



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Comments on Proposed Rule: Significant New Uses of Chemical Substances; Updates to the Hazard Communication Program and Regulatory Framework; Minor Amendments to Reporting Requirements for Premanufacture Notices

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BlueGreen Alliance * Center for Progressive Reform * Communications Workers of America * International Center for Technology Assessment * International Chemical Workers Union Council * Natural Resources Defense Council * Occupational Safety & Health Law Project * United Automobile, Aerospace & Agricultural Implement Workers of America – UAW * United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

The undersigned organizations submit these comments on the proposed rule published by the United States Environmental Protection Agency (“EPA”) to align its standard regulations for new chemical significant new use rules (“SNURs”) under the Toxic Substances Control Act (“TSCA”) with regulations of the Occupational Safety and Health Administration (“OSHA”) and best practices for reducing risk to workers exposed to toxic chemicals in the workplace (“Proposed Rule”).¹ We submit these comments to offer strong support for EPA’s decision to incorporate the hierarchy of controls into its standard significant new use rules for new chemicals. **We strongly urge EPA to finalize the Proposed Rule within the next sixty days.**

Background

When EPA limits the use of a new chemical under TSCA section 5 to protect workers, it often relies on standard “significant new use” requirements. This approach expedites the issuance of new chemical SNURs, which has the benefit of allowing new chemicals to enter commerce more promptly. Two sets of standardized significant new uses protect against occupational risks: one lays out standard requirements for “[p]rotection in the workplace”²; the other lays out standard “[h]azard communication program” requirements.³ These regulations were modeled on the regulations of OSHA and the National Institute for Occupational Safety and Health (“NIOSH”) that were in force

¹ Significant New Uses of Chemical Substances; Updates to the Hazard Communication Program and Regulatory Framework; Minor Amendments to Reporting Requirements for Premanufacture Notices, 81 Fed. Reg. 49,598 (July 28, 2016).

² 40 C.F.R. § 721.63.

³ 40 C.F.R. § 721.72.

at the time the initial SNUR rule was issued in 1989.⁴ Looking to OSHA and NIOSH for workplace best practices made sense in 1989 and it continues to make sense today.⁵

The hierarchy of controls is a core component of occupational safety and health standards issued by OSHA to protect workers from a range of hazardous substances. As explained in the American National Standards Institute (“ANSI”)/American Industrial Hygiene Association (“AIHA”) Z10 2005 standard: employers shall implement and maintain a process for achieving feasible risk reduction based upon the following preferred order of controls:

- A) First: Elimination;
- B) Then: Substitution of less hazardous materials, processes, operations or equipment;
- C) Then: Engineering controls;
- D) Then: Administrative controls; and
- E) As a last resort: Personal Protective Equipment (“PPE”).⁶

OSHA has relied upon the hierarchy of controls in every health standard it has issued.⁷ NIOSH depicts the hierarchy of controls with this graphic, which shows the significantly increased effectiveness of controls *other than* PPE⁸:

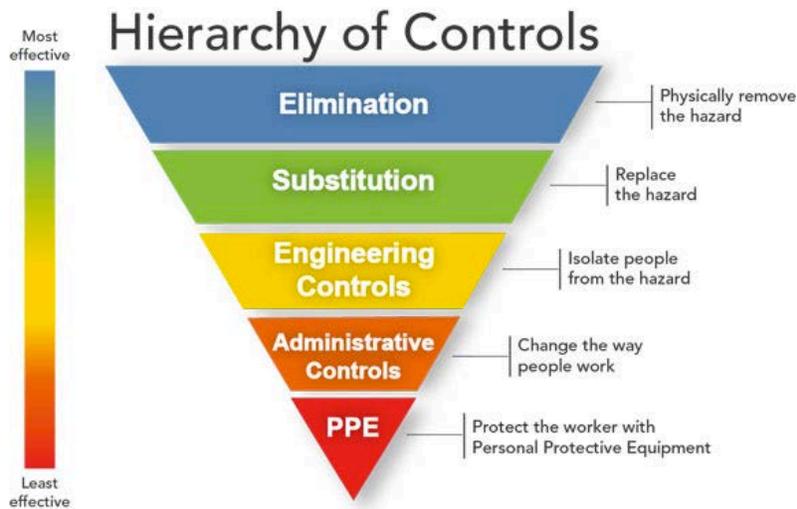
⁴ Proposed Rule, 81 Fed. Reg. at 49,599.

