

Testimony of Michael Belliveau

President and Executive Director

Environmental Health Strategy Center

on the

Discussion Draft of

The Chemicals in Commerce Act

before the

Subcommittee on Environment and the Economy

Committee on Energy and Commerce

U. S. House of Representatives

Wednesday, March 12, 2014

2322 Rayburn House Office Building

Washington, D.C.

Summary of the Testimony of Michael Belliveau,
President and Executive Director of the Environmental Health Strategy Center
on the Discussion Draft of the Chemicals in Commerce Act
before the Subcommittee on Environment and the Economy, House Energy and Commerce Committee
March 12, 2014

I direct the Environmental Health Strategy Center, a nonprofit organization that promotes human health and safer chemicals in a sustainable economy, and serve as Senior Advisor to the Safer Chemicals, Healthy Families coalition. I have an environmental science degree from MIT and thirty-five years experience on chemicals management issues in California, Maine and nationally. For the last decade, I've worked with many other stakeholders toward achieving reform of the Toxic Substances Control Act of 1976 (TSCA). I appreciate the efforts of this Committee in pursuit of that same goal.

Unfortunately, the Chemicals in Commerce Act as drafted, like its Senate counterpart the Chemical Safety Improvement Act (CSIA), would endanger public health and the environment, if enacted. Among the many problems with the proposed TSCA reform legislation are the following:

1. The House bill abandons the consensus for a health-based safety standard
2. Both bills fail to protect pregnant women and children from toxic chemicals
3. Both bills roll back current law: Many chemicals will remain untested
4. Both bills roll back current law: Weakening the review of new chemicals
5. The House bill rolls back current law on chemicals in consumer products
6. Both bills fail to require expedited action on chemicals of high concern
7. Both bills set aside thousands of chemicals as "low priority" without safety data
8. Both bills maintain an onerous burden on EPA to restrict existing chemicals
9. Both bills violate States' rights to protect their citizens from toxic chemicals
10. Both bills maintain a veil of secrecy over critical chemical information
11. Both bills lack adequate deadlines and resources to drive serious progress
12. Both bills restrict EPA's ability to timely exercise its scientific judgment

If the Committee remains committed to the goal of restoring public confidence of the safety of chemicals in commerce, then considerable effort will be needed to overcome the fundamental flaws of this bill. A fresh start based on past stakeholder dialog would offer a more fruitful path to TSCA reform.

Chairman Shimkus, Ranking Member Tonko and members of the Committee, thank you for this opportunity to testify today. My name is Michael Belliveau. I am the President and Executive Director of the Environmental Health Strategy Center, a national nonprofit organization that promotes human health and safer chemicals in a sustainable economy, headquartered in Portland, Maine. I also serve as Senior Advisor to Safer Chemicals, Healthy Families, the national coalition of more than 350 organizations working to protect American families from toxic chemicals. I hold an environmental science degree from the Massachusetts Institute of Technology. I have thirty-five years of experience working on chemicals issues at the state and national levels, including twenty years based in California.

For the last decade, I've worked with many other stakeholders toward achieving reform of the Toxic Substances Control Act (TSCA). I appreciate the efforts of this Committee to pursue the same goal. Unfortunately, the Chemicals in Commerce Act as drafted, like its Senate counterpart the Chemical Safety Improvement Act (CSIA), would be disastrous for public health and the environment, if enacted.

The House Discussion Draft would roll back existing TSCA authority on new chemicals, chemicals in products, and testing of chemicals, which are among the few areas where the U.S. Environmental Protection Agency (EPA) has been able to make limited progress using outdated policy tools. The House bill would also maintain the most universally recognized fatal flaws of TSCA, including an unworkable cost-benefit standard that prevented EPA action on asbestos, failure to ensure the safety of vulnerable populations, and unjustified secrecy about chemicals. Reaching further, the House bill would preempt states' rights to regulate product safety and set aside potentially thousands of so-called "low priority" chemicals without adequate safety data to justify placing them off limits to future scrutiny.

The House bill finds that "public confidence in the Federal chemical regulatory program is important." §2(a)(3).¹ Yet rather than restoring public confidence, the bill would further undermine it. The House bill lies so far outside the mainstream of chemicals policy in the private sector, in the states,

¹ Citations are to the TSCA sections amended by the draft Chemicals in Commerce Act, unless otherwise indicated.

among our trading partners and internationally, that the draft legislation cannot be considered a serious TSCA reform proposal. Unfortunately, the Senate bill contains most of these same fundamental flaws.

