REACH & CLP Hub: Chromates under authorisation – a state of play overview

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It's been a turbulent 2019 for chromate users in the EEA. Bernadette Quinn, Head of REACHLaw's Authorisation practice takes a look back at how we got here and what the future holds.

When it comes to REACH authorisation it has been a roller-coaster year for hexavalent chromate users in the EEA. There are currently 11 entries for the substances on Annex XIV (the authorisation list), and one of the first to be included – chromium trioxide – has proved to be a major test of the application process in terms of the viability of broad upstream applications.

Hexavalent chromates are very widely used for both chrome plating and chromate conversion coating of surfaces. Chrome coatings are very familiar to us all as probably every shiny metal surface you see has a chrome coating from your coffee machine, your car bumper, the legs of the chair you are sitting on, your fridge, to your bathroom fittings. Probably every aircraft you have flown on will have chromate conversion coatings in its engine components to prevent corrosion.

Hence, potentially thousands of downstream users could need an authorisation to continue their uses.

Chromate upstream applications

Initially, it was believed that the most logical approach to applying for an authorisation to continue these uses was to prepare all-inclusive upstream applications that would cover all downstream users.

Back in 2012 the Chromium Trioxide Authorisation Consortium (CTAC) provided the first example of this approach. The consortium, comprising more than 150 members from all supply chain levels, prepared an application covering six broad use descriptions for chromium trioxide. The intention was to cover all the uses by all possible downstream users. The CTAC Submission Consortium (CTACSub) was formed to submit the consortium's application to Echa.

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However, during the post submission phase it became clear that that this approach brought with it a great deal of uncertainty as to who the actual users were, how they were using the chemical, if the risk management measures in place at the sites of use were adequate to protect workers and if it was credible that there were no suitable alternatives for all uses covered by the broad use descriptions. For example for one of the uses, functional chrome plating, an estimated 1,500 downstream users are covered by the application.

It soon became obvious that this type of all-inclusive upstream application was going to have a difficult time passing both Echa's committees for Risk Assessment and Socio-economic Analysis (Rac and Seac) and the European Commission.

And indeed, this turned out to be the case. Although Echa's committees gave strict but favourable Opinions in September 2016, we now find ourselves three years later in a situation where the sunset date has passed and the applicants have yet to receive a Commission decision. This is because the application has been the focus of intense stakeholder criticism, especially from some member states and NGOs.

Delayed decision-making

While the Echa committees were very critical of the approach taken, they nevertheless recommended approval of the application for all uses.

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In their Opinions they recommended shorter review periods than the applicants had requested and, for five of the six uses, recommended stringent conditions of use and monitoring arrangements on the granted authorisation. The committees' Opinions were issued to the Commission for decision making in 2016 and remained there for more than two years embroiled in an intense debate on whether they should be approved or rejected.

The problem for the Commission was that the criticality of the uses of chromium trioxide in some sectors such as aerospace combined with the sheer number of downstream users dependent on this application (potentially thousands) meant that rejecting the application was not a feasible option.

And other chromate upstream applications submitted following the same strategy as that employed by the CTACSub – for example by the Chromium VI Compounds for Surface Treatment REACH Authorisation Consortium (CCST) and the Global Chromates Consortium for Aerospace (GCCA) – suffered a similar fate.

General Court setback

In February of this year, it seemed like a compromise had been reached when the CTACSub Decision was approved by the Commission's REACH Committee. However, a month later a General Court judgment annulled authorisations granted for the use of lead chromates for paint applications following a challenge by Sweden. This required the Commission to reconsider their approval.

The court ruling said the Commission could not grant authorisation when there is uncertainty on the availability of alternatives. This exact concern had been raised by Echa's committees during their assessment of the CTACSub application.

At this point, the European Parliament got involved in the controversy and, in the same month, passed a resolution asking the Commission to reconsider its approval of the CTACSub application and to make provisions to enable downstream users to get their own authorisation swiftly.

Now in November, it seems that the Commission will finally approve some CTACSub uses and other pending upstream applications, but will require the submission of a substitution plan for some uses (specifically decorative chrome plating). In its July and September meetings, the REACH Committee already voted to approve many of the CCST and GCCA applications.

Back to the drawing board

However, the very recent intervention from the European Parliament for a pending downstream user application may have thrown all of the above up in the air. On 24 October, the European Parliament passed a resolution objecting to the approval of a downstream user application for functional chrome plating uses with chromium trioxide. The resolution invoked the ruling of the General Court and called on the Commission to withdraw its decision and to submit a new draft granting the authorisation only for the uses specifically defined for which no suitable alternatives are available.

