

June 12, 2013

The Honorable John Shimkus  
Chairman  
House Energy & Commerce Committee  
Subcommittee on Environment & Economy  
2125 Rayburn House Office Building  
Washington, DC 20515

The Honorable Paul Tonko  
Ranking Member  
House Energy & Commerce Committee  
Subcommittee on Environment & Economy  
2125 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Shimkus and Ranking Member Tonko:

The undersigned are thirty-four law professors, legal scholars, and public interest lawyers from across the country who have years of collective experience in the fields of administrative, public health, and environmental law, with a particular focus on state and federal toxics policy. In view of tomorrow's hearing, we write to express serious reservations with the "Chemical Safety Improvement Act," which was introduced by Sen. David Vitter and the late Sen. Frank Lautenberg on May 22, 2013, in an effort to reform the Toxic Substances Control Act. Supporters have heralded the bill as a "historic step" toward fixing our broken framework for regulating chemicals on the market. However, for reasons explained herein, we cannot support the bill as written, which must be strengthened to overhaul current law and ensure that chemicals are safe for people, particularly vulnerable populations such as children.

In our expert opinion, the bill:

- Essentially preserves the same inadequate safety standard used in current law, which has been read by at least one court to require the U.S. Environmental Protection Agency (EPA) to engage in an onerous balancing of costs and benefits to justify restrictions on toxic chemicals;
- Retains the same obstructive standard of judicial review that appears in current law, which requires judges to demand substantial evidence from EPA to justify any safety determination or restriction of a chemical that poses risks to public health and the environment;
- Contains sweeping preemption language that would prevent states from enforcing existing, and adopting new, laws designed to supplement federal law in protecting people and the environment from exposures to harmful substances; and
- Takes the extraordinary step of making any safety determination by EPA dispositive on the question of whether a chemical is safe in federal and state courts. This would effectively bar judges and juries from taking into account other relevant evidence regarding the safety of a chemical, particularly new evidence developed after the determination is made.

Here are our four major concerns presented in detail:

**Safety Standard**. The bill defines "safety standard" as one that "ensures that no *unreasonable risk* of harm to human health or the environment will result from exposure to a chemical

substance.” Chemical Safety Improvement Act, S. 1009, 113th Cong. § 3(16) (emphasis added). This definition fundamentally reproduces the same safety standard found in current law. *See* Toxic Substances Control Act § 6(a), 15 U.S.C. § 2605(a). Unlike strictly health-based standards (e.g., “reasonable certainty of no harm”), laws that use “unreasonable risk” language have been interpreted to require EPA to complete a complex balancing of costs and benefits before the agency can impose a restriction on a chemical to address safety concerns. *E.g.*, John S. Applegate, *Synthesizing TSCA and REACH: Practical Principles for Chemical Regulation Reform*, 35 Ecology L.Q. 721 (2008); *see also* Noah M. Sachs, *Jumping the Pond: Transnational Law and the Future of Chemical Regulation*, 62 Vand. L. Rev. 1817 (2009). Therefore, even without language in the safety standard directing EPA to restrict a chemical using the “least burdensome requirements,” Toxic Substances Control Act § 6(a), 15 U.S.C. § 2605(a), by retaining the “unreasonable risk” language, the Chemical Safety Improvement Act might be read to place a heavy burden on EPA to impose even modest restrictions on a chemical. As a result, we believe that the same outcome in *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991) (striking down EPA asbestos ban and phaseout rule) could be possible under the safety standard proposed in this bill, particularly with the heightened judicial review discussed in the next paragraph.

