COMMENTS ON EPA'S PROPOSED METHYLENE CHLORIDE REGULATION UNDER THE TOXIC SUBSTANCES CONTROL ACT

Docket ID: EPA-HQ-OPPT-2020-0465
Document ID: EPA-HQ-OPPT-2020-0465-0022

June 30, 2023

These comments are submitted jointly by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), North America's Building Trades Unions (NABTU), the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and the United Steelworkers (USW). The AFL-CIO is the federation of 60 national and international labor unions representing 12.5 million working people across a wide variety of industries. NABTU is a labor organization representing more than 3 million skilled craft professionals in the United States and Canada and is composed of fourteen national and international unions and over 330 provincial, state and local building and construction trades councils. The UAW represents more than 1 million active and retired members in North America, with members in virtually every sector of the economy, including multinational corporations engaged in manufacturing, small manufacturers, state and local governments, colleges, universities, hospitals and private non-profit organizations. The USW is North America's largest industrial union, representing 1.2 million members and retirees in many industries throughout the United States, Canada and the Caribbean.

These comments focus on EPA's approach to risk management of *occupational* exposures to methylene chloride. After decades investigating health and safety conditions in workplaces, hands-on involvement with the development and implementation of OSHA regulation of workplace exposures to toxicants and collective bargaining on behalf of our members, we have critical information and experience that other stakeholders lack about occupational health issues. We therefore are in a unique position to provide EPA with an understanding of chemical hazards such as methylene chloride in this country's workplaces and to help EPA align its methylene chloride risk management rules with OSHA policy so the two complement each other. Our comments focus on those issues.[1]

We commend EPA for its proposal to protect all workers from the unreasonable risks methylene chloride poses, even below the current OSHA permissible exposure limit (PEL) of 25 ppm. We fully support a ban on all consumer uses of methylene chloride. We also fully support a ban on most commercial uses of methylene chloride, namely for the conditions of use EPA identifies in its proposal, including many degreasing, removal, cleaning and other prohibited uses as an agent in many occupational settings.[2] This includes our full support of a ban on all uses of methylene chloride in construction

[1] Our expertise lies in practical and policy issues affecting **occupational** exposure to chemicals. We defer to the expertise of other groups in preventing unreasonable risk to the environment and other affected populations, such as the fenceline communities where many of our members and other workers reside.
[2] 88 FR 28317.

settings, including all uses and products. In these regards, we are pleased with EPA's decision to abandon any plan to implement a training and certification program as an alternative to banning the commercial use of methylene chloride in paint and coating removal products.

In those commercial settings in which methylene chloride will continue to be permitted, we strongly support EPA's proposal to require the entities responsible for those workplaces to implement workplace chemical protection programs (WCPPs) and EPA's efforts to align those programs with existing OSHA requirements, albeit at the lower exposure levels known to pose unreasonable risks to workers. To that end, we generally agree with EPA's proposal to stratify worker protection requirements in those conditions of use where methylene chloride's use will still be permitted, imposing fewer requirements when exposures are known to be below an action level, requiring continued monitoring when exposures are between the action level and the existing chemical exposure limit (ECEL) and, when exposures exceed the ECEL, requiring strict adherence to the hierarchy of controls, combined with other ancillary requirements, such as regulated areas. This stratified approach to regulation will impose appropriate controls, based on the particulars of each workplace, yet should ultimately encourage owners/operators to shift away from using methylene chloride and to substitute safer chemicals and processes. We also agree that where no evidence exists that owners/operators can meet an ECEL of 2 ppm without relying on respirators, EPA should prohibit the use of methylene chloride. Under no circumstances should EPA accept the mistaken premise that reliance on respirators is an effective means to "eliminate unreasonable risk," as TSCA requires.

Our comments proceed in three parts. First, we describe relevant OSHA practices and legal interpretations of the Occupational Safety & Health Act of 1970 (OSH Act),[3] pointing out approaches we believe EPA should adopt in developing its methylene chloride risk management rule, as well as areas in which EPA has responsibility to act where OSHA's current regulations fall short. Second, we describe the criteria we believe EPA should use to determine when to prohibit methylene chloride for a specific condition of use and when to permit its continued use, under regulated conditions. Third, we offer detailed comments on EPA's proposed risk management rule, section-by-section.

