WRITTEN TESTIMONY OF MAUREEN F. GORSEN

PARTNER, ENVIRONMENTAL AND LAND USE GROUP

ALSTON & BIRD, LLP

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

OF THE

UNITED STATES SENATE

JULY 31, 2013

Madam Chair, distinguished members of the Committee and staff – good afternoon. Thank you for inviting me to testify today on the topic of public health protections that address potential threats from toxic chemicals, particularly as they relate to children and sensitive subpopulations. I hope my testimony will prove useful to the Committee.

I have been an environmental attorney since 1993, and spent half of that 20-year career in California state government service. Currently, I am a partner in the environmental and land use practice of the law firm of Alston & Bird, based in Sacramento. From 2003 to 2009, I served in two positions at the California Environmental Protection Agency (Cal/EPA), first as the Deputy Secretary for Law Enforcement and Counsel for Cal/EPA, and then as the Director of the California Department of Toxic Substances Control. Cal/EPA and its subdivisions implement and enforce the federal and state pollution control laws, such as the Clean Air Act, the Clean Water Act, CERCLA, RCRA, and Proposition 65. For most of the 1990s, I served as General Counsel of the California Natural Resources Agency where I had responsibility for policy, implementation and enforcement for state and federal laws governing the conservation of water, forests, coastal areas, flora and fauna such as the Endangered Species Act. I have also served as a Commissioner on the California State Parks and Recreation Commission. As a result of my California government service, I have had much opportunity to understand and appreciate how environmental conditions may be impacted by law and regulation.

This is particularly true with respect to the subject of this hearing. I led the Green Chemistry Initiative in California from 2006 to 2008 which resulted in the adoption of California's unique, first of their kind, laws providing overarching regulatory authority to Cal/EPA to collect data and information about the toxicity of chemicals in consumer products, and to require manufacturers to examine safer alternative ways to make those products.

The recent developments in Congress – the introduction of a bipartisan bill to strengthen TSCA, are a wonderful and unexpected surprise. Back in 2006 when California started the Green Chemistry Initiative, we did not hold out much hope for federal leadership or action on these issues. If the Chemical Safety Improvement Act is enacted, I believe that most of us who worked at the incipient phases of the Green Chemistry Initiative will feel quite proud that, in the great tradition that is California, we started something that spread eastward and was the impetus for positive change on the national level.

After 8 years of toiling in relative isolation to design a regulatory system to understand and regulate the risks posed by chemicals in consumer products, the announcement that a bipartisan compromise had been reached to update and strengthen TSCA has taken California by surprise. Some of the initial reactions by California's regulators evidence this shock.

"*cripples the police powers in California"*

An allegation has been raised that this bipartisan compromise somehow "takes away" historical or traditional police powers. This is false.

California's police powers are guaranteed by the 10th Amendment to the US Constitution. Police power is the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals and general welfare of their inhabitants.

For most of their now 50-year history, environmental laws have governed facilities, not products. California's traditional police powers and historical regulation of the environment has governed the emissions and wastes of facilities located within the state's geographical boundaries, to protect the environment and population located near the facility.

In 2006, California started the Green Chemistry Initiative to explore how it could stretch the application of 40 years of environmental laws governing emissions and wastes from facilities that impact air, water and land, to address the potential impacts to the environment and California's population from ingredients in consumer products. One of the outcomes was the conclusion that those laws could not be stretched in this way, as they were not designed to address products and their raw material and supply chain decisions made around the globe. A new law was needed. New authorities were needed. Indeed, this resulted in California enacting a brand new safer consumer products law.

We, in California, are in a brand new era of environmental law.

California's new law to address chemicals in products was passed in 2008, five years ago, and California has yet to commence implementation of the law. They have plans to start implementing the law in 2014 but even then they believe they will only be able to look at 3-5 chemical/product combinations in the first five years of the program. Therefore, it

cannot be said that the CSIA is "taking away" any historical police power. They haven't even begun to exercise it.

Having a strong federal program that will address every single chemical, and their use in industrial and consumer products, currently active in commerce can only enhance the California program, and allow California to focus on those 3-5 chemical/consumer product combinations that impact California's environment and public health more particularly. And it will most definitely help the rest of the nation, which has yet to arrive at this new era of environmental law.

