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ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW
JERSEY, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND
VIRGINIA**

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Via Electronic Filing

EPA-HQ-OPPT-2021-0202

Michal Freedhoff
Acting Assistant Administrator
Office of Chemical Safety and Pollution Prevention
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460-0001

**Re: *Regulation of Persistent, Bioaccumulative, and Toxic Chemicals
Under TSCA Section 6(h); Request for Comments, 86 Fed. Reg. 14,398
(March 16, 2021)***

Dear Acting Administrator Freedhoff:

The Attorneys General of New York, Connecticut, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia submit these comments in response to the U.S. Environmental Protection Agency's (EPA) request for additional public comments on five final rules for persistent, bioaccumulative, and toxic (PBT) chemicals, issued on January 6, 2021 under the Toxic Substances Control Act (TSCA).¹ 86 Fed. Reg. 14,398 (Mar. 16, 2021). In accordance with the January 20, 2021 Executive Order 13,990, entitled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," and other Biden-Harris Administration executive orders, EPA must review the final rules on the PBT chemicals to ensure that they meet

¹ Those five rules are: (1) 2,4,6-tris(tert-butyl)phenol (2,4,6-TTBP); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h), 86 Fed. Reg. 866 (Jan. 6, 2021); (2) Decabromodiphenyl Ether (decaBDE); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h), 86 Fed. Reg. 880 (Jan. 6, 2021); (3) Phenol, Isopropylated Phosphate (3:1) (PIP 3:1); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h), 86 Fed. Reg. 894 (Jan. 6, 2021); (4) Pentachlorothiophenol (PCTP); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h), 86 Fed. Reg. 911 (Jan. 6, 2021); and (5) Hexachlorobutadiene (HCBd); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h), 86 Fed. Reg. 922 (Jan. 6, 2021).

statutory requirements, are guided by the best available science, ensure the integrity of federal decision-making, and protect human health and the environment.

PBT chemicals are of particular concern to the States because of the danger they pose to human health and the environment.² These chemicals are highly toxic, slow to degrade in the environment, and can accumulate in living organisms. They can cause cancer, neurological damage, and reproductive and developmental harm. Therefore, the States have a strong interest in ensuring that EPA uses its authority under TSCA to regulate PBT chemicals to the fullest extent authorized by law.

The 2016 amendments to TSCA added a new section 6(h), which requires EPA to regulate PBT chemicals on an expedited basis without first undergoing the risk evaluation process. In selecting among the prohibitions and other restrictions set forth in TSCA section 6(a), EPA must “address the risks of injury to health or the environment” presented by the PBT chemicals and “reduce exposure to [PBT chemicals] to the extent practicable.” 15 U.S.C. § 2605(h)(4).

The States agree with EPA’s determination that the five PBT chemicals meet the TSCA section 6(h) criteria for expedited action. The States also support the restrictions that were imposed by the five final rules. However, there are further exposure reductions that can and should be achieved, including reductions for potentially exposed or susceptible subpopulations and the environment. The States urge EPA to accomplish these reductions through the following means. First, EPA should follow the plain meaning of TSCA section 6(h) and interpret the term “practicable” to mean “feasible” rather than “reasonable.” Second, EPA should use its authority under TSCA to directly regulate occupational exposures to the PBT chemicals. Third, EPA should regulate the disposal of the PBT chemicals under TSCA. Fourth, EPA should follow the requirements of TSCA Section 6(g) to exempt certain uses from the restrictions on the five PBT chemicals. Fifth, EPA should eliminate the exemption that allows for the recycling of plastics containing decaBDE. EPA should act swiftly to further protect the public and the environment from the dangers of the five PBT chemicals.

I. EPA Should Interpret the Term “Practicable” to Mean “Feasible”

As noted above, TSCA section 6(h)(4) directs EPA to “reduce exposure to [PBT chemicals] to the extent practicable.” 15 U.S.C. § 2605(h)(4). As “practicable” is not defined in the statute, it should be given its ordinary meaning. *See Crawford v. Metro. Gov’t of Nashville & Davidson Cty., Tennessee*, 555 U.S. 271, 847 (2009). The

² See, e.g., Elaine S. Povich, *States Aren’t Waiting for Feds to Ban Flame Retardants from Kids’ Products*, Pew (Mar. 20, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/20/states-arent-waiting-for-feds-to-ban-flame-retardants-from-kids-products>; *Report of the New York State Task Force on Flame Retardant Safety* (Mar. 2013), <https://www.health.ny.gov/environmental/investigations/flame/docs/report.pdf>.

