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MATTHEW RODRIQUEZ
SECRETARY FOR
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EDMUND G. BROWN JR.
GOVERNOR

June 25, 2013

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Barbara Boxer
United States Senate
112 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Kirsten Gillibrand
United States Senate
478 Russell Senate Office Building
Washington, D.C. 20510

RE: S. 1009, Chemical Safety Improvement Act (CSIA) – Concern with Preemption Language

Dear Senators Feinstein, Boxer, and Gillibrand:

I am writing on behalf of the California Environmental Protection Agency (Cal/EPA) to express serious concern about the effects of S. 1009 on California's ability to protect its residents from toxic chemicals, air pollution, and threats to drinking water. You have previously received letters from the California Department of Toxic Substance Control and the California Attorney General's Office expressing reservations about this proposed legislation. (See attached letters of May 31 and June 11, 2013.) We agree with the concerns stated in these letters and write separately to note that as currently written, S. 1009 also could jeopardize California's ability to control greenhouse gases and thereby meet the State's targets under AB 32, the California Global Warming Solutions Act of 2006. Although the Toxic Substances Control Act (TSCA) is clearly in need of reform, we respectfully request that S. 1009 should not be adopted unless amended prior to moving forward in the Senate to address major concerns with the legislation, including the provisions governing preemption of state laws.

The existing and more reasonable preemption provisions currently in TSCA have allowed California to take necessary action over the past three decades to reduce toxic chemicals and protect public health and the environment. Many of our regulatory actions have resulted in beneficial changes in product composition and chemical use that extend far beyond the borders of our state. As an example, California's Safe Drinking Water and Toxic Enforcement

Act (Proposition 65) stimulated nationwide reformulation of numerous products to remove chemicals known to the State of California to cause cancer or reproductive harm. Successes under this law include removing lead from water faucets, eliminating trichloroethylene (TCE) from liquid correction fluid, and more recently removing flame retardants from infant nap mats.

California laws or regulations have also provided a model that is followed in other states or nationally. For instance, California legislation, adopted in 2007 to ban certain phthalates in toys and children's products [Cal. Health & Saf. Code, §§ 108935-108939, Stats. 2007, c. 672, A.B. 1108], was the inspiration for Senator Feinstein's legislation, S. 2663, banning these same chemicals nationally in the Consumer Product Safety Improvement Act of 2008.

After consulting with scientific and legal experts who work for the boards and departments within Cal/EPA, we have identified dozens of California laws and regulations that may be at risk of preemption under the current provisions of S. 1009. Information concerning each of these laws and regulations could be provided at your request, and several examples are highlighted here:

- Global Warming Solutions Act of 2006 (AB 32): Some very potent greenhouse gases, such as sulfur hexafluoride and methane, are of relatively low toxicity. If the EPA Administrator designates any of these chemicals as "Low Priority" under S. 1109, states will be barred from any "prohibition or restriction on the manufacture, processing, distribution . . . or use" of these chemicals. This provision could bar state actions to regulate or control potent greenhouse gases and could undermine California's efforts to achieve our reduction targets under AB 32.

- Reducing Ozone Pollution: California contains major geographic areas in "Extreme" ozone non-attainment. Ozone is a Criteria Air Pollutant that causes or contributes to respiratory disease, asthma, emergency room visits, hospitalizations, and premature death. Nonattainment areas are required to take aggressive action to reduce ozone pollution, including reducing the emissions of ozone precursors such as volatile organic compounds (VOCs). S. 1009 sec. 15, subsection (c) states that the preemption does not apply to a state regulation that is "... adopted under a law of the State . . . related to . . . air quality . . . that (A) does not impose a restriction on the manufacture, processing, distribution in commerce, or use of a chemical substance." The California Air Resources Board, however, has a number of regulations that would not be able to take advantage of the exception in subsection (c) because they impose restrictions on the "use" or "distribution in commerce" of specific VOCs in products. This could significantly impair California's efforts to come into attainment with the Clean Air Act and could put millions of people in the Los Angeles area and San Joaquin Valley of California at increased risk of respiratory disease.

- Drinking Water Safety: More than 60 California water systems contain hexavalent chromium or perchlorate. It is reasonably likely that these will be designated as "High Priority" chemicals under S. 1009, thereby immediately preempting all future state actions, and retroactively preempting existing state laws and regulations once U.S. EPA has acted. This puts future California activities to protect sources of drinking water in immediate jeopardy, and also may endanger historic regulations, including our 1989 ban on the use of hexavalent chromium in cooling towers; our 2007 strict performance and emissions requirements for the chrome plating industry; and the Perchlorate Best Management Practices regulations of 2006.

