**Environmental Defense Fund**
**Comments on**

**Agency Information Collection Activities;**
**Proposed Renewal of an Existing Collection and Request for Comment;**
**User Fees for the Administration of the Toxic Substances Control Act (TSCA)**

**Docket ID: EPA-HQ-OPPT-2020-0616**

**Submitted May 18, 2021**

Environmental Defense Fund (EDF) appreciates the opportunity to provide these comments on the Environmental Protection Agency's (EPA) proposed renewal of its Information Collection Request pertaining to user fees under the Toxic Substances Control Act (TSCA). 86 Fed. Reg. 14,904 (Mar. 19, 2021).

These comments address one issue in the Federal Register notice: As it did in its proposed rule to amend its existing fee rule, 86 Fed. Reg. 1890 (Jan. 11, 2021), EPA continues to misread TSCA in asserting that the relevant activities involving collecting, processing, and reviewing information "under this title" are limited to section 14 activities.

On p. 14,904 of the notice, EPA states (emphasis added):

> The Frank R. Lautenberg Chemical Safety for the 21st Century Act of 2016 made transformative changes to the TSCA, including an amendment that provides EPA with authority to collect fees to defray 25% of the costs associated with administering sections 4, 5, and 6 of TSCA, as well *as the costs of collecting, processing, reviewing and providing access to and protecting CBI from disclosure as appropriate under TSCA section 14*.

By shifting the reference to section 14 to the end of the italicized phrase and omitting the phrase "under this title," EPA has significantly altered the language from that used in TSCA itself, thereby misconstruing it and erroneously narrowing the information-related activities the costs of which can be defrayed by user fees. The several other statements in the Federal Register notice that mention TSCA section 14 repeat this mistake, in each case erroneously limiting the

delineated information-related activities only to those taking place pursuant to section 14. Similar erroneous statements are made in the Supporting Statement for this proposal ICR.[1]

TSCA Section 26(b)(1) states (emphasis added) that EPA may "require the payment from any person *** of a fee that is sufficient and not more than reasonably necessary to defray the cost related to such chemical substance of *** *collecting, processing, reviewing, and providing access to and protecting from disclosure as appropriate under section 14 information on chemical substances under this title* ***." 15 U.S.C. § 2625(b)(1) (emphasis added). Similarly, EPA must set fees at a level that will annually defray "25 percent of the costs to the Administrator of carrying out sections 4, 5, and 6, and of collecting, processing, reviewing, and providing access to and protecting from disclosure as appropriate under section 14 information on chemical substances *under this title*." 15 U.S.C. § 2625(b)(4)(B)(I) (emphasis added). In other words, the user fees EPA collects must recoup a portion of EPA's costs of "collecting, processing, [and] reviewing" information on chemicals substances *under Title I of TSCA*. *Id.*

As it did in its proposed rule to amend its existing fee rule, 86 Fed. Reg. 1890 (Jan. 11, 2021), EPA continues to incorrectly transcribe and interpret this provision so as to limit its applicability only to the costs *under section 14* of "collecting, processing, and reviewing" information. In doing so, EPA excludes activities involving collecting, processing, and reviewing information that EPA must consider under section 26(b)(4)(B)(I). 15 U.S.C. § 2625(b)(4)(B)(I). EPA's reading of this TSCA provision is simply incorrect, as we indicated in our comments on the 2018 Fee Rule proposal and the 2021 Amended Fee Rule proposal, and as we reiterate again below.

*First*, the plain meaning of the words "collect," "process," and "review" clearly encompass EPA activities outside of section 14, particularly under section 8. For instance, under sections 8(a) and 8(d), EPA develops reporting rules under which EPA *collects* information on chemicals. *See* U.S.C. § 2607(a), (d).

Under section 8(b)(4)(C), EPA must develop and implement a rule establishing "a plan to *review* all claims to protect the specific chemical identities of chemical substances on the confidential portion of the [Inventory]." 15 U.S.C. § 2607(b)(4)(C) (emphasis added). EPA must also manage and *review* CBI claims asserted in notices submitted by manufacturers or processors to change the status of chemicals from inactive to active pursuant to section 8(b)(5). *See* 15 U.S.C. § 2607(b)(5).

