



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

OFFICE OF CHEMICAL SAFETY
AND POLLUTION PREVENTION

SUBJECT: Request for No Action Assurance Regarding the Prohibition of Processing and Distribution of Phenol Isopropylated Phosphate (3:1), PIP (3:1), for Use in Articles and PIP (3:1)-containing Articles under 40 CFR 751.407(a)(1)

FROM: Michal Freedhoff
Acting Assistant Administrator (7101M)

TO: Larry Starfield
Acting Assistant Administrator
Office of Enforcement and Compliance Assurance

The purpose of this memorandum is to request that the Office of Enforcement and Compliance Assurance (OECA) exercise its enforcement discretion by issuing a “No Action Assurance” for certain entities that are subject to prohibitions on processing and distribution of PIP (3:1) and PIP (3:1)-containing articles under section 751.407(a)(1) of EPA’s final rule, “Phenol, Isopropylated Phosphate (3:1) (PIP (3:1)); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals under TSCA Section 6(h),” published on January 6, 2021 (86 FR 894; FRL-10018-88).

OCSPP believes that issuing a No Action Assurance for entities that, beginning March 9, 2021 are subject to the prohibitions on processing and distribution of PIP (3:1) for use in articles, and the articles to which PIP (3:1) has been added is necessary and appropriate to address the hardships apparently created by the rule as currently promulgated but which were unknown to EPA until after the rule was published.¹ As the non-exhaustive list of prohibited articles in the footnote indicates, a wide range of key consumer and commercial goods could be affected by the prohibitions to varying degrees, and EPA is being alerted of additional articles every day as stakeholders investigate the presence of PIP (3:1) in their supply chains. We request that such a No Action Assurance provide enforcement discretion, limited to the prohibitions on processing and distribution of PIP (3:1) for use in articles, and the articles to which PIP (3:1) has been added, outlined at 40 CFR 751.407(a)(1), for 180 days to ensure that the supply chains for these important articles continue uninterrupted while OCSPP develops a final agency action to extend the processing and distribution in commerce compliance dates for these articles as necessary. This action will be issued no later than 180 days from March 8, 2021.² We also request that the No Action Assurance cover the requirement in 751.407(d)(2) that records required to be kept under 40 CFR 751.407(d)(1) contain a statement that the PIP (3:1), or the PIP (3:1)-containing articles, are in

¹ The articles that may be covered by this No Action Assurance request include, but are not limited to, electronics, electronic components, electrical equipment and components, home appliances, manufacturing equipment for semiconductors, heavy equipment, offroad vehicles, curtains used in mining applications, military tents, and vehicles that do not qualify as motor vehicles for purposes of this rule (hereafter referred to as “articles”).

² We are not requesting enforcement discretion regarding the processing and distribution of PIP (3:1) for other uses (e.g., not for use in articles).

compliance with 40 CFR 751.407(a), for those entities covered by the exercise of enforcement discretion regarding 40 CFR 751.407(a)(1).

OCSPP is currently preparing for publication a Federal Register notice that will open a public comment period on PIP (3:1) and the other four persistent, bioaccumulative, and toxic (PBT) chemicals. EPA is requesting public input in part to facilitate consideration of additional or alternative measures or approaches relating to implementation and compliance issues, and in part to assist EPA in reviewing the final PBT rules in keeping with the Executive Order entitled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis” and other direction provided by the Biden-Harris Administration. EPA will be reviewing aspects of the final rules as they pertain to reducing exposure to the extent practicable, environmental justice, scientific integrity, and EPA’s mission of protecting human health and the environment. This notice will also specifically request comment on the compliance date for the processing and distribution in commerce of PIP (3:1) for use in articles and PIP (3:1)-containing articles. EPA will use the public comments received in the response to this notice, as well as the stakeholder input received after the final rules were issued, to develop and issue the final agency action extending compliance dates as necessary. EPA will also use these public comments to determine whether additional amendments to the PBT rules are warranted.

As required by the statute, EPA issued a proposed rule for regulation of five PBT chemicals, including PIP (3:1), on July 29, 2019, with an initial 60-day comment period that was extended for 30 days as requested by stakeholders. Stakeholder outreach during the development of the proposed and final rule was extensive, and stakeholder input is reflected in the provisions of the proposed and final rule. The final rule was published on January 6, 2021.

Since the publication of the final rule, many stakeholders, for example from the electronics and electrical manufacturing community and their customers, have raised significant concerns about the March 8, 2021 compliance date in the final rule for the prohibition of processing and distribution of PIP (3:1) and PIP (3:1)-containing articles. These stakeholders request an extension of the compliance date in order to clear the existing articles through the supply chain, find and certify an alternative chemical, and produce or import new articles or complex goods that do not contain PIP (3:1).

