

**Testimony to House Committee on Energy and Commerce,
Subcommittee on Environment and the Economy**

Hearing on

**“Regulation of Existing Chemicals and the Role of Pre-Emption
Under Sections 6 and 18 of the Toxic Substances Control Act”**

By

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SUMMARY

(1) New York Attorney General Eric T. Schneiderman strongly supports the goal of the federal Toxic Substances Control Act of 1976 (TSCA) and recognizes the critical contribution that this law — in partnership with state efforts — could make in ensuring the adequate protection of public health and the environment from toxic chemicals.

(2) The State of New York has played and is playing a leading role in protecting our citizens and the environment from harms posed by toxic substances, including protecting our residents — particularly those who are most vulnerable — from carcinogens, chemicals that mimic estrogen, and other dangerous chemicals..

(3) In practice, TSCA has largely failed to live up to its goal. TSCA should be strengthened by requiring EPA to conduct expeditious safety reviews of the tens of thousands of chemicals to which Americans are exposed. Once EPA has done so, it should be required to timely impose restrictions on the manufacture and use of those chemicals as necessary to adequately protect public health and the environment.

(4) In any reform of TSCA, it is critical to preserve the ability of states to protect their citizens and environment from chemicals that states have found dangerous. This goal can be achieved by allowing state restrictions to remain in place until EPA has imposed a restriction, and in some circumstances allowing a state restriction on a chemical to remain in effect even after EPA has imposed a restriction.

(5) Because Attorney General Schneiderman believes that achieving TSCA's goal of ensuring the adequate protection of public health and the environment from toxic chemicals is as important as ever, he offers the full assistance of his office to this Subcommittee as you review this important federal law.

TESTIMONY

Introduction

Good afternoon Chairman Shimkus, Ranking Member Tonko, and distinguished members of the Subcommittee on Environment and the Economy. Thank you for the opportunity to testify today on behalf of Eric T. Schneiderman, Attorney General of New York, regarding the regulation of toxic chemicals. I would like to begin by discussing the role that New York has played and is playing in protecting our citizens and the environment from harm posed by toxic substances. I will then discuss the need for strengthening the federal Toxic Substances Control Act of 1976 (TSCA), and the New York Attorney General's support for doing so. Lastly, I will discuss the Attorney General's views on the appropriate balance between federal and state restrictions on toxic chemicals.

Actions by New York to Protect Human Health and the Environment

For many decades, New York has been a leader in protecting public health and the environment from toxic chemicals. That exercise of traditional state power has allowed New York to protect its citizens and natural resources and to serve as laboratory for nationwide solutions to threats to human health and the environment posed by toxic chemicals.

For example, in 1970 New York banned use of the insecticide DDT, which was devastating many bird populations, including American bald eagles, peregrine falcons, brown pelicans, and ospreys. Two years later, EPA followed New York's lead in banning DDT. Twenty years later, the American bald eagle was recovering, and was "up"-listed from an endangered species to a threatened species.

New York has taken other actions to protect public health and the environment by restricting the sale or use of products containing harmful chemicals. They include the following:

- To protect babies and young children from exposure to biologically active bisphenol A (BPA), New York has banned the chemical in pacifiers and baby bottles for use by children under three years old. N.Y. Envtl. Conserv. Law § 37-0501 *et seq.* BPA leaches into liquids and foods and has been shown to mimic the behavior of estrogens in the human body, potentially causing changes in the onset of puberty and reproductive functioning.
- To protect babies and young children from exposure to biologically active tris(2-chloroethyl) phosphate (TRIS), New York has banned the flame retardant chemical in products intended for use by children under three years of age, including toys, car seats, nursing pillows, crib mattresses, and strollers. N.Y. Envtl. Conserv. Law § 37-0701 *et seq.* The Consumer Products Safety Commission classifies TRIS as a probable human carcinogen. Studies have shown that young children are often the group most highly exposed to TRIS, and estimate that children can ingest up to ten times as much of this chemical as adults do because of their tendency to put their hands and other objects into their mouths.
- To protect humans from harm posed by pentabrominated and octabrominated diphenyl ethers (both of which are polybrominated diphenyl ethers or PBDE), New York restricts the concentration of these brominated flame retardants in products manufactured, processed or distributed in New York. N.Y. Envtl. Conserv. Law § 37-0111. PBDE has been correlated with lower birth weight in newborns. Animal

studies indicate that pre- and post-natal exposures to PBDE may cause long-lasting behavioral alterations and can affect motor activity and cognitive behavior.