At the outset, however, we stress that EPA's approach to worker participation is inadequate, because EPA has not recognized the important role that unions, workers, and other employee representatives play in helping workers navigate safety and health compliance and providing technical expertise on occupational exposures. EPA might have avoided this omission if it had reached out to unions in developing this area of its proposed risk management approach for methylene chloride. Instead, EPA has emphasized its outreach to academics, industry, state and local officials, and NGOs, but not workers or their representatives.[4] While OSHA recognizes the important role that unions play in protecting worker safety and health, and its standards routinely provide unions with access to information about toxic exposures, EPA's proposal ignores these

[3] 29 U.S.C. §§ 651 *et seq*.
[4] 88 FR 28286, 28293.

aspects of OSHA policy. EPA's proposal fails to guarantee workers and their representatives meaningful participation in developing and implementing the workplace chemical protection program (WCPP) or in the exposure control plan. This proposed risk management rule also does not make clear worker representatives' rights to access to information about exposures, as required by OSHA's access standard.[5] EPA's overall failure to identify workers and their collective bargaining representatives as stakeholders is particularly surprising, since unions actively participated in the proceedings to identify the risks to workers from methylene chloride, and the United Steelworkers joined the petition for review filed in the 9th Circuit seeking to correct EPA's misinterpretation of OSHA requirements and industrial hygiene practices.

Worker participation, and the participation of their representatives, without fear of retaliation or discrimination, is critical for effective implementation of workplace safety and health rules. Throughout these comments, we have identified areas where meaningful worker and union involvement should be better aligned with OSHA's framework on the rights, access and participation of workers and their representatives.

I. The Limits of OSHA Methylene Chloride Regulation

EPA does not write on a clean slate when evaluating methylene chloride's occupational risks. OSHA and the National Institute for Occupational Safety and Health (NIOSH) have a fifty-year history of evaluating workplace exposures under the OSH Act. While we welcome EPA's efforts to align its risk management proposal with OSHA's methylene chloride standard,[6] we note that EPA's efforts leave significant gaps and are, in part, based on several misunderstandings of OSHA requirements. It is therefore important for EPA to understand what OSHA standards do, and do not, require.

OSHA first regulated methylene chloride in 1971, when it adopted a permissible exposure limit (PEL) of 500 parts per million (ppm) averaged over an eight-hour workday, to protect workers from the chemical's acute neurological effects.[7] When evidence that methylene chloride causes cancer emerged in the 1980s, several unions—including the UAW and USW—petitioned OSHA to further regulate the chemical.[8]

In 1997, after extensive rulemaking proceedings, OSHA lowered the methylene chloride PEL from 500 to 25 ppm averaged over an eight-hour workday and adopted other worker protections (the "ancillary provisions") under Section 6(b)(5) of the OSH Act.[9] In promulgating its final methylene chloride rule, OSHA conceded that its PEL was not fully health protective, and that even at 25 ppm, employees would remain exposed to

[5] 29 CFR 1910.1020.
[6] 29 CFR 1910.1052.
[7] *See* Occupational Exposure to Methylene Chloride. 62 Fed. Reg. 1494, 1496 (Jan. 10, 1997).
[8] *Id.* at 1497.
[9] *See* 29 C.F.R. § 1910.1052(c)(1); 29 USC 655(b)(b).

"clearly significant" and "unacceptably high" cancer risks. OSHA recognized that methylene chloride also caused non-cancer hepatic risks but did not quantify that effect.[10]

OSHA nonetheless set the PEL at 25 ppm because of a statutory limit on its rulemaking authority: OSHA may only regulate to the limits of feasibility, even if such regulation would leave employees exposed to significant risks. Having determined that the affected industry could not feasibly reduce exposures to lower levels in 1997, OSHA set the PEL at 25 ppm. TSCA, on the other hand, requires EPA to eliminate "unreasonable risks" and does not limit EPA's regulatory authority to only feasible control technologies. Besides, industries' technological capabilities have likely advanced over the past 25 years since OSHA issued its methylene chloride standard and exposure limits which may not have been feasible in 1997 may be feasible today.

Understanding this distinction is critical as EPA proceeds in evaluating toxicants, like methylene chloride, for which OSHA has established standards. Because EPA is required to eliminate unreasonable risks, and because it has the authority to ban a chemical's use to accomplish this goal, EPA must protect workers from chemical risks in ways that OSHA cannot. We applaud EPA's efforts to go beyond what OSHA can accomplish and to provide additional, necessary health protections to workers.

In fact, there are a number of ways in which OSHA's standards fail to adequately protect against exposure to methylene chloride. First, it is important for EPA to recognize that while OSHA standards require employers to implement measures to control exposures to a PEL, employers are under no statutory duty to reduce exposures below the PEL. Under OSHA's methylene chloride standard, if employee exposures to methylene chloride exceed 25 ppm, OSHA requires an employer to control exposures "to or below the PELs," and to do so using engineering and work practice controls alone wherever feasible.[11] Where engineering controls cannot reduce exposures to the PEL in some operations, some of the time, the OSHA standard permits limited use of respirators to achieve the PEL.[12] But once the employer complies with the standard by controlling to the PEL, the Act does not require the employer to do anything more.[13] That is, OSHA's methylene chloride standard imposes no requirement to use respirators, or to take any other action, to reduce methylene chloride exposures below 25 ppm.[14]

