

Washington Watch

US EPA's \$1.4 Million TSCA Enforcement Action: Why It Matters

The Agency signals an intent to use its TSCA authority more aggressively

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Enforcement actions under the Toxic Substances Control Act (TSCA) are not all that frequent. When they do occur, however, they tend to be memorable. The most recent example involves an action brought by the United States Environmental Protection Agency (US EPA) against Dover Chemical Corporation. On February 7, 2012, the Agency announced that Dover Chemical had agreed to pay a \$1.4 million civil penalty for alleged violations of TSCA premanufacture notice (PMN) obligations.

The action against Dover Chemical involved the company's production of certain chlorinated paraffins at facilities in Dover, Ohio, and Hammond, Indiana. According to US EPA, Dover Chemical produces the "vast majority" of chlorinated paraffins sold in the United States. The enforcement action targeted short-chain chlorinated paraffins (SCCPs) in particular. According to US EPA, SCCPs have persistent, bioaccumulative, and toxic (PBT) characteristics.

The enforcement action against Dover Chemical is noteworthy for several reasons aside from the eye-popping civil penalty. This "Washington Watch" column explains why. We begin with some important background information on the temporal and legal context of the case.

Background: US EPA's "Chemical Action Plan" Announcement

In December 2009, US EPA Administrator Lisa P. Jackson announced that the Agency would be developing "action plans" on several chemicals, including so-called SCCPs. The Agency indicated that, among other things, it might consider initiating action to limit or ban SCCPs under TSCA Section 6.

This initiative sent shock waves through the chemical community. The announcement telegraphed the Agency's commitment to use its core authorities under TSCA in new, different, and potentially game-changing ways. US EPA had never previously announced so many actions under TSCA, nor had it ever cited use of its Section 6 authority so widely.

The Agency's chemical action plans summarize available information on hazards, exposure, and use; outline the risks that each chemical may present; and identify specific steps US EPA is taking to address those concerns. The Agency states that these actions "represent its determination to use its authority under the existing Toxic Substances Control Act . . . to the fullest extent possible, recognizing EPA's strong belief that the 1976 law is both outdated and in need of reform."¹

Expanding Chemical Management Initiatives

The action plan announcement also made good on Administrator Jackson's explicit commitment, first announced on September 29, 2009, to expand chemical management initiatives. At the same time, Administrator Jackson announced the Obama Administration's core principles for TSCA legislative reform.

In parallel with the legislative initiative — and perhaps sensing that TSCA reform would continue to move with the glacial speed to which we have become accustomed — Jackson announced US EPA's plans to strengthen its current chemical management program and increase the pace of its efforts to address chemicals that the Agency believes pose a risk to the public.

While the Obama Administration believes that legislative reform is necessary for effective chemicals management, Jackson stated that US EPA is committed to strengthening the performance of the current chemical management program. Enhancements included the development of chemical action plans that outline the Agency's risk management efforts on industrial chemical exposures of greatest concern and development of a list of "chemicals of concern."²

Action-Plan Chemicals

The Agency's initial list of chemicals to be considered for action-plan development included phthalates, perfluorinated chemicals, polybrominated diphenyl ethers (PBDEs) in products, benzidine dyes and pigments, bisphenol A (BPA), and SCCPs. US EPA stated that it chose the initial list of chemicals on the basis of multiple factors. Among the types of chemicals targeted for inclusion were the following:³

- chemicals identified as PBTs;
- high production volume (HPV) chemicals;

- chemicals in consumer products;
- chemicals of particular potential concern for children's health because of reproductive or developmental toxicity;
- chemicals subject to review and potential action in international forums;
- chemicals that bio-monitoring programs have found in human blood; and
- chemicals in categories generally identified as being of potential concern under the TSCA "new chemicals" program.

As this list makes clear, US EPA sees no dearth of chemical candidates from which to choose in developing action plans.

Action Plan for SCCPs

US EPA stated that, for purposes of its action plan, SCCPs would be defined to include all individual chemicals or mixtures that contain: ⁴ $C_xH_{(2x-y+2)}Cl_y$ where $x = 10-13$, $y = 3-12$, and the average chlorine content ranges from approximately 40 to 70 percent, with the limiting molecular formulas set at $C_{10}H_{19}Cl_3$ and $C_{13}H_{16}Cl_{12}$.

