



**Environmental Defense Fund Comments on
Significant New Use Rules on Certain Chemical Substances (21-1.5e)
Docket ID: EPA-HQ-OPPT-2020-0588¹**

Submitted July 12, 2021

Environmental Defense Fund (EDF) appreciates the opportunity to provide comments to the Environmental Protection Agency (EPA) on EPA's proposed rule covering 32 significant new use rules (SNURs), *see* 86 Fed. Reg. 31,239 (June 11, 2021), under the Toxic Substances Control Act (TSCA). Premanufacture notices (PMNs) on each of the chemical substances were submitted to and reviewed by EPA, and all of the substances are subject to final TSCA § 5(e) consent orders.

These comments focus on the inadequacy of the SNURs' provisions addressing workplace protections. Even though these comments are adverse, EDF supports EPA's promulgation of SNURs for all of the chemical substances.

The provisions in many of the proposed SNURs that address “protection in the workplace” are not consistent with the underlying consent orders, and unlike the consent orders, do not accurately and sufficiently invoke the Industrial Hygiene Hierarchy of Controls.

The proposed SNURs' provisions addressing “protection in the workplace” do refer in broad terms to the use of engineering or administrative control measures, which represent the highest tier (i.e., most preferred approaches) in the Industrial Hygiene Hierarchy of Controls (HOC) for addressing workplace exposures to chemicals. The HOC is a basic tenet of industrial hygiene,² as well as a longstanding foundational element of the Occupational Safety and Health

¹ Available at <https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0588-0001>.

² *See* Occupational Safety & Health Admin., *Informational Booklet on Industrial Hygiene* (1998), <https://www.osha.gov/Publications/OSHA3143/OSHA3143.htm#How do>.

Administration's (OSHA) workplace safety policy³ and of the National Institute for Occupational Safety and Health's (NIOSH) workplace safety guidance.⁴

However, with respect to these provisions in many of the SNURs, our review has identified inconsistencies between:

- the text of the proposed SNURs and the corresponding requirements in the consent orders; and
- the descriptions in the preamble to the proposed SNURs of the requirements of the consent orders and the actual requirements in the consent orders.

A. The text of the final SNURs needs to clearly incorporate the consent orders' language describing the role of engineering and administrative control measures in controlling workplace exposures.

Those consent orders that accurately reflect the preferred role assigned in the HOC to engineering and administrative control measures generally use this or very similar language relating to respiratory protection, and comparable language relating to dermal protection:

Engineering control measures (e.g. enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g. workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible, to each person who is reasonably likely to be exposed by inhalation in the work area to the PMN substance in the form listed in subparagraph (a)(5) of this section. Where engineering, work practice, and administrative controls are not feasible or, if feasible, do not prevent exposure, each person subject to this exposure must be provided with and is required to wear, at a minimum, a National Institute for Occupational Safety and Health ("NIOSH")-certified respirator with an Assigned Protection Factor ("APF") of 50, from the respirators listed in subparagraph (a)(6) of this section, and the respirator is used in accordance with OSHA and NIOSH respiratory protection requirements at 29 C.F.R. § 1910.134 and 42 C.F.R. Part 84. All respirators must be issued, used, and maintained according to an appropriate respiratory protection program under the OSHA requirements in 29 C.F.R. § 1910.134.⁵

³ See CHEMICAL HAZARDS AND TOXIC SUBSTANCES, CONTROLLING EXPOSURES, <https://www.osha.gov/SLTC/hazardoustoxicsubstances/control.html> (last visited Sept. 14, 2018).

⁴ See WORKPLACE SAFETY AND HEALTH TOPICS, HIERARCHY OF CONTROLS, <https://www.cdc.gov/niosh/topics/hierarchy/> (last visited Sept. 14, 2018).

⁵ Consent Order for (PMN) P-18-0323 Sanitized at 8-9, https://downloads.regulations.gov/EPA-HQ-OPPT-2020-0588-0034/attachment_1.pdf.

