections

When Part 68 was promulgated, the text of section 68.79(a), was drawn from the OSHA PSM standard, but it was not revised to reflect the different structure of EPA's rule. The OSHA PSM standard is contained in a single section; EPA's Program 3 prevention program is contained in a subpart. Rather than referencing "this section," the paragraph should have referenced the "subpart." Therefore, as proposed, EPA is changing "section" to "subpart" in section 68.79(a).

Under section 68.180(b), EPA intended that all covered sources report the name and telephone number of the agency with which they coordinate emergency response activities, even if the source is not required to have an emergency response plan. However, the rule refers only to coordinating the emergency plan. In this action, EPA is revising this section to refer to the local agency with which emergency response activities and the emergency response plan is coordinated.

#### IV. Section-by-Section Discussion of the Final Rule

In Section 68.3, Definitions, the definition of SIC is removed and replaced by the definition of NAICS.

Section 68.10, Applicability, is revised to replace the SIC codes with NAICS codes, as discussed above.

Section 68.42, Five-Year Accident History, is revised to require the percentage concentration by weight of regulated toxic substances released in a liquid mixture and the five- or six-digit NAICS code that most closely corresponds to the process that had the release. The phrase "five- or six-digit" has been added before the NAICS code to clarify the level of detail required for NAICS code reporting.

Section 68.79, Compliance Audits, the word "section" in paragraph (a) is replaced by "subpart."

Section 68.150, Submission, is revised by adding a paragraph to state that procedures for asserting CBI claims and determining the sufficiency of such claims are provided in new Sections 68.151 and 68.152.

Section 68.151 is added to set forth the procedures to assert a CBI claim and list data elements that may not be claimed as CBI, as discussed above.

Section 68.152 is added to set forth procedures for substantiating CBI claims, as proposed.

Section 68.160, Registration, is revised by adding the requirements to report the method and description of latitude and longitude, replacing SIC codes with five- or six-digit NAICS codes, and adding the requirement to report Title V permit number, when applicable. This section is also revised to include optional data elements. The phrase "five- or six-digit" has been added before NAICS code to clarify the level of detail required for NAICS code reporting.

Section 68.165, Offsite Consequence Analysis, is revised by adding the requirement that the percentage weight of a regulated toxic substance in a liquid mixture be reported.

Section 68.170, Prevention Program/Program 2, is revised to replace SIC codes with five- or six-digit NAICS codes, as is Section 68.175.

Section 68.180, Emergency Response Program, is revised to clarify that paragraph (b) covers both the coordination of response activities and plans, as proposed.

#### V. Judicial Review

The proposed rule amending the accidental release prevention requirements; under section 112(r)(7) was proposed in the **Federal Register** on

April 17, 1998. This **Federal Register** action announces EPA's final decision on the amendments. Under section 307(b)(1) of the CAA, judicial review of this action is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit on or before March 8, 1999. Under section 307(b)(2) of the CAA, the requirements that are the subject of today's action may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

#### VI. Administrative Requirements

##### A. Docket

The docket is an organized and complete file of all the information considered by the EPA in the development of this rulemaking. The docket is a dynamic file, because it allows members of the public and industries involved to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the proposed and promulgated rules and their preambles, the contents of the docket serve as the record in the case of judicial review. (See section 307(d)(7)(A) of the CAA.)

The official record for this rulemaking, as well as the public version, has been established for this rulemaking under Docket No. A-98-08 (including comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:00 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located at the address in **ADDRESSES** at the beginning of this document.

##### B. Executive Order 12866

Under Executive Order (E.O.) 12866, [58 FR 51,735 (October 4, 1993)], the Agency must determine whether the regulatory action is "significant", and therefore subject to OMB review and the requirements of the E.O. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal government or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

Pursuant to the terms of Executive Order 12866, OMB has notified EPA that it considers this a "significant regulatory action" within the meaning of the Executive Order. EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

#### *C. Executive Order 12875*

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input to the development of regulatory proposals containing significant unfunded mandates."

