

August 27, 2020

Alexandra Dunn

Assistant Administrator for Chemical Safety and Pollution Prevention

US Environmental Protection Agency

1200 Pennsylvania Avenue NW

Washington DC 20460

Re: *Exemption Requests for 1:3 PIP under TSCA PBT Rule (EPA-HQ-OPPT-2019-0080)*

Dear Assistant Administrator Dunn:

We are writing to express concern about the lack of opportunity to comment on two recent requests for critical use exemptions from EPA's rule for Persistent, Bioaccumulative and Toxic Chemicals (PBTs) under section 6(h) of the Toxic Substances Control Act (TSCA).

Section 6(h) creates a fast-track process for stringently restricting manufacture, use and disposal of chemicals previously determined by EPA to possess PBT properties. These restrictions must reduce exposure to the extent practicable, thereby preventing further build-up of the PBTs in the environment and biota and the harmful consequences that result. Reflecting this sense of urgency, TSCA provides that rules imposing these restrictions must be proposed no later than June of 2019 and finalized 18 months thereafter. EPA proposed rules for five PBTs under section 6(h) on July 29, 2019 (84 Federal Register 36728) and the comment period on these proposals closed on October 28, 2019.

Several months later, EPA received two requests for exemptions under section 6(g) from the PBT rule for phenol, isopropylated, phosphate (3:1 PIP). The first request, dated June 2, 2020, was submitted by FUJIFILM North America Corporation and seeks an exemption for distribution and processing of film articles containing 3:1 PIP (EPA-HQ-OPPT-2019-0080-0584). The second request, dated July 6, 2020, was submitted by Hempel (USA) Inc. and seeks an exemption for 3:1 PIP use in the formulation of intumescent coatings that provide fire protection for industrial infrastructure (EPA-HQ-OPPT-2019-0080-0585).

Section 6(g) of TSCA authorizes EPA to "grant an exemption from a requirement of a subsection (a) rule for a specific condition of use of a chemical substance or mixture." To grant the exemption, EPA must find that that the stringent criteria in subsection (g)(1) are met. The exemption must be "part of a rule promulgated under subsection (a) or in a separate rule." Under paragraph (1)(4), a "rule" establishing an exemption must include "conditions . . . necessary to protect health and the environment while achieving the purposes of the exemption."

Since exemptions under section 6(g) must be granted by rule, the notice and comment requirements in the Administrative Procedure Act (APA) apply. 5 U.S.C. § 553. If these requirements are not followed, any rule granting exemptions would be invalid. *Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 100-01 (D.C. Cir. 2013) (invalidating rule for failure to comply with notice and comment obligations). While a "final rule [need] not be an exact replica of the rule proposed in the Notice," "the final rule must be a 'logical outgrowth' of the rule proposed." *Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83, 113 (2d Cir. 2007), *rev'd on other grounds*, 556 U.S. 208 (2009). "[I]f the final rule deviates too sharply from the proposal,

affected parties will be deprived of notice and an opportunity to respond to the proposal.” *Nat’l BlackMedia Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986).

The two exemption requests were not included in EPA’s July 2019 proposal and have not been subject to public comment. Thus, there has been no opportunity for the public to address whether the two requests meet the stringent exemption criteria in section 6(g) and what conditions should be placed on any exemptions to protect public health and the environment. Given the requirement in TSCA to finalize the PBT rule by the end of 2020, reopening the record to solicit public comment is a practical impossibility. To include the requested exemptions in the final rule would thus be a violation of the APA. If the exemption requests are considered at all, it should be in a subsequent rulemaking.

Because the two exemption requests were submitted long after the close of the comment period on EPA’s July 2019 proposal, they should be removed from that rulemaking docket. EPA announced its intention to issue section a 6(h) rule for 3:1 PIP in December 2016, leaving FUJIFILM and Hempel ample opportunity to seek critical use exemptions before EPA’s proposal. Because they failed to do so, and instead held their requests until after the close of the comment period on the proposed PBT rules, their submissions are not properly before the agency and should not be considered by EPA.

Please include this letter in the docket for the PBT rulemaking.

We appreciate this opportunity to present our views.

Please contact Bob Sussman, SCHF counsel, with any questions at bobsussman1@comcast.net.

Respectfully submitted,

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cc: Yvette Collazo Reyes
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