Merriam-Webster Dictionary defines “practicable” as “capable of being put into practice or of being done or accomplished.”³ The term “practicable” thus “imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible.” *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 107 (D.D.C. 1995), *amended*, 967 F. Supp. 6 (D.D.C. 1997) (discussing the term “to the maximum extent practicable” in the Endangered Species Act).⁴ Consistent with that plain language, the legislative history for the 2016 amendments to TSCA also makes clear that Congress viewed the terms “to the maximum extent practicable” and “to the extent practicable” as “synonymous.”⁵

In the final rules, however, EPA incorrectly interpreted the requirement to reduce exposures to the extent practicable “as generally directing the Agency to consider such factors as achievability, feasibility, workability, and reasonableness.” 86 Fed. Reg. at 883. As a result, EPA found numerous restrictions on the five PBT chemicals to be impracticable based on inconvenience, cost, burden, enforcement difficulty, and compliance complexity. But these subjective considerations of what EPA deems reasonable have no bearing on whether exposures to PBT chemicals feasibly can be further reduced, and therefore, EPA’s interpretation of “practicable” conflicts with the plain meaning of the statute.

Indeed, EPA has construed this “reasonableness” factor so broadly that it has ruled out exposure reductions that are feasible. For example, EPA concluded that it would be “unreasonable” and thus “impracticable” to prohibit the continued commercial use of PCTP in golf balls because of the low concentration of the chemical. 84 Fed. Reg. 36,728, 36,745 (July 29, 2019). Yet, EPA has found that there are available substitutes for this chemical and that only one golf ball manufacturer has confirmed using PCTP. 86 Fed. Reg. at 920. So while it would be feasible to enact a ban on PCTP, EPA ruled out this alternative because it perceived it to be unreasonable. EPA has an obligation under TSCA to enact restrictions that will reduce exposure to PBT chemicals regardless of whether the concentrations are low, the chemicals are regulated in some way under other statutes, or the restrictions may burden manufacturers or users. Thus, EPA should revise its interpretation of

³ *Practicable*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/practicable>.

⁴ Merriam-Webster Dictionary defines “feasible” as “capable of being done or carried out.” <https://www.merriam-webster.com/dictionary/feasible>.

⁵ Cong. Rec. S.3517 (daily ed. June 7, 2016) (“Several sections of the Frank R. Lautenberg Chemical Safety for the 21st Century Act include direction to EPA to take certain actions to ‘the extent practicable’, in contrast to language in S 697 as reported by the Senate that actions be taken to ‘the maximum extent practicable.’ During House-Senate negotiations on the bill, Senate negotiators were informed that House Legislative Counsel believed the terms ‘extent practicable’ and ‘maximum extent practicable’ are synonymous, and ultimately Congress agreed to include ‘extent practicable’ in the Frank R. Lautenberg Chemical Safety for the 21st Century Act with the expectation that no change in meaning from S 697 as reported by the Senate be inferred from that agreement.”).

“practicable” to remove subjective policy considerations of what is reasonable and instead focus on whether or not it is feasible to further reduce exposures to PBT chemicals, as TSCA requires.

II. EPA Must Address the Risks Workers Face from Exposure to PBT Chemicals

TSCA includes workers as a “potentially exposed or susceptible subpopulation” that must be considered when EPA adopts rules concerning PBT chemicals. 15 U.S.C. §§ 2602(12), 2605(h)(1)(B). There is a strong likelihood of occupational exposure to the five PBT chemicals if workers are not properly protected. *See* 84 Fed. Reg. at 36,741-43. For example, “[d]ermal exposure to liquids is possible from incidental contact of liquid flame-retardant formulations containing DecaBDE during transfer, loading, and mixing operations.” *Id.* at 36,741. Transportation workers such as airline crews can be exposed to hydraulic or engine oil smoke or fumes containing PIP (3:1). *Id.* at 36,742. “Dermal exposure to 2,4,6-TTBP to workers may occur from transfer and fuel loading operations.” *Id.* Workers may inhale fugitive vapors of HCBD that is generated as a by-product during the manufacture of other chlorinated solvents. *Id.* at 36,743. Workers may be exposed to PCTP during the manufacturing process through fugitive dust and solid waste from floor sweepings, disposal of used transfer containers with residual PCTP, and liquid waste from equipment cleaning. *Id.* In addition, the disposal and recycling of PBT chemicals also pose additional sources of exposure to workers.

