



ISRI is the voice of the recycled materials industry, promoting safe, economically sustainable, and environmentally responsible recycling through networking, advocacy, and education.

Via electronic submission at www.regulations.gov

January 8, 2024

Brooke Porter, Environmental Protection Specialist
Scott Drewes, Environmental Protection Specialist
Existing Chemicals Risk Management Division (7404M)
Office of Pollution Prevention and Toxics
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) (EPA-HQ-OPPT-2023-0376)

Dear Ms. Porter and Dr. Drewes:

The Institute of Scrap Recycling Industries, Inc. (ISRI) would like to submit the following comments for EPA's consideration in response to its proposal, "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)" (the Proposal)¹.

ISRI is the *Voice of the Recycled Materials Industry*[™]. With headquarters in Washington, DC, 18 chapters nationwide, and more than 1,600 members, ISRI represents companies that process, broker, and consume recyclable materials, including metals, paper, plastics, glass, rubber, electronics, and textiles. ISRI provides education, advocacy, and safety and compliance training, and promotes public awareness of the essential role that recycled materials play in the U.S. economy, global trade, the environment, and sustainable development. Based on the latest annual data (2021), the U.S. recycled materials industry produces more than \$117 billion annually in economic activity and supports more than 500,000 Americans with good jobs.

In summary of the comments below, ISRI supports the current exclusions for recycling and reuse activities under 40 CFR § 751.405 and § 751.407 and the Proposal's inclusion of such exclusions respecting workplace protection requirements under both proposed § 751.405(e)(7)

¹ 88 Fed. Reg. 82287-82312, November 24, 2023 (EPA-HQ-OPPT-2023-0376).

and § 751.407(f)(8). However, the proposed labeling requirement at § 751.405(d) is unreasonable and must exclude recyclers and labeled pallets from its scope. For the proposed exclusions under both § 751.405(e)(7) and § 751.407(f)(8), “provision(s)” should be replaced by “workplace protection requirements”. Lastly, the combination of the proposed prohibition at § 751.407(a)(iv) and its proposed exclusion at § 751.407(b)(1)(ii) is potentially problematic for certain recycling and reuse activities and necessitates an exclusion for such activities.

I. Background

ISRI takes interest in the Proposal because of ISRI’s past involvement in the development of these TSCA Section 6(h) regulations for persistent, bioaccumulative, and toxic (PBT) chemicals. ISRI submitted comments in late October 2019² on the initial proposal to establish 40 CFR Part 705, Subpart E for five initial PBT chemicals³, including decabromodiphenyl ether (decaBDE) and phenol, isopropylated phosphate (3:1) (PIP (3:1)). While ISRI appreciated the initially proposed recycling exclusions for decaBDE, ISRI was greatly concerned by the lack of exclusions for the following: reuse activities respecting decaBDE; recycling and reuse activities respecting PIP (3:1); and processing and distribution in commerce for purposes of disposal respecting all PBT chemicals. The lack of such exclusions had the potential to significantly impede, if not prohibit, certain recycling and reuse activities. The subsequent final rule addressed most of ISRI’s concerns at the time. In March 2021, pursuant to Executive Order 13990⁴, EPA requested additional public comment on the Subpart E regulations⁵. In May 2021 comments⁶, ISRI urged EPA “to consider the potential consequences and trade-offs of any new conditions” to address potential exposures to PBT chemicals that could prohibit recycling and reuse of materials and products with any associated PBT chemicals and instead increase disposal of such materials and products.

In light of the background above, ISRI offers the comments below on the Proposal.

II. Comments

Overall, ISRI supports the current exclusions for recycling and reuse activities under § 751.405 for decaBDE and § 751.407 for PIP (3:1) and the Proposal’s inclusion of such exclusions respecting workplace protection requirements under proposed § 751.405(e)(7) and §

² See [EPA-HQ-OPPT-2019-0080-0559](#).

³ 84 Fed. Reg. 36728-36760, July 29, 2019 (EPA-HQ-OPPT-2019-0080).

⁴ Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”; see #6-#10 under EPA in the [Fact Sheet: List of Agency Actions for Review](#).

⁵ 86 Fed. Reg. 14398-14401, March 16, 2021 (EPA-HQ-OPPT-2021-0202).

⁶ See [EPA-HQ-OPPT-2021-0202-0111](#).

751.407(f)(8). However, ISRI has concerns about certain provisions of the Proposal. ISRI's concerns are discussed below in order of appearance of these certain provisions in the Proposal.

A. The Proposed Labeling Requirement at § 751.405(d) Is Unreasonable and Must Exclude Recyclers and Labeled Pallets from Its Scope.

The proposed labeling requirement at § 751.405(d) is much more expansive than its justification and arguably requires redundant labeling activity. As proposed, the beginning of § 751.405(d) reads in pertinent part:

...all persons who process, including recycle, plastic shipping pallets that are known to contain decaBDE must securely attach a label to each pallet...

This proposed requirement is justified as follows, in pertinent part from the preamble of the Proposal⁷:

EPA determined it is practicable to label existing plastic shipping pallets containing decaBD. ...