EPA has concluded that this rule may create a nominal mandate on State, local or tribal governments and that the Federal government will not provide the funds necessary to pay the direct costs incurred by these governments in complying with the mandate. Specifically, some public entities may be covered sources and will have to add the new data elements to their RMP. In developing this rule, EPA consulted with state, local and tribal governments to enable them to provide meaningful and timely input in the development of this rule. Even though this rule revises Part 68 in a way that does not significantly change the burden imposed by the underlying rule, EPA

has taken efforts to involve state and local entities in this regulatory effort. Specifically, much of the rule responds to issues raised by the Electronic Submission Workgroup discussed above, which includes State and local government stakeholders. In addition, EPA has recently conducted seminars with tribal governments; however, there were no concerns raised on any issues that are covered in this rule. EPA discussed the need for issuing this regulation in sections II and III in this preamble. Also, EPA provided OMB with copies of the comments to the proposed rule.

#### *D. Executive Order 13045*

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the E.O. 13045 because it is not "economically significant" as defined in E.O. 12866, and because it does not involve decisions based on environmental health or safety risks.

#### *E. Executive Order 13084*

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of

Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Two of the amendments made by this rule, the addition of RMP data elements and the conversion of SIC codes to NAICS codes, impose only minimal burden on any sources that may be owned or operated by tribal governments, such as drinking water and waste water treatment systems. The third amendment made by this rule addresses the procedures for submission of confidential business information in the RMP. The sources that are mentioned above handle chemicals that are known to public (e.g., chlorine for use of disinfection, propane used for fuel, etc.). EPA does not, therefore, expect RMP information on these types of processes to include CBI, so any costs related to CBI will not fall on Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

Notwithstanding the non-applicability of E. O. 13084, EPA has recently conducted seminars with the tribal governments. However, there were no concerns raised on any issues that are covered in this rule.

#### *F. Regulatory Flexibility*

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has also determined that this action will not have a significant economic impact on a substantial number of small entities. Two of the amendments made by this rule, the addition of RMP data elements and the conversion of SIC codes to NAICS codes, impose only minimal burden on small entities. Moreover, those small businesses that claim CBI when submitting the RMP will not face any costs beyond those imposed by the existing CBI regulations. Even considering the costs of CBI substantiation, however, there is no significant economic impact on a substantial number of small entities. EPA estimates that very few small entities (approximately 500) will claim CBI and that these few entities represent a small fraction of the small entities (less than 5 percent) affected by the RMP rule. Finally, EPA estimates that those small businesses filing CBI will experience a cost which is significantly less than one percent of their annual sales. For a more detailed analysis of the

small entity impacts of CBI submission, see Document Number, IV-B-02, available in the docket for this rulemaking (see ADDRESSES section).

### G. Paperwork Reduction

#### 1. General

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1656.05) and a copy may be obtained from Sandy Farmer, by mail at Office of Policy, Regulatory Information Division, U.S. Environmental Protection Agency (2137), 401 M St, SW, Washington, DC 20460, by e-mail at [farmer.sandy@epamail.epa.gov](mailto:farmer.sandy@epamail.epa.gov) or by calling (202) 260-2740. A copy may also be downloaded off the Internet at <http://www.epa.gov/icr>. The information requirements are not effective until OMB approves them.

The submission of the RMP is mandated by section 112(r)(7) of the CAA and demonstrates compliance with Part 68 consistent with section 114(c) of the CAA. The information collected also will be made available to state and local governments and the public to enhance their preparedness, response, and prevention activities. Certain information in the RMP may be claimed as confidential business information under 40 CFR Part 2 and Part 68.

This rule will impose very little burden on affected sources. First, EPA estimates that the new data elements will require only a nominal burden, .25 hours for a typical source, because latitude and longitude method and description will be selected from a list of options, the Title V permit number is available to any source to which Title V applies, and the percentage weight of a toxic substance in a liquid mixture is usually provided by the supplier of the mixture. Second, the NAICS code provision is simply a change from one code to another.<sup>6</sup> Third, as discussed above in the preamble, EPA believes that the CBI provisions of this rule will add no additional burden beyond what sources otherwise would face in

complying with the CBI rules in 40 CFR Part 2. The Agency has calculated the burden of substantiations made for purposes of this rule below.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and system for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the 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 numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

#### 2. CBI Burden

In the Notice of Proposed Rulemaking for these amendments, EPA proposed to amend existing 40 CFR Part 68 to add two sections which would clarify the procedures for submitting RMPs that contain confidential business information (CBI). As proposed, CBI would be handled in much the same way as it presently is under other EPA programs, except that EPA would require sources claiming CBI to submit documentation substantiating their CBI claims at the time such claims were made and EPA also would not permit CBI claims for certain data elements which clearly are not CBI. Aside from these procedural changes, however, the proposed rule was substantively identical to the existing rules governing the substantiation of CBI claims, presently codified in 40 CFR Part 2.