"*severely compromises California's authority to supplement and complement federal efforts to regulate the safety of chemicals"*

An allegation has been raised that the bipartisan compromise will prevent California from supplementing federal efforts and making more strict restrictions in California where deemed necessary.

California is a unique and special state. Both the highest and lowest elevation points in the lower 48 states are located in California and less than 150 miles apart – Mt. Whitney (14,505 ft) and Death Valley (-282 ft). Traveling horizontally across California from the Pacific Ocean to Nevada, one can cross 5 microclimates in less than 200 miles. Its geography does present unique environmental and public health issues that require special and individualized attention, and that may require stricter environmental restrictions than are necessary in other states.

With multiple mountain ranges and valleys creating ripe conditions for smog formation, parts of California have long suffered from intolerable air quality. Due to this particularized burden, the federal Clean Air Act has a waiver provision specific to California. California alone among the 50 states can obtain a waiver from EPA to set its own, more restrictive, motor vehicle emission standards.

Before implementing its own standards, however, California must first be granted a "waiver" from U.S. EPA

Under Clean Air Action Section 209, EPA shall grant a waiver unless it finds that California:

- was arbitrary and capricious in its finding that its standards are in the aggregate at least as protective of public health and welfare as applicable federal standards;
- does not need such standards to meet compelling and extraordinary conditions; or
- has proposed standards not consistent with Section 202(a) of the Clean Air Act.

The standard to obtain a waiver under the Chemical Safety Improvement Act is quite similar in wording and arguably appears to be less strict than the Clean Air Act requirement. The Chemical Safety Improvement Act waiver requirement requires the

State to show a "compelling local interest" in order to impose stricter requirements on chemicals and products entering California for sale than the EPA has determined.

While it cannot be known now how EPA will interpret and apply the words "compelling local interest" in the context of TSCA/CSIA implementation, we can look to how EPA has interpreted and applied the similar words, "compelling and extraordinary," in the Clean Air Act waiver requirements.

Under the Clean Air Act, EPA has found that California has a need for stricter regulation to meet "compelling and extraordinary conditions" numerous times. In fact, US EPA has approved over 50 waivers for California to implement more stringent vehicle emissions rules.

It seems likely that if California has been able to make the case for "compelling and extraordinary" conditions under the Clean Air Act, it will be able to make the case for "compelling local interests" where the facts and circumstances warrant it.

It is not clear how often the facts and circumstances will warrant it. As the California Attorney General's office noted in their letter to Senator Boxer, there may not be that many instances where a waiver is warranted, "since dangerous chemicals don't act differently in different locations" and that "risks from exposure to chemicals in the home, at the office or at retail establishments do not vary from one state to the next." (Letter from California Attorney General to Senator Boxer dated June 11, 2013.) Thus, to the extent that EPA acts to protect the public and environment from dangerous chemicals, Californians will benefit as much as citizens in other states.

For these reasons, it is not accurate to conclude that the Chemical Safety Improvement Act "severely compromises California's authority to supplement and complement federal efforts to regulate the safety of chemicals."

"California programs are threatened"

An allegation has been raised that important California programs are threatened. Examples included AB 32 – California's climate change law, Proposition 65 and its consumer product VOC regulations.

Across the board, as general matter, California does have stricter standards to protect air, water, and land whether they are acting as the delegated authority under a federal law or implementing and enforcing a state law. The bill has an explicit exemption for state restrictions stemming from federal laws or state laws to protect air, water, waste, so California will continue to implement their stringent environmental standards.

All existing California laws will continue to be in force and in effect as the bill never preempts an entire law. To the extent that the bill contains strong federal preemption, it only extends to how a state can regulate an individual chemical in TSCA-like ways, and the specific scope of that preemption will be decided by EPA on a case-by-case,

chemical-by-chemical basis. Thus, the preemption on any and all existing state law and regulation will be decided by EPA and customized by EPA in their safety determination.

Thus, all California laws currently governing reduction of ozone in non-attainment areas, reduction of hexavalent chromium in drinking water, reducing of various chemicals to meet Proposition 65 warning levels, will continue to be in force and effect until such time as EPA acts to make a safety determination.