According to the Agency, it intends to evaluate further whether medium-chain chlorinated paraffins (MCCPs) and long-chain chlorinated paraffins (LCCPs) also should be addressed. These chemicals appear to present similar concerns, although data on them are not as comprehensive as are data on SCCPs.

Concerns About SCCPs

US EPA believes that SCCPs are persistent, bioaccumulative, and toxic to aquatic organisms at low concentrations. SCCPs have been measured in a variety of environmental media, including air, sediment, surface waters, and wastewater. SCCPs have also been measured in a variety of biota, including freshwater aquatic species, marine mammals, and avian and terrestrial wildlife. In addition, SCCPs have been detected in samples of human breast milk from Canada and the United Kingdom, as well as in a variety of food items from Japan and various regions of Europe.

Canada has proposed to add SCCPs to its list of prohibited substances. SCCPs already are listed on the European Union's Registration, Evaluation,

Authorization and Restriction of Chemicals (REACH) candidate list of “Substances of Very High Concern.” SCCPs have also been teed up for possible identification as a Persistent Organic Pollutant (POP) under the United Nations Stockholm Convention.

SCCPs and the TSCA Inventory

In the action plan, US EPA identified various initiatives it is taking or intends to take concerning SCCPs. Importantly for present purposes, the Agency stated that it is conducting a review to determine whether specific SCCPs, MCCPs, and LCCPs currently being manufactured and/or imported and used in the United States are listed on the TSCA Inventory.

Under TSCA, any substance that is not listed on the TSCA Inventory is classified as a “new” chemical. Prior to manufacturing or importing a new chemical for commercial use, a notice must be filed with US EPA under TSCA Section 5. If the Agency determines that a chemical in commerce is being produced or distributed in violation of this requirement, the consequences for business interests can be catastrophic. US EPA is authorized, for example, to enjoin further production and initiate enforcement action. Such measures can be hugely disruptive to both the chemical producer and its downstream purchasers.

In the SCCP action plan, the Agency expressed its intent to address discrepancies between any specific chlorinated paraffin (and specific fraction thereof) that companies are actually manufacturing or importing as SCCPs, and those listed on the TSCA Inventory. In fact, US EPA stated that it intended to require companies to submit PMNs for the SCCP, MCCP, and LCCP fractions that are not listed on the TSCA Inventory. The Agency also indicated that, if appropriate, it would initiate enforcement action under TSCA to address potential risks.

SCCP Enforcement Action

US EPA expressed its enforcement intent clearly in the SCCP action plan. What was not immediately apparent to many in the regulated community, however, was that at the same time the Agency rolled out the action plan, it was simultaneously targeting SCCP manufacturers and importers for enforcement actions. These actions were premised on US EPA’s belief that domestic entities were manufacturing SCCPs not listed on the TSCA Inventory, in violation of TSCA.

The Agency issued a notice of violation to Dover Chemical on December 15, 2009 — before the chemical action plan announcement was

even made public. In the notice, US EPA alleged that Dover Chemical had manufactured “new” chemical substances while failing to comply with TSCA’s PMN requirements.

Reliance on TSCA Section 11(c)

Another important, but subtle, twist to US EPA’s enforcement activities was its issuance of administrative subpoenas to various chemical manufacturers and importers of chlorinated paraffins pursuant to TSCA Section 11(c). Under this section, the Agency is authorized to require the production of reports, papers, documents, answers to questions, and other information that US EPA deems necessary in carrying out the provisions of TSCA.

Despite the significant authority granted to US EPA under TSCA Section 11(c), over the past three decades the Agency has largely ignored this provision as an information gathering and enforcement tool. That US EPA elected to rely upon TSCA Section 11(c) to augment its enforcement authority in connection with the investigation of chlorinated paraffins is further evidence of the Agency’s commitment to expand its use of the authority granted to it under TSCA.

Based on responses to the TSCA Section 11(c) administrative subpoenas, US EPA also issued notices of violation and “show cause” letters to various regulated entities. These letters typically are sent after the Agency has formed an initial opinion, based on the information available to it, that TSCA violations have occurred and/or are occurring. The recipient of such a letter is invited to explain why US EPA should not proceed with an enforcement action to address the violations that the Agency believes have occurred.