At the time it proposed these amendments, EPA estimated the public reporting burden for CBI claims to be 15 hours for chemical manufacturers with Program 3 processes, the only kinds of facilities that EPA expects to be able to claim CBI for any RMP data elements. This estimate was premised upon EPA's assessment that it would require 8.5 hours per claim to develop and submit the CBI substantiation and 6.5 hours to complete an unsanitized version of the RMP, for a total of 15 hours. EPA also estimated that approximately 20 percent

of the 4000 chemical manufacturers (out of 64,200 stationary sources estimated to be covered by the RMP rule) may file CBI claims (800 sources). The 800 sources represent a conservative projection based on the Agency's experience under EPCRA program. Consequently, the total annual public reporting burden for filing CBI claims was estimated to be approximately 12,000 hours over three years (800 facilities multiplied by an average burden of 15 hours), or an annual burden of 4,000 hours (Information Collection Request No. 1656.04).

*a. Comment received.* EPA received one comment on the ICR developed for the proposed rule, opposing up-front substantiation of any CBI claims. The commenter stated that "[t]his is a major departure from standard EPA procedure, and would impose a substantial and unjustified burden for several years." The commenter further added that up-front substantiation would significantly increase the burden of this rule, and that up-front substantiation unnecessarily increases the volume and potential loss of CBI documents. The commenter also stated that the estimate of 15 hours for chemical manufacturers "seems unreasonably low," and cited the EPA burden estimate of 27.7 to 33.2 hours per claim (with an average of 28.8) under the trade secret provisions of EPCRA.

In the preamble to the proposed rule, EPA estimated that 20 percent of the 4,000 chemical manufacturers will file a CBI claim. The commenter contends that "[t]he EPA analysis \* \* \* excludes facilities in other industries that will need to file CBI claims."

Finally, the commenter stated that claiming multiple data elements as CBI will increase reporting burden.

*b. EPA response. Burden Estimates:* EPA disagrees with these comments. As pointed out above, the requirement to submit up-front substantiation of CBI claims imposes no additional burden. In addition, the total burden of the CBI provisions of this rule are not understated. EPA has re-examined its analysis in light of the commenter's concerns and has determined—contrary to the commenter's claim—that its initial estimate of the total burden associated with preparing and claiming CBI was likely too conservative. As explained below, the Agency's best available information indicates that the process of documenting and submitting a claim of CBI should impose a burden of approximately 9.5 hours per CBI claimant.

First, EPA believes that the requirement to submit, at the time a source claims information as CBI,

<sup>6</sup> EPA intends to provide several outreach mechanisms to assist sources in identifying their new NAICS code. RMP\*Submit will provide a "pick list" that will make it easier for sources to find the appropriate code. Also, selected NAICS codes are included in the General Guidance for Risk Management Programs (July 1998) and in the industry-specific guidance documents that EPA is developing. EPA will also utilize the Emergency Planning and Community Right-to-Know Hotline at 800-424-9346 (or 703-412-9810) to assist sources in determining the source's NAICS codes.

substantiation demonstrating that the material truly is CBI imposes no burden on sources beyond that which presently exists under EPA's CBI regulations in Part 2. In order to decide whether they might properly claim CBI for a given piece of information, a source must determine if the criteria stated in section 2.208 of 40 CFR Part 2 are satisfied. Naturally, a source goes through this process before a CBI claim is made. EPA agrees that most programs do not require the information that forms the basis for the substantiation to be submitted at the time of the claim; however, a facility must still determine whether or not a claim can be substantiated. Because existing rules require sources to formulate a legitimate basis for claiming CBI, even if those rules do not require immediate documentation, and because the Agency fully expects requests for RMP information which will necessitate sources' submitting such documentation, EPA believes that up-front submission will not increase the burden of the regulation.