Nonetheless, in the final rules, EPA inexplicably declined to directly regulate risks to workers through mandated engineering controls or use of personal protective equipment such as gloves or respirators. EPA asserted that such measures are not necessary because “EPA assumes compliance with federal and state requirements, such as worker protection standards.” 86 Fed. Reg. 880, 886 (Jan. 6, 2021). Moreover, EPA stated that since it did not and could not conduct a risk evaluation for the five PBT chemicals, it is unable to quantify the risks posed by occupational exposure. Without quantified risks from exposure, EPA concluded that it cannot determine what specific worker protection measures would be appropriate to address those risks. EPA Response to Comments, EPA-HQ-OPPT-2019-0080-0647 (Dec. 2020), at 32-33.

It is inappropriate and unlawful for EPA to rely solely on the Occupational Safety and Health Administration’s (OSHA) regulations to protect workers from the five PBT chemicals. EPA should instead satisfy its obligations under TSCA section 6(h) to protect workers by further reducing their exposures to PBT chemicals to the extent practicable. First, as EPA acknowledges, “some worker populations are not covered by the OSHA regulations.” Response to Comments at 34. These worker populations include government employees, independent contractors, and people who work for small employers. *See* 29 U.S.C. § 652(5). Second, there is no requirement

under OSHA that an employer reduce employees' exposure to PBT chemicals "to the extent practicable" as TSCA directs; instead, OSHA requires an employer to meet the less demanding standard of eliminating a recognized likelihood of "death or serious physical harm to his employees." *Compare* 29 U.S.C. § 654(a)(1), *with* 15 U.S.C. § 2605(h)(4). Third, none of the five PBT chemicals is subject to OSHA occupational health standards so there are no enforceable exposure limits for workplaces where PBTs are used. Fourth, OSHA's regulations for personal protective equipment apply only where the employer has determined that workers are subject to sufficient hazards from chemical exposures so that such equipment is necessary. *See* 29 C.F.R. § 1910.132. Thus, an employer could determine that PBT chemicals do not present a hazard under the OSHA standard and decide not to provide personal protective equipment to employees working with one or more of these chemicals.

Moreover, EPA does not need to complete risk evaluations in order to determine what specific worker protection measures would be appropriate under TSCA. Section 6(h)(2) is explicit that EPA is not required to conduct risk evaluations on PBTs subject to section 6(h). And this makes sense because PBTs are so harmful that a risk determination is unnecessary to justify eliminating or reducing their presence in the workplace. EPA's Exposure and Use Assessment of the five PBT chemicals identifies the sources of occupational exposures for each chemical. *See* EPA Exposure and Use Assessment, EPA-HQ-OPPT-2019-0080-0518 (June 2019). It is EPA's obligation to determine how these exposures can be reduced to the extent practicable through limitations on the use of the chemicals, engineering controls, or use of personal protective equipment.

III. EPA Should Regulate the Disposal of PBT Chemicals

Disposal is an additional exposure pathway through which PBT chemicals are released to the environment. DecaBDE is found in landfill leachate and releases of decaDBE associated with disposal are likely to increase over time. Exposure and Use Assessment at 58, 113. The chemicals PIP (3:1), 2,4,6 TTBP, and PCTP may be released to land from disposal of empty containers, floor sweepings, and off-spec product. *Id.* at 176-77, 214, 231. Waste HCBd is incinerated, which can result in air releases from incinerator flue gas and land releases from disposal of ash and slag. *Id.* at 126.

Despite these significant sources of environmental exposures, in the final rules, EPA declined to regulate the disposal of the five PBT chemicals. EPA asserted that "it would not be practicable to impose restrictions on disposal that go beyond restrictions already imposed, e.g. by the Resource Conservation and Recovery Act (RCRA)." Response to Comments at 27.

EPA should not rely solely on RCRA to regulate the disposal of the PBT chemicals. Of the five chemicals, only HCBd is considered a hazardous waste under

RCRA that must be disposed of in accordance with the RCRA Subtitle C regulations. The four other PBT chemicals are subject only to the solid waste disposal guidelines under Subtitle D of RCRA, which are not binding on state or local governments. *See e.g.* 40 C.F.R. § 243.100. These four PBT chemicals may be disposed of in municipal solid waste landfills, which can lead to the land releases discussed above.

