affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

282. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

SEVENTH CLAIM FOR RELIEF

5 U.S.C. § 706(2)(A)
Arbitrary and capricious rulemaking -
EPA's failure to adequately explain the reasons for its change in position on reporting thresholds for covered PBT chemicals

283. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 282 in this claim for relief.

284. Agency rulemaking is arbitrary and capricious if the agency has changed a rule or policy without explaining why the original reasons for adopting the rule or policy are no longer dispositive, or if the agency has failed to respond in a reasoned manner to significant comments received.

285. In October 1999, in its preamble to the 1999 PBT Regulations, EPA rejected the idea of allowing a facility to use Form A for PBT chemicals if the facility manufactured, processed or otherwise used 1 million pounds or less of the chemical, and had an ARA of 500 pounds or less of the chemical. *Persistent Bioaccumulative Toxic (PBT) Chemicals; Final Rule*, 64 Fed. Reg. 58666, 58670/2-3, 58672/2 (Oct. 29, 1999).

286. EPA rejected use of Form A for PBT chemicals under those conditions because it would reduce data gathering not only for releases but also for other waste management quantities:

> The general information provided in the Form A on the quantities of the chemical that the facility manages as waste is *insufficient for conducting analyses on PBT chemicals* and would be *virtually useless* for communities interested in assessing risk from releases *and other waste management* of PBT chemicals.

Id. at 58670/2 (emphasis added); *see also id.* at 58732/3-58733/2.

287. At that time, EPA concluded that:

> PBT chemicals can remain in the environment for a significant amount of time and can bioaccumulate in animal tissues. Even relatively small releases of such chemicals have the potential to accumulate over time and cause significant adverse impacts on human health and the environment. Therefore, EPA believes it is particularly important to gather and disseminate to the public relevant information on even relatively small amounts of releases *and other waste management of PBT chemicals*.

64 Fed. Reg. at 58729/2-3 (emphasis added).

288. In the preamble to the 2001 Lead Regulations, EPA reiterated that:

> [t]he nature of PBT chemicals, including lead . . . , indicates that small quantities of such chemicals are of concern, which provides strong support for setting lower reporting thresholds than the . . . section 313 thresholds of 10,000 and 25,000 pounds.

66 Fed. Reg. at 4504/1.

289. In addition, in the 1999 PBT rulemaking, EPA considered and rejected the idea that facilities could use Form A if they had zero releases of the PBT chemical. 64 Fed. Reg. at 58733/1.

290. EPA rejected this idea because it concluded that it was necessary to ensure continued reporting of information on waste quantities other than releases on Form R, stating that

> *[t]his additional waste management information* on PBT chemicals is very important to communities because it helps them understand the quantities of

> EPCRA section 313 chemicals that are being transported through their communities, the destination of these EPCRA section 313 chemicals, as well as the reported waste management activity at the receiving facility.

Id. at 58732/3-58733/1 (emphasis added).

291. EPA also rejected the idea of "range reporting" in the 1999 PBT rule because it believed that range reporting was not consistent with "the ultimate intent" of TRI reporting for PBT chemicals, which was "to provide useful information on PBT chemicals to assist communities in determining if PBT chemicals are present in their communities at levels that may pose an unacceptable risk." *Id.* at 58734/2.

292. Furthermore, when it rejected range reporting in 1999, EPA reasoned that:

> the use of ranges could misrepresent data accuracy because the low or the high end range numbers may not really be that close to the estimated value, even taking into account its inherent error (i.e., error in measurements and developing estimates) . . . . For example, a release of 501 pounds could be misinterpreted as a 999 if reported as a range of 500-999. This represents nearly a 100% error.

Id. at 58734/3.

293. In the 2006 Regulations, EPA reversed position and allowed the use of Form A for covered PBT chemicals.

294. Commenters asserted that EPA had not adequately explained this reversal of position. *See, e.g.*, *Response to Comments* at 77-78.

295. EPA responded to the comments by providing the following rationale for now allowing the use of Form A:

> allowing Form A for PBT chemicals as conditioned in the [2006 Regulations] will not result in an appreciable reduction in the data reported to the Agency. . . . [EPA] anticipates this rule will have a minimal impact on the national totals for waste management . . . . On an individual facility basis, data users will know that the facility filing Form A for a PBT chemical has zero releases and between zero and 500 pounds of combined recycling, energy recovery, and treatment for destruction. In addition, data users will know that the facility has manufactured, processed or otherwise used the PBT chemical above the relevant thresholds and

> did not exceed the one-million-pound alternate threshold for Form A. EPA believes that this is an appropriate level of detail for public reporting . . . .

71 Fed. Reg. at 76938/2.

296. Thus, under the 2006 Regulations, Form A reporting is acceptable to EPA because "the Form A serves as a range report, which informs the public and other data users that other waste management of the PBT chemical is 500 pounds or less." *Response to Comments* at 79.

297. EPA's assertions do not provide an adequate explanation of its reversal in position: why such "range reporting" on Form A was "insufficient for conducting analyses on PBT chemicals" and "virtually useless for communities interested in assessing risk" in 1999, but is an "appropriate level of detail for public reporting" for those communities and others in 2006.

298. Nor does EPA's rationale respond in a reasoned way to the comments submitted to EPA on these issues.

299. EPA's failure to explain why the reasons supporting its previous exclusion of PBT chemicals from Form A eligibility are no longer dispositive, and its failure to respond in a reasoned manner to the comments raising these issues, render the 2006 rulemaking arbitrary and capricious.

300. Because this aspect of the 2006 rulemaking is arbitrary and capricious, APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration that EPA has violated the law in this actual controversy.

301. In addition, APA section 706(2)(A), 5 U.S.C. § 706(2)(A), gives this Court the power to hold unlawful and set aside the provisions of the Final Rule regarding covered PBT chemicals, and in particular 40 C.F.R. §§ 372.27(a)(2) and 372.95(b)(4)(ii).

302. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their

affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

303. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

EIGHTH CLAIM FOR RELIEF

5 U.S.C. § 706(2)(A)
Arbitrary and capricious rulemaking -
EPA's failure to explain how it calculated the amounts of lost TRI reporting for non-PBT chemicals

304. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 303 in this claim for relief.

305. Agency rulemaking is arbitrary and capricious if the agency has failed cogently to explain why it has exercised its discretion in a given manner, or the agency has failed to respond in a reasoned manner to significant comments received.

306. In order to determine the overall percentage reduction in reporting for non-PBT chemicals that could result from the 2006 Regulations, EPA relied on nationwide calculations of reduction in the amounts of reported releases and other waste management quantities for each affected non-PBT chemical.

