

Testimony of Mark N. Duvall

Before the Committee on Environment and Public Works

United States Senate

**“Strengthening Public Health Protections by Addressing Toxic
Chemical Threats”**

July 31, 2013

Thank you for inviting me to testify at this hearing. My name is Mark N. Duvall. Although I represent a variety of clients on TSCA issues, I am appearing here today solely in my personal capacity, and the views I express today are my personal views. For clarity, in my appearance here today, I am not representing my law firm or any client of my law firm.

I have extensive experience with the Toxic Substances Control Act (TSCA). I have been advising clients on TSCA for nearly 30 years.

I have studied the TSCA legislation that has been introduced this year, both the Safe Chemicals Act of 2013 (SCA), S. 696, and the Chemical Safety Improvement Act (CSIA), S. 1009. My comments today focus on the issue of preemption.

1. Comparison of Preemption Provisions in TSCA, SCA, and CSIA

TSCA today has a fairly strong preemption provision. Actions by EPA under section 4, 5, or 6 with respect to a chemical will generally preempt State and local restrictions on that chemical that address the same risk. States may apply to EPA for a waiver of preemption. In practice, there has been little occasion for this preemption provision to come into play, and EPA has never been asked for a waiver.

EPA has adopted very few rules under section 6 other than those for PCBs, which have been held to preempt local restrictions on PCBs. If section 6 of TSCA worked better, EPA could be expected to adopt more rules on chemicals that preempt State and local restrictions on those chemicals.

Few if any States or localities have adopted testing requirements that could be preempted by EPA test rules under section 4.

EPA has adopted over 2,000 significant new use rules (SNURs). EPA has also issued many orders under section 5(e) for both PMN and SNUR chemicals. As rules or orders under section 5, they could preempt State or local restrictions on those chemicals. However, few States or localities have adopted restrictions for those chemicals.

The SCA takes a radically different approach to preemption from TSCA today. No State or local restriction on a chemical would be preempted unless compliance with both that restriction and EPA's restriction would be impossible, in which case the State or local restriction would be preempted. The SCA thus does nothing to bring regulation of chemicals in products sold nationally to the national level.

The CSIA's preemption provision is much closer to that of TSCA currently. As under TSCA today, actions by EPA under section 4, 5, or 6 with respect to a chemical will generally preempt State and local restrictions on that chemical. States may apply to EPA for a waiver of preemption. The CSIA introduces two new EPA actions under section 4 and 6, a prioritization decision and a safety determination. Either of those EPA actions for a chemical will preempt certain kinds of State or local restrictions for that chemical.

2. A Strong Preemption Provision Is Appropriate

The CSIA has a strong preemption provision. That is appropriate for a statute such as TSCA that is primarily aimed at managing the risks of chemicals that may become components of products that are distributed nationally or internationally. For the most part, products sold in any one state are also sold throughout the country. A State restriction on the chemicals in a product sold in that State effectively may become a national standard, since manufacturers generally cannot vary the content of their products by State. This means that manufacturers must monitor the laws of all States and tailor the content of their products to meet all applicable State requirements. Thus, State product content restrictions directly burden interstate commerce.

TSCA provides a federal response to the concerns underlying State product content restrictions. Until now, TSCA has limited EPA's ability to address those concerns. The CSIA will enable EPA to address those concerns faster and more comprehensively than has been possible under TSCA to date. Where EPA has addressed a chemical under TSCA, in many circumstances its actions should preempt State and local restrictions on the use of that chemical in products.

The CSIA significantly expands the role of States in EPA's decisionmaking under TSCA. Today, States have at most a peripheral role in EPA's implementation of TSCA. Their role would not be greater under the Safe Chemicals Act. In contrast, the CSIA makes States important contributors to EPA's implementation of TSCA. States can have access to confidential business information, under appropriate safeguards. The role of States begins with the prioritization process. If a State has concerns about a chemical (for example, because it has enacted a restriction on the use of that chemical in products sold in the State), the State may nominate it for immediate consideration in EPA's prioritization process. The State may bring important information to EPA's attention to help it prioritize the chemical appropriately. EPA must give quick consideration to the State's nomination of a chemical for prioritization, as the bill gives EPA only six months in which to designate a State-nominated chemical as either a high priority or a low priority for a safety assessment and safety determination. Where EPA has designated a chemical as a high priority, a State has the opportunity to provide additional information for EPA to evaluate in making its safety assessment and safety determination. Where EPA determines that a chemical does not meet the safety standard under the intended conditions of use, a State may provide comments to EPA on the risk management measures that EPA should adopt.

In short, the CSIA shifts the focus of regulation of chemicals in products sold in interstate commerce from individual States to the national level, while creating an important role for States in evaluating and regulating those chemicals at the national level.

3. The CSIA Preemption Provision Has Important Limitations

In evaluating the CSIA's preemption provision, it is important to recognize the limited scope of that provision.

First and foremost, it does not preempt any State or local requirements that apply to large numbers of chemicals. Instead, at most it preempts the application of those requirements to individual chemicals for which EPA has taken a preemptive action. EPA will need years to prioritize chemicals and to complete safety determinations. Until it does one or the other, there will be no preemption.

Second, the provision does not apply to State or local requirements related to water quality, air quality, or waste management. Thus, many state environmental laws will remain unaffected.

Third, the provision does not apply to State or local laws related to the end-of-life for chemicals or products. Recycling, product take-back, and disposal restrictions will not be preempted.

Fourth, the CSIA does not preempt any reporting requirements. As I will discuss, this means that most state green chemistry laws will not be affected. Nor does it preempt any State statutes based on federal law, such as the Clean Air Act.

