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March 18, 2015

Honorable James M. Inhofe, Chairman
Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, DC 20510-6175

Honorable Barbara Boxer, Ranking Member
Senate Committee on Environment and Public Works
456 Dirksen Senate Office Building
Washington, DC 20510-6175

Dear Chairman Inhofe and Ranking Member Boxer:

I write to express my deep concern regarding the Frank R. Lautenberg Chemical Safety for the 21st Century Act, S. 697, as presently drafted. While I strongly support efforts to modernize the Toxic Substances Control Act (TSCA) of 1967 and to address many of its shortcomings, the bill as presently drafted contains revisions that are problematic.

First, the proposed framework to preempt state laws could create a significant void in the regulation of toxic chemicals. Second, the proposed prohibition on state enforcement of federal rules unnecessarily limits the states' ability to complement and assist the federal government's work in protecting the public and the environment. Last, the proposed revisions jeopardize the states' ability to address toxic chemicals, an ability that the current TSCA regulatory system has afforded.

I. Preemption of State Requirements

S. 697 as presently drafted dramatically alters the process by which federal action would preempt state requirements concerning toxic chemicals. Under the existing TSCA system, states may act to protect the public from risk of injury to health or the environment due to a toxic chemical unless and until the United States Environmental Protection Agency (EPA) has put into effect its own requirements for the toxic chemical.

The bill as presently drafted would significantly change the preemptive effect of federal action with respect to regulation of toxic substances in a way that could result in substantial time

frames during which potentially dangerous chemicals would go unregulated. Under Section 18(b) of the bill, all new state restrictions on high-priority chemicals would be preempted once EPA starts its safety assessment. The bill allows EPA to take up to three years to complete such an assessment, to take two more years to promulgate a final regulation, and to extend the rule-making process by an additional two years. This process creates a period of nearly a decade during which states cannot restrict a chemical in order to protect the public and the environment.

In contrast, the existing TSCA system permits states to take the lead on newly identified threats and to establish innovative rules and requirements to protect the public and the environment, all in advance of any action by the federal government. Under the current system, the federal government has often benefitted from early action by the states, as those forward-looking state initiatives have gone on to serve as potential templates for national standards.

The proposed new process for preempting state requirements under S. 697 should not displace such innovative state action. Moreover, the process should not create a broad regulatory void that could extend for nearly a decade and during which states could not regulate a dangerous chemical merely because the EPA has begun the lengthy process of assessing the chemical on its own. States must be allowed to set requirements regarding dangerous chemicals until the federal government has completed an action that would replace those requirements.

II. Restriction of Enforcement Activities

S. 697 as presently drafted would significantly interfere with the states' ability to carry out their responsibility to protect the public and the environment from the dangers of toxic chemicals. Currently under TSCA, the states and the federal government share this responsibility. States have traditionally supplemented federal enforcement capacity and supported federal environmental and consumer protection statutes by passing state laws that mirror those federal standards. This allows the states to act when the federal government does not take action to enforce its own requirements.

The bill, however, would alter this structure to the states' detriment. For example, under subsection 18(d)(1)(C)(ii)(I), states would be precluded from adopting a chemical regulation that is "already required" by a decision by the Administrator, thereby preventing state action even when the state action would be entirely consistent with regulation supported by the federal government. Removing the states' enforcement authority for federal requirements does not appear to be solving any identified problem in the system, and it results in a dramatic reduction of government authority to enforce the substance of federal regulations. Revisions to TSCA must leave in place the authority of state governments to act in support of federal requirements.

III. States' Ability to Address Toxic Chemicals under the Current TSCA System

Revisions to TSCA should not jeopardize the states' ability to address toxic chemicals, an ability that the current TSCA regulatory system affords. For example, under the existing system, the State of Vermont has taken action to the great benefit of the health and safety of Vermonters, including adopting statutes that regulate mercury, lead, phalates, bisphenol A, the gasoline additive MTBE, and various classes of flame retardants. Vermont has further protected children,

a particularly vulnerable population, by enacting a statute that requires manufacturers and retailers to disclose the presence of toxic chemicals used in a children's product. The statute also enables the Commissioner of the Vermont Department of Health to designate certain chemicals as "chemicals of high concern" to children when particular risks have been identified, and to either regulate or ban those chemicals. Additionally, the Vermont Attorney General's Office has used its state statutory authority to take action to remove from store shelves dangerous products designed for children that contain lead. By establishing a system wherein the states are able to regulate toxic chemicals before the federal government has acted and are able to enforce federal requirements when the federal government has yet to act, TSCA has been vital to the State of Vermont's efforts to protect Vermonters.

In conclusion, I welcome an effort to reform TSCA to help it meet its goal of restricting the manufacture and use of chemicals that present an unacceptable risk of injury to public health and the environment, but any such effort must preserve the attributes of the existing system. Because of my deep concern, I respectfully ask that you explore all possible avenues to improve S. 697 so that we may move forward with a stronger framework for protecting people from the effects of toxic chemicals without losing any of the important tools already available to the federal and state governments.

Sincerely,



Wendy Morgan, Assistant Attorney General
Chief of the Public Protection Division
Office of the Vermont Attorney General

cc: The Honorable Patrick Leahy
The Honorable Bernie Sanders