Settlement Agreement with Dover Chemical

While it is not clear (based on publicly available information) whether US EPA is currently pursuing other enforcement actions on chlorinated paraffins, we now know that Dover Chemical was a key target in the Agency’s investigation — presumably based largely on US EPA’s belief that Dover Chemical is the producer of the “vast majority” of chlorinated paraffins sold in the United States.

Under the terms of the consent decree that Dover Chemical signed settling the TSCA enforcement action, the company denied all alleged violations, agreed to pay \$1.4 million, and has committed to certain compliance requirements. These include the following:

- Dover Chemical cannot manufacture or distribute in commerce any chemical substance composed of a SCCP or combination of SCCPs, unless and until the “particular” substance has been added to the TSCA Inventory or exempted from Inventory requirements; and
- Dover Chemical cannot manufacture or distribute in commerce any chemical substance composed of a MCCP, LCCP, or a combination of these substances for which a new PMN is not submitted within 30 days after the effective date of the consent decree, unless and until the MCCP, LCCP, or particular combination of MCCPs or LCCPs have been added to the TSCA Inventory or exempted from Inventory requirements.⁵

Implications of the SCCP Enforcement Action

While any major US EPA enforcement action is noteworthy, the actions that the Agency pursued in connection with chlorinated paraffins (culminating in the action against Dover Chemical) are especially significant. Noted below are the unique — and perhaps precedent-setting — aspects of the case.

Change in TSCA Inventory Interpretation

US EPA brought the enforcement action against Dover Chemical based on its belief that certain chlorinated paraffins manufactured by the company are “new.” Because these substances are not specifically listed on the TSCA Inventory, the Agency argued that Dover Chemical was violating TSCA by manufacturing the substances and distributing them in commerce. Reportedly, at the same time US EPA brought the action against Dover Chemical, the Agency also was pursuing similar claims with respect to other companies that were manufacturing and/or importing chlorinated paraffins.

These enforcement actions appear to be based on what some would characterize as US EPA’s new (or at least “clarified”) interpretation of the scope of TSCA Inventory listings. To understand how this revised interpretation works, consider the following background information: There are many TSCA Inventory listings of polychlorinated alkanes (a term the Agency uses that is interchangeable with paraffins) and mixtures that might contain polychlorinated alkanes. A common chemical substance description for chlorinated paraffins (certainly in 2009), was “alkanes, chloro,” CAS # 61788-76-9. This chemical is listed on the TSCA Inventory. US EPA describes it as a mixture that may contain polychlorinated alkanes, but does not specify any particular chain length. The description thus appears to encompass all ranges of carbon atoms and all degrees of chlorination. There

are many other alkanes assigned CAS numbers and listed on the TSCA Inventory that are more precise in terms of the chemical's carbon chain length/fraction. For example, Alkanes, C₁₀-C₁₂, chloro (CAS # 108171-26-2) and Alkanes, C₁₂-C₁₄, chloro (CAS # 85536-22-7), to name two.

In the various enforcement actions that US EPA has launched regarding chlorinated paraffins, the Agency is taking the position that a broad listing of "alkanes, chloro" is insufficiently descriptive of a chemical substance for TSCA Section 5 purposes if the manufacturer or importer knew or should have known that a more specific chemical description would better reflect the chemical identity of the substance being manufactured.

While in hindsight this may seem self-evident, the reality is that entities had likely been describing their polychlorinated alkane substances using the broad "alkanes, chloro" CAS number for decades, believing such a description was adequate for TSCA compliance purposes. US EPA's recent focus on (and enforcement of) more particularity in chemical identification likely came as a surprise to many in the chemical community.

Use of US EPA Program Databases

The Dover Chemical enforcement action is also significant for a second reason, this one having to do with the way in which the alleged TSCA violations were discovered. Reportedly, US EPA is using various Agency databases to determine how companies identify and report chemical substances. A lack of consistency between databases could inspire further US EPA investigation.

