CalEPA
California Environmental Protection Agency

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The Honorable Barbara Boxer
Ranking Member
Senate Committee on Environment and Public Works
112 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Boxer:

My Agency, the California Environmental Protection Agency, enforces state and federal law and implements state programs for the control and regulation of toxic and hazardous chemicals and waste. California, and many other states, have a long and essential tradition in leading the nation's response to dangerous chemicals when science identifies the need to do so. As a result, I have been following closely Congress's effort to amend the federal Toxic Substances Control Act ("TSCA").

I am writing to you, because I have serious concerns about the "Frank R. Lautenberg Chemical Safety for the 21st Century Act," ("S. 697"). As proposed, this bill fails to provide an effective federal program to protect the public from dangerous chemicals. At the same time, the bill would undercut the ability of states to develop solutions to limit exposures to these chemicals and could eliminate existing protections. Unfortunately, rather than reforming TSCA to ensure that state and federal agencies can efficiently and effectively work together to protect the public, this legislation takes a step backward from what should be the common goal of achieving strong public health and safety protections under a reformed version of TSCA.

Three aspects of the current bill's preemption provisions are especially troubling. First, the bill eliminates state authority to maintain or develop protections against dangerous chemicals before compliance with new federal rules is required. Second, the bill would potentially preempt state chemical management laws, such as California's Safer Consumer Products program, as well as clean air and water laws. Third, the bill would eliminate state authority to implement and enforce standards identical to the federal Environmental Protection Agency's ("U.S. EPA") rules. This unnecessary retreat from the longstanding approach used in numerous other federal environmental laws would undercut the opportunity for federal and state agencies to collaborate and efficiently allocate resources when implementing and enforcing chemical health and safety laws.

Laws in California and other states have led to innovative and effective standards that demonstrate a clean environment and a strong economy can go hand in hand. TSCA reform legislation should build on this solid foundation of public health protections. The public, including pregnant women and children who are especially vulnerable to toxins, deserve no less.

State Action to Address Chemical Threats Spurs Federal and Other State Protections

States have always played an important role as laboratories of experiment and reform, using their police powers to develop policy solutions that address threats to public health and safety. The State of California in particular has a long history of leading the way by developing innovative programs that address threats from toxic chemicals and benefit people across the nation.

California's regulatory and science-based departments work in concert to provide such protection. Our Office of Environmental Health Hazard Assessment (OEHHA) uses the most updated scientific methods to assess the health risks posed by environmental contaminants. California's regulatory agencies use OEHHA's risk assessments to create necessary and achievable standards. OEHHA also has a long history of working cooperatively with U.S. EPA to assess the health hazards associated with toxic chemicals.

Preserving the use of states' police powers is critically important because states are often in a better position to act quickly to protect their citizens from newly emerging threats. For instance, in 2006, California adopted the Lead Containing Jewelry Law. We were joined by at least five other states in 2007, which helped to spur Congressional passage of the Consumer Product Safety Improvement Act of 2008regulating dangerous metals in children's jewelry.

In 2003, California enacted the nation's first ban on certain persistent, bioaccumulative, and highly toxic polybrominated diphenyl ethers (PBDEs) used as flame retardants. Subsequently, other states, such as Michigan, Maine, and Hawaii passed similar legislation. These important state actions led the sole U.S. manufacturer of these chemicals to voluntarily cease their production.

In 2007, California banned phthalates from toys and children's products and required replacement with less toxic alternatives, protecting children during sensitive stages of development from these dangerous chemicals. Vermont and Washington followed suit in 2008, and three more states have similar legislation pending.

Other states have also acted to address chemical threats. In 2009, Michigan passed the first ban of Bisphenol A in baby products and at least ten states have followed suit, including California. California, Illinois, Maine, Minnesota, and New York have also passed laws banning the use of lead in vehicle wheel weights.