1. The House Bill Abandons the Consensus for a Health-Based Safety Standard

The lack of a health-based safety standard has plagued the implementation of current law. In *Corrosion Proof Fittings*, the court held that EPA had failed to adequately assess costs and benefits in determining that asbestos posed an unreasonable risk of injury to human health.² Even though asbestos is a known human carcinogen that kills an estimated 10,000 Americans per year,³ EPA's proposed asbestos restrictions were thrown out. This decision chilled EPA's ability to protect public health from dangerous chemicals. Even the chemical industry joined the growing consensus for health-based TSCA reform, stating that: "the benefit of chemicals being evaluated, the costs of methods to control their risks, and the benefits and costs of alternatives ... should not be part of (EPA's) safe use determinations."⁴

However, the House discussion draft contains no definition of or requirement to meet an explicit safety standard. Instead, it abandons the consensus call for a risk-based approach by applying the current TSCA test of whether a chemical presents an "unreasonable risk." §6(b). The courts have held that this standard triggers an upfront cost-benefit analysis rather than protection of human health and the environment as the primary consideration in making a "safety" determination.

The House bill's archaic embrace of the failed "unreasonable risk" standard has profound implications. For new chemicals, it means that EPA must consider costs and benefits before requiring testing to determine potential dangers or imposing conditions on chemical use. §5(c)(3). It means that even in the absence of adequate data, EPA can set aside a chemical as "low priority" because the cost associated with potential regulation is perceived to be greater than the benefits. §6(a)(1)(C). Under the

² *Corrosion Proof Fittings v. EPA*, 947 F. 2d 1201 – Court of Appeals, 5th Circuit (1991)

³ EWG Action Fund, Deaths from Asbestos-related diseases, <http://www.ewg.org/asbestos/facts/fact1.php#table1>

⁴ American Chemistry Council, 10 Principles for Modernizing TSCA, August 2009

“unreasonable risk” standard, “making safety determinations” for all high priority chemicals amounts to false advertising. §6(b). Instead of ensuring the public that the chemical is “safe” for its intended uses, the real message will be that the chemical is “safe enough,” given the costs and benefits to the industry.

2. Both Bills Fail to Protect Pregnant Women and Children from Toxic Chemicals

Everyone recognizes that TSCA’s failure to require EPA to determine the safety of hazardous chemicals to which Americans are routinely exposed is one of the greatest shortcomings of current law. Credible scientific evidence consistently shows that certain groups are inherently more susceptible and/or more exposed to chemicals, including pregnant women, children, communities of color, workers and others. Federal law needs to explicitly apply a safety standard to protect vulnerable populations.

Although both the House and Senate bills require EPA to make safety determinations for an unspecified number of high priority chemicals over time, the legislation fails to require that the chemical be found to meet the safety standard for all vulnerable populations. It’s not enough to define and analyze “potentially exposed populations.” §3(12), §6(c)(3). Unless EPA is explicitly required to apply a health-based safety standard to vulnerable populations, and to determine whether a chemical is safe for those most vulnerable, then protecting the health of pregnant women and children will not be assured. Unless the House bill is revised, such vulnerable groups can be legally, and too readily, ignored. EPA could simply decide that the serious health risk to vulnerable populations is not “unreasonable,” considering the lower population-wide risks and the costs to industry of protecting the most vulnerable.

Under other authorities, the federal government has protected young children from exposure to lead dust from old paint and pregnant women from methylmercury in fish. A group of toxic chemicals known as phthalates illustrate the need to explicitly protect vulnerable groups under TSCA. Congress previously banned six phthalates from use in toys and the European Chemicals Agency will phase-out all uses of four phthalates in 2015. Yet American women of childbearing age continue to be significantly

exposed to phthalates. The strongest scientific evidence from human health studies shows that pregnant women exposed to the highest levels of phthalates give birth to children with higher rates of birth defects of male sex organs, learning and behavioral problems, and asthma and allergies. When a revised TSCA requires EPA to determine the safety of phthalates, the safety of pregnant women and children should be a guarantee, not an option.

Neither bill requires EPA to follow the National Academy of Sciences’ recommendations on risk assessment, including the importance of considering aggregate risks of exposure to the same chemical from multiple sources, as well cumulative risks from simultaneous exposure to multiple chemicals and other risk factors.⁵ Without adhering to modern principles of risk assessment, EPA’s safety determinations, when they are able to make them under the constraints of the House bill, will likely be “wrong,” that is they won’t be fully protective of the health of vulnerable populations.

3. Both Bills *Roll Back Current Law: Many Chemicals Will Remain Untested*

The Government Accountability Office and others have decried the lack of adequate data on the health hazards of and exposures to most chemicals in commerce. EPA has required testing of chemicals for only about 200 of the 62,000 chemicals ‘grandfathered in’ when TSCA was signed into law in 1976, and fewer than 15% of new chemicals have adequate health and safety data.⁶ The large number of poorly tested chemicals in everyday products alarms parents nearly as much as the known hazardous chemicals that are still in widespread use.

