



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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August 23, 2011

The Honorable James M. Inhofe
United States Senate
205 Russell Senate Office Building
Washington, D.C. 20510-3602

The Honorable Frank R. Lautenberg
United States Senate
324 Hart Senate Office Building
Washington, D.C. 20510-3003

**RE: Safe Chemicals Act of 2011 (S.847) –
State Environmental Commissioners' Comments**

Dear Senators Inhofe and Lautenberg:

I am writing to thank you for your recent and timely leadership on efforts to reform our nation's chemical safety laws, and for soliciting the perspective of states on those efforts. On behalf of nine State Environmental Commissioners, I am pleased to submit these comments related to the Safe Chemicals Act of 2011 (S. 847) that have been endorsed by California, Colorado, Delaware, Massachusetts, Maryland, Michigan, Oregon, Vermont and Washington. We fully support your bi-partisan efforts to move this important legislation forward.

As a group of state commissioners, we appreciate this opportunity for the states to be heard on the important work to reform the Toxic Substances Control Act of 1976 (TSCA). TSCA reform is a key issue for the states. As of today, 30 states have passed chemical policy laws, ranging from comprehensive approaches to bans on certain high-risk chemicals to introduction of resolutions calling for TSCA reform. In 2009, 13 states adopted the States' Principles for TSCA Reform. In 2010, the Environmental Council of States (ECOS) passed a resolution calling for responsible TSCA reform.

Based on our collective experience in protecting our citizens and environments from avoidable toxic exposures, the State Environmental Commissioners wish to work with you to:

- Develop legislation that establishes a strong, protective federal system.
- Preserve the ability of our states to protect public health and the environment.

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- Require minimum data for all chemicals, and require manufacturers to demonstrate that chemicals meet reasonable safety standards.
- Require the United States Environmental Protection Agency (EPA) to define criteria for safer alternatives, using a hazard and risk-based approach that considers the entire chemical life cycle.
- Authorize EPA to take immediate action to reduce threats from the most harmful chemicals, especially persistent, bioaccumulative and toxic chemicals (PBTs), including chemical bans, where needed.
- Reward innovation and accelerate the delivery of safer chemicals and alternatives to the marketplace.
- Share information and coordinate between state and federal programs to maximize use of resources and ensure a predictable regulatory environment for all stakeholders.

I am pleased that you have been hosting individual stakeholder meetings with industry and environmental organizations over the past several weeks. I believe that this is a positive step forward, and request that states be given the same opportunity to meet with you and your staff at the earliest opportunity. It is my understanding that your staff is in contact with Ms. Kathy Kinsey of Maryland to schedule such a meeting in the near future. State Environmental Commissioners look forward to meeting with you to share state experiences and perspectives in addressing the limitations of current U.S. Chemical Safety Laws.

If you have any questions related to the attached comments, please feel free to contact Ken Zarker of our Hazardous Waste & Toxics Reduction Program, at ken.zarker@ecy.wa.gov or (360) 407-6724.

Sincerely,



Ted Sturdevant
Director

Enclosure

cc: Deborah O. Raphael, Director, California Department of Toxic Substances Control
Christopher E. Urbina, Executive Director & Chief Medical Officer, Colorado
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Collin O'Mara, Secretary, Delaware Department of Natural Resources & Environmental
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Bob Sommers, Secretary, Maryland Department of Environment
Kenneth Kimmell, Commissioner, Massachusetts Department of Environmental
Protection
Dan Wyant, Director, Michigan Department of Environmental Quality
Dick Pedersen, Director, Oregon Department of Environmental Quality
David K. Mears, Commissioner, Vermont Department of Environmental Conservation
Steve Owens, U.S. EPA

**STATE ENVIRONMENTAL COMMISSIONERS
COMMENTS ON THE
SAFE CHEMICALS ACT OF 2011
S. 847
(April 15, 2011 Legislative Version)**

Summary

These comments on the Safe Chemicals Act of 2011 are submitted on behalf of nine state environmental commissioners from California, Colorado, Delaware, Massachusetts, Maryland, Michigan, Oregon, Vermont and Washington.

