Before the United States
Environmental Protection Agency

Trichloroethylene: Regulation of Use in Vapor Degreasing Under TSCA §6(a)
(Docket EPA-HQ-OPPT-2016-0387)

Comments of the Chemical Users Coalition

The U.S. Environmental Protection Agency recently issued for comment a proposed rule under Section 6 of the Toxic Substances Control Act ("TSCA"), at 82 Fed. Reg. 7432 (January 19, 2017) to prohibit the manufacture, processing, distribution, and commercial use of trichloroethylene ("TCE") for vapor degreasing. (Hereinafter, the "TCE2 Rule".) This proposed rule raises important precedential issues for the TSCA program, as modified by the Frank R. Lautenberg Chemical Safety for the 21st Century Act ("LCSA"). The Chemical Users Coalition ("CUC") appreciates the opportunity to provide comments concerning those issues.

CUC is an association of companies from diverse industries that are interested in chemical management policy from the perspective of those who use, rather than manufacture, chemical substances.[1] CUC believes in the importance of aligning protection of health and the environment with the pursuit of technological innovation, two goals that can and must be made compatible if our society is to achieve sustainable economic development. Aligning these goals is particularly important in the area of chemical management policy, which necessarily addresses how core technologies and products should be adapted to address emerging information about health and environmental risk.

CUC supported passage of the LCSA and has a strong, continuing interest in implementation of the new law to assure that it results in an effective and efficient TSCA program. In commenting on the TCE2 Rule, CUC is focusing on specific statutory interpretations of TSCA and regulatory strategies set forth in EPA's proposed rule and preamble that may set important precedents for the program. Specifically, these comments address (a) EPA's interpretation of its Section 9 obligations; (b) the rationale for EPA's decision to regulate commercial users of TCE; (c) a recommendation for EPA to undertake alternatives assessment for a set of solvents, including TCE, perchloroethylene, methylene chloride and 1-bromopropane; and (d) a recommendation for how EPA should address transition issues.

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[1] The members of CUC are Intel Corporation, Procter & Gamble Company, American Honda Motor Corporation, Lockheed Martin Corporation, HP Incorporated, IBM Company, The Boeing Company, General Electric Company, and Airbus S.A.S.

1. EPA's Interpretation of Section 9(a) is Inconsistent with the Statute

On December 16, 2016, EPA issued a proposed rule (identified by the Agency as the "TCE1 Rule") to prohibit other specific uses of TCE.[2] CUC filed comments on this proposed rule noting that the preamble provided an inadequate rationale for EPA's decision not to initiate consultation with other agencies under Section 9(a) of TSCA.

In the proposed TCE2 Rule, EPA similarly provides an inadequate explanation for its decision not to initiate Section 9(a) consultation with other agencies. In fact, the basic arguments in the TCE2 Rule, and in some cases the preamble text itself, are identical to that of the TCE1 Rule on this topic.

Accordingly, CUC is incorporating by reference, and including in this submission on the TCE2 Rule, the comments filed for the TCE1 Rule. EPA should reconsider its decision under Section 9(a) for the TCE2 Rule for the same reasons that it should reconsider its decision for the TCE1 Rule.

2. EPA Has Not Established a Reasonable Rationale for Regulating Commercial Users of TCE

Another common issue arising in this proposed rule and the TCE1 Rule is EPA's decision to regulate commercial users of TCE in vapor degreasing. In the TCE1 Rule, EPA argued that it was necessary to regulate commercial users of TCE because these parties could divert TCE from authorized uses to the uses for which manufacture, processing and distribution had been prohibited. EPA offered no record support indicating that this scenario was likely. The Agency also did not factor into its analysis the fact that Section 15(2) of the statute already prohibits "use for commercial purposes" of a chemical that was manufactured, processed or distributed in violation of a Section 6 rule.

The TCE2 Rule is even more flawed in this regard. The analysis supporting the rule does not even examine an option that would rely on a prohibition of manufacture, processing and distribution, coupled with a notification of customers for all uses of TCE about the prohibition related to vapor degreasing. Instead, the TCE2 Rule simply assumes that a prohibition on commercial use of TCE is necessary as a general matter.