Second, in response to the commenter's claim that the Agency had underestimated the total burden associated with CBI claims, EPA undertook a review of recent information collection requests (ICRs) covering data similar to that required to be submitted in an RMP. Initially, EPA examined the ICR prepared for Part 2 itself (ICR No. 1665.02, OMB Control No. 2020-0003). Under an analysis contained in the Statement of Support for the ICR, the Agency estimated that it takes approximately 9.4 hours to substantiate claims of CBI, prepare documentation, and submit such documentation to EPA. Next, the Agency reviewed a survey conducted by the Agency (under Office of Management and Budget clearance #2070-0034), to present the average burden associated with indicating confidential business information claims for certain data elements under the proposed inventory update rule (IUR) amendment under TSCA section 8. This survey specifically asked affected industry how long it would take to prepare CBI claims for two data elements—chemical identity and production volume range information. Part 68 also requires similar information (e.g., chemical identity and maximum quantity in a process) to be included in a source's RMP and, indeed, EPA anticipates that they will be the data elements most likely to be claimed CBI. The average burden estimates for chemical identity were between 1.82 and 3.13 hours, and the average burden

estimates for production volume in ranges were between 0.87 and 2.08 hours. Thus, assuming that the average source claims both chemical identity and the maximum quantity in a process as CBI, a conservative estimate for the reporting burden would be 5.21 hours. Finally, EPA examined the burden estimate upon which it relied at proposal. That estimate predicted that the average CBI claim would take 15 hours, of which 8.5 would be developing and submitting the CBI claim, and 6.5 would be completing an unsanitized version of the RMP. In view of EPA's current plan not to require a source claiming CBI to submit a full, unsanitized RMP, but instead to submit only the particular elements claimed as CBI, the Agency expects the latter burden to decrease to 1 hour, for a total burden of 9.5 hours.

In light of its extensive research of the burden hours involved in preparing and submitting CBI claims, EPA believes that the total burden estimate was not understated in the April proposal. Rather, other ICRs and the ICR proposal, combined with the changes to the method of documenting CBI claims, indicate that a burden estimate between 5.21 and 9.5 hours is appropriate for this final rule. EPA has selected the most conservative of these, 9.5 hours, in its ICR for this final rule.

EPA rejected one ICR's burden estimate as being inapplicable to the present rulemaking. Although the commenter urged the Agency to adopt the estimate associated with trade secret claims under EPCRA (28 hours), EPA believes that the estimates discussed above are more accurate for several reasons. First, the EPCRA figures are based upon a survey with a very small sample size, as compared to the TSCA survey cited previously. Second, most (if not all) of the facilities submitting RMPs are likely to already be reporting under sections 311 and 312 or section 313 of EPCRA, and many of the manufacturers submitting an RMP are subject to TSCA reporting requirements; thus, most sources likely to claim CBI for an RMP data element will have already done some analysis of whether or not such information would reveal legitimately confidential matter.

*Other Facilities Can Claim CBI:* The Agency does not agree with the commenter's claim that facilities other than chemical manufacturers might be expected to claim CBI for information contained in their RMPs. The other industries affected by the RMP rule (e.g., propane retailers, publicly owned treatment works) will not be disclosing in the RMP information that is likely to cause substantial harm to the business's

competitive position. For example, covered public drinking water and wastewater treatment plants generally use common regulated substances in standard processes (i.e., chlorine used for disinfection). Also, covered processes at many sources involve the storage of regulated substances that the sources sell (e.g., propane, ammonia), so the processes are already public knowledge. Other covered processes involve the use of well-known combinations of regulated substances such as refrigerants. Therefore, it is not likely that these businesses would claim information as CBI.

As a point of comparison, EPA notes that of the 869,000 facilities that are estimated to be required to report under sections 311 and 312 of EPCRA, approximately 58 facilities have submitted trade secret claims for under those sections. For this reason, EPA believes the estimate of 800 sources may, in fact, be an overestimate of the number of sources claiming CBI.

*Reporting Multiple Data Elements:* The Agency disagrees with the commenters' assertion that it has underestimated the reporting burden on sources' claiming multiple data elements as CBI. The burden figures stated above are based on the Agency's estimates of the average number of data elements that a typical source will likely claim CBI.