Nor does the existence of RCRA render it impracticable to regulate PBT chemical disposal under TSCA. EPA currently regulates the disposal of several chemicals under TSCA, including polychlorinated biphenyls, asbestos, radon, and lead-based paint, despite the applicability of RCRA. It should similarly regulate the disposal of PBT chemicals.

IV. EPA Should Follow the Requirements of TSCA Section 6(g) in Granting Exemptions for Uses of PBT Chemicals

TSCA section 6(g) sets forth the procedure EPA must follow to grant exemptions for specific uses of restricted chemicals. EPA may only grant an exemption upon finding that:

(A) the specific condition of use is a critical or essential use for which no technically and economically feasible safer alternative is available, taking into consideration hazard and exposure;

(B) compliance with the requirement, as applied with respect to the specific condition of use, would significantly disrupt the national economy, national security, or critical infrastructure; or

(C) the specific condition of use of the chemical substance or mixture, as compared to reasonably available alternatives, provides a substantial benefit to health, the environment, or public safety.

15 U.S.C. § 2605(g)(1). EPA must publish an analysis of the need for the exemption and establish a time limit on the exemption. *Id.* §§ 2605(g)(2), (3). It must also set conditions such as reasonable recordkeeping, monitoring, and reporting requirements if those conditions are necessary to protect public health and the environment. *Id.* § 2605(g)(4).

Despite these strict limitations, in the final rules, EPA granted exemptions for numerous uses of these chemicals on the grounds that regulation of those uses would not be practicable. What is more, EPA did not follow the section 6(g) process for these exemptions. For example, EPA exempted the use of PIP (3:1) in aviation hydraulic fluid, lubricants, and greases because it found restrictions on those uses to be impracticable. 84 Fed. Reg. at 36,750. Similarly, EPA exempted PCTP manufacturing and processing below one percent concentration by weight because restricting it would be “overly burdensome and therefore impracticable.” 84 Fed. Reg. at 36,754. EPA also exempted use of 2,4,6-TTBP as a fuel additive on the grounds that it is a “critical use in the nation’s fuel supply.” 84 Fed. Reg. at 36,752. But for all three

chemicals, EPA neither made the formal findings required by section 6(g) nor imposed a time limit on the exemptions. EPA must reevaluate the exemptions in the final rules in light of the legal requirements of section 6(g). It is likely that many of these exemptions will not meet the high bar for use exemptions that section 6(g) sets and should therefore be prohibited. Moreover, any exemptions that do meet that bar must have set time limits.

V. EPA Should Eliminate the Exemption for DecaBDE Recycling

TSCA expressly includes infants and children as a “potentially exposed or susceptible subpopulation” that must be considered when EPA adopts rules concerning PBT chemicals. 15 U.S.C. §§ 2602(12), 2605(h)(1)(B). Infants and young children are exposed to decaBDE by drinking contaminated breastmilk, ingesting contaminated indoor dust, and mouthing plastic and fabric articles containing decaBDE, including children’s toys. Exposure and Use Assessment at 112, 115, 118. These exposures lead children to have a comparatively higher estimated dose of decaBDE than adults. *Id.* at 112, 114.

Despite these exposure pathways, the final rule for decaBDE unlawfully allows for “processing and distribution in commerce for recycling of decaBDE-containing plastic products and articles . . . and for decaBDE-containing products or articles made from such recycled plastic, where no new decaBDE is added during the recycling or production process.” 86 Fed. Reg. at 881. EPA attempted to justify this exemption stating that “it would be overly burdensome and not practicable to impose restrictions on the recycling of plastics that may contain decaBDE, or on the use of recycled plastic in plastic articles, because the decaBDE is typically present in such articles at low levels.” 86 Fed. Reg. at 889. EPA added that it would be prohibitively expensive and require complicated testing to identify and separate decaBDE-containing plastic during the recycling process. *Id.*

EPA failed to fully assess the risks of decaBDE leaching from toys made of recycled plastic. EPA’s analysis of decaBDE in children’s toys found that brominated flame retardants (such as decaBDE) do in fact leach from toys when they are mouthed by children, yet EPA concluded that “this exposure scenario is unlikely of concern.” EPA, Exploratory Analysis for DecaBDE in Children’s Toys, EPA-HQ-OPPT-2019-0080-0033 (April 2019), at 4. EPA’s conclusion is not well supported because, as EPA noted, the two data sources on which it based this conclusion “have a limited sample size.” *Id.* at 3. In addition, EPA admitted that “the range of DecaBDE concentration in toys as it relates to migration rates is not well characterized.” *Id.* Moreover, EPA’s analysis did not consider the potential that decaBDE will migrate from toys into house dust and be ingested by children in that form.