Arguably, the correct policy response would be to ***require chemical manufacturers to provide minimum data sets for all chemicals***, sufficient at least for screening level assessments of hazard, exposure and risk. That’s the policy principle embodied in the 2007 REACH legislation in Europe, which

⁵ National Academy of Sciences, *Science and Decisions: Advancing Risk Assessment*, August 2009

⁶ U.S. Government Accountability Office, *CHEMICAL REGULATION: Options Exist to Improve EPA’s Ability to Assess Health Risks and Manage Its Chemical Review Program*, GAO-05-458, June 2005

warns of “no data, no market,” and is similar in principle to the data requirements now imposed by Walmart and Target, among others, who are requiring suppliers to provide information on chemicals.

Paradoxically, however, the House discussion draft, like the Senate bill, would actually greatly weaken EPA’s current authority to require testing of chemicals. Under current law, EPA can require testing of *any* chemical, if the chemical **may present** an unreasonable risk *or* it’s a chemical produced in substantial quantities that may result in substantial environmental releases or significant human exposure. TSCA §4(a)(1). Both bills significantly narrow that broad chemical testing authority. EPA could only require testing of chemicals when information is needed to perform a safety determination or to ensure compliance, based on a finding that an existing chemical **results** in an unreasonable risk (or a new chemical **will likely result** in an unreasonable risk). §4(a)(1). The bills shrink the chemical universe for testing to a small portion of the thousands of poorly tested chemicals to which people are exposed.

Even when testing is warranted, the proposed legislation creates new burdens that EPA must meet before it could justify a new testing requirement. EPA must first consider all available information, including exposure potential and screening level hazard and exposure information, and if insufficient may require that by rule, before requiring new testing on chemicals. §4(a)(3), (a)(4), (a)(5)

The legislation does allow EPA to issue an order to require testing, a less burdensome hurdle than the full rulemaking required by current TSCA. §4(a)(2). However, that authority is immediately diminished by an extensive, onerous, and upfront justification that EPA would have to make before it could use its new order authority, rather than a rulemaking, to require chemical testing. §4(b)

The bottom line: the House bill would keep Americans in the dark about health hazards and exposures for the vast majority of chemicals in commerce today. Just like in the recent Elk River

chemical spill where no data were available on the hazards of MCHM,⁷ the Chemicals in Commerce Act would keep Americans guessing about the dangers of the many untested or poorly tested chemicals.

4. Both Bills *Roll Back* Current Law: Weakening the Review of New Chemicals

Under current TSCA §5(e), EPA may restrict manufacturing of new chemicals pending the development of testing information, if the new chemical **may present** an unreasonable risk to human health and the environment *or* will be produced in substantial volumes and have substantial environmental release or significant or substantial human exposure. Most new chemicals lack adequate data to make that determination, minimum data sets are not required, and EPA has only 90 days to complete its initial review before manufacturing of the new chemical can begin. However, EPA has often mustered its limited TSCA authority to enter into negotiated consent agreements with chemical manufacturers that require additional testing, worker protections, restrictions on environmental releases and pollution control equipment for new chemicals.⁸

The Chemicals in Commerce Act would significantly curtail EPA's authority to review and regulate new chemicals. Both the House and Senate bills raise the bar higher before action can be taken, requiring EPA to determine whether or not the chemical **is likely to result** in an unreasonable risk of harm to human health and the environment. §5(c)(3). Further, because of the lack of a health-based safety standard in the House bill (see #1 above), EPA must now weigh costs and benefit factors before taking action on a new chemical under the House bill.

Both bills further limit EPA's authority to require testing of new chemicals that lack sufficient data to determine whether or not they are "likely" to present an unreasonable risk. This roll back

⁷ Richard Denison, Failed TSCA collides with the real world in West Virginia chemical spill this week, January 11, 2014, <http://blogs.edf.org/health/2014/01/11/failed-tsca-collides-with-the-real-world-in-west-virginia-chemical-spill-this-week/#more-2891>

⁸ U.S. Environmental Protection Agency, New Chemical Consent Orders and Significant New Use Rules (SNURs), <http://www.epa.gov/oppt/newchemicals/pubs/cnosnurs.htm>

eliminates EPA's ability under TSCA §5(e) to block manufacturing of the chemical until such additional testing information is developed. Under the House bill, in evaluating a new chemical during the 90-day pre-manufacturing review period, if EPA determines that additional information is needed to make an "unreasonable risk" determination, the agency can request that the manufacturer submit such additional information. §5(c)(2)(B). EPA can extend the review period for the development of additional information but only "by agreement with the submitter." §5(c)(2)(B)(ii). If the submitter is not cooperative, it is free to submit a notice of commencement of manufacture pursuant to §5(c)(4) unless EPA determines that the chemical is "likely" to present an unreasonable risk. But if data are inadequate to support such a determination, the new chemical enters commerce with poorly understood hazards.

