North American Metals Council
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March 14, 2017

Via Docket Submission

U.S. Environmental Protection Agency
Office of Pollution Prevention and Toxics
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Input on Proposed Rulemaking for TSCA Inventory Notification (Active-Inactive); Docket Number EPA–HQ–OPPT–2016–0426

Dear Sir or Madam:

The North American Metals Council (NAMC)[1] and the National Mining Association (NMA)[2] are pleased to submit these comments in response to the U.S. Environmental Protection Agency's (EPA) proposed rulemaking for notification of chemical substances listed on the Toxic Substances Control Act (TSCA) Inventory as "active" or "inactive" (82 Fed. Reg. 4255 (Jan. 13, 2017)).

Use of 2012 and 2016 CDR List as Interim Active List Is Appropriate

NAMC and NMA support the proposal to use the chemicals reported during the 2012 and 2016 Chemical Data Reporting (CDR) submission periods as the interim active list of chemicals.[3] NAMC and NMA understand that chemicals already reported during the 2012

1 NAMC is an unincorporated, not-for-profit organization serving as a collective voice for the North American metals producers and users. NAMC has been a leading voice for the metals industry on science- and policy-based issues affecting metals. Our organization has worked closely with the U.S. federal and international agencies to address risk assessment issues that are unique to metals and various stages of their lifecycle -- sourcing, production, engineering, use, recycling, and recovery.

2 NMA is a national trade association whose members produce most of the nation's coal, metals, and industrial and agricultural minerals; are the manufacturers of mining and mineral processing machinery, equipment, and supplies; and are the engineering and consulting firms, financial institutions, and other firms serving the mining industry.

3 82 Fed. Reg. at 4265-66 (proposed 40 C.F.R. § 710.23).

and/or 2016 CDR submission periods with no confidential business information (CBI) claims on chemical identity do not need to be notified per the proposed rulemaking.[4] NAMC and NMA further understand that a manufacturer of a chemical substance reported during the 2012 and/or 2016 CDR submission periods with the chemical identity claimed as CBI will need to inform EPA if it wishes to maintain the existing CBI claim.

Proposed Reporting Requirements of Commercial Activity and Date Ranges Are Unnecessary

NAMC and NMA do not support the proposed requirement of reporting the type of commercial activity for each reportable substance or the reporting of the first and last date of manufacture or import.[5] In the *Federal Register* notice, EPA states that these information elements are needed to "reduce the likelihood of receiving erroneous notices" and to "support EPA's capacity to inquire into the accuracy of activity notices."[6]

NAMC and NMA recommend that EPA remove the proposed requirements to report commercial activity and the first and last date of manufacture or import from the final rulemaking. There is nothing in the legislative text that supports the inclusion of these reporting elements, nor is this information necessary to achieve the goal of identifying active chemicals. A simple identification of the chemical substance by the manufacturer, importer, or processor, with the appropriate signed certification statement, is all that is necessary. It should not matter when the chemical was manufactured, imported, or processed, nor should it matter whether the substance was manufactured or imported. If EPA believes it must "inquire about the accuracy" of a chemical substance reported as active, it has the authority to examine the supporting records that the reporting company must keep.

NAMC and NMA also have concerns with the proposed record retention requirement applicable to the contemplated notifications. As EPA is aware, TSCA only requires the maintenance of five years of records. EPA fails to explain how it reconciles a requirement to demonstrate commercial activity beyond five years from the submission date. Indeed, it is

4 *Id*. at 4259.

5 *Id*. at 4266 (proposed 40 C.F.R. § 710.29(b)(2), (3)).

6 *Id.* at 4260.

questionable whether EPA has the authority to require an entity to prove or disprove manufacture or import in a time period for which it is not required to keep records.

Processors' Review of Preliminary Active/Inactive Lists Appropriate

NAMC and NMA support the proposal to provide processors an additional 180-day period to review the preliminary draft active and inactive lists that result from the initial reporting provided by manufacturers and importers.[7] NAMC and NMA understand that during this second 180-day review period for processors, the initial list of active and inactive substances will be made available for processors to review, but will not have a legal effect.

EPA Should Clarify When and How Processing Activity Can Occur

Under proposed 40 C.F.R. § 710.30(a)(1), the reporting period for manufacturers and importers runs from the date of publication of the final rule in the *Federal Register* and ends 180 days thereafter. For processors, proposed 40 C.F.R. § 710.30(a)(2) states that the reporting period runs from the date of publication of the final rule in the *Federal Register* and ends 360 days thereafter. So, it appears that manufacturers and importers that also process chemicals can submit notifications for processed chemicals during the initial 180-day reporting period for manufacturers. The only commercial activity options under proposed 40 C.F.R. § 710.29(b)(2), however, are (1) domestically manufactured, (2) imported, or (3) both manufactured and imported. There is no indication that "processing" will be a reporting option for commercial activity. EPA should either delete the reporting requirement for commercial activity altogether or add "processing" as an option for commercial activity. EPA should also clarify that manufacturers and importers can also report chemicals processed as part of the initial 180-day reporting cycle if they choose to do so. If they choose not to do so, companies should retain the option to report processed chemicals during the second 180-day reporting cycle.