Reforming the Toxic Substances Control Act of 1976, (TSCA) is a key issue for states. In 2010, the Environmental Council of States (ECOS) passed a resolution calling for responsible TSCA reform to cover both new and in-use chemicals, and provide for quick action when needed, assessment of safer alternatives, and collaboration and information-sharing between federal and state programs. As of today, 30 states have passed chemical policy laws that include comprehensive chemical programs, bans on specific high-risk chemicals, and resolutions that call for TSCA reform. These are overwhelmingly bipartisan efforts. Through our work, we have learned many lessons about what has worked and what has not in the Federal TSCA law. Our comments address the key issues for states, which are that TSCA reform should:

- Establish a strong federal system that ensures the safety of chemicals in commerce.
- Preserve states' ability to protect public health and the environment.
- Require minimum data for all chemicals, and require manufacturers to show that chemicals meet safety standards.
- Require United States Environmental Protection Agency (EPA) to define criteria for safer alternatives, using a hazard and risk-based approach that considers the entire chemical life cycle, and encourage use of safer alternatives through market incentives and other means.
- Give EPA authority to take immediate action to reduce threats from the most harmful chemicals, especially Persistent, Bioaccumulative and Toxic chemicals (PBTs) and other chemical substances determined to require immediate risk management, including chemical bans where needed.
- Reward innovation and help safer chemicals and alternatives get to the marketplace faster.
- Share information and coordinate between state and federal programs to maximize use of resources and ensure a predictable regulatory environment for all stakeholders.

We appreciate the opportunity to submit these comments and respectfully ask for their consideration. We would welcome the opportunity to provide additional information, answer questions, engage in discussion and provide suggested language on any or all of these issues.

1. Preservation of State Authority

We support the express preservation of state authority in §18 of Safe Chemicals Act of 2011 (S. 847) and urge the bill's sponsors to retain this language.

The retention of state authority, as it is described in S. 847, is one of the most important issues in the TSCA reform debate. Many federal environmental laws expressly preserve state authority. For example, many states have programs that contain requirements in addition to those specified in the Resource

Conservation and Recovery Act (RCRA). Washington State has enacted toxic chemical cleanup legislation that is more restrictive than the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). States also have state cleanup programs in addition to CERCLA. The Clean Air Act authorizes California to establish more stringent vehicle emission standards, which can then be adopted by other states in lieu of the federal standards. These are only a few examples where state authority has been maintained without disruption of a federal program. Preservation of state authority is both workable and necessary. The states strongly recommend that this provision be retained in its current form.

2. Enhanced State Coordination Role

Section 24 (State Programs) amends TSCA § 28 to require EPA to establish a state coordination process for data sharing and prioritization as it relates to management of chemical substances and mixtures. The language from last year's House discussion draft does not appear in S. 847. Last year, the states worked with House Committee staff to strengthen federal coordination and cooperation with state programs and provide an enhanced consultative role in areas of particular importance to the states. At a minimum, the states request that §24 be revised to strengthen consultation and coordination with the states and local governments to:

- Provide for advance consultation and coordination on the design and development of the electronic database established under § 9(d).
- Provide for advance consultation and coordination on the development of a streamlined process for sharing confidential business information with the states under § 14.
- Provide for consultation and coordination prior to: (1) establishing conditions on the manufacture, processing, use, distribution, or disposal of a chemical substance or mixture; and (2) granting an exemption or providing for public notice under § 6(e) to determine if related states have taken a similar action under state law.
- Provide for consultation and coordination before initiating any rulemaking and for meaningful opportunities for input throughout any rulemaking process under TSCA, including efforts to define "safer alternatives" and establish criteria for alternatives assessment.
- Provide for advance consultation and coordination on the development of Hot Spot action plans under § 34.
- Provide for grant funding to the states to support activities related to §§ 5-9, 14, 18, 23, 29, and 34, in addition to grant funding provided for states to promote and support activities in § 31.
- Provide for state representation, appointed by ECOS, on the Interagency Science Advisory Board on alternative testing methods and the Interagency Prioritization and Testing Committee.

3. Risk Based Safety Standards and the Role of Hazard Assessment

Section 3 (Findings, Policy and Goal) amends TSCA § 2(b) (3) to add new policy language related to meeting a risk-based safety standard that protects vulnerable populations and the environment. States recommend addition of the term *hazard* so that, consistent with the approach taken by many states,

federal policy is based on a *hazard* and risk-based approach to protect vulnerable populations and the environment.

Chemical policy reform should shift chemical use from chemicals that possess a high intrinsic hazard to chemicals with lower hazard. In many cases, there are equally effective and safer alternatives to hazardous chemicals. Manufacturers should be required to conduct safer chemical alternative assessments, as part of a safety standard determination, prior to implementing any other proposed risk control measures. In instances where safer alternatives are available, chemical policy should help shift uses towards these alternatives. When faced with a choice between implementing control measures and reducing intrinsic hazard, the states have often found that the cheapest and most effective option is reducing hazard. Protection of public health and the environment requires identification and substitution of safer alternatives, irrespective of current known risks.

