Union Comments on EPA's Proposed Updates to New Chemicals Regulations under the Toxic Substances Control Act

Document ID: EPA-HQ-OPPT-2022-0902-0001

August 8, 2023

These comments are submitted jointly by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and the United Steelworkers (USW). The AFL-CIO is the federation of 60 national and international labor unions representing 12.5 million working people across a wide variety of industries. The UAW represents more than 1 million active and retired members in North America, with members in virtually every sector of the economy, including multinational corporations engaged in manufacturing, small manufacturers, state and local governments, colleges, universities, hospitals and private non-profit organizations. The USW is North America's largest industrial union, representing 1.2 million members and retirees in many industries throughout the United States, Canada and the Caribbean.

The AFL-CIO has previously submitted comments on EPA's new chemicals framework.[1] Our comments here focus on the information disclosure provisions of the proposed rule.

As EPA acknowledged in proposing its first set of regulations establishing the framework for its premanufacture program, Congress intended transparency in EPA's review process through the Toxic Substances Control Act. "Congress intended information on uses of new substances to be published so that the public can estimate the types and extent of potential human

[1] *See* EPA-HQ-OPPT-0585-0075.

and environmental exposures to substances."[2] This information disclosure, moreover, was not purely for informational purposes. Instead, Congress intended that, "[w]ith an understanding of likely exposure, the public more effectively may exercise its opportunities for participating in review of chemical risks."[3]

The Unions appreciate EPA's efforts, in this rulemaking, to accomplish this transparency goal through "more efficient and effective mechanisms" than those contained in its earlier rules.[4] However, like the current rules, the proposed amendments fall short of providing notice and any opportunity to participate in the review process to the constituency most at risk of exposure to the new chemicals and chemicals for which companies are seeking authority for significant new uses: the workers who will be engaged in their production and use. In these comments, we will explain how the current system fails to provide any meaningful notice to affected workers and why the proposed amendments do not solve this problem, and we will propose additional amendments to the regulations that will more effectively accomplish the agency's and Congress' transparency objectives.

A. The Federal Register and ChemView Provide no Meaningful Information to Employees and their Unions

Under the current rules, once EPA receives a premanufacture notice (PMN) or a significant new use notice (SNUN), the Agency publishes notice that it has received the application in the Federal Register, along with specified supporting information, to the extent the

[2] Environmental Protection Agency, *Premanufacture Notification Requirements and Review Procedures,* 44 Fed.Reg. 2242, 2253 (Jan. 10, 1979).

[3] *Id.*

[4] Environmental Protection Agency, *Updates to New Chemicals Regulations under the Toxic Substances Control Act (TSCA),* 88 Fed.Reg. 34100, 34105 (May 26, 2023).

submitter has not claimed the information is confidential[5]—a limitation which is often, if not always, invoked. EPA is proposing that, instead of publishing this information in the Federal Register, it will provide "streamlined access to information EPA receives and develops" about these applications in its ChemView online database.[6]

Neither the Federal Register notice nor ChemView provides workers or their unions with meaningful or timely information. First, it is extremely rare and impractical that a union, much less individual unrepresented employees, will monitor the Federal Register to see whether their employer has submitted a new chemical or significant new use application or is subject to a Section 5(e) order. Moreover, given the broad range of information submitters routinely claim as confidential, even when a union accesses ChemView, it is unlikely to learn anything that would enable them to participate in the review process in any meaningful way.

A recent experience by a union in trying to identify the chemicals to which its members are exposed, and any precautions EPA may (or may not) have required in a Section 5(e) order illustrates this problem. The union found in the EPA database ChemView that one of the employers whose employees it represents has filed four Pre-Manufacture Notices (PMNs) and one Significant New Use Notice (SNUN). However, the union cannot determine the precise identity of the substances because the company has redacted important information, such as the CAS numbers, along with much of the other information about and accompanying these submissions.

[5] 15 C.F.R. § 720.70.

[6] 88 Fed.Reg. at 34105.

The union and affected workers knew nothing of these applications when they were filed. The chemicals are currently in use in the facility indicating that the consent order had already been finalized.

