

EPA Will Not Enforce the PIP (3:1) Rule's Compliance Deadline for Up to 180 Days



Key Takeaways:

- ◆ **What:** EPA announced it is exercising enforcement discretion not to enforce the ban on processing and distributing articles containing PIP (3:1) after March 8, 2021 for a period of up to 180 days.
- ◆ **Who's Affected?:** Manufacturers and distributors of articles that may contain PIP (3:1), a flame retardant and plasticizer, e.g., in electrical jacketing or cords.
- ◆ **What Should I Do?:** Take steps to comply with the recordkeeping requirements. Submit comments within 60 days.

Late in the day on March 8, 2021, EPA **announced** that it is exercising enforcement discretion not to enforce the compliance deadline in the PIP (3:1) rule for up to 180 days (as late as September 4, 2021). During that time, it will conduct a review of that rule and the other four rules on persistent, bioaccumulative, and toxic substances (PBTs) published on January 6, 2021. Importantly, some requirements of the PIP (3:1) rule remain enforceable even for article manufacturers and distributors.

This last-minute reprieve comes as a relief to article manufacturers and distributors throughout the country, as PIP (3:1), a flame retardant and plasticizer, is used in many electrical and electronic products, among others. Without this EPA action,

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the rule would have prohibited all processing (including assembly) and distribution of articles containing PIP (3:1) starting March 9.

EPA also announced a 60-day comment period on all five PBT rules and requested comments on a number of issues.

EPA issued three documents on March 8: a prepublication version of a Federal Register notice (later [published](#) on March 16, 2021), a [No-Action Assurance letter](#), and the [request](#) from the EPA Acting Assistant Administrator for that letter. These documents are all available on EPA's [webpage](#).

The Impending March 8 Deadline Created a Crisis

PIP (3:1) is phenol, isopropylated phosphate (3:1), CAS No. 68937-41-7. The [PIP \(3:1\) final rule](#) provides in 40 C.F.R. § 751.407(a)(1) that, with certain exceptions, “all persons are prohibited from all processing and distributing in commerce of PIP (3:1), including in PIP (3:1)-containing products or articles after March 8, 2021.” This compliance deadline was 60 days after publication of the rule in the Federal Register on January 6.

Some commenters on the [2019 proposed rule](#) had complained that the proposed 60-day compliance period for PIP (3:1) was not practicable. In the [Response to Public Comments document](#) for the final rule, EPA rejected those comments, saying, “outside of articles produced as a result of excluded activities, there is little evidence to suggest that PIP (3:1) is present in commercial and industrial articles.”

This led to a flurry of trade association letters to EPA after publication of the final rule, largely from trade associations for manufacturers of electronics and electrical equipment. These letters explained that PIP (3:1) does appear in their articles, and that it would take years to remove the substance from those articles. They asked EPA to extend the compliance deadline through rulemaking and, in the meantime, to exercise enforcement discretion not to enforce the compliance deadline until EPA can change it through rulemaking.

EPA Has Provided Short-Term Breathing Room on PIP (3:1) Compliance

The [Federal Register notice](#) announced that EPA will review all five PBT rules and, “[i]n the meantime, the Agency will exercise its enforcement discretion to not pursue enforcement actions for violations of the prohibitions on the processing and distribution of PIP (3:1) for use in articles, or articles containing PIP (3:1) for up to 180 days, while this review and agency action to address this matter are pending.”

Also on March 8, the EPA Office of Enforcement and Compliance Assurance (OECA) issued a [No Action Assurance letter](#) to implement that pledge. Its key passage reads:

As explained more fully below, this No Action Assurance establishes that the EPA will exercise its enforcement discretion to not pursue enforcement actions for violations of the prohibitions on processing and distribution of PIP (3:1) for use in articles, and the articles to which PIP (3:1) has been added, outlined at 40 CFR § 751.407(a)(1) and for the requirement in 751.407(d)(2) that records required to be kept under 40 CFR § 751.407(d)(1) contain a statement that the PIP (3:1), or the PIP (3:1)-containing articles, are in compliance with 40 CFR § 751.407(a), for those entities covered by the exercise of enforcement discretion regarding 40 CFR § 751.407(a)(1).

The letter indicates that the enforcement discretion will continue until “(1) 11:59 PM ET, September 4, 2021, or (2) the effective date of a final action addressing the compliance date for the prohibition on

processing and distributing in commerce of PIP (3:1); including in PIP (3:1)-containing articles, whichever occurs earlier.”

To What Does the No Action Assurance Letter Apply?

The No Action Assurance letter applies only to articles, such as “electronics, electronic components, electrical equipment and components, home appliances, manufacturing equipment for semiconductors, heavy equipment, off-road vehicles, curtains used in mining applications, military tents, and vehicles that do not qualify as motor vehicles for purposes of this rule.”

