wiley

ALERT

EPA Proposes To Restrict Certain Persistent, Bioaccumulative, and Toxic Chemicals

June 26, 2019

In a landmark proposed rulemaking on Friday, June 21, 2019, the U.S. Environmental Protection Agency (EPA) proposed to restrict four out of the five chemicals that the agency determined to be persistent, bioaccumulative, and toxic (PBT) pursuant to section 6(h) of the Toxic Substances Control Act (TSCA).[1] The following five chemicals are subject to this rulemaking: decabromodiphenyl ethers (DecaBDE); phenol, isopropylated, phosphate (3:1) (PIP (3:1)); 2,4,6-Tris(tert-butyl) phenol (2,4,6-TTBP); pentachlorothiophenol (PCTP); and hexachlorobutadiene (HCBD). To comply with TSCA section 6(h)(3), EPA must issue a final PBT rule by December 21, 2020.

We strongly urge the affected chemical manufacturers, processors, and downstream users to engage closely with EPA during the next 18 months, especially by providing substantive, informative comments within 60 days of publication in the Federal Register. The quality and type of comments that the agency receives will significantly impact the restrictions, if any, EPA ultimately decides to impose on these chemicals. Knowing which arguments are persuasive to key decisionmakers, what offices within EPA have equities in this rulemaking, and how other federal agencies can help shape the final rulemaking will be crucial to the success of your comments. With Wiley Rein's deep TSCA expertise and recent experience serving in EPA leadership, we are uniquely positioned to provide you with the best advocacy on this impactful rulemaking.

Proposed Restrictions

Below we provide a brief description of each PBT chemical substance and EPA's proposed restrictions.

Authors

Martha E. Marrapese
Partner
202.719.7156
mmarrapese@wiley.law

Practice Areas

Environment & Product Regulation
Toxic Substances Control Act (TSCA)

Decabromodiphenyl ethers (DecaBDE): DecaBDE is a flame retardant that has been widely used in textiles, plastics, adhesives, and polyurethane foam. Affected products may include carpet, upholstery fabric, back coatings, cushions, mattresses, tents, and electrical appliances and equipment (stereos, computers, televisions, circuit boards, casings, and cable insulation).

EPA proposes to prohibit the manufacture, processing, and distribution of DecaBDE, including articles and products to which DecaBDE has been added. The agency, however, proposes the following exceptions to this general restriction:

- For a period of three years, this prohibition would not apply to the manufacture, processing, and distribution for use in parts installed in and sold as part of new aerospace vehicles, and the parts to which DecaBDE has been added for such vehicles;
- This prohibition would not apply to the manufacture, processing, and distribution for use in replacement parts for automobiles, other motor vehicles, aircraft, and aerospace vehicles, and the replacement parts, to which DecaBDE has been added, for such vehicles;
- This prohibition would not apply to processing and distribution for recycling of plastic from products or articles containing DecaBDE, where no new DecaBDE is added during the recycling process;
- This prohibition would not apply to the processing and distribution of DecaBDE in finished products or articles made of plastic recycled from products or articles containing DecaBDE, where no new DecaBDE was added during the production of the products or articles made of recycled plastic; and
- For a period of eighteen months, this prohibition would not apply to the manufacture, processing, and distribution for use in curtains in the hospitality industry, and the curtains to which DecaBDE has been added.

Phenol, isopropylated, phosphate (3:1) (PIP (3:1)): PIP (3:1) is a flame retardant, a plasticizer, and an anti-compressibility and anti-wear additive. The uses of PIP (3:1) include electronic device casings and circuit boards, electrical wires and cables, paints and coatings for building materials, foam upholstery, textile fibers, carpets, and curtains, automotive plastics, foams, and fabrics, and lubricants (grease, oil, and hydraulic fluid).

EPA proposes to prohibit the processing and distribution of the PIP (3:1), including products or articles containing it. The agency, however, proposes the following exceptions to this general restriction:

- This prohibition would not apply to the processing and distribution of PIP (3:1) and PIP (3:1)-containing products for use in aviation hydraulic fluid;
- This prohibition would not apply to the processing and distribution of PIP (3:1) and PIP (3:1)-containing products for use in lubricants and greases; and
- This prohibition would not apply to the processing and distribution of PIP (3:1) and PIP (3:1)-containing products for use in new and replacement parts for automobiles and other motor vehicles, and distribution of the new and replacement parts to which PIP (3:1) has been added for such vehicles.

EPA also proposes to prohibit releases of PIP (3:1) to water during manufacturing, processing, distribution, and commercial use of PIP (3:1), in addition to proposing a downstream notification requirement for any remaining uses.

2,4,6-Tris(tert-butyl)phenol (2,4,6-TTBP): 2,4,6-TTBP is an antioxidant that can be used as a fuel or lubricant additive, an intermediate in the manufacture of other compounds, and a waste fuel.

EPA proposes to prohibit the distribution of 2,4,6-TTBP, including any products containing it, in any container with a volume of less than 55 gallons for any use, with the goal of preventing the use as a fuel additive or fuel injector cleaner used by consumers and small commercial operations (e.g., automobile repair shops and marinas). The permissible uses will be limited to commercial operators, whom EPA believes to have the capacity to protect workers and follow OSHA requirements.