EPA understands that the company typically attaches a label when it has possession of a plastic pallet in its inventory (i.e., after a pallet is returned from being rented out) as part of normal business practice.

ISRI can understand this justification as far as it goes; however, the proposed requirement applies far beyond its justification to “**all persons** who process, including recycle, plastic shipping pallets” (emphasis added). For this reason, the proposed labeling requirement is unreasonable.

Further, taken literally, this proposed labeling requirement applies to both unlabeled pallets (i.e., those without a securely attached conforming label) and labeled pallets (i.e., those with a securely attached conforming label). Because this proposed labeling requirement is not limited to unlabeled pallets, pallets would end up being redundantly labeled. This makes the proposed labeling requirement even more unreasonable.

Also, this proposed requirement makes no sense for recyclers. Recyclers that receive plastic pallets for recycling are in no position to determine whether an unlabeled pallet contains decaBDE, so they cannot reasonably comply with this proposed requirement. On the other

⁷ 88 Fed. Reg. 82296.

hand, if they receive a labeled pallet, which is known to contain decaBDE, the label informs them that they must conduct the required workplace protection measures under proposed § 751.405(e) respecting these labeled pallets, given the § 751.405(a)(2)(v) exception in the recycling exclusion at § 751.405(e)(7)(ii). Despite the requirement to label a labeled pallet, recyclers do not need to securely attach another conforming label to a labeled pallet that will soon no longer be a pallet. In fact, such a label would likely have to be removed before processing of the pallet because the label would likely be a recycling contaminant. For these reasons, proposed § 751.405(d) should not apply to recyclers.

EPA needs to revise proposed § 751.405(d) to limit its scope. It must exclude recyclers and must not require labeling of pallets that have a securely attached conforming label. These revisions would require revision of the proposed text on the required label.

B. In the Proposed Exclusions under § 751.405(e)(7), “Provision” Should Be Replaced by “Workplace Protection Requirements”.

As proposed, the exclusions under § 751.405(e)(7) entail two issues that need to be addressed. The beginning of § 751.405(e)(7) reads:

(7) Exclusions. The following are not subject to the provision of paragraph (e) of this section:

The first issue concerns the use of “provision” in the singular. The proposed beginning does not accurately reflect the many provisions of § 751.405(e) that apply to the owner or operator of a workplace. In the current Subpart E regulations, “provision of” is not used at all, but “provisions of [this section]” is used five times. A similar pattern applies more generally across Title 40 of the CFR⁸. To make the beginning of § 751.405(e)(7) more accurate, the phrase, “provision of paragraph (e)”, should be replaced by a plural phrase. The choice of the plural phrase is connected to the second issue.

The second issue involves the reference to “paragraph (e)” in the beginning of proposed § 751.405(e)(7). As proposed, § 751.405(e)(7) refers to itself, and each of the § 751.405(e)(7) exclusions is a provision of § 751.405(e). As a result, § 751.405(e)(7) apparently excludes its own exclusions.

⁸ Based on searches of Title 40 via www.eCFR.gov, the phrase, “the provisions of paragraph”, is much more common (312 times, with 19 in Subchapter R) than the phrase, “the provision of paragraph” (twice, with none in Subchapter R).

To address this apparent self-exclusion—as similarly proposed in Section II.D. below regarding the proposed exclusions under § 751.407(f)(8)—the beginning of § 751.405(e)(7) could be revised to read: “7) *Exclusions*. The following are not subject to the workplace protection requirements of paragraph (e) of this section:”. Such revision would eliminate the self-exclusion issue arising from the generality of “provision” and would resolve the first issue arising from “provision” in the singular.

C. The Combination of the Proposed Prohibition at § 751.407(a)(iv) and Its Proposed Exclusion at § 751.407(b)(1)(ii) is Potentially Problematic for Certain Recycling and Reuse Activities and Necessitates an Exclusion for Such Activities.

The combination of the proposed prohibition at § 751.407(a)(iv) and its proposed exclusion at § 751.407(b)(1)(ii) is potentially problematic for recycling and reuse activities due to the “short” delay in the effective date of the prohibition and the narrow applicable exclusion, respectively. Proposed § 751.407(a)(iv) reads:

After [DATE 5 YEARS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], except as provided in paragraph (b)(1)(ii) of this section, all persons are prohibited from all processing and distribution in commerce of PIP (3:1) and manufacturing, processing, and distribution of PIP (3:1)-containing products for use in lubricants and greases and PIP (3:1)-containing lubricants and greases.

Its exclusion at § 751.407(b)(1)(ii) reads in pertinent part:

... and PIP (3:1)-containing lubricants and greases for aerospace and turbine uses;

This proposed exclusion indicates that PIP (3:1)-containing lubricants and greases for use or used in motor vehicles, industrial machinery, and other non-aerospace/turbine equipment that are commonly reused and recycled would not be excluded from the prohibition at § 751.407(a)(iv).