4. Minimum Data Set

Section 5 amends the Minimum Data Set and testing requirements of TSCA §4. The states are concerned with the proposed language relating to the minimum data set, particularly the requirement that each minimum data set include the minimum amount of information necessary for the Administrator to conduct a screening-level risk assessment. This limitation appears to be open to a variety of interpretations, depending on the definition of screening level risk assessment. Many chemicals, particularly those produced at high volumes or chemicals with particular hazard traits, should receive a comprehensive risk assessment; the minimum data set should contain all of the data needed to conduct these types of assessments. The current language appears to limit the scope of the minimum data set in such a way as to preclude a thorough assessment of chemical substances without relying on additional testing orders. It is important to have a minimum data set that actually provides the information needed to make good decisions. When additional data may be needed beyond the minimum data set, there should be specific pre-established criteria and processes to quickly obtain this data without relying on additional testing orders.

In addition, S. 847 requires that each minimum data set include information on the characteristics, toxicological properties, exposure, and use of chemical substances. States recommend that the following changes be made: characteristics changed to physical characteristics; exposure changed to potential exposure; and that information pertaining to environmental hazard be specifically added to this section.

5. Chemical Substances in Priority Class 1

States support the definitions for Persistent and Bioaccumulative in S. 847. Section 7 (Prioritization, Safety Standard Determination, and Risk Management) amends TSCA § 6 to require the Administrator to assign a chemical substance to priority class 1 if it is determined that the chemical substance is, or is degraded and metabolized into, a PBT with the potential for widespread exposure to humans or other organisms.

In addition to PBTs that meet the above findings, the Administrator should be given the authority to add any other chemical substance that is determined to require immediate risk management to priority class 1. This should not be limited to PBTs.

The term “widespread” should be replaced by the term “significant.” Significant exposure may occur even though that exposure may not be widespread.

Additionally, the draft SCA requires the Administrator to determine, based on any “more than theoretical” concern, that there is uncertainty whether a chemical substance would satisfy the safety standard. The phrase “more-than-theoretical” is vague and unclear and should be refined or deleted. The states recommend that the language be made clear that the Administrator may ban PBTs and other chemicals in priority class 1 if, after an alternatives assessment, safer alternatives have been identified, regardless of whether measures are proposed to reduce exposure.

6. Safety Standard Determination

Section 7(b) places the burden of proof on the manufacturer and processor of a chemical substance to prove that a chemical substance meets the applicable safety standard. The EPA Administrator then determines whether the chemical substance meets the safety standard, using the best available science, which shall be based on the recommendations of a National Academy of Sciences (NAS) report entitled: Science and Decisions. At a minimum, a timeframe should be established for the Administrator to develop guidance on the application of the NAS methodology to the data to be collected by the manufacturers for the purpose of EPA’s Safety Standard Determination and for the manufacturer’s requirement to indicate whether a chemical substance meets the safety standard.

The requirements of the Safety Standard proposed for TSCA § 6(b) (1) (C) should be modified to include consideration of the most vulnerable ecosystems in addition to the health of vulnerable human populations.

In addition, Section 7 amends TSCA § 6 to provide a process for determining whether chemicals of concern meet a safety standard and conditions under which chemicals may be exempted from the requirement to meet a safety standard. The public participation procedures as they relate to safety standard and exemption determinations are not adequate. While the bill authorizes a petition requesting EPA to reconsider a determination that a chemical *continues* to meet the safety standard, it does not provide for state input or public comment on initial safety standard determinations. A determination that a chemical meets the safety standard should be subject to a public notice and comment process. Similarly, while a determination to *renew* an exemption from the safety standard is subject to notice and public comment, initial determinations on such requests are not. Last year’s House discussion draft provided for notice and comment on initial exemption requests. We submit that this is the better approach, as it provides an opportunity for the broadest exchange of information on these two key determinations, which have public health and environmental impacts.

7. Data Sharing—Confidential Business Information

Section 14 (Disclosure of Data) amends TSCA § 14 to provide for sharing of confidential information with states, tribes and local governments, upon request, for the purpose of administration or enforcement of a law and in accordance with one or more applicable agreements to ensure that confidentiality is maintained. We suggest two revisions to this section to facilitate a streamlined data sharing process and strengthen the state/federal partnership. First, access to confidential information should not be conditional on its use for administration or enforcement of an existing law. A growing number of states

have taken, or are considering, action to regulate various toxic chemicals now in commerce. Unfettered state access to information on chemical substances is important, not only to administer and enforce existing laws, but also to inform state decision making on the need for further regulation or restrictions on chemical substances.

Second, the reference to applicable agreements in § 14 is not clear. As an alternative, we suggest that state access to confidential information should be provided so long as the state agrees to safeguard the information under procedures that are equivalent to those utilized by EPA. We also suggest that EPA be required to coordinate and consult with the states in establishing a streamlined information sharing process.