307. A group of commenters asserted that EPA had not explained how it had calculated the figures for losses in reporting. *Response to Comments* at 106.

308. In response, EPA did not explain how it had calculated those figures. *Response to Comments* at 106-07.

309. EPA's failure to explain how it calculated the reporting loss estimates on which it relies to justify the 2006 Regulations, and its failure to respond in a reasoned manner to comments raising that issue, render the 2006 rulemaking arbitrary and capricious.

310. Because this aspect of the 2006 rulemaking is arbitrary and capricious, APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration that EPA has violated the law in this actual controversy.

311. In addition, APA section 706(2)(A), 5 U.S.C. § 706(2)(A), gives this Court the power to hold unlawful and set aside the provisions of the Final Rule regarding non-PBT chemicals, and in particular 40 C.F.R. §§ 372.27(a)(1) and §§ 372.95(b)(4)(i).

312. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

313. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

NINTH CLAIM FOR RELIEF

5 U.S.C. § 706(2)(A)
Arbitrary and capricious rulemaking -
EPA's failure to explain the astounding variation in its calculations of amounts of lost TRI reporting for covered PBT chemicals

314. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 313 in this claim for relief.

315. Agency rulemaking is arbitrary and capricious if the agency has failed cogently to explain why it has exercised its discretion in a given manner, or if the agency has failed to respond in a reasoned manner to significant comments received.

316. In order to determine the overall percentage reduction in reporting that could result from the new alternate reporting thresholds for covered PBT chemicals, EPA relied on calculations of reduction in the amounts of reported total production related waste that could result from the new thresholds.

317. In the economic analysis for the Proposed Rule, EPA calculated an aggregate reporting loss of 12,855,836 pounds, or over 6,400 tons, of total production related waste for covered PBT chemicals. *Economic Analysis (Proposed Rule)* at 5-4 (Table 5-1).

318. In the economic analysis for the Final Rule, which did not vary from the Proposed Rule as regards covered PBT chemicals, EPA calculated an aggregate reporting loss of 83,129 pounds, or approximately 42 tons, of total production related waste for covered PBT chemicals. *Economic Analysis (Final Rule)* at 5-4 (Table 5-1).

319. Thus, the reporting loss calculation for the Final Rule was approximately six-tenths of one percent of the reporting loss calculation for the identical Proposed Rule.

320. EPA's reliance on such drastically different calculations for identical sets of reporting requirements in itself renders the covered PBT component of the 2006 rulemaking arbitrary and capricious.

321. A group of commenters noted that EPA had not provided a chemical-by-chemical analysis of reporting losses for covered PBT chemicals for the Proposed Rule. *Responses to Comments* at 78.

322. EPA did provide a chemical-by-chemical analysis for covered PBT chemicals for the Final Rule, *see Economic Analysis (Final Rule)* at A-2, but did not explain how it calculated those chemical-by-chemical reporting losses.

323. Nor did EPA provide any explanation as to why the two calculations of aggregate reporting loss for the same set of reporting requirements varied so drastically.

324. Because EPA failed to explain how it performed the chemical-by-chemical calculations for the Final Rule, and failed to provide a chemical-by-chemical calculation for the analysis supporting the Proposed Rule, the Plaintiff States, and the public generally, are unable to determine why the two sets of calculations differ and whether the new chemical-by-chemical calculations used to support the final regulation are correct.

325. Indeed, such different results suggest that EPA may have changed assumptions or methodologies between the Proposed Rule and the Final Rule, but without an explanation from EPA, it is not possible to know.

326. EPA's failure to explain that drastic difference in the calculations, and more generally, its failure to explain the methodology – or change in methodology – for the two calculations, along with its failure to respond in a reasoned manner to comments by explaining its new calculations, render the 2006 Regulations arbitrary and capricious.

327. Because this aspect of the 2006 rulemaking is arbitrary and capricious, APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration that EPA has violated the law in this actual controversy.

328. In addition, APA section 706(2)(A), 5 U.S.C. § 706(2)(A), gives this Court the power to hold unlawful and set aside the provisions of the Final Rule regarding covered PBT chemicals, and in particular 40 C.F.R. §§ 372.27(a)(2) and 372.95(b)(4)(ii).

329. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

330. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

TENTH CLAIM FOR RELIEF

5 U.S.C. § 706(2)(A)
Arbitrary and capricious rulemaking -
EPA's improper consideration of burden reduction

331. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 330 in this claim for relief.

332. Agency rulemaking is arbitrary and capricious if the agency has relied on factors that Congress had not intended for the agency to consider, if the agency has changed a rule or

policy without explaining why the original reasons for adopting the rule or policy are no longer dispositive, or if the agency has failed cogently to explain why it has exercised its discretion in a given manner.

333. EPA's principal purpose in promulgating the 2006 Regulations was "to reduce the reporting burden" for facilities subject to TRI reporting requirements. 70 Fed. Reg. at 57822/2; *see also id.* at 57825/2; 71 Fed. Reg. at 76932/1.

334. Congress, however, did not intend for EPA to make burden reduction the predominant consideration when establishing "a threshold amount for a toxic chemical different from the amount established by [Congress]" 42 U.S.C. § 11023(f)(2).

335. To the contrary, by statute, Congress provided that the purpose of TRI is:

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

42 U.S.C. § 11023(h).

336. EPA has stated that TRI's "*overriding* purpose . . . is to provide government agencies, researchers, and local communities, with a comprehensive picture of toxic chemical releases and potential exposures to humans and ecosystems." 66 Fed. Reg. at 4506/2 (emphasis added).

337. EPA has also stated that "[t]he entire concept of TRI . . . is founded on the belief that the public has the right to know about chemical use, release, and other waste management in the areas in which they live, as well as the hazards associated with these chemicals." 64 Fed. Reg. at 58677/1.

338. Thus, TRI reporting requirements "should be construed *expansively* to require the collection of the *most* information permitted under the statutory language." 132 Cong. Rec. 29747 (1986) (comments of Rep. Edgar) (emphasis added).

339. While EPCRA section 313(f)(2), 42 U.S.C. § 11023(f)(2), grants EPA authority to revise reporting thresholds through application of the substantial majority test, it does not authorize EPA to replace the statutory test with the goal of burden reduction.

340. In fact, the plain language of section 313(f)(2) does not require, authorize or even mention reporting burden as a factor to be considered in revising reporting thresholds. Instead, the only criterion referenced in section 313(f)(2) is whether the revision obtains reporting on a substantial majority of releases of the chemical at issue from facilities subject to section 313.

341. In the preambles to the Proposed and Final Rules, EPA provides no legal authority supporting consideration of reporting burdens in revising TRI reporting thresholds.

