

National Affairs and Legislation Committee
The Garden Club of America
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Update #6

Toxic Substance Control Act (TSCA)
S.1009, "Chemical Safety Improvement Act"

What you can do:

- If you are concerned about the environmental and health risks of the tens of thousands of chemicals on the market place and want chemicals that have a higher potential risk to be tested for safety, contact your representative and senators and tell them you support reforming the Toxic Substance Control Act. If your legislator is not already a cosponsor, ask her or him to sign on to the bill.
- If your state already regulates chemicals sold within its borders, urge your legislators to work on an approach that would incorporate those regulations in any federal TSCA overhaul.

TSCA Overhaul Legislation

For many years before his death in June, Sen. Lautenberg (D-NJ) campaigned for comprehensive reforms of the Toxic Substance Control Act of 1976. He advocated shifting the burden to chemical makers to prove their substances are safe *before* they go to market. He wanted manufacturers to provide a minimum data set for each chemical they produce, with EPA authority to request additional data necessary to make a safety determination. Under his Safe Chemicals Act,¹ EPA would prioritize chemicals based on that data and would take quick action on chemicals that clearly demonstrated high risk. Sen. Lautenberg also promoted “green chemistry” through incentives for companies to make and use safer alternatives to some chemicals.

Sen. Lautenberg’s bill was approved by the Senate Environment and Public Works Committee (EPW) in July, 2012 but never reached the floor. One problem was opposition from Republicans and some portions of the sprawling chemical industry.

In 2013, Sen Lautenberg renewed his efforts to reform TSCA. In a surprise development, shortly before he died, he joined with Sen. Vitter (R-LA) in a bipartisan bill, the “Chemical Safety Improvement Act of 2013 (CSIA), which was introduced in May, 2013 as S. 1009. As of this writing, there are 25 bipartisan cosponsors¹. Some previous Lautenberg allies have declined to cosponsor the legislation, including EPW chair Boxer (D-CA). After Sen. Lautenberg’s death, Sen. Tom Udall (D-NM) became the lead Democratic proponent.

¹ Lead sponsors Senators Vitter (R-LA) and Udall (D-NM), Alexander (R-TN), Begich (D-AK), Boozman (R-AR), Burr (R-NC), Chambliss (R-GA), Collins (R-ME),Crapo (R-ID), Durbin (D-IL), Gillibrand (D-NY), Hagan (D-NC), Harkin (D-IA), Hoeven (R-ND), Inhofe (R-OK), Isakson R-GA), Landrieu (D-LA), Manchin (D-WV), Menendez (D-NJ), Murkowski (R-AK), Murray (D-WA), Pryor (D-AR), Rubio (R-FL), Shumer (D-NY), Toomey (R- PA)

The bipartisan bill balanced Lautenberg’s original approach with industry input. CSIA would establish, for the first time, an effective framework for EPA to evaluate both new chemicals and the thousands of currently untested chemicals being manufactured. Although many hailed the new bill as a pragmatic, realistic compromise, many others were skeptical. Like most compromises, CSIA fully satisfies neither side. Many points of view were aired at a lengthy hearing at the end of July. Health experts alleged that CSIA does not call for enough data about chemicals being marketed and does not require EPA to do enough to evaluate the impact of chemicals on particularly vulnerable populations including children and the elderly. Some criticized the bill’s lack of firm deadlines for EPA to make determinations regarding specific chemicals. On the other hand, some industry spokesmen charged that CSIA went too far and would cripple business.

Preemption of state law: the big problem

The most serious political issue facing CSIA is how the bill would affect the dozen or so states that, tired of waiting for EPA to act, have passed their own laws banning or regulating the marketing of specific chemicals in their states. One witness at the July hearing said, “As currently written, S. 1009 will not give us more protection. To the contrary, it would cripple the states’ power to protect our environment and the health and welfare of our citizens.”² Backers of the bill say the legislation would allow existing state regulations to remain intact until EPA has made a safety determination, and a waiver system would also allow states to uphold their current chemical regulations.



El Cajon Pass 1966. Photo source: NOAA Incidents Gallery

Nine state attorneys general³ wrote to Chairman Boxer and the EPW committee expressing deep concerns about the preemption of their laws by CSIA. They alleged that CSIA would prevent states from enforcing their laws for months or years before federal regulation took over the job and would bar states from adopting and enforcing new laws regulating “low-priority” chemicals. Clearly, their concerns will have to be addressed in order for the bipartisan bill to proceed further in the legislative process.