- Consumer Product Safety: Numerous California laws and regulations have collectively worked to increase the safety of consumer goods and reduce the use of toxic chemicals in products. Specific examples include the 2006 ban on certain flame retardants, which has been replicated or expanded in at least a dozen states; bans on mercury in products ranging from thermostats to thermometers, which are now in place in more than 20 states; a phase-out by 2014 of toxic substances including copper, cadmium, hexavalent chromium, lead, mercury and asbestos in automobile brake pads; and a ban on toxic chemicals in art supplies for young school children. The California Safer Consumer Products regulations, slated for release next month, will constitute the most ambitious effort to date to systematically address the issue of toxic chemicals in consumer products by promoting innovation in safer alternatives and green chemistry. Depending on the scope and interpretation of S. 1009 and the resulting actions of the EPA Administrator, components of the above laws and regulations will be put at risk.

In addition to the above issues, we are concerned that the lack of clarity of some of the preemption provisions in S. 1009 would open the door to extensive litigation. For example, the preemption of state actions that prohibit or restrict "the manufacture, processing, distribution in commerce or use of a chemical substance" in §15(a) and (b) should not be understood to limit states from requiring that information be provided to the public; however we recognize that the ambiguity of the language could cause others to claim that a label or warning to consumers is an indirect "restriction on the . . . distribution . . . or use". This issue requires clarification.

I am confident that this legislation is not intended to invalidate or undermine existing California laws and regulations governing public health and the environment, nor is it the intent to block future innovation and health protection at the state level. Accordingly, we respectfully request that you reconsider the provisions of S. 1009 to ensure that it is written in a manner that will be successful in protecting the public from toxic chemicals, in a reasonably expeditious manner, without unintentionally restricting the ability of states to protect consumers, health, and the environment.

Sincerely,

Matthew Rodriquez
Secretary for Environmental Protection

Attachments

cc: See next page.

cc: Ms. Katie Wheeler Mathews
Deputy Director
Washington D.C. Office of California Governor Edmund G Brown, Jr.

Mr. Cliff Rechtschaffen
Senior Advisor
Office of California Governor Edmund G. Brown Jr.

Brian Nelson
Special Assistant Attorney General
California Department of Justice

Sally Magnani
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Ms. Debbie Raphael, Director
California Department of Toxic Substances Control

Mr. Richard Corey
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Matthew Rodriquez
Secretary for
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Edmund G. Brown Jr.
Governor

May 31, 2013

Felix S. Yeung, Esq.
Legislative Assistant
Office of Senator Dianne Feinstein
Felix_Yeung@feinstein.senate.gov

Dear Mr. Yeung:

I am writing to you to convey initial comments from the California Department of Toxic Substances Control (DTSC) regarding the proposed Chemical Safety Improvement Act ("the Act"). DTSC is extremely concerned about this bill. DTSC recognizes that the Act includes some positive reforms to the Toxic Substances Control Act ("TSCA"), but at this point, the areas of concern overshadow these improvements. While most of DTSC's concerns center around the Act's preemption provisions, DTSC also has broader concerns regarding the functionality and effectiveness of the Act.

Areas of concern:

- **The expansion of the preemptive effect of EPA action under TSCA.**
    - The Act would broaden vastly the scope and conditions of preemption by TSCA of state and local chemical regulations.
    - There is a need for clarification regarding what constitutes a "prohibition or restriction on the manufacture, processing, or distribution in commerce or use of a chemical substance," in order to clearly define what types of state actions are intended to be preempted under the Act.
        - Industry may argue that a labeling requirement could be considered a restriction on the use of a chemical substance, which is far too broad an interpretation of this phrase.
    - States would be barred from enforcing existing chemical regulations after issuance of a safety determination by US EPA, even when state regulations are consistent with the findings of US EPA's safety determinations.
        - States should be allowed to continue to enforce their regulations until the Administrator for US EPA promulgates a rule establishing necessary restrictions after making a determination.
    - States would be barred from imposing new prohibitions or restrictions on chemical substances that are identified as "high-priority" as of the time the