⁵ The mission of OSHA is to “assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.” *About OSHA*, U.S. Dep’t of Labor (last visited Sept. 22, 2016), <https://www.osha.gov/about.html>; see also 29 U.S.C. § 651(b). The mission of NIOSH is to develop new knowledge in the field of occupational safety and health and to transfer that knowledge into practice. *About NIOSH*, Ctrs. for Disease Control & Prevention (last updated June 15, 2016), <https://www.cdc.gov/niosh/about/default.html>; see also 29 U.S.C. § 669(e).

⁶ Fred A. Manuele, *ANSI/AIHA Z10-2005: The New Benchmark for Safety Management Systems*, Prof’l Safety 25, 30 (Feb. 2006), <http://www.coshnetwork.org/sites/default/files/Z10%20New%20Benchmark%20for%20Health%20and%20Safety%20Systems%20by%20Fred%20Manuele.pdf>, a copy of which is submitted as Exhibit 1.

⁷ Cf. 29 C.F.R. § 1926.55 (to prevent employee exposure to inhalation, ingestion, skin absorption or contact with substances above safe levels, “engineering controls must first be implemented whenever feasible; when such controls are not feasible to achieve full compliance, protective equipment or other protective measures shall be used.....”); 29 C.F.R. § 1910.134(a)(1) (to control occupational disease due to contaminated air, “the primary objective shall be to prevent atmospheric contamination. This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitution of less toxic materials). When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used”); 29 C.F.R. § 1910.1025(e) (where employees are exposed to lead over permissible levels, “the employer shall implement engineering and work practice controls (including administrative controls) to reduce and maintain employee exposure to lead”).

⁸ *Hierarchy of Controls*, NIOSH (last updated July 18, 2016), <https://www.cdc.gov/niosh/topics/hierarchy/>.



The Proposed Rule Improves Worker Safety and Ensures Predictability and Consistency

Since 1989, EPA regulations have identified a set of standard significant new uses for new chemical SNURs. A standard new use applies to a specific substance only if the SNUR for that substance incorporates the regulation.⁹ The proposed amendment to the “Protection in the Workplace” section of 40 C.F.R. Part 721 codifies the significant new use language that EPA has recently included on a case-by-case basis in all new chemical SNURs. In each of these cases, EPA makes it clear that a significant new use is triggered when an employer *fails* to implement components of the hierarchy of controls, namely “engineering and administrative controls,” in meeting the requirements for protecting workers. As EPA states in the Preamble to the Proposed Rule, in every new chemical SNUR issued since June 26, 2013 for which it is a significant new use not to implement work place protections EPA has required the consideration and implementation of “engineering and administrative controls” to avoid triggering notice and a significant new use “unreasonable risk” review.¹⁰ Because failure to implement components of the hierarchy of controls has become a standard significant new use *as a matter of practice*, it is appropriate for EPA to codify this practice into Subpart B of 40 C.F.R. Part 721, along with other standard significant new uses that EPA may include in new chemical SNURs, *as a matter of law*. Codification of this practice as a standard significant new use provides greater predictability and clarity than the current SNUR-by-SNUR approach to requiring use of components of the hierarchy of controls.¹¹

Codifying the failure to consider and implement “engineering and administrative controls” as a standard significant new use that triggers notice and unreasonable risk review also ensures

⁹ Codified at 40 C.F.R. Part 721, Subpart B; initially adopted in Significant New Use Rules; General Provisions for New Chemicals Follow-up, 54 Fed. Reg. 31,298 (July 27, 1989).

¹⁰ Proposed Rule at 49,601.

¹¹ We strongly support the decision to expand the circumstances that trigger the need for engineering or administrative controls to include reasonably likely eye exposure, as well as dermal and inhalation exposures

consistency with other federal laws and programs. As noted above and in the Preamble, the hierarchy of controls is fundamental to OSHA's and NIOSH's approach to workplace safety. It is also standard industrial hygiene practice. For that reason, most employers already implement a hierarchy of controls to meet the requirements of OSHA.¹² Harmonizing workplace protections under TSCA with those under OSHA – the agency charged with assuring safe and healthful working conditions by developing health-protective standards and workplace practices -- is a sensible way to avoid inconsistent governmental mandates.