Historical note on preemption: Virtually all of the major federal environmental protections enacted in the 1970s came about after decades of industry opposition. When states began setting their own anti-pollution rules, industry’s point of view shifted. Industries most emphatically did not relish the prospect of 50 different regulatory schemes for dealing with air, water and land pollutants. As long as they could avoid any regulation at all, that was their preference. But when states began enacting stringent limits and bans, opponents of regulation realized they would be better off with the “lesser evil:” one single nationwide regulatory approach that was weaker than the rules coming from the most progressive states. In some cases, when the federal anti-pollution laws were enacted, states that already had tough regulations were allowed to keep those stricter standards; the California auto-emissions standards are a case in point.

² Michael Troncoso, senior counsel for the CA attorney general, testifying at EPW July 31, 2013

³ AGs from CA, CT, DE, HI, MA, MD, OR, VT and WA

House action

House Republicans began working on TSCA reform in June when the Environment and Economy Subcommittee⁴ of the House Energy and Commerce committee announced it intended to join in the bipartisan overhaul. However, witnesses at June 13 and July 11 subcommittee hearings mostly praised the existing law and the way it balances the chemical industry's effort to introduce new cutting-edge chemicals and the protection of confidential proprietary information. The state preemption issue has not come up at the House hearings yet.

What's next?

CSIA has been a truly bipartisan effort thus far. Of the 25 Senate cosponsors, 12 are Republicans and 13 are Democrats. But, as noted above, a bipartisan compromise is not likely to fully satisfy any constituency. The challenge between now and the end of the 113th Congress next year will be for legislators to find just the right "sweet spot" that makes maximum improvement in chemical safety, adequately responds to industry concerns and accommodates state interests. Developing the perfect package will take place behind closed doors as legislators and their staffs negotiate to bill language that can pass in both the House and Senate and can be signed into law.

GCA position:

The GCA Position Paper on Clean Water recognizes that all life is dependent upon clean, uncontaminated water. It says, "We support the original objective of the 1972 Clean Water Act to "restore and maintain the chemical, physical and biological integrity of the nation's waters." It also says that "The proliferation of excess . . . toxic substances pollutes our rivers, lakes and coastal waters."

BACKGROUND

The Problem:

More than 80,000 chemicals permitted in the U.S. have never been fully assessed for toxic impact on human health or the environment. That makes it impossible for EPA to take regulatory action against known health dangers or to require testing on chemicals suspected of being unsafe

The early 1970's were the "golden age" of environmental law when the National Environmental Policy Act, the Clean Water Act, the Clean Air Act and many other protections were first enacted (and signed into law by Presidents Nixon and Ford.) Part of this suite of important environmental statutes was the 1976 Toxic Substances Control Act (TSCA). It was supposed to make sure that chemicals were safe during their life cycle, from their manufacture, to their use and ultimately to their disposal.

Unfortunately the statute proved to have serious flaws. Unlike the other major environmental protection laws⁵, the basic TSCA statute has never been amended.⁶ So now, 37 years later, toxic chemicals still pose

⁴ Subcommittee Republicans: Chairman Shimkus (IL), Vice Chairman Gingrey (GA), Hall (TX), Whitfield (KY), Pitts (PA), Murphy (PA), Latta (OH), Harper (MS), Cassidy (LA), McKinley (WV), Bilirakis (FL), Johnson (OH), Barton (TX), and exofficio Upton (MI). Democrats Ranking Member Tonko (NY), Pallone, Jr. (NJ), Green (TX), DeGette (CO), Capps (CA), McNerney (CA), Dingell (MI), Schakowsky (IL), Barrow (GA), Matsui (CA), Waxman (CA).

⁵ European Union's "Registration, Evaluation and Authorization of Chemicals" (REACH) requires manufacturers, importers and customers to provide information on chemicals up and down the supply chain regarding their health and safety—approximately 143,000 chemicals were registered by the end of 2008. REACH also requires notification of the presence of substances of very high concern because of their potential negative impact on human health or the environment.

huge health and environmental risks. The Clean Air Act, Clean Water Act, Occupational Health and Safety Act (OSHA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and other protective statutes have not been able to fill the gap.

The 62,000 chemicals grandfathered under TSCA were permitted to be marketed without any testing of their effects on health or the environment because they were not considered to present an “unreasonable risk.” Only 200 of these chemicals have been tested by EPA, and only five of these have been partially regulated: polychlorinated biphenyls (PCBs), fully halogenated chlorofluoroalkanes, dioxin, asbestos and hexavalent chromium. Currently, EPA can conduct risk assessments on only 10 to 20 chemicals per year. EPA has prioritized 83 chemicals it plans to study, starting with seven in 2013. But under the current TSCA, chemicals are safety-tested only *after* they are being marketed and evidence shows they are dangerous and pose an unreasonable risk” to health or environment.