Administrator of US EPA publishes a schedule for conducting a safety assessment, not as of the time that such a determination is actually made.
        - States should not be barred from imposing regulations on chemical substances for which they have already evaluated the safety and determined that prohibitions or restrictions are necessary to protect public health or the environment merely because the Administrator has released a schedule by which US EPA will conduct its own assessment.
    - The criteria for a state waiver are nearly impossible to meet.
        - The requirement that "compelling State or local conditions" warrant the waiver is unreasonable, as the risks presented by exposure to chemical substances are unlikely to present localized risks.
- **The safety standard to be used in making safety determinations**
    - There is a need for clarification of the definition of "unreasonable risk of harm to human health or the environment," which is central to the regulatory standard of US EPA's safety determination.
- **The lack of deadlines for US EPA actions both in making the initial determinations of high-priority and low-priority chemicals, and in acting upon unreasonable risks that are identified**
    - Proposed language only says that the US EPA Administrator "shall make every effort to complete the prioritization of all active substances in a timely manner."
        - There is conflicting language in Section 4, subparagraph (e)(3)(E)(i) and (ii) under "Identification of High-Priority Substances." These provisions state that the Administrator both "shall" and "may" identify a chemical substance that has the potential for high hazard or exposure as a high-priority substance.
    - Deferring safety determinations until after receipt of additional test data and information may allow the chemical industry to actively stall the assessment process if no deadline is included.
    - There is no proposed deadline by which the US EPA Administrator must promulgate a rule establishing necessary restrictions after making a determination that a chemical substance does not meet the safety standard under current intended conditions of use.

<u>Background:</u>
The Act first requires US EPA to identify all active chemicals, which are those in use in non-exempted products in the last 5 years. These chemicals will represent US EPA's initial list of chemicals, and EPA will then consider existing information, and where more is needed, will solicit this information from the public. EPA is then charged with conducting a prioritization screening of these chemicals. This screening designates chemicals as either low-priority, when they are "likely to meet the safety standard," or high-priority, indicating that they present a high hazard and exposure or high hazard or high exposure. EPA can also prioritize chemicals that lack sufficient information as high-priority.

Once prioritized, the Administrator of US EPA will publish a schedule for the completion of a safety assessment of high-priority chemicals on a chemical-by-chemical basis. The assessments will result in a safety determination by the Administrator as to whether a chemical substance meets the safety standard under the intended conditions of use. The safety standard is defined as "a standard that ensures that no unreasonable risk of harm to human health or the environment will result from exposure to a chemical substance." If there is a determination that there is insufficient information to make this determination, the Administrator may obtain new data by request, rule, testing consent agreement, or order.

If a chemical does not meet the safety standard under current intended conditions of use, the Administrator may impose, by rule, necessary restrictions or prohibitions on use of the chemical, or a ban or phase-out of the chemical. The latter must be based on a cost-benefit analysis.

The Act significantly changes the preemption provisions in TSCA (currently found in section 18). Under TSCA, a state may apply to the Administrator for an exemption from preemption for a state requirement

> "designed to protect against a risk of injury to health or the environment associated with a chemical substance, mixture, or article containing a chemical substance or mixture if (1) compliance with the requirement would not cause the manufacturing, processing, distribution in commerce, or use of the substance, mixture, or article to be in violation of the applicable requirement under [TSCA], and (2) the State or political subdivision requirement (A) provides a significantly higher degree of protection from such risk than the requirement under [TSCA] and (B) does not, through difficulties in marketing, distribution, or other factors, unduly burden interstate commerce."

Under the proposed Act, however, States are preempted from enforcing existing requirements, or establishing new requirements, once the Administrator has issued a completed safety determination for a chemical substance, or published a schedule for conducting a safety assessment of a chemical identified as high-priority, respectively. The preemption provision would apply to State requirements that represent "a prohibition or restriction on the manufacture, processing, or distribution in commerce or use of a chemical substance…", as well as certain requirements for the development or test data or information that would produce information similar to that required under section 4, 5, or 6 of the Act.

The Act does include a section on state waivers from the preemption provisions, but the criteria to qualify for such a waiver make obtaining one nearly impossible. The Act provides that if the State "determines in cannot wait until the end of the period specified in the established schedule and deadline for the completion of a full safety assessment and determination," the Administrator may provide a waiver from the preemption provisions upon a determination that:

> "(i) compelling State or local conditions warrant granting the waiver to protect human health or the environment;
> (ii) compliance with the proposed requirement of the State or political subdivision of the State does not unduly burden interstate and foreign commerce in the manufacture, processing, distribution in commerce, or use of a chemical substance;
> (iii) compliance with the proposed requirement of the State or political subdivision of the State would not cause a violation of any applicable Federal law, rule, or order; and

(iv) the proposed requirement of the State or political subdivision of the State is based on the best available science and is supported by the weight of the evidence; or

(2)(A) the Administrator finds a safety assessment or determination has been unreasonably delayed; and

(B) the State certifies that—

(i) the State has a compelling local interest to protect human health or the environment;

(ii) compliance with the proposed requirement of the State does not unduly burden interstate and foreign commerce in the manufacture, processing, distribution in commerce, or use of a chemical substance;

(iii) compliance with the proposed requirement would not cause a violation of any applicable Federal law, rule, or order; and

(iv) the proposed requirement is grounded in reasonable scientific concern."

