



**Environmental Defense Fund Additional Comments on  
Significant New Use Rules on Certain Chemical Substances  
Docket ID: EPA-HQ-OPPT-2017-0414<sup>1</sup>**

**Submitted October 30, 2018**

Environmental Defense Fund (EDF) appreciates the opportunity to provide additional comments to the Environmental Protection Agency (EPA) regarding the proposed rule covering 27 significant new use rules (SNURs) under the Toxic Substances Control Act (TSCA) applicable to 27 chemical substances. 83 Fed. Reg. 41039 (Aug. 17, 2018). EDF previously submitted comments on the proposed rule, *see* EDF Comments on 27 Proposed SNURs (Sept. 17, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2017-0414-0135>. However, based on a number of comments that EPA received in opposition to the proposed SNURs applicable to chlorinated paraffins,<sup>2</sup> EDF is now submitting supplemental comments addressing those new issues.

EPA received comments asserting that the agency cannot promulgate SNURs on the subject chlorinated paraffins because “manufacturing” of the chemicals is an ongoing use and that these chemical substances can only be regulated under section 6 of TSCA rather than under section 5.<sup>3</sup> As will be explained in detail below, because these chemicals are already subject to section 5 consent orders, TSCA requires EPA to take additional action under section 5 in the form of a SNUR or provide an explanation for why EPA chooses not to promulgate a SNUR. 15 U.S.C. § 2604(f)(4). Moreover, as a result of a 2012 legal settlement between EPA and the chemicals’ manufacturers, the companies agreed to submit premanufacture notices (PMNs) and subject the chemicals to EPA review under section 5. These reviews have been ongoing and resulted in issuance of consent orders that were signed by the companies. Both those consent orders and the current proposed SNUR are logical outgrowths of section 5 review under TSCA. Given the manufacturers’ earlier acceptance of the consent decrees initiating these section 5 reviews, and

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<sup>1</sup> The docket is located at: <https://www.regulations.gov/docket?D=EPA-HQ-OPPT-2017-0414>.

<sup>2</sup> The “chlorinated paraffins” refers to the twelve chemical substances covered by the proposed SNURs at 40 C.F.R. §§ 721.11068 - .11077.

<sup>3</sup> *See, e.g.*, Comment submitted by American Chemistry Council, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2017-0414-0140>; Comment submitted Chemical Users Coalition, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2017-0414-0136>.

their signing of consent orders that were the logical and legal result of those reviews, industry's opposition to the proposed SNURs, called for at this stage of the process, is unfounded.<sup>4</sup>

**I. EPA needs to promulgate SNURs for the chlorinated paraffins, and it must do so in a manner that is consistent with the consent orders.**

When EPA issues a rule or order under TSCA § 5(e) or § 5(f), TSCA requires EPA to promulgate a SNUR or justify why it will not do so. 15 U.S.C. § 2604(f)(4). In deciding whether to promulgate a SNUR, TSCA requires EPA to consider “all relevant factor[s],” including but not limited to the factors identified in TSCA section 5(a)(2). 15 U.S.C. § 2604(a)(2). EPA considered relevant information about “the toxicity of the chemical substance” and the “likely human exposures and environmental releases,” in addition to the factors identified at section 5(a)(2), in order to determine what constitutes a significant new use. 83 Fed. Reg. 40988.

Once EPA initiates a rulemaking to promulgate a SNUR, the SNUR must “identif[y] as a significant new use any manufacturing, processing, use, distribution in commerce, or disposal of the chemical substance that *does not conform to the restrictions imposed by the action or order*” under TSCA § 5(e) or § 5(f). 15 U.S.C. § 2604(f)(4) (emphasis added). The statute’s plain language requires a SNUR to impose restrictions that “conform” to the restrictions in a § 5(e) or 5(f) order or a § 5(f) rule. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (statutory interpretation “begin[s] with the language of the statute”). As relevant here, “conform” means to “comply with rules, standards, or laws.” *Oxford English Dictionary* 365 (3d. ed. 2010). Therefore, in implementing this provision, EPA is to promulgate SNURs that identify as a significant new use any action that does not comply with the restrictions in the corresponding § 5(e) and § 5(f) actions or orders.