Finally, states have shown leadership in working with industry and business leaders to pass laws that promote safer alternatives to the use of toxic chemicals. As an example, California and Washington have passed landmark laws phasing out the use of copper and heavy metals in automotive brake pads. Copper is an especially harmful toxin to fish and other aquatic life. The U.S. EPA, Environmental Council of the States, Motor and Equipment Manufacturers Association, Automobile Aftermarket Suppliers Association, Brake Manufactures Council, Auto Care Association, Alliance of Automobile Manufacturers, and Association of Global Automakers, Inc. recently signed a Memorandum of Understanding to apply the California and Washington protections across the nation.

S. 697's Sweeping Preemption Provisions Eliminate State Police Powers

S. 697 discards the notion that states are laboratories of innovation and reform that create thoughtful and effective solutions to protect people within their borders and across the nation. In its place, S. 697 erects sweeping preemption provisions that would bar or at minimum impede new and existing state protections, and inappropriately eliminates states' authority to enforce federal safeguards. Some of the many problems presented by this legislation are briefly presented below.

S. 697 Eliminates State Authority to Enact New Protections on the Most Dangerous Chemicals with No Required Timeline for Federal Protections

S. 697 preempts new state protections on the date the U.S. EPA "commences a safety assessment." (§18(b).) Pursuant to S. 697's provisions, if EPA conducts a safety assessment on a "high priority" chemical, including chemicals that EPA has already determined "have the potential for high hazard and widespread exposure" (§ 4A(b)(3).), EPA would have 7 years to adopt a safety assessment and safety determination and issue a final regulation containing any restrictions. (§6(a).) During this time, any state action to protect the public – such as the important safeguards identified above – would be preempted. Additionally, S. 697 does not require immediate implementation, but instead allows EPA to set compliance timelines, which can "vary for different affected persons," with no prescribed end date. (§6(d)(2)(B).) This regulatory scheme could leave the public, including pregnant women and children, with neither state nor federal safeguards to protect them against the most dangerous types of chemicals for an indeterminate length of time.

S. 697 also provides the means to preempt state action even on "low priority" chemicals. S. 697 requires states to notify U.S. EPA if "a State proposes an administrative action or enacts a statute or takes an administrative action to prohibit or otherwise restrict" a "low priority" chemical, and authorizes EPA to demand onerous amounts of information after the notification. (§4A(b)(9)(A) and §4A(b)(9)(B).) Because of these provisions, S. 697 would effectively extinguish both the impetus for and health-protective result of any potential state action.

S. 697 Eliminates the Traditional and Efficacious Co-Enforcement of Health Safeguards

TSCA currently follows a traditional approach to environmental enforcement, which allows states to create and enforce protections that mirror federal law. This allows federal and state agencies to efficiently divide work needed to ensure compliance with these requirements. For instance, state agencies could conduct on-the-ground investigations and initiate enforcement actions in which federal agencies then intervene and collaborate, a common co-enforcement scenario. S. 697 abrogates states' authority to enact and enforce laws that mirror federal protections, eliminating a significant set of resources needed to ensure compliance. (§18(d)(1)(C)(ii)(I).) In the event that these provisions go into effect, U.S. EPA will need significant additional resources to take on the duties previously fulfilled by the states.

S. 697's Contradictory Preemption Provisions Imperil Existing State Clean Air, Water Protections, and Hazardous Waste Treatment and Disposal Laws

S. 697 contains a series of preemption rules, exceptions to those rules, and exceptions to the exceptions, which contradict each other and potentially imperil state protections for clean air and

water. For example, S. 697 purports to set up an exception to preemption for state laws "related to water quality, air quality, or waste treatment or disposal," but then limits the application of this exception according to broad criteria, which could result in the preemption of such laws. (*See, e.g.*, §18(d)(2)(C)(i), barring states from in any way restricting "manufacture, processing, distribution in commerce or use of a chemical substance" in their endeavor to protect water quality or air quality, or to regulate waste treatment or disposal.)

