



NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

TESTIMONY OF
SENATOR MICHAEL MOORE
MASSACHUSETTS STATE SENATE

ON BEHALF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES

REGARDING
CHEMICALS IN COMMERCE ACT – DISCUSSION DRAFT

BEFORE THE
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY
UNITED STATES HOUSE OF REPRESENTATIVES

APRIL 29, 2014

444 North Capitol Street, N.W., Suite 515, Washington, D.C. 20001
Tel: 202-624-5400 | Fax: 202-737-1069

Chairman Shimkus, Ranking Member Tonko and distinguished members of the House Environment and the Economy Subcommittee, I am Senator Michael Moore, Member of the Massachusetts State Senate and a member of the National Conference of State Legislatures (NCSL). I appear before you today on behalf of NCSL, a bi-partisan organization representing the 50 state legislatures and the legislatures of our nation's commonwealths, territories, and the District of Columbia. I thank you for the opportunity to testify on the important issue of reforming the federal chemical regulatory program.

Mr. Chairman, NCSL is appreciative of your efforts to engage in the necessary work to reform our federal chemical regulatory program, which has not been updated since the Toxic Substances Control Act (TSCA) was enacted in 1976. NCSL believes reforming TSCA is important to reflect the advances in science and technology to better evaluate and regulate chemicals that have been developed since 1976. While NCSL encourages Congress to reform and modernize TSCA, we must insist that any changes to the existing statute do not eliminate, through sweeping federal preemption, states' abilities to protect the health and safety of their citizens.

As currently drafted, The Chemicals in Commerce Act (CICA) includes onerous preemption language that would handcuff states from acting against harmful chemicals to protect their population. CICA essentially ignores nearly 40 years of state policy in an attempt to provide a one-size-fits-all approach to toxic chemicals regulation. It is very disconcerting for me as a state policymaker to think that the good work done in my state and in other states to regulate toxic substances since 1976 will be nullified if this draft bill becomes law. To strip states' residents of protections enacted by their elected officials would be a serious breach of state sovereignty and would leave everyone more susceptible to increased harm from toxic chemicals.

Sections 5, 6, and 17 of CICA, would essentially eliminate the ability of state policymakers to regulate toxic chemicals at the state level by divesting all authority away from states and localities and placing this authority solely with the Administrator of the Environmental Protection Agency (EPA). The EPA would decide what constitutes a "significant new use" of a chemical substance, the notice requirements for the development of new chemical substances or mixtures and safety determinations would all be federalized under CICA, and the designation of

a chemical as “low” or “high” priority would also fall to the EPA. This approach would: (1) prevent states from establishing or continuing to enforce any state regulation of chemicals if the EPA has made a safety determination and priority designation of the chemical; (2) prohibit states from regulating or banning any new chemical when the EPA makes a safety determination, and, (3) eliminate states’ abilities to enact stricter or stronger laws than the federal government. States’ inability to go beyond federal requirements to protect health and safety is especially troubling and runs counter to current law which allows for states to regulate toxic substances in a manner that complements the federal scheme.

CICA may also have unintended and adverse consequences that extend into other areas of state environmental regulation, such as air and water pollution. CICA’s broad preemption language may also negate state laws directed towards air or water quality, because current language does not explicitly exempt such pollution laws. For example, the ambiguity of the CICA draft may preempt such laws as New York’s Mercury Reduction Program that regulates the amount of mercury in the air.

States have enjoyed a long history of co-regulation with the federal government in environmental protection and have made sound policy decisions benefitting the American people. We do not want to see such collaborative protections eroded, or in the case of CICA, completely eradicated. NCSL has long standing policy on environmental federalism that recognizes the need to preserve and strengthen uniform minimum federal standards for environmental protection while maintaining statutory authority for states to enact state environmental standards that are more stringent than minimum federal standards. There must surely be a more harmonious solution to update TSCA, which sorely needs reforming and harmonize our shared federal/state goals of protecting our citizens and regulating chemical substances than CICA.

In the absence of federal action to address issues related to TSCA implementation, many state legislatures have enacted legislation to regulate individual chemicals. States such as my own state of Massachusetts joined by California, Connecticut, Illinois, Maine, Michigan, Montana, New Hampshire, Ohio, Oregon, Tennessee, South Carolina, and Wisconsin have also developed comprehensive state chemical policies that aim to establish broad and permanent frameworks to systematically prioritize chemicals of concern, close data gaps on those chemicals and restrict

their uses in those states. More broadly, there are laws in 24 states that regulate toxic chemicals. The CICA would preempt those state laws, rendering them useless, and would prevent states from regulating chemicals in the future.

In my home state of Massachusetts we have enacted many laws aimed at protecting our citizens from harmful chemicals and pollutants which are all now in jeopardy under CICA. My state of Massachusetts has laws on the books that ban the sale of mercury-added products; laws that regulate lacquer sealers and flammable floor products; and a comprehensive chemicals management scheme, that requires companies that use large quantities of particular toxic chemicals to evaluate and plan for pollution prevention, implement management plans if practical, and annually measure and report the results.

