

Children's Safe Products Act Advisory Committee Meeting Summary September 9, 2008

The fourth meeting of the Children's Safe Products Act Advisory Group was held on September 9, 2008, in SeaTac, Washington, at the Red Lion Hotel. The meeting agenda and meeting materials are available on the [website](#).¹

Committee members attending the meeting:

- **Dr. Thomas Burbacher**, Center of Human Development and Disability
- **Representative Larry Haler**, House of Representatives
- **Elizabeth Davis**, League of Women Voters
- **Steve Gano**, Wal-Mart (alternate for Jennifer Spall of Wal-Mart)
- **Carter Keithley**, Toy Industry Association (alternate for Arthur Kazianis of Hasbro)
- **Carol Kraege**, Washington State Department of Ecology
- **Denise LaFlamme**, Washington State Department of Health
- **Senator Debbie Regala**, Washington State Senate
- **John Ryan**, Toysmith
- **Dr. Sheela Sathyanarayana**, University of Washington Department of Pediatrics
- **Melissa Tennille**, Teaching Toys and Books
- **Laurie Valeriano**, Washington Toxics Coalition
- **Valla Wagner**, Teaching Toys and Books

Other attendees:

- **Bill Alkire**, Alkire & Associates
- **Karen Bowman**, Washington State Nurses Association
- **Charlie Brown**, Lab/Cor Materials
- **Kelly Cooper**, Washington State Department of Health
- **Holly Davies**, Washington State Department of Ecology
- **Kathy Davis**, Washington State Department of Ecology
- **Charlie Eichholz**, Washington Physicians for Social Responsibility
- **Steven Gilbert**, Institute of Neurotoxicology and Neurological Disorders
- **Mark Greenberg**, American Chemistry Council
- **Tiffany Hatch**, Seattle Goodwill
- **Kathryn Hedrick**, Bogard & Johnson, LLC
- **Kim Hoff**, Nintendo
- **Mark Johnson**, Washington Retail Association
- **Rhonda Kaetzel**, Exponent
- **Bob Knight**, Find It Games
- **Kathy Kruger**, Safety Restraint Coalition
- **Joan Lawrence**, Toy Industry Association
- **Tom Lindley**, Perkins Coie
- **Rick Locker**, Toy Industry Association
- **Estefania Moreira**, University of Washington

¹ <http://www.ecy.wa.gov/programs/swfa/ruleChildrenAdvise.html>

- **Ashley Pedersen**, House of Representatives
- **Allen Rickert**, Top Ten Toys
- **Carl Schroeder**, House Democratic Caucus
- **Margaret Shield**, Local Hazardous Waste Management Program for King County
- **Gary Smith**, Toy Industry Association
- **Alex Stone**, Washington State Department of Ecology
- **Karen Terwilleger**, House Democratic Caucus
- **Joyce Tsuji**, Exponent
- **Allyson Zipp**, Attorney General's Office

Dan Silver facilitated the meeting, and Matt Schoellhamer took notes.

HR 4040 and its Effect on Washington's Statute

Comparison between CPSIA (HR 4040) and CSPA

Holly Davies provided a summary comparison of HR 4040, the federal Consumer Product Safety Improvement Act (CPSIA), and Washington State's Children's Safe Products Act (CSPA). While both laws cover lead, cadmium, and phthalates in products, they overlap in different ways for each. The CPSIA mandates a lead limit of 600 ppm by 2/10/09, 300 ppm by 8/14/2009, and 100 ppm by 7/1/09 if feasible, as compared to the CSPA limit of 90 ppm by 7/1/2009. The CPSIA applies to children's products for children under 12, while the Washington law only has an age limit (under 12) for cosmetics and jewelry. The federal law has two large exemptions that are not in the Washington law. The first is for inaccessible components. The second is that the Commission can decide by rule to exempt certain materials that don't result in lead absorption. The CPSIA also includes a lower limit of 90 ppm for paint as of 8/14/09. For cadmium, the CPSIA incorporates the American Society for Testing and Materials (ASTM) standards, which will mandate a limit of 75 ppm soluble cadmium in the surface coatings of toys, as compared to the CSPA's limit of 40 ppm total in children's products and components. The CPSIA also has a phthalate limit of 1,000 ppm for each of the six regulated phthalates, whereas the CSPA imposes a 1,000 ppm limit on total phthalate levels across all six. While the Washington law limits all six phthalates in all children's products, the federal law limits three phthalates in children's toys and childcare articles and only limits the other three in mouthable children's toys and childcare articles. Again, the Washington law only includes an age limit of under 12 for cosmetics and jewelry. The federal law regulates children's toys for 12 and under and childcare articles for age 3 and under. The federal phthalate ban on mouthable items is temporary and 180 days after its passage, a panel will be convened to examine phthalate toxicity.