5. The House Bill *Rolls Back* Current Law on Chemicals in Consumer Products

Parents are concerned about the safety of products and alarmed by credible scientific reports that indicate that consumer products are a major source of toxic chemical exposure. Under existing law, EPA has considerable authority to regulate chemicals in "articles," which is the TSCA term for consumer products. For existing chemicals, EPA can restrict a particular chemical use, require an article to be accompanied by warnings and instructions, or regulate the disposal of an article containing a chemical. TSCA §6(a)(2), (a)(3), (a)(6).

Current law also provides EPA with similar authority to restrict uses or disposal of new chemicals and significant new uses of chemicals, including chemicals in articles. TSCA §5(e). When a new chemical of uncertain safety is introduced into commerce, or an existing chemical is "voluntarily" phased out due to scientific concern and public outcry, EPA often uses its current authority to issue a Significant New Use Rule (SNUR), which is a rule that requires any new uses of that chemical to be reported to EPA so that the agency can evaluate whether to impose restrictions. TSCA §5(a)(1)(B). Historically, EPA has used its discretion to exempt articles from SNURs. However, in recent years, EPA has increasingly

recognized that for many chemical substances the greatest risks to human health and the environment result when toxic chemicals escape from consumer products during their use and disposal.

The proposed Chemicals in Commerce Act would make it significantly more difficult for EPA to restrict new uses of chemicals in products. Before EPA could adopt a SNUR that included articles, EPA must determine *in advance* whether the targeted chemical in the specific product may pose an unreasonable risk, *and* determine that the risk cannot be addressed adequately through requirements placed on the chemical substance rather than on the article. §5(a)(3). The first requirement creates a Catch-22, since EPA needs the notifications to determine whether there may be an unreasonable risk. But, in order to adopt the rule to require the notifications, EPA must first determine that an unreasonable risk may result. The second requirement discourages EPA from regulating new uses of toxic chemicals in articles, even though the products may result in a major source of chemical exposure. The House bill invites industry lawsuits alleging that EPA has not met its steep new burden of proof.

This provision of the Chemicals in Commerce Act seems aimed directly at reversing EPA's growing reliance on SNURs to address legitimate and growing concerns about chemicals in consumer products. In 2012, EPA proposed a SNUR that would require notification of new uses of Deca, the widely used PBDE flame retardant, in articles.⁹ This proposed rule followed an announcement by chemical manufacturers they would phase out production of Deca by December 31, 2013. EPA proposed that any new uses after that date, including the import of articles containing Deca, must be reported to EPA. This SNUR has not yet been finalized. Last year, EPA adopted a final SNUR that also regulated chemicals in articles.¹⁰ That SNUR requires notification of any new uses of specified perfluorinated chemicals (PFCs) when used as stain repellants on carpets. This follows a voluntary agreement negotiated with DuPont and other chemical manufacturers to reduce their production of PFOA and related C8 PFCs. Under the SNUR, any person who manufactures or imports carpets containing the specified PFCs must first notify

⁹ 77 Fed. Reg. 19862 (April 2, 2012)

¹⁰ 78 Fed. Reg. 62443 (Oct. 22, 2013)

EPA of their intended new use. That will provide EPA with time to determine whether the use of the chemicals, which are persistent, bioaccumulative and toxic, may pose an unreasonable risk to human health and the environment and should be restricted.

As with SNURs, the House bill also restricts EPA's ability to regulate existing chemicals in articles. When EPA finds that an existing chemical results in an unreasonable risk, it can adopt rules to restrict articles containing that chemical only where EPA "identifies specific types of articles that are, or likely will be, in U.S. commerce" and determines that protecting against unreasonable risks requires regulation of articles and cannot be accomplished only by regulating the restricted chemical. §6(f)(2). EPA may be able to satisfy these criteria in particular instances but they will add more work to the rulemaking process and discourage necessary action to protect the public from chemicals in products.

In another product-related roll back, the House bill would eliminate existing EPA authority to restrict the disposal of articles containing chemicals of concern. When EPA finds that a chemical presents an unreasonable risk to human health and the environment, TSCA authorizes various risk management actions, including restrictions on the disposal of articles containing the chemical. TSCA §6(a)(6). In a related TSCA authority, state governments are always authorized and can never be preempted from regulating the disposal of articles containing a chemical. TSCA §18(a)(2)(B).