342. In the past, EPA has acknowledged that EPCRA does not require consideration of reporting burden in revising thresholds. 64 Fed. Reg. at 58676/2.

343. Moreover, EPA has also acknowledged that "Congress made clear it *never* intended impacts on reporting facilities to outweigh the public's right-to-know about their potential exposures to toxic chemicals." *Id.* at 58690/3 (emphasis added).

344. Yet EPA's predominant rationale for promulgating the final 2006 rule is that the purported benefit from burden reduction outweighs the harm resulting from reduced reporting. *See, e.g.*, 71 Fed. Reg. at 76939/1.

345. EPA not only relies on a factor, burden reduction, that is neither one of the statutory purposes of TRI reporting nor one of the statutory criteria for changing reporting thresholds under section 313(f)(2), it does so in direct contravention of the actual statutory goal of TRI

reporting to provide as much information as possible regarding releases of toxic chemicals to federal, state and local governments and the public, including citizens of the local communities in which facilities using and discharging those toxic chemicals are located.

346. EPA's reliance on the burden reduction factor in lieu of the "substantial majority" standard, contrary to Congress' intent and in contravention of the actual goals of TRI, EPA's unexplained reversal in policy as to whether burden reduction can outweigh the public's right-to-know, and EPA's failure cogently to explain why it is allowing impacts on reporting facilities to outweigh the public's right to know, contrary to Congress' intent, render the 2006 rule arbitrary and capricious.

347. Because this aspect of the 2006 rulemaking is arbitrary and capricious, APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration that EPA has violated the law in this actual controversy.

348. In addition, APA section 706(2)(A), 5 U.S.C. § 706(2)(A), gives this Court the power to hold unlawful and set aside the Final Rule, and in particular 40 C.F.R. §§ 372.27(a)(1) and (2) and §§ 372.95(b)(4)(i) and (ii).

349. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

350. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The

Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

ELEVENTH CLAIM FOR RELIEF

5 U.S.C. § 706(2)(A)
Arbitrary and capricious rulemaking -
EPA's failure to explain why its burden estimates have varied dramatically since 2003

351. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 350 in this claim for relief.

352. Agency rulemaking is arbitrary and capricious if the agency has failed cogently to explain why it has exercised its discretion in a given manner, or if the agency has failed to respond in a reasoned manner to significant comments received.

353. EPA has referenced several widely-varying estimates of TRI reporting burdens in the past few years.

354. For example, in 2002-2003, EPA analyzed data from TRI reporting facilities and developed a revised estimate of 14.5 hours to perform necessary calculations and complete Form R.

355. This revised represents a 69 percent reduction from the previous estimate of 47.1 hours.

356. Nonetheless, EPA continued to use the 47.1 hour estimate.

357. In 2004, EPA consultants performed an analysis of TRI reporting burdens and developed, on information and belief, a revised estimate of 23.95 hours to perform necessary calculations and complete Form R.

358. This figure represents a 49 percent reduction from the previous estimate of 47.1 hours.

359. Nonetheless, EPA used the 47.1-hour estimate for the proposed and final rules.

360. A commenter noted that EPA had referenced several TRI burden estimates in recent years, queried if any of those number was accurate, and suggested that EPA should resolve the question of how to calculate reporting burdens and burden reduction before promulgating a rule premised on the magnitude of burden reduction. *Response to Comments* at 149, 154.

361. The commenter also suggested that EPA not proceed with the proposed rule until it explained why it had reached a "wide range" of burden estimates in the past, and why it was not using the newer estimates. *Response to Comments* at 154.

362. EPA failed to respond to these comments in a reasoned manner.

363. EPA did not address the 2003 estimates, and indicated that it might in the future consider any comments on the 2004 estimates that had been submitted during the rulemaking process, but otherwise just stated that it had based its burden reduction estimates for the rule on the oldest burden reduction estimates, which had been approved by OMB for the purposes of the Paperwork Reduction Act. *Response to Comments* at 155.

364. EPA's failure to resolve the question of how to calculate reporting burdens, its failure to explain why the estimates that it relied on were better than the newer estimates, and its failure otherwise to respond in a reasoned manner to comments raising this issue, render the 2006 rulemaking arbitrary and capricious.

365. Because this aspect of the 2006 rulemaking is arbitrary and capricious, APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration that EPA has violated the law in this actual controversy.

366. In addition, APA section 706(2)(A), 5 U.S.C. § 706(2)(A), gives this Court the power to hold unlawful and set aside the Final Rule, and in particular 40 C.F.R. §§ 372.27(a)(1) and (2) and §§ 372.95(b)(4)(i) and (ii).

367. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

368. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

TWELFTH CLAIM FOR RELIEF

5 U.S.C. § 706(2)(A)
Arbitrary and capricious rulemaking -
EPA's failure to analyze whether its burden reduction estimates are accurate

369. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 368 in this claim for relief.

370. Agency rulemaking is arbitrary and capricious if the agency has failed cogently to explain why it has exercised its discretion in a given manner, if the agency has failed to respond in a reasoned manner to significant comments received, or if there are no findings or analysis to justify the choice the agency made nor any indication of the basis on which the agency exercised its discretion.

371. Even if reporting burden were a statutorily recognized factor, EPA's burden reduction estimates are arbitrary, capricious and unreliable.

372. Since reporting year 2001, EPA has made available to TRI reporting facilities a software package known as "TRI-Made Easy" or "TRI-ME."

373. "TRI-ME is an interactive, user-friendly software tool that guides facilities through the TRI reporting process. . . . TRI-ME facilitates the analysis needed to determine if a facility must complete a Form A or Form R report for a particular chemical." 70 Fed. Reg. at 57826/1.

374. More specifically, "TRI-ME leads prospective reporters interactively through a series of questions that eliminate a good portion of the analysis required to determine whether a facility needs to comply with the TRI reporting requirements, including the threshold calculations needed to determine Form A eligibility." U.S. Government Accountability Office, *Environmental Information: EPA Actions Could Reduce the Availability of Environmental Information to the Public* at 10, No. GAO-07-464T (Feb. 6, 2007).

375. "EPA has made considerable progress in reducing burden associated with its various information collections through . . . implementing technology-based processes (*i.e.*, electronic reporting using the Toxics Release Inventory–Made Easy (TRI-ME) software and EPA's Central Data Exchange (CDX) . . .). These measures have reduced the time, cost, and complexity of existing environmental reporting requirements." 70 Fed. Reg. at 57825/2.

376. "Approximately 90% of the roughly 84,000 Form R's filed in 2003 were prepared using the TRI-ME software." *Id.* at 57826/1.

377. A commenter noted that EPA did not factor into its analysis of burden reduction the extent to which electronic filing is reducing reporting burden independent of changes in reporting thresholds. *Response to Comments* at 176.