This language makes clear that engineering and administrative control measures are options of first resort, to be followed by use of personal protective equipment (PPE) only where the former approaches are not feasible or sufficient to prevent exposure.

In contrast, the text of the final SNURs does not make this preference clear and is confusing and ambiguous. For example:

Protection in the workplace. Requirements as specified in § 721.63(a)(1), (a)(2)(i) through (iii), (a)(3) through (6), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1) and (a)(4), engineering control measures (e.g., enclosure or confinement of the operation, general and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.⁶

86 Fed. Reg. at 31257 (to be codified at 40 C.F.R. § 721.11587(a)(2)(i)). What precisely is being required with respect to the use of engineering and administrative control measures through this provision and the analogous provisions in other proposed SNURs is not clear, and certainly does not mirror the far more straightforward language in the consent orders that clearly indicates the preference for engineering and administrative control measures over the use of PPE. Among other concerns, the language appears to require consideration of engineering controls *only* when determining which persons are reasonably likely to be exposed to the chemical.

We recognize that EPA's proposed SNUR provisions seek to rely on references to EPA's existing general SNUR regulations at 40 C.F.R. pt. 721, subpart B, along with the clause regarding engineering and administrative control measures. The result is simply too convoluted, however. It entirely fails to communicate the preference given to engineering and administrative control measures that is clear in the consent orders.

We note that, in 2016, EPA proposed updates to its SNUR regulations "to align these regulations with revisions to the Occupational Safety and Health Administration's (OSHA) Hazard Communications Standard (HCS)." 81 Fed. Reg. 49598 (Jul. 28, 2016). EDF filed comments supporting the changes, most notably EPA's proposal to incorporate the HOC into its

⁶ Identical or nearly identical language appears in the proposed SNURs at §§ 721.11571, 721.11572, 721.11573, 721.11574, 721.11579, 721.11580, 721.11581, 721.11583, 721.11585, 721.11587, 721.11588, 721.11589, 721.11591, 721.11592, 721.11593, 721.11599, and 721.11601. EDF's comments apply to each of these proposed SNURs.

regulation.⁷ We reiterate and incorporate herein these comments by reference. OSHA also strongly supported EPA's proposal.⁸ The language EPA proposed to add to its SNUR regulations closely mirrors the language used in the consent orders underlying the current proposed SNURs, cited above. *Compare* 81 Fed. Reg. at 49608 (which was proposed to be codified at 40 C.F.R. § 721.63(a)(1) and (4)), *with* P-18-0323 Consent Order (Sanitized) at 8-9, https://downloads.regulations.gov/EPA-HQ-OPPT-2020-0588-0034/attachment_1.pdf.

Unfortunately, EPA has not finalized the proposed modifications to its SNUR regulations, precluding EPA from using a straightforward cross-reference to those regulations to incorporate the HOC requirement into individual SNURs. Rather than use convoluted, incomplete and ambiguous language, as it is now proposing, EPA should directly incorporate into each SNUR the language from the corresponding consent order.

Absent this correction, the proposed SNURs do not meet the requirements of TSCA and EPA's own regulations that require SNURs to faithfully mirror the requirements in the corresponding consent orders. 15 U.S.C. § 2604(f)(4).

EPA recently published its Spring 2021 Regulatory Agenda that resurrects the 2016 proposal and indicates a date of February 2022 for finalizing it.⁹ This is a welcome development and we urge EPA to follow through on this action.

B. The preamble's descriptions of the workplace requirements in many consent orders are inaccurate because they do not include or accurately describe the requirements for use of engineering control measures.

The preamble includes descriptions of requirements in the underlying consent orders. *See, e.g.*, 86 Fed. Reg. at 31240 (description for P-16-0167). Where these descriptions address workplace protections, however, the descriptions fail to include any mention at all of the requirements in the consent orders to consider and implement engineering control measures to prevent exposure wherever feasible. Instead, the preamble descriptions refer only to the consent orders'

⁷ *See* EDF Comments on Significant New Uses of Chemical Substances: Updates to the Hazard Communication Program and Regulatory Framework, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0052>.