AB 32 (California's Global Warming Solutions Act of 2006) is not undermined by the Chemical Safety Improvement Act. With respect to California's program to address climate change, California is under no illusion that it can address this problem solely within its geographical boundaries. The very hope is that California is incurring great expense to take a leadership position, to develop the methodologies and regulatory tools that could one day be the foundation for a national climate change regulatory program. It is remarkable that California can take credit for acting first, taking the lead and playing a role in bringing about a strong federal program to regulate chemicals in products, and is not seizing on this.

"higher degree of protection needed in California"

California is a leader in protecting sensitive subpopulations.

California is currently implementing the first state level biomonitoring program. Cal. Health and Safety Code §§ 105440-105444. The program will engage in the systematic collection and chemical analysis of blood, urine, breast milk of a representative sample of Californians, that will also correlate the findings to demographics. The program will determine baseline levels of environmental contaminants in a representative sample of Californians, establish time trends in chemical levels, and assess the effectiveness of current regulatory programs.

California is also implementing the first state-level environmental health screening tool, CalEnviroScreen 1.0. Visually compelling, it is the nation's first comprehensive screening methodology to identify California communities that are disproportionately burdened by multiple sources of pollution. It measures a broad range of pollutants (*e.g*, pesticides, diesel exhaust), locations of hazardous waste facilities and toxic cleanup sites, as well as health indicators (*e.g.*, asthma rates, low birth weight) and population characteristics (*e.g.*, poverty, elderly, percentage non-white). The factors result in scores, and are graphically illustrated with colors that become more intense as the pollution burden increases.

The results of these programs will be used by California regulatory agencies to identify communities with disadvantaged or sensitive populations that may be disproportionately affected by environmental harms to assist the state prioritize clean-up activities, administer environmental justice grants, and to fund projects in disadvantaged communities with the cap and trade auction revenue under AB 32.

The bill requires EPA to consider the "vulnerability of exposed subpopulations" in conducting its safety assessments. The bill also requires EPA to give higher priority to "relevant data and information from a Governor of a State or a State agency with responsibility for protecting health and the environment." For these reasons, it can be anticipated that the results of these studies will greatly inform the regulatory reviews of California under its safer consumer products laws, and be introduced as evidence of the need for greater protections for those populations in the prioritization and safety determinations by EPA authorized by this bill.

These programs will not be preempted by the Chemical Safety Improvement Act. Rather, it is quite likely that they will benefit from the increased amounts of data and information gathered by EPA during its safety assessments, which will be valuable to craft more precise and efficient solutions for California.

Conclusion

Given that California has yet to regulate a single chemical under its 2008 law, and has plans to only address 3-5 chemicals in the next 5 years, the first time that the issue of preemption could be raised is in about 6 years when California's review of those 3-5 chemicals is complete and they are ready to take a regulatory action regarding them. It wouldn't take that much coordination and communication between Cal/EPA and US EPA on their respective program's prioritization of chemicals to avoid the issue of preemption entirely. But even if, through what would then probably be described as an appalling lack of communication, they both choose to examine the same 3-5 chemicals in the next 5 years and have different opinions as to their safety or the scope of restrictions that ought to apply, California will have the opportunity to participate in the EPA safety determination process, provide its data and assessment evidence to bear on EPA's determination, and, if the EPA determination fails to meet California's needs, will have the opportunity to seek a waiver to impose a higher restriction on the sale of that chemical in California. Two agencies working on these issues, rather than one agency working in isolation in a single state, brings more resources and expertise to the important issue of chemical safety which will benefit all Californians, and can be shared with the rest of the country.

In sum, the Chemical Safety Improvement Act is likely to make all Californians safer from harmful chemicals in that it will authorize for the first time EPA to examine the safety of every single chemical in active commerce. In 2006, when the California Green Chemistry Initiative started, we did not imagine that Congress would ever act to grant EPA a brand new regulatory program with sweeping authorities to examine the safety of ingredients of consumer products and place restrictions on them. We may be in, what one of my old law professors termed, "a national moment," when the greater good of the nation transcends quotidian self-interests. The bill is a bipartisan compromise that indicates that industry is willing and ready to be regulated by EPA in a way that seemed rather unfathomable in 2006.

I hope my testimony is helpful to the Committee.

Thank you.