378. Another commenter suggested that EPA should perform an analysis of burden reduction taking into account TRI-ME to obtain more reliable and accurate figures. *Id.* at 149.

379. In response, EPA conceded that:

> [the] commenter correctly observed that increases in electronic filing through time is achieving burden reduction and that [EPA's] burden reduction estimates from the rule do not take this into account. For example, the availability of TRI-ME reporting software is likely to assist and streamline the reporting process. This could mean that [EPA's] Form R reporting cost estimates are overstated, and thus [EPA's] estimate of the cost savings associated with the [2006 Regulations] also could be overstated.

Id. at 176.

380. Thus, EPA did not analyze to what extent its estimate of cost savings, *i.e.*, burden reduction, associated with the 2006 Regulations might have been significantly overstated because it failed to consider that TRI reporting burdens may be much lower than EPA assumed due to the availability and widespread use of TRI-ME software and electronic filing.

381. Numerous commenters noted that the burden reduction cost saving estimates were too high because the data collection burden is similar for both Form R and Form A. *Id.* at 158-59.

382. For example, one TRI reporting company explained that once a facility has collected all of the data needed to demonstrate entitlement to use Form A, the work needed to complete Form R is basically done. The company noted that it has a policy of submitting only Form Rs based, in part, on the "insignificant difference in burden" between Form A and Form R. *Id.* at 158.

383. Another TRI reporting company similarly noted that most of the burden for its facilities is in determining eligibility, and that any burden reduction from expanded entitlement to use Form A would be "minimal." *Id.* at 10.

384. EPA responded to these comments by asserting that "facilities with releases and other waste management amounts *well below* the threshold for Form A may be spared the burden of detailed calculations each year to determine eligibility for Form A." *Id.* at 159 (emphasis added).

385. EPA did not analyze, however, what percentage of facilities entitled to file Form A by the 2006 rule might in fact be "well below" the threshold and thus might experience significant burden reduction on this rationale.

386. EPA did not reduce the aggregate expected cost savings to reflect that, under its own rationale, only some unknown number – but not all – of the facilities entitled to file Form A might actually experience significant burden reduction from filing Form A. Nor, in the alternative, did EPA explain why it was appropriate to assume the same large amount of cost saving reduction for all such facilities when its rationale for such savings only applied to some uncertain percentage of those facilities.

387. In addition, a group of commenters noted that the benefit reduction estimates for the Proposed Rule assumed a savings of $81 in recordkeeping/mailing costs for each Form A certification that replaced a full Form R report, even though recordkeeping and mailing costs would be comparable whether the facility submitted Form R or Form A. *Response to Comments* at 156.

388. EPA in fact stated that recordkeeping requirements would not change, 70 Fed. Reg. at 57841/1 (section entitled "Do My Recordkeeping Requirements Change?"); *id* at 57842/2 (same), and EPA provided no reason to believe that there would be any difference in mailing costs for Form A versus Form R.

389. The economic analysis for the Final Rule continued to rely on an assumed savings in recordkeeping/mailing costs for facilities that switched from Form R to Form A, although in the slightly larger amount of approximately $87. *Economic Analysis (Final Rule)* at 2-5 (Table 2-3).

390. EPA did not explain why there would be such significant cost savings in recordkeeping/mailing costs in switching from Form R to Form A when it would appear that there would in fact be little or no such savings.

391. As a result of failing to provide an explanation as to why there would be any savings in recordkeeping/mailing costs, EPA's cost savings estimates for non-PBT chemicals may be overstated by up to twenty-five percent. Twenty-five percent equals $87, the purported savings in recordkeeping/mailing costs, divided by $351, where $351 represents EPA's $438 savings estimate minus the unjustified $87.

392. For the same reason, EPA's cost savings estimates for covered PBT chemicals may be overstated by up to thirteen percent. Thirteen percent equals $87, the purported savings in recordkeeping/mailing costs, divided by $661, where $661 represents EPA's $748 savings estimate minus the unjustified $87.

393. In the preamble to the Proposed Rule, EPA noted that a large subset of the Form Rs for covered PBTs that might qualify for conversion to Form A – 2,085 out of 2,703 forms, or approximately 77 percent – reported zero releases and zero amounts of other waste management quantities. 70 Fed. Reg. at 57839/2.

394. EPA stated that the burden for completing Form R for facilities that have zero releases and zero amounts of other waste management quantities was "small." *Id.*

395. If the burden for completing Form R for such facilities is "small" to begin with, any burden reduction from switching to Form A must also be small.

396. In the preamble to the Final Rule, EPA used a cost saving estimate of $748, representing a burden reduction of 15.5 hours, for each Form A submitted instead of a Form R for a covered PBT chemical. 71 Fed. Reg. at 76942 (Table 1).

397. This $748 burden reduction estimate that EPA used for covered PBTs represents a relatively large number, as EPA used a much smaller burden reduction figure – $438 – for non-PBT chemicals. *Id.*

398. A group of commenters pointed out that, given EPA's conclusion that the burden of completing Form R for the bulk of the facilities that might qualify to use Form A is "small," most of the facilities in this category would receive little burden reduction benefit from proposed change. *Response to Comments* at 91.

399. In response, EPA did not offer a reasoned explanation as to why it is using the full burden reduction amount of $748 for all qualifying forms for covered PBT chemicals when approximately 77 percent of the qualifying forms would experience only a small burden reduction. *Id.*

400. EPA's failure cogently to explain why it relied on these burden estimates notwithstanding their unreliability, EPA's failure to respond in a reasoned manner to comments raising these issues of unreliability, and EPA's failure to provide analysis addressing these issues, render the 2006 rulemaking arbitrary and capricious.

401. Because these aspects of the 2006 rulemaking are arbitrary and capricious, APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration that EPA has violated the law in this actual controversy.

402. In addition, APA section 706(2)(A), 5 U.S.C. § 706(2)(A), gives this Court the power to hold unlawful and set aside the Final Rule, and in particular 40 C.F.R. §§ 372.27(a)(1) and (2) and §§ 372.95(b)(4)(i) and (ii).

403. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

404. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

THIRTEENTH CLAIM FOR RELIEF

5 U.S.C. § 706(2)(A)
Arbitrary and capricious rulemaking -
EPA's failure to consider the 2006 Regulations' potential to weaken existing incentives to reduce releases and other waste amounts of non-PBT chemicals

405. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 404 in this claim for relief.

406. Agency rulemaking is arbitrary and capricious if the agency has failed entirely to consider an important aspect of the problem, the agency has failed to respond in a reasoned manner to significant comments received, or if there are no findings or analysis to justify the choice that the agency made nor any indication of the basis on which the agency exercised its discretion.