Despite EPA’s extensive outreach, most stakeholders contacting EPA after the rule was finalized did not comment on the proposal or otherwise engage with the Agency on the PIP (3:1) rulemaking, and do not appear to have previously surveyed their supply chains to determine if PIP (3:1) was being used. Several have indicated that they did not understand that articles can be regulated under TSCA, and that, because PIP (3:1) is not regulated by other authorities, there was a lack of awareness relative to its presence in the supply chain. Absent timely input from these stakeholders, in the final rule EPA determined that PIP (3:1) was not widely present in complex articles outside the aerospace and automotive sectors. While some commenters on the proposed rule indicated that PIP (3:1) may be present in articles, their comments were very general and did not identify specific uses or concerns with the March 8, 2021 compliance date. EPA held a number of follow-up calls with these stakeholders and requested information specific to PIP (3:1)’s presence in articles. No additional information was provided by stakeholders in these follow-up calls and meetings.

Stakeholders in the electronics sector and elsewhere now identify the presence of PIP (3:1) in articles where it is used as a flame retardant and plasticizer in plastic components such as PVC wire covers and casings. Other components which have been identified or are being investigated for the presence of PIP (3:1) include PVC tubes, harnesses, cables, covers, sleeves, and casings, which include AC power cords and USB cables for consumer and commercial articles such as laptops, TVs, and gaming consoles, as

well as internal components of high-tech robotics and manufacturing equipment. Other items are gaskets and clamps. Additionally, the chemical has been identified in components in scanning electron microscopes utilized in research, national laboratories, academia, and manufacturing and electronic components utilized for electronic design and assembly. Many of these articles are imported, which may make it more difficult for processors and distributors to determine whether they contain PIP (3:1). Stakeholders state that an immediate decision on their extension request is necessary in order to prevent companies from immediately stopping importation, as well as processing and distribution, of articles containing PIP (3:1) in order to comply with the March 8, 2021 compliance deadline. Such stoppage would lead to disruptions to commerce for a wide variety of consumer and commercial goods such as cellphones, laptops, and other electronic devices, and industrial and commercial equipment used in various sectors including transportation, life sciences, and semiconductors. The processors and distributors for which we are requesting the application of enforcement discretion serve large swaths of the consumer and industrial market and facilitate the distribution of critical supplies.

Stakeholders note that the complexity of international supply chains for complex articles such as those described by stakeholders makes locating the presence of PIP (3:1) in components challenging; in addition, once PIP (3:1) is identified, a suitable alternative or replacement component may need to be tested for industry safety or performance standards. Despite these challenges, a majority of stakeholders are not requesting an exclusion from the restriction. Rather, to avoid significant disruption to the supply chain, they request what in their view would be enough time to identify, replace, and certify the absence of PIP (3:1) in their articles. Stakeholder estimates of the appropriate time frame to accomplish the aforementioned activities range from six months to seven years; however, OCSPP believes 180 days is an appropriate timeframe for the No Action Assurance in order to ensure that the supply chain of these important articles is not interrupted while OCSPP continues to collect the information needed to best inform subsequent regulatory efforts and allow for the issuance of a final agency action to extend the March 8, 2021 compliance date as necessary. Stakeholders acknowledge that they should have been more engaged with EPA during the rulemaking at the proposal stage or earlier and intend to be proactively engaged as EPA undertakes additional efforts on this matter.

A No Action Assurance is in the public interest. As noted by the stakeholders and summarized herein, a large section of industry was caught unawares as this rulemaking was the first time their activities would be affected by a TSCA section 6 rulemaking, and a wide range of articles are affected to varying degrees in ways such that enforcement of the prohibition may be detrimental to the public interest. A No Action Assurance for PIP (3:1) processed and distributed for use in articles and PIP (3:1)-containing articles would mitigate what some stakeholders believe would be the significant disruption of international supply chains.

In sum, numerous companies and trade associations are hearing from their supply chains that PIP (3:1) is present or may be present in a wide range of articles for industrial and consumer markets in the United States, although stakeholders indicate they are still identifying articles throughout the supply chain. For example:

- In discussion with EPA on March 1, 2021, affected industries stressed the complexities of the global supply chains and the degree to which small, medium, and large sized businesses may need to disrupt business in such a way that may endanger machinery and create potential public health and national security concerns in order to meet the March 8, 2021 compliance date.
- The semiconductor industry is noted specifically in the February 24, 2021 Executive Order on America's Supply Chains placing an emphasis on creating resilient and diverse supply chains.

