

**Testimony of Kenneth Cook  
President  
Environmental Working Group**

**On**

**S. 697**

**Before the Senate Committee on Environment and Public Works**

**March 18, 2015**

Thank you for the opportunity to testify. My name is Kenneth Cook and I am the President and co-founder of Environmental Working Group.

Congress hasn't sent a major, comprehensive environmental protection law to the president's desk for signature since 1996 – nineteen years ago this summer, to be exact, when Congress made landmark reforms to the safe drinking water and pesticide laws.

Dozens of bedrock environmental laws were enacted in the preceding 30 years as science revealed more and more ways in which human activity was harming nature and people alike. The development of those laws was driven by scientific advances, overwhelming public support and environmental advocates and organizations determined to clean up America's air and water and safeguard human health from toxic pollution.

It's a good thing for all of us that those laws were enacted when they were. Every one of them began as a "pie in the sky" response to a grave environmental problem – polluted air, rivers, tap water, land. And not a single one of those bedrock laws could be enacted by Congress today.

The ongoing stalemate in U.S. environmental lawmaking represents a handsome return on investment for a wide range of industries and corporations whose processes and products pollute the environment and threaten human health. They have invested heavily in lobbyists, political contributions and campaign ads to block any new legislation that protects our planet and our health.

Now we may see polluting industries reap the ultimate payoff from their decades of political investments.

It is possible that the first major, comprehensive environmental protection bill to emerge from Congress in almost a generation will be one that originated in the chemical industry – the very industry the bill purports to regulate.

The driving motivation behind this bill is not to protect American workers and families from the thousands of chemicals those companies make, and which scientists find in all of us, including in newborns' umbilical cord blood.<sup>1</sup>

No, this bill has been introduced to protect chemical companies from the backlash and mistrust they themselves have engendered among consumers, responsible companies and legislators in dozens of states. If you want to better understand some of the underlying reasons for this mistrust, I urge you to look at the chemical industry documents EWG has collected and made available to the public.<sup>2</sup> There, you can read in the chemical industry's own words about efforts to hide the truth about harmful chemicals and to derail efforts to raise awareness about, and guard against, harmful exposures. Consider, for example, the devastation chemical pollution has caused in communities such as Anniston, Ala., Parkersburg, W.Va., Bhopal, India, and elsewhere.

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<sup>1</sup> EWG, *Body Burden: The Pollution in Newborns* (2005), <http://www.ewg.org/reports/bodyburden2/execsumm.php>; see also App. A (list of chemicals detected in cord blood monitoring studies nationally).

<sup>2</sup> EWG, *Chemical Industry Archives* (2002), <http://www.chemicalindustryarchives.org>; see also App. B (sample of chemical industry documents).

That backlash has been intensified by federal inaction – the combination of a weak law passed in 1976 and the chemical industry’s opposition to every effort to strengthen it to protect human health and the environment.

While it is not true of every member of Congress, it is true that Congress, as an institution, is ultimately responsible for this TSCA stalemate. As a consequence, literally hundreds of thousands of people have died, unnecessarily, from exposure to just one TSCA-regulated substance – asbestos.

Congress after Congress has sat by and watched as this human tragedy unfolded – as companies knowingly exposed workers, their wives, their families and the communities in which they live to that deadly substance. Congress sat by as those same companies lied about the exposure and its dangers and fought every effort to prevent its victims – those struck down and their surviving loved ones – from receiving any meaningful justice or protection.

That alone would be a terrible legacy for Congress to redress. But there are dozens of other chemicals that present elements of that same story that have unfolded over the past 40 years of neglect – and continue to unfold today. The lobbyists for those chemicals are well represented in the room.

Reform of the Toxic Substances Control Act must directly and aggressively take on this tragic health and environmental heritage. That’s what those of us from the environmental wing of the environmental movement resolutely believe. In that spirit, I come here today to strongly oppose S. 697.