Persons working with the substances in the plant have been complaining about health effects, including chemical burns and respiratory irritation. When the union inquired what worker protections the employer may have agreed to with EPA, the employer responded that this information is confidential. The union accordingly does not know whether workers' adverse reactions are occurring because the company has failed to comply with any agreement it may have reached with EPA or whether any such agreement itself is inadequate to protect the workers.

Even with industrial hygiene expertise, the union has searched ChemView to answer these questions but much of the information in ChemView is heavily redacted, making the effort fruitless and the union less likely to use their limited capacity on this search in the future.

It is unreasonable to call this system at all "transparent," or to pretend that listing more chemicals on ChemView will enable working people and their representatives to participate in the review process. TSCA Section 5 requires EPA to consider all relevant factors when deciding whether new chemicals and significant new chemical uses may pose unreasonable risks and what controls may be needed to mitigate those risks. EPA requires the submitter to provide detailed worker exposure information at each site where the chemical will be used, whether the site is controlled by the submitter or by someone else. The proposed regulations emphasize the importance of this information by listing the types of exposure, in-place protections, and forms of the chemical exposure as "separate, unique information requirements" on the notice and in

new fields on the PNM form.[7] Unless workers and their unions know the information their employers are submitting regarding worker exposures, there is no way for EPA to know whether the submitted information paints a full picture of workplace exposures. The workers have first-hand information about the potential sources of exposure and any controls that may be in place and are in the best position to provide a reality check on what EPA is being told. They can also help EPA evaluate whether the terms the Agency is considering for a 5(e) order can be effectively implemented to control exposures in their workplaces.

Moreover, without access to the 5(e) orders, workers and their unions have no way of ensuring that their employers are complying with workplace protections incorporated into those orders—or even knowing that there are practices the employer is supposed to be following.

In short, the new chemical review and evaluation was not intended solely to be a two-way conversation between EPA and the submitter. Workers have an interest and a right to know that the conversation is taking place, and when they are at risk of being exposed to new chemicals with unknown health effects, they must be provided the opportunity to participate and to improve the orders to make them more effective before they are finalized. Without such notice to and involvement from exposed workers and their representatives, EPA cannot be sure that its 5(e) order eliminates unreasonable risk to workers as TSCA requires.

B. EPA Can Require Disclosure to Unions without Compromising Employer Confidentiality

Section 5 emphasizes transparency in new chemical reviews. It requires EPA to consider fully all relevant factors when deciding whether new chemicals and significant new chemical uses may pose unreasonable risks and what controls may be needed to mitigate those risks. TSCA also authorizes EPA to require such reports as necessary to meet the Act's requirements.

[7] 88 Fed.Reg. at 34108; *see proposed* §§ 720.45(g)(3) and (h)(3).

While TSCA Section 14 prohibits the Agency from disclosing confidential information, any apparent tension between the Act's transparency requirements and Section 14 can be resolved in a manner that gives workers access to new chemical information while protecting submitter's legitimate confidentiality concerns.

EPA must do so by thinking of the applicant in their capacity as both a submitter and an employer. By doing so, EPA can require any submitter that is also an employer (which is likely to be all submitters) to: (1) notify affected workers and their authorized representative, if there is one, that an application to manufacture or engage in a new use of a chemical has been filed; (2) make the application and supporting data available to workers or their authorized representative for review upon request, subject to the confidentiality protections described below; and (3) ensure that potentially exposed workers and their representatives have an opportunity to comment on any evaluation of risks or draft Section 5(e) orders before they are finalized. EPA can ensure that workers are provided with the required notice by requiring the submitter/employer to certify that it has met the disclosure requirements before EPA approves either the manufacture of a new chemical or a new use for a chemical. Finally, EPA must require the submitter/employer to post any Section 5(e) order or SNUR in any workplace where there are affected employees.