Additionally, under sections 8(c) and 8(e), EPA has authority to *collect* and *review* records of significant adverse reactions to health or the environment and notices of substantial risk, respectively. *See* 15 U.S.C. § 2607(c), (e). These activities under section 8 all squarely fall within the plain text of section 26(b)(4)(B)(I), so EPA must include these activities in its fee rule ICR. EPA also needs to include collecting, processing, and reviewing information elsewhere

[1] See https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0616-0006.

under TSCA, such as collecting, processing, and reviewing information through subpoenas under TSCA section 11(c), *see* 15 U.S.C. § 2610(c).

*Second*, if Congress had intended for section 26(b)(4)(B)(I) to only include the costs of administering section 14, Congress could have easily done so with a much more concise and precise formulation. For instance, the provision could have alternatively stated EPA may charge a fee at a "level that will annually defray "25 percent of the costs to the Administrator of carrying out sections 4, 5, [ ] 6, [and 14]." 15 U.S.C. § 2625(b)(4)(B)(I). Congress did not enact this language, however. See *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1235 (2014) ("Given that the drafters did not adopt that alternative, the natural implication is that they did not intend" to do so).

Consistent with this plain language reading, under the rule of the last antecedent, the phrase "under section 14" modifies only the phrase "providing access to and protecting from disclosure as appropriate." *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016) ("The rule provides that 'a limiting clause or phrase *** should ordinarily be read as modifying only the noun or phrase that it immediately follows.'"); *see also* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 144 (2012). In other words, because the modifier, "under section 14," appears at the end of a list, it applies only to the item that immediately precedes it. *Lockhart*, 136 S. Ct. at 963. The structure of the list supports this interpretation because it contains two "ands," suggesting that the final two verbs are distinct from the three proceeding verbs: "collecting, processing, reviewing, *and* providing access to *and* protecting from disclosure as appropriate." 15 U.S.C. § 2625(b)(4)(B)(I) (emphases added). In addition, these last two verbs align well with EPA's duties under section 14.

*Third*, the whole list ends with the phrase "under this title" modifying the object "information," making it clear that the statute requires that EPA consider all the costs of "collecting, processing, reviewing, *** information on chemical substances *under this title*." 15 U.S.C. § 2625(b)(4)(B)(I) (emphasis added). EPA's interpretation limiting this language to section 14 contradicts the plain language that it encompasses all of these activities "under this title," *i.e.*, under TSCA Title I as a whole. In addition, EPA's interpretation gives this phrase no meaning whatsoever. EPA's interpretation thus "runs aground on the so-called surplusage canon—the presumption that each word Congress uses is there for a reason." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017). Since EPA's rewrite of TSCA's language limits it only to "collecting, processing, reviewing, *** information" under section 14, EPA has failed to give any meaning to the phrase "under this title." In essence, EPA "treat[s] those words as stray marks on a page—notations that Congress regrettably made but did not really intend." *Id.* But a correct interpretation should "give effect, if possible, to every clause and word of a statute." *Id.* (quoting *Williams v. Taylor*, 529 U. S. 362, 404 (2000)).

Additionally, comments in the legislative history suggest that section 26(b)(4)(B)(I) was not restricted to section 14. Four lead negotiators stated three times in the record, without reference to section 14, that "[f]ees under section 26(b) *** are authorized to be collected so that 25% of EPA's overall costs to carry out section 4, 5, and 6, and to collect, process, review, provide access to and protect from disclosure information, are defrayed ***." 114 Cong. Rec. S3518 (daily ed. June 7, 2016). That language indicates that Congress intended for EPA to defray the costs of collecting, processing, and reviewing information, without limitation to doing so under section 14.

In conclusion, EPA must correct the language of its fee rule ICR renewal and supporting statement (as well as in amending its existing fee rule) to accurately mirror the language of TSCA.

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EDF appreciates the opportunity to provide comments and EPA's consideration of them.