The House bill takes away both of those current authorities. EPA would no longer have in its toolbox the authority under TSCA to restrict the disposal of articles containing a chemical that presented an unreasonable risk. And states would no longer have explicit authority to regulate the disposal of articles containing similar chemicals. Instead, the House bill would newly preempt states from regulating the disposal of articles containing a chemical, whenever EPA names that chemical as a low priority, completes a safety determination on a high priority chemical (even if it results in no action), or if at any time in the past EPA has named that chemical in an order or rule, including the more than 1,600 SNURs that EPA has issued to date. §18(a)(1), (a)(2). (See also #9 below).

If the House bill became law, then product and chemical manufacturers could never be held financially responsible for collecting and safely managing the disposal of the millions of old couches containing Penta, the now-banned, notorious PBDE flame retardant, even though they still pose serious health and environmental risks. Reasonable restrictions on the recycling of old computers, TVs and foam containing PBDEs could never be imposed, jeopardizing the health of recycling workers, consumers of recycled materials, and the environment.

In addition, dozens of state product stewardship laws could be preempted or severely curtailed. Many states are passing laws requiring product manufacturers to assume physical and/or financial responsibility for safely managing their products at the end of their useful life.¹¹ Some of those products contain toxic chemicals such as lead, PBDEs and petrochemicals. If any of those chemicals are touched by a past or future EPA action, under the House bill those product laws could be overturned.

6. Both Bills Fail to Require Expedited Action on Chemicals of High Concern

Although the House and Senate legislation requires EPA to name an unspecified number of chemicals as “high priority” for safety determinations (without specific deadlines to drive the priority setting and decision making), both bills fail to recognize a category of substances of very high concern. Nor does the proposed legislation establish specific requirements for substances that are persistent (long-lived in the environment), bioaccumulative (building up in the food web) and toxic, also known as PBTs. Such PBTs as lead, methylmercury, PBDEs and PFOA have long been recognized as requiring expedited action to reduce their use and exposures to the maximum extent practicable.

The failure of the legislation to accelerate solutions to chemicals of very high concern places these TSCA reform bills well outside the mainstream of chemicals management policy in the private sector, in the states, among our trading partners and internationally. Major multinational companies

¹¹ Product Stewardship Institute, Extended Producer Responsibility State Laws as of January, 2014, <http://productstewardship.us/displaycommon.cfm?an=1&subarticlenbr=280>

like Nike and Walmart are phasing out chemicals of high concern in their supply chain based on Restricted Substances Lists. More than thirty states has passed laws prohibiting specific uses of mercury, lead, PBDEs, phthalates, BPA and other flame retardant chemicals. Under REACH, the European Chemicals Agency will begin phasing out Substances of Very High Concern in 2015, except for critical uses for which there are not yet safer alternatives or which raise extraordinary socio-economic concerns. Internationally, under the Stockholm Convention, Persistent Organic Pollutants (POPs) must be phased out in favor of safer alternatives. Such actions together represent the policy mainstream.

Any serious TSCA reform proposal would require expedited action on PBTs and other chemical substances of very high concern, with a much lower burden on EPA to take protective action.

7. Both Bills Set Aside Thousands of Chemicals as “Low Priority” without Safety Data

The House and Senate bills dedicate inordinate attention to requiring EPA to affirmatively ferret out “low priority” chemicals, at the expense of taking away limited resources from addressing “high priority” chemicals. One can envision a new EPA Office of Low Priority Chemicals full of bureaucrats wasting precious taxpayer dollars chasing down unimportant chemicals. But a far more insidious fate will logically follow from the implementation of the proposed “low priority” provision.

The House bill requires EPA to designate all chemicals as either “high priority” or “low priority” as soon as feasible. §6(a)(1), (a)(2). Since the Chemicals in Commerce Act does not contain a health-based safety standard, substances can be listed as low-priority based on a combination of risk and economic factors when EPA determines that a chemical is “not likely to result in an unreasonable risk of harm to human health or the environment under intended conditions of use.” §6(a)(1)(C). A chemical could meet this standard where EPA concludes that a chemical’s benefits outweigh its risks or where, in the absence of adverse health and safety data, the Agency determines that an unreasonable risk is not “likely.” Further, low-priority substances “shall not be subject to a safety determination” and “shall be

considered not likely to result in an unreasonable risk of harm to human health or the environment.”

§6(a)(5). States are also preempted from restricting any low priority substances. §18(a)(2)(A)(iv).

It’s unclear whether EPA’s decisions on low priority chemicals can be challenged. High-priority listings are deemed not to be final agency action subject to judicial review. §6(a)(10). However, the House bill is silent on whether low-priority listings are subject to judicial review. They are not explicitly identified in the revised section 19 judicial review provisions. This is an important omission given the ease with which EPA can make low priority listings and their preemptive effect on state regulation.