Finally, EPA proposes to prohibit the processing and distribution of 2,4,6-TTBP, including any products containing it, for use as an oil or lubricant additive, regardless of container size.

Pentachlorothiophenol (PCTP): PCTP is used in the manufacturer of rubber compounds, including as a rubber peptizer.

EPA proposes to prohibit the manufacture, processing, and distribution of PCTP, including products and articles containing PCTP, unless it is in concentrations at or below 1 percent by weight.

Hexachlorobutadiene (HCBD): HCBD is a halogenated aliphatic hydrocarbon that is produced as a byproduct during the manufacture of chlorinated solvents, particularly perchloroethylene, trichloroethylene, and carbon tetrachloride.

EPA proposes not to take any regulatory action on HCBD at this stage, but the comments the agency receives may change this proposed non-action to certain prohibitions when EPA issues its final rule.

Initial Observations

We have four initial observations on EPA's proposed PBT rulemaking.

First, EPA did not conduct risk evaluations on these five chemical substances and, therefore, did not make any unreasonable risk findings under TSCA section 6(b)(4)(A). We recommend manufacturers, processors, and users of these chemical substances convey this message to their consumers and the general public – especially considering the potential to misunderstand government actions on chemicals.

Section 6(h)(4) of TSCA requires EPA to "address the risk of injury to health or the environment that the Administrator determines are presented by the chemical substance and [to] reduce exposure to the chemical

substance to the extent practicable." Even though section 6(h)(2) states that EPA "shall not be required to conduct risk evaluations" on these PBT chemicals, EPA has essentially interpreted this provision to mean that Congress directed EPA not even to consider conducting risk evaluations and, instead, go straight to risk management restrictions under section 6(a). We will not pass judgment on the policy decision to forego risk evaluations of these chemicals because we understand that EPA still lacks sufficient resources to implement many of the other new requirements under amended TSCA.

Second, EPA failed to demonstrate meaningful exposure reductions to the five PBT chemical substances, but nevertheless proposed significant, costly, and potentially unnecessary prohibitions on these chemicals. Because EPA did not conduct risk evaluations on these chemicals, the agency is basing its risk management decisions on reducing exposure to these chemicals to the extent practicable.

EPA focused on whether there is *potential* exposure to a chemical substance, instead of determining whether there is *actual* exposure. In fact, the proposal admits that "EPA is not aware of any exposures to unprotected workers for the PBT chemicals, based on information gathered by EPA specific to these chemicals. Therefore, any additional workplace regulations that EPA could impose are unlikely to result in meaningful exposure reductions." Therefore, commenters will need to directly address the actual exposures of the chemical substance to workers, consumers, and the environment. Failure to engage and inform EPA on actual exposures could lead to adverse regulatory outcomes, even if the proposed rule does not currently prohibit certain uses.

Third, EPA still lacks an established framework for managing chemicals under section 6(a) of TSCA. This proposed rulemaking continues EPA's approach of applying the most restrictive option available to the agency – i.e., banning the manufacture, distribution, processing, and use of a chemical – when potentially less burdensome and equally protective options are available.[2] We submit that EPA should set forth a tiered approach for risk management under section 6(a), which would consider all the potential options listed under section 6(a) and then provide a justification for why each option would not suffice as a chemical management tool when the agency has selected a stricter option. The lack of a transparent, consistent risk management system is more apparent in this rulemaking, where EPA has neither conducted risk evaluations nor provided much substantiation for its exposure analyses. In short, this proposal is precisely why we strongly believe EPA should issue a risk management rule.

Fourth, we have a couple procedural requests for EPA. The agency needs to extend the 60-day comment period for another 60 days because stakeholders will need the additional time to collect exposure information and provide it to EPA. Generating this data will take significant time. Given that EPA's proposal relies on potential exposures rather than actual exposures, this information is vital to a thoughtful, fact-based final rulemaking. An additional 60 days to submit comments should not materially affect EPA's internal timeline to complete a final rule by December 21, 2020. We also urge EPA to divide this rulemaking into five separate final rules. The complexity of the rulemaking and the uniqueness of each PBT chemical substance at issue necessitate splitting this rulemaking into separate actions.

Companies who would like to discuss these restrictions and areas for comment further should contact Martha Marrapese (202-719-7156 or mmarrapese@wiley.law).

---

[1] When amending TSCA in 2016, Congress created a new provision under section 6(h) for "expedited action" on toxic chemical substances that meet certain criteria for persistence, bioaccumulation, and exposure. The provision required EPA to issue this proposal by June 22, 2019.

[2] Earlier this year, EPA banned methylene chloride for consumer paint and coating removal without giving significant consideration to other regulatory options (e.g., a concentration limit or an improved warning label). (Methylene Chloride; Regulation of Paint and Coating Removal for Consumer Use Under TSCA Section 6(a), 84 Fed. Reg. 11420 (March 27, 2019)).