



July 13, 2022

Via Electronic Filing

The Honorable Michal Ilana Freedhoff
Assistant Administrator
Office of Chemical Safety and Pollution Prevention
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Comments of the U.S. Chamber of Commerce on EPA's Proposed Rule "Asbestos Part 1: Chrysotile Asbestos; Regulation of Certain Conditions of Use under Section 6(a) of the Toxic Substances Control Act," (87 Fed. Reg. 21,706-21,738)

Dear Administrator. Freedhoff:

The U.S. Chamber of Commerce ("the Chamber") appreciates the opportunity to comment on the U.S. Environmental Protection Agency's ("EPA's" or "Agency's") proposed rule on "Asbestos Part 1: Chrysotile Asbestos; Regulation of Certain Conditions of Use under Section 6(a) of the Toxic Substances Control Act."¹ We appreciate that EPA granted the Chamber's request to extend the comment period by 30 days to give the regulated community more time to evaluate and provide necessary input on this important rulemaking.

The Chamber's members include companies across all sectors that are impacted by the Toxic Substances Control Act ("TSCA")—chemicals, coatings, refining, petrochemicals, petroleum, forestry, wood products, batteries, electronics, energy, and electricity, among many others. These companies, which manufacture and use chemicals subject to regulation under TSCA, deliver products and innovation that are integral not only to the health and well-being of the American people, but to the domestic economy and supply chain. Chemical technologies improve our quality of life in numerous ways by providing new solutions to problems in health, materials, transportation, agriculture, and energy usage. Protecting the health of workers and surrounding communities is a priority for our members. It is also a priority to ensure the availability of the critical building block chemicals, chlorine and sodium hydroxide (caustic soda), produced through the chlor-alkali process, and likewise to avoid disruptive interruptions to the production of energy, fuels, pharmaceuticals, sanitizing agents, and other essential products

The Chamber and its members urge EPA to consider the economic, legal, and practical issues outlined in our comments. For example, EPA must consider the significant economic and supply chain consequences that banning the critical use of chrysotile asbestos diaphragms used in the chlor-alkali industry would have on the regulated industries, downstream users, and the American public. We oppose EPA's proposed ban on chrysotile

¹ Asbestos Part 1: Chrysotile Asbestos; Regulation of Certain Conditions of Use under Section 6(a) of the Toxic Substances Control Act (TSCA), 87 Fed. Reg. 21,706 (Apr. 12, 2022).

asbestos diaphragms in the chlor-alkali industry and urge EPA to allow this essential use to continue, or alternatively, grant a critical use exemption under TSCA Section 6(g).

In addition – and likewise of critical importance – EPA should make clear that already-installed asbestos-containing sheet gaskets and other gaskets may remain in use until they reach the end of their life cycles and need to be replaced. Requiring the premature removal of such gaskets would likely have a debilitating effect resulting in shortages of fuels, energy, and other essential chemicals.

We recognize the significance of the proposed rule, as it will be the first-ever risk management rule issued under the new process for evaluating and regulating existing chemicals established under the 2016 TSCA amendments. The Chamber supports the goal of implementing TSCA to eliminate unreasonable human health risks, while at the same time preserving the use of essential chemistries and products that are important to the U.S. economy. We encourage EPA to continue to refine important aspects of this precedent-setting rule based on feedback from stakeholders to meet these goals.

I. The Proposed Rule Does Not Appropriately Consider Reasonably Ascertainable Economic Consequences and Does Not Adequately Incorporate Such Considerations in Its Analysis

A. The Proposal Does Not Adequately Consider the Impact on the U.S. Supply Chain of a Complete Ban of Chrysotile Asbestos Diaphragms in the Chlor-Alkali Industry

TSCA Section 6(c) requires that, in establishing risk management rules, EPA must “factor in” the reasonably ascertainable economic consequences of the rule, including consideration of the likely effect on the national economy, small business, technological innovation, the environment, and public health,² as well as the costs and benefits of the rule.³ EPA has not demonstrated in the proposed rule that it has satisfied its obligation under TSCA to consider the economic consequences of the proposed rule on the chlor-alkali industry. EPA’s proposed ban on asbestos diaphragms in the chlor-alkali industry should be rescinded in light of the serious consequences this rule would have on the economy and the risk this would create to the health and safety of communities.

While EPA claims in the proposed rule that it has considered the effect of the rule on the national economy and the costs and benefits of the rule, it fails to justify how a proposed decision to ban these essential products adequately “factors in” the serious impact a ban on chrysotile asbestos diaphragms in the chlor-alkali industry will have on the national supply chain. EPA’s own statements acknowledge the importance of chlor-alkali products on the national economy.⁴ EPA admits it is “aware that chlor-alkali chemicals are used in sectors

² 15 U.S.C. § 2605(c)(2)(A)(iv)(I).

³ 15 U.S.C. § 2605(c)(2)(A)(iv)(II).

⁴ In a letter from Michael S. Regan, Administrator, U.S. Environmental Protection Agency, to Chemical Sector Partners (June 30, 2021), Administrator Regan noted the criticality of our nation’s drinking water and wastewater services and stated, “if drinking water systems cannot obtain a sufficient and reliable

important to the national economy and operation of critical infrastructure to protect human health.”⁵ The proposed rule also notes EPA’s awareness “that public drinking water and wastewater systems have experienced substantial price increases for chlor-alkali products related to supply shortages and COVID pandemic impacts” and that “EPA has insufficient information to fully assess the impact of this proposed rule on the cost or availability of water treatment chemicals.”⁶ EPA notes that it “lacks sufficient information to characterize the demand curve for chlor-alkali products.”⁷ Yet in June 2021 when Administrator Regan wrote to chemical sector partners, EPA was well aware that to provide safe drinking water to American communities, products like chlorine, sodium hypochlorite and other chlorine derivatives are essential.⁸

It is important to ensure that critical goods remain readily available in commerce, including access to sufficient supplies of chlorine and sodium hydroxide. Chrysotile asbestos, as used in the chlor-alkali process, has been utilized safely in the United States for decades. This process, involving the electrolysis of a brine, separates chlorine and sodium hydroxide, both of which play a significant role in the manufacture of thousands of products and other important chemical processes.⁹

For example, water treatment, medical equipment, crop protection products, pharmaceuticals, and consumer goods all depend on chlorine chemistry. About 33 percent of the U.S. chlorine capacity depends on the use of asbestos diaphragms.¹⁰ Chlorine and sodium hydroxide are basic chemical building blocks necessary to produce consumer goods, electronics, cleaning products, PVC flooring, and many other necessities of daily life. They are also used for products found in factories, farms, and hospitals. School districts, labor unions, and state water authorities are among the commenters who have already provided comments to the EPA rulemaking docket expressing concerns about the impact this regulation will have on health and safety. The concerns about creating a chlorine shortage are well-recognized across many sectors. EPA should allow continued use of asbestos diaphragms in the chlor-alkali industry with appropriate risk management measures in place, rather than implementing a total ban that does not consider the essential nature of chlorine and its by-products.