Public reporting of the new RMP data elements is estimated to require an average of .25 hours for all sources (64,200 sources) and substantiating CBI claims is estimated to take approximately 9.5 hours for certain chemical manufacturing sources (800 sources). The aggregate increase in burden over that estimated in the previous Information Collection Request (ICR) for part 68 is estimated to be about 23,650 hours over three years, or an annual burden of 7,883 hours for the three years covered by the ICR.

#### *H. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205

of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for state, local, and

tribal governments, in the aggregate, or the private sector in any one year. The EPA has determined that the total nationwide capital cost for these rule amendments is zero and the annual nationwide cost for these amendments is less than \$1 million. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Act.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Small governments are unlikely to claim information confidential, because sources owned or operated by these entities (e.g., drinking water and waste water treatment systems), handle chemicals that are known to public. The new data elements and the conversion of SIC codes to NAICS codes impose only minimal burden on these entities.

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

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Pub L. 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, business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA requires 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. Therefore, EPA did not consider the use of any voluntary consensus standards.

#### **J. Congressional Review Act**

The Congressional Review Act, 5 U.S.C. section 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**. This action is not a "major rule" as defined by 5 U.S.C. section 804(2). This rule will be effective February 5, 1999.

#### **APPENDIX TO PREAMBLE—DATA ELEMENTS THAT MAY NOT BE CLAIMED AS CBI**

| Rule element   | Comment  |
|--|--|
| 68.160(b)(1) Stationary source name, street, city, county, state, zip code, latitude, and longitude, method for obtaining latitude and longitude, and description of location that latitude and longitude represent. | This information is filed with EPA and other agencies under other regulations and is made available to the public and, therefore, does not meet the criteria for CBI claims. It is also available in business and other directories. |
| 68.160(b)(2) Stationary source Dun and Bradstreet number.  |  |
| 68.160(b)(3) Name and Dun and Bradstreet number of the corporate parent company.   |  |
| 68.160(b)(4) The name, telephone number, and mailing address of the owner/operator.  |  |
| 68.160(b)(5) The name and title of the person or position with overall responsibility for RMP elements and implementation.   | This information provides no information that would affect a source's competitive position.  |
| 68.160(b)(6) The name, title, telephone number, and 24-hour telephone number of the emergency contact.   | This information is filed with state and local agencies under EPCRA and is made available to the public and, therefore, does not meet the criteria for CBI claims.   |
| 68.160(b)(7) Program level and NAICS code of the process.  | This information provides no information that would affect a source's competitive position.  |
| 68.160(b)(8) The stationary source EPA identifier.   | This information provides no information that would affect a source's competitive position.  |
| 68.160(b)(10) Whether the stationary source is subject to 29 CFR 1910.119.   | This information provides no information that would affect a source's competitive position.  |
| 68.160(b)(11) Whether the stationary source is subject to 40 CFR Part 355.   | Sources are required to notify the state and local agencies if they are subject to this rule; this information is available to the public and, therefore, does not meet the criteria for CBI claims.                                 |
| 68.160(b)(12) If the stationary source has a CAA Title V operating permit, the permit number.  | This information will be known to state and federal air agencies and is available to the public and, therefore, does not meet the criteria for CBI claims.   |



## APPENDIX TO PREAMBLE—DATA ELEMENTS THAT MAY NOT BE CLAIMED AS CBI—Continued

| Rule element   | Comment  |
|--|--|
| 68.160(b)(13) The date of the last safety inspection and the identity of the inspecting entity.  | This information provides no information that would affect a source's competitive position.  |
| 68.165(b)(4) Basis of the results (give model name if used).   | Without the chemical name and quantity, this reveals no business information.  |
| 68.165(b)(9) Wind speed and atmospheric stability class (toxics only).   | This information provides no information that would affect a source's competitive position.  |
| 68.165(b)(10) Topography (toxics only) .....   | Without the chemical name and quantity, this reveals no business information.  |
| 68.165(b)(11) Distance to an endpoint .....  | By itself, this information provides no confidential information. Other elements that would reveal chemical identity or quantity may be claimed as CBI.  |
| 68.165(b)(12) Public and environmental receptors within the distance.  | By itself, this information provides no confidential information. Other elements that would reveal chemical identity or quantity may be claimed as CBI.  |
| 68.168 Five-year accident history .....  | Sources are required to report most of these releases and information (chemical released, quantity, impacts) to the federal, state, and local agencies under CERCLA and EPCRA; these data are available to the public and, therefore, do not meet the criteria for CBI claims. Much of this information is also available from the public media. |
| 68.170(b), (d), (e)(1), and (f)–(k)<br>68.175(b), (d), (e)(1), and (f)–(p)<br>NAICS code, prevention program compliance dates and information. | NAICS codes and the prevention program compliance dates and information provide no information that would affect a source's competitive position.  |
| 68.180 Emergency response program .....  | This information provides no information that would affect a source's competitive position.  |

