

Washington Toxics Reduction Strategy Group

Draft Ideas about Product Responsibility and Liability Approaches- 11/15/2012

This document contains a working draft of ideas the TRS group has raised about how product responsibility or liability approaches might be used to reduce exposures to toxics.

Overarching Observations

- There are many existing products and chemicals, and new products and chemicals are being developed all the time. Any regulatory program will have significant challenges keeping up pace with new chemicals, without risking a stifling of innovation.
- At the same time, our current system errs too much on the assumption that producers, manufacturers, and retailers have the information and incentive to ensure that products are safe with respect to chemical ingredients and toxicity in particular. There are significant data, safety and information gaps that need to be addressed.
- Even when safer alternatives to toxic household products exist in the marketplace, too few consumers are making the switch to safer products. More action is needed to ensure non-toxic alternatives are widely available and that toxic products bear their own externalities.
- Since toxic effects on people, and in the environment, can be years down the road from initial exposure or release, and can be difficult to prove, there is effective separation between the producers, manufacturers, and retailers, and the harm that is created by toxic chemicals in products. The purpose of a liability approach is to repair these connections, so that producers, manufacturers, and retailers are clearly responsible for the harmful chemicals contained in their products.
- Liability around Superfund cleanups and related state cleanup programs has the potential to change behavior in manufacturing processes and waste management, but it has not been generally designed to reduce the toxicity of products or addressing exposure and potential harm to people or the environment.

Ideas for Discussion

A. Use Liability and Market Responses to Repair Connections between Producers, Manufactures, and Retailers and the Costs of Toxics in Products

- Establish a new proactive **liability scheme** that makes it clear that producers, manufacturers, and retailers are responsible for the toxic chemicals in their products. (Currently, chemical producers and product manufacturers and retailers cannot efficiently be held responsible for toxics in products, even in the context of Superfund cleanup where other chemicals cause strict liability.)
- If toxic chemicals contained in a products are found to be harmful the producer, manufacturer, and/or retailers would be responsible for that harm and would be required to take the product

back and refund the price (i.e., a product recall), provide a safer alternative, repair the product to eliminate the toxicity, or compensate for the harmful effects.

- Once liability has been established for a specific chemical, manufacturers are likely to spread that liability across their entire supply chain, thereby ensuring that toxics are eliminated across the supply chain and that liability is not unfairly loaded onto one manufacturer.
- **“Harm”** might be established based on:
 - Assessment of the exposure to the chemical and the potential hazard of the chemical
 - Observed effects
 - The presence or absence of potentially harmful chemicals
 - Other ways?
- Harm might be defined proactively by the government for certain chemicals or classes of chemicals or certain types of products (, or it might be defined in the market, e.g., through torts. How, when, and who defines harm is at key set of questions for this idea.
- To complement a new liability scheme, government or another actor might create a **safe harbor provision**, where if producers, manufacturers or retailers demonstrate that a product meets certain standards or uses only certain classes of safe chemicals, it could be verified as non-toxic and not subject to liability.
- This safe harbor provision could encourage innovation if the development of safer alternatives is encouraged, and when a safer alternative is established, at that point regulation would kick in to require the use of that alternative. Manufacturers under the safe harbor provision might collaborate to create safer alternatives.

Discussion questions:

1. How would responsibility be aligned between producers, manufacturers, and retailers?
2. Is it appropriate to use toxicity or harm as a trigger for action? What would other triggers be?
3. If toxicity or harm are used as triggers for action, who would define them? Is it appropriate to have an approach where harm may have to happen before responsibility is established? Are there ways to modify this approach to incentivize more proactive detoxification of products?
4. Is a “safe harbor” option appropriate? How would safe harbor be defined and who would do it?
5. Can liability be established for a manufacturer if toxic chemicals are found in sensitive areas of the environment or human tissue (e.g., PBDEs in orca whales)?
6. Is there potential for regional collaborative approaches to reach across state borders and impact a broader market area to make this proposed system workable?
7. What would be the first step in the implementation of such an approach?

B. Use the Regulatory System to Repair Connections between Producers, Manufactures, and Retailers and the Costs of Toxics in Products

- If toxic chemicals are contained in a product a government would have the authority to ban or restrict that chemical and the producer, manufacturer, and/or retailers would be responsible for that chemical and would be required to find a safer alternative, or if there were no safer alternative the manufactures would have to demonstrate this and pay a fee for using that chemical.

Discussion questions:

1. Who would define toxicity and/or harm? Are there ways to modify this approach to incentivize more proactive detoxification of products?

2. Is there potential for regional collaborative approaches to reach across state borders and impact a broader market area to make this proposed system workable?
3. Can the state marshal sustained interest and investment in such an approach?
4. What would be the first step in the implementation of such an approach?

C. Impose Fees or Taxes on Products with Toxics and Use the Revenue to Toxics Reduction Efforts

- Working from a list of chemicals that are problems for children, Puget Sound, and other priorities, impose taxes or fees on products that contain these chemicals.
- Use the revenue to fund toxics reduction efforts.

Discussion questions:

1. How would a list of priorities be developed? Who would develop this list?
2. Is it appropriate to impose fees if no safer alternatives are available?
3. How would the amount of the fee be established? Is it appropriate to have an approach where harm may have to happen before responsibility is established?
4. Can the state marshal sustained interest and investment in such an approach?
5. What would be the first step in the implementation of such an approach?