Simply put, S. 697 will not ensure that chemicals are safe, will not mandate that EPA quickly review and act to protect human health from the most dangerous chemicals, will not provide EPA the resources needed to conduct badly needed chemical safety reviews, and will not preserve a meaningful role in chemical regulation for the states. By simultaneously and substantially removing the ability of states to regulate “high priority” chemicals and failing to

provide EPA with firm deadlines, adequate resources and a proven, unambiguous safety standard, S. 697 would *actually weaken* the Toxic Substances Control Act – a law so broken that EPA could not even ban asbestos.

In particular, S. 697 would not require that chemicals regulated under TSCA are as safe as the chemicals used in and on food, that is, that chemicals pose a “reasonable certainty of no harm.” Instead, S. 697 continues to allow chemicals to be used so long as they pose “no *unreasonable* risk of harm” to people and the environment.<sup>3</sup> As more than 20 law professors, legal scholars and public interest lawyers noted this week, the standard proposed in S. 697 is deeply problematic because it fails to give EPA clear authority to ban or restrict dangerous substances.<sup>4</sup> By contrast, S. 725 would require chemical manufacturers to demonstrate that their products pose a “reasonable certainty of no harm,” a more robust, proven, health-based safety standard that clearly excludes consideration of cost from the determination of safety.

As they consider the importance of the safety standard, committee members should have one word in the forefront of their thinking: cancer.

The “reasonable certainty of no harm” standard has an established regulatory history at EPA for chemical carcinogens. In the context of pesticides, EPA applies the standard to ensure that a chemical cannot pose more than a 1-in-100,000 to 1-in-1,000,000 risk of developing cancer over a lifetime of exposure. While we do not always agree with EPA’s risk assessments of chemical carcinogens, “reasonable certainty of no harm” remains the strongest health standard to date for cancer regulation in federal environmental law.

It has been suggested that “reasonable certainty of no harm” is appropriate for pesticides, but not for TSCA-regulated chemicals, because “pesticides are designed to kill.” Indeed they are. But

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<sup>3</sup> The safety standard purports to exclude consideration of costs when evaluating whether a chemical meets the safety standard and removes from current law the requirement that EPA adopt the “least burdensome” alternative to regulating a chemical. Importantly, however, it retains the term of art “unreasonable risk,” which has been interpreted by courts as requiring a careful balancing of costs and benefits. Therefore, the combination of “unreasonable risk” in the safety standard, along with other provisions in the bill that demand onerous consideration of costs and benefits, see § 8 of S. 697 (amending §§ 6(d)(4)(A)-(B), 6(d)(5)(D) of TSCA), raise serious concerns about the effectiveness of this standard from a public health perspective.

<sup>4</sup> See App. C (copy of letter).

some TSCA chemicals to which your constituents may be unwittingly exposed are every bit as dangerous for many people exposed to them. The known human carcinogens asbestos and formaldehyde come to mind, along with many TSCA chemicals associated with serious non-cancer effects: They are neurotoxic or known to cause birth defects or disruption of the endocrine system that produces hormones in our bodies.

**It is for those most dangerous chemicals that a tough, clear and tested TSCA safety standard is most needed.** We would anticipate that the majority of TSCA-regulated chemicals would not be placed in acute regulatory jeopardy by the “reasonable certainty of no harm” standard, either because those chemicals are not sufficiently toxic, people are not significantly exposed, or some combination of those two risk considerations.

After all, literally thousands of pesticide uses are approved for use right now by EPA under the “reasonable certainty of no harm” standard, despite the fact that, as has been noted, those chemicals are indeed designed to kill. At the same time, dangerous pesticides *have* been banned or restricted under that standard, as were chemicals used in food over decades of previous regulatory application by the FDA. In regulatory interpretation, it is not a perfect standard. Yet “reasonable certainty of no harm” is simply the strongest public health standard in environmental law. It would help us ensure that chemicals that end up in our kids are at least as safe as pesticides.