**List of Subjects in 40 CFR Part 68**

Environmental protection,  
Administrative practice and procedure,  
Air pollution control, Chemicals,  
Hazardous substances,  
Intergovernmental relations, Reporting  
and recordkeeping requirements.

Dated: December 29, 1998.

**Carol M. Browner,**  
*Administrator.*

For the reasons set out in the preamble, title 40, chapter I, subchapter C, part 68 of the Code of Federal Regulations is amended to read as follows:

**PART 68—CHEMICAL ACCIDENT PREVENTION PROVISIONS**

1. The authority citation for Part 68 continues to read as follows:

**Authority:** 42 U.S.C. 7412(r), 7601(a)(1), 7661–7661f.

2. Section 68.3 is amended by removing the definition of SIC and by adding in alphabetical order the definition for NAICS to read as follows:

**§ 68.3 Definitions.**

\* \* \* \* \*

NAICS means North American Industry Classification System.

\* \* \* \* \*

3. Section 68.10 is amended by revising paragraph (d)(1) to read as follows:

**§ 68.10 Applicability.**

\* \* \* \* \*

(d) \* \* \*

(1) The process is in NAICS code 32211, 32411, 32511, 325181, 325188,

325192, 325199, 325211, 325311, or 32532; or

\* \* \* \* \*

4. Section 68.42 is amended by revising paragraph (b)(3), redesignating paragraphs (b)(4) through (b)(10) as paragraphs (b)(5) through (b)(11) and by adding a new paragraph (b)(4) to read as follows:

**§ 68.42 Five-year accident history.**

\* \* \* \* \*

(b) \* \* \*

(3) Estimated quantity released in pounds and, for mixtures containing regulated toxic substances, percentage concentration by weight of the released regulated toxic substance in the liquid mixture;

(4) Five- or six-digit NAICS code that most closely corresponds to the process;

\* \* \* \* \*

5. Section 68.79 is amended by revising paragraph (a) to read as follows:

**§ 68.79 Compliance audits.**

(a) The owner or operator shall certify that they have evaluated compliance with the provisions of this subpart at least every three years to verify that procedures and practices developed under this subpart are adequate and are being followed.

\* \* \* \* \*

6. Section 68.150 is amended by adding paragraph (e) to read as follows:

**§ 68.150 Submission.**

\* \* \* \* \*

(e) Procedures for asserting that information submitted in the RMP is entitled to protection as confidential business information are set forth in §§ 68.151 and 68.152.

7. Section 68.151 is added to read as follows:

**§ 68.151 Assertion of claims of confidential business information.**

(a) Except as provided in paragraph (b) of this section, an owner or operator of a stationary source required to report or otherwise provide information under this part may make a claim of confidential business information for any such information that meets the criteria set forth in 40 CFR 2.301.

(b) Notwithstanding the provisions of 40 CFR part 2, an owner or operator of a stationary source subject to this part may not claim as confidential business information the following information:

(1) Registration data required by § 68.160(b)(1) through (b)(6) and (b)(8), (b)(10) through (b)(13) and NAICS code and Program level of the process set forth in § 68.160(b)(7);

(2) Offsite consequence analysis data required by § 68.165(b)(4), (b)(9), (b)(10), (b)(11), and (b)(12).

(3) Accident history data required by § 68.168;

(4) Prevention program data required by § 68.170(b), (d), (e)(1), (f) through (k);

(5) Prevention program data required by § 68.175(b), (d), (e)(1), (f) through (p); and

(6) Emergency response program data required by § 68.180.