Federal Preemption and HR 4040

Allyson Zipp of the Attorney General's Office presented an overview of how federal preemption works, discussed in general terms the preemption framework of the CPSIA, and then applied this framework to Washington's CSPA. Federal preemption of state laws can be either *express*, wherein Congress explicitly states that the federal law preempts state laws, or *implied*, wherein the courts determine that the federal law is controlling over state law even though Congress did not explicitly say so. Implied preemption is made up of two subcategories: conflict preemption and field preemption. In conflict preemption, the court determines that federal and state laws actually conflict. In field preemption, the court determines that Congress intended to occupy a field of law comprehensively.

The CPSIA is part of a larger statutory structure that includes the Consumer Product Safety Act (CPSA) and the Federal Hazardous Substances Act (FHSA). In fact, the CPSIA is actually an amendment to the CPSA. Each of these acts contains its own explicit preemption language, which produces an act-specific express preemption scheme. However, at a high level, the three acts share a common preemption framework and a common exemption from preemption.

The common preemption framework provides that if a federal standard is in effect and applies to a particular risk of injury, and a state standard deals with the same risk, then the state standard is preempted unless it is identical to the federal standard. Applying this general framework to the CSPA, both the federal law and the CSPA set standards for lead, cadmium, and phthalates, and the state standards are not identical to the federal standards. Speaking in the very broad terms outlined above, where the CSPA standards address the same risk of injury as the federal standards, the state standards are preempted. Of course, within the broad framework, there are questions of interpretation, which provide the basis to argue that there might be room for a state to regulate around the margins of a federal standard.

As for the common exemption, a state may apply for its standard to be exempt from preemption by demonstrating that the standard provides a significantly higher degree of protection than the federal standard and does not unduly burden interstate commerce. Generally speaking, the federal law sets a high bar for demonstrating that a state standard does not unduly burden interstate commerce, which means that there is a high bar to obtaining this exemption.

In addition to the common exemption from preemption, the CPSIA contains various savings clauses, which expressly delineate specific areas in which the federal law does not preempt state standards. One savings clause provides that states are not preempted from regulating phthalate alternatives. However, this provision does not save the CSPA standards, which regulate phthalates and not phthalate alternatives. A second savings clause provides that the new federal toy safety standards, including the cadmium standard, do not preempt state standards "in effect" before August 14, 2008. The CSPA's cadmium standard may not be covered by this savings clause, depending on whether the standard was "in effect" prior to the identified date because it had been enacted, or not "in effect" until July 1, 2009, when it becomes enforceable.

The CSPA also directs Ecology to develop a list of chemicals of high concern in children's products and establishes future reporting requirements on those chemicals for manufacturers. The express preemption framework does not appear to be very applicable to these CSPA components. First, the list and reporting requirements may not be standards as the term is used in this context. If they are standards, they would be expressly preempted only if a federal standard exists that applies to the same risk. As a general matter, I am not aware of a federal provision directly analogous to the list or the general reporting requirements. However, if a federal standard were established regarding a particular chemical that was also subject to the state reporting requirement, the express preemption analysis would change with respect to reporting on that chemical. There also exists the possibility of implied preemption. A court considering this issue would look for whether the list and reporting requirements conflict with the federal law or the purpose of the federal law, as well as whether Congress intended to preempt the entire field of identifying, and collecting information regarding, chemicals of high concern in children's products.

Rick Locker and Ashley Pedersen shared their perspectives on preemption. They agreed with the overview of preemption provided by Allyson. Rick described several places in the law where there is legal uncertainty as to how preemption might apply.