Still, we can understand why the chemical industry would oppose the adoption of the “reasonable certainty of no harm” safety standard for TSCA regulation. **The most dangerous chemicals – known human carcinogens, highly neurotoxic chemicals, chemicals linked to birth defects – would be much less likely to escape regulation under “reasonable certainty of no harm,” compared to a standard rooted in “unreasonable risk.”**

By contrast, we have strong reason to believe that even the most dangerous industrial chemicals in the world might continue to be loosely regulated or unregulated threats to Americans’ health under the untested, less protective standard in S. 697.

S. 697 would establish a modified version of the famously failed safety standard in TSCA, again rooted in “no unreasonable risk of harm.” How would the standard in S. 697 deal with known human carcinogens regulated by TSCA that end up in Americans, in some cases before they’ve left the womb? We are left to guess.

If the underlying standard turns out to be weak or pliable when applied to truly dangerous chemicals – and we fear that it would – it will hardly matter if the EPA administrator identifies a “potentially exposed or susceptible population” as “relevant to the safety assessment and safety determination” of a TSCA chemical. If the harm done to those “populations” is not an “unreasonable risk,” it will not be unreasonable to risk their continued toxic exposures.

Along those same industry-favoring lines, S. 697 would not mandate accelerated reviews of the most dangerous chemicals already in commerce and, in many cases, already in people. Instead, S. 697 would only require that 25 high priority chemical reviews *be underway* within five years of enactment. It sets no deadline for implementation of any new chemical restriction. Each chemical review could take up to seven years, and S. 697 provides only \$18 million a year in industry revenue to help pay the program’s costs.<sup>5</sup> Under this proposal, EPA could take *a century or more* to review the most dangerous chemicals in commerce.<sup>6</sup>

By contrast, S. 725 would require review of asbestos within three years of enactment, require review of all chemicals that persist in the environment and build up in our bodies within four

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<sup>5</sup> Moreover, instead of expediting the review of asbestos or extremely dangerous chemicals that persist in the environment and build up in people, S. 697 would allow manufacturers to obtain fast-tracked reviews of their favored chemicals for a fee. See § 6 of S. 697 (establishing § 4A(c)).

<sup>6</sup> Testifying last year before the U.S. House of Representatives Energy and Commerce Committee Subcommittee on Environment and the Economy, EPA Assistant Administrator Jim Jones said that about 1,000 chemicals had exhibited hazardous properties, were now in use and should receive EPA review. See The Chemicals In Commerce Act: Hearing Before Subcomm. on Env’t & Econ. of H. Comm. on Energy & Commerce, 113th Cong. (2014) (statement of Jim Jones, Assistant Adm’r, U.S. Env’tl. Prot. Agency), <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg90983/html/CHRG-113hhrg90983.htm>. Yet S. 697 would require that safety assessments of just 25 chemicals be underway in the first five years after passage. Because each review could take up to seven years, only reviews of those 25 chemicals would have to be completed in the first 12 years after passage. For every review completed, only one chemical would have to be added to the high-priority list for review. At this pace, if S. 697 passes as written, it could take centuries to go through 1,000 chemicals.

years and require that review of 75 high-priority chemicals be underway within five years. In addition, S. 725 provides clear deadlines for review and for implementation of chemical restrictions, and provides sufficient industry revenue to ensure that these reviews and restrictions are quickly and *actually* completed *and* implemented.

S. 697 also creates new obstacles to regulating products made from dangerous chemicals, ignores the impact of chemical spills on fence-line communities,<sup>7</sup> fails to help communities detect cancer clusters<sup>8</sup> and weakens EPA's ability to intercept dangerous imports. Under S. 697, EPA would have to make a separate determination of "significant exposure" before it could, for example, regulate a couch containing flame retardants that harm the endocrine system, or regulate building materials treated with formaldehyde, a known Group 1 carcinogen. By contrast, S. 725 places no restrictions on EPA's ability to regulate both the chemical *and* the couch. What's more, S. 725 explicitly requires EPA consideration of chemical spills, such as the Elk River spill in West Virginia, creates a new program to track cancer clusters and preserves EPA tools to ban dangerous imports.