The letter does not extend to PIP (3:1) not already in articles, such as PIP (3:1) itself or plastic into which PIP (3:1) has been compounded but which has not yet been turned into an article. In TSCA parlance, the plastic containing PIP (3:1) is a “product” (also known as a “mixture”). The five PBT rules include the following definitions of “article” and “product” in 40 C.F.R. § 751.403 that clarify that “product” does not include articles:

Article means a manufactured item: (1) Which is formed to a specific shape or design during manufacture, (2) Which has end use function(s) dependent in whole or in part upon its shape or design during end use, and (3) Which has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article, and that result from a chemical reaction that occurs upon end use of other chemical substances, mixtures, or articles; except that fluids and particles are not considered articles regardless of shape or design.

Product means the chemical substance, a mixture containing the chemical substance, or any object that contains the chemical substance or mixture containing the chemical substance **that is not an article**.

These definitions appear in the Federal Register notice for the [PBT rule on TTBP](#).

What Parts of the PIP (3:1) Rule Remain Enforceable?

Despite the No Action Assurance letter, some provisions of the PIP (3:1) rule remain enforceable against article manufacturers and distributors during the 180-day period.

The PIP (3:1) rule consists of the following provisions:

- ◆ Paragraph (a)(1), the prohibition on processing and distribution except as otherwise provided.
- ◆ Paragraph (a)(2), exceptions to paragraph (a)(1) with time limits.
- ◆ Paragraph (b), exceptions to paragraph (a)(1) without time limits.
- ◆ Paragraph (c), a prohibition on release to PIP (3:1) to water.
- ◆ Paragraph (d), recordkeeping.
- ◆ Paragraph (e), downstream notification.

The No Action Assurance letter cautions:

The exercise of enforcement discretion is conditioned on compliance with all other applicable aspects of the Final PIP (3:1) Rule, including:

- ◆ 40 CFR § 751.407(c) Prohibition on releases to water. After March 8, 2021, all persons are prohibited from releasing PIP (3:1) to water during manufacturing, processing and distribution in

commerce of PIP (3:1) and PIP (3:1) containing products, and all persons are required to follow all applicable regulations and best management practices for preventing the release of PIP (3:1) and PIP (3:1)-containing products to water during commercial use.

- ◆ 40 CFR § 751.407(d)(1) Recordkeeping. After March 8, 2021, persons who manufacture, process, or distribute in commerce PIP (3:1) or PIP (3:1)-containing products or articles must maintain ordinary business records, such as invoices and bills-of-lading, related to compliance with the prohibitions, restrictions, and other provisions of this section. These records must be maintained for a period of three years from the date the record is generated.
- ◆ 40 CFR § 751.407(e)(2) Downstream notification. Each person who processes or distributes in commerce PIP (3:1) or PIP (3:1)-containing products for any use after July 6, 2021 must, prior to or concurrent with the shipment, notify persons to whom PIP (3:1) is shipped, in writing, of the restrictions described in this subpart.

Release to Water

The prohibition on release to water in paragraph (c) should have little impact on article manufacturers that purchase components containing PIP (3:1) and do not themselves handle PIP (3:1) itself or mixtures containing PIP (3:1), such as plastic into which PIP (3:1) has been compounded.

Recordkeeping

The recordkeeping provision of paragraph (d)(1) does impact article manufacturers and distributors. The provision applies to records (such as invoices and bills of lading, or one-time statements) received by product manufacturers and distributors from upstream suppliers (implying a need to ask suppliers for a statement about compliance, e.g., in their invoices or bills of lading or in a one-time statement). Notably, it does not appear to apply to records of the invoices and bills of lading sent by product manufacturers and distributors to their downstream customers, even if they keep copies of those documents.

Nevertheless, downstream customers that are themselves processors or distributors of the articles that a company supplies are also subject to the recordkeeping requirement. Their only source of information is the company that supplies those articles. Accordingly, companies that sell articles containing PIP (3:1) should consider providing their customers with similar statements for their products, either in documents such as invoices or bills of lading, or in one-time statements.

Paragraph (d)(2) provides, "These records must include a statement that the PIP (3:1), or the PIP (3:1)-containing products or articles, are in compliance with 40 CFR 751.407(a)." The No Action Assurance letter specifically says that this provision is not enforceable during the 180-day period, since during that period processing and distribution of articles that do not comply with paragraph (a)(1) may continue. However, the letter further explains:

Records required to be kept under 40 CFR § 751.407(d)(1) must contain a statement that the PIP (3:1), or the PIP (3:1)-containing articles, are complying with all other aspects of the rule consistent with this No Action Assurance.