There is currently no excess supply for chlorine in the U.S. Elemental chlorine does not trade intercontinentally, and chlorine is primarily traded as chlorine equivalents (Cl₂ EQ) in chlorine-containing derivatives. Only Canada and Mexico supply the U.S. with elemental

supply of gaseous chlorine, sodium hypochlorite, and calcium hypochlorite, they will be unable to continue to provide safe drinking water to their communities.” This letter is available at <https://www.waterisac.org/system/files/articles/Letter%20to%20Chemical%20Sector%20from%20EPA%20Administrator.pdf>.

⁵ 87 Fed. Reg. at 21,726.

⁶ 87 Fed. Reg. at 21,721.

⁷ 87 Fed. Reg. at 21,730.

⁸ See footnote 4.

⁹ See Products of the Chlorine Tree, Products of the Sodium Hydroxide Tree, and Chlorine: The Essential Chemistry, available at <https://www.regulations.gov/document/EPA-HQ-OPPT-2021-0057-0261>.

¹⁰ EPA, Economic Analysis of the TSCA Section 6 Proposed Rule for Asbestos Risk Management, Part 1, April 2022, available at: <https://www.regulations.gov/document/EPA-HQ-OPPT-2021-0057-0008>.

chlorine imports. Canada and Mexico currently lack spare capacity to increase chlorine exports to the U.S.¹¹ Canada's chlor-alkali operating rates are near maximum, and Mexico's export capacity is limited by the availability of railcars.

U.S. sodium hydroxide exports supply a significant proportion (roughly 4.2 percent) of sodium hydroxide demand in other world regions¹². For example, U.S. sodium hydroxide exports supply approximately 83 percent of South American sodium hydroxide demand. Similarly, the U.S. supplies 48 percent of sodium hydroxide demand in Mexico, 28 percent of demand in Canada, and 24 percent of demand in Australia¹³.

If a total shutdown of one third of the chlorine production in the U.S., or 4.67MMT, takes place in November of 2025, the following could occur: If all U.S. asbestos diaphragm cell sodium hydroxide were removed from the market in 2025 while domestic U.S. sodium hydroxide demand remained constant, the U.S. domestic market could be short approximately 240kMT of sodium hydroxide supply with no spare capacity to supply the export market¹⁴. The 3.6 MMT merchant market supplies a majority of the water and wastewater treatment¹⁵. This is less than the 4.6 MMT that would be shut down. The resulting shortage and price increase would have a domino effect across the merchant market of chlorine uses including construction, medical devices, semiconductors, agriculture and pulp and paper¹⁶.

We urge EPA to consider the impact that a ban on chrysotile asbestos diaphragms in the chlor-alkali industry would have on the economy and public health, in addition to the enormous costs that such a ban would have on the regulated product markets, particularly on the chlor-alkali industry, as compared with the estimated benefits. EPA estimates that there are approximately 814 individuals who are exposed to chrysotile asbestos for the regulated conditions of use.¹⁷ Fewer than a quarter of these individuals are potentially exposed from asbestos in diaphragms in the chlor-alkali industry. ACC and the Chlorine Industry have provided considerable data to EPA describing how personal protective equipment (PPE) is extensively used by these employees. For example, the Chlorine Institute has provided information on the best practices implemented by the industry to mitigate exposure risks from chrysotile asbestos—measures which run the gamut from wearing personal protective equipment and imposing exposure controls, to employee training and posted warning signs throughout the workplace. EPA should take into account the OSHA asbestos standards and industry best practices as noted in the proposed rule.¹⁸

¹¹ Impact of EPA's Proposed Asbestos-Diaphragm Chlor-Alkali Rulemaking, July 2022. Chemical Market Analytics, pg. 17.

¹² *Id.* pg. 21

¹³ *Id.* pg. 21

¹⁴ *Id.* pg. 21

¹⁵ *Id.* pg. 7,10

¹⁶ *Id.* pg. 13

¹⁷ EPA estimates that 100 workers and 100 occupational non-users ("ONUs") are exposed to chrysotile asbestos in diaphragms in the chlor-alkali industry; 4 workers and 8 ONUs exposed in sheet gasket stamping; 22 workers and 150 ONUs in sheet gaskets in chemical production; 15 workers and 15 ONUs in aftermarket automotive brakes; and 400 consumers exposed (DIY mechanics). 87 Fed. Reg. at 21,728.

¹⁸ 87 Fed. Reg. at 21,712-3.

EPA estimates that the cost of this proposed rule to the chlor-alkali industry alone would be \$1.8 billion to convert the remaining plants to membrane cell technology.¹⁹ EPA estimates the incremental net effect of the rule over a 20-year period on the chlor-alkali industry would be an annualized cost of \$49 million per year to annualized savings of \$35 million per year (using a 3 percent discount rate).²⁰ By contrast, the benefits of the proposed rule as estimated by EPA are comparatively modest, precisely because the proposed rule would reduce risks to a relatively low degree. EPA should carefully consider whether the burdens of the proposed rule are justified and whether there are more effective ways of achieving the same or greater level of benefits for health and the environment. For instance, requiring PPE can be used to mitigate worker risks of concern.

B. Alternatively, EPA Should Consider a Critical Use Exemption for Chrysotile Asbestos in the Chlor-Alkali Industry

Congress provides EPA with directives under TSCA Section 6(c) and 6(g) to allow for the ongoing safe use of critical conditions of use. EPA did not choose to evaluate either of these provisions as established by the 2016 TSCA amendments and instead proposed a prohibition for the chlor-alkali condition of use. EPA invited comments regarding the need and rationale for exemptions. We believe that allowing for the safe, ongoing use in the chlor-alkali industry under either 6(c) or 6(g) would prevent dramatic disruptions to the chlorine and caustic supply chain as well as allow for a safe and effective transition to asbestos alternatives in chlorine production.

Chrysotile asbestos as used in the chlor-alkali industry is a critical use that satisfies the statutory criteria for an exemption. As discussed in detail in the previous section, a ban on chrysotile asbestos in diaphragms would significantly disrupt the national economy because it would significantly decrease the necessary supply of chlorine for water treatment and other critical medical and consumer products. An exemption under Section 6(g) would not last indefinitely and would not free covered facilities from *all* regulation. To the contrary, the Agency would establish conditions as determined necessary to protect health and a “reasonable” time limit based on its assessment of the circumstances.²¹

C. EPA’s Proposed Ban on Chrysotile Asbestos for Use in Sheet Gaskets in Chemical Production and Other Installed Gaskets in Oil Refineries and other Chemical Plants Should Apply Only to New Gaskets and Should Not Require Removal and Replacement of Existing Gaskets

EPA requests comment on the potential costs of its proposed ban on the use of asbestos in sheet gaskets in chemical production as well as “other gaskets.” Asbestos is used in sheet gaskets in some older chemical plants as a mechanical seal to prevent leakage from or into objects under compression. These gaskets hold pipes together and can be safely utilized for decades before needing to be replaced. Replacing these gaskets in the short

¹⁹ 87 Fed. Reg. at 21,708.