OSHA's standard also fails to adequately protect workers from dermal exposure to methylene chloride. EPA has found that dermal exposure to methylene chloride poses unreasonable risks of central nervous system and liver effects for all occupational conditions of use in the absence of personal protective equipment (PPE). OSHA's

[10] 62 Fed. Reg. at 1562-63.
[11] 29 C.F.R. § 1910.1052(f)(1).
[12] *Id.* § 1910.1052(g); *see also* 62 Fed. Reg. at 1581 (requiring the use of respirators "only if occupational exposures [to methylene chloride] … are likely to exceed the … PEL").
[13] 29 U.S.C § 654(a)(2).
[14] *See* 62 Fed. Reg. at 1581; *see also Sec'y of Lab., U.S. Dep't of Lab. v. Seward Ship's Drydock, Inc*., 937 F.3d 1301, 1306, 1308 (9th Cir. 2019) (recognizing that respirators are not required below an OSHA PEL).

methylene chloride standard requires glove use only "[w]here needed" to protect employees from "skin or eye irritation"—not chronic liver and neural effects.[15]

Nor does OSHA's Hazard Communication Standard impose a duty on owners/operators to reduce exposures to methylene chloride below 25 ppm.[16] That standard requires chemical manufacturers to prepare safety data sheets (SDSs) advising of a chemical's hazards and recommended methods for hazard control. But OSHA has made clear that "*there is no requirement for employers to implement the recommended controls*" on an SDS (emphasis added).[17]

Likewise, the OSH Act's general duty clause is of little use in protecting workers from methylene chloride exposures below 25 ppm.[18] EPA has correctly identified many of the obstacles OSHA would face if it tried to rely on the general duty clause.[19] Other obstacles exist as well. For example, OSHA regulations provide that where a specific standard already applies, the general duty clause does not.[20] OSHA has advised its inspectors that "section 5(a)(1) shall not normally be used to impose a stricter requirement" than required by an OSHA PEL.[21] Second, to establish a general duty clause violation, OSHA must show that reducing exposures below 25 ppm is feasible, which—in promulgating its methylene chloride standard—it has already determined it is not.[22] These factors make it entirely unrealistic that OSHA could, or would, rely on the general duty clause to force exposure reductions below 25 ppm.

Moreover, an analysis of the few recent general duty clause citations OSHA has issued for chemical exposures reveals that none were simply for exposures above an occupational exposure limit, but instead, were issued only where exposures led to clinical health effects, most with symptoms of acute onset within a brief period of time after exposure, and not chronic conditions.[23] So, in practice, OSHA does not cite overexposure to chemicals using the general duty clause absent evidence of actual, and usually acute, harm, a practice that is not a preventative substitute for EPA risk management requirements.

These limitations on OSHA's standards and statutory authority mean that TSCA risk management rules are necessary to protect a population substantially larger than EPA has acknowledged. It is true, as EPA noted, that TSCA risk management rules are necessary to protect workers who are not covered by OSHA regulations, such as public sector workers in states without OSHA state plans, independent contractors, etc. But TSCA

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[15] 29 C.F.R. 1910.1052(h)(1).
[16] 29 C.F.R. §1910.1200.
[17] Hazard Communication, 77 Fed. Reg. 17,574, 17,693 (Mar. 26, 2012).
[18] 29 USC 654(a)(1).
[19] 88 FR 28288.
[20] See 29 U.S.C § 654(a)(1); 29 C.F.R. § 1910.5(f). See also, *Chewy, Inc v. Dep't of Labor,* No 19-0868 (11th Cir. 2023).
[21] OSHA Regulatory Directive, *Inspection Procedures for the Respiratory Protection Standard* at 5 (June 2014), https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-158.pdf.
[22] *National Realty v. OSHA,* 489 F.2d 1257 (D.C. Cir. 1973).
[23] AFL-CIO, *Death on the Job* at 141 (2023), available at https://aflcio.org/reports/death-job-toll-neglect-2023.

rules are also necessary to protect workers whose exposures to methylene chloride fall between 25 ppm—the lowest exposure level OSHA can currently enforce, yet one set over 25 years ago—and 2 ppm, the exposure level EPA has determined is necessary to protect workers from unreasonable risks.