407. In the preamble to the Final Rule, EPA contended that the Final Rule, by revising the alternative reporting requirements for non-PBT chemicals to include a 2,000-pound threshold for releases, would create an incentive for facilities to reduce their releases beneath that threshold so that the facilities could file a Form A certification rather than provide full reporting on Form R. 71 Fed. Reg. at 76937/3.

408. EPA claims that this incentive would further the national policy on pollution prevention set forth in PPA section 6602(b), 42 U.S.C. § 13101(b). *Id.* at 76939/3.

409. EPA did not, however, provide any data or analysis to demonstrate that this purported incentive will in fact result in reduced amounts of releases.

410. It might in fact be the case that some, most or all facilities that would qualify to use Form A would find it easier and less burdensome to continue to file Form R rather than to change their operational or waste management practices to reduce their releases to less than 2,000 pounds.

411. If that were the case, the purported incentive might have no effect, or a significantly smaller effect than EPA anticipated, on the amount of releases that facilities generate.

412. Nor did EPA consider that the 2006 Regulations weaken or merely duplicate the preexisting incentive to reduce releases that arises from the obligation to disclose the amount of releases under TRI.

413. Since TRI reporting requirements became effective in the late 1980s, facilities have often reduced the amounts of releases because they know that the amounts of their releases are public knowledge as a result of TRI and reducing them can improve their public images.

414. That incentive to reduce releases applies to all facilities, whether they had more than 2,000 pounds of releases or less, so that a facility that had releases of 1,900 pounds of a TRI

chemical would have an incentive to reduce those releases to zero pounds to create better goodwill in its community and beyond.

415. EPA's decision to allow facilities with releases of less than 2,000 pounds not to report the amount of their releases eliminates the incentive for such facilities to reduce their releases.

416. A facility that in the past might have reduced its releases of a non-PBT chemical from 1,900 pounds to zero pounds to create better goodwill would no longer have an incentive to do so, since it could simply maintain its existing level of releases, file Form A and thus not report the amount of its releases.

417. In addition, the new 2,000 pound threshold might induce some facilities to increase their releases to save production costs, to increase production or for other reasons.

418. A facility that might in the past have reduced its releases to zero pounds to create better goodwill in its community might now increase its releases to 1,900 pounds.

419. If the facility could and did use Form A certification, the community would never know about that increase, since Form A certification, unlike Form R reporting, does not distinguish between zero releases and 1,900 pounds of releases.

420. Through the 2006 Regulations, EPA purports to create a new incentive to reduce releases, but it has not considered whether those regulations have either weakened an existing incentive to reduce releases or created an incentive to increase releases. Thus, EPA has not adequately analyzed whether, given these countervailing incentives, the Final Rule will in fact, on balance, increase incentives to reduce releases.

421. Moreover, as noted in paragraphs 413-414 above, even before the 2006 Regulations were promulgated, facilities with releases greater than 2,000 pounds already had a preexisting

incentive to reduce their releases beneath 2,000 pounds to create better goodwill in their communities and beyond.

422. EPA has not considered whether the possibility of being able to submit a Form A certification rather than a full Form R report will provide sufficient additional incentive – over and above the preexisting incentive – to induce more facilities with releases over 2,000 pounds to reduce their releases beneath 2,000 pounds.

423. Incentive arguments analogous to those discussed in paragraphs 407-422 would also apply to EPA's decision in the 2006 Regulations to raise the ARA from 500 pounds to 5,000 pounds.

424. Thus, facilities that previously had an incentive to reduce their ARA waste quantities to less than 500 pounds no longer have that threshold incentive (the previous 500-pound threshold being replaced by the new 5,000-pound threshold); facilities that previously kept their ARA waste quantity to less than 500 pounds to avoid filing Form R might now increase it to almost 5,000 pounds; and given the preexisting incentive to reduce ARA waste quantities to less than 5,000 pounds to create better goodwill, the purported new, additional incentive to reduce ARA waste quantities to less than 5,000 pounds resulting from the new 5,000-pound reporting threshold might not in fact be sufficient to induce additional facilities to make such reductions.

425. EPA has not analyzed the interplay between any pre-existing incentive to reduce waste amounts to less than 500 pounds and any new incentive to reduce waste amounts to less than 5,000 pounds.

426. Thus, EPA has failed to consider whether the new regulations will in fact increase, rather than decrease, the amount of releases and other waste amounts of TRI chemicals that facilities generate.

427. As a result, it has not analyzed whether the 2006 Regulations impede, rather than advance, the national pollution prevention policy set out in PPA section 6602(b), 42 U.S.C. § 13101(b).

428. EPA's failure to consider this important aspect of the problem, its failure to provide analysis justifying the choice it made, and its failure to respond in a reasoned manner to comments raising this issue, render the 2006 rulemaking arbitrary and capricious.

429. Because this aspect of the 2006 rule is arbitrary and capricious, APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration that EPA has violated the law in this actual controversy.

430. In addition, APA section 706(2)(A), 5 U.S.C. § 706(2)(A), gives this Court the power to hold unlawful and set aside the provisions of the Final Rule regarding non-PBT chemicals, and in particular 40 C.F.R. §§ 372.27(a)(1) and 372.95(b)(4)(i).

431. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

432. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

FOURTEENTH CLAIM FOR RELIEF

5 U.S.C. § 706(2)(A)
Arbitrary and capricious rulemaking -
EPA's failure to consider the 2006 Regulations' potential to weaken existing incentives to reduce waste management amounts and use of covered PBT chemicals

433. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 432 in this claim for relief.

434. Agency rulemaking is arbitrary and capricious if the agency has failed entirely to consider an important aspect of the problem, the agency has failed to respond in a reasoned manner to significant comments received, or if there are no findings or analysis to justify the choice that the agency made nor any indication of the basis on which the agency exercised its discretion.

435. In the preamble to the Proposed Rule, EPA contended that the Proposed Rule would create an incentive for facilities to reduce their waste management quantities other than releases beneath the 500-pound PRA threshold so that the facilities could file a Form A certification rather than provide full reporting on Form R. 70 Fed. Reg. at 57838/2.

436. EPA claims that this incentive would further the national policy on pollution prevention set forth in PPA section 6602(b), 42 U.S.C. § 13101(b). *Id.*

437. In response to EPA's argument that the new alternate reporting requirements for covered PBT chemicals would create incentives to reduce waste management quantities other than releases, a group of commenters asserted that EPA had not evaluated the extent to which the proposed changes could weaken pre-existing incentives to reduce use and waste management quantities of TRI chemicals. *Response to Comments* at 89-90.