The Semiconductor Industry Association (SIA) says that it produces America's fifth largest export and that the equipment it uses to manufacture semiconductors may have PIP (3:1)-containing articles; compliance with the rule will impact highly engineered pieces of equipment comprised of many thousands of components and costing millions of dollars. These machines are in use for many years. Each manufacturing facility may have dozens or hundreds of these machines, and each one is made of many individual finished articles, which contain components which are believed to contain PIP (3:1) in wiring and tubing. On a daily basis these machines are being serviced and may require the purchase and installation of replacement parts that may contain PIP (3:1). SIA noted the recent shortage of semiconductors to supply the automotive industry and explained that any interruption of service for the machines used to make semiconductors would exacerbate the strain on the industry, potentially damage the national economy, and impacting on national security.

- EPA has also heard from the Air-conditioning, Heating, and Refrigeration Institute (AHRI), which notes that PIP (3:1) is used in critical heating, ventilation, air-conditioning, and refrigeration (HVACR) equipment. AHRI further notes that HVACR and water heating equipment are especially critical during the pandemic and during severe climate events that are becoming all too frequent. They, and other stakeholders, contend the unintended result of the March 8, 2021 compliance time frame is that PIP-containing articles may no longer be available to U.S. consumers.
- Some stakeholders also made claims that the disruption of distribution and servicing of articles may impede efforts to distribute vaccines.
- Companies are now evaluating any articles that might incorporate PIP (3:1) and working back from lists of many thousands of components to specifically and more precisely determine which articles actually include PIP (3:1).
- Additionally, stakeholders stated that the prohibition would “effectively eliminate from manufacturing supply chains critically important articles which may contain certain PBT chemicals” (Chemical Users Coalition). Semiconductors and HVACR equipment are just two of the numerous sectors already identified.
- In the retail sector, Retail Industry Leaders Association (RILA) represents businesses that sell millions of consumer goods across a wide range of categories, including appliances, tools, auto and much more. They claim that each article may contain hundreds to even thousands of individual components made by different manufacturers. A majority of the identified goods qualify as "articles" under TSCA, and an unknown - but potentially significant – number of articles may contain PIP (3:1).
- Numerous companies and trade associations are hearing from their supply chains that PIP (3:1) is present or may be present in numerous components in a wide range of electronics or electrical components, as well as in PVC and wire coatings for a few non-electrical articles.
 - PIP (3:1) may be found in articles ranging from acoustic pianos, to radios, to consumer and commercial projectors, and microscopes and medical devices.

- Forklifts used to move critical supplies in warehouses contain components with PIP (3:1)-containing components for which processing and distribution are prohibited under the final rule.

As the above illustrative list of articles potentially impacted by the prohibition in the final rule demonstrates, the final rule potentially has a broad ranging impact that the agency did not intend when finalizing the rule and the March 8, 2021 compliance deadline.

While OCSPP recognizes that allowing articles indicated by industry as containing the chemical PIP (3:1) leaves a PBT chemical in commerce longer than was deemed “as soon as practicable” in the final rule, the requested No Action Assurance would be in the public interest based on the information stakeholders have provided to EPA. EPA will subsequently further review and verify this information during the next 180 days. As noted above, the processors and distributors for which we are requesting the application of enforcement discretion serve large swaths of the consumer and industrial market and facilitate the distribution of critical supplies. It would not benefit the general public for these entities to immediately cease the processing and distribution of these articles and disrupt complex supply chains. Moreover, as noted above, it was clearly not EPA’s intent during the development of the rule to have such a broad disruptive impact. In other words, absent industry stakeholder participation in the rulemaking process, EPA established a compliance deadline that cannot be feasibly complied with as intended.

In addition, while this request seeks to extend the compliance date on the prohibition on processing and distribution of PIP (3:1) for use in articles, and PIP (3:1)-containing articles, it does not seek to change the compliance requirements for the prohibitions and restrictions on releases to water found at 40 CFR 751.407(c) and the downstream notification requirements found at 40 CFR 751.407(e), which provide immediate protection from water releases. In addition, the recordkeeping requirements of 40 CFR 751.407(d) apply to persons who process or distribute in commerce PIP (3:1) or PIP (3:1)-containing articles, including those persons who would otherwise be prohibited from processing or distributing PIP (3:1) under 40 CFR 751.407(a)(1), although we do request that the No Action Assurance address the requirements of 40 CFR 751.407(d)(2) for entities covered by the No Action Assurance. OCSPP is requesting the No Action Assurance to avoid widespread disruption of critical supply chains while OCSPP develops a final agency action to address the compliance date for these articles. As such, the No Action Assurance would not jeopardize the Agency’s efforts to ensure the protection of health and the environment under TSCA.

Please feel free to contact me for further information, or your staff may contact Mark Hartman at (202) 564-0985. We have worked closely with OECA on determining the extent to which enforcement discretion might appropriately be provided, and their assistance has been extremely helpful. Thank you for your consideration of this request.

cc: Melissa Hoffer, OGC
Rosemarie Kelley, OECA
Diana Saenz, OECA
Yvette Collazo-Reyes, OCSPP