Since the Lautenberg Act passed, EPA has acknowledged that SNURs are required to conform to the restrictions in corresponding section 5(e) orders. In fact, every SNUR published pursuant to a consent order since the Lautenberg Act passed has designated as a significant new use the absence of the protective measures included in the corresponding consent order.<sup>5</sup>

Additionally, even before the Lautenberg Act introduced this new provision, EPA’s policy has been for SNURs to be consistent with section 5(e) orders. For instance, the 1989 regulation

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<sup>4</sup> We note that one of the manufacturers, Dover Chemical Corporation, the leading domestic producer of these chemicals, is a member of the American Chemistry Council (ACC), which has filed comments opposing the SNURs. *See* <https://www.americanchemistry.com/Membership/MemberCompanies/>. The other company, INOVYN (formerly INEOS Chlor Americas, Inc.), the leading importer of the chemicals, is not an ACC member as it is not based in the U.S.

<sup>5</sup> *See, e.g.*, 83 Fed. Reg. 40986, 40988 (Aug. 17, 2018).

establishing much of the SNUR procedures stated that “the standard SNUR language is designed to track the corresponding section 5(e) order provisions.” 54 Fed. Reg. 31298, 31299 (Jul. 27, 1989). As an example, in a SNUR from 2003, EPA stated that “the SNUR provisions for these chemical substances listed in this document are *consistent with* the provisions of the TSCA section 5(e) consent orders.” 68 Fed. Reg. 70155, 70171 (Dec. 17, 2003) (emphasis added).

The proposed SNURs at issue here, which cover the chlorinated paraffins, were proposed *after* EPA entered into three section 5 consent orders that covered all twelve chemical substances.<sup>6</sup> As required by section 5 of TSCA, after EPA entered into those consent orders EPA was required to either engage in a SNUR rulemaking or explain why it chose to not do so. 15 U.S.C. § 2604(f)(4). EPA complied with this provision of TSCA by engaging in rulemaking and proposing the SNURs at issue. 83 Fed. Reg. at 40998-41000. As EPA indicated in the preamble to the proposed rule, these chemical substances pose concerns for “systemic toxicity as well as aquatic and terrestrial toxicity” and are “potentially persistent, bioaccumulative, and toxic (PBT) chemicals.” As discussed in EDF’s earlier comments on the proposed SNURs, EPA has repeatedly found that these chemicals are all expected to be *very* persistent and *very* bioaccumulative.<sup>7</sup> 83 Fed. Reg. at 40989. As such, EPA properly concluded that SNURs are necessary.

The corresponding consent orders each include a provision that states:

Beginning five years following the date of submission of a Notice of Commencement of Manufacture (“NOC”), the Company is prohibited from manufacturing (which under TSCA includes importing), processing, distributing in commerce, using, or disposing of the PMN substances in the United States, for any nonexempt commercial purpose, unless the Company conducts the following studies on the PMN substances and submits all final reports and underlying data in accordance with the conditions specified in this Testing section.<sup>8</sup>

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<sup>6</sup> P12-0277 to P12-0284 Consent Order (Sanitized), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2017-0414-0086> (hereinafter “Dover Consent Order”); P12-0433, P12-0453 and P12-0505 Consent Order (Sanitized), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2017-0414-0074> (hereinafter “Ineos Consent Order”); Sanitized Consent Order for P-14-0683-84, [https://chemview.epa.gov/chemview/proxy?filename=sanitized\\_consent\\_order\\_p\\_14\\_0683c.pdf](https://chemview.epa.gov/chemview/proxy?filename=sanitized_consent_order_p_14_0683c.pdf) (hereinafter “Qualice Consent Order”) (not available in the docket for the proposed SNURs).

<sup>7</sup> See EDF Comments on 27 Proposed SNURs (Sept. 17, 2018) at 4-5, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2017-0414-0135>.

<sup>8</sup> Dover Consent Order at vi; Ineos Consent Order at v, Qualice Consent Order at v.

TSCA requires that the SNURs contain an analogous provision. 15 U.S.C. § 2604(f)(4). Our previous comments identified an inconsistency in this regard that EPA needs to remedy.<sup>9</sup>

Now, however, EPA has received comments asserting that EPA must deviate even further from the consent orders by entirely excluding this provision from the SNURs. Such an approach would be inconsistent with TSCA, which requires the SNURs to conform to the consent orders, and it would be inconsistent with EPA's longstanding policy that SNURs conform to the respective consent orders.

EPA should not deviate from this longstanding policy, now codified into TSCA. And it should certainly not do so without explaining and subjecting to public notice and comment its policy rationale and legal basis for doing so.