438. EPA did not, however, reply with any data or analysis to demonstrate that the purported incentive upon which it relied will in fact result in reduced amounts of waste management quantities other than releases.

439. It might in fact be the case that some, most or all facilities that would qualify to use Form A would find it easier and less burdensome to continue to file Form R rather than to change their operational or waste management practices to reduce their PRA to less than 500 pounds.

440. If that were the case, the purported incentive might have no effect, or a significantly smaller effect than EPA anticipated, on the amount of waste management quantities other than releases that facilities generate.

441. Nor did EPA consider the extent to which the 2006 Regulations weaken or merely duplicate the preexisting incentive to reduce waste management quantities other than releases that arises from the obligation to disclose the amount of releases under TRI.

442. Since TRI reporting requirements became effective in the late 1980s, facilities have had an incentive to reduce the amounts of other waste management quantities because they know that such amounts are public knowledge as a result of TRI, and reducing them can improve their public image.

443. That pre-existing incentive to reduce other waste management quantities applies to all facilities, whether they had more than 500 pounds of waste management quantities or less, so that a facility that had a total waste management quantity of 450 pounds of a TRI chemical would have an incentive to reduce that release to zero pounds to create better goodwill in its community and beyond.

444. EPA's decision to allow facilities with a PRA of less than 500 pounds not to report the amount of their other waste management quantities eliminates the incentive for such facilities to reduce their other waste management quantities.

445. A facility that might in the past have reduced its waste management quantities of a covered PBT chemical from 450 pounds to zero pounds to create better goodwill would no longer have an incentive to do so, since it could simply maintain its existing level of waste management quantities, file Form A and thus not report the amount of its waste management quantities.

446. In addition, the new 500-pound threshold might induce some facilities to increase their waste management quantities.

447. A facility that might in fact already have reduced its waste management quantities to zero pounds to create better goodwill in its community might now increase them to 450 pounds to save production costs, to increase production or for other reasons.

448. If the facility could and did use Form A certification, the community would never know about that increase, since Form A certification, unlike Form R reporting, does not distinguish between zero waste management quantities and 450 pounds of waste management quantities.

449. Through the 2006 Regulations, EPA purports to create a new incentive to reduce waste management quantities, but it has not considered whether it has weakened an existing incentive to reduce waste management quantities or created an incentive to increase waste management quantities. Thus, EPA has not adequately analyzed whether, given these countervailing incentives, the Final Rule will in fact, on balance, increase incentives to reduce other waste management quantities.

450. Moreover, as noted in paragraphs 442-443 above, even before the 2006 Regulations were promulgated, facilities with waste management quantities greater than 500 pounds already had a pre-existing incentive to reduce their waste management quantities beneath 500 pounds to create better goodwill in their communities.

451. EPA has not considered whether the possibility of being able to submit a Form A certification rather than a full Form R report will provide sufficient additional incentive – over and above the preexisting incentive – to induce more facilities with waste management quantities over 500 pounds to reduce those quantities beneath 500 pounds.

452. Incentive arguments analogous to those in paragraphs 435-451 would also apply to EPA's decision in the 2006 Regulations to create an alternative use threshold of 1 million pounds for covered PBT chemicals, when previously the only applicable use thresholds for those chemicals were 10 pounds or 100 pounds.

453. Thus, facilities that previously had an incentive to reduce their use of covered PBT chemicals to less than 10 or 100 pounds no longer have that threshold incentive (those two thresholds being replaced by the 1 million-pound threshold); facilities that previously kept their use of a covered PBT chemical to less than 10 or 100 pounds to avoid filing Form R might now increase it to almost 1 million pounds; and given the preexisting incentive to reduce use of the covered PBT chemical to less than 10 or 100 pounds to create better goodwill, any purported new, additional incentive to reduce use to less than 1 million pounds resulting from the new 1 million-pound use threshold might not in fact be sufficient to induce additional facilities to make such reductions.

454. Indeed, under the Final Rule, a facility that had previously decided not to use covered PBT chemicals might be more inclined to use them now if that were economically

advantageous, since previously the facility could not use more than 10 or 100 pounds of the chemical without having to file Form R, while now the facility might be able to use up to 1 million pounds without having to file Form R.

455. EPA has not analyzed the interplay between any pre-existing incentive to reduce use amounts and any new incentive to reduce use amounts to less than 1 million pounds.

456. Thus, EPA has failed to consider whether the new regulations will in fact increase, rather than decrease, (a) the amount of waste management quantities of covered PBT chemicals that facilities generate, and (b) the amount of such chemicals that facilities use.

457. As a result, it has not analyzed whether the 2006 Regulations impede, rather than advance, the national policy of pollution prevention policy set out in PPA section 6602(b), 42 U.S.C. § 13101(b).

458. EPA's failure to consider this important aspect of the problem, its failure to provide analysis justifying the choice it made, and its failure to respond in a reasoned manner to comments raising this issue, render the 2006 rulemaking arbitrary and capricious.

459. Because this aspect of the 2006 rulemaking is arbitrary and capricious, APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration that EPA has violated the law in this actual controversy.

460. In addition, APA section 706(2)(A), 5 U.S.C. § 706(2)(A), gives this Court the power to hold unlawful and set aside the provisions of the Final Rule regarding covered PBT chemicals, and in particular 40 C.F.R. §§ 372.27(a)(2) and 372.95(b)(4)(ii).

461. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that

facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

462. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

FIFTEENTH CLAIM FOR RELIEF

5 U.S.C. § 706(2)(A)
Arbitrary and capricious rulemaking -
EPA's irrelevant and unreliable conclusion that the Final Rule represents an appropriate "balance" between burden reduction and the intended purposes of TRI

463. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 462 in this claim for relief.

464. Agency rulemaking is arbitrary and capricious if the agency has failed cogently to explain why it has exercised its discretion in a given manner, if the agency has relied on factors that Congress had not intended for the agency to consider, if the agency has changed a rule or policy without explaining why the original reasons for the rule or policy are no longer dispositive, or if there are no findings or analysis to justify the choice the agency made nor any indication of the basis on which the agency exercised its discretion.

465. In the preamble to the Final Rule, EPA justifies the revised alternative reporting requirements for TRI chemicals by reference to a balancing test.

466. With regard to non-PBT chemicals, EPA asserts that the Final Rule "appropriately balances the paperwork burdens of reporting against the promotion of pollution prevention and the requirement to provide the public and other data users with valuable information that is

consistent with the goals and statutory purposes of the TRI program." 71 Fed. Reg. at 76940/1; *see also Response to Comments* at 22.