Accordingly, CUC incorporates by reference its comments on this topic from the TCE1 Rule into these comments as further support for its recommendation that EPA reconsider the need for a regulatory ban on commercial use of TCE for vapor degreasing, which has no independent support in the record and is duplicative of an existing statutory provision.

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[2] 81 Fed. Reg. 91592 (December 16, 2016).

3. EPA Should Conduct an Alternatives Assessment on the Chemical Substances Likely to Replace TCE in Vapor Degreasing

The TCE1 preamble noted that some of the leading alternatives for the applications addressed by that rule included chemicals such as methylene chloride, 1-bromopropane and perchloroethylene. EPA has identified these substances as targets for future regulation under Section 6 of TSCA. These same substances are identified as likely "drop-in solvent alternatives" for the TCE2 vapor degreasing applications as well.[3] CUC incorporates by reference its comments on this topic from the TCE1 Rule into these comments as further support for the recommendation that EPA conduct an assessment of vapor degreasing alternatives, examining the comparative hazards, exposures, resource impacts and performance attributes of these substances.

4. EPA's Assessment of the Technical and Economic Feasibility of TCE-based Vapor Degreasers is Inadequate

The TCE2 Rule presents a precedential issue regarding how the new TSCA Section 6 risk management provisions will be implemented. Specifically, the record supporting this proposed rule indicates EPA has received substantial information questioning whether it is technically and economically feasible to replace TCE with water-based cleaners, EPA's recommended alternatives. In failing to respond adequately to this information, EPA has not addressed its statutory obligations for assessing the feasibility of alternatives.[4]

Section 6 requires EPA to assess the feasibility and benefits of alternatives for several purposes in the risk management process. Section 6(c)(2)(C) states that EPA must "consider to the extent practicable" whether "technically and economically feasible alternatives that benefit health or the environment" will be "reasonably available" by the time a prohibition or restriction regarding a specific condition of use takes effect. This is a substantive consideration for EPA "in deciding whether to prohibit or restrict" a chemical substance under Section 6.

Similarly, Section 6(c)(2)(C) indicates that this same consideration of alternatives is also required "in setting an appropriate transition period" for a prohibition or restriction under Section 6. This language aligns with Section 6(d)(1)(E), which specifies that any Section 6 risk management rule shall "provide for a reasonable transition period."

In addition, Section 6(g)(A) allows EPA to grant exemptions as part of a Section 6(a) rule, or in a separate rule, where a "specific condition of use is a critical or essential use

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[3] 82 Fed. Reg. 7432 (January 19, 2017) ("FR Notice"), at 7450.

[4] CUC's concern on this matter is the inadequacy of EPA's response to the many substantive objections to its proposed regulatory action, based on questions of technical and economic feasibility. CUC does not take a position on the specific merits of those objections.

for which no technically and economically feasible safer alternative is available, taking into consideration hazard and exposure."

In the preamble to the TCE2 proposed rule, EPA describes its consultation with a Small Business Advocacy Review ("SBAR") Panel in which a group of Small Entity Representatives ("SERs") identified technological and economic obstacles to conversion of their operations to the water-based cleaners that EPA recommended. In this context, EPA received multiple, detailed comments from specific companies indicating that alternatives to TCE were technically infeasible (e.g., lack of effectiveness for small parts in the aerospace industry and for glass-to-metal seals), impractical (e.g., facility space demands and water demand of up to 10,000 gallons per day for aqueous cleaning systems), incompatible with customer (e.g., military) specifications, and economically infeasible (e.g., costs beyond the capability of many small businesses.)

In the preamble to the TCE2 proposal, and in its report on the SBAR Panel discussions, EPA did not question the validity of these concerns. Instead, the Agency requested "additional comments, information, and data to assist EPA in evaluating the availability of alternatives to TCE in vapor degreasing applications."[5] At a minimum, it is not clear what additional "comments, information and data" EPA expects companies to provide, as many of the letters and questionnaire responses already in the record show that the SER participants in the SBAR process provided multiple examples to support their concerns and specific quantitative data on their operations. The broader concern with the proposed rule on this topic, however, is that EPA provides no clear explanation of how it considered this evidence that a TCE ban was not technically or economically feasible "in deciding whether to prohibit" TCE in vapor degreasing, as required under Section 6(c)(2)(C).