Another subsection of S.697 contains language referring to preservation of certain state laws. (§18(e).) However, the general text in this section is in conflict with several other provisions that would have broad preemptive effect. (*Compare* §18(e) *with* §18(a), §18(d)(1)(C), and §18(d)(2)(C).) These conflicts would support the argument that state action is forbidden, even though certain sections clearly allow such action, causing confusion in states over what is allowed. At a minimum, the confusing interrelationship among these preemption provisions and purported savings provisions would guarantee years of litigation by those intent on maximizing regulatory delay at the expense of states' health-protective standards.

Specific Impacts on California State Safeguards

Using TSCA to preempt state clean air, clean water, and hazardous waste laws would have a far-reaching and harmful impact in California. The following describe some of the critical safeguards imperiled by S. 697:

- **Controls on Smog**: California experiences serious smog pollution, and needs the ability to control chemicals that create smog, such as volatile organic compounds ("VOCs"), to meet necessary federal health-based clean air standards. California has enacted controls on the use of VOCs in products in areas with unhealthy levels of smog pollution. Just last month, the New England Journal of Medicine reported that the lung function of children in Southern California has demonstrably improved as a direct result of in-state controls on smog-forming pollutants. (*See* http://well.blogs.nytimes.com/2015/03/04/childrens-lung-health-improves-as-air-pollution-is-reduced-study-says/?_r=0 .) S. 697's preemption of state restrictions on the "use" or "distribution in commerce" of chemicals threatens to reverse California's tremendous progress in controlling the use of VOCs, potentially putting millions of people in the Los Angeles area and San Joaquin Valley of California at increased risk of respiratory disease and death.

- **Air Toxics (Airborne Toxic Control Measures)**: S. 697 may disrupt California's safeguards against Toxic Air Contaminants. California's Airborne Toxic Control Measures (ATCMs) place restrictions on the use of these chemicals, which protect public health from an increased risk of cancer and other serious health effects. Such toxins include diesel particulate matter, hexavalent chromium, benzene, perchloroethylene, heavy metals, formaldehyde, and 1,3 butadiene. California has used an ATCM to limit hexavalent chromium emissions from chrome plating facilities often found in environmental justice communities.

  California's regulations in this area have provided a model for the rest of the country. California's identification of formaldehyde as a Toxic Air Contaminant led it to adopt an ATCM that limits toxic formaldehyde emissions from raw materials used in flooring, furniture

and other household wood products. Later, federal legislation required U.S. EPA to adopt the California standard.

California also continues to evaluate new substances as candidate Toxic Air Contaminants and existing contaminants for their potential exposures. The state also analyzes the availability of control technologies and substitutes for such contaminants.

- **Global Warming/Greenhouse Gases (GHGs)**: The current version of S. 697 appears to limit preemption of state laws regulating greenhouse gases, which likely would be captured in provisions that govern low-priority chemicals. That limit may prove illusory, however, if chemicals such as sulfur hexafluoride or methane are subject to the safety assessment process once a state initiates regulation. Additionally, S. 697 would establish an onerous reporting and screening process that could adversely affect new rules the states are currently developing to reduce greenhouse gas emissions, such as methane controls on oil and gas production related to well stimulation techniques. Thus, S. 697 poses a threat to California's economy-wide program to limit greenhouse gas emissions to levels that may avert the worst impacts of global warming.

- **Toxics in Fuels**. S. 697 also has the potential to disrupt California's comprehensive regulation of toxics and other air pollutants from fuels burned in the 30 million vehicles driven in our state. For example, if a tailpipe pollutant such as polyaromatic hydrocarbon, lead, or benzene is identified as a high priority pollutant, California's longstanding regulation of those pollutants in fuel – and their complex relationship to the multiple pollutants fuel producers must juggle as they formulate their fuels for our markets – would be at risk.