This suggests that a statement of compliance must appear on documents such as invoices and bills of lading or in a one-time statement. A general statement about compliance with laws may not suffice, in EPA's view. Instead, there must be a statement specific to compliance with the portions of the PIP (3:1) rule that remain enforceable. For article manufacturers and distributors, those portions are the release to water provision of paragraph (c) and the recordkeeping provisions of paragraph (d)(1) and (d)(3).

Paragraph (d)(3) says, "These records must be made available to EPA within 30 calendar days upon request."

Downstream Notification

The downstream notification provisions of paragraph (e)(1) and (e)(2) do not apply to article manufacturers and distributors (despite the reference to paragraph (e)(2) in the No Action Assurance letter). Paragraph (e)(1) refers to each person that "manufactures" (including imports) PIP (3:1) itself. Paragraph (e)(2) refers to each person that "processes or distributes in commerce PIP (3:1) or PIP (3:1)-containing products." Neither provision refers to persons who process or distribute PIP (3:1)-containing articles.

The SDS and label provisions of paragraphs (e)(3) and (e)(4) do not apply to article manufacturers and distributors either, since those paragraphs address how to meet the notification requirement in paragraph (e)(2).

Will the 180-Day Period Be Extended?

Possibly. The [request for a no-action assurance letter](#) explained that it asked for enforcement discretion lasting 180 days "to ensure that the supply chains for these important articles continue uninterrupted while OCSPP develops a final agency action to extend the processing and distribution in commerce compliance dates for these articles as necessary. This action will be issued no later than 180 days from March 8, 2021." Thus, by early September EPA plans either to decide that no extension is necessary or to extend the compliance deadline further, through a rulemaking to be completed by then, but only as justified by comments.

What Should Comments Address?

The Federal Register notice asks for comments on "any aspect" of all five PBT rules. These include the rules on [PIP \(3:1\)](#), [decaBDE](#), [TTBP](#), [PCTP](#), and [HCBP](#). Comments are due by May 17.

EPA is evidently considering adding restrictions to those rules:

The public is encouraged to provide comments and information relating to EPA's statutory obligations under TSCA section 6(h) and the extent to which there are further exposure reductions that could be achieved, including exposure reductions for potentially exposed or susceptible subpopulations and the environment. EPA is particularly interested in information relating to the impacts of the final rules on human health, including potentially exposed or susceptible subpopulations, and the environment. EPA is also requesting comment on implementation issues associated with these final rules. EPA specifically invites public comment on additional measures or approaches that EPA could take in addition to the provisions in the final rules.

Article manufacturers and distributors will want to comment specifically on what the notice refers to as "newly-raised issues associated with the March 8, 2021 compliance date in the PIP (3:1) rule for certain regulated articles."

Comments on the compliance date should go beyond the letters that EPA has already received, which EPA describes as follows:

Stakeholders note that the complexity of international supply chains makes locating the presence of, and finding alternatives to, PIP (3:1) in components challenging. They assert that an extension to the compliance deadline is necessary to avoid significant disruption to the supply chain for a wide variety of articles.

EPA does not regard these letters as sufficient to justify an extension beyond 180 days:

It was clearly not EPA's intent during the development of the rule to have such a broad disruptive impact. Nonetheless, compliance deadlines for the PBT rules must be in place "as soon as practicable" and provide reasonable transition periods, pursuant to the requirements of TSCA section 6(d)(1). Thus, for EPA to amend the existing deadline, the Agency needs additional information regarding the impact of the deadline.

EPA calls on industry to provide "additional information" such as the following:

EPA specifically asks commenters to specify the articles that need the alternative deadline; the basis for the alternative deadline, taking into consideration the reasons supporting alternative deadlines in the final rule already issued, such as the January 1, 2022, date for photographic printing articles and the January 6, 2025, date for adhesives and sealants, with supporting documentation; and the additional time needed for specific articles to clear channels of trade.

Trade associations could collect specific information on those topics from their members and present that information without identifying particular members. Individual companies should consider providing their own comments, where they can provide more detail about their particular situations than trade associations can.

In particular, companies may want to explain their specific plans for ensuring that PIP (3:1) is not in their products after a certain date, and to justify why an extension until that date is necessary in their case.

The comments may contain confidential business information (CBI) so long as the CBI is not submitted through the Federal eRulemaking Portal. Those wishing to mask their identities may submit letters through their outside counsel on behalf of an unnamed client.

Please contact Beveridge & Diamond if we may assist in preparation of comments, plans to remove PIP (3:1) from articles, or communications with suppliers and customers.

****Updated on March 23, 2021 after the publication of the Federal Register notice.****

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