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Before the  
United States Senate  
Committee on Environment and Public Works

March 18, 2015

Chairman Inhofe, Ranking Member Boxer and members of the Committee, I appreciate the opportunity to testify today on efforts to reform the Toxic Substances Control Act (TSCA). Few disagree that TSCA has done an inadequate job protecting the public from exposure to untested and damaging toxic chemicals. TSCA reform is needed, but the changes must ensure that any reform includes meaningful protections. Unfortunately, S. 697 includes the near evisceration of state authority to regulate toxic chemicals and fails to achieve TSCA's intended goals.

As a state attorney general, I am deeply concerned that the bill would diverge from the model of cooperative federalism – where the role of states, including state attorneys general, in protecting the health and welfare of their residents, is respected even as the federal government sets a floor for action. We employ this model in many other contexts of environmental protection, and it works. I do not understand how this legislation brings us closer to the health and safety protections that the public deserves.



I served as a state legislator for 28 years. I have sponsored and supported many laws that protect the health and safety of Maryland residents, including laws that protect the public from toxic substances. I have also served on a variety of federal and state commissions, committees, and taskforces charged with protecting the environment and restoring the Chesapeake Bay to health. In Maryland, we have passed laws to protect babies from ingesting BPA and to guard our residents from brominated flame retardants. We have banned the manufacture and sale of lead-containing children's products, and we restrict the cadmium content in children's jewelry.

I understand the tensions that are inevitable in any federal-state partnership. But the legislation before you is at odds with the effective, cooperative federalism that characterizes every other federal environmental law, and with the cooperation that has persisted for four decades with respect to TSCA. Currently, TSCA states unequivocally that in the absence of a rule or order promulgated by the EPA

nothing in this chapter shall affect the authority of any State or political subdivision of a State to establish or continue in effect regulation of any chemical substance, mixture, or article containing a chemical substance or mixture.

15 U.S.C. §2917(a)

Second, it provides that even if EPA manages to adopt control requirements as to a chemical substance or mixture under TSCA, states may still (i) enact identical requirements, to assume the role of co-enforcers, (ii) adopt requirements under the authority of other federal laws, or (iii) ban the use of such substance or mixture – other than its use in the manufacture or processing of other substances. 15 U.S.C. §2917(a)(2)(B). And, where the states wish to provide their residents with a “significantly higher degree of protection” from the risks *for any reason*, they may apply for an exemption so long as the state’s requirement would not cause the manufacturer to violate a federal requirement and would not unduly burden interstate commerce. 15 U.S.C. § 2617(b).

As members of this Committee know well, many major environmental statutes provide that states may apply for delegation to implement permitting and other regulatory programs. Once they receive such delegations, states must maintain programs that comply with federal guidance, except that they may also choose to go further to provide more stringent protections for their residents.<sup>1</sup>

S. 697 imposes a tangled web of preemption that ties states' hands at nearly every turn. This also provides fodder for litigation challenges where states dare to navigate that web. Perhaps the most obvious example of this expansion of preemption is the prohibition on new state chemicals restrictions from the moment EPA "commences" the long and arduous process of considering whether to regulate a "high priority" chemical.<sup>2</sup> During this process, likely to last 7 years or more, for a chemical that EPA's screening has identified as a "high priority," S. 697 imposes a regulatory freeze in any state not fortunate enough to have enacted restrictions previously. Equally vexing, anytime a state even "proposes" a new statute or administrative action, it must report its proposal to EPA, setting in motion a screening process that could very well lead to preemption before the state has time to see its proposal through to fruition. S. 697, § 4A(b)(9). Such a restriction does not enhance the protection of the public health or serve the goals of TSCA.

Another pernicious expansion of preemption is the removal of the ability of states to enact restrictions on high priority chemicals that are *identical* to any of those eventually adopted by EPA. Why is this important? Because such "mirror image" statutes can empower the states to fill the

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<sup>1</sup> See, e.g., the provisions authorizing delegation of federal authority to regulate hazardous air pollution: "A program submitted by a State under this subsection may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements but shall not include authority to set standards less stringent than those promulgated by the Administrator under this chapter." 42 U.S.C. §7412(l).

<sup>2</sup> "No State or political subdivision of a State may establish (after the date of enactment of the Frank R. Lautenberg Chemical Safety for the 21st Century Act) a statute or administrative action prohibiting or restricting the manufacture, processing, distribution in commerce or use of a chemical substance that is a high-priority substance designated under section 4A, as of the date on which the Administrator commences a safety assessment." S. 697, § 18(b).

role of co-enforcers of EPA's standards. Allowing for the enactment of identical state statutes treats states as partners and enables the civil servants and prosecutors in states to do their part to protect the health and environment of their residents. Across the spectrum of federal environmental statutes, the preemption provisions routinely preserve this authority for states – without question and without any requirement for the federal agency to grant a waiver or engage in a rulemaking exercise. The divergence from the longstanding policy enshrined in existing TSCA would set a dangerous precedent in federal environmental law.

Within this web of preemption, some will point to openings for state authority which they will claim answer the concerns of states like mine. But, as several attorneys general have written, we have grave concerns that those openings will prove illusory. Thus, for example, one provision of the bill preserves “any action taken before January 1, 2015, under the authority of a State law...” S. 697, § 18(e)(1)(A). Even assuming that “action” includes the adoption of regulations, will the state be able to enforce those pre-Act regulations after EPA has established its own rule with respect to high priority chemicals? Section 18(a)(1)(B)'s preemption of continued enforcement of state statutes or administrative actions would seem to imply not. This raises the question whether section 18(e)(1)(A) is just an illusion. Another “opening” for states that some have pointed to are the waiver provisions in section 18(f). Here, the cited provisions come with a curious twist, a requirement that the state requesting the waiver show that “compelling state or local conditions warrant the waiver to protect health or the environment.” S. 697, § 18(f)(1)(A)(i) and (B)(i). This additional requirement is unduly burdensome. Moreover, it places the EPA administrator, who has already concluded her safety determination and come to a different conclusion, in a position of having to say she “got it wrong” at least as to the state or locality seeking the waiver. This

hardly seems like the “opening” that most environmental waiver provisions provide, where it suffices for a state to show that it is being more protective and not unduly burdening commerce.

Quite apart from the impact these changes will have on the federal-state partnership, the legislative record thus far lacks any concrete example of unjustifiable harm suffered by chemical manufacturers as a result of state activity under this law. For the most part, the states have given EPA ample room to implement the law, acting only when their residents are able to convince state legislators that one or a handful of admittedly toxic chemicals are causing potential threats to public health, especially the health of vulnerable groups like children and the elderly. No innocent chemical has been condemned, much less outlawed. In fact, the manufacturers’ real complaint appears to be that consumer pressure in the marketplace has forced changes in the use of chemicals like bisphenol-A (BPA), a plasticizer thought to cause harmful disruption of the endocrine systems of fetuses, babies, and small children.

I am a pragmatist, and I understand the desire to cut a deal with the chemical industry that will allow this 40-year-old law to be updated. What I do not understand is how the evisceration of state authority is a fair deal.

In conclusion, my state shares the goal of this Committee in reforming the Toxic Substances Control Act. The federal government should set standards for the safety of chemicals. However, whatever action you take should also recognize the long-standing role of states in working cooperatively with the federal government. I hope you will let states continue to protect the health and safety of their residents. I thank you for the opportunity to testify before this Committee.