467. Similarly, with regard to covered PBT chemicals, EPA asserts that the Final Rule "strikes an appropriate balance between paperwork burden and the provision of valuable information consistent with the goals and statutory purposes of the TRI program." 71 Fed. Reg. at 76939/1.

468. Because EPA's "balancing" test is nowhere set forth in the statute and relies on a factor Congress did not intend for EPA to consider, namely, burden reduction, the test is contrary to law and arbitrary and capricious.

469. Even if EPA's "balancing" test were a legitimate legal standard, however, EPA's application of the test is unreliable.

470. While EPA states that the Final Rule represents an "appropriate balance," EPA never sets out any criteria for determining why the amounts that EPA selected for reporting thresholds represent more appropriate "balances" of the factors that EPA considered than other threshold amounts.

471. EPA's conclusion that the Final Rule provides an "appropriate balance" relies on EPA's estimates of reporting losses, but, as noted in paragraphs 206-230, 305-309 and 315-326 above, EPA's estimates of reporting losses are unreliable.

472. EPA's conclusion that the Final Rule provides an "appropriate balance" relies on its burden reduction estimates, but, as noted in paragraphs 352-364 and 370-400 above, EPA has not analyzed a number of factors that could significantly affect its burden reduction estimates, and thus those estimates are unreliable.

473. EPA's conclusion that the Final Rule provides an "appropriate balance" also relies on its assertions regarding incentives for reduction in releases, waste quantities and use of TRI chemicals, but, as noted in paragraphs 406-428 and 434-458 above, EPA has not fully analyzed the incentive effects of the Final Rule, and thus its assertions regarding incentive effects are unreliable.

474. Because EPA relied on potentially unreliable estimates of reporting losses, incentive effects and burden reduction in applying its "balance" test, its conclusion that the Final Rule represents an "appropriate balance" between burden reduction and the purposes of TRI is arbitrary and capricious.

475. Moreover, as regards one of the covered PBT chemicals, lead, which is a potent neurotoxin and in particular interferes with the proper development of the nervous system of infants and children, EPA concluded in the 2006 Regulations that the "appropriate balance" of burden and informational concerns was to allow Form A certification for facilities that do not exceed a 1,000,000-pound use threshold, a 500-pound ARA threshold and a zero-pound release threshold. 71 Fed. Reg. at 76939/1.

476. That 2006 conclusion is directly contrary to EPA's 2001 conclusion that the "appropriate balance" of those concerns was that no facilities should be allowed to use Form A for lead, and that all facilities that use more than 100 pounds of lead must report on Form R. 66 Fed. Reg. at 4530/3.

477. Thus, in 2001 EPA determined that a facility that used 110 pounds of lead and generated no lead waste *was not* entitled to file a Form A and had to file Form R, but in 2006 EPA determined that a facility that uses 990,000 pounds of lead and generates 450 pounds of lead waste *was* entitled to file a Form A and did not have to file Form R.

478. EPA has provided no reasoned explanation as to why the "appropriate balance" is no longer what EPA declared it to be in 2001.

479. EPA's failure to provide a reasoned explanation on these points renders the 2006 rulemaking arbitrary and capricious.

480. Because these aspects of the 2006 rule are arbitrary and capricious, APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration that EPA has violated the law in this actual controversy.

481. In addition, APA section 706(2)(A), 5 U.S.C. § 706(2)(A), gives this Court the power to hold unlawful and set aside the Final Rule, and in particular 40 C.F.R. §§ 372.27(a)(1) and (2) and §§ 372.95(b)(4)(i) and (ii).

482. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

483. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

SIXTEENTH CLAIM FOR RELIEF

5 U.S.C. § 706(2)(A)
Arbitrary and capricious rulemaking -
EPA's failure to consider the potential for adverse health and environmental impacts should the 2006 Regulations increase the amount of releases of non-PBT chemicals

484. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 483 in this claim for relief.

485. Agency rulemaking is arbitrary and capricious if the agency has failed entirely to consider an important aspect of the problem, or the agency has failed to respond in a reasoned manner to significant comments received.

486. Commenters expressed concern that reduced TRI reporting resulting from the Proposed Rule would result in increased releases and, as a result, increased adverse impacts on the environment and human health. *See, e.g., Response to Comments* at 15, 18.

487. EPA responded that it did not believe that the rule would cause such negative impacts because the rule would encourage facilities to reduce their releases. *Response to Comments* at 16, 19.

488. Because, as noted in paragraphs 406-428 above, EPA improperly failed to consider whether the new regulations might increase, rather than decrease, releases of non-PBT chemicals, which include chemicals known to cause brain, blood, respiratory and developmental problems, EPA also failed to consider the extent to which such increased releases, if any, arising from the new regulations might cause adverse impacts on the environment and human health.

489. EPA's failure to consider this important aspect of the problem, and its failure to respond in a reasoned manner to comments raising this issue, render the 2006 rulemaking arbitrary and capricious.

490. Because this aspect of the 2006 rulemaking is arbitrary and capricious, APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration that EPA has violated the law in this actual controversy.

491. In addition, APA section 706(2)(A), 5 U.S.C. § 706(2)(A), gives this Court the power to hold unlawful and set aside the provisions of the Final Rule regarding non-PBT chemicals, and in particular 40 C.F.R. §§ 372.27(a)(1) and 372.95(b)(4)(i).

492. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

493. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

SEVENTEENTH CLAIM FOR RELIEF

5 U.S.C. § 706(2)(A)
Arbitrary and capricious rulemaking -
EPA's failure cogently to explain its reasons for allowing carcinogens to be subject to the new, less stringent, alternate reporting requirements for non-PBT chemicals

494. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 493 in this claim for relief.

495. Agency rulemaking is arbitrary and capricious if the agency has failed cogently to explain why it has exercised its discretion in a given manner, or the agency has failed to respond in a reasoned manner to significant comments received.

496. Under the Final Rule, the alternative reporting thresholds for non-PBT chemicals are less stringent that the alternative reporting thresholds for covered PBT chemicals.

497. Numerous known or suspected carcinogens, including, for example, 2,6-TDI, are non-PBT chemicals and are therefore subject under the Final Rule to the less stringent alternate reporting thresholds for those chemicals.

498. Commenters asked why EPA was establishing less stringent reporting thresholds for the carcinogens than for the covered PBT chemicals. *Response to Comments* at 146.

499. In its response, EPA acknowledged that the non-PBT chemicals had "varying toxicities." *Id.* at 147.

500. EPA did not, however, either (a) explain why it was appropriate to have less stringent thresholds for the carcinogenic non-PBT chemicals than for the covered PBT chemicals, or (b) revise the rule so that the same reporting thresholds applied to both the carcinogenic non-PBT chemicals and the covered PBT chemicals.

