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Chemistry
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C2-010
60387

July 12, 2002

Ms. Barbara Cunningham
Acting Director
Environmental Assistance Division
Office of Pollution Prevention and Toxics
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Document Control Office (7407M)
Office of Pollution Prevention and Toxics
U.S. Environmental Protection Agency
Collection Strategies Division
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Comments on Supplemental Significant New Use Rule
Docket Control No. OPPTS-50639C

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Dear Ms. Cunningham:

The American Chemistry Council ("ACC" or the "Council") is pleased to submit these comments in response to the Environmental Protection Agency's (EPA) proposal for a supplemental significant new use rule (SNUR) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for 75 substances collectively referred to as perfluoroalkyl sulfonates (PFAS).¹

The American Chemistry Council represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care[®], common sense advocacy designed to address major public policy issues, and health and environmental research and product testing.

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¹ 67 Fed. Reg. 11014 (March 11, 2002)



ACC recognizes that the supplemental proposed rule and the related final SNUR issued on the same day² reflect a significant effort by EPA and industry to address concerns pertaining to PFAS compounds on a cooperative basis. ACC applauds that effort and in no way intends these comments to detract from it.

At the same time, ACC has concerns regarding EPA's apparent interpretation of TSCA section 5(a)(2), as reflected in portions of the supplemental proposed rule that address ongoing uses of PFAS chemicals. EPA appears to recognize that a SNUR is not an appropriate vehicle for addressing ongoing uses (see, e.g., 67 Fed. Reg. at 11020: "... those specific chemicals would be considered ongoing and would not be subject to a significant new use determination.") In other statements, however, EPA conveys the impression that it might consider regulating ongoing uses under section 5(a)(2), perhaps by defining "new use" in terms of a production volume cap on an existing use. Thus, EPA states:

EPA is proposing to exclude these photographic uses from the definition of significant new use in the SNUR, based on its understanding that the industry is actively working to move away from these PFAS chemicals and to reduce the use and release of PFAS. . . . In the absence of . . . information to confirm the Agency's understanding . . . , EPA may include these photographic uses in the definition of significant new uses that would be subject to this SNUR at such time as a final rule is promulgated, perhaps defining the new use based on a volume cap on new manufacture or importation intended for this use.³

ACC believes the better interpretation of TSCA section 5(a)(2) is that a SNUR may be promulgated only for a use that would be both new and significant. The latter determination must be based on the factors set forth in section 5(a)(2). ACC does not believe section 5(a)(2) was intended to give EPA authority to restrict existing uses of TSCA chemicals.⁴

ACC's interpretation is supported by the language, structure and legislative history of TSCA and specifically section 5(a)(2). The Conference Report, for example, states as follows:

² 67 Fed. Reg. 11008.

³ 67 Fed. Reg. at 11021.

⁴ EPA is given such authority in TSCA section 6 – regulation of hazardous chemical substances and mixtures. Under that section, if EPA finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use or disposal of a chemical substance or mixture, or any combination of such activities, presents *or will present* an unreasonable risk of injury to health or the environment, then EPA may apply one or more of several possible restrictions to the chemical substance or mixture, including: "limiting the amount of such substance or mixture which may be manufactured, processed or distributed in commerce;" "prohibiting the manufacture, processing, or distribution in commerce of such substance or mixture for (i) for a particular use or (ii) a particular use in a concentration in excess of a level specified by the Administrator;" and "limiting the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce for (i) for a particular use or (ii) a particular use in a concentration in excess of a level specified by the Administrator." TSCA section 6(a)(1) & (2). Other possible restrictions are identified in TSCA section 6(a)(3) through (7).

The requirements [of section 5] are intended to provide the Administrator with an opportunity to review and evaluate information with respect to the substance to determine if manufacture, processing, distribution in commerce, use or disposal should be limited, delayed or prohibited because data is insufficient to evaluate the health and environmental effects or because the substance or the new use presents or will present an unreasonable risk of injury to health or the environment.⁵

Similarly, the Conference Report states:

[T]he conferees intend that any potential threats to health or the environment from the manufacture, processing, distribution in commerce, or disposal of a substance associated with a new use be considered by the Administrator when determining the significance of a new use.⁶

During Senate consideration of the Conference Report, Senator Magnuson explained the SNUR provisions in section 5 as follows:

The requirement that manufacturing and processing notices be given for significant new uses of chemical substances is extremely important. . . .
[N]otification will occur with respect to significant new threats arising from any of these activities if it is associated with a different use.⁷

As already indicated, ACC supports efforts by EPA and industry to address health concerns pertaining to chemical substances on a cooperative basis. Where those efforts lead to the cessation of an existing use of a chemical substance, ACC believes it may be within EPA's authority to promulgate a SNUR covering that discontinued use, so that EPA would be notified before that use may be started anew. However, ACC does not believe EPA has authority to promulgate a SNUR for a use that is

⁵ Report No. 94-1679 at 65 (emphasis added), found in Legislative History of the Toxic Substances Control Act (Dec. 1996) at 678. The same statement is made by Rep. Murphy (New York) during House deliberations. Legislative History at 748.

⁶ Id. at 66 (emphasis added).

⁷ Legislative History at 723 (emphasis added).

Barbara Cunningham

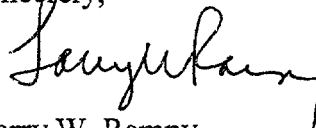
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ongoing and therefore not new. We do not believe an increase in manufacture or importation for an existing use should be considered a "new use" within the meaning of section 5(a)(2).⁸

If you have any questions related to these comments, please contact Michael Walls, Senior Counsel, at 703 741 5167.

Sincerely,



Larry W. Rampy

Product Stewardship Team

⁸ The situation here is different from a SNUR promulgated simultaneously with issuance of an order under section 5(e) pursuant to pre-manufacture notification and review. Such 5(e) orders often include a production volume cap or trigger, which is incorporated in the SNUR. However, at the time the 5(e) order and SNUR are issued, the chemical substance is being added to the TSCA inventory (which makes the SNUR necessary) and all prospective uses are new.