## **II. EPA should regulate these chlorinated paraffins under TSCA section 5.**

As EPA and the industry commenters are well aware, there is a long history leading up to EPA's review and regulation of these chlorinated paraffins under section 5 of TSCA. In 2009, EPA issued a notice of violation to Dover Chemical for manufacturing and distributing in commerce a "new chemical substance" without having submitted a PMN as required under 15 U.S.C. § 2604. Dover Consent Decree at 1 (Aug. 31, 2012), <https://www.epa.gov/enforcement/consent-decree-dover-chemical-corporation>. The parties reached a settlement in 2012, and the Consent Decree required that:

Defendant shall not manufacture or distribute in commerce any chemical substance composed of a MCCP, LCCP, or a combination of MCCPs or LCCPs *for which a new Premanufacture Notice is not submitted within 30 Days* of the Effective Date of this Consent Decree, unless and until the MCCP, LCCP, or particular combination of MCCPs or LCCPs, has been added to the TSCA Inventory or exempted from the TSCA Inventory requirements pursuant to TSCA and its implementing regulations.

Dover Consent Decree at 6-7 (emphasis added). A separate Consent Decree reached with INEOS has virtually identical language. INEOS Consent Decree at 6 (Nov. 5, 2012), <https://www.epa.gov/sites/production/files/documents/ineos-cd.pdf>.

Thus, the Consent Decrees very clearly required the companies to submit PMNs on the chemical substances to initiate their review under section 5 of TSCA.

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<sup>9</sup> EDF Comments on 27 Proposed SNURs at 13-14 (Sept. 17, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2017-0414-0135>.

Before the Consent Decree was entered, however, there was a public notice and comment process. In 2012, the Department of Justice published a notice in the Federal Register that opened a 30-day comment period on the Dover Consent Decree. 77 Fed. Reg. 11158 (Feb. 24, 2012), <https://www.federalregister.gov/documents/2012/02/24/2012-4369/notice-of-lodging-of-consent-decree-under-the-toxic-substances-control-act>; *see also* 77 Fed. Reg. 54609 (Sept. 5, 2012), <https://www.federalregister.gov/documents/2012/09/05/2012-21716/notice-of-lodging-of-consent-decree-under-the-toxic-substances-control-act> (providing a 30-day comment period on the Ineos Consent Decree). Only three substantive comments were submitted on the Dover Consent Decree, all of which related to the development of a Supplemental Environmental Project. *See* Docket No. 5:12-cv-00292-SL. There were no comments that opposed the requirement in the Consent Decree that these chlorinated paraffins undergo section 5 reviews. No comments were submitted on the Ineos Consent Decree. *See* Docket No. 1:12-cv-01058-RGA.

Six years later, it is only logical that EPA would be proposing SNURs applicable to these chlorinated paraffins. Having found that the chemicals may present an unreasonable risk,<sup>10</sup> EPA and the chemicals' manufacturers entered into consent orders covering these chlorinated paraffins. EPA has since concluded that SNURs are necessary to more broadly extend the conditions of the consent orders in order to help protect against the risks posed by these chlorinated paraffins, a decision that directly flows from the section 5 review process it conducted under TSCA. The suggestion that EPA cannot take action under section 5, six years after EPA initiated this process, is illogical.

**a. At industry's request these chlorinated paraffins were specifically exempted from expedited risk management action under section 6(h) of TSCA.**

It is at best disingenuous that industry commenters representing the interests of their member company that manufactures these chemicals now argue that these chlorinated paraffins must be addressed under section 6 rather than under section 5 as the companies had agreed earlier. This repositioning is particularly pernicious given that these same industry interests succeeded in securing an exemption for these chemicals from expedited risk management action that would otherwise have been required under section 6(h) of the Lautenberg Act, *based on the fact that they were undergoing review under section 5*. Pub. L. No. 114-182, 130 Stat. 448, 469, § 6(h) (June 22, 2016).

More specifically, as chemicals on the TSCA 2014 Work Plan<sup>11</sup> that were assigned high scores for both persistence and bioaccumulation, under the Lautenberg Act these chemicals met the

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<sup>10</sup> Dover Consent Order at ix; Ineos Consent Order at ix, Qualice Consent Order at ix.