Thousands of untested or poorly tested chemicals like MCHM, which recently contaminated the water supply of hundreds of thousands of West Virginians, are likely to be declared “low priority” under both bills. Once EPA sets aside low priority chemicals, they can’t take a second look unless new information appears. But where will those new data come from? Not from EPA-required testing. And states could never act. Maybe that’s why low-priority is such a high priority for the chemical industry.

8. Both Bills Maintain an Onerous Burden on EPA to Restrict Existing Chemicals

Under the House bill, and similarly in CSIA, EPA remains shackled to a heavy burden that will prevent timely, health-protective action on existing chemicals of high concern. The TSCA handcuffs on EPA, which the court so clearly emphasized in *Corrosion Proof Fittings*, fully remain. Only some of the words have been changed to protect the innocent from remembering EPA’s failed asbestos regulation.

Proponents have touted both bills’ removal of the TSCA requirement that any restrictions on chemicals that may present an unreasonable risk be applied “using the least burdensome requirements” to industry. TSCA §6(a). In *Corrosion Proof Fittings*, the court excoriated EPA for not exhaustively evaluating all the risk management options for reducing asbestos risk and not choosing the one that was demonstrably least burdensome to the industry.

The Chemicals in Commerce Act requires that EPA undertake a safety determination for all high-priority chemicals and to regulate those chemicals found to result in an unreasonable risk. §6(b), §6(f). However, as discussed above (see #1), since the safety determination under the House bill is based on the unreasonable risk standard and not a health-based safety standard, the determination will likely involve a weighing of health and economic factors. Thus, chemicals raising serious safety concerns could be dropped from further action because their benefits are perceived to outweigh their risks.

Since a risk-based safety standard is absent from the House bill, there is no requirement that restrictions imposed under section 6(f) be sufficient to assure the safety of the restricted chemical. Instead, the House bill imposes “least burdensome” type requirements on EPA under another name. EPA would face an equally heavy burden to demonstrate that any chemical restrictions are “proportional to the risks” of the restricted substance (i.e. do not impose burdens that are excessive in light of the risks reduced); will result in “net benefits” (i.e. benefits that exceed the costs); are “cost-effective” in reducing risks “compared to alternative requirements or restrictions” that the Agency might adopt; prohibit or substantially prevent specific uses only where “technically and economically feasible alternatives” are available and likely to be used and these alternatives “materially reduce risk to health or the environment” compared to the restricted use; and provide “for a reasonable transition period for implementation.” §6(f)(4).

The combination of these constraints will make it challenging for EPA to adopt chemical restrictions and will impose analytical burdens on the Agency at least as great as under the current law. Even though the House sponsors have played up the absence of an express requirement to select the “least burdensome” alternative as an improvement in section 6, the hurdles that EPA must clear are likely to be equally if not more onerous.

9. Both Bills Violate States’ Rights to Protect Their Citizens from Toxic Chemicals

Existing law permits all state regulation of chemicals except for restrictions on chemicals where EPA has imposed a testing rule under section 4 or restrictions under sections 5 or 6 that address the same risk as the state regulation. In those limited cases, TSCA preempts state restrictions. Even so, notwithstanding such federal action, TSCA always allows states to restrict disposal, ban use of a chemical, co-enforce restrictions identical to federal rules, and take action under other federal laws. TSCA provides for a waiver from federal preemption if states make a compelling case to EPA. TSCA §18.

Both the House and Senate bill would unravel TSCA's delicate balance between state and federal authority to regulate chemicals. Both bills would preempt states from enacting or enforcing chemical restrictions *before* EPA has taken a *final* action to protect public health and the environment. Both bills would preempt states from restricting chemicals that EPA set aside as "low priority" even though such decisions would be made without adequate data, using an extremely low "safety" bar. (See #7 above).

The new House bill, if it became law, would take this violation of states' rights to new extremes by preempting state chemical regulation much more severely than either CSIA or existing TSCA.

PREEMPTION OF STATE INFORMATION LAWS. Once EPA completes a safety determination or imposed a restriction on any chemical, the House bill would preempt all existing and new state laws that require chemical use reporting, alternatives assessments, toxics use reduction plans and goal, warnings of exposure and other requirements to develop or submit information for that chemical. §18(a)(1). As a result, the House bill would gut state chemical policies in California, Washington and Maine (and those proposed in several other states) that require chemical use reporting and alternatives assessments. The bill would prohibit a state law or regulation that "requires the development or submission of information" ... "relating to a chemical substance, mixture or article and its intended conditions of use with respect to which the Administrator has completed a safety determination." That means that once EPA completes a safety determination on a chemical, Washington state and Maine would be prohibited from adopting or enforcing rules under existing state law that require product manufacturers to report

which products they sell in the state contain that chemical, in what amount and for what purpose.