**Judicial Review.** Courts typically use a reasoned decisionmaking standard to review agency actions, meaning they will not strike down a regulation unless an agency has acted in an arbitrary or capricious manner. *E.g.*, *Allied Local & Regional Reg’l Mfrs. Caucus v. EPA*, 215 F.3d 61, 77 (D.C. Cir. 2000) (EPA consideration of factors listed in statute “adequate to constitute reasoned decisionmaking”); *see also* Administrative Procedure Act, 5 U.S.C. § 706. In contrast, the Chemical Safety Improvement Act, like the Toxic Substances Control Act, would require courts to apply a heightened standard of judicial review when evaluating rules made pursuant to the bill. Specifically, courts would have to set aside rules requiring the development of more test data, safety determinations, and restrictions on chemicals unlikely to meet the safety standard if, in their opinion, EPA has not supported them with “substantial evidence.” Chemical Safety Improvement Act, S. 1009, 113th Cong. § 16(2). In practice, this standard can be read to “impose[ ] a considerable burden” on EPA to develop a record that can withstand a hard look from courts, particularly when all of the other procedural hurdles in the bill are factored in. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1214 (5th Cir. 1991), quoting *Mobile Oil Co. v. Fed. Power Comm’n*, 483 F.2d 1238, 1258 (D.C. Cir. 1973).

**Preemption.** The Chemical Safety Improvement Act would appear to largely preempt state regulations designed to protect public health and the environment from exposure to harmful chemicals. It would preempt existing and future state regulations that: require the development of test data or information on chemicals for which companies have to submit similar information to EPA; restrict the manufacture, processing, distribution, or use of a chemical after EPA has issued a safety determination for that chemical; or require notification for the use of a chemical substance if EPA has determined that it is a significant new use that must be reported to the agency. Chemical Safety Improvement Act, S. 1009, 113th Cong. § 15(a). The bill also would prohibit states from creating new restrictions on the manufacture, processing, distribution, or use of a chemical that EPA has classified as high- or low-priority. *Id.* § 15(b). This preemption provision is sweeping in nature and raises serious questions as to whether states could even enact or continue to enforce laws that simply require companies to disclose information about

chemicals to consumers or require that products carry warning labels. Numerous states have passed laws in recent years in the absence of federal regulatory action to protect the public from toxic chemicals. *E.g.*, Safer Chemicals Healthy Families, *Healthy States: Protecting Families from Toxic Chemicals While Congress Lags Behind* (2010), <http://www.saferstates.com/attachments/HealthyStates.pdf>. If this bill were to become law, it would perpetuate many of the Toxic Substances Control Act's shortcomings while preventing states from protecting public health and the environment in the absence of a robust federal law — or in the case of a strong federal regulatory framework, from complementing EPA's efforts to achieve this important goal.

**Private Remedies.** The bill takes the extraordinary step of making a safety determination by EPA admissible in any federal or state court and dispositive as to whether a chemical substance is safe. Chemical Safety Improvement Act, S. 1009, 113th Cong. § 15(e). As a result, the bill's section on private remedies could significantly encroach on the right of judges and juries to evaluate and weigh relevant evidence regarding the potential injuries caused by toxic chemicals. In turn, this could have the effect of granting chemical companies immunity from legal actions by private parties once EPA has issued a positive safety standard determination, even when subsequent evidence calls into question the agency's reasoning.

In view of these issues, and others identified by public health and environmental groups, we believe the Chemical Safety Improvement Act preserves some of the most problematic features of the Toxic Substances Control Act, while making it harder for state and private actors to ensure the safety of chemicals in the absence of a strong federal backstop for regulating these substances. As a result, the bill, as currently drafted, takes a step backward in the protection of public health. We respectfully ask that the bill be made stronger to achieve meaningful reform of current toxics law and are available to provide substantive recommendations as needed.

Thank you for the opportunity to offer comments on reforming federal regulation of toxic chemicals. We ask that you submit this letter for the record.

Sincerely,

*Note: Institutions listed for identification purposes only. The signators do not purport to represent the views of their institutions.*

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cc: The Honorable Fred Upton, Chairman, House Energy & Commerce Committee

The Honorable Henry Waxman, Ranking Member, House Energy & Commerce Committee