To the extent that motor vehicles, industrial machinery, and other non-aerospace/turbine equipment can be used and reused for decades before recycling, the proposed five-year delay in the effective date after publication of the Final Rule seems to have the potential to leave motor vehicles, industrial machinery, and other non-aerospace/turbine equipment that use or contain any PIP (3:1)-containing lubricants and greases subject to the prohibition well before the end of their useful lives and subsequent recycling. For such future “prohibited” motor vehicles, industrial machinery, and other non-aerospace/turbine

equipment, the only open pathway for them under the Subpart E regulations, as revised by the Proposal, would be disposal, which is authorized under current § 751.401(b)(2). In ISRI's view, this would be a highly problematic outcome and would not promote sustainability.

In the preamble to the Proposal⁹, EPA indicates its intention to narrow the current exclusion at § 751.407(b)(1)(ii) and to leave such motor vehicles, industrial machinery, and other non-aerospace/turbine equipment subject to the prohibition in the not-too-distant future:

Under this proposal, the exclusion from prohibition would be narrowed to allow only for the processing and distribution in commerce of PIP (3:1), PIP (3:1)-containing products, and PIP (3:1)-containing lubricants and greases for use in aerospace and turbine applications. The processing and distribution in commerce of PIP (3 :1), PIP (3 :1)-containing products, and PIP (3:1)-containing lubricants and greases for all other uses, including but not limited to use in motor vehicles and industrial machinery, would be subject to a 5-year phased-in prohibition.

Currently, § 751.407(b) contains recycling and reuse exclusions at §§ 751.407(b)(vi) and (vii), but their contexts are necessarily different.

ISRI believes that an exclusion for recycling and reuse activities respecting proposed § 751.407(a)(iv) is necessary and encourages EPA to add such an exclusion under § 751.407(b). Adding such a new exclusion would require further revisions to § 751.407, including current § 751.407(d)(4), current § 751.407(e)(4), and proposed § 751.407(f)(8)(ii).

D. In the Proposed Exclusions under § 751.407(f)(8), “Provision(s)” Should Be Replaced by “Workplace Protection Requirements”.

Some of the proposed exclusions under § 751.407(f)(8) contain the same issues as do the proposed exclusions under § 751.405(e)(7), described in Section II.B. above. With regard to the issue of “provision” in the singular, proposed § 751.407(f)(8)(i) should be revised to use a plural phrase in place of the phrase, “provision of paragraph (f)”, due to the many provisions of § 751.407(f) that apply to the owner or operator of a workplace. While the use of “provision” in the phrase, “provision of paragraph (f)(3) and (4)”, in § 751.407(f)(8)(iii) could be construed to apply separately to §§ 751.407(f)(3) and (4), use of a plural phrase instead would be appropriate. In contrast, this issue does not apply to § 751.407(f)(8)(ii), as it already uses the plural phrase, “the provisions of paragraph (f)”.

⁹ 88 Fed. Reg. 82300.

With regard to apparent self-exclusion, §§ 751.407(f)(8)(i) and (ii) apparently exclude themselves due to their reference to “paragraph (f)”, which includes each exclusion under § 751.407(f)(8) as a provision. In contrast, the exclusion at § 751.407(f)(8)(iii) does not refer to itself as it lacks a reference to “paragraph (f)”.

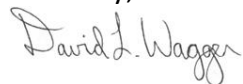
By way of comparison, exclusions under current § 751.407 are provided both externally and internally. In the external case, § 751.407(b), “*Exclusions*”, applies to § 751.407(a), “*Prohibition*”. In the internal cases of §§ 751.407(d) and (e), the internal exclusions do not mention “provision(s)” but rather describe the type of requirements that do not apply to the excluded activity: “recordkeeping requirements in paragraph (d)” in § 751.407(d)(4); and “downstream notification requirements in this paragraph (e)” in § 751.407(e)(4). Describing the type of requirements eliminates the self-exclusion issue arising from the generality of “provision(s)”. To resolve these two issues, each occurrence of “provision” or “provisions” under proposed § 751.407(f)(8) could be replaced by “workplace protection requirements”.

III. Summary

ISRI supports the current exclusions for recycling and reuse activities under § 751.405 for decaBDE and § 751.407 for PIP (3:1) and the Proposal’s inclusion of such exclusions respecting workplace protection requirements under both proposed § 751.405(e)(7) and § 751.407(f)(8). However, the proposed labeling requirement at § 751.405(d) is unreasonable and must exclude recyclers and pallets with securely attached conforming labels from its scope. In the proposed exclusions under both § 751.405(e)(7) and § 751.407(f)(8), “provision(s)” should be replaced by “workplace protection requirements”. Lastly, the combination of the proposed prohibition at § 751.407(a)(iv) and its proposed exclusion at § 751.407(b)(1)(ii) is potentially problematic for certain recycling and reuse activities and necessitates an exclusion for such activities.

In closing, ISRI appreciates this opportunity to provide comment on EPA’s proposal, “[DecaBDE] and [PIP] (3:1); Revision to the Regulation of [PBT] Chemicals Under [TSCA]” and EPA’s consideration of these comments. If you have any questions, you can reach me at DWagger@isri.org or 202-662-8533.

Sincerely,



David L. Waggoner, Ph.D.
Chief Scientist / Director of Environmental Management
Institute of Scrap Recycling Industries, Inc.