²⁰ *Id.* The incremental annualized net effect ranges from a cost of \$87 million per year to savings of \$40,000 per year at a 7% discount rate.

²¹ *See* 15 U.S.C. § 2605(g)(3)-(4).

timeframe EPA has proposed would cause plants to shut down for weeks at a time and lead to further supply chain disruptions.

Chrysotile asbestos is used in sheet gaskets and other gaskets in chemical plants and refineries as a mechanical seal to prevent leakage from or into objects under compression and other challenging conditions. These gaskets prevent liquids and vapors from being released from joints called flanges in pipes and other equipment. The number of chrysotile asbestos gaskets remaining in use across industry in chemical plants and refineries is suspected to be in the hundreds of thousands and potentially the millions, as the gaskets are durable and can be safely utilized for decades (typically trapped between two pipe flanges) before needing to be replaced. There is no unreasonable risk from installed gaskets. Therefore, no safety and health justification exists for their premature removal and the implementation of a measure that could significantly increase the potential risk of chemical releases to the environment.

The chemical plant and refining industry produce energy, essential fuels, pharmaceuticals, sanitizing agents, and other chemicals. As explained by the U.S. Cybersecurity and Infrastructure Security Agency, the Chemical Sector and Energy Sector are two of the sixteen critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.²² Further, other critical infrastructure sectors rely on these sectors. Replacing the asbestos gaskets in the short timeframe as EPA has suggested would cause plants and refineries to shut down from weeks to years at a time. This is not the time for the nation to shut down essential infrastructure for extended periods to remove and replace gaskets in crucial infrastructure sectors that pose no risk while they remain installed. Such an action would lead to further supply chain disruptions that the country is already facing and premature removal would likely result in shortages of fuels, energy, and other essential chemicals.

Compliance with the proposed rule would be infeasible. This would be an enormous undertaking for industry, having the counterproductive effect of concentrating worker exposure levels and introducing other safety and environmental hazards. Due to the lack of useful industry records concerning the composition of every single gasket in facilities over the past fifty years, it is not far-fetched to conclude that to confirm that no chrysotile asbestos sheet gaskets are installed anywhere in a facility, it would become necessary to remove and replace a significant amount of all gaskets in the facility.

Gaskets are used in a wide variety of industries, such as refineries, power generation, chemical processing, food, pharmaceuticals, and more.²³ Millions of gaskets are in place, and an unknown percentage contain asbestos. The gaskets cannot be inspected or tested for asbestos without opening the flanges. Generally, when the flange is opened, the gasket is damaged and will need to be replaced. This requires shutting down manufacturing processes

²² Presidential Policy Directive 21 (*PPD-21*): *Critical Infrastructure Security and Resilience*; see also <https://www.cisa.gov/critical-infrastructure-sectors>.

²³ Industrial Gaskets Market; February 2021, Report Code: CH6026. Industrial Gaskets Market Global Forecast to 2025 | MarketsandMarkets.

to identify the gasket type. Given that flanges are opened only when required by operating needs, one cannot rely on the composition of the gasket at any of the surrounding joints. In general, it becomes an all-or-nothing approach. To do this on a large scale creates process safety risks and the potential for fugitive emissions from potential releases associated with the work. In addition, other required equipment maintenance and inspection could be needed, adding to the time and complexity of the outage.

Gasket removal is performed by specially skilled workers and contractors because of the knowledge and skills required to coordinate the following actions: the safe shutdown of a facility; the isolation of the piping and equipment to be opened from inflows of hazardous chemicals; the elimination of any hazardous chemicals from that equipment and piping; flushing the lines where practical to eliminate residual material; isolating any other hazardous energy sources affecting the work; cooling down piping and equipment; verifying material and energy isolation; and properly unbolting and separating the flanges to gain access to and remove the gaskets. We estimate that the contractors that can do this work do not have sufficient capacity to increase their workload to safely perform this work within even five years. Accordingly, we are concerned that the shortage of personnel and short deadline would likely increase the risks of accidents in efforts to achieve infeasible compliance across industry.²⁴

EPA estimated that the proposed removal of sheet gaskets in chemical production would involve only 22 workers and 150 occupational non-users (ONUs) at 5 sites.²⁵ Based on that estimate, it is clear that EPA has somehow developed a scoping and risk assessment document without having critical information on the magnitude of the remaining use of sheet gaskets in chemical production, the economic impact on both the facilities where the gaskets are installed and the national economy of replacing those gaskets, or the fact that the gaskets do not present an unreasonable risk to workers when left in place. Any such scoping and risk assessment document should be released for public comment.

Asbestos gaskets pose a potential risk to workers only when they are being removed or installed. The safest approach to managing asbestos gaskets is to prohibit their future installation and require controls when they are removed at the time when flanges or equipment are opened for maintenance or modification and the gasket must then be replaced. Years of monitoring data collected during the removal of asbestos gaskets, using simple but effective control measures, demonstrate that they can be removed safely when they need to be replaced. In addition, leaving these gaskets in place will avoid creation of supply chain shortages in related industries (e.g. fuels, chemicals, power generation, or pharmaceuticals).

Alternatively, EPA should grant a critical use exemption under TSCA Section 6(g) for sheet gaskets and other gaskets that are currently installed based on their critical uses described above and the consideration that the volume of sheet gaskets that would require replacement would significantly impact critical infrastructure.

²⁴ Spence, S and Rocchi, P., Exposure to Asbestos Fibers During Gasket Removal, Ann. Occup. Hy, Vol. 40, No. 5, pp. 584-588 (1996).

²⁵ 87 Fed. Reg. at 21,728.

D. EPA's Cost Analysis for the Primary Alternative Option Is Fundamentally Flawed

EPA's cost analysis for the primary alternative regulatory option differs from the proposed option, as it takes into account the cost of complying with the existing chemical exposure limit ("ECEL"), the requirements for downstream notification, and the requirements for signage and labeling. As proposed, under the primary alternative, regulated entities using asbestos diaphragms in the chlor-alkali industry and sheet gaskets in chemical production would be required to comply with the ECEL for four and a half years,²⁶ and then the bans would go into effect after five years.

EPA's cost analysis for complying with the ECEL annualizes all costs over 20 years and assumes that facilities will incur compliance costs for the first five years of the analytical timeframe. A rationale for this approach is not provided; thus, it is difficult to understand the agency's justification for annualizing costs over 20 years when these processes would be prohibited after four and a half years, when all activities that use asbestos would cease. In addition, facilities would incur compliance costs for only the four and a half years during which the ECEL program would be in effect. By extending these timeframes, EPA has significantly underestimated the real annual costs, during the relevant four and a half-year period, of complying with the ECEL and its associated requirements (including recordkeeping and monitoring).