<sup>11</sup> "TSCA Work Plan for Chemical Assessments: 2014 Update," <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/tsca-work-plan-chemical-assessments-2014-update>.

criteria that would have subjected them to expedited action under section 6(h), were it not for the fact that EPA had “initiated a review under section 5” of those chemicals. 15 U.S.C. § 2605(h)(1)(A). In fact, the *only* chemicals to which this exemption applied were these chlorinated paraffins, indicating that Congress understood that these *existing* chemicals were being reviewed under section 5 and were to continue being reviewed under section 5 rather than under section 6. See *Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 20 (2017) (stating that there is a presumption that Congress does not act inadvertently). Now, only after ensuring these chemical substances avoided expedited review under section 6 as PBTs, these commenters have the audacity to argue that EPA should address these chemicals only under section 6.

**b. Section 5 review was set in motion because EPA found that these chemicals were being manufactured in the U.S. illegally.**

EPA initially brought enforcement actions against Dover Chemical and INEOS because the companies were in violation of section 5. See Dover Consent Decree at 1; and INEOS Consent Decree at 1. The “ongoing” manufacturing and distribution in commerce of these chemicals was therefore illegal, and as part of the settlement agreements, EPA allowed such activities to continue only once PMNs were filed and the agency initiated its review of the chemicals under section 5. Therefore, that illegal, even if “ongoing,” manufacturing or distribution in commerce of the chemicals was permitted only in light of the section 5 review process. It follows that use of these illegally manufactured and commercially distributed chemicals was equally tenuous, and hardly constitutes the sorts of “ongoing uses” that are typically beyond the reach of SNURs under TSCA. Treating an illegal use as an ongoing use for purposes of TSCA § 5(a)(2) would turn the statute on its head.

**III. Companies have had sufficient time to certify and implement alternatives to the chlorinated paraffins.**

Industry comments also argue that the SNURs’ allowance for these chemicals to continue to be manufactured for another five years without any notification to, or further review by, EPA is insufficient to allow for affected companies to certify and implement alternatives.<sup>12</sup> (Note that these provisions in the SNURs reflect the provisions in the underlying consent orders barring manufacturing after five years in the absence of specified testing being conducted.) Yet, as even other industry commenters have documented,<sup>13</sup> companies have been on notice since 2009 that EPA has been taking actions to regulate these chemical substances. As stated previously, EPA has publicly documented its concerns over these chemicals through multiple actions taken over the last decade: by initiating the enforcement action in 2009, publishing an “Action Plan” in

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<sup>12</sup> Comment submitted by the Aerospace Industries Association, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2017-0414-0139>.

<sup>13</sup> Comment submitted by the American Chemistry Council, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2017-0414-0140>.

2009 raising its concerns about these chemicals,<sup>14</sup> reaching legal settlements with the manufacturers in 2012, initiating the section 5 process in 2012, listing the chemicals on the 2012 Work Plan,<sup>15</sup> and publishing risk assessments in 2015 that identified numerous health and environmental concerns.<sup>16</sup> Also, as EDF noted in our prior comments, EPA intended earlier to *ban* these chemicals pending further testing in 2015, in conformance with its PBT policy. 80 Fed. Reg. 79887 (Dec. 23, 2015). Considering that EPA has instead allowed these chemicals to remain on the market for far longer than originally intended, there is no basis for EPA to further extend the five-year timeline in the proposed SNURs when the regulated industry has been on notice for many years that EPA was acting on these chemical substances.

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<sup>14</sup> See U.S. EPA, *Short-Chain Chlorinated Paraffins (SCCPs) and Other Chlorinated Paraffins Action Plan* (Dec. 30, 2009), [https://www.epa.gov/sites/production/files/2015-09/documents/sccps\\_ap\\_2009\\_1230\\_final.pdf](https://www.epa.gov/sites/production/files/2015-09/documents/sccps_ap_2009_1230_final.pdf).

<sup>15</sup> TSCA WORK PLAN CHEMICALS, [https://www.epa.gov/sites/production/files/2014-02/documents/work\\_plan\\_chemicals\\_web\\_final.pdf](https://www.epa.gov/sites/production/files/2014-02/documents/work_plan_chemicals_web_final.pdf) (identifying chemicals based on their high combined hazard, exposure, and persistence and bioaccumulation characteristics).

<sup>16</sup> See U.S. EPA, *Standard Review Risk Assessment on Medium-chain and Long-chain Chlorinated paraffin PMN submissions by Dover Chemical* (Dec. 22, 2015), <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tasca/standard-review-risk-assessment>; U.S. EPA, *Standard Review Risk Assessment on Medium-chain and Long-chain Chlorinated paraffin PMN submissions by INEOS Chlor Americas* (Dec. 22, 2015), <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tasca/standard-review-risk-assessment-0>.