Maine would be prohibited from exercising its authority to require additional information to justify continued use of that chemical. California and Maine would be prohibited from using existing state authority to require product manufacturers to assess the availability of safer alternatives to that chemical in specific product categories. Other states would be prohibited from adopting similar new state laws that require chemical use reporting and alternative assessments.

The House bill would also gut state toxics use reduction laws in Massachusetts, New Jersey, Maine and elsewhere. By the same provision as above, once EPA has completed a safety determination on a chemical, none of these states could require a toxics use reduction plan or goals for that chemical. The House bill would also savage California's Proposition 65 warning requirements for exposures to chemicals known to cause cancer or reproductive toxicity, which would be interpreted as information requirements. By the same provision as above, once EPA has completed a safety determination, the development of a Prop 65 warning could not be required or enforced.

PREEMPTION OF STATE RESTRICTIONS ON NEW CHEMICALS. The House bill would preempt states from ever regulating a new chemical introduced into commerce under the new law. If either EPA determines that a new chemical is not likely to result in an unreasonable risk under section 5(c)(3)(B) or if the 90-day pre-manufacture review period expires (or extended review period) during which EPA must determine whether a chemical will likely result in an unreasonable risk, then a state is preempted from prohibiting or restricting the chemical in any way. §18(a)(2)(A)(i), (a)(2)(B). Since that covers all the bases, there's no way a state could ever restrict or prohibit a new chemical introduced under the new law, even if the chemical was later found to pose serious health or environmental risks.

PREEMPTION OF STATE RESTRICTIONS ON EXISTING CHEMICALS. The House bill would preempt states from enacting or enforcing restrictions that are strictly health-based or precautionary, once EPA makes a determination based on a cost-benefit analysis embedded in the "unreasonable risk"

standard. In what at first impression seems to be a slight improvement over CSIA, the House bill's preemption would kick in when EPA either determines that the chemical will not result in an unreasonable risk or when a rule or order is adopted based on a finding that the chemical will result in an unreasonable risk (in contrast to CSIA, which would preempt states shortly after a chemical was designated as a high priority chemical). §18(a)(2)(A)(ii), (iii). However, under the House bill, the safety standard of "unreasonable risk" retains the cost-benefit analysis of existing TSCA and case law, rather than being a strictly health-based standard, which CSIA is purported to be. Therefore, it's more likely under the House bill that EPA will determine that chemicals will not result in an unreasonable risk and therefore no federal restrictions are needed, or that the chemical does result in unreasonable risk but only token control measures are required. Under either scenario, states are preempted from restricting those same chemicals on a strictly health-basis or precautionary basis.

RETROACTIVE PREEMPTION OF STATES BASED ON PAST EPA ACTION. The House bill would retroactively preempt any state requirement on a chemical if EPA had taken action before the new law takes effect. §18(a)(4). The opposite of 'grandfathering in' existing state laws, the bill would reach back into history and define certain actions that EPA has taken in the past as now having a preemptive effect on any state restrictions for the same chemical. EPA actions include adoption of a rule, entering into a consent agreement, issuing an order or letting a significant new use review period expire, under either Section 5 or 6. Although EPA has a limited track record of success under TSCA, the agency has entered into many consent agreements (in lieu of actual regulation) and issued more than 1,300 SNURs (Significant New Use Rules) for new chemicals and more than 300 SNURs for existing chemicals (such as the flame retardants, PBDEs).¹² Basically, if EPA has touched any chemical under TSCA in the last 35 years, no matter how lightly, and it has done so many times, then any and all state requirements on that chemical are preempted. This could have a shockingly large preemptive effect. And industry doesn't

¹² Burch LA, Auer CM and Bergeron LL, Significant New Uses: EPA's SNUR Authority and Key Points Regarding SNURs for Former New Chemicals, BNA Daily Environment Report, September 12, 2011.

have to wait for EPA to act. Simply enacting the bill will deliver state preemption to their doorstep.

ELIMINATES ALL EXCEPTIONS TO PREEMPTION. The House bill eliminates the CSIA exception from preemption for state information collection requirements (see above). The bill also eliminates the (weak) CSIA exception from preemption for existing state laws adopted to address air quality, water quality or waste treatment and disposal that may have the effect of restricting a chemical. Like CSIA, the House bill eliminates the existing TSCA exceptions for state requirements identical to the federal regulation, which allows state co-enforcement of federal requirements, and eliminates the existing TSCA exception that allows states to ban the use of a chemical regardless of EPA action on the chemical.