Accordingly, EPA should revise the cost analysis associated with the cost of complying with the ECEL. Considering the large, expected impact, EPA should present this revised analysis in a supplemental notice of proposed rulemaking that is made available for public comment and review.²⁷

E. The Proposed Rule's Incorporation of Air Pollution Reduction Co-Benefits Is Not an Appropriate Basis to Support the Proposed Rule, Given TSCA's Structure

In the proposed rule, EPA indicates that there would be decreased air pollution as a result of the rule because industry would convert from using asbestos diaphragm cells in chlor-alkali production, which consumes high volumes of electricity, to membrane technology. While it is appropriate to analyze such potential indirect benefits as part of an economic analysis under Executive Order 12866, it is not proper for EPA to include such potential benefits in its cost-benefit analysis and decision making under TSCA. Reductions in criteria pollutants under the Clean Air Act (CAA) should not factor into the selection of particular risk

²⁶ EPA indicates in the proposal that EPA would require compliance with the ECEL beginning 180 days after the effective date of the rule. 87 Fed. Reg. at 21,723.

²⁷ In addition, EPA has not factored in the cost of complying with Good Laboratory Practice (GLP) Standards at 40 C.F.R. part 792. When EPA promulgated the GLP regulations under TSCA, it estimated the costs of compliance with the GLP regulations based on additional personnel, equipment, supplies, storage construction, and utilities required for laboratories to comply with the regulations. 48 Fed. Reg. 53,922, 53,936 (Nov. 29, 1983). EPA then estimated the total annual cost of the regulation to be approximately \$80,000 per laboratory. These costs are either direct or indirect overhead costs allocated over the tests performed by the lab. These costs do not include the cost to implement GLP in sample collection and analysis. Of course, considering inflation and other changes since 1983, the annual cost would likely be different now.

management measures under Section 6(a) of TSCA. Rather, under Section 9(b) of TSCA, EPA must coordinate with the Agency's other authorities and address air pollution utilizing its primary CAA authority. Before concluding that it is appropriate to use TSCA to address risks subject to the CAA, EPA would need to perform a detailed analysis under TSCA Section 9(b)(2). EPA has not performed such an analysis in this case, and there is no reason to believe that the CAA is inadequate to address any such risks here.

II. EPA Failed to Use the Best Available Science and the Weight of the Scientific Evidence in its Risk Evaluation Process

A. EPA's Baseline Risk Assumption Does Not Use the Best Available Science and the Weight of the Scientific Evidence

Section 26(h) of TSCA²⁸ requires that EPA use scientific information, procedures, methods, and protocols consistent with the "best available science" whenever it makes a decision based on science under TSCA Section 6. This standard applies to EPA's risk determinations, as they are science-based decisions. It also applies to EPA's consideration of health effects and the magnitude of exposure to a chemical in the risk management process.²⁹ The "best available science" is science that is reliable, unbiased, and involves use of supporting studies conducted in accordance with sound and objective science practices.³⁰ EPA must comply with its obligations under Section 26(h) and consider the extent to which the scientific information, technical procedures, methods, or models it uses are reasonable for the intended use of the information. EPA must also make decisions that are based on the weight of the scientific evidence.³¹

As reflected in the docket, EPA's risk evaluation for chrysotile asbestos suffered from many flaws. Commenters provided information to help improve EPA's exposure assessment, cancer assessment, systematic review method and peer review processes.³² Many of these concerns have not been addressed by EPA, and EPA's reliance on this evaluation, which did not incorporate best available science, has led to an overly conservative proposed risk management rule.

EPA claims in the proposed rule that it used scientific information, technical procedures, measures, methods, protocols, methodologies, and models consistent with the best available science.³³ It states that the unreasonable risk determination for chrysotile asbestos was based on its risk evaluation, which was developed in a manner consistent with the best available science and based on the weight of the scientific evidence.³⁴ However, EPA states in the preamble that "EPA conducts baseline assessments of risk and makes its

²⁸ 15 U.S.C. § 2625(h).

²⁹ 15 U.S.C. § 2605(c)(2)(A)(i).

³⁰ 40 C.F.R. § 702.33.

³¹ 15 U.S.C. § 2625(i).

³² See public comments available at: <https://www.regulations.gov/docket/EPA-HQ-OPPT-2016-0736/comments>.

³³ 87 Fed. Reg. at 21,733.

³⁴ *Id.*

determination of unreasonable risk from a baseline scenario that is not based on an assumption of compliance with Occupational Safety and Health Administration (OSHA) standards, including any applicable exposure limits or requirements for use of respiratory protection or other PPE.”³⁵ EPA’s policy to not assume OSHA compliance is flawed and in violation of EPA’s Section 26(h) science requirements. EPA has also made clear that this is the Agency’s position for risk evaluations going forward. Indeed, EPA’s recently revised HBCD,³⁶ NMP,³⁷ and perchloroethylene³⁸ risk determinations explicitly state that it does not rely on assumptions regarding the use of PPE in making unreasonable risk determinations.

EPA fails to explain how a decision or assessment based on such a position is consistent with the best available science and the weight of the scientific evidence as required by TSCA Section 26. EPA does not provide a reasoned rationale or substantial evidence to support its baseline position about compliance with workplace safety standards in the industrial workplace. EPA’s only explanation for taking this position is that it cannot assume “as a general matter” that applicable OSHA requirements are always properly followed.³⁹ This general statement is not based on objective data or an evaluation of the weight of the scientific evidence. EPA disregards the fact that asbestos use in the chlor-alkali industry is heavily regulated by OSHA, including failure to consider current OSHA regulatory requirements related to the use of PPE, and that asbestos handling occurs under highly controlled conditions, a factor that may be corrected by completing the required harmonization of EPA and OSHA authority. EPA’s risk evaluation for chrysotile asbestos describes how workers involved in chlor-alkali diaphragm manufacturing and processing handle chrysotile asbestos in conformance with OSHA’s asbestos standard, which includes PPE and respiratory protection.⁴⁰

EPA’s position that it cannot assume the use of PPE in assessing industrial risk is inconsistent with TSCA Section 6 and EPA’s risk evaluation regulations, which require that the Agency determine unreasonable risk under the conditions of use,⁴¹ which means the circumstances in which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.⁴² EPA also must consider likely duration, intensity, frequency, and number of exposures under the conditions of use.⁴³ PPE is a critical tool that impacts the intensity and duration of exposures to chemicals. For certain conditions of use, such as in chlor-alkali production, PPE use is intended, known, and reasonably foreseen for workers.⁴⁴

³⁵ 87 Fed. Reg. at 21,713.

³⁶ 87 Fed. Reg. 38,747 (June 29, 2022).

³⁷ 87 Fed. Reg. 39,511 (July 1, 2022).

³⁸ 87 Fed. Reg. 39,085 (June 30, 2022).

³⁹ 87 Fed. Reg. at 21,712.

⁴⁰ EPA’s “Risk Evaluation for Asbestos Part I: Chrysotile Asbestos” (December 2020) at 74-75, 79.

⁴¹ 15 U.S.C. § 2605(b)(4)(A); 40 C.F.R. § 702.41(a)(8).

⁴² 40 C.F.R. § 702.33.

⁴³ 15 U.S.C. § 2605(b)(4)(F)(iv); 40 C.F.R. § 702.43(a)(4).

⁴⁴ See Section 2.3.1.3 of EPA’s “Risk Evaluation for Asbestos Part I: Chrysotile Asbestos” (December 2020) for description of PPE used by workers in chlor-alkali industry.

