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Submitted via regulations.gov

Brooke Porter and Scott Drewes

Existing Chemicals Risk Management Division

Office of Chemical Safety and Pollution Prevention (7404M)

Environmental Protection Agency

1200 Pennsylvania Ave., NW

Washington, DC 20460-0001

Re: Decabromodiphenyl Ether and Phenol, Isopropylated Phosphate (3:1); Revision to the Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 82287 (November 24, 2023), Docket ID. No. EPA-HQ-OPPT-2023-0376

Dear Brooke Porter and Scott Drewes:

The American Chemistry Council (ACC) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) proposed revisions to the risk management rules for Decabromodiphenyl Ether (DecaBDE) and Phenol, Isopropylated Phosphate (3:1) (PIP (3:1)). Please find below comments regarding the risk management approach, in general, and specific aspects of the proposed revisions for each chemical's regulations.

- 1. EPA should provide flexibility to entities subject to these regulations so that exposures to DecaBDE and PIP (3:1) can be reduced in a manner that is achievable, feasible, workable and reasonable.**

The preamble to the proposed regulations includes lengthy discussion of the requirements of TSCA Section 6(h) where EPA states that it:

interprets "reduce exposures to the extent practicable" to consider such factors as "achievability, feasibility, workability and reasonableness," consistent with dictionary definitions. Thus, EPA noted that "[w]hether a regulatory option is achievable, feasible, workable, and reasonable inherently takes into consideration circumstances, such as the economic burden and complexities with an option, the utility of the chemical, and whether there are technically and economically feasible alternatives available for the chemical." [88 Fed. Reg. 82293]

The proposed regulations are highly prescriptive, particularly with respect to workplace protections, such as the use of personal protective equipment (PPE). The proposed regulations, however, do not recognize that there are likely other hazards that need to be assessed and controlled at specific sites. Overly focusing on one *potential* exposure can compromise attention to other known hazards. There may be trade-offs in safety as the result of requirements for uses of respirators and dermal protection that can result in new hazards such as limited vision,



impeded mobility, or added susceptibility heat stress that should be considered before requiring new, previously unused (and potentially unnecessary) PPE. The agency should defer to the expertise of onsite occupational safety and health professionals in identifying potential hazards and prescribing necessary exposure controls.

2. EPA should align its owner/operator definition to OSHA’s regulations.

The proposed DecaBDE/PIP (3:1) risk management rules are intended to supplement OSHA standards and EPA states:

the Agency considers it practicable to require worker protections in addition to applicable OSHA regulations...¹

and notes it:

did not use its TSCA section 6(a) authorities to directly regulate occupational exposures in the 2021 decaBDE or PIP (3:1) final rules²

partially because:

imposing such measures without sufficient analysis could inadvertently result in conflicting or confusing requirements and make it difficult for employers to understand their obligations.³

Unfortunately, EPA has proposed “conflicting or confusing requirements” by imposing the regulatory obligations on “owners and operators” rather than “employers” as is the case with the OSHA standards. EPA does not define “owner or operator” in the proposed regulations, but in other TSCA section 6 risk management regulations, EPA has proposed that:

Owner or operator means any person who owns, leases, operates, controls, or supervises a workplace covered by this part.⁴

ACC understands that the intent in defining “owner or operator” rather than “employer” is to ensure that workers that have not previously been covered under the Occupational Safety and Health Act (OSH Act), such as state and local government employees, are protected under TSCA. However, EPA’s proposed definition implies that the person or company overseeing the worksite is responsible for all aspects of managing the chemical in the workplace, including providing PPE, fit testing, training workers, conducting medical surveillance, and keeping any necessary records. These requirements directly conflict with OSHA compliance and enforcement policy, and present significant concerns for multi-employer workplaces or employers who have a mobile workforce. Under OSHA standards, employers are responsible for providing a workplace

¹ 88 Fed. Reg. 82293.

² *Ibid.*

³ *Ibid.*

⁴ *See, e.g.*, Trichloroethylene (TCE); Regulation Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 74712 (October 31, 2023).

free from serious recognized hazards and complying with standards, rules, and regulations issued under the OSH Act. “Employer” is defined as:

a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a States.⁵

This definition of employer necessarily recognizes that there are employers who have either a) mobile workforces that do not report to the same location on a regular basis, or b) multiple employers sharing a single worksite. In these situations, the employer still has a duty to their employees to provide PPE and the attendant fit testing and medical evaluation, the tools needed for their work, and appropriate safety training. EPA’s proposed definition of “owner or operator,” along with the list of requirements that the owner or operator would need to meet under the rules, conflicts with this understanding.