- **Safer Consumer Products**: S. 697 presents an immediate threat to California's Safer Consumer Products program. The program's goals are to reduce toxic chemicals in consumer products, create new business opportunities in the emerging safer consumer products economy, and reduce the burden on consumers and businesses struggling to identify the chemicals in the products they buy for their families and customers. This program works to achieve this goal by asking manufacturers to answer two basic questions: 1) Is this chemical necessary? 2) Is there a safer alternative? By shifting the question of an ingredient's toxicity to the product development stage, concerns can be addressed early on. This approach results in safer ingredients and designs, and provides an opportunity for California industry to once again demonstrate its innovative spirit by making "benign by design" products that meet consumer demand throughout the world.

  California's Department of Toxic Substances Control has developed a Priority Product Work Plan that identifies product categories from which Priority Products will be selected over the next three years. Industry trade press makes abundantly clear that supply chains in multiple industries are working behind the scenes to develop and deploy safer product chemistries even in advance of product-specific regulation, showing the broad salutary effect on the marketplace of the state's program. However, S. 697's preemption provisions would prevent California from fully implementing this important law.

S. 697's Illusory Waiver Provisions

Equally problematic is the state waiver provision in S. 697. (§18(f).) This provision requires a state to show that "compelling State or local conditions warrant granting the waiver." (§18(f)(1).) Unlike other types of environmental and health hazards, this standard does not work well for chemicals because the risks from exposure rarely vary by location.

S. 697 Retains the Standard of Review Used to Overturn EPA's Ban on Asbestos

S. 697 fails to fix one of TSCA's core problems, the burdensome "substantial evidence" test applied to informal rulemakings under the statute. The court in *Corrosion Proof Fittings*, 947 F.2d 1201 (5th Cir., 1991), repeatedly referred to this standard of review in overturning EPA's phase out and ban of the deadly chemical, asbestos. Retaining this onerous standard provides a substantial obstacle to any potential restrictions that U.S. EPA may attempt to impose upon other deadly chemicals.

The solution to this problem is readily available and widely used in environmental law; it is the "arbitrary and capricious" standard of review that traditionally applies to informal rulemakings. This standard of review would help to sustain public health safeguards and create consistency with other federal environmental laws.

S. 697 Makes the Adoption of Safeguards Needed to Protect People from the Most Dangerous Chemicals an Extremely Difficult Task

S. 697 makes the adoption of strong public health protections against the most dangerous types of chemicals an extremely and unnecessarily difficult task. The bill requires U.S. EPA to conduct two cumbersome and complex cost-benefit analyses to justify a ban or phase out of a toxic chemical that EPA has determined is unsafe. (§6(d)(4)(A)-(B) and §6(d)(4)(D).) In addition to creating these unreasonable implementation obstacles, the bill includes a feasibility-based standard that prejudices EPA's analyses towards less-protective actions. These overly burdensome requirements could limit EPA's ability to create strong and effective protections in precisely the situations in which they are most needed.

Underfunding the U.S. EPA While Preempting State Protections

Finally, I am very concerned about the U.S. EPA's ability to do the work called for under S. 697. This legislation would create a need for EPA to reevaluate all of its current priority chemicals and establish timelines for other actions, paired with a limited allowance for fees. EPA will require substantial additional resources to accomplish the goal of protecting public health when there are 80,000 chemicals available for use in commerce. Yet, many of EPA's current initiatives are under attack. There is little evidence that Congress has a substantial appetite to sufficiently fund or support the EPA to accomplish the work called for in S. 697.

The "Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act"

In contrast, the "Alan Reinstein and Trevor Schaefer Toxic Chemical Protection Act" (S. 725), recently introduced by Senators Boxer and Markey, addresses many of the concerns highlighted in this letter. It preserves states' rights to pass and enforce laws to protect their own residents, while

working cooperatively with U.S. EPA to effect meaningful improvements to chemical safety in our nation.

Thank you for the opportunity to comment on this important legislation. Please let me know if you have any questions about these comments. If it would be helpful, we stand ready to assist you in addressing the issues presented by this legislation.

Sincerely,

Matthew Rodriquez
Secretary for Environmental Protection

cc: The Honorable Diane Feinstein