Most importantly, the Proposed Rule will likely provide meaningful benefits for worker safety. Over the last three fiscal years, EPA has issued 481 new chemical SNURS – either following a section 5(e) consent order or following a PMN. Only 25 significant new use notices were submitted in those years, indicating that most manufacturers and processors are complying with SNURs that incorporate components of the hierarchy of controls, meaning that their workplaces are safer than they would be if workers had to rely solely on PPE. Moreover, in 171 instances over the last three fiscal years, manufacturers or processors withdrew PMNs seeking to manufacture chemicals rather than comply with a SNUR or section 5(e) consent order. This suggests that the threat of a SNUR has kept some hazardous chemicals out of the marketplace and workplace, a benefit for the general population as well as workers.¹³

For these reasons, we strongly support EPA's proposal to incorporate its recent practice into 40 CFR section 721.63 ("Protections in the workplace").

The "Engineering and Administrative Controls" Provisions Are Consistent with TSCA

Codifying the failure to implement the engineering and administrative control components of the hierarchy of controls as a standard significant new use in new chemical SNURs is fully consistent with the terms of TSCA. TSCA gives EPA very broad discretion to determine what constitutes a "significant new use" based on consideration of "all relevant factors." Specifically, section 5(a)(2) states that:

A determination by the Administrator that a use of a chemical substance is a significant new use with respect to which notification is required . . . shall be made by a rule promulgated after a consideration of all relevant factors, including--

- (A) the projected volume of manufacturing and processing of a chemical substance,
- (B) the extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance,
- (C) the extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance, and

¹² Proposed Rule at 49,602 ("EPA believes most companies are already following a hierarchy of controls due to OSHA regulations.").

¹³ *Statistics for the New Chemicals Review Program under TSCA*, EPA (last updated Aug. 4, 2016), <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/statistics-new-chemicals-review>.

(D) the reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

Because EPA can issue a chemical-specific new chemical SNUR that lists the failure to implement components of the hierarchy of controls as a significant new use – which it plainly can given the broad parameters and discretion authorized by section 5(a)(2) -- it can identify this same significant new use for a “category of chemical substances,” such as all new chemical uses that EPA designates as subject to the Protection in the Workplace regulation.¹⁴ This is because any action EPA may take under TSCA with respect to single chemical substance – including designating a use as a significant new use -- “may be taken by the Administrator . . . with respect to a *category of chemical substances* or mixtures.”¹⁵ For the same reason that the 1989 rule establishing standard significant new uses for new chemicals was valid, the Proposed Rule is valid and consistent with TSCA.

Law firms that represent chemical manufacturers have suggested that EPA lacks authority to codify failure to implement components of the hierarchy of controls as a standard significant new use in new chemical SNURs on the theory that if Congress wanted this result, it would have said so explicitly in the recently adopted Lautenberg Safe Chemical Act amendments to TSCA. This argument has no merit. During all three years that TSCA reform was debated in Congress, EPA consistently issued new chemical SNURs that provided that failure to implement the hierarchy of controls is a significant new use. Had Congress wanted EPA to change this practice, it could have provided clear direction in the new law. But it did not do so. The plain text of TSCA continues to authorize the Proposed Rule just as it authorized the 1989 standard significant new use rule.

The Proposed Changes to Section 721.63 Should Be Strengthened

While we strongly support the proposed changes to 40 C.F.R. section 721.63, we urge EPA to make the following additional changes to further strengthen the protections afforded workers by this provision.

First, we ask EPA to bring its regulation more fully in line with the hierarchy of controls by identifying both “elimination” and “substitution of less hazardous materials, processes, operations or equipment” as components of the hierarchy that must be considered in order to avoid having to give EPA notice of a significant new use.¹⁶ In the Proposed Rule, EPA identifies the components of the hierarchy as including only engineering controls -- “e.g., enclosure or confinement of the operation, general and local ventilation” -- and administrative control measures -- “e.g., workplace policies and procedures.”¹⁷ Its proposal thus does not incorporate the two most effective control measures – elimination and substitution. At a minimum, EPA’s regulations should be as protective as OSHA’s regulations, which define

¹⁴ See 54 Fed. Reg. 31,298.

¹⁵ 15 U.S.C. § 2625(c) (emphasis added).

¹⁶ Manuele, *supra* note 6, at 30.