⁸ *See* OSHA Comments on Significant New Uses of Chemical Substances: Updates to the Hazard Communication Program and Regulatory Framework, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0041>.

⁹ *See* <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=2070-AJ94>.

requirements regarding use of PPE.¹⁰ EPA needs to include in its preamble an accurate description of each consent order's requirements pertaining to engineering control measures.

C. EPA should add provisions addressing “protection in the workplace” for 13 of the proposed SNURs that do not include any such provision.

The SNURs proposed for 13 other PMNs in this batch do not include any specific provisions to incorporate requirements in EPA's “protection in the workplace” regulations codified at 40 C.F.R. § 721.63. These include the proposed SNURs for the following PMNs (listed along with some of the concerns relevant to workers):

- P-17-235 and P-18-226: surfactant effects on the lungs, irritation and possible corrosion to the eyes, skin, and respiratory tract
- P-17-259: skin sensitization and systemic effects (liver, blood, and spleen)
- P-18-43: systemic toxicity
- P-18-256: skin and eye irritation, systemic toxicity, developmental toxicity
- P-18-298: skin and eye irritation, dermal and respiratory sensitization, lung effects, reproductive toxicity and systemic effects
- P-18-318: irritation to the eyes, skin, and respiratory tract, liver effects lung effects
- P-18-405: skin and lung sensitization, carcinogenicity, developmental toxicity, male reproductive toxicity, liver, and kidney toxicity, genotoxicity
- P-19-77: skin irritation, eye irritation, reproductive toxicity, systemic toxicity, respiratory tract irritation
- P-19-131: irritation to the eyes and skin, systemic effects, lung effects, and developmental effects
- P-19-143 and P-19-144: lung effects, dermal and respiratory sensitization, skin and eye irritation, systemic, reproductive, and developmental effects
- P-19-145: neurological, systemic, and reproductive/developmental effects
- P-20-29: skin and eye irritation, dermal sensitization, systemic toxicity, neurotoxicity, respiratory sensitization, respiratory effects
- P-20-104: lung effects (surfactancy), irritation to the skin, eyes, and respiratory tract, systemic effects (i.e., neurotoxicity and cardiotoxicity)

Omission of any workplace controls is deeply concerning given that these chemicals pose concerns directly relevant to workers. We fail to understand why and how EPA concluded that no specific workplace dermal or inhalation exposure requirements should apply to any of these

¹⁰ These comments apply to the descriptions of the consent orders for the following PMNs: P-16-167, P-16-419/423/424, P-18-178/217/218, P-18-283, P-18-310, P-18-323, P-18-327, P-18-347, P-19-36, P-19-52, P-19-53, and P-19-153 .

substances.¹¹ It is not clear from the proposed SNURs, consent orders or other documents on these chemicals available in the docket why EPA has not included specific workplace exposure provisions in the proposed SNURs or on what basis it concluded that the controls identified in footnote 11 will be sufficient to eliminate risks to workers. EPA needs to explain the basis for these decisions.

While the consent orders are final (although subject to modification), we urge EPA to add to each of these SNURs more specific language addressing worker exposure prevention, including the need to incorporate engineering controls to reduce the potential for dermal or inhalation exposure where the proposed SNUR does not already do so, consistent with the HOC. At the very least, EPA needs to provide more explanation and justification for any decision not to do so.

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EDF appreciates the opportunity to provide comments and EPA's consideration of them.

¹¹ It should be noted that for some of the chemicals discussed in this section of our comments, EPA has included in the SNURs other types of triggers for notification, such as: manufacturing or processing the chemical substance in a manner that results in inhalation exposures. Although EDF supports inclusion of these notification triggers, EPA must also require notification for any manufacturing or processing without *specific* workplace exposure controls unless EPA can determine and publicly justify why those exposure controls are not necessary to ameliorate the risks to workers.