- To protect humans and the environment from toxic metals in product packaging, New York restricts the concentration of lead, cadmium, mercury, and hexavalent chromium in inks, dyes, pigments, adhesives, stabilizers, or other additives in product packaging. N.Y. Env'tl. Conserv. Law § 37-0205 *et seq.* EPA has determined that lead and mercury are probable human carcinogens while cadmium and chromium are known human carcinogens. Exposure to high levels of any of these heavy metals can permanently damage the brain, kidneys, and other vital organs.
- To protect the public from a toxic and flammable dry cleaning solvent, New York restricts the use of n-propyl bromide in dry cleaning. *See* "Approved Alternative Solvents for Dry Cleaning" at <http://www.dec.ny.gov/chemical/72273.html>. N-propyl bromide has been found to cause sterility in both male and female test animals, and to harm developing animal fetuses. In humans, the chemical can damage nerves, causing weakness, pain, numbness, and paralysis. As a result, New York will not issue an air facility registration to any facility proposing to use n-propyl bromide as an alternative dry cleaning solvent because n-propyl bromide does not qualify as an approved alternative solvent under 6 N.Y.C.R.R. Part 232. New York City also specifically bans n-propyl bromide under its fire code because of its flammability. N.Y.C. Admin. Code §§ 27-426, 27-427.
- To protect New Yorkers that rely on groundwater for their drinking water supply, New York prohibits the import, sale, or distribution of gasoline containing methyl tertiary butyl ether (MTBE). N.Y. Agric. & Mkts. Law § 192-g. Studies of animals

have shown that exposure to large amounts of MTBE had effects on their nervous systems, and people exposed to MTBE have reported headaches, nausea, dizziness, and irritation of the nose and throat. MTBE in drinking water may also adversely affect taste and odor.

- To protect New York's rich surface water resources — from Long Island Sound to Lake Erie and Lake Ontario — New York limits the phosphorus content of household cleaning products and the sale and use of phosphorus lawn fertilizers. N.Y. Env'tl. Conserv. Law §§ 17-2103, 35-0105(2)(a). Phosphorus entering New York's waters has caused reductions in the oxygen that is necessary for fish to breathe and has contributed to algae that turns water green and degrades drinking water quality.

The Federal Toxic Substances Control Act

The goal of TSCA is to establish necessary and appropriate federal restrictions on the manufacture and use of chemicals that present an unreasonable risk of injury to the health of Americans or the environment. New York strongly supports this goal and recognizes the critical contribution that TSCA — in partnership with state efforts — could make in ensuring the adequate protection of public health and the environment from toxic chemicals. Unfortunately, in practice TSCA has largely failed to live up to its goal.

The primary requirements of TSCA are:

- Under § 8(b), EPA is required to maintain an inventory of chemicals currently manufactured or processed in the United States. 15 U.S.C. § 2607(b).
- Under § 5, manufacturers must notify EPA before using a chemical that is not on the inventory or creating a new use of a chemical that is on the inventory. *Id.* § 2604.

- Under § 4, EPA is required to issue a rule requiring testing of a chemical that “may present an unreasonable risk of injury to health or the environment” or that is or will be “produced in substantial quantities” and will either enter the environment in substantial quantities or lead to human exposure in substantial or significant quantities, if there is insufficient data about the chemical. *Id.* § 2603.
- Under § 6(a), if EPA finds that “there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal” of a chemical “presents an unreasonable risk of injury to health or the environment,” EPA shall protect against that risk using “the least burdensome requirement” with respect to the chemical’s manufacture, processing, distribution, use or disposal. *Id.* § 2605(a).