Fifth, the scope of a safety determination limits the scope of preemption. If a safety determination addresses some uses of a chemical but not others, State or local restrictions on the uses not addressed in the safety determination would not be preempted.

Sixth, the provision has a waiver provision. A State or locality may apply to EPA for a waiver of preemption. If EPA agrees that certain criteria are met, it can waive preemption. One criterion is that the State or locality shows that compelling State or local conditions warrant granting the waiver. Several federal statutes require demonstration of “compelling local conditions” to justify State action in the face of federal action, including the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 346A and 360k, and the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 667.

Despite some criticisms of these criteria, they are not significant obstacles for States or localities. OSHA has determined that the phrase “compelling local conditions” in the OSH Act’s preemption provision does not require uniquely localized risks. In its approval of California’s plan to add Proposition 65 to its State plan, OSHA concluded, 62 Fed. Reg. 31159 (June 6, 1997):

Conditions unique to a given State are a sufficient, but not a necessary, basis for a finding of compelling local conditions OSHA has never said that a State must establish that the conditions of concern to the State’s lawmakers are not prevalent in any other State as well. Such an interpretation would be inconsistent with the plain meaning of “compelling”; more than one State may have a compelling interest in regulating particular safety issues. Simply put, “compelling local conditions” are compelling conditions which exist locally.

On judicial review, a court specifically found that “OSHA’s construction of [the] ‘compelling local conditions’ requirement is permissible under the Court’s deferential review.” *Shell Oil Co. v. U.S. Department of Labor*, 106 F. Supp. 2d 15 (D.D.C. 2000). EPA is likely to follow OSHA’s construction in considering a waiver request asserting “compelling State or local conditions.” Thus, a State or locality would only have to establish that compelling conditions justifying a waiver exist within its borders, not that those conditions are unique to that jurisdiction.

Another criterion for a waiver is that compliance with the State or local restriction would not unduly burden interstate or foreign commerce. In the same proceeding, OSHA also found that adding Proposition 65 to the California State plan would not unduly burden commerce. The court upheld that finding as well. The “not unduly burden” criterion, which appears in numerous federal statutes, is unlikely to be a substantial hurdle for a waiver.

4. The CSIA Preemption Provision Will Have Little Impact on State Green Chemistry Laws

An important question is how the CSIA will impact state green chemistry laws, such as California’s proposed Safer Consumer Products (SCP) regulations. The answer is that there will likely be little or no impact.

Upon passage of the CSIA, the SCP regulations will be unaffected, because EPA will not have taken any preemptive actions. Under the regulations as proposed, the Department of Toxic Substances Control (DTSC) must identify Priority Products containing Chemicals of Concern. At that point, a responsible entity who makes or sells a Priority Product containing a Chemical of Concern must notify DTSC. This is a reporting requirement, and as such will not be preempted by the CSIA. Next, the responsible entity must conduct and submit an Alternatives Analysis. This is also a reporting requirement, and so will not be preempted. DTSC must evaluate the Alternatives Assessment. After doing so, DTSC may choose to impose restrictions. Any restrictions related to end-of-life will not be preempted. The only kind of DTSC restriction that will be preempted is one that relates to the manufacture, processing, distribution, or use of a chemical for which EPA has taken a preemptive action. In practice, it is unlikely that many entities selling consumer products in California will go through the full process of notification, Alternatives Analysis, and restriction. Most will choose to reformulate or to remove the product from the California market. Thus, in the vast majority of cases, there is likely to be no preemption at all.

Similarly, under the green chemistry law in Washington, the Children’s Safe Products Act, responsible entities must notify the Department of Ecology that they sell into the State a children’s product containing a Chemical of High Concern to Children (CHCC) at or above the relevant threshold. This is a reporting requirement, and as such will not be preempted by the CSIA even after EPA takes action on a CHCC.

Maine’s green chemistry law, Toxic Chemicals in Children’s Products, also has a notification requirement. Like California’s SCP regulations, it can require responsible entities to

conduct and submit alternatives assessments. As reporting requirements, these requirements will not be preempted by the CSIA. Only in limited cases can the Maine Department of Environmental Protection restrict chemicals in children's products. Those restrictions could potentially be preempted by EPA taking a preemptive action with respect to the chemicals involved.

3. The CSIA Preemption Provision Will Have Little Impact on Tort Suits

The CSIA will not have a significant impact on tort suits. It will not preempt them, nor will it determine their outcomes.

It is clear that the drafters did not intend for EPA action to preempt tort suits, as indicated by the provision that refers to the use of an EPA safety determination for a chemical in tort suits related to that chemical. To clarify the limited intent of the preemption provisions, it may be appropriate to amend the provision to refer to preemption of State or local statutes or administrative actions rather than the broader term "restrictions."

The CSIA preemption provision would deem an EPA safety determination to be admissible in court proceedings. This is not a significant limitation on tort cases. Courts already routinely take judicial notice of official federal actions. This requirement is simply an extension of current practice.

The CSIA preemption provision will make a safety determination for a chemical substance "determinative of whether the substance meets the safety standard under the conditions of use addressed in the safety determination." The question of whether a chemical substance meets the newly-created safety standard under the CSIA is not determinative of the outcome of tort suits. There the question is typically whether the defendant violated a common-law duty or an applicable legislative or regulatory obligation. The safety standard under the CSIA has no direct relationship to common-law duties or legislative or regulatory obligations other than those under TSCA.

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In conclusion, the CSIA's preemption provision will help promote a level playing field for products sold throughout the nation, without crippling state green chemistry laws or limiting tort suits.

Thank you for considering this testimony.