As an environmental police officer I worked under the office of the State Attorney General's Environmental Strike Force to investigate environmental crimes associated with illegal chemical practices. During my 18 years there, I participated in every facet of criminal investigations, from investigating crime scenes, to examining corporate manifests and records, to serving search warrants for criminal, civil and administrative proceedings. The state plays an essential role as the primary investigative authority in these matters, often coordinating with several federal and state organizations to ensure a safe and efficient response. For 18 years my colleagues and I were tasked with holding individuals and companies responsible for their violations of state chemical laws. These were not investigations into trivial incidents, but cases that required strong state action to serve justice. In 1993, I was involved with a case in which a metal manufacturing plant failed to use standard procedures when disposing of residual sodium, resulting in an explosion. Upon the arrival of first responders, firefighters attempting to quell the blaze were significantly injured due to several failures by the company. This included a failure to warn responding officers about the current state of the involved chemical, which explodes upon contact with water. When firefighters began containment procedures, several were critically burned through their protective gear by the reacting chemical. Through the Attorney General's Strike Force, Massachusetts was able to hold the responsible party accountable, and bring justice to those injured in the incident. Without state participation, enforcement of a comprehensive chemical policy would be nearly impossible, current language would drastically hinder state enforcement.

By eliminating the ability of state's to enforce laws that are comparable to the federal standards, the responsibility of holding violators responsible would fall solely on the federal government, despite established state organizations that have been proven successful. States embrace the opportunity to provide improved safety for their residents and the environment, but preemption language in this draft significantly endangers that enforcement ability.

As I shifted the focus of my public service to that of a legislator, it became even more apparent how intricately states must be involved in chemical policy. I commend the Subcommittee for their commitment to businesses and interstate commerce in this draft, and understand the motivations for a uniform federal chemical policy to promote those goals. However, the advancement of these ideas cannot come at the expense of public and environmental safety. The TCSA has not been updated for nearly 40 years, and states have acted to pass laws that complement the federal policy. This action may have been motivated by a desire to regulate a chemical like mercury that is acknowledged as dangerous, but fails to meet the current federal standards. Or they could have been passed to address a specific need relating to an industry with greater prevalence in one state. While the reasoning behind specific bills may change, they are all passed with the welfare of the public in mind. Beyond the host of Massachusetts laws that provide increased protection from toxic chemicals, several communities in my district are currently experiencing difficulties and costs associated with federal preemption of chemical laws at rail yards. I share the resident's belief that their proximity to a potential spill entitles them to a measure of involvement in ensuring chemical safety. When 100 gallons of a chemical called styrene, which is used in the manufacture of Styrofoam, were spilled in one of these preempted yards, a cooperative effort of rail yard employees and workers from state and municipal agencies was responsible for the cleanup. The incident was handled safely and professionally by all involved parties with only minor complaints of irritated eyes and lingering smells. However, if a rail yard is federally preempted from state law, the citizens of those communities have no recourse to protect their homes and families from future spills. There must be a balance struck between the benefits of interstate commerce and the need for public safety. State legislatures have and must continue to have a role in chemical policy in order to reach that balance.

Modernizing TSCA

NCSL encourages Congress to reform and modernize TSCA but does not believe the current discussion draft adequately accomplishes this goal. At a minimum, NCSL believes proposed TSCA reform legislation should embody the elements outlined in NCSL's Federal Chemical Policy Reform Policy Directive:

- **States Rights:** State governments play a critical role in environmental regulation. For nearly all federal environmental statutes, there are provisions to extend the reach of the federal government by delegation of program authority and/or provision of federal grants to support state implementation of environmental requirements in lieu of or in addition to the federal requirements. Any reform of TSCA should preserve state rights to manage chemicals, and resources should be provided for state level implementation.
- **Act on the Harmful Chemicals First and Promote Safer Alternatives:** Persistent, bioaccumulative and toxic chemicals (PBTs) are uniquely dangerous and should be phased out of commerce except for critical uses that lack viable alternatives. Exposure to other toxic chemicals, like formaldehyde, that have already been extensively studied should be reduced to the maximum extent feasible. Research into chemicals and chemical processes designed to reduce or eliminate negative environmental impacts of chemicals should be expanded, and safer chemicals favored over those with known health hazards.
- **Ensure Broad Access to Mandatory Safety Data on All Chemicals:** Chemical manufacturers should bear the burden of proof of safety of their products, and should be required to provide full information on the health hazards associated with their chemicals, how they are used, and the ways that the public or workers could be exposed. The public, workers, and businesses should have full access to such information.
- **Protect All People, and Vulnerable Groups, Using the Best Science:** All chemicals should be assessed against a health standard that protects all people and the environment, especially the most vulnerable subpopulations, including children, low-income people, racial and ethnic minorities, workers, and pregnant women. EPA should adopt the recommendations of the National Academy of Sciences for reforming risk assessment.

Biomonitoring by the Centers for Disease Control and Prevention should be significantly expanded and used by EPA to assess the effects of pollution on people.

Modernizing TSCA can help assure that we protect the nation's interest in a strong American business of chemistry – and assure that the United States produces products that save lives, protect our children, make our economy more energy efficient, and reduce greenhouse gas emissions. While NCSL wholeheartedly supports the need for toxic chemical reform legislation, we must oppose any bill that so egregiously preempts states laws.

NCSL is encouraged by the fact that the Chairman has released this language as a draft, and hopes the committee will continue to engage in meaningful discussion with the states before introducing TSCA reform legislation that would preempt state laws. NCSL staff stands ready to work with this subcommittee if it moves forward with formal legislation on TSCA. Thank you again for the opportunity to provide a voice for the importance of state sovereignty in protecting the health and welfare of our citizens against harmful chemicals. I look forward to questions from members of the subcommittee.

Appendices:

NCSL Federal Chemical Reform Policy

NCSL Environmental Federalism Policy

State Laws Chart