While efforts by some owners/operators to further reduce exposures to methylene chloride beyond the reductions required by the OSHA standard are commendable, they are voluntary, not mandatory. Voluntary compliance efforts cannot be enforced; they can be dropped at any time. EPA has repeatedly noted that "it does not question public comments" indicating some employers have reduced methylene chloride exposures to levels below the OSHA PEL of 25 ppm, but that observation is meaningless from a regulatory perspective. EPA cannot meet the requirements of TSCA Section 6—to eliminate unreasonable risk—by pointing to unenforceable, voluntary efforts by some, but not all, employers.[24]

Besides, when employers voluntarily choose to reduce exposures below 25 ppm, many do so by insisting that workers wear respirators, rather than relying on engineering solutions to reduce exposures. Reliance on respirators to protect workers from chemical exposures is not an effective alternative to engineering or other controls. OSHA has consistently found respirators to be unreliable as protection against harmful chemicals, warning that respirators are "uncomfortable to wear, cumbersome to use, and interfere with communication in the workplace, which can often be critical to maintaining safety and health."[25,26,27] Courts have upheld OSHA's findings that respirators are "woefully inadequate" to protect workers due to "problems with adequate facial fit, increased heat stress, reduced vision, increased breathing resistance, speech limitation, limited mobility, and excess weight."[28]

Even if respirators are being used to reduce exposures below 25 ppm, EPA lacks any data to show that employers requiring respirator use comply with OSHA requirements for periodic fit testing, medical testing, and employee training.[29] Without these elements, reliance on respirators is substantially less protective than would otherwise be the case. Even where respirators are accompanied by adequate testing and training, EPA has previously acknowledged that "not all workers may be able to wear respirators," or to

[24] Information about employer best practices and voluntary efforts to protect workers from methylene chloride exposures below 25 ppm are nonetheless relevant to EPA's development of risk management rules in several ways. For example, such information can help identify current levels of exposure and the incremental technological and economic impact of EPA's proposal. They can also highlight effective exposure reduction strategies.

[25] 62 Fed. Reg. at 1583.

[26] *See* Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite, 51 Fed. Reg. 22,612, 22,693 (June 20, 1986) (describing the limits of respirator use).

[27] *See* Occupational Exposure to Respirable Silica, 81 Fed. Reg. 16,286, 16,293 (Mar. 25, 2016) (describing how OSHA health standards generally rely on the hierarchy of controls and limit respirator use).

[28] *See also Pub. Citizen Health Rsch. Grp. v. U.S. Dep't of Lab.*, 557 F.3d 165, 179 (3rd Cir. 2009) (discussing why respirators are strongly disfavored).

[29] 62 Fed. Reg. at 1607, 1582.

wear them safely and effectively.[30] In its proposed ban on methylene chloride's paint-stripping uses, EPA declined to rely on respirators precisely because workers with impaired lung function—such as those with asthma, emphysema, and chronic obstructive pulmonary disease— "may be physically unable to wear a respirator," and workers with facial hair "cannot wear tight-fitting respirators" that require a face-to-respirator seal.[31]

The challenges associated with respirator use are particularly acute for methylene chloride, which, unlike other solvents, cannot be captured with an organic vapor respirator cartridge. As a result, OSHA's methylene chloride standard only permits the use of supplied-air respirators, "a relatively expensive type of respiratory equipment, requiring the employer not only to purchase the respirators themselves but also to install an air compressor and associated ductwork or rent cylinders containing breathing air."[32] The added expense and difficulty of using supplied-air respirators makes it particularly unlikely that all owners/operators voluntarily provide this type of equipment in circumstances where OSHA does not require them.

Finally, a licensing and testing regime, such as the one previously proposed by employer associations, will not adequately protect workers. As NABTU explained in its comments responding to EPA's Advance Notice of Proposed Rulemaking: Methylene Chloride; Commercial Paint and Coating Removal Training, Certification and Limited Access Program, with one exception, such schemes have been used only to address legacy chemicals, such as lead and asbestos, exposures that cannot be banned or known in advance of construction activities. The exception is a very structured and extremely limited program for technicians handling refrigerants, chemicals for which there are presently no substitutes, but which EPA is requiring the industry to phase out. These training and certification programs have never been used to control ongoing uses of a chemical that can be controlled relying on the hierarchy of controls. Moreover, these programs are not only easily circumvented, but do nothing to address exposure to occupational non-users or to day-laborers, foreign-born workers, and others who are the most vulnerable when workplace safety depends on worker knowledge and initiative, rather than employer controls.[33]

II. Criteria EPA Should Rely Upon to Determine When to Prohibit a Methylene Chloride Use

The preamble to the proposed rule does not make clear exactly what criteria EPA is using to determine whether to ban certain uses of methylene chloride or to require owners/operators to implement workplace controls to meet an ECEL of 2 ppm. We propose the following framework as a means of effectively protecting workers from unreasonable risk.

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[30] *See* 82 Fed. Reg. at 7481.
[31] *ASARCO v. OSHA*, 746 F.2d 483, 496 n.27, 497 (9th Cir. 1984).
[32] Methylene chloride; Final Rule, 63 Fed. Reg. 50,712, 50,718 (Sept. 22, 1998); 29 C.F.R. § 1910.1052(g)(3)(i).
[33] *See* NABTU Comments, EPA Docket No. EPA-HQ-OPPT-2018-0844-0036.