DTSC is very concerned that the bar has been set too high for obtaining state waivers from the expanded preemption provisions in the Act. The preemption provisions would potentially impact the ability of DTSC to implement certain regulatory responses under the Safer Consumer Products regulations, including product information for consumers, use restrictions on chemicals and consumer products, product sales prohibitions, engineered safety measures or administrative controls, end-of-life management requirements, and advancement of green chemistry and green engineering.

Thank you very much for reaching out to DTSC and allowing us the opportunity to provide input on these important issues.

If you have any questions, please feel free to contact me at (916) 324-7663 or Joshua.Tooker@dtsc.ca.gov

Sincerely,

Josh Tooker
Deputy Director for Legislation
Department of Toxic Substances Control

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

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June 11, 2013

The Honorable Barbara Boxer
Chairwoman, Senate Environment
and Public Works Committee
112 Hart Senate Office Building
Washington, D.C. 20510

RE: Concerns with Preemption Language in Chemical Safety Improvement Act, S.1009

Dear Senator Boxer:

I write to convey the concerns of the California Attorney General regarding the proposed Chemical Safety Improvement Act, S.1009. Although we recognize that the Toxic Substances Control Act (TSCA) is in need of substantial reform, we believe that S.1009, as currently drafted, cripples the police powers that California relies on to protect public health and the environment and, in addition, severely compromises California's authority to supplement and complement federal efforts to regulate the safety of chemicals. As a leader in chemical safety and consumer protection, California has a direct stake in the outcome of any reform of TSCA. We respectfully request that S.1009 be amended to address the problems outlined below.

California's Role in Protecting Public Health

California has been a leader in enacting laws that protect public health and the environment, and has served as a laboratory for innovation for other states and the federal government. Many of the innovative laws that California has enacted are jeopardized by S. 1009.

Green Chemistry

Over the past several years, California has undertaken to implement ground-breaking "green chemistry" programs, reflecting an approach to environmental and public health protection that focuses on reducing or eliminating the use and generation of hazardous substances. Green chemistry marks a sharp departure from managing hazardous substances after they already have entered consumer products and our environment. In 2005, the State enacted the California Safe Cosmetics Act, becoming the first state in the nation to regulate toxic ingredients in cosmetics. The next year, California established the California Environmental Contaminant Biomonitoring Program to identify toxics accumulating in California residents and, in 2007, banned plasticizers called phthalates in children's products. In 2008, California enacted

two bills that together created the State's comprehensive Green Chemistry Program. Under that program, the Department of Toxic Substances Control (DTSC) is in the final stages of promulgating regulations that will establish a process for identifying chemicals of concern in consumer products and their potential alternatives, in order to determine how best to limit exposure or to reduce hazard levels.

Proposition 65

The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), was enacted as a ballot initiative in November 1986 by 63% of the voters. Proposition 65 was designed to protect California citizens and drinking water sources from chemicals known to cause cancer, and birth defects or other reproductive harm. Proposition 65 requires the Governor to publish, at least annually, a list of chemicals known to the State to cause cancer or reproductive toxicity. Businesses may not discharge these chemicals to sources of drinking water and must warn individuals about exposures to the listed chemicals. The Attorney General is the only official with statewide authority to enforce Proposition 65, and actions by the Attorney General in the name of the People are brought under the sovereign authority of the State.

Using this authority, the Attorney General's Office has taken a number of steps over the years to protect public health, including:

- Required manufacturers to reformulate the "Brazilian Blowout" hair straightener which contained high levels of formaldehyde that sickened hair stylists and their customers, and to provide warnings and accurate labeling of such products.

- Required manufacturers, sellers, and distributors of vinyl "jump houses" for children, to lower the levels of lead in the vinyl. Children playing in the jump houses were previously exposed to significant levels of lead from the vinyl.

- Required terminal operators at the Los Angeles and Long Beach Ports to provide a strong warning program about diesel fumes emitted into surrounding neighborhoods, and to implement a Clean Trucks Program to reduce diesel emissions from Port operations.

- Required manufacturers to reduce the lead in calcium supplements, multi-vitamins, and other nutritional supplements, including prenatal supplements, supplements for women of childbearing age, