

## **Ultium Cells LLC and General Motors Company Enter into Consent Agreement with EPA for Alleged TSCA Violations**

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Under a November 20, 2023, **final order** of the U.S. Environmental Protection Agency's (EPA) Environmental Appeals Board (EAB), Ultium Cells LLC (Ultium) and General Motors Company (GM) have entered into a consent agreement with EPA concerning alleged violations of Section 5(a)(1) of the Toxic Substances Control Act (TSCA). According to the consent agreement, the respondents voluntarily disclosed to EPA that three chemical substances were manufactured (imported) "a number of times between November 2021 and March 3, 2023," even though the chemicals were not listed on the TSCA Inventory at the time of import and no premanufacture notices (PMN) were filed at least 90 days before manufacture (import) (Count I). The consent agreement states that the respondents violated TSCA Section 13 by certifying that the chemicals complied with all applicable rules or orders under TSCA and were not offered for entry in violation of TSCA or any applicable rule or order under TSCA (Count II). The consent agreement notes that Ultium continued to process and use existing stocks of the three chemicals from the date of discovery on January 24, 2023, to March 7, 2023, constituting a violation of TSCA Section 15(2) (Count III), and that the respondents later informed EPA

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that they continued to use the chemicals for at least 20 days after the March 28, 2023, date (Count IV).

EPA agreed that respondents satisfied the conditions in the Audit Policy for the alleged violations described in Counts I, II, and III, qualifying for 100 percent reduction of the gravity component of the civil penalty for alleged violations that otherwise would apply. The consent agreement states that the alleged violations listed in Count IV do not qualify for 100 percent gravity component reduction under the Audit Policy. According to the consent agreement, “[t]o avoid the disruption of orderly business activities and the expense of protracted and costly litigation, both Parties agree that the penalty for alleged violations described in Count IV is \$654,150.” The consent agreement notes that the agreed upon civil penalty in this case reflects a determination of the gravity-based penalty (GBP) and adjustments to the GBP, taking into account the statutory factors.

As a condition of the agreement, respondents may import, process, use, and distribute the three chemicals while EPA and the respondents negotiate a final TSCA Section 5(e) consent order. The import, processing, use, and distribution must meet certain requirements, including that respondents may import the chemicals only for the Ultium facilities located in Warren, Ohio; Spring Hill, Tennessee; and Lansing, Michigan; and as a cathode active material (CAM) for use in the manufacture of battery cells.

## **Background**

As reported in our [November 23, 2022](#), and [April 6, 2023](#), memoranda, EPA held a two-part webinar series on its new standardized process to assess risk and apply mitigation measures, as appropriate, for mixed metal oxides (MMO), including new and modified CAMs. Under TSCA, EPA reviews new chemical substances before they enter the marketplace to ensure they do not present unreasonable risk to human health or the environment. In October 2022, EPA

**announced** an “innovative effort” to help make its review of new MMOs, including new and modified CAMs, more efficient. More information on the initiative is available in our October 11, 2022, **memorandum**.

## Commentary

This action reflects the quandary companies find themselves in when dealing with EPA’s interpretation of MMOs. We have no line of sight on the chemical identities of the substances at issue and thus cannot assess whether they qualify as statutory mixtures. We do know that EPA’s current interpretation of statutory mixtures does not align with its long-standing published guidance. EPA’s current interpretation of its statutory mixture guidance as it applies to MMOs has not been the subject of notice and comment, as EPA provided for activated phosphors. The standard justification is that there are many MMOs on the Inventory, so “clearly” MMOs are substances. Even if you assume that the underlying facts about those listed MMOs are the same as those for unlisted MMOs, it has never been the case that one entity’s choice not to rely on an exemption negates another’s choice to rely on that same exemption. Accepting EPA’s view is one way to go, and may be an expedient, but it does not legitimize EPA’s actions.

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