Questions and Comments Regarding Federal Preemption and HR 4040

- **What is the process by which a state applies for preemption?**
 - A state applies in a manner that the Consumer Product Safety Commission designates. At this point we do not know more than that.
- **Have you drawn any conclusions as to whether the federal law's cadmium savings clause applies to the date of the CSPA's passage or the date it goes into effect?**
 - No.

- **Did you reach any conclusions on preemption in regard to the creation of the chemical list and any related reporting?**
 - [Allyson could not go into much detail on this question without violating attorney-client privilege.]
- **It seems that the federal law will not preempt the chemical list in the CSPA. Is that true?**
 - In general, states have broad authority to research health topics, and to the extent the list serves such purposes, the chemical list most likely would not be preempted by federal law. Furthermore, the list constitutes a directive from the state legislature to a state agency, and, as such, is unlikely to be federally preempted. The issues related to potential preemption of the reporting requirements are more complicated. Because these requirements are not exclusively an intra-state directive, there is more basis to argue that they may be preempted by the federal law.
- **Small businesses are concerned that the reporting requirement would be particularly burdensome for small manufacturers, which could have a large impact on interstate commerce. Could that consideration exempt them from the requirement?**
 - The best way to get this information is probably from the chemical manufacturers themselves, rather than consumer product manufacturers.
- **Are there new reporting requirements in HR 4040?**
 - Yes, the law has expanded in regard to the penalties associated with violations as well as having shortened compliance timeframes.

Ecology's Position on Preemption

Carol Kraege outlined Ecology's plans to proceed given federal preemption considerations. Ecology concludes that the chemical standards in the CSPA are significantly preempted and that applying for exemption would likely result in a protracted legal argument with the promise of only minimal improvements in the safety of children's products. Ecology is not interested in pursuing this option. Ecology also does not intend to challenge the effective date of the cadmium preemption.

Ecology concludes that the CPSIA does not preempt listing or reporting requirements, and the agency intends to move forward on these topics. The exact nature of the scope and the mechanics of this reporting requirement are still being considered, and Ecology is interested in addressing those issues to ensure that the bill's implementation will be practical.

Chemical Listing and Reporting

Carol Kraege presented an update on the rulemaking process and introduced Ecology's current approach to developing a list of chemicals of high concern. Because of federal preemption, Ecology will withdraw its rule.

Ecology explained the timeline for developing the list of chemicals of high concern. The list will not be finalized by the end of the year. Rather, Ecology will develop an approach to creating such a list by this deadline. At present, the approach is in draft form, and Ecology is seeking feedback on the approach.

The CSPA mandates that Ecology develop identify a list of high priority chemicals. The statute defines these chemicals as those that have been identified by a state or federal agency, or other recognized body, as causing developmental damage, reproductive harm, or damage to the endocrine, immune or other system, or as a persistent bioaccumulative.

Ecology's current approach is to build on research that other entities have done. By consolidating lists that have already been compiled, Ecology has developed a list of approximately 1,600 chemicals that meet the definition of high priority chemical. The statute then asks that Ecology and Health use this list to identify which high priority chemicals are also of high concern to children. The criteria for chemicals of high concern for children listed in the statute and are focused on whether the chemical has been found in human tissue, in our homes (dust, indoor air, etc) or in common household consumer products. One source of information on chemicals found in human tissue is biomonitoring data from the National Health and Nutrition Examination Survey (NHANES). This is a national effort by the Centers for Disease Control and Prevention to measure chemicals in people across the states. Cross-referencing the preliminary list of high priority chemicals with the NHANES data produces a list of roughly 80 unique chemicals. This list gives us an idea of the magnitude of chemicals found in people and may indicate a need to further prioritize the list of chemicals of high concern for children, as 80 chemicals may still be too many for a reporting scheme. Ecology is currently seeking feedback on developing a methodology to prioritize the list of chemicals of high concern for children.