The downstream user application analysis of alternatives was based on the CTACSub application and the resolution refers to its earlier resolution. In essence, the resolution criticises the Commission for not implementing the court ruling relating to availability of alternatives, as it did not require the applicant to submit a substitution plan.

> Functional chrome plating was not one of the uses where the Commission will request a substitution plan

This may have immediate consequences for CTACSub and other upstream chromate applications for authorisation as functional chrome plating was not one of the uses where the Commission will request a substitution plan. It seems that a "substitution plan" is going to be a key concept from here on in the authorisation process.

Substitution plans and upstream applications

The immediate consequence of the court ruling was that substitution plans are now required for applications submitted via the socio-economic route when it is considered that "alternatives are generally available".

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Echa has been requesting substitution plans from all current applicants since mid-July. The Commission has also indicated it will request the submission of substitution plans for a select number of pending applications where agency final Opinions highlight uncertainty on the availability of alternatives. However, the recent European Parliament resolution may have the consequence that where an Echa committee Opinion has highlighted this specific uncertainty, all pending applications may be required to submit a substitution plan before a decision can be taken.

This is all uncharted territory as no substitution plan has previously been submitted using the Echa template as none are available on the agency's website. And there is no guidance available on how to approach this situation as an upstream applicant covering broad downstream uses by potentially very different users (for example job shops and repair maintenance and overhaul (RMO) service providers). It will be interesting to see how upstream applicants can prepare a substitution plan given that they are "upstream" and not users. It is also somehow counterintuitive to require the least motivated party in the chain to drive substitution to prepare a plan (it is, after all, in effect a roadmap to end its business).

Completing the required elements of a substitution plan for potentially hundreds of users of different sizes and business models will be a formidable challenge particularly as there remains uncertainty as to whether Echa's committees will accept it.

The perspective of chromate downstream users

In response to the uncertainty on the ultimate fate of all the pending upstream applications, tens of chromate downstream users have already submitted individual and joint applications. These generally have passed though the Echa committees more smoothly and have received Commission decisions without undue delay when the sites and conditions of use are clearly described in the applications.

> The question that now remains is whether the process can manage the deluge of chromate downstream users applications that are likely to be submitted

Based on all of the above, it is clear that chromate downstream users will continue to break away from upstream applications and submit their own applications either individually or in groups. These are clearly preferred by the Echa's committees, stakeholders and the Commission. The question that now remains is whether the process can manage the deluge of chromate downstream users applications that are likely to be submitted and if, in effect, the end of the unloved broad upstream application has the consequence of bringing the entire process to its knees.

Advice to chromate downstream users

It is clearly prudent not to depend on upstream applications. If continued use is critical to your business, you will need to organise to submit your application either individually, or with a group of similar users.

Based on all of the above, define your use narrowly, invest in your analysis of alternatives, submit a substitution plan, ensure you describe the risk management measures you have in place to minimise exposure. Don't overlook your socio-economic analysis as you will need to demonstrate that the benefits of continued use outweigh the risks. If this is not the case, do not submit an application as it will be rejected. Ensure that "uncertainty" is not a word that could be used to describe either your analysis of alternatives, or your conditions of use at the sites where the chromates are being used. Keep in mind that non-experts in your area of expertise (for example engineering, automotive, etc) will assess your application, so ensure that your use description is tailored to your target audience.

Headaches on the horizon

Finally, chrome platers have an additional worry as lead metal is on the candidate list for inclusion on the authorisation list and is likely to be prioritised early in 2020 in the next Echa prioritisation round. Lead anodes are the most commonly used anodes in chrome plating. This means that even if chrome platers ultimately substitute hexavalent chromate for trivalent chromates, they may still need to consider applying for authorisation to continue using their lead anodes or switch to different anodes.

The views expressed in this article are those of the expert authors and are not necessarily shared by Chemical Watch.

What do companies need to look out for?

The implementation of California and possibly New York's regulations will result in a nationwide relabeling of affected products. Given their numerous and, in some cases, highly technical requirements, manufacturers of cleaning products need to act now.

The first step is to determine whether any of their products are subject to California's Act, and ensure compliance by 2020. The CBI provisions are complex and should be consulted in detail when assessing compliance approaches.

Neither California nor New York's plans are static programmes. Companies will need a system to monitor changes in any of the lists and changes in their products' composition. Once the California Act is in effect, if a list is changed, a company will have six months to update online information and 18 months to update product labels.

These "ingredient disclosure" programmes are becoming more popular among states. They generally have a key goal of transparency and offering information to make choices, but they do so in ways that are often differ from state to state, adding a level of complexity to compliance. Similar legislation is pending in Maryland, Minnesota and Oregon.

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