¹⁷ Proposed 40 C.F.R. §§ 721.63(a)(1) & (4).

engineering control measures as including “enclosure or confinement of the operation, general and local ventilation, and *substitution of less toxic materials.*”¹⁸

Second, we ask EPA to modify Proposed Section 721.63(a)(1) so that it requires engineering or administrative control measures to be used “to the extent feasible,” instead of “where feasible.” The OSH Act requires the adoption of standards that “most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.”¹⁹ The corresponding regulation echoes the Act, mandating that “[prevention of] atmospheric contamination...shall be accomplished *as far as feasible* by accepted engineering control measures...”²⁰ Since one of the primary goals of the Proposed Rule is to align EPA’s rules with OSHA’s, it makes sense for EPA to use the same feasibility terminology that OSHA uses. Adopting slightly different language than OSHA uses, as reflected in the Proposed Rule, will create ambiguity. To avoid this result, EPA should replace the term “where feasible” with “to the extent feasible.” In addition, for further clarity in implementation, we urge EPA to state explicitly that its use of the term “to the extent feasible” in its SNUR rule has the same meaning as that term in section 6(b)(5) of the OSH Act. The Supreme Court has held that the term “to the extent feasible” in the OSH Act means “capable of being done.”²¹ In so holding, the Court specifically rejected the argument that “to the extent feasible” involves a weighing of costs against benefit.²² In sum, because EPA is seeking to harmonize its workplace regulations with OSHA’s, the final rule should clarify that hierarchy of controls is required “to the extent feasible” to avert a significant new use notice, and this feasibility determination is limited to what is “capable of being done,” irrespective of cost.

Third, we ask EPA to further modify 40 C.F.R. section 721.63 to make clear that when its provisions apply, they apply to any manner or method of “distribution in commerce” and “disposal” as well as to manufacturing and processing. Under TSCA, one of the considerations for issuance of a SNUR is “the reasonably anticipated manner and methods of manufacturing, processing, *distribution in commerce, and disposal* of a chemical substance.”²³ Because hazards from distribution in commerce and disposal can give rise to a SNUR, the workplace protections for SNUR’ed chemicals should also apply to distribution in commerce and disposal.²⁴

¹⁸ 29 C.F.R. § 1910.134(a)(1), cited in Proposed Rule at 49,601 (emphasis added).

¹⁹ 29 U.S.C. § 655(b)(5) (emphasis added).

²⁰ 29 C.F.R. § 1910.134(a)(1) (emphasis added).

²¹ *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 508-09 (1981).

²² *Id.*, 452 U.S. at 509 (“cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is”).

²³ We note that TSCA specifically directs that after EPA orders risk management in connection with an unreasonable risk finding after receiving a SNUN or issues a section 5(e) consent order, it should consider whether to promulgate a SNUR that “identifies as a significant new use any manufacturing, processing, use, distribution in commerce, or disposal of the chemical substance that does not conform to the restrictions imposed by the action or order.” 15 U.S.C. § 2604(f)(4) (emphasis added). This clarifies that significant new uses can arise in the context of disposal and distribution as well as manufacturing and processing.

²⁴ *Id.*

Thank you very much for proposing this rule and for the opportunity to comment. We urge EPA to finalize this proposal, with the modifications urged herein, without delay. If you have any questions, please contact Eve Gartner at 212-845-7381 or egartner@earthjustice.org.

Sincerely,



Eve Gartner
Earthjustice

Charlotte Brody, Vice President, Health Initiatives
Mike Wilson, Director, Occupational and Environmental Health
BlueGreen Alliance

Matthew Shultz, Executive Director
Center for Progressive Reform

David LeGrande, Occupational Safety and Health Director
Communications Workers of America

Celeste Monforton, Professorial Lecturer, Milken Institute School of Public Health
George Washington University

Jennifer Sass
Senior Scientist, Natural Resources Defense Council
Professorial Lecturer, Department of Occupational and Environmental Health,
George Washington University

Jaydee Hanson, Policy Director
International Center for Technology Assessment

John S. Morawetz, Health and Safety Specialist
International Chemical Workers Union Council/UFCW

Daniel Rosenberg, Senior Attorney for Health and Environment
Natural Resources Defense Council

Randy Rabinowitz, Executive Director
Occupational Safety & Health Law Project

Andrew Comai, Assistant Director, Health and Safety Department, International Union
United Automobile, Aerospace & Agricultural Implement Workers of America - UAW

Michael J. Wright, Director of Health, Safety, and Environment
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service
Workers International Union