In making risk determinations, EPA must account for existing workplace controls (including administrative controls, engineering controls, and PPE) and requirements from OSHA that reduce exposures to workers. These workplace controls are part of the “conditions of use” for the uses that result in exposures in the workplace. EPA must coordinate with expert agencies such as OSHA, National Institute for Occupational Safety and Health (NIOSH), the American Industrial Hygiene Association (AIHA), and other industrial hygiene experts to ensure that EPA is relying on the weight of the scientific evidence and the best available science in making assumptions about workplace exposures.

EPA also disregarded the value of PPE as a tool to mitigate risk in the risk management proposed rule by jumping to a ban when the risk evaluation showed instances of PPE mitigating risk to workers below the risk benchmarks. In EPA’s unreasonable risk determination for processing and industrial use of chrysotile asbestos diaphragms, it found unreasonable risk to workers from chronic inhalation exposure based on personal air monitoring data and area monitoring data that lead to the high-end risk estimates exceeding the risk benchmark. EPA indicated it focused on high-end risk estimates rather than central tendency risk estimates to be protective of workers, occupational non-users, consumers, and bystanders.⁴⁵ It also concluded that high-end estimates capture exposures to potentially exposed susceptible subpopulations and to account for uncertainties related to whether or not workers are using PPE.⁴⁶ By EPA’s own assessment, the unreasonable risk does not exceed the benchmark with the use of PPE with an assigned protection factor (APF) of 10 (for chlor-alkali industry workers) and an APF of 25 (for sheet gasket workers).⁴⁷ For individuals who EPA determined were not protected by PPE (because they were not required to wear it), or for activities in which workers do not wear PPE, EPA should have considered requiring PPE to mitigate risk during such tasks. By not considering the well-known benefits of PPE, EPA is proposing a ban of the use of asbestos diaphragms that is unnecessary and is not cost effective. Ignoring the utility of PPE in either risk evaluation or risk management is contrary to many of EPA’s own regulations and guidance, ignores objective studies and data, and is inconsistent with TCSA Section 6(a).⁴⁸

III. EPA’s Finding that the Implementation of an Existing Chemical Exposure Limit (ECEL) Eliminates Unreasonable Risk Is Inconsistent with the Proposed Ban of All Uses of Chrysotile Asbestos

In the proposed rule, EPA proposes a ban on chrysotile asbestos used in diaphragms in the chlor-alkali industry and sheet gaskets in chemical production within two years. As a primary regulatory alternative option, EPA proposes the establishment of an ECEL to limit inhalation exposures by workers and occupational non-users (ONUs) in the interim before a ban of chlor-alkali diaphragm uses and sheet gasket uses after five years. EPA states that, if inhalation exposures to chrysotile asbestos in an occupational setting are kept at or below the

⁴⁵ EPA’s “Risk Evaluation for Asbestos Part I: Chrysotile Asbestos” (December 2020) at 31.

⁴⁶ *Id.* at 230.

⁴⁷ EPA’s “Risk Evaluation for Asbestos Part I: Chrysotile Asbestos” (December 2020) at 202.

⁴⁸ TCSA section 6(a) requires that EPA, in managing unreasonable risks, must apply one or more risk management measures “to the extent necessary so that the chemical substance or mixture no longer presents such risk.”

ECEL of 0.005 f/cc, a person reasonably likely to be exposed in the workplace would be protected against excess risk of cancer above the 1×10^{-4} (1 death per 10,000) benchmark resulting from chronic occupational exposure. EPA concludes that requirements to meet an ECEL “could reduce exposures and address unreasonable risk during the interim period of time the regulated entities need for implementing prohibitions.”⁴⁹

An effective approach to eliminating unreasonable risk to chlor-alkali workers would be an appropriately derived ECEL based on best available science to develop the inhalation unit risk (IUR), appropriate current occupational assumptions about the age at first exposure and duration of exposure, and recognition of the inherent conservatism of standard monitoring methods. These other concerns regarding the scientific basis of the ECEL are not addressed herein,⁵⁰ but based on EPA’s own conclusion that that compliance with the ECEL will reduce asbestos exposures so that the risk estimate falls below its risk benchmark, the ECEL appears to mitigate risk “to the extent necessary” under TSCA Section 6(a), raising the question of why a ban must be required as well.

TSCA Section 6(a) requires that EPA, in managing unreasonable risks, must apply one or more risk management measures “to the extent necessary so that the chemical substance or mixture no longer presents such risk.”⁵¹ If an employer implements workplace controls to reduce asbestos exposures to a level below the ECEL, and individuals are reasonably likely to be protected from unreasonable risks, this risk management approach would mitigate unreasonable risk “to the extent necessary.” Thus, EPA lacks authority to propose a ban in the proposed regulatory option and in the primary alternative when it also concedes that, for those same conditions of use, the implementation of an ECEL in the workplace eliminates unreasonable risk in the interim period before a ban goes into effect. A ban would be going above and beyond “the extent necessary” to ensure that the chemical no longer presents an unreasonable risk to individuals in an occupational setting.

IV. EPA Should Consider Certification and Training as a Risk Management Tool for This Rule and Other TSCA Section 6 Risk Management Rules

In this rulemaking and other Section 6(a) risk management rulemakings, EPA should consider certification and training (“C&T”) as a risk management approach to mitigate unreasonable risks. Under TSCA Section 6(a), risk management requirements can restrict how a substance is distributed in commerce for a particular use⁵² and regulate any manner or method for use of the substance commercially.⁵³ EPA has recognized in previous rulemakings that TSCA provides EPA the authority to require C&T as a risk management approach.⁵⁴ EPA

⁴⁹ 87 Fed. Reg. at 21,723.

⁵⁰ See comments of the American Chemistry Council on this proposed rule.

⁵¹ 15 U.S.C. § 2605(a).

⁵² 15 U.S.C. § 2605(a)(2).

⁵³ 15 U.S.C. § 2605(a)(5).

⁵⁴ In 2017, EPA acknowledged that a C&T program could be a regulatory option for methylene chloride used in paint and coating removal. See Methylene Chloride and N-Methylpyrrolidone; Regulation of Certain Uses under TSCA Section 6(a), 82 Fed. Reg. 7,464 (Jan. 19, 2017). In 2019, EPA solicited further

should consider C&T as a risk management approach for chemicals that it determines warrant risk management under TSCA Section 6(a).

A. EPA Recognizes the Utility and Value of Existing C&T in Evaluating Unreasonable Risks

EPA has recognized in the risk evaluation process that C&T programs under certain conditions of use result in reduced exposures to a substance. This reduced exposure can warrant a determination by EPA that the substance does not present an unreasonable risk under the condition of use. Therefore, EPA should also recognize the value of requiring C&T to eliminate risk for conditions of use that it determines pose an unreasonable risk and require risk management. In some cases, C&T will serve to mitigate risks to the extent necessary so that the chemical no longer presents an unreasonable risk, therefore alleviating the need for a ban.

