

# EPA Can Lead or Get Out of the Way

**A** MAJOR task we face in achieving circularity is ensuring that policies remain nimble in addressing environmental and public health challenges. Our suite of laws and their regulatory implementation sometimes reflect an unhelpful resistance to circularity, expressed in policies that are indifferent or antithetical to an efficient transition to true resource economy.

Measures implementing the 2016 amendments of the Toxic Substances Control Act increasingly affect a broad range of commercial activities, including “processing,” a uniquely vague and broadly encompassing statutory term that can include recycling. Barriers to the mechanical reuse of certain plastic waste streams can be mitigated in TSCA’s implementation, but policymakers must also take full account of the benefits of recycling to help achieve the goals of a circular economy.

For example, recyclers that gather, grind, or physically manipulate waste plastic would not be considered chemically changing the substance, as the recycled product would retain its specific chemical identity. PET bottles, for example, may thus be collected, shredded, melted, and spun into fibers without triggering TSCA “new chemical” jeopardy.

But chemically reacting PET by depolymerizing it to convert the plastic into another substance could elicit a different TSCA regulatory result, and one less favorable to circularity. If a new chemical is generated in the process, it would of course need to be addressed under the law’s new-chemical provisions. This would invite all the challenges and marketing uncertainties associated with commercializing a new chemical. That process’s indeterminate length, often adverse commercial outcomes, and cost



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make the feasibility of this type of recycling potentially untenable, or at least commercially risky.

In implementing the new law, EPA must balance the benefits of recycling activities and their contribution to circularity with the potential risks posed by low levels of chemicals of concern contained in recycled feedstocks. Recent agency actions demonstrate that recycling opportunities can be diminished or eliminated entirely under certain TSCA rules unless the agency explicitly excludes recycling activities.

For example, under TSCA Section 6(h), EPA must regulate on an expedited basis certain chemicals identified as persistent, bioaccumulative, and toxic—known as PBT. In 2021, EPA issued a final rule for the chemical decaBDE, prohibiting all manufacturing, processing, and distribution in commerce of the substance and of articles containing it, with certain exclusions. The agency wisely excepted from the prohibitions processing and distribution in commerce for recycling of decaBDE-containing plastic from products or articles, and decaBDE-containing products or articles made from such recycled plastics. EPA did so based on its careful balancing of the potential harm from the expected “low levels of decaBDE” resulting

from recycling and the “prohibitively expensive and complicated testing” that would result if EPA declined to exclude recycling operations.

The agency also exempted recycling operations under the PIP (3:1) rule, another PBT chemical regulated under Section 6(h). EPA has announced that it intends to revisit its 6(h) rules later this year. Commenters who opposed recycling exclusions in the last set of rules can be expected to renew their concerns. Those who favor the existing exclusions will need to voice their relevance to circularity.

This balancing will soon be called into action as EPA moves to managing the risks of chemicals that have undergone TSCA evaluation, including substances such as those in the so-called HBCD cluster that may be in certain recycled materials. Interestingly, in its HBCD evaluation, EPA found recycling to present an unreasonable risk, signaling a management approach that will not exempt recycling. Similar issues can be expected to arise, albeit not immediately, under TSCA in the context of state, municipal, and private initiatives involving PFAS in recycled plastics.

In short, EPA needs to implement TSCA in a way that optimizes its utility to achieve circularity, or at least does not work to prevent it.