First, EPA should adopt a risk management rule that eliminates the unreasonable risk workers face from methylene chloride. Where an existing chemical exposure limit, together with a short-term exposure limit (STEL) and action level, would do so, we believe EPA should adopt an ECEL that protects workers from the most sensitive health endpoint. TSCA requires nothing less. In this regard, we believe EPA has correctly selected non-cancer hepatic effects as the reference point for setting an ECEL that will eliminate unreasonable risk to workers.[34]

Second, in the case of methylene chloride, EPA must also determine, for each identified condition of use, that employers can feasibly control exposures to the ECEL, through principal reliance on engineering and work practice controls, and without relying on respirators. In making that determination, EPA should adopt the definition of feasibility, first articulated by the D.C. Circuit in *United Steelworkers v. Marshall,* 647 F.2d 1189 (DC Cir. 1980), and adopted by every other circuit to consider the issue, in the methylene chloride risk management rule. The D.C. Circuit wrote in *United Steelworkers* that feasibility under the OSH Act has two components: technological feasibility and economic feasibility.

Under TSCA, the standard for technological feasibility is the relevant yardstick. A standard is technologically feasible where OSHA can show

> "a reasonable possibility that the typical firm will be able to develop and install engineering and work practice controls that can meet the PEL in most of its operations. OSHA can do so by pointing to technology that is either already in use or has been conceived and is reasonably capable of experimental refinement and distribution within the standard's deadlines… Insufficient proof of technological feasibility for a few isolated operations within an industry, or even OSHA's concession that respirators will be necessary in a few such operations, will not undermine this general presumption in favor of feasibility. Rather, in such operations firms will remain responsible for installing engineering and work practice controls to the extent feasible, and for using them to reduce [chemical] exposure[s] as far as these controls can do so."[35]

By adopting this standard for determining whether methylene chloride exposures can be controlled "by installing engineering and work practice controls to the extent feasible," *id.,* EPA can ensure that employers must continually work to reduce exposures without regard to respirators to remain in compliance with the ECEL. Industrial hygiene policy and OSHA regulatory requirements conclusively demonstrate that routine reliance on respirators is not an effective means of protecting workers from toxicants. By proposing to ban methylene chloride's use where EPA lacks data that an ECEL of 2 ppm can be met through reliance on engineering and work practice controls, EPA has correctly recognized as much. Long-term reliance on supplied air respirators to control methylene chloride exposures can be even more problematic

[34] We remain concerned that EPA has not adequately explained why its PBPK cancer estimates predict cancer risks so much lower than OSHA's, based on the same underlying data. Nevertheless, since EPA is aiming to protect workers from non-cancer liver effects – a health endpoint more sensitive than either the OSHA or EPA cancer risk estimate – the inconsistency between the two agency's cancer risk estimates has no bearing on the selection of a health protective ECEL.

[35] *Id.*

than half-mask respirators because they can limit vision, movement, and communication and, therefore, create new safety hazards. They are also more expensive than half-mask or other respirators, imposing significant, recurring costs for owners/operators.

Third, when EPA lacks evidence that engineering and work practice controls can reduce exposures to 2 ppm, it should ban continued use of methylene chloride. Any course other than a ban on methylene chloride use in such circumstances would fail to meet EPA's statutory duty to eliminate unreasonable risk. Once EPA has determined that it will prohibit a methylene chloride use, it should mandate that the use be stopped as soon as feasible. Extended deadlines to comply with a regulatory phase out of a methylene chloride unnecessarily prolong exposure to unreasonable risks.

Finally, where EPA believes it is necessary to prohibit a use of methylene chloride, it should limit the critical use exemptions it authorizes under TSCA 6(g). Critical use exemptions should be narrow, and last only as long as necessary, for substitute processes to be developed or the critical nature of the use to end.

The framework we are proposing has a number of advantages. First, it satisfies TSCA's statutory command that EPA eliminate unreasonable risk by using the most effective tools—elimination or substitution, or where feasible, engineering controls and work practices. It is also consistent with both OSHA and NIOSH's long-standing preference for controlling exposures through the hierarchy of controls. Second, even in those instances where EPA permits a continued condition of use, this approach will incentivize industry to substitute other, safer chemicals, the preferred method of controlling occupational exposures. Industrial hygiene policy places elimination of, or substitution away from, toxic chemicals at the very top of the hierarchy of controls.[36] While OSHA's performance-oriented standards generally call on employers to control exposures through any combination of substitution, engineering and work practice controls, the cost of engineering and work practice controls often convinces employers to eliminate the use of a toxicant posing unreasonable risks. That is, engineering and work practice controls can involve costly capital investments, and in the case of methylene chloride, even reliance on supplied air respirators imposes significant initial and recurring costs. Any rational employer should prefer to substitute a safer alternative if one is available.

Accordingly, where EPA determines owners/operators can feasibly control exposures to 2 ppm, we support EPA's decision nonetheless to require them first to consider elimination or substitution in developing their exposure control plan, but where those options are unavailable, then to implement and maintain engineering and work practice controls to reduce exposures to the extent feasible. In the end, we believe this approach will ultimately lead to the development of safer alternatives.