In the risk evaluation for chrysotile asbestos, EPA considered how worker C&T programs reduce exposures when evaluating unreasonable risks to workers. EPA found that one condition of use of chrysotile asbestos—the use of chrysotile asbestos brakes for the NASA Super Guppy Turbine (“SGT”)—did not present an unreasonable risk (and thus was not subject to risk management) based on worker exposure data provided by NASA. As described in the risk evaluation, brake replacement is performed only by certified technicians. Additionally, NASA provided EPA with a clear process description for the replacement activity, which includes appropriate ventilation, wet methods to control release, employing high efficiency particulate vacuums, and proper disposal. The certified technicians are trained annually on asbestos hazards, work practices that can reduce the generation of airborne asbestos dust, and how PPE can reduce exposures. In fact, when proper methods are followed, NASA does not require that certified technicians use respiratory protection. NASA also documented for EPA the ability to limit the amount of time during which workers are exposed to activities which may release asbestos. EPA’s determination of no unreasonable risk for the use of chrysotile asbestos in brakes for the NASA SGT is based on available exposure data and NASA’s existing C&T program.

We support the approach EPA took by considering a C&T program in its evaluation of exposures to workers from chrysotile asbestos in SGT brakes. For future risk evaluations, we encourage EPA to consider C&T programs in determining unreasonable risk, as well as consider C&T as a risk management tool.

public comment on training, certification, and limited access requirements for methylene chloride when used for commercial paint and coating removal, specifically citing TSCA Sections 6(a)(2) and (5) as providing authority for such requirements. See Methylene Chloride; Commercial Paint and Coating Removal Training, Certification and Limited Access Program, 84 Fed. Reg. 11,467 (Mar. 27, 2019) (“TSCA sections 6(a)(2) and (5) authorize EPA to regulate the distribution in commerce for a particular use and any manner or method of commercial use, respectively, of a chemical found to present unreasonable risk. Potential training, certification, and limited access program requirements could be promulgated under those authorities as part of rulemaking under the authority of TSCA section 6(a)”).

Further, we support EPA's approach in its risk evaluation to issue separate risk determinations for each condition of use evaluated. EPA must continue to assess unreasonable risk on a use-by-use basis. EPA is required to evaluate risks "under the conditions of use" under TSCA Section 6(b), 15 U.S.C. § 2605(b)(4)(A), which requires use-by-use risk determinations. If EPA were to use the "whole chemical" approach to risk evaluation, it would decide whether a chemical, at the broadest (and arguably most abstract) level, poses an "unreasonable risk" to human health or the environment.⁵⁵ Such an approach would be a step backwards in transparency and clarity. Additionally, it is unclear how EPA would impose risk management requirements, including C&T, to chemicals that have one overall unreasonable risk determination rather than use-by-use determinations with risk management requirements tailored to mitigate the risk of each particular condition of use.

B. The Proposed Rule Recognizes the Utility and Value of Future C&T as Part of the Primary Alternative Regulatory Action

EPA recognized the value of existing C&T in reducing chemical exposures to mitigate unreasonable risk, as evidenced by its primary alternative regulatory action in the proposed rule. EPA's primary alternative regulatory action for chrysotile asbestos diaphragms in the chlor-alkali industry and for chrysotile-asbestos-containing sheet gaskets in chemical production requires compliance with an ECEL. EPA views the ECEL as a beneficial control measure implemented as part of industrial hygiene programs.

C&T plays a role in the implementation of and compliance with industrial hygiene programs so that workers are properly trained and educated on the controls necessary to achieve the ECEL. The ECEL is a performance-based exposure limit that allows industries latitude in determining how to meet this standard while following a hierarchy of controls. The hierarchy of controls includes, in sequential order, elimination and substitution, engineering controls, administrative controls, and PPE. The primary regulatory alternative also requires that regulated entities: 1) determine the level of respiratory protection needed; 2) refer to OSHA's General Requirements for Personal Protective Equipment Standard at 29 C.F.R. § 1910.132 for application of a PPE program; and 3) select the required respiratory protection and also refer to OSHA's Respiratory Protection Standard at 29 C.F.R. § 1910.134 and the respiratory protection provision of the Asbestos Standard for General Industry at 29 C.F.R. § 1910.1001(g) for directions on how to implement a respiratory protection program. Further, EPA requires monitoring, notification of monitoring results, recordkeeping, and signage and labeling.

Each of these elements in the primary regulatory alternative is an important component of a robust industrial hygiene and C&T program. The requirements of the primary regulatory alternative demonstrate that EPA recognizes that an industrial hygiene program that includes exposure monitoring, exposure controls, respiratory protection and PPE (in certain circumstances), and recordkeeping is sufficient to mitigate unreasonable risks to workers. C&T programs, consistent with other industrial hygiene and environmental health

⁵⁵ EPA has recently released a final revised risk determination for HBCD and proposed revised risk determinations for methylene chloride, perchloroethylene (PCE), trichloroethylene (TCE), C.I. Pigment Violet 29 (PV29), and n-methylpyrrolidone (NMP) using the "whole chemical approach."

and safety programs, can also be used in an occupational setting to help ensure that occupational non-users who are in the area where work is being performed correctly use any required respiratory protection.

V. EPA Has Not Provided Sufficient Rationale for its Failure to Harmonize the Proposed Requirements with OSHA and CPSC Regulations or Other EPA Authorities

Section 9 of TSCA was enacted to prevent duplicative regulation and reinforce TSCA's original "gap filling" purpose. Sections 9(a), 9(b), and 9(d) direct EPA to coordinate with other federal agencies when these agencies can take or have already taken action under their own authorities to address identified risks. In the proposed rule, EPA failed to do the robust analysis required under Section 9 of TSCA to explain why other relevant authorities cannot sufficiently mitigate the identified unreasonable risks of chrysotile asbestos and what type of coordination the agency did to comply with its obligations under Section 9. Specifically, EPA is required to properly consult and coordinate with OSHA as it carries out its obligations under TSCA Section 6(a) to mitigate the identified unreasonable risks to workers, as OSHA has the primary responsibility and experience in regulating chemical risks in the workplace. EPA's requirement to mitigate risks to workers "to the extent necessary" does not broadly confer upon EPA the authority to take over the role of OSHA and ban conditions of use—potentially shutting down businesses—without appropriately deferring to OSHA. EPA's proposed approach to mitigating worker risks would make OSHA's regulatory authority and practices irrelevant, which is not what Congress intended and exceeds the scope of EPA's authority. When Congress enacted TSCA in 1976 and again when it revised TSCA through the Lautenberg Amendments in 2016, EPA was not authorized to go beyond TSCA's "gap filling" purpose and assume the role of OSHA and supplant OSHA's authority to regulate the workplace.⁵⁶

A. EPA's Rationale for Deciding that Risks Cannot be Sufficiently Mitigated by Other EPA Laws or Other Federal Agencies Is Flawed

Section 9(a) of TSCA requires that if, at EPA's discretion, it determines that an unreasonable risk associated with a chemical substance or mixture may be prevented or reduced to a "sufficient extent" by action taken by another federal agency, EPA must submit a report to that agency describing such risk and must request that the agency determine if the risk may be prevented or reduced to a sufficient extent under its authority.⁵⁷ The other agency must respond to EPA's report. If the other agency either determines that the activity discussed in EPA's report does not present an unreasonable risk or initiates agency action to protect against such risk, then EPA may not take risk management action on that substance

⁵⁶ The proposed rule threatens to upend the role of OSHA -- particularly in regulating industrial chemical manufacturing, where OSHA has been the primary regulator for over 50 years. The vision of OSHA displacement by TSCA that EPA has proposed is inconsistent with the regime that Congress clearly articulated, where EPA is to coordinate with OSHA and work to avoid unnecessary duplication of regulation. The Lautenberg amendments do not indicate a preference for TSCA over OSHA regulation, nor do they call into question the adequacy or primacy of the OSHA regime. As recently affirmed by the Supreme Court, EPA cannot take on wholly new, major domains of regulation unless there is clear and unmistakable authority provided by Congress. See *West Virginia v. EPA*, 597 U.S., 2022 WL 2347278 (June 30, 2022).