Over the years since TSCA was enacted, about 22,000 more chemicals have come to market in the U.S. Companies must notify the EPA of their intent to manufacture “new” chemicals, but no safety information is required. Instead EPA uses computer modeling to assess whether the new chemical presents an “unreasonable risk.” If EPA does not block the manufacture of a new chemical within 90 days, the chemical can be legally marketed.

Knowledge has exploded in recent decades about the impact of chemicals and the vulnerability of children to chemicals as well as the impact of continued long-term exposure to chemicals. The American Academy of Pediatrics has called for an overhaul in the way we manage chemicals. Other concerned groups include Physicians for Social Responsibility, the Lung Cancer Alliance, the Asbestos Disease Awareness Organization, the US Public Interest Research Group, the Environmental Defense Fund and the Natural Resources Defense Council. As a result of alarms raised by these and other groups, a dozen states have enacted regulations to protect their citizens from chemicals not restricted by EPA. Examples: California’s ban on certain flame retardants, Maryland’s ban on manufacture and sale of lead-containing children’s products, Massachusetts’s ban on the sale of certain mercury-added products, Oregon’s ban on art and craft supplies containing more than one percent of any toxic substance, and Connecticut’s, Washington’s and Vermont’s bans on bisphenol A.

The problem is not just industrial chemicals. Chemicals are found in household products, children’s toys and products, electronics, clothing, furnishings, and vehicles. These chemicals eventually end up in our land, air and waters.

Toxic release:

TSCA deals with the manufacture, marketing and use of chemicals. There is a separate but related problem: accidental release of dangerous chemicals into the environment. After Union Carbide released toxic gases in Bhopal, India in 1984 killing thousands and injuring half a million people, Congress became concerned about accidental releases in the U. S. and in 1986 passed The Emergency Planning and Community Right-to-Know Act to establish the Toxic Release Inventory (TRI). Polluters were required to report annually on their toxic chemical releases, using a very detailed form for releases of more than 2,000

⁶ The basic TSCA provisions have never been amended. However, Chapter II of TSCA, “Asbestos Hazard Emergency Response” was added in 1986 to address asbestos abatement in schools; Chapter III, “Indoor Radon Abatement” was enacted in 1988; and Chapter IV, “Lead Exposure Reduction” was enacted in 1992.

pounds and a more general form for smaller releases in excess of 500 pounds. The idea was that making data public about toxic releases would create an incentive for companies to make greater efforts to reduce or avoid releases of toxic chemicals and thereby avoid the negative publicity associated with being publicly documented as polluters. It worked: during the first ten years, companies reduced their pollution by 50%. In 1988, 3.4 million pounds of industrial releases covered by TRI occurred. By 1994, releases had been reduced to 1.56 million pounds.

TRI originally covered approximately 300 chemicals; the list was based on New Jersey and Maryland chemical reporting requirements. In 1993, EPA expanded the list to include ozone-depleting hydrochloro-fluorocarbons and 22 other chemicals that cause chronic health effects. In 1994, EPA added 286 chemicals connected to cancer and other human health problems. Today the current TRI toxic chemical list covers 682 chemicals and chemical categories, including those that cause significant adverse environmental effects.

Chemical manufacturers did not like having to comply with TRI and the inevitable pushback gained traction after the 2000 election. In the Bush administration, EPA in 2006 raised the threshold for detailed TRI reports from the original 2,000 pounds to 5,000 pounds. The change made about 3500 facilities that file TRI reports eligible to use the short form rather than providing more detailed information. A dozen states sued EPA for weakening TRI. Three years later, in early 2009, the omnibus appropriations bill overturned the 2006 relaxation of reporting requirements.

How to contact your legislators:

To send e-mail to your senator, go to http://www.senate.gov/general/contact_information/senators_cfm.cfm and scroll to the senator's name. There you will see a "web form" address in red type. Click on that address and follow the directions for sending e-mail.

To send email to your representative, go to <https://writerep.house.gov/writerep/welcome.shtml>

To telephone any legislator, call the Capitol switchboard: 202-224-3121. Ask for your senator's office by name. When the phone is answered, say that you want to leave a message about an issue. A very young aide will take the message or send you to the legislator's voice mail. This seems impersonal, but is nevertheless effective—legislators keep track of how many calls come in on different issues and the direction in which sentiment is running. Even a relatively small number of calls are enough to warrant serious consideration of the views expressed.

NAL updates serve in an **advisory capacity**, based on committee research. Individual clubs and members may act on any issue as they choose. Editors: Martha Phillips (mhphillips@optonline.net) and Suzanne Canfield (sbc@sbcandfield.com). All e-mails and faxes are sent from GCA Headquarters. To unsubscribe: Contact Sarah at GCA Headquarters, 212-753-8287, or sarah.frelinghuysen@gcamerica.org