

June 12, 2013

The Honorable Barbara Boxer
Chairman
Committee on Environment & Public Works
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable David Vitter
Ranking Member
Committee on Environment & Public Works
456 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Boxer and Ranking Member Vitter:

The undersigned are thirty-four law professors, legal scholars, and public interest lawyers from across the country who have years of collective experience in the fields of administrative, public health, and environmental law, with a particular focus on state and federal toxics policy. We write to express serious reservations with the “Chemical Safety Improvement Act,” which was introduced by Sen. David Vitter and the late Sen. Frank Lautenberg on May 22, 2013. Supporters have heralded the bill as a “historic step” toward reforming our broken framework for regulating chemicals on the market. However, for reasons explained herein, we cannot support the bill as written, which must be strengthened to fix current law and ensure that chemicals are safe for people, particularly vulnerable populations such as children.

In our expert opinion, the bill:

- Essentially preserves the same inadequate safety standard used in current law, which has been read by at least one court to require the U.S. Environmental Protection Agency (EPA) to engage in an onerous balancing of costs and benefits to justify restrictions on toxic chemicals;
- Retains the same obstructive standard of judicial review that appears in current law, which requires judges to demand substantial evidence from EPA to justify any safety determination or restriction of a chemical that poses risks to public health and the environment;
- Contains sweeping preemption language that would prevent states from enforcing existing, and adopting new, laws designed to supplement federal law in protecting people and the environment from exposures to harmful substances; and
- Takes the extraordinary step of making any safety determination by EPA dispositive on the question of whether a chemical is safe in federal and state courts. This would effectively bar judges and juries from taking into account other relevant evidence regarding the safety of a chemical, particularly new evidence developed after the determination is made.

Here are our four major concerns presented in detail:

Safety Standard. The bill defines “safety standard” as one that “ensures that no *unreasonable risk* of harm to human health or the environment will result from exposure to a chemical substance.” Chemical Safety Improvement Act, S. 1009, 113th Cong. § 3(16) (emphasis added). This definition fundamentally reproduces the same safety standard found in current law.

See Toxic Substances Control Act § 6(a), 15 U.S.C. § 2605(a). Unlike strictly health-based standards (e.g., “reasonable certainty of no harm”), laws that use “unreasonable risk” language have been interpreted to require EPA to complete a complex balancing of costs and benefits before the agency can impose a restriction on a chemical to address safety concerns. E.g., John S. Applegate, *Synthesizing TSCA and REACH: Practical Principles for Chemical Regulation Reform*, 35 Ecology L.Q. 721 (2008); see also Noah M. Sachs, *Jumping the Pond: Transnational Law and the Future of Chemical Regulation*, 62 Vand. L. Rev. 1817 (2009). Therefore, even without language in the safety standard directing EPA to restrict a chemical using the “least burdensome requirements,” Toxic Substances Control Act § 6(a), 15 U.S.C. § 2605(a), by retaining the “unreasonable risk” language, the Chemical Safety Improvement Act might be read to place a heavy burden on EPA to impose even modest restrictions on a chemical. As a result, we believe that the same outcome in *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991) (striking down EPA asbestos ban and phaseout rule) could be possible under the safety standard proposed in this bill, particularly with the heightened judicial review discussed in the next paragraph.

Judicial Review. Courts typically use a reasoned decisionmaking standard to review agency actions, meaning they will not strike down a regulation unless an agency has acted in an arbitrary or capricious manner. E.g., *Allied Local & Regional Reg’l Mfrs. Caucus v. EPA*, 215 F.3d 61, 77 (D.C. Cir. 2000) (EPA consideration of factors listed in statute “adequate to constitute reasoned decisionmaking”); see also Administrative Procedure Act, 5 U.S.C. § 706. In contrast, the Chemical Safety Improvement Act, like the Toxic Substances Control Act, would require courts to apply a heightened standard of judicial review when evaluating rules made pursuant to the bill. Specifically, courts would have to set aside rules requiring the development of more test data, safety determinations, and restrictions on chemicals unlikely to meet the safety standard if, in their opinion, EPA has not supported them with “substantial evidence.” Chemical Safety Improvement Act, S. 1009, 113th Cong. § 16(2). In practice, this standard can be read to “impose[] a considerable burden” on EPA to develop a record that can withstand a hard look from courts, particularly when all of the other procedural hurdles in the bill are factored in. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1214 (5th Cir. 1991), quoting *Mobile Oil Co. v. Fed. Power Comm’n*, 483 F.2d 1238, 1258 (D.C. Cir. 1973).

Preemption. The Chemical Safety Improvement Act would appear to largely preempt state regulations designed to protect public health and the environment from exposure to harmful chemicals. It would preempt existing and future state regulations that: require the development of test data or information on chemicals for which companies have to submit similar information to EPA; restrict the manufacture, processing, distribution, or use of a chemical after EPA has issued a safety determination for that chemical; or require notification for the use of a chemical substance if EPA has determined that it is a significant new use that must be reported to the agency. Chemical Safety Improvement Act, S. 1009, 113th Cong. § 15(a). The bill also would prohibit states from creating new restrictions on the manufacture, processing, distribution, or use of a chemical that EPA has classified as high- or low-priority. *Id.* § 15(b). This preemption provision is sweeping in nature and raises serious questions as to whether states could even enact or continue to enforce laws that simply require companies to disclose information about chemicals to consumers or require that products carry warning labels. Numerous states have passed laws in recent years in the absence of federal regulatory action to protect the public from

toxic chemicals. *E.g.*, Safer Chemicals Healthy Families, *Healthy States: Protecting Families from Toxic Chemicals While Congress Lags Behind* (2010), <http://www.saferstates.com/attachments/HealthyStates.pdf>. If this bill were to become law, it would perpetuate many of the Toxic Substances Control Act's shortcomings while preventing states from protecting public health and the environment in the absence of a robust federal law — or in the case of a strong federal regulatory framework, from complementing EPA's efforts to achieve this important goal.