8. Green Chemistry, Safer Alternatives and Market Incentives

The development of safer alternatives to existing hazardous chemicals is an important tool to facilitate a shift away from the use of hazardous chemicals in commerce. S. 847 should encourage manufacturers and processors to evaluate whether functionally equivalent alternatives are available, especially for those chemicals identified in priority class 1, new chemical substances, or existing chemical substances with new uses. EPA should be given the authority to ban these chemical substances to reduce the level of hazard posed by the chemical substance if a functionally equivalent alternative exists. Currently, the bill only requires a manufacturer or processor to evaluate whether feasible alternative exists if they are applying for an exemption to an EPA imposed prohibition. EPA, the states, formulators and the public should have access to identified safer alternatives to hazardous substances. The states strongly support the creation of market incentives for the development of safer alternatives, such as expedited EPA review of new chemicals that include a safer alternatives analysis, as provided in § 31, but this is not sufficient to ensure a systematic approach to determine if functionally-equivalent, safer chemical substances are available.

S. 847 is silent on criteria for evaluating chemicals and their alternatives. The bill should require that, within a year of enactment, EPA define and establish criteria for safer alternatives through rulemaking. At a minimum, safer alternatives should be identified based on risk assessment throughout the life cycle of a chemical substance. Other criteria that EPA might include are product function or performance, useful life, materials and resource consumption, water conservation, water quality and air emission impacts, transportation-related energy usage, greenhouse gas emissions, waste and end-of-life disposal impacts and public health, environmental and economic impacts. EPA could benefit from the states' experience in these areas and with these types of evaluations, and we have identified this as one of the recommended areas for enhanced state coordination. Public outreach and perhaps labeling explanation also will be needed to help people understand that safer alternatives mean less risk, not no risk.

9. Development of Hot Spot Action Plans

Section 34 requires EPA to identify localities that are disproportionately exposed to toxic chemicals and mixtures (the Hot Spot list), and, after consultation with applicable state and local governments and elected officials, to publish the list. Subsection (f) further requires EPA to develop Hot Spot plans for EPA action to reduce disproportionate exposure in the identified localities.

Addressing exposures using public health as the end rather than media-specific cleanup standards is strongly needed; however, this section does not provide for a state or local government role in developing or implementing such plans, a process for prioritizing the most severely impacted localities, or an identified source of funding to implement action plans. A collaborative relationship between the federal, state, and local governments in this regard, as well as adequate funding, is essential to successful implementation of these important environmental justice provisions. The states recommend that these additions be made to § 34.

10. Coordination between Federal Agencies with Chemical Oversight Responsibilities

States support formal, ongoing and strong coordination between all federal agencies with responsibility for oversight of chemicals, including FDA, FIFRA, OSHA and CPSC. There also should be strong coordination within agencies, particularly EPA, so that decisions about chemical safety made in the TSCA program are considered in the media programs.

11. Funding for Technical Assistance to Business through State Environmental Agencies

The bill does not currently provide any state funding to facilitate the use of safer chemicals. Grant funding should be provided for state programs to reduce the use of and exposure to hazardous chemicals, including technical assistance to businesses seeking information on chemical use and exposure reduction strategies and pollution prevention and green chemistry, including onsite technical assistance to facilitate development of state and local toxic-use reduction and pollution prevention plans; state chemicals clearinghouse data and information sharing to facilitate collaboration between state and local jurisdictions on chemicals information and data, product information, and safer alternatives outreach and education; training in chemical-use and exposure reduction strategies and programs; reporting of state performance output and outcome measures; state recognition programs for reduction in toxic chemicals or implementation of voluntary programs; and monitoring of chemicals in the environment, animals, and humans to assess persistence and bioaccumulation.

12. Regulation of PCB Waste and Residuals

TSCA Section 6 should be amended to provide for regulation of the management and disposal of polychlorinated biphenyl (PCB) waste and residuals under the appropriate provisions of RCRA and CERCLA. Currently, the management and disposal of PCB wastes and residuals are subject to overlapping regulation under three separate federal environmental statutes: TSCA, RCRA, and CERCLA. PCBs are identified as a hazardous constituent under RCRA and as a hazardous substance regulated under CERCLA. The existing regulatory authority under RCRA and CERCLA governing the management and disposal of hazardous and toxic wastes and residuals is broader in scope than the authority under TSCA. The coordination of management of PCB wastes and residuals under these overlapping authorities often requires substantial time and effort between the three regulatory programs, resulting in a redundant, cumbersome approval process that impedes the timely and efficient remediation of contaminated properties and management of PCB wastes and residuals.