

ARTICLE

Will EPA's First Low-Priority Chemical Substances Be Their Last?

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Now that EPA has finalized the first-ever "low-priority" designations for 20 chemical substances, we wonder if we will ever see any more of these designations. The fact that Congress took the time to include this provision in the Lautenberg Amendments is laudable and consistent with authentic "green chemistry" initiatives that truly seek to provide the public with information on safer chemicals. It also seemed like a good prioritization tool to help make EPA's task of evaluating substances on the TSCA Inventory more manageable. One could envision entire classes of chemistries as "low priority." Polymers on the Inventory that nevertheless meet the polymer exemption criteria come to mind, as an example. All chemicals for which EPA has reviewed premanufacture notification submissions since the Lautenberg amendments are another potential low priority class of chemicals on the Inventory.

Designation as "low-priority" means that risk evaluations are not warranted at this time for these chemicals per TSCA Section 6(b)(1)(A) and 40 C.F.R. § 702.15. Nevertheless, low-priority designations are final agency actions and judicially reviewable. EPA may face challenges on individual chemicals – or the entire group – in the coming days and weeks. In addition, low-priority designations do not benefit from federal preemption against state action.

As a result, the fate of the chemicals hangs in the balance right now. In a perfect world, the use of these low-priority chemical substances should represent a great choice and should present a low risk of regulatory action at both the EPA and state levels. All 20 substances already benefit from being on EPA's Safer Chemical Ingredients List

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(SCIL). This makes it all the more ironic that if a court were to overturn EPA's low-priority designations for any or all of these chemicals, the agency may be forced to conduct full risk evaluations on them.

The agency's position is that it is required to designate only 20 low-priority substances under the Lautenberg Amendments at TSCA section 6(b)(2)(B). Having fulfilled this commitment, it remains to be seen if the agency takes on any future low-priority reviews. Will public interest groups simply fight any attempt to make these designations? Should the agency have to legally defend these first twenty designations, it could tremendously disincentivize EPA from attempting to identify safer chemicals for the public in the future.