S. 697 also retains many of the legal obstacles that stymied EPA's efforts to ban asbestos more than two decades ago. In addition to continuing the use of "no unreasonable risk of harm" as the safety standard, S. 697 explicitly requires a cost-benefit analysis for a chemical ban or phase-out and retains the heightened "substantial evidence" standard of judicial review.<sup>9</sup> Simply put, TSCA legislation that fails to clear away all of the major hurdles that prevented EPA from banning asbestos does not deserve the support of Congress.

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<sup>7</sup> S. 697 fails to explicitly include unintended chemical spills in the scope of the "conditions of use" to be considered when assessing the safety of a chemical. Furthermore, the bill's definition of "potentially exposed or susceptible population" does not explicitly protect fence-line communities. About 10,000 tons of chemicals are spilled every year in the U.S. The communities that bear the brunt of the harm from these events must be ensured greater protection.

<sup>8</sup> In contrast, S. 725 provides EPA with the authority to work with other federal, state and local agencies, as well as with educational institutions, to investigate and address the causes of disease clusters. §§ 201-07, 301-02 of S. 725.

<sup>9</sup> Although other EPA regulations are subject to the more deferential "arbitrary and capricious" standard of judicial review, actions taken to regulate chemicals pursuant to EPA's authority under TSCA are reviewed under the heightened "substantial evidence" standard. The Fifth Circuit relied on this heightened level of scrutiny when it examined and largely rejected EPA's rule banning asbestos. Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1213-14 (5th Cir. 1991).

S. 697 also establishes a troubling new “safe” list of “low priority” chemicals that EPA deems “likely to meet” the safety standard. Similar “safe lists” have been attacked for allowing dangerous chemicals into our food.<sup>10</sup> But unlike similar “safe” lists for food chemicals, the “low priority” list envisioned by S. 697 would not be subject to judicial review.

Finally, S. 697 proposes a radical new version of preemption that restricts state efforts by: 1, preempting state action on any chemical designated as “high priority” by EPA; 2, blocking state co-enforcement of EPA rules; 3, limiting regulation under state environmental and public health statutes; and 4, eviscerating a state’s ability to set more protective standards than EPA’s. Though states could still regulate some chemicals, they would be required to notify EPA of their intention to do so.

States have been the only cops on the beat in recent decades. Since *Corrosion Proof Fittings*, the Fifth Circuit opinion that prevented EPA from banning asbestos, 33 states have acted to protect us from dangerous substances, including lead, cadmium, mercury, formaldehyde and phthalates.<sup>11</sup> Many states have created programs to review and regulate chemicals and many more are currently considering legislation to do so. The expertise, capacity and regulatory commitment of the states should be leveraged to complement EPA, as they have throughout the history of federal environmental law, not stymied or extinguished.

Under S. 697, however, states would be blocked from regulating a chemical once EPA begins to study a “high priority” chemical, not when EPA actually implements a rule restricting a chemical, as current law provides and is typically the case for regulatory action. This radical new version of preemption would not only rob the states of the ability to complement EPA action on

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<sup>10</sup> See generally NRDC, *Generally Recognized as Secret: Chemicals Added to Food in the United States* (2014), <http://www.nrdc.org/food/files/safety-loophole-for-chemicals-in-food-report.pdf>; The Pew Charitable Trusts, *Fixing the Oversight of Chemicals Added to our Food: Findings and Recommendations of Pew’s Assessment of the U.S. Food Additives Program* (2013), <http://www.pewtrusts.org/en/research-and-analysis/reports/2013/11/07/fixing-the-oversight-of-chemicals-added-to-our-food>.

<sup>11</sup> See Mary Ellen Kustin & Melanie Benesh, *States Lead the Way on Dangerous Chemicals*, EWG enviroblog (Mar. 9, 2015), <http://www.ewg.org/enviroblog/2015/03/states-lead-way-dangerous-chemicals>.

chemicals but would also set a dangerous new precedent that could affect laws related to everything from environmental protection to worker safety. It must be rejected.

Thank you for opportunity to testify. EWG strongly oppose S. 697 and urges this Committee to support real reform of our broken chemical safety laws.