(c) Notwithstanding the procedures specified in 40 CFR part 2, an owner or operator asserting a claim of CBI with respect to information contained in its RMP, shall submit to EPA at the time it submits the RMP the following:

(1) The information claimed confidential, provided in a format to be specified by EPA;

(2) A sanitized (redacted) copy of the RMP, with the notation "CBI" substituted for the information claimed confidential, except that a generic category or class name shall be substituted for any chemical name or identity claimed confidential; and

(3) The document or documents substantiating each claim of confidential business information, as described in § 68.152.

8. Section 68.152 is added to read as follows:

**§ 68.152 Substantiating claims of confidential business information.**

(a) An owner or operator claiming that information is confidential business information must substantiate that claim by providing documentation that demonstrates that the claim meets the substantive criteria set forth in 40 CFR 2.301.

(b) Information that is submitted as part of the substantiation may be claimed confidential by marking it as confidential business information. Information not so marked will be treated as public and may be disclosed without notice to the submitter. If information that is submitted as part of the substantiation is claimed confidential, the owner or operator must provide a sanitized and unsanitized version of the substantiation.

(c) The owner, operator, or senior official with management responsibility of the stationary source shall sign a certification that the signer has personally examined the information submitted and that based on inquiry of the persons who compiled the information, the information is true, accurate, and complete, and that those portions of the substantiation claimed as confidential business information would, if disclosed, reveal trade secrets or other confidential business information.

9. Section 68.160 is amended by revising paragraphs (b)(1), (b)(7), and

(b)(12) and adding paragraphs (b)(14) through (b)(18) to read as follows:

**§ 68.160 Registration.**

\* \* \* \* \*

(b) \* \* \*

(1) Stationary source name, street, city, county, state, zip code, latitude and longitude, method for obtaining latitude and longitude, and description of location that latitude and longitude represent;

\* \* \* \* \*

(7) For each covered process, the name and CAS number of each regulated substance held above the threshold quantity in the process, the maximum quantity of each regulated substance or mixture in the process (in pounds) to two significant digits, the five- or six-digit NAICS code that most closely corresponds to the process, and the Program level of the process;

\* \* \* \* \*

(12) If the stationary source has a CAA Title V operating permit, the permit number; and

\* \* \* \* \*

(14) Source or Parent Company E-Mail Address (Optional);

(15) Source Homepage address (Optional)

(16) Phone number at the source for public inquiries (Optional);

(17) Local Emergency Planning Committee (Optional);

(18) OSHA Voluntary Protection Program status (Optional);

10. Section 68.165 is amended by revising paragraph (b) to read as follows:

**§ 68.165 Offsite consequence analysis.**

\* \* \* \* \*

(b) The owner or operator shall submit the following data:

(1) Chemical name;

(2) Percentage weight of the chemical in a liquid mixture (toxics only);

(3) Physical state (toxics only);

(4) Basis of results (give model name if used);

(5) Scenario (explosion, fire, toxic gas release, or liquid spill and evaporation);

(6) Quantity released in pounds;

(7) Release rate;

(8) Release duration;

(9) Wind speed and atmospheric stability class (toxics only);

(10) Topography (toxics only);

(11) Distance to endpoint;

(12) Public and environmental receptors within the distance;

(13) Passive mitigation considered; and

(14) Active mitigation considered (alternative releases only);

11. Section 68.170 is amended by revising paragraph (b) to read as follows:

**§ 68.170 Prevention program/Program 2.**

\* \* \* \* \*

(b) The five- or six-digit NAICS code that most closely corresponds to the process.

\* \* \* \* \*

12. Section 68.175 is amended by revising paragraph (b) to read as follows:

**§ 68.175 Prevention program/Program 3.**

\* \* \* \* \*

(b) The five- or six-digit NAICS code that most closely corresponds to the process.

\* \* \* \* \*

13. Section 68.180 is amended by revising paragraph (b) to read as follows:

**§ 68.180 Emergency response program.**

\* \* \* \* \*

(b) The owner or operator shall provide the name and telephone number of the local agency with which emergency response activities and the emergency response plan is coordinated.

\* \* \* \* \*

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