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Don't Be Left "On the Fence" with the EPA Fenceline Risk Screening Approach

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ICYMI. . . the U.S. Environmental Protection Agency's (EPA's or Agency's) Toxic Substances Control Act (TSCA) office is moving into evaluating whether there is unreasonable risk at industrial facility "fencelines." What's important to understand about this development is that the TSCA office will be evaluating the same chemical exposure pathways that EPA already regulates under the Clean Air Act, the Clean Water Act, and/or the Safe Drinking Water Act. EPA is providing companies with a public comment opportunity that is closing soon – next Tuesday, March 22 – to weigh in on the agency's initial screening approach to identify the need for regulation. Using TSCA for this purpose has the potential to create regulatory conflicts with facility-specific air and water discharge regulations and state-issued permits with respect to chemicals that are subject to TSCA risk evaluations. Also, as we explain later in this blog, screening can be useful for potential risk identification, but TSCA risk management decisions should not be driven by screening outcomes alone.

This approach is a noteworthy "sea change" in EPA's implementation of the 2016 Lautenberg Amendments to TSCA. It was just released to the public in January in a document called the *Draft TSCA Screening Level Approach for Assessing Ambient Air and Water Exposures to Fenceline Communities* (Draft Approach). The Draft Approach describes a new method to screen and identify potential risks of existing chemicals undergoing risk evaluation from ambient air and water exposures. The TSCA program's approach relies on data from the Toxic Release Inventory (TRI) and does not rely on emission or release models used by the Air, Water, or Superfund programs. The Draft Approach transparently describes how the TSCA office plans to

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use the results from the screening analysis to inform or support risk management actions for at least seven of the first ten chemicals to undergo risk evaluation.

By way of background, EPA completed and published the first 10 TSCA risk evaluations between 2020 and 2021. These risk evaluations reflect the agency's determination, at that time, to *not* routinely assess certain exposure pathways in recognition of EPA's jurisdiction in these areas under other EPA-administered laws. This approach was reflective of EPA's interpretation, based on the legislative history of the amended TSCA, that the Administrator is provided the discretion to determine the conditions of use that enable EPA to focus on the greatest potential for risk. In the problem formulation documents for the original 10 chemicals, EPA made a compelling case that it was not required to duplicate the regulatory efforts of other program offices, due to the need to manage resources, meet statutory deadlines, and in recognition that "[t]he provisions of various EPA-administered environmental statutes and their implementing regulations represent the judgment of Congress and the Administrator, respectively, as to the degree of health and environmental risk reduction that is sufficient under the various environmental statutes." The current Administration has reversed course, placing a spotlight on the question of whether Congress intended for TSCA to review and potentially supersede EPA decisions under other laws specifically tailored to regulate air emissions and water discharges.

Particularly when it comes to air and water pathways that EPA is already charged with regulating on a facility-by-facility basis, worst case scenarios and screening tools have a limited role to play. Typically, screening evaluations inform or support decisions on whether to conduct more in-depth risk evaluations. In contrast, TSCA section 26(h) requires EPA to make risk *management* decisions using "scientific information, technical procedures, measures, methods, protocols, methodologies, or models, employed in a manner consistent with the best available science."[1] Any attempt to base a risk management decision on screening outcomes at this late stage could cause the integrity of any final risk management rule to be questioned, simply because it is not consistent with the best available science to base risk management decisions on screening tool outcomes alone.

This week, the EPA held a public virtual meeting of the Science Advisory Committee on Chemicals (SACC) (March 15-17, 2022) to peer review the Draft Approach. There are already a number of public comments in the public docket. The SACC raised fundamental science considerations such as how conservatively and how comprehensively the methodology should cover potential exposure pathways. Several peer reviewers also identified existing screening tools in EPA's Air, Water, and Superfund programs that the TSCA office has not publicly accounted for in putting forward its own methodology.

EPA still needs to finalize this document – but it does not have to allow any further opportunity for public comment in doing so. Comment if you can before the comment period ends next week on March 22.

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1 15 U.S.C. § 2625(h).