But EPA must prohibit owners/operators from substituting equally or more toxic products that EPA has not yet regulated. It must offer technical assistance to owners/operators on safe substitutes, because many owners/operators, particularly small businesses, cannot reasonably be expected to weigh the relative toxicity of various chemicals that salespeople promote. Owners/operators, workers, and their representatives will need guidance to identify "safe"

[36] https://www.cdc.gov/niosh/topics/hierarchy/default.html.

substitutes. We believe EPA should identify the substitutes it views as "safe" or the chemical properties it views as preferred (or discouraged). This is particularly important in the case of methylene chloride because evidence suggests that when OSHA issued its standard in 1997, many employers substituted other equally hazardous chemicals for methylene chloride, creating new hazards for workers.[37,38,39] Substituting an unregulated chemical posing unreasonable risks for a regulated chemical posing unreasonable risks does not improve worker health and safety and should be forbidden.

Where a use would otherwise be prohibited, but EPA determines it is "critical," EPA should permit methylene chloride to be used for only so long as it will take to develop safer alternatives or processes—less than the 10 years it has proposed—to encourage the development of alternatives to methylene chloride for uses EPA now deems critical. This is particularly true when the owner/operator granted the use is either the federal government or working for the federal government, because the government can fund the research and development necessary to identify alternatives. Further, when a 6(g) exemption is about to expire, the burden should be on owners/operators to demonstrate that the use of methylene chloride remains critical and there remain no substitutes for methylene chloride. Because, even if workplace exposures to methylene chloride can be controlled to 2 ppm, its continued use ensures downstream exposures will continue and they should be avoided to the extent possible.

III. Comments on Specific Provisions of the Proposal

Definition of Owner/Operator – We agree with EPA that it should broadly define those entities required to comply with the methylene chloride risk management rule. The OSH Act is an employment law, and its application is tied to the employer/employee relationship. TSCA is not. There is no statutory reason to limit the application of this rule to employers with employees. Furthermore, OSHA itself has recognized that it is often necessary to hold one employer responsible for the exposures of another employer's employees.[40] While long true in the construction industry, where employees of different employers work side by side, it is increasingly the case across many industries.

Definition of potentially exposed person – We agree that the methylene chloride risk management rule should apply to all potentially exposed people at the workplace. As mentioned above, TSCA is not an employment law, and there is no basis for EPA to tie exposure protections to employment status. With businesses' increased reliance on contractors, gig workers, and independent contractors, EPA is correct that this rule must protect everyone who is occupationally exposed, regardless their employment status.

Likewise, EPA is correct in eliminating the distinction between directly exposed workers and occupational non-users (ONUs). This distinction—never before relied upon in assessing

[37] https://www.nytimes.com/2013/03/31/us/osha-emphasizes-safety-health-risks-fester.html.
[38] https://www.epa.gov/sites/default/files/2015-09/documents/nmpfaq.pdf.
[39] https://cen.acs.org/safety/consumer-safety/Replacing-methylene-chloride-paint-strippers/96/i24.
[40] *Multi-Employer Citation Policy,* OSHA Instruction CPL 2-0.124 (1999), *available at* https://www.osha.gov/enforcement/directives/cpl-02-00-124.

occupational risks—is flawed. Some ONUs, like service, cleaning and maintenance workers, may have very high exposures, while other ONUs' exposures may be very low. Grouping both together for purposes of risk evaluation masks important exposure differences. Besides, for purposes of regulation, not risk evaluation, all people who work in a facility and face the same exposures should have the same protections. We applaud EPA for recognizing this important point. [41]

Worker Chemical Protection Program – We agree with EPA that where methylene chloride is not banned, a stringent worker protection program—designed to complement the existing OSHA chemical regulation regime—is necessary to protect those who are potentially exposed throughout their working lifetime. We generally support EPA's efforts to closely align its WCPP with OSHA's existing methylene chloride standard in most respects. Owners/operators are familiar with OSHA's approach to regulating health hazards and it is consistent with long-standing and widely accepted principles of industrial hygiene practice. We support EPA's decision to adopt an ECEL, a STEL, and requirements for monitoring, regulated areas, and recordkeeping. Below, we note that EPA omitted several important protections routinely included in OSHA health standards, which we believe are necessary to adequately protect workers from unreasonable risks, without any explanation as to why. We believe EPA should correct these omissions.

