

# EPA Accepting Comment on Proposed Consent Decrees to Settle Lawsuits Challenging Time to Complete TSCA Risk Evaluations

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On April 26, 2024, the U.S. Environmental Protection Agency (EPA) requested comment on proposed consent decrees that would address lawsuits filed by the Community In-Power and Development Association Inc. (CIDA), Learning Disabilities Association of America, Louisiana Environmental Action Network, Sierra Club, and Texas Environmental Justice Advocacy Services (CIDA Plaintiffs) in the U.S. District Court for the District of Columbia on September 18, 2023, *CIDA v. EPA*, Case No. 1:23-cv-02715 (the CIDA action), and by the American Chemistry Council (ACC) in the same court on December 19, 2023, *ACC v. EPA*, Case No. 1:23-cv-03726 (the ACC action). [89 Fed. Reg. 32424](#). The CIDA Plaintiffs and ACC filed cases pursuant to the Toxic Substances Control Act (TSCA), alleging that EPA failed to perform non-discretionary duties under TSCA to complete timely several risk evaluations. The cases were consolidated on January 17, 2024. EPA is providing notice of the proposed consent decrees, which would resolve all claims in both cases by establishing deadlines for EPA to take action on the subject risk evaluations. Comments are due **May 28, 2024**.

## Background

On December 20, 2019, EPA designated 20 chemical substances as high priority (the High-Priority Chemicals) and initiated risk evaluations for those chemicals under TSCA. On May 24, 2019, ExxonMobil Chemical Company, through ACC's High Phthalates Panel, requested that EPA conduct risk evaluations for di-isodecyl phthalate (DIDP) and di-isononyl phthalate (DINP). EPA granted the request on December 2, 2019, and initiated the risk evaluation process for both manufacturer requested risk evaluations (the MRRE chemicals) on January 2, 2020.

Earthjustice, on behalf of the CIDA Plaintiffs, filed an action in the U.S. District Court for the District of Columbia pursuant to TSCA Section 20(a)(2) on September 18, 2023, alleging that EPA failed to perform non-discretionary duties to complete timely risk evaluations for the High-Priority Chemicals and the MRRE chemicals. ACC filed an action pursuant to TSCA Section 20(a)(2) on December 19, 2023, alleging that EPA failed to perform non-discretionary duties to complete timely risk evaluations for the MRRE chemicals. The court consolidated the cases on January 17, 2024.

## Proposed Consent Decrees

Under the [proposed consent decree with the CIDA Plaintiffs](#), EPA would complete its risk evaluations for the High-Priority Chemicals in accordance with the following schedule:

- EPA shall transmit to the Office of the *Federal Register* notices of availability of draft risk evaluations for at least seven of the High-Priority Chemicals, including a draft risk evaluation for 1,3-butadiene, by no later than **December 31, 2024**;
- EPA shall transmit to the Office of the *Federal Register* notices of availability of final risk evaluations for three of the High-Priority Chemicals, identified as tris(2-chloroethyl) phosphate (TCEP), formaldehyde, and 1,1-dichloroethane, by no later than **December 31, 2024**;
- EPA shall transmit to the Office of the *Federal Register* notices of availability of final risk evaluations for seven of the remaining High-Priority Chemicals, one of which shall be 1,3-butadiene, by no later than **December 31, 2025**; and
- EPA shall transmit to the Office of the *Federal Register* notices of availability of final risk evaluations for the remaining ten High-Priority Chemicals by no later than **December 31, 2026**.

Under the [proposed consent decree with ACC](#), EPA would transmit notices of availability of final risk evaluations for DIDP and DINP to the Office of the *Federal Register* by no later than **December 31, 2024**.

## Commentary

Bergeson & Campbell, P.C. (B&C<sup>®</sup>) is not surprised that CIDA and ACC commenced civil actions against EPA to compel it to perform its non-discretionary duties under TSCA Section 6. We are, however, surprised by these aggressive, enforceable deadlines, particularly the deadline for EPA to complete five final risk evaluations by the end of the calendar year. EPA's past performance on its risk evaluation activities suggests that it will miss this deadline for at least four of the scheduled risk evaluations. Below we provide our reasoning for these observations.

B&C expects EPA to meet the deadline for completing the final risk evaluation for TCEP by December 31, 2024. EPA released this draft risk evaluation in December 2023. For discussion, see our [memorandum](#) dated December 21, 2023. On April 29, 2024, EPA [posted](#) the letter peer-review comments on the draft risk evaluation. EPA has seven months to complete its risk evaluation on a chemical substance with limited commercial availability. We do not, however, expect EPA to release the final risk evaluations for formaldehyde, 1,1-dichloroethane, DIDP, or DINP by December 31, 2024.

EPA released the draft risk evaluation for formaldehyde on March 15, 2024, and provided a two-month public comment period that closes on **May 14, 2024**. The TSCA Science Advisory Committee on Chemicals (SACC) is scheduled to review this document at a virtual public meeting on **May 20-23, 2024**. For discussion, see our [memorandum](#) dated March 21, 2024. As a comparison, the TSCA SACC reviewed EPA's draft supplement to the 1,4-dioxane risk evaluation in September 2023. For discussion see our [memorandum](#) dated July 31, 2023. EPA [received](#) the TSCA SACC's final peer-review report in November 2023. EPA has not, however, released the final version of the draft supplement, nearly eight months after the TSCA SACC initiated its review on this document.

EPA has yet to release the draft risk evaluations for 1,1-dichloroethane, DIDP, and DINP. If we assume that EPA releases these documents in the beginning of June 2024, the public comment periods will close around August 2024. It is unclear whether EPA will peer review these chemical substances through public meetings by the TSCA SACC or by letter peer reviews. Either option is

expected to add an additional two to four months to the schedule, which means EPA will have less than two months to issue the final risk evaluations on these substances by December 31, 2024. We find this unlikely and expect EPA to file motions to extend the deadlines.

B&C encourages interested persons to monitor EPA's activities on the above-stated risk evaluations. We think it is unlikely that EPA will complete five risk evaluations by the enforceable deadline of December 31, 2024. This does not, however, mean that it is impossible for EPA to do so. If EPA is successful at completing these risk evaluations by December 31, 2024, we hope that EPA will not compromise the quality of these documents, nor limit the scope of the peer reviews to which each is subject. B&C considers the enforceable deadlines of December 31, 2025, or 2026 for the remaining chemical substances to be reasonable. We acknowledge additional uncertainty with EPA meeting those deadlines if there is a change in Administration.

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