⁵⁷ 15 U.S.C. § 2608(a)(1).

under TSCA. If the other agency fails to respond to EPA's report in accordance with Section 9(a), EPA may initiate TSCA risk management, and the other agency must consult with EPA before taking any action under its own authority "for the purpose of avoiding duplication of Federal laws against such risk."⁵⁸ Congress intended EPA to "defer to other agencies that have relevant responsibility such as the Department of Labor in cases involving occupational safety" and did not intend for TSCA to conflict with or disregard OSHA standards.⁵⁹

Section 9(b) of TSCA also requires that EPA coordinate actions taken under TSCA with actions taken under other federal laws administered by EPA.⁶⁰ If EPA determines that a risk to health or the environment associated with a chemical substance can be eliminated or reduced to a sufficient extent by actions taken under other federal laws, EPA must use those authorities unless it is in the public interest to take actions under TSCA. This language is intended to focus EPA's exercise of discretion regarding which statute to apply and to "encourage decisions that avoid confusion, complication, and duplication."⁶¹

In the proposed rule, EPA has chosen not to undertake the report that is contemplated in Section 9(a) or do an analysis of other laws implemented by EPA under Section 9(b). EPA's decision is based wholly on EPA's claim that no federal authority, other than TSCA, is capable of preventing or mitigating risk. EPA states that TSCA addresses risk in both consumer and workplace settings, and that "there is no Federal law that provides authority to prevent or sufficiently reduce these cross-cutting exposures."⁶² EPA justifies this conclusion by pointing to certain "gaps" in regulation by OSHA and Consumer Product Safety Commission (CPSC), such as 1) OSHA's exposure limits for workers that do not extend to consumer uses of hazardous chemicals, 2) worker exposures for workers outside of OSHA and CPSC jurisdiction such as state and local government employees, and 3) certain products outside of CPSC jurisdiction such as automobiles.⁶³ EPA also makes the general statement in the proposed rule that it believes that many of the current OSHA Permissible Exposure Limits (PELs) are out of date, without addressing why the OSHA PELs for asbestos is not protective.

Additionally, EPA discusses the "[g]aps [that] also exist between OSHA's authority to set workplace standards under the OSH Act and EPA's obligations to sufficiently address chemical risks under TSCA."⁶⁴ EPA finds that its authority to address unreasonable risk under TSCA is "distinct" from Consumer Product Safety Act (CPSA), Federal Hazardous Substances Act (FHSA), and OSHA authorities. On this basis, EPA finds that there is no federal law that provides authority to evaluate and address the "totality of the risk" that EPA is addressing in the proposed rule. EPA concludes that TSCA is the only regulatory authority able to prevent or reduce risks of chrysotile asbestos to a "sufficient extent" across the conditions of use, and that these risks can be better addressed under TSCA.

⁵⁸ 15 U.S.C. § 2608(a)(6).

⁵⁹ H. Rept. 114-176 TSCA Modernization Act of 2015 at 28-29.

⁶⁰ 15 U.S.C. § 2608(b).

⁶¹ H. Rept. 114-176 TSCA Modernization Act of 2015 at 28.

⁶² 87 Fed. Reg. at 21,732.

⁶³ *Id.*

⁶⁴ 87 Fed. Reg. at 21,733.

EPA also concludes that actions taken under other EPA authorities cannot sufficiently mitigate unreasonable risk because the other statutes do not address all exposure pathways (i.e., the CAA focuses on ambient air releases, whereas the Resource Conservation and Recovery Act (RCRA) regulates disposal) and that only TSCA provides EPA authority to regulate manufacture, processing, distribution, commercial use, and commercial disposal.⁶⁵

This attempt to avoid an in-depth analysis of other federal regulatory approaches is inconsistent not only with TSCA's text, but with its effort to avoid unnecessary duplication of regulatory burden, and does not adequately support EPA's alleged choice in favor of dual regulation over a tailored approach under which TSCA should supplement but not supplant existing statutory schemes that are protective. EPA's "statutory gap" explanation is not a sufficient basis to forgo a complete analysis of its sister agencies' authority. EPA could apply this generic rationale about OSHA standards to every single risk management rule it releases, which is contrary to the intent, text, and structure of TSCA Section 9 and would improperly circumvent EPA's obligation to coordinate its regulatory activity with OSHA (and other agencies) pursuant to the statute. EPA does acknowledge that OSHA requires that employers provide a safe and healthful working environment by providing training, outreach, education, and assistance. EPA also acknowledges OSHA's asbestos standards⁶⁶ and notes that they apply to all occupational exposures to asbestos and require exposure monitoring. Likewise, EPA acknowledges that OSHA standards exist to mitigate risks in occupational settings. But EPA makes no serious attempt to determine which existing OSHA regulations may mitigate certain risks or why OSHA's (or other federal agencies') current authorities to address chemical risks cannot sufficiently mitigate the risks for the particular conditions of use to chrysotile asbestos.

Recognizing OSHA standards and regulations, EPA should analyze the significant role that OSHA plays in addressing these occupational exposures. A full analysis may show that TSCA authority can fill gaps in other contexts, such as addressing consumer settings (e.g., do-it-yourself workers) where CPSC does not have statutory authority and should utilize C&T to mitigate risk. EPA's view that a single statute should be used to mitigate all risks is contrary to the plain language of TSCA and should not be a substitute for a careful analysis of existing law and regulation. EPA incorrectly presumes, without supporting analysis, that because other statutes have differing balancing factors (e.g., OSHA requires consideration of technical and economic feasibility), these statutes cannot mitigate unreasonable risks to a "sufficient extent." EPA has provided no data or information to show that other statutes would not be able to mitigate unreasonable risk. This is simply an assumption,⁶⁷ and EPA has not given other agencies, in this case OSHA and CPSC, the opportunity to conduct a robust analysis.

Further, EPA does not explain how cost and practicability under TSCA risk management rules promulgated under Section 6 may differ significantly from considerations under other federal risk management approaches. As discussed above, TSCA also requires

⁶⁵ *Id.*

⁶⁶ These standards include General Industry (29 C.F.R. § 1910.1001); Shipyards (29 C.F.R. § 1915.1001); and Construction (29 C.F.R. § 1926.1101) standards.