EPA proposes to require the owner or operator to, among other things:

- Provide respiratory protection,
- Provide dermal PPE,
- Provide OSHA-compliant PPE training to those employees required to use PPE, and
- Maintain workplace protection records for those employees required to use PPE.

Many of these requirements would traditionally fall to the individual *employers*, not the owner or operator of a worksite. For example:

Company A is a chemical manufacturing facility that uses PIP (3:1) in a fixed process to manufacture a formulated product in which it is contained. Company A is undergoing a planned maintenance shutdown. As part of this turnaround, Company A hires Contractor Z to conduct specialized work.

Under existing OSHA standards, Company A would be responsible for the overall hazard mitigation at its facility, including implementing any permanent engineering controls and correcting any hazards identified. It would also be responsible for training its own employees, setting up a medical evaluation or fit testing program for its employees, and providing needed PPE for its employees. Company A would also be responsible for setting out requirements with which Contractor Z would need to comply. For example, that employees of Contractor Z must not enter specific demarcated areas where there may be exposure to PIP (3:1), or that certain PPE is needed in the area.

⁵ 29 CFR § 1920.2(c).

However, Company A would *not* be responsible for actually providing PPE to Contractor Z's employees, nor setting up fit testing or medical evaluations for Contractor Z's employees, or for general safety training on hazard recognition or the correct use of PPE for Contractor Z's employees. Company A would need to train Contractor Z's employees on site-specific policies and procedures, or provide these documents to Contractor Z for training its own employees.

In a situation like this, with multiple employers on a single site, where each employer has responsibilities to their employees, OSHA has a defined Multi-Employer Citation Policy that is used to determine which employer(s) to cite when an OSHA standard is violated.⁶ This policy provides some idea of each employer's responsibility to its employees, as well as to hazard recognition and mitigation on the site more broadly. EPA's proposed requirement that the *owner or operator* conduct these activities, rather than the *employer*, directly contradicts decades of OSHA policy and puts these employers in a difficult position.

Certainly, if an employee of Company A notices that an employee of Contractor Z is not wearing his or her respirator properly, or is engaging in activities that could interfere with the respirator's protectiveness, Company A should alert Contractor Z – and if it does not, Company A could be cited by OSHA in addition to Contractor Z. However, it is Contractor Z's employee and therefore Contractor Z's responsibility to correct the behavior; and OSHA could cite Contractor Z if it chose not to correct its employee.

As a second example:

Company A contracts with Contractor Z to perform a specific task that uses PIP (3:1). In this situation, Contractor Z would be responsible for setting up the demarcated area and utilizing engineering controls to ensure that exposures are below the concentration limit, even though it is not the owner or operator of the workplace.

ACC's appreciates EPA's intent to cover additional workplaces with its definition of "owner or operator" however, for the reasons described above, this term is unnecessarily confusing to employers who have responsibilities to their employees under the OSH Act. ACC suggests that EPA strike the use of "owner or operator" and instead replace it with "employer," including a definition such as the one used by the Cambridge Dictionary:

A person, company or organization that employs people.⁷

This change would address EPA's concerns about workplaces using TSCA chemistries that are not currently covered by OSHA standards, while reducing any unnecessary confusion on the part of employers as to their responsibilities under OSHA and EPA requirements.

⁶ OSHA Multi-Employer Citation Policy. Directive CPL 02-00-124. December 10, 1999.

⁷ Employer, Cambridge Business English Dictionary (1st ed. 2011).

Alternatively, EPA could rephrase these requirements to state that owners or operators “shall ensure” that the requirement has been fulfilled. ACC has provided some examples of suggested changes as examples. Such changes could be made wherever the proposed regulations refer to owners and operators:

§751.405(e)(2)(iii) The owner or operator *shall ensure that all persons within the regulated area have been supplied with a respirator* that complies with the requirements of paragraph (e) of this section and must ensure that all persons within the regulated area are using the provided respirators whenever exposures to airborne concentrations of decaBDE can reasonably be expected.

§751.405(e)(5) The owner or operator *shall ensure that PPE training in accordance with 29 CFR 1910.132(f) is provided to all persons required to use PPE under this subsection. The training shall be provided prior to or at the time of initial assignment to a job involving potential exposure to decaBDE.*

§751.407(f)(3) The owner or operator *shall ensure that respiratory protection is provided to all potentially exposed persons in the regulated area as demarcated in accordance with paragraph (f)(2) of this section, and according to the provisions outlined in 29 CFR 1910.134(a) through (l) and as specified in this paragraph for potentially exposed persons to PIP (3:1) during expected time of use.*

EPA notes in several areas of the preamble of the proposed rules that OSHA regulations will be in force for those entities subject to the OSH Act, however, as we have described in this section, the terms “employer” and “owners or operators” are not equivalent. ACC expects these suggested changes will reduce unnecessary confusion by better aligning with the standard understanding of responsibilities of employers who oversee multi-employer worksites, while still addressing EPA’s concerns that all employees are adequately protected from exposure to decaBDE and PIP (3:1).