Section 751.109(b) is underinclusive. We agree that EPA should cross-reference those sections of OSHA's "Access to Employee Medical and Access Records,"[42] that provide employees with access to information and require employers to retain and disclose such information. We also agree that those provisions on access should benefit all "potentially exposed" people. However, the purpose of OSHA's Access Standard is to provide "employees and their **designated representatives"** access to information.[43] For purposes of access to exposure records or any analyses of exposure records, OSHA defines a "designated representative" as "a recognized or certified collective bargaining agency" who "shall be treated automatically as a designated representative."[44] A recognized or certified collective bargaining representative is, under Federal labor law, the representative of workers and must be provided with access to information about exposure. Workers not represented by unions should also be permitted to designate a representative to have access to exposure information. Often, unions are the organizations with expertise to analyze exposure information, and they routinely bargain for improved working conditions. EPA should ensure that owners/operators grant unions access to exposure information consistent with the Access Standard.

ECEL and STEL – We agree that EPA should adopt an ECEL that protects workers against the most sensitive health endpoint even if they have exposure to the chemical for their working lifetime.[45] We also agree that EPA should establish an action level at one-half the ECEL, which triggers certain compliance duties. This serves to further ensure compliance with the ECEL.

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[41] 88 FR 28292.
[42] 29 CFR 1910.1020.
[43] *Id*. at (a).
[44] *Id.* at (c)(3).
[45] 88 FR 28290.

Finally, a STEL is necessary to protect workers from acute effects of high exposures, since too many workers have died from methylene chloride exposures even with the OSHA standard.

We commend EPA for selecting non-cancer liver effects as the health endpoint of concern—because it is the most sensitive health end point for which EPA has data of harm—and seeking to protect workers from this unreasonable risk to their health

Exposure Monitoring – We applaud EPA for proposing to mirror the monitoring requirements in OSHA's methylene chloride standard. Unfortunately, EPA omitted two important elements of the OSHA monitoring program from its proposal. First, OSHA requires exposure monitoring to be conducted without regard to respirator use.[46] EPA omitted this definition from its WCPP. In light of the confusion over the role PPE use should play in EPA's decision about chemical risks and their control, it is imperative that EPA spell out that exposure be measured without taking respirators into account for reasons already covered.

Second, OSHA health standards, including the methylene chloride standard, routinely require that employees or their designated representatives be provided the opportunity to observe the monitoring.[47] This is an important check to ensure that owners/operators are correctly monitoring employee exposure and that the monitoring they conduct is representative of employee exposures. EPA should add this requirement to the final methylene chloride risk management rule.

We agree with EPA that initial monitoring should be conducted frequently; however, the few owners/operators continuing to use methylene chloride should be required to conduct this monitoring at least once every one to two years. This ensures that monitoring results continue to be representative of actual exposures. Exposure may change over time. Results taken in one year may not reflect exposures years later. More frequent initial monitoring than OSHA requires will ensure that workers continue to receive the protections they need from methylene chloride exposures.

OSHA's methylene chloride standard imposes certain requirements for documenting what exposure measurements represent and how exposure monitoring was conducted.[48] EPA should include similar requirements in the risk management rule.

Methods of Compliance – We applaud EPA for adopting the hierarchy of controls as mandatory in its proposed methylene chloride risk management rule. Insisting that owners/operators implement all engineering and work practice controls before resorting to respirator use is fully consistent with established industrial hygiene policy and OSHA's regulatory approach.

Exposure Control Plan – We agree with EPA that employers must develop and document the basis for its selection of controls, including its evaluation of whether substitutes for methylene chloride are available. The documentation and analysis of each step required

[46] 29 CFR 1910.152(b) (definition of employee exposure).
[47] 29 CFR 1910.1052(d)(6).
[48] 29 CFR 1910.1052.

in the exposure control plan is an important part of the analysis on the methods to control methylene chloride exposures.

We agree with EPA that, when possible, elimination or substitution of other chemicals for methylene chloride is the preferred approach to exposure control. We also agree with EPA that employers must avoid substituting a chemical which is equally or more toxic than methylene chloride. We think the language of the WCPP is not strong enough to ensure that owners/operators substitute less *toxic* chemicals for methylene chloride, rather than just substituting less *regulated* chemicals. If EPA is to prefer substitution, it should ensure that it does not inadvertently encourage "regrettable substitution." One way to do so would be to prohibit owners/operators from substituting another chemical EPA has found to pose unreasonable risks.

Missing from the proposed risk management rule is a requirement that owners/operators consult with potentially exposed persons and their representatives before selecting the controls to be implemented. Workers and their representatives are important participants in any control strategy. They work with the product and know the vulnerabilities in any control strategy and, often, the most effective methods to remedy them. The participation of workers, and their representatives, in the development of the exposure control plan should be mandatory.

Finally, EPA must ensure that potentially exposed persons and their designated representative (as defined by OSHA at 29 CFR 1910.1020) have access to the exposure control plan within a specified time when requested. It is not enough for EPA to require owners/operators to document their procedures for providing access to the exposure control plan. EPA must mandate minimum procedures to ensure workers and their representative can review the plan. Absent such access, workers and their representatives cannot know whether the plan meets EPA's requirements or monitor whether it is being implemented consistent with the law.