⁶⁷ EPA states that changes to TSCA "reduce the likelihood" that other statutes would sufficiently reduce unreasonable risk. EPA has not adequately explained or justified this conclusion.

that, in selecting risk management requirements for conditions of use that present an unreasonable risk, EPA consider the economic consequences of the rule, including consideration of the costs and benefits of the regulatory action and the likely effect of the rule on the economy and technological innovation.

EPA should first conduct a robust analysis to support a determination as to whether it can use other statutory authorities to mitigate risk. EPA must explain why it cannot take action under its other statutory authorities to mitigate risks to workers and consumers (for example, why it cannot sufficiently reduce exposures during disposal under RCRA). As required by law, EPA should follow the Section 9(a) procedures and submit a report to OSHA and CPSC that describes the risk and the activities that present such risk. In addition, EPA should also conduct an analysis of the duplicative burdens that EPA would be imposing by requiring new obligations in areas already regulated by OSHA and CPSC.

B. EPA Does Not Describe Its Coordination with Other Federal Agencies under Section 9(d)

Section 9(d) of TSCA also requires that EPA affirmatively consult and coordinate with the Secretary of Health and Human Services (HHS) and the head of any other appropriate federal agency “for the purpose of achieving the maximum enforcement of this chapter while imposing the least burdens of duplicative requirements....”⁶⁸

EPA states in the proposed rule that it did consult with OSHA and NIOSH pursuant to Section 9(d). However, EPA does not provide any information in the proposed rule on how the consultation with these agencies addressed this statutory requirement. In fact, the proposed rule suggests that EPA *is* aware of duplicative requirements with OSHA but finds them acceptable because of the differences in EPA’s and OSHA’s regulatory approaches.⁶⁹

While the requirements and application of TSCA and OSHA regulatory analyses may differ, differences alone are an insufficient basis for EPA’s conclusion. Under TSCA, EPA must provide sufficient information to support its finding that the OSHA regulatory scheme cannot sufficiently reduce risk. Additionally, the proposed rule makes reference to existing OSHA standards that limit the compliance burden to employers. EPA must explain how, in instances of duplicative requirements, such as requiring an ECEL below an existing OSHA PEL, OSHA and EPA addressed this issue in its consultation, and whether reliance interests relating to the well-understood OSHA framework were adequately considered.⁷⁰

EPA also misstates the statutory standard by concluding that the use of TSCA to mitigate unreasonable risk for all conditions of use is “more coordinated, efficient, and effective.”⁷¹ If Congress had prioritized efficiency -- in particular, the potential efficiency benefits of using only one statutory scheme to regulate -- above all values, then Congress would not have included language throughout Section 9 of TSCA that requires harmonization

⁶⁸ 15 U.S.C. § 2608(d).

⁶⁹ 87 Fed. Reg. at 21,711.

⁷⁰ *Cf. Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913-15 (2020).

⁷¹ 87 Fed. Reg. at 21,733.

with other agencies (or other EPA programs) and imposes preconditions to EPA's using TSCA to regulate in areas subject to EPA and other agencies' jurisdiction under other statutes.⁷² Section 9(d) expressly requires consultation and coordination so that EPA would impose the "least burdens of duplicative requirements." Additionally, Section 2(b)(3) of TSCA requires that authority over chemicals "be exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation while fulfilling the primary purpose of this Act...," and TSCA Section 2(c) requires consideration of economic impacts. Thus, the lack of any tangible anti-duplication analysis is inconsistent with EPA's statutory obligations. EPA must explain how it complied with the requirements of Section 9(d) to consult with these agencies "for the purpose of achieving the maximum enforcement of TSCA while imposing the least burdens of duplicative requirements." It is also critical for EPA to coordinate with OSHA and other relevant agencies in addressing chemical risks as EPA struggles to meet its statutory deadlines under TSCA Section 6. Enhanced coordination and deference to agencies with more experience addressing particular risks will help EPA manage its limited resources.⁷³

VI. EPA Should Adopt a *De Minimis* Threshold

EPA requested comments on whether it should adopt a *de minimis* level in recognition that chrysotile asbestos is a naturally occurring fiber that may be unintentionally present.⁷⁴ We believe EPA should adopt a *de minimis* threshold of 1% for asbestos impurities. A 1% threshold would be consistent with definition of "asbestos-containing material" in TSCA Title II, EPA's own NESHAP for asbestos, and the OSHA asbestos standard. Importers are very unlikely to have any information about the presence of asbestos impurities below 1%.

* * *

We hope these comments can assist EPA in revising this proposed rule in a manner that will establish a sound, lawful, and durable precedent for future TSCA risk management rules. As EPA enacts rulemakings for these other chemicals, it should consider a holistic

⁷² A Conference Report from the time of TSCA's passage explains that Section 9 is intended "to assure that overlapping or duplicative regulation is avoided while attempting to provide for the greatest possible measure of protection to health and the environment." S. Rep. No. 94-1302 at 84. See also H. Rep. No. 114-176 at 28 (stating that the 2016 TSCA amendments "reinforce TSCA's original purpose of filling gaps in Federal law" and citing new language in Section 9(b)(2) intended "to focus the Administrator's exercise of discretion regarding which statute to apply and to encourage decisions that avoid confusion, complication, and duplication"). Congress also recognized that EPA should respect the experience of, and defer to, other agencies that have relevant responsibility such as OSHA in cases involving occupational safety: "Specifically, the Committee does not intend for the implementation of TSCA to conflict with or disregard Occupational Safety and Health Administration's hierarchy of controls." H. Rep. No. 114-176 at 28. This legislative history is further support for the conclusion that TSCA Section 9 authority must be used by EPA to tailor TSCA risk evaluations by coordinating with other agencies and other EPA programs.

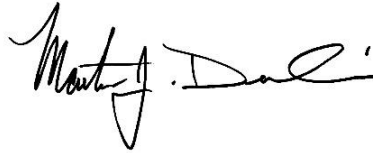
⁷³ See Testimony of Michal Ilana Freedhoff, Ph.D. Before the Committee on Energy and Commerce (October 27, 2021): https://www.epa.gov/system/files/documents/2021-11/epa-test.final_hearing-on-tsca.10.27.21.pdf ("The Office of Pollution Prevention and Toxics or OPPT has been—and remains—incredibly underfunded").

⁷⁴ 87 Fed. Reg. at 21,720.

approach to ensure that industry avoids rolling from one suboptimal and costly substitution to another. Otherwise, the rulemaking could result in the undesired and unintended outcome of imposing high cost and strain on industry in making equipment and other items integral to the everyday lives of a large numbers of individuals without resulting in much, if any, decrease in risk.

Thank you for considering our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Martin J. Durbin". The signature is fluid and cursive, with a large, stylized initial "M" and a distinct "J" and "D".

Martin J. Durbin
Senior Vice President, Policy
President, Global Energy Institute
U.S. Chamber of Commerce