3. EPA should establish a *de minimis* threshold below which there is exemption from the regulations in 40 CFR § 751.

EPA requested comment on the practicability of an exclusion for TSCA Section 6(h) PBTs, such as DecaBDE and PIP (3:1), present at low levels as unintentional contaminant or in *de minimis* quantities [88 Fed. Reg. 82306]. EPA indicates that it did not include a *de minimis* threshold (except for recycled plastics) reasoning that:

where it is practicable to reduce exposures, the statute provides no such exceptions. EPA believes that there are any number of reasonable steps that can be taken to determine whether a product or article is compliant with the PBT regulations, such as contract specifications that describe the chemicals that may not be used, or a statement from the supplier that the articles furnished do not contain specific prohibited chemicals. [88 Fed. Reg. 82306].

ACC is of the opinion that a *de minimis* threshold of regulation is consistent with TSCA’s requirement to reduce exposure “to the extent practicable”; that is, it incorporates achievability,

feasibility, workability, and reasonableness. Without a *de minimis* threshold, regulated entities would not know whether they are in compliance with EPA's rules because detection levels of chemicals are constantly being reduced. Therefore, certainty regarding the lack of presence of the substance is *unachievable*, and it is *infeasible* for those entities to know whether they remain in compliance. The example in the preamble of "a statement from the supplier that the articles furnished do not contain specific prohibited chemicals" is not feasible because it cannot be made with certainty given constantly increasing sensitivity of detection methods. It is unworkable and unreasonable for regulated entities to potentially have to continually test materials for the presence of trace levels of a material that has no appreciable risk associated with it.

4. EPA should align its proposed definition of *regulated area* with OSHA's definition.

EPA proposes to amend the regulations to include a definition of *regulated area* to mean "an area established by the regulated entity to demarcate areas where airborne concentrations or direct dermal contact of a specific chemical substance can reasonably be expected."

In contrast, OSHA regulations for Toxic and Hazardous Substances (29 CFR § 1910 Subpart Z) generally use the term *regulated area* to demarcate areas where airborne concentrations exceed an occupational exposure limit such the permissible exposure limits. EPA should align its definition of a regulated area to that of OSHA so as to avoid confusion in regulated workplaces.

5. EPA should limit labeling requirements for pallets that are known to contain decaBDE to a notice that decaBDE is present.

EPA proposes to require all persons who process plastic shipping pallets that are known to contain decaBDE to securely attach a label to each pallet indicating that the pallet contains decaBDE. The label would also state that "All persons who recycle or process this pallet are required to wear personal protective equipment, per regulations at 40 CFR 751.405(e)."

While it may be valuable to label these pallets to promote proper handling and disposal, decisions regarding the use of personal protective equipment should be the purview of the industrial hygiene staff responsible for the worksite because they are a part of the hazard characterization and exposure control of a specific worksite. ACC recommends that EPA delete the following text from the labeling requirement:

All persons who recycle or process this pallet are required to wear personal protective equipment, per regulations at 40 CFR 751.405(e). The use of decaBDE is restricted under 40 CFR 751.405, all persons are prohibited from all manufacturing (including importing), processing, or distribution in commerce of decaBDE or decaBDE-containing products or articles, except for select uses, including those for plastic shipping pallets at 40 CFR 751.405(a)(2)(v) and (b). After the end of the pallets' service life, all persons are prohibited from all distribution in commerce of plastic shipping pallets that contain decaBDE and were manufactured prior to March 8, 2021.

6. EPA should not prescribe workplace protection requirements for workplaces engaged in manufacturing and processing of decaBDE and decaBDE containing products and articles but defer to onsite occupational safety practitioners.

EPA proposes to require the owner or operator (of any workplaces, engaged in manufacturing and processing of decaBDE and decaBDE containing products and articles) to supply a respirator and personal protective equipment for all persons within the regulated area; that is, for all persons who can reasonably be expected to be exposed to decaBDE at any level.

ACC recommends that the additional workplace protections proposed for risk management of decaBDE not be included. As stated above, workplace hazard characterization and exposure control are the purview of the industrial hygiene staff responsible for the site. Those staff will consider all potential hazards at a site and make recommendations for exposure controls including possibly the use of PPE. Imposition of controls for an individual chemical may lead to improper characterization of existing hazards or creation of new hazards. EPA cannot know the situation at any particular workplace “engaged in manufacturing and processing of decaBDE and decaBDE containing products and articles.” As such, EPA should not be prescribing controls that may not be appropriate for the particular circumstances of an individual workplace.