This proposed disclosure process will fulfill EPA's transparency requirements and TSCA's mandate to eliminate unreasonable risks, and is fully consistent with TSCA's confidentiality provisions. First, Section 14 restricts what *EPA* may disclose. It does not bar EPA from requiring a submitter to disclose information to its workers and their representatives. The Supreme Court has recognized that rules governing data that private parties must disclose to the

government are fundamentally different than those requiring disclosure of information by private parties to one another.[8]

Second, Section 14(d)(8) exempts from the statute's confidentiality requirements information that "is required to be made public under any other provision of Federal law."[9] Under the National Labor Relations Act, unions have a right to information related to their role as the employees' representative in dealing with their employers on terms and conditions of employment. Of particular relevance here, unions are entitled to information related to safety and health conditions in the workplace and to financial information that pertains to positions employers take in collective bargaining.[10] EPA could require employers to disclose this information to workers and their unions, while conditioning disclosure on confidentiality protections. Workers and unions are familiar with these kinds of restrictions: Employers often impose confidentiality restrictions on employees as a condition of employment, and unions are often asked to sign confidentiality agreements to obtain this information.

Similarly, the Occupational Safety and Health Administration's Hazard Communications Standard requires employers to make available to employees and their representatives a wide range of information about the hazards they confront in the workplace and the appropriate protective measures.[11] The standard specifically provides protections for trade secrets. However,

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[8] *Dole v. Steelworkers*, 494 U.S. 26, 33 (1990) (distinguishing between rules requiring private parties to provide information to the government, regulated by the Paperwork Reduction Act, and rules requiring private parties to disclose the identity of hazardous substances to their employees, which the Act does not address).

[9] 15 U.S.C. § 2613(d)(8).

[10] *See, e.g., NLRB v. Gulf Power Co.,* 384 F.2d 822, 824 (5th Cir. 1967) (safety and health conditions are mandatory subjects of bargaining: "It is inescapable that … workers, through their chosen representative, should have the right to bargain with the Company in reference to safe work practices"); *NLRB v. Truitt Mfg.*, 351 U.S. 149, 152-53 (1956) (employers are obligated to provide financial information relevant to their bargaining positions).

[11] 29 C.F.R. § 1910.1200.

recognizing that workers, their representatives, and some health professionals often need chemical identity and hazard information, the standard requires employers to provide information, otherwise protected from disclosure, on request if the requester agrees to sign a confidentiality agreement.[12]

EPA can take the same approach: As noted above, EPA can require entities submitting new chemical or significant new use applications to notify their affected employees that they are submitting these applications and to make the applications, the health and safety studies submitted with the application, and any risk evaluations completed by EPA available to the employees and their unions upon request, contingent on the requester agreeing to confidentiality protections. EPA should require the submitter to certify that it provided notice of the application to workers at the time it submitted the PMN or SNUN. EPA should further ensure that workers have access to any evaluation completed by the Agency of the risks posed by a new chemical or new uses and any draft section 5(e) order before it becomes a *fait acompli*. EPA can do so by disclosing this information directly to interested workers or their representatives or directing the submitter/employer to do so. This system would resolve any tension between EPA's interest in bringing greater transparency and public participation into the new chemicals and significant new use approval process and the submitters' legitimate interests in protecting their confidential business information. It would also eliminate any need for EPA to make the relevant disclosures, while ensuring that affected workers can access the information necessary to participate meaningfully in the review process and to monitor implementation of protective processes in their workplaces.

[12] 29 C.F.R. § 1910.1200(i)(3).

Finally, there is no reason to keep the details of a Section 5(e) order confidential. Any restrictions on manufacturing or processing a new chemical directly affects workers. They have a right to know the identity of the chemical with which they will be working and be involved in determining what, if any, protections are supposed to be in place, so they can monitor compliance with those requirements or alert the manufacturer, processor or EPA if those protections prove inadequate. These disclosures are a necessary part of any regime to protect workers from the risks new chemicals may pose. OSHA notifies unions when it opens an investigation against an employer whose workers the union represents so that the union can be involved throughout the investigatory process, and subsequently, when the agency issues a citation against that employer. The agency also requires employers to post citations in the workplace. The Occupational Safety & Health Review Commission requires employers either to notify unions when citations are contested or to post such a contest in the workplace.[13] These notifications are the minimum necessary to ensure workers have a meaningful opportunity to participate in government decisions affecting their health and safety.

[13] 29 C.F.R. § 2200.7.