ELIMINATES PROCESS TO EXEMPT STATES FROM PREEMPTION. Under the House bill, there's no process provided at all whereby states can appeal a preemptive effect and seek to have federal preemption of state requirement waived. Although onerous and burdensome, both CSIA and existing TSCA provide a process whereby states can seek waivers from preemption. TSCA §18(b).

10. Both Bills Maintain a Veil of Secrecy Over Critical Chemical Information

Excessive and unsubstantiated claims of confidential business information (CBI) have plagued the TSCA program, resulting in a secret inventory of some 17,000 chemical substances whose identities are kept hidden from the public, and the withholding of chemical identity even when new health studies reveal substantial risks that trigger notice to EPA under TSCA section 8(e).¹³

Confounding these problems, and in contrast with existing law, the House bill perpetuates chemical secrecy by establishing broad presumptions that numerous categories of information are confidential whether or not they meet legal requirements for trade secret protection. Several listed

¹³ Richard Denison, Worse than we thought: Decades of out-of-control CBI claims under TSCA, February 12, 2010, <http://blogs.edf.org/health/2010/02/12/worse-than-we-thought-decades-of-out-of-control-cbi-claims-under-tsca/#more-432>

information categories are unequivocally barred from disclosure, with virtually no option for EPA to require substantiation of the basis for protection. §14(a).

The House bill also 'grandfathers in' all CBI claims made under TSCA over the last 35 years, eliminating any obligation for industry to justify the ongoing need for confidentiality, except under very narrow circumstances. The Chemicals in Commerce act bars EPA from requiring re-documentation of CBI claims made before the enactment of the law "unless the Administrator has a reasonable basis to conclude that the claim does not meet the requirements of this section for protection from disclosure." §14(f)(2). In other words, EPA must have a specific reason to question the validity of the CBI claim. It cannot require re-documentation because it believes disclosure would be beneficial to the public, the information would be useful to the scientific community or, with the passage of time, the validity of the CBI claim should be reconfirmed.

11. Both Bills Lack Adequate Deadlines and Resources to Drive Serious Progress

While EPA must develop a risk-based prioritization process within one year under section 6(a)(1), there is no schedule for issuing and updating the list of high-priority chemicals itself, and thus no assurance that chemicals threatening public health or the environment are assessed and regulated where warranted. While all active substances must be prioritized "as soon as feasible" under paragraph (a)(2), there is no time-line for completing this process. Further, no minimum number of chemicals must be listed as high-priority, again weakening the drivers for assessing and regulating chemicals of concern.

The House bill does not refer to any of the Work Plan chemicals EPA has already prioritized and contains no mechanism for automatically listing these chemicals as high-priority. No deadlines are provided for completing safety determinations and rulemakings restricting high-priority chemicals. On top of the absence of deadlines and minimum requirements for priority-setting, this will allow open-ended delays in addressing chemicals of high concern that should be assessed expeditiously.

Neither bill provides the resources necessary for EPA to implement a modernized TSCA

program that will restore public confidence in the safety of chemicals in commerce. The absence of fees on industry to fund the program violate both the EPA's and the chemical industry's principles for TSCA reform. The chemical manufacturers have asserted that "EPA should have the staff, resources and regulatory tools it needs to ensure the safety of chemicals" and "EPA's budget should be commensurate with its chemical management responsibilities."¹⁴

EPA calls for fees on industry to fund the modernized TSCA program: "Principle #6: EPA Should be Given a Sustained Source of Funding for Implementation: Implementation of the law should be adequately and consistently funded, in order to meet the goal of assuring the safety of chemicals, and to maintain public confidence that EPA is meeting that goal. To that end, manufacturers of chemicals should support the costs of Agency implementation, including the review of information provided by manufacturers."¹⁵ Both TSCA bills fail to answer the bottom-line question: "Where's the money?"

12. Both Bills Restrict EPA's Ability to Timely Exercise Its Scientific Judgment

In the House bill, for example, EPA must divert resources to develop guidelines and procedures for "information quality" and "best available science" that will delay priority setting and assessment of chemical safety. These requirements will restrict EPA's ability to exercise scientific judgment in weighing available data and information on chemical risks. §26(h), (i), (j). These detailed requirements provide a new basis for legal challenges to EPA's science determinations, which could delay actions on chemicals.

CONCLUSION: The Chemicals in Commerce Act, as drafted, would endanger public health and the environment, in ways similar to the Senate bill, CSIA. The Committee should start all over from scratch.

¹⁴ American Chemistry Council, 10 Principles for Modernizing TSCA, August 2009.

¹⁵ U.S. Environmental Protection Agency, Essential Principles for Reform of Chemicals Management Legislation, <http://www.epa.gov/oppt/existingchemicals/pubs/principles.html>