

PBT Regulations Update - No Action Assurance for PIP (3:1) Articles and New Request for Comments

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After a recent flurry of concerns over the potential for widespread supply-chain interruptions, the United States Environmental Protection Agency (“EPA”) issued a 180-day No Action Assurance (NAA) regarding the new prohibitions on processing and distribution of articles containing phenol, isopropylated phosphate (3:1) (PIP (3:1)). While the NAA does not apply to all the requirements of the new rule, it does provide some immediate protection from enforcement on certain products with PIP (3:1). EPA also opened a new 60-day comment period for PIP (3:1) and four other restricted chemicals so that it can determine what, if any, changes to the final rules may be appropriate.

Because of the broad use of PIP (3:1) in articles, this impacts a much broader range of manufacturing and distribution operations, including equipment, engines, vehicles, electronics parts and consumer products.

Background:

Under the Lautenberg amendments to the Toxic Substances Control Act (TSCA), EPA was required to promulgate regulations addressing certain chemical substances that EPA classified as persistent, bioaccumulative, and toxic substances (“PBTs”). In addition to PIP (3:1), EPA identified the following PBT substances for action in recent rulemaking: 2,4,6-tris(tert-butyl)phenol (2,4,6-TTBP); decabromodiphenyl ether (decaBDE); pentachlorothiophenol (PCTP); and hexachlorobutadiene (HCBd). EPA published proposed rules for all five PBTs on July 29, 2019 and the final rules were published on January 6, 2021. Many of the provisions of the new rules went into effect on March 8, 2021.

The regulations for the five PBTs set out prohibitions on the manufacture, processing, and/or distribution of the chemical substances, and also on products or articles containing the substances, subject to some exemptions. For PIP (3:1), the regulations also spell out recordkeeping requirements, notification obligations, and a prohibition on the release of PIP (3:1) to water.

While the regulations contain exemptions as noted above, the restrictions for PIP (3:1) pose some challenges, in particular regarding the prohibition on *articles* distributed in commerce. PIP (3:1) is used as a flame retardant, plasticizer and/or additive in a broad range of products. This includes products such as cables, wiring, plastic housing, and components used in electronics, vehicles, and manufacturing equipment. As each part or component can be several steps down the supply chain, the presence of PIP (3:1) may not be known, or immediately apparent to the regulated community, particularly for products and articles sourced from the international supply chain.

EPA, in acknowledging the impact the prohibition could cause, issued the NAA to enable certain uses to proceed while it conducts further review of the uses of PIP (3:1), and identifies whether extended compliance dates or additional exemptions to the restrictions are necessary.

Note that the NAA is specifically narrow to the use of PIP (3:1) in “articles” and provides that EPA will exercise its enforcement discretion not to enforce:

1. the prohibition on processing and distribution of PIP (3:1) for use in articles, and PIP (3:1) containing articles, and
2. the requirement for a statement of compliance in records pertaining to those articles.

All other requirements of the PIP (3:1) rule are not provided enforcement discretion and require full compliance. This includes the prohibition on releases to water, recordkeeping requirements, and notification obligations, all of which apply not only to articles with PIP (3:1), but also to the uses of PIP (3:1) otherwise allowed by the regulations. The NAA will remain in effect until the earlier of September 4, 2021 or until the date of a final action by EPA addressing the compliance obligations for PIP (3:1) in articles.

During the comment period, EPA is seeking comments specific to compliance issues associated with PIP (3:1) in articles, as well as input on any aspect of all five PBT rules. The comment period will expire on May 17, 2021.

The NAA and comment period provide an opportunity for manufacturers and distributors to reassess products in their supply chain for the potential presence of PIP (3:1) and identify alternatives or raise issues of concern to EPA. Because of their broad use in so many different products, the NAA is a short, but significant, opportunity for manufacturers and producers to identify whether their products contain PIP (3:1) and to ensure they are in position to be compliant with the new rules by the time the NAA expires on September 4, 2021.

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