Questions and Comments Regarding Chemical Listing and Reporting

- **Is the list of chemicals of high concern limited to children's products?**
 - No, the CSPA does not limit the list of chemicals of high concern to children to those that appear in children's products. The scope of this list is much broader.
- **Will Ecology be conducting studies that may duplicate other work that is being done on this topic?**
 - Ecology is not planning to conduct any primary research as part of this process. The agency will use outside, peer-reviewed studies only.
- **The scientific consensus on a chemical might change; will there be a process for delisting chemicals?**
 - The specifics of that issue need to be worked out, but the list will not be static.
- **How does the NHANES account for background toxics levels?**
 - The survey results are obtained through random sampling and are pooled across communities. Gathering data from across the country allows the results to be averaged out, as well as demonstrating when a particular community has elevated levels of a toxic chemical. However, while some data that can shed light on source materials is collected as part of this survey, the NHANES data is intended for biomonitoring, not for use to determine the sources of chemicals.
- **Will other elements that are of concern but are not necessarily chemicals, such as lead, be listed?**
 - Ecology has not decided that yet. Currently the list does contain mercury.
- **Do we have information on what chemicals are in toys, and if not do we have a plan for figuring that out?**
 - Ecology does not have good information about what chemicals are currently used in toys. That information will be obtained when companies begin to report their chemical use, but if companies are willing to voluntarily provide information now it will be very helpful.

- **When I get results back from a testing company, they tell me whether my products contain lead, cadmium, and phthalates at or above a specified threshold. The report does not provide a list of the chemicals in my products, nor does it provide a concentration amount for any of the tested chemicals. This limitation would need to be addressed before implementing the proposed reporting process.**
 - It is fairly common for testing company's to provide results in this format, but there is no technical reason why they do so. They have the capability to provide each identified chemical and its concentration.
- **Will Ecology have an algorithm for narrowing down the list of 80 chemicals that we will be able to review?**
 - Ecology is looking for input on how best to prioritize the list of chemicals of high concern for children.
- **Does Ecology have a rough estimate of the number of chemicals it can effectively manage?**
 - No. Ecology thinks the data may reveal an obvious break but it is too soon to estimate how many chemicals can be effectively managed.
- **Are the issues of availability and accessibility still relevant in identifying and prioritizing chemicals for the list?**
 - Those options are certainly open for discussion; Ecology has not made a decision on whether or not to factor them in.
- **There are background levels of chemicals that levels in toys will not drop below.**
 - Background levels are not always disassociated from a product, however. For example, there are not background levels of BPA unless the material is made of polycarbonate.
- **Does Ecology know what the reporting requirements will look like?**
 - Not yet. Specific details of how reporting will be done will be included in the rule along with the list of chemicals. Six months after that rule is finalized, manufacturers will have to notify the state if any of their products contain one or more listed chemicals. The CSPA requires that these reports include the name of the chemical, the name of the product, the reason the chemical is in the product, and the range of the chemical's concentration in the product.

Recommendations Regarding Chemical Listing and Reporting

For identifying and prioritizing the final chemical list, members made these observations:

- What should the threshold be for determining that a product contains a given chemical? Several members do not want to waste money testing for chemicals that will not be found in products.
- Be attentive to the accessibility and availability of chemicals in products.
- If chemicals are not found in toys, do we need to worry about them?

- Focus on European Union chemical lists as the basis for Washington's list.
- Consider how to address the potential impacts of new chemicals and alternatives to existing ones.
- Are there chemicals that we can agree will not show up in certain materials? That would allow us to conclude that we do not need to worry about certain chemicals in those materials.
- The Washington Toxics Coalition has data on chemicals in toys, including which materials are likely to contain certain chemicals.

Committee members also made the following comments:

- Our toys do not contain a lot of toxics, per FHSA specifications. We welcome information on chemicals that are dangerous.
- As we identify hazardous chemicals, they are often replaced by a chemical whose health effects are unknown. In replacing items we know are problems, we may use chemicals that we do not know anything about.
- Make sure that this list is cost-effective by considering all available sources of information before we attempt to reinvent the wheel.
- The Committee should place a priority on those chemicals that the European Union is looking at, given that the toy marketplace is global, and many safe, quality toys are produced in Europe. Burdensome reporting might remove these toys from the marketplace.
- It would be great to find out information on what chemicals are in the toys. We do not want companies to spend millions of dollars testing for chemicals that will never be found.