A similar flaw arises in EPA's approach to setting the proposed effective date for the TCE2 rule. The proposed rule indicates that the manufacture, import, processing and distribution of TCE for vapor degreasing would be banned 18 months after publication of the final rule. Commercial use of TCE for vapor degreasing would be banned six months later, 2 years after publication of the final rule.

As the basis for this transition period, EPA cites a comment by one SER who thought that conversion to a water-based cleaning system could take place in two years.[6] As EPA noted in its report on the SBAR deliberations, however, other SERs participating in the process indicated that the timeline would probably take up to four years, in order to address performance expectations in customer groups like the aerospace industry. More fundamentally, as noted above, there were multiple SER commenters indicating that water-based cleaners would not be technically or economically feasible alternatives at all, no matter what the transition period might be. In the absence of a cogent explanation for

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[5] FR Notice, at 7451.

[6] FR Notice, at 7456.

why those substantive objections are incorrect, EPA has not established a basis for why two years is a "reasonable" transition period under Section 6(d)(1)(E).[7]

EPA's primary response in the proposed TCE2 Rule to the objections about the technical and economic feasibility of alternatives is a deferral of these issues to a later point in time. Specifically, the Agency indicates that it would "consider granting a time-limited exemption, under the authority of TSCA section 6(g), for a specific condition of use for which EPA can obtain documentation."[8] The Agency then asked for comment on "a process for receiving and evaluating petitions and requesting EPA [to] promulgate critical use exemption rules."[9] EPA expresses interest in the "kinds of documentation" that should be required and the timeframes for EPA action "given that the documentation for any given use could be technical and extensive, and that EPA may also need to develop additional information, such as economic estimates, in order to promulgate an exemption rule."[10]

As noted above, EPA should be taking several steps before adopting a Section 6(g) strategy to address these issues. First, EPA should evaluate the substantial information it has already received in deciding whether to prohibit TCE from the various technology applications discussed in the SBAR proceeding. Second, in those situations where a ban can be justified for vapor degreasing, EPA should establish a transition period reflecting the whole record regarding transition issues, which may vary by applications, industries or size of companies.

To the extent that EPA decides to invoke Section 6(g) to address the absence of technically or economically feasible alternatives to TCE for vapor degreasing, we recommend that EPA adopt the following principles. First, Section 6(g) exemptions should be adopted in the TCE2 rule itself, to the extent feasible. EPA has already received substantial information supporting an exemption from some of the companies in the SBAR process. There is no need to defer a decision where a sufficient basis for an exemption is already before the Agency. Second, if EPA defers decisions on these matters to a future process, EPA has a responsibility to define clearly what specific additional information, besides what it has already received from the SERs, would be needed to make a decision.

Third, the timeline for EPA decision making on exemption requests should not punish the applicants. If, for example, EPA decides that it "may need to develop additional

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[7] EPA suggests in the preamble that it might create an incentive for conversion to water-based cleaners by offering an effective date of 3 years after publication of the final rule for those companies who make a commitment to convert to such cleaners. FR Notice, at 7456. This option, however, is no more responsive than the proposed rule's approach to the evidence in the record that such a conversion is not technically or economically feasible.

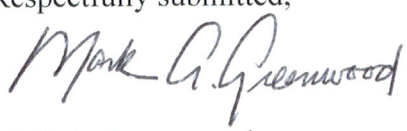
[8] FR Notice, at 7451.

[9] Id.

[10] Id.

information" as noted above, or if EPA receives many exemption requests that may delay its responsiveness, there should be a process in place that tolls the effective date of the Section 6(a) rule to allow for review and decisions on individual exemption request. The general Section 6(a) rule, particularly a rule that bans use of the chemical, should not apply to a party that has filed a timely request for an exemption while EPA deliberates on that request. EPA's approach to Section 6(g) exemption requests must be integrated into EPA's overall approach to the feasibility of alternatives under Section 6(a), Section 6(c) and Section 6(d).

Respectfully submitted,



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