EPA should eliminate the exemption for the recycling of plastic containing decaBDE. As long as decaBDE plastic is recycled, it will remain in the stream of commerce and continue to cause harmful exposures to infants and children. According to EPA's economic analysis, a large amount of decaBDE is recycled in the United States. In 2017, for example, approximately 140,000 pounds of decaBDE were recycled. EPA Economic Analysis, EPA-HQ-OPPT-2019-0080-0516 (June 2019), at 2-15. It has been shown that "toxic flame retardant chemicals [including decaBDE] found in e-waste are widely present in children's toys made of recycled plastic."⁶ One study examined the levels of decaBDE in various children's toys and other items and found that 91 percent of samples contained decaBDE at concentrations ranging from 1 ppm to 672 ppm.⁷

EPA states that it expects the amount of decaBDE in recycled plastic to decrease over time, but its Economic Analysis belies this conclusion, noting that "DecaBDE can persist through the recycling processes for some time." Economic Analysis at 2-15. For example, polystyrene containing decaBDE can withstand five cycles of regrind and molding without formation of degradation products. *Id.* Moreover, the vast number of decaBDE-containing plastic products currently in use will eventually be available for recycling, ensuring that decaBDE is found in recycled plastic and impacting infants and children long into the future.

Further, technology exists for separating plastic containing decaBDE from recycling streams and despite EPA's claims that it is cost prohibitive, facilities in Europe are able to separate it on an industrial scale.⁸ Indeed, the Stockholm Convention on Persistent Organic Pollutants, a treaty signed by 182 countries and the European Union (but not the United States), calls for global elimination of decaBDE and does not include any exemption for recycling.⁹ This ban, which went into effect in March 2019, demonstrates the practicability of a prohibition on

⁶ DiGangi, Joseph et al., "POPS Recycling Contaminates Children's Toys With Toxic Flame Retardants" (April 2017) at 8, https://ipen.org/sites/default/files/documents/toxic_toy_report_2017_update_v1_5-en.pdf.

⁷ *Id.*

⁸ See e.g. Martin Strååtoch and Camilla Nilsson, Decabromodiphenyl ether and other flame retardants in plastic waste destined for recycling (Feb. 23, 2018), <https://www.miljodirektoratet.no/globalassets/publikasjoner/M973/M973.pdf>; Norway Environment Agency, Literature Study—DecaBDE in waste streams (Dec. 11, 2015), <http://www.basel.int/Portals/4/download.aspx?d=UNEP-CHW-SUBM-COM-POPsWastes-DecaBDE-Norway-20160914.English.pdf>.

⁹ See Stockholm Convention on Persistent Organic Pollutants, UNEP (2015) Report of the Persistent Organic Pollutants Review Committee on the Work of its Eleventh Meeting: Risk Management Evaluation on Decabromodiphenyl Ether (Commercial Mixture, C-DecaBDE) (Nov. 2015), available as UNEP/POPS/POPRC.11/10/Add.1 at <http://chm.pops.int/TheConvention/POPsReviewCommittee/Reports/tabid/2301/Default.aspx>.

decaBDE, including recycling.¹⁰ Moreover, the purportedly low concentration of decaBDE in recycled plastics has no relationship to whether further reductions are practicable. EPA should remove this exemption.

VI. Conclusion

The final rules for the five PBT chemicals were a positive step but further action should be taken to reduce exposures to these chemicals to the extent practicable, as is required by TSCA. In particular, we urge EPA to take action to protect workers, children, and infants from these dangerous chemicals.

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¹⁰ See Ministry of Environment and Food of Denmark, Updated National Implementation Plan for the Stockholm Convention 2018, <http://www.pops.int/Implementation/NationalImplementationPlans/NIPTransmission/tabid/253/ctl/Download/mid/16124/Default.aspx?id=45&ObjID=22932>.

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