US EPA can, for example, compare information submitted under TSCA's Inventory Update Reporting (IUR) rule (and soon its Chemical Data Reporting, or CDR, rule), Toxics Release Inventory (TRI) Form R submissions under Emergency Planning and Community Right-to-Know Act Section 313, and other reports submitted pursuant to other Agency programs to determine whether chemical substances are being reported inconsistently. In the present case, for example, US EPA could review the company's Form R response to determine if the TRI Category (N583) was reported, and compare it against the company's IUR (now CDR) Form U reporting form.

Expanded Use of TSCA Administrative Subpoena Authority

Finally, the SCCP investigation indicates that US EPA may begin to use its TSCA Section 11(c) administrative subpoena authority more routinely. As noted, historically the Agency has made limited use of this authority. In the future, however, TSCA subpoenas could well be used regularly to obtain

information.

Concluding Thoughts

The Dover Chemical case and US EPA's SCCP investigation tell us several things. First, companies should pay very close attention to how the chemical substances they manufacture and/or import are identified in terms of specific TSCA nomenclature and TSCA Inventory conventions. The Dover Chemical enforcement action is reflective of fairly recent and subtle shifts in the Agency's interpretation of the TSCA Inventory, certain chemical naming conventions, and the level of particularity that US EPA expects in TSCA Inventory chemical listing determinations.

Other examples of changing Agency thinking include US EPA's interest in "clarifying" the chemical identification of certain statutory mixtures for purposes of the TSCA Inventory and its "final clarification" describing certain "activated phosphors" that are not specifically listed on the TSCA Inventory (and thus are "new" chemical substances for which PMNs would be required).

These actions clearly indicate that US EPA is looking closely at how chemical substances are identified for TSCA Inventory purposes. The Agency is enforcing its view that chemical manufacturers (including importers) must ensure that commercial chemical substances are identified as precisely as possible for TSCA Inventory listing purposes.⁶ Companies are urged to review carefully how chemical substances are identified under each of their reporting obligations and ensure that chemical substances are identified similarly and consistently across US EPA programs.

Companies should also expect the Agency to rely more regularly upon administrative subpoenas. If an entity is unlucky enough to be on the receiving end of such a subpoena, it should carefully review the subpoena and carefully craft a response. A timely response to such a subpoena is also essential.

Finally, as TSCA legislative reform drags on with no near-term prospects on the horizon for Congressional action, chemical stakeholders should expect US EPA to continue aggressively using its TSCA authority to address perceived chemical exposure risks. Naturally, all things could change if the Republicans take either the White House or both houses of the United States Congress in the forthcoming elections. Barring that possibility, chemical entities can expect US EPA to be more creative and ambitious in its use of the TSCA authorities that it has had at its disposal all along.

As an aside to this final point, we would note that, as this column was being written, US EPA proposed a TSCA “significant new use rule” that would apply to certain SCCPs.⁷ Stay tuned.

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Notes

¹ More information on the action plans is available at <http://www.epa.gov/oppt/existingchemicals>.

² TSCA Section 5(b)(4) provides that US EPA “may, by rule, compile and keep current a list of chemical substances with respect to which the Administrator finds that the manufacture, processing . . . or any combination of such activities, presents or may present an unreasonable risk of injury to health or the environment.” The rulemaking on “chemicals of concern” has been bottled up at the Office of Management and Budget for over a year, with no sign of its release any time soon. For more information on the rulemaking, see Auer, C. M., Bergeson, L. L., and Burchi, L. R. (2010, May 24). TSCA Section 5(b)(4) “Chemicals of Concern” list: Questions, issues, concerns. BNA Daily Environment Report. Available at <http://www.lawbc.com/published-articles/P90>.

³ For more information, see <http://www.epa.gov/oppt/existingchemicals/pubs/ecactionpln.html>

⁴ For more information, see <http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/sccps.html#new>

⁵ For more information on the consent decree, see <http://www.epa.gov/compliance/resources/decrees/civil/tsca/doverchemical-cd.pdf>.

⁶ Bergeson & Campbell, P.C.’s recent article discussing, in part, TSCA Inventory issues regarding Section 8(b)(2) statutory mixtures and activated phosphors is available at <http://www.lawbc.com/uploads/docs/00089258.pdf>.

⁷ For more information, see http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/PrePub_Bundled_SNUR_NPRM_SIGNED_2012-03-20.pdf.