

Testimony  
Hearing on Regulation of Existing Chemicals and the Role of Pre-Emption  
under Sections 6 and 18 of the Toxic Substances Control Act  
Subcommittee on Environment and the Economy  
House Committee on Energy and Commerce  
Wednesday, September 18, 2013  
by  
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Main Points

1. ECOS believes that new legislation is needed to strengthen the Toxics Substances Control Act (TSCA).
2. The primary concerns of states are:
  - a. That states should not be pre-empted by TSCA revisions beyond those currently in the statute;
  - b. The need for EPA to conduct more chemical assessments;
  - c. The safety standard burden of proof should be less onerous;
  - d. States should have access to Confidential Business Information.

Ladies and gentlemen of the committee, thank you for inviting me here today to talk about our organization's views on the Toxics Substances Control Act (TSCA). I am representing the Environmental Council of the States (ECOS), whose members are the leaders of the state and territorial environmental protection agencies, and I may make comments from my own state's point-of-view as well, which I will note at the time.

My role in ECOS is as the Chairman of our Cross-Media Committee. Our Committee works on issues such as chemical management and other matters that affect air, water, and waste. Over the past year, the committee has been intently interested in TSCA reform. Our first resolution on this matter dates back to 2001, asking that states have access to confidential business information. During the ECOS Annual Meeting on September 17, we will be considering modifications to our resolution entitled "Reforming the Toxic Substances Control Act." Because I do not know the outcome of this discussion yet, I cannot address our changes in

this written testimony. I will however discuss the outcome during my oral testimony. Instead, I will summarize the primary concerns of the states as expressed in a series of conference calls about the resolution that we've had during 2013.

First, ECOS wants TSCA reform to occur and we seek a bi-partisan bill that will pass both houses and be signed by the President. We understand that we might not see every item we seek in the final bill, but some issues are of very high importance to states. Our resolution speaks for itself with respect to our priorities, but in this testimony I will focus on the top four issues of concern to ECOS.

Pre-emption is our number one topic. States don't want to lose the ability to act to restrict a chemical in order to prevent harm to the public or the environment. States can agree, however, that a state requirement that makes it impossible for the manufacturer to comply with both state and federal rules should result in the federal rule taking precedence. This ability to act is important to states because it is the backstop to a weak federal program, or a federal program that does not work as intended, or a federal program that acts very slowly or one that fails to act when reliable scientific data indicates that action is needed. Without the state ability to act, the only resource would be for Congress to re-address TSCA, and that is a very high bar indeed. Even though states want to keep the ability to act, I expect that not all states will need to act, and that retaining our ability to act does not mean 50 states with 50 different chemical laws. It means that states can act on chemicals in a way that their legislatures, Governors, and people deem appropriate.

This is where we find ourselves today. States have had a loss in confidence that TSCA works as thoroughly or quickly as it ought to, leaving states to pass their own laws and rules on chemical management. However, if TSCA did work thoroughly and quickly there would be

much less incentive for states to enact additional requirements. State authority would be preserved but seldom invoked. As a practical matter, implementation of a comprehensively reformed TSCA will render the state preemption issue largely moot, as states will focus their increasingly limited resources on other priorities. During the past 20 years, however, states have acted to fill the regulatory void at the federal level, illustrating the vitally important role states play in providing a “backstop” to federal inaction and as laboratories of innovation. With regard to the impact of the current TSCA Sections 6 and 18 on the exercise of states action, or on common law authority, we suggest that because EPA has acted on so few chemicals under TSCA, preemption of state authority has not been an issue under the current law.

States believe that for TSCA to work well there are at least three other key requirements.

1. Chemical Assessments Need to be Conducted. There are thousands of chemicals that the U.S. Environmental Protection Agency (EPA) hasn't acted on. Currently, EPA must conduct reviews of new chemicals to determine if they are a threat. Because of the current TSCA requirements for EPA to generate most of the data itself, this burden is beyond the agency's capability and so very few get reviewed. Most chemicals simply pass into commerce. When this happens, states may see a problem with some of these and then act. The key then, is for EPA to prioritize and review high priority chemicals, perhaps by a set of prioritization criteria. Then it can focus on the chemicals of greatest concern. But EPA currently does not have the resources to conduct this process. So, industry should supply all the needed data. This is why ECOS says that TSCA reform should ensure the burden is effectively placed on manufacturers.
2. The Safety Standard Burden of Proof Should Be Less Onerous. Currently, states think that the action standard that EPA is held to is too high, restricting its ability to limit a chemical's

use. Currently, TSCA's safety standard requires EPA to prove harm from a chemical has occurred before it can restrict use of that chemical. This is an almost impossible standard for EPA to meet. In our new resolution, we ask that TSCA be reformed so that EPA can take expedited action when a chemical presents a very serious or immediate risk to public health or the environment, including the ability to impose interim conditions to be in effect until EPA has had the opportunity to make a safety determination. This will help to alleviate state concerns about the effectiveness of TSCA.

3. Sharing Confidential Business Information with States. States need access to confidential data submitted to EPA. This is to help us fulfill our requirements protect human health and the environment. We understand that states will have to follow federal guidelines that restrict distribution of these materials, rather than the state standards which are often more open.

The other issues that our resolution addresses are also important to states although I am not detailing them here. With your permission, I will provide a copy of our final resolution as an addendum to my written testimony so that you can see these for yourself.

There are two other issues that ECOS discussed in our many calls on TSCA reform that we did not address in our resolution, primarily because of time constraints. One of these is defining what are adequate resources for EPA (e.g., annual budget) needed to conduct the assessments, prioritizations and reviews. As managers of state agencies, we understand that much is expected of us and that our ability to succeed is sometimes limited by the resources at hand. The same is true at EPA. We want EPA to succeed in chemicals management. Part of the reason we did not address this issue in our resolution is because we do not have a number to suggest, or the information we need to develop such a number.

Our second unaddressed issue is deadlines for chemical reviews. There was discussion among the states about having a more rigid system of timelines for review of chemicals. Most states have deadlines for air or water permit issuance, and so states find the use of deadlines to be customary. Perhaps similar deadlines for EPA would be appropriate and would assure timely action, but we are not currently able to suggest to you what those deadlines ought to be.

I am happy to take questions when you are ready.