Next Steps

Carol requested feedback from the group on four topics to help Ecology move the process forward:

1. Does the group recommend any fixes to the statute for 2009?
2. How should Ecology select and prioritize chemicals of high concern for children?
3. How should Ecology store and/or share data reported by manufacturers?
4. What actions, if any, are taken if a product is found to contain a chemical of high concern for children?

Current Rulemaking Timeline

Carol summarized the updated rulemaking timeline. Ecology needs to provide the report to the Legislature by January 1, 2009. While that report is supposed to identify a list of high priority chemicals, it will only contain the outline of Ecology's approach to create such a list.

Ecology will not have the capacity to continue the rulemaking process until after the next legislative session. Once they have identified the list of chemicals of high concern for children, Ecology will be able to paint a more detailed picture of how rulemaking will proceed. In general, rulemaking on complex issues takes at least a year. Reporting would begin six months after the rule is finalized.

- **Will the list of chemicals of high concern be finished before the rulemaking process begins?**
 - Identifying the list of chemicals will begin before rulemaking begins and continue through the rulemaking process. Committee members will have plenty of time to weigh in on the topic.

Prioritizing the List of Chemicals of High Concern

Dan Silver solicited feedback from the Committee on other factors that Ecology should use in prioritizing chemicals on the list of high concern.

Questions and Comments Regarding Prioritizing the List of Chemicals of High Concern

- **Is there information on the impacts of specific chemicals on children? Do we know which chemicals affect the greatest number of children?**
 - That information is difficult to obtain other than for a few chemicals, such as lead. In particular, there is not a lot of information on how chemicals affect certain subpopulations. It would be better to start with both human and animal biomonitoring data.
- **What is a reasonable time frame from which to accept studies as relevant? If a study is 10 years old, are its toxicity findings still relevant?**
 - Ten years is not a long time for these types of studies. Over time, studies tend to reveal more data on effects at lower levels of exposure as tests become more sophisticated and to provide a more coherent body of evidence as more studies are conducted. Compared on a one-to-one basis, the information from an older study is generally just as valid as that from a more recent study.
- **Can we direct this question to product manufacturers? They should have good information on these chemicals and what products they are used in.**
 - The American Chemistry Council might be able to provide this information as well.
- **Several Committee members supported the option of reducing the potential list of 80 high priority chemicals if there is a compelling health rationale for doing so.**
 - Exposure is a key issue. Chemicals that will not be found in products should not be on the list. The list should start with the highest priority chemicals that people will be exposed to.
 - Ecology could take a structural approach and include chemicals with a similar structure to chemicals with known health effects. Structural activity analysis may be used.
 - Reducing the list is complicated; there are a lot of chemicals for which we do not know the direct health effects.
 - There is a lot of information on the chemical content of certain materials. If the Committee can obtain information from manufacturers on which products contain these materials, we can use that to help prioritize a chemical list. Maybe this means we wait to narrow the list until we get more information.
 - A weight of evidence approach could be used to narrow the list.

- Ecology could prioritize chemicals by starting with what chemicals are used in toys and then determine their toxicity.
- Threshold levels for individual chemicals should not be used. The limits of detection are changing rapidly as technology improves; establishing a threshold that changes in the near future is not sensible.
- The EU has conducted research on what chemicals are found in toys. The Commission produced a report that might be useful and that several Committee members might have.
- Several Committee members proposed that the chemical industry, rather than toy manufacturers, would be a good place to start trying to obtain data on what chemicals are used in certain materials. They should have information on what they use as well as on whom they are selling to.
- We need to make sure we are looking not only at toys but also at other children's products, such as clothes and backpacks. Items that show up in other children's products should be on the list.

Recommendations Regarding Prioritizing the List of Chemicals of High Concern

The Departments of Ecology and Health will prepare a draft list of factors to consider in creating the algorithm to identify the final list of chemicals of high concern. The Departments will provide this information to the Committee by Monday, September 22nd.

Storing and Sharing Reported Information

Dan Silver requested feedback from the Committee on how Ecology should hold and share information, including addressing concerns regarding confidential business information.

Carol Kraege summarized Ecology's original intent to share that information with consumers as part of a website. While that idea has been temporarily shelved, the Committee could discuss it. California has also been debating what to do with information reported by businesses.