Private Remedies. The bill takes the extraordinary step of making a safety determination by EPA admissible in any federal or state court and dispositive as to whether a chemical substance is safe. Chemical Safety Improvement Act, S. 1009, 113th Cong. § 15(e). As a result, the bill's section on private remedies could significantly encroach on the right of judges and juries to evaluate and weigh relevant evidence regarding the potential injuries caused by toxic chemicals. In turn, this could have the effect of granting chemical companies immunity from legal actions by private parties once EPA has issued a positive safety standard determination, even when subsequent evidence calls into question the agency's reasoning.

In view of these issues, and others identified by public health and environmental groups, we believe the Chemical Safety Improvement Act preserves some of the most problematic features of the Toxic Substances Control Act, while making it harder for state and private actors to ensure the safety of chemicals in the absence of a strong federal backstop for regulating these substances. As a result, the bill, as currently drafted, takes a step backward in the protection of public health. We respectfully ask that the bill be made stronger to achieve meaningful reform of current toxics law and are available to provide substantive recommendations as needed.

Sincerely,

Note: Institutions listed for identification purposes only. The signators do not purport to represent the views of their institutions.

John S. Applegate

Walter W. Foskett Professor of Law
Indiana University Maurer School of Law

Nicholas A. Ashford, Ph.D., J.D.

Professor of Technology and Policy and Director, MIT Technology & Law Program
Massachusetts Institute of Technology

Hope Babcock

Professor of Law and Co-Director, Institute for Public Representation
Georgetown University Law Center

William W. Buzbee

Professor of Law
Emory Law School
Visiting Professor of Law
Georgetown University Law Center (Fall 2012)

Charles C. Caldart

Lecturer in Environmental Law and Policy
Massachusetts Institute of Technology
Director of Litigation
National Environmental Law Center

Alejandro E. Camacho

Professor of Law and Director, Center for Land, Environment, & Natural Resources
University of California, Irvine

Cinnamon P. Carlarne

Associate Professor of Law
Ohio State University Michael E. Moritz College of Law

David W. Case

Associate Professor of Law
University of Mississippi School of Law

Thomas Cluderay

General Counsel
Environmental Working Group
Adjunct Professor of Law
Georgetown University Law Center

Carl F. Cranor

Distinguished Professor of Philosophy and Faculty Member, Environmental Toxicology
University of California

David M. Driesen

University Professor
Syracuse University College of Law

Stephen Dycus

Professor of Law
Vermont Law School

Angelique Townsend EagleWoman (Wambdi A. WasteWin)

Associate Professor of Law and James E. Rogers Fellow in American Indian Law
University of Idaho College of Law

Adam M. Finkel, Sc.D.

Senior Fellow and Executive Director
Penn Program on Regulation University of Pennsylvania Law School *Professor of*
Environmental and Occupational Health University of Medicine and Dentistry of New Jersey
School of Public Health

Victor Flatt

*Tom and Elizabeth Taft Distinguished Professor of Law and Director, Center for Law, Environment, Adaptation, & Resources (CLEAR) University of North Carolina School of Law
Distinguished Scholar of Carbon Markets Global Energy Management Institute University of Houston*

Steve C. Gold

*Associate Professor of Law
Rutgers University School of Law - Newark Rutgers, The State University of New Jersey*

Carmen G. Gonzalez

*Professor of Law
Seattle University School of Law*

Lisa Heinzerling

*Professor of Law
Georgetown University Law Center*

Oliver Houck

*Professor of Law
Tulane University School of Law*

Howard A. Latin

*Distinguished Professor of Law and Justice John J. Francis Scholar
Rutgers University School of Law Rutgers, The State University of New Jersey*

Albert Lin

*Professor of Law
UC Davis School of Law*

Mary L. Lyndon

*Professor of Law
St. John's University School of Law*

Thomas O. McGarity

*Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law
University of Texas School of Law*

Joel A. Mintz

*Professor of Law
Nova Southeastern University Law Center*

Joseph A. Page

*Professor of Law
Georgetown University Law Center*

Rick Reibstein

Adjunct Professor

Boston University

Faculty

Harvard Extension School

John Rumpler

Senior Attorney

Environment America

Noah Sachs

Professor of Law

University of Richmond School of Law

Sidney A. Shapiro

University Chair in Law

Wake Forest University

Amy Sinden

Professor of Law

Temple University Beasley School of Law

William Snape

Fellow and Practitioner in Residence

American University Washington College of Law

Rena Steinzor

Professor of Law

University of Maryland School of Law

Robert R.M. Verchick

Gauthier-St. Martin Chair in Environmental Law

Loyola University New Orleans

Wendy Wagner

Joe A. Worsham Centennial Professor

University of Texas School of Law