TSCA has largely failed to meet the goal of keeping Americans and the environment safe from dangerous chemicals because only a small number of chemicals have been tested and only a handful have been restricted. For example, after TSCA went into effect in 1977, 60,000 existing chemicals were placed on EPA’s inventory but only about 200 of those chemicals were tested and only a handful were restricted.

As a result of the failure of TSCA to fulfill its goal, the American public and our environment are currently being exposed to potentially hazardous chemicals on an ongoing basis, even though their toxicity is not yet fully understood. It is essential that TSCA be reformed to require EPA to increase its knowledge of these chemicals’ toxicity as quickly as possible and to impose appropriate restrictions on their manufacture and use as necessary to adequately protect public and environmental health.

The pending Senate bill, S. 1009, proposes several ways to accomplish that reform, including:

- Amending § 4 of TSCA to require EPA to classify every chemical on the inventory as either low or high priority;
- Amending § 6(a)-(c) to require EPA to make a safety assessment and safety determination about every high-priority chemical;
- Amending § 6(c) to provide that, if EPA finds as a result of the safety determination that a chemical will present an unreasonable risk of injury to health or the environment under its “intended conditions of use,” EPA is required to impose additional restrictions as “necessary”; and
- Further amending § 6(c) to remove the “least burdensome requirement” provision, which has acted as a barrier to regulation.

I believe that these amendments represent critical improvements to TSCA. However, I also believe that these amendments could be further improved by imposing deadlines on EPA for designating chemicals as low priority or high priority, for conducting safety assessments and determinations, and for imposing additional restrictions on chemicals that are found to present an unreasonable risk to health or the environment.

Preemption of State Laws under TSCA

Protecting the Nation’s public health and the environment from the adverse effects of toxic chemicals is best achieved through a dynamic federal/state relationship in which the authority of states to enact and enforce protections — which are at least as stringent as federal protections but may also be more stringent — is preserved. That relationship animates our national laws governing air and water pollution, hazardous waste, and pesticides as well as TSCA.

TSCA's preemption provisions allow a state to impose its own restriction on a dangerous chemical until EPA has restricted a chemical, exempt several categories of state restrictions from preemption even after EPA has imposed a restriction, and establish a preemption waiver process. These provisions help to ensure that states retain their ability to protect their citizens and environment from chemicals that states have found dangerous as well as allowing states to continue to be laboratories for nationwide solutions.

§ 18(a)(1) of TSCA provides that a state may regulate any chemical unless and until EPA regulates the chemical under § 6. 15 U.S.C. § 2617(a)(1). Once EPA regulates a chemical because it has found that the chemical presents an unreasonable risk, § 18(a)(2)(B) provides that a state may not enforce an existing regulation or establish a new regulation "which is designed to protect against such risk" after the effective date of that federal regulation. *Id.* § 2617(a)(2)(B).

However, § 18(a)(2)(B) exempts a state restriction on a chemical from preemption if the state restriction is: (1) identical to EPA's restriction; (2) enacted pursuant to another federal law; or (3) a complete ban on in-state use of the chemical. *Id.* These exceptions provide important protections to states. For example, the exception for restrictions that are identical to EPA's restriction allows a state to enforce a restriction under its own law and administrative enforcement process rather than seeking to enforce it in a citizens' suit brought under TSCA in federal district court.

In addition, § 18(b) provides that a state may seek a waiver from preemption if a state restriction: (1) would not create a violation of EPA's regulation; (2) provides a significantly higher degree of protection than EPA's regulation; and (3) would not unduly burden interstate commerce. *Id.* § 2617(b). In considering necessary reform of TSCA's regulatory provisions,

the authority of states to take action to protect their citizens and the environment from threats posed by toxic chemicals should be preserved.

Conclusion

In conclusion, achieving TSCA's goal of ensuring the adequate protection of public health and the environment from toxic chemicals is critically important, as is preserving the authority of states to protect public health and the environment from the risks posed by toxic chemicals. Because TSCA has not met its goal, Attorney General Eric T. Schneiderman strongly supports your efforts and offers the full assistance of our office to you and your colleagues as you review this important federal law.

I would like to thank you Chairman Shimkus, Ranking Member Tonko, and the other members of this committee and subcommittee for your consideration of TSCA and its necessary reform.