7. EPA should only limit the release of decaBDE to water to a level that poses no significant risk.

As noted in EPA’s *Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Decabromodiphenyl Ether*,⁸ principal domestic manufacturers and importers of commercially available decaBDE agreed to voluntarily phase out domestic manufacture and import of the chemical no later than December 31, 2013. Subsequently, production volumes in the United States declined from 51,008,002 pounds in 2010 to less than 25,000 lbs in 2015. The additional restrictions imposed under 40 CFR§ 751.405 ensure that the volume of use in the United States will remain low, except where necessary for critical applications. The imposition of a complete prohibition on releases to water is excessive and counter to the statutory requirements under TSCA section 6(h)(4) that “the Administrator [shall] address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and [shall] reduce exposure to the substance to the extent practicable.” While it is desirable to minimize emissions of decaBDE to the environment, EPA does not explain the necessity of eliminating the emissions in a risk context. ACC believes that minimal emissions of decaBDE to water may not pose significant risks and EPA should provide flexibility to those few remaining critical users.

8. EPA should not prescribe workplace protection requirements for workplaces engaged in manufacturing and processing of PIP (3:1) and PIP (3:1)-containing products and articles but defer to onsite occupational safety practitioners.

⁸ U.S. Environmental Protection Agency. 2017. *Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Decabromodiphenyl Ether*, CASRN: 1163-19-5. Office of Chemical Safety and Pollution Prevention, U.S. Environmental Protection Agency, Washington, D.C.

Similar to that described above for decaBDE, EPA proposes to require the owner or operator (of any workplaces, engaged in manufacturing and processing PIP (3:1) and PIP (3:1)-containing products and articles) to supply a respirator and personal protective equipment for all persons within the regulated area; that is, for all persons who can reasonably be expected to be exposed to PIP (3:1) at any level. The proposed revision goes on to specify respiratory protection for specific conditions of use:

- The type of respiratory protection that regulated entities must select and provide to potentially exposed persons must be at least as protective as a NIOSH-approved N95 respirator (APF 10) for the manufacturing and processing of PIP (3:1), and PIP (3:1)-containing products for use in new and replacement parts for motor vehicles, including heavy machinery, and aerospace vehicles. [40 CFR § 751.407(f)(3)(ii)]
- The type of respiratory protection that regulated entities must select and provide to potentially exposed persons must be at least as protective as a NIOSH-approved APF 50 purifying respirator for use as an intermediate to produce cyanoacrylate adhesives when PIP (3:1) and PIP (3:1)-containing products are not contained in a closed system (i.e., except as described in paragraph (f)(8)(iii) of this section). [40 CFR § 751.407(f)(3)(iii)]

In addition, the proposed workplace protections would also require “donning of gloves that are chemically resistant to PIP (3:1) with activity-specific training where dermal contact with PIP (3:1) is possible.” [40 CFR § 751.407(f)(4)]

Again, similar to our comments regarding the proposed decaBDE workplace protections, ACC recommends that the additional workplace protections proposed for risk management of PIP (3:1) not be included. As stated above, workplace hazard characterization and exposure control are the purview of the industrial hygiene staff responsible for the site. Those staff will consider all potential hazards at a site and make recommendations for exposure controls including possibly the use of PPE. Imposition of controls for an individual chemical may lead to improper characterization of existing hazards or creation of new hazards. EPA cannot know the situation at any particular workplace “engaged in manufacturing and processing of PIP (3:1) and PIP (3:1)-containing products and articles”. As such, EPA should not be prescribing controls that may not be appropriate for the particular circumstances of an individual workplace.

9. EPA should choose a regulatory alternative with higher net benefits.

The Agency’s Economic Analysis estimates annual costs much higher than other recent rulemaking actions under TSCA. The Economic Analysis identifies annualized costs of \$416 million (7% discount rate) for the proposed rule and \$819 million (7% discount rate) for the one alternative option. This is due to the large number of firms that use PIP (3:1), the stringency of the requirements for these firms to reduce worker exposure, and the additional time for exclusions. EO 12866 recommends choosing a regulatory alternative with the highest net benefits. Such an alternative could be requirements that allow for more cost-effective and practicable control of worker exposure, an option that we urge the Agency to consider and consistent with our previous comments. Such an alternative would also better align with the requirements of the Paperwork Reduction Act, which is applicable to this rulemaking.

We appreciate EPA's consideration of our comments.

Sincerely,

Paul C. DeLeo

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Senior Director

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