EPA omitted several important subjects from the exposure control plan. Most importantly, the exposure control plan should include documented procedures for ensuring that all potentially exposed persons are adequately trained in the hazards of methylene chloride, the requirements of EPA's risk management rule, and the owner/operators exposure control plan. All potentially exposed workers should be trained to know the protections in place to protect them. Training is essential to effective exposure control.

Similarly, OSHA's methylene chloride standard mandates that employers have procedures in place to clean up leaks and spills when they occur.[49] EPA should ensure that owners/operators also have such procedures. OSHA's standard includes requirements for protective clothing and hygiene facilities when employees may come into contact with methylene chloride.[50] EPA should mandate similar precautions, particularly since EPA has found that dermal exposure to methylene chloride may pose unreasonable risks.

[49] 29 CFR 1910.1052(f)(3).
[50] 29 CFR 1910.1052(h) and (i).

Recordkeeping – The proposed retention period is too short. The retention period should continue for five years from the date the owner/operator ceases to use methylene chloride. Records about the development of the exposure control plan and its implementation (such as monitoring results before and after) remain relevant while methylene chloride continues to be used. They do not cease to be relevant after five years if methylene chloride is still being used and workers continue to be exposed. Additionally, record retention should be much longer than the required frequency for exposure monitoring, so that comparisons can be made over time.

EPA asked for comment on a "de minimis" level of methylene chloride exposure below which its prohibitions would not apply. EPA should consider that instead, OSHA sometimes provides in its standards and enforcement letters of interpretation that employers would not have to monitor if they provide objective data that is representative of worker exposures, showing that exposures will not exceed a limit. EPA should consult with OSHA on appropriate scenarios where objective data has been permitted. In its 2016 silica standard, OSHA defined objective data as:

> "information, such as air monitoring data from industry-wide surveys or calculations based on the composition of a substance, demonstrating employee exposure to respirable crystalline silica associated with a particular product or material or a specific process, task, or activity. The data must reflect workplace conditions closely resembling or with a higher exposure potential than the processes, types of material, control methods, work practices, and environmental conditions in the employer's current operations."[51]

In a 2006 letter of interpretation on hexavalent chromium sampling, OSHA states clearly:[52]

- Where objective data are used to satisfy the exposure determination requirement, the employer must establish and maintain an accurate record of all the information it relied on. This record must include: the specific chromium-containing material in question; the source of the objective data; the testing protocol and results of testing or analysis of the material that releases chromium (VI); a description of the process, operation, or activity involved and how the data support the determination; and any other data relevant to the process, operation, activity, material, or employee exposures (71 *FR* 10370).

- Since objective data may be used to exempt the employer from provisions of the standard or provide a basis for selection of respirators, it is critical that this determination be carefully documented. Reliance on objective data is intended to provide the same degree of assurance that employee exposures have been correctly characterized as air monitoring would have. Records must demonstrate a

[51] 29 CFR 1910.1053.

[52] https://www.osha.gov/laws-regs/standardinterpretations/2006-11-14-0.

reasonable basis for the underlying exposure determination (71 *FR* 10370).

- OSHA's term "closely resemble" that appears in this standard's definition for both "objective data" and "historical monitoring data" (note that historical data may be used as objective data) in the standard's paragraph (b) has been defined in other standards as circumstances where the major workplace conditions which have contributed to the levels of historic exposure are no more protective than in the current workplace. OSHA's intent is to allow data reflecting past exposures to be used to predict current exposures only when the conditions of the earlier job were not more protective… (reference 59 *FR* 40977, 29 CFR Parts 1910, et al., *Occupational Exposure to Asbestos; Final Rule*, August 10, 1994).

- The burden is ultimately on the employer to show that the objective data comply with the requirements of the standard. OSHA's intent is to allow employers the greatest possible flexibility in selecting methods used to determine employee exposures to chromium (VI), so long as the methods used are accurate in characterizing employee exposures (71 *FR* 10342).

Conclusion

We applaud EPA for proposing to adopt much needed additional health protections for workers exposed to methylene chloride. OSHA’s standard, adopted more than 25 years ago, admittedly leaves workers exposed to significant and unreasonable health risks. Since its adoption, too many workers have been made ill or died from overexposure to methylene chloride. EPA should promptly adopt rules to prevent this continuing health threat.

We agree that methylene chloride should be banned for all consumer uses and for commercial uses where exposure cannot be feasibly controlled. We applaud EPA for proposing a risk management regime for those uses where methylene chloride will continue to be used, which follows the approach OSHA has relied upon for decades when regulating the control of toxic exposures. This avoids imposing duplicate or conflicting requirements on owner/operators and workers are familiar with the OSHA regulatory approach. We believe that with the additions we have proposed, EPA’s risk management rule will go a long way to eliminating the unreasonable risk exposure to methylene chloride poses to workers.