501. Instead, EPA merely stated that it was adding the 2,000 pound release threshold for all non-PBT chemicals. *Id.*

502. EPA's failure adequately to explain why it is allowing the carcinogens to be subject to the less stringent reporting requirements than covered PBT chemicals, and its failure to respond in a reasoned manner to comments raising that issue, render the 2006 rulemaking arbitrary and capricious.

503. Because this aspect of the 2006 rulemaking is arbitrary and capricious, APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration that EPA has violated the law in this actual controversy.

504. In addition, APA section 706(2)(A), 5 U.S.C. § 706(2)(A), gives this Court the power to hold unlawful and set aside the provisions of the Final Rule regarding non-PBT chemicals, and in particular 40 C.F.R. §§ 372.27(a)(1) and 372.95(b)(4)(i).

505. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

506. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

<u>EIGHTEENTH CLAIM FOR RELIEF</u>

5 U.S.C. § 706(2)(A) & (C)
Violations of EPCRA Section 328

507. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 506 in this claim for relief.

508. EPA asserts that it is promulgating the Final Rule under the authority of EPCRA section 328, 42 U.S.C. § 11048, as well as under the authority of EPCRA section 313(f)(2), 42 U.S.C. § 11023(f)(2). 71 Fed. Reg. at 76932/3.

509. Section 328 authorizes EPA to "prescribe such regulations as may be necessary to carry out [EPCRA.]" 42 U.S.C. § 11048.

510. Section 328 does not, however, authorize EPA to promulgate regulations that are: contrary to other EPCRA requirements, including those found in section 313(f)(2); in excess of statutory authority or limitations, including the authority and limitations found in section 313(f)(2); or arbitrary and capricious.

511. In promulgating the 2006 rule, EPA did not satisfy the section 328 standard.

512. EPA did not demonstrate, or even attempt to demonstrate, in the administrative record that the 2006 rule was "necessary" to carry out EPCRA.

513. In fact, EPCRA operated successfully for years without the new alternative reporting requirements set forth in the Final Rule.

514. Since, as set out in paragraphs 141-506 above, the Final Rule is contrary to EPCRA section 313(f)(2), in excess of the statutory authority and limitations set out in section 313(f)(2), and arbitrary and capricious, EPCRA section 328 does not give EPA authority to promulgate the Final Rule.

515. APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration in this actual controversy that the Final Rule is not in accordance with law and is in excess of statutory authority and limitations.

516. In addition, APA sections 706(2)(A) and (C), 5 U.S.C. §§ 706(2)(A) & (C), give this Court the power to hold unlawful and set aside the Final Rule, and in particular 40 C.F.R. §§ 372.27(a)(1) and (2), and §§ 372.95(b)(4)(i) and (ii).

517. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their

affected citizens by invalidating the new, less stringent alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

518. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

NINETEENTH CLAIM FOR RELIEF

5 U.S.C. § 706(2)(A) & (C)
Failure to provide notice required under APA § 553(b) -
absence of notice of the 2,000 pound threshold for releases

519. The Plaintiff States reallege and incorporate by reference paragraphs 1 through 518 in this claim for relief.

520. Pursuant to APA section 553(b), EPA must provide notice of proposed rulemaking, and in particular must provide "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b).

521. Such notice "must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto." Sen. Doc. No. 248, 79th Cong. 2d Sess. 200 (1946).

522. The Proposed Rule gave no indication that the final alternate reporting requirements for non-PBT chemicals would include a 2,000-pound threshold for releases.

523. EPA's failure to provide notice of that threshold for releases prejudiced the Plaintiff States, since the failure to provide notice prevented the Plaintiff States from making arguments,

including without limitation arguments the same as, or analogous to, those set out in paragraphs 142-153, 159-180, 186-200, 206-213, 223-229, 268-270 and 274-278 above, that might have succeeded in reducing the 2,000 pound threshold, and had those arguments succeeded, fewer facilities would be able to avoid reporting release quantities and other information.

524. As a result, APA section 703, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle the Plaintiff States to a declaration that EPA has violated 5 U.S.C. § 553(b) in this actual controversy.

525. In addition, APA sections 706(2)(A) and (C), 5 U.S.C. §§ 706(2)(A) & (C), give this Court the power to hold unlawful and set aside the provisions of the Final Rule regarding non-PBT chemicals, and in particular 40 C.F.R. §§ 372.27(a)(1) and 372.95(b)(4)(i).

526. EPA's violation of the APA has injured and continues to injure the Plaintiff States and their affected citizens. Relief in this action would benefit the Plaintiff States and their affected citizens by invalidating the new alternative reporting thresholds and thereby ensure that facilities continue to provide more comprehensive information about their use, releases and other waste management quantities of TRI chemicals.

527. APA sections 702 and 703, 5 U.S.C. §§ 702 & 703, authorize the award of injunctive relief for EPA's violations of law. The Plaintiff States and their affected citizens have no adequate remedy at law for EPA's unlawful weakening of TRI reporting requirements. The Plaintiff States and their affected citizens continue to suffer irreparable injury as a result of that unlawful action.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff States respectfully request that this Court enter a judgment:

1. Declaring that the Final Rule violates EPCRA sections 313(f)(2) and 328, 42 U.S.C. §§ 11023(f)(2) & 11048, PPA sections 6607(a)-(c), 42 U.S.C. § 13106(a)-(c), and APA sections 553(b), 706(2)(A) and (C), 5 U.S.C. §§ 553(b), 706(2)(A) & (C);

2. Vacating the Final Rule, and in particular vacating those provisions of 40 C.F.R. §§ 372.27 and 327.95 that were amended by the Final Rule;

3. Ordering EPA to publish in the Federal Register a notice sufficient to inform entities subject to TRI reporting requirements that the Final Rule has been vacated and that the TRI reporting requirements in effect prior to January 22, 2007 will again be in effect;

4. Awarding the Plaintiff States their costs of litigation pursuant to Fed. R. Civ. P. 54 or any other appropriate authority; and

5. Granting the Plaintiff States such other relief as the Court deems just and proper.

Dated: November 28, 2007

Respectfully submitted,

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* Motion for admission *pro hac vice* to be filed shortly after filing of complaint.

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APPENDIX A

ACRONYMS

2,6-TDI	toluene-2,6-diisocyanate
APA	Administrative Procedure Act, 5 U.S.C. §§ 701-706
ARA	annual reportable amount
EPCRA	Emergency Preparedness and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050
NYS DEC	New York State Department of Environmental Conservation
PBT	persistent, bioaccumulative and toxic
PPA	Pollution Prevention Act, 42 U.S.C. §§ 13101-13109
PRA	PBT reporting amount
TRI:	Toxics Release Inventory