In regard to confidential business information, Washington has a broad public disclosure act, which contributes to an already complicated question. Generally in Washington, any information generated by the government or provided to the government is a public record and must be disclosed upon a citizen's request. Exceptions to this law are defined narrowly, as in the case of personal identifying information such as social security numbers. There is also a process for applying for an exemption. Fines for breaking this law are strict: up to \$100 per record per day.

Questions and Comments Regarding Storing and Sharing Reported Information

- **Several members were concerned that reporting an entire list of chemicals in a product would reveal formulas, which are quite valuable.**
 - The CSPA states that the reported information shall include the name of the chemical, a description of its use, and the quantity used. That is enough information for a competitor to use.

- **Why was CSPA section 8, requiring the publication of business' reported information on a website, vetoed?**
 - The Governor wanted the Legislature to review the Committee's findings before the rule process began. Her veto of Section 8 was made to remove the deadline for the rule. Since she could not veto a subsection only, she chose to veto the entire section. Her veto message does not address the publication of reported information.
 - Although section 8 was vetoed, the CSPA still contains section 6, which authorizes the Department of Health to establish and maintain a product safety education campaign.
- **How does Ecology think they would use business' reported information?**
 - The original intent was to provide information to consumers. Following the veto, Ecology has returned to the more open question of how to use this information to ensure that toys are safe.
- **Is there a cost associated with a potential website?**
 - Yes, these costs were included in the fiscal note and funds were appropriated.
- **If the information reported by businesses is used for education and consumer knowledge, not for regulatory purposes, is federal preemption triggered?**
 - If the reporting is part of something that triggers a regulatory standard, it may trigger preemption. If not, it may not trigger preemption. Reporting is much less likely to be preempted if it is not connected with a ban.
- **Complying with the reporting requirement will be a cost for businesses. What if a business does not comply? What are the carrot and the stick that will promote compliance?**
 - There are provisions for penalties in the statute that were not vetoed, including for failure to report. Ecology had envisioned a spot-check system, similar to that used by the European Union.
- **Is there still a plan to restrict retailers from selling toys that contain a chemical on the list of high concern? If we restrict access to niche items, we hurt the people that need those niche products.**
 - The CSPA does not restrict a retailer from selling toys that contain a chemical of high concern; it just requires manufacturers to report their use of chemicals of high concern to Ecology. Who reports and how it is done are very important. Ecology will solicit feedback to help address these questions.

Recommendations Regarding Storing and Sharing Reported Information

Several Committee members favored including a mechanism so that businesses would not be required to disclose an entire formula, including non-hazardous chemicals.

- Requiring businesses to report only those particular chemicals in their products that are on Ecology's list of high concern would achieve this goal.

- Ecology will need a method to address this concern for companies that might only be able to report a formula, as opposed to individual chemicals.

Several Committee members favored providing information on chemical content to consumers through a website.

Several Committee members favored accepting the Washington State importer of record as the manufacturer for items manufactured outside of the state.

- Companies view the location of their factory as proprietary.
- The original idea behind requiring the manufacturer's location was to ensure accountability, as in Toxics Release Inventory (TRI) reporting. Providing the address of the importer would achieve this goal.

Committee members also made the following comments:

- Information should still be provided to consumers through a variety of methods, including a website. We would support that approach as contained in the original bill.
- One of the most useful impacts of having this reported data will be its potential public relations impact. Similarly, the federal Consumer Product Safety Commission does not have to do much enforcement because of the large impacts of a recall.

Meeting Summary and Next Steps

Dan Silver summarized the meeting. Ecology is going to focus on chemical listing. Ecology will work in conjunction with the Department of Health to develop a series of options or questions to consider for how to limit the list of chemicals of high concern. The Committee has issues with how that list is prioritized and especially with how the necessary information to do so will be obtained. Those recommendations will make up the backbone of the report to the Legislature. Ecology and the Department of Health will provide these options by Monday, September 22nd. In the meantime, Dan will talk to Committee members about ways to pair down Ecology's current list of chemicals. The Committee will aim to be done following the Oct 7th meeting, but we still have the November 6 date if it is needed.

The next meeting of the CSPA Advisory Committee is scheduled for Tuesday, October 7, 2008, at the Red Lion Hotel in SeaTac, Washington.