Estimated Cost Analysis for Industry Is Too Low

The EPA cost estimate of $1,346 per industry submission is far too low if the proposed reporting requirements for dates of first and last manufacturing (or import) are maintained.[8] As noted, the ten-year look-back period exceeds the recordkeeping requirements

7 *Id.* at 4259 (proposed 40 C.F.R. § 710.30(a)(2)).

8 *Id* at 4257.

for TSCA and companies will find it difficult, if not impossible, to obtain this information. Time and effort spent on that particular aspect of the proposal will far exceed the $1,346 estimate.

Language in Certification Statement Is Excessive and Unnecessary

NAMC and NMA believe that the second sentence in the proposed certification statement is excessive and unnecessary. As proposed, the certification statement would be:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision and the information contained therein, to the best of my knowledge is, true, accurate, and complete. I am aware there are significant penalties for submitting incomplete, false and/or misleading information, including the possibility of fine and imprisonment for knowing violations.[9]

Given that the first sentence already references "under penalty of law," the second sentence, which is overly aggressive in tone, is simply not needed.

Consideration of Inactive Chemical Substances and Reporting Exemptions

As correctly identified by EPA, the statutory mandate of a TSCA Inventory "reset" obligates manufacturers and processors, as applicable, to report the manufacture or processing of chemical substances identified on the TSCA Inventory "for a nonexempt commercial purpose" during the ten-year look-back period.[10] As interpreted by EPA in the proposed rule at 40 C.F.R. § 710.27, the following activities are considered "exempt" commercial purposes that do not trigger the proposed notification requirements: (1) manufacturing or processing of a chemical substance solely in small quantities for research and development; (2) the import of a chemical substance as part of an article; (3) manufacturing or processing of a chemical substance as described in 40 C.F.R. § 720.30(g) or (h); (4) manufacturing a naturally occurring chemical substance (as defined in 40 C.F.R. § 710.4(b)); and

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9 *Id* at 4267 (proposed 40 C.F.R. § 710.29(c)(5)).

10 TSCA § 8(b)(4)(A)(i), 15 U.S.C. § 2607(b)(4)(A)(i).

(5) processing of a naturally occurring chemical substance by certain means.[11] NAMC and NMA support EPA's identification of these activities as constituting "exempt" commercial purposes and suggest that EPA make explicit in the final rule that the failure to report chemical substances in reliance on 40 C.F.R. § 710.27 is not a violation of the rule.

NAMC and NMA note that some companies may use chemicals currently on the TSCA Inventory in one of the exempt activities listed above -- in which case, they would not have to be reported under the reset rule even though they have been manufactured, imported, or processed during the ten-year look-back period. If these chemicals are not identified by entities using them for a nonexempt commercial purpose, they will be listed as "inactive." NAMC and NMA request that EPA acknowledge that under amended TSCA, policies and interpretations of exemptions may evolve, and modifications of current policies and interpretations could affect an existing exemption status. As these new policy transitions occur, EPA must allow an appropriate time period in which companies that have relied on an exemption in good faith can address any new regulatory requirements based on a change in exemption status without adversely impacting commercial activity. In particular, we believe that if policy changes on exemption status require an inactive chemical to be notified as active, that notification should not specifically trigger prioritization review by EPA.

For example, as EPA is aware, much of EPA's guidance regarding the exempt commercial purposes identified in the proposed rule originated when the predecessor to the CDR, the Inventory Update Rule, applied only to organic chemical substances. Since the inclusion of inorganic chemical substances as a result of the Inventory Update Rule Amendments, and continuing with the CDR, the applicability of previously relied upon exemptions by inorganic chemical manufacturers has been called into question by EPA. Such exemptions include those for byproducts that are set forth in 40 C.F.R. § 720.30(g) and (h). As a result, Congress mandated, as part of TSCA reform (TSCA § 8(a)(6)), that EPA convene a negotiated rulemaking to propose a rule "providing for limiting the reporting requirements . . . for manufacturers of any inorganic byproducts, when such byproducts, whether by the byproduct manufacturer or by any other person, are subsequently recycled, reused, or reprocessed."[12] On December 15, 2016, EPA announced its intent to convene such a negotiated rulemaking.[13] The

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11 82 Fed. Reg. at 4266 (proposed 40 C.F.R. § 710.27).

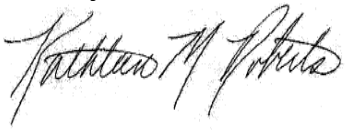
12 TSCA § 8(a)(6), 15 U.S.C. § 2607(a)(6).

13 81 Fed. Reg. 90843 (Dec. 15, 2016).

outcome of that negotiated rulemaking will likely impact how byproduct exemptions will be applied in the future. As needed, EPA should allow for a transition period for industry stakeholders who are impacted by the result of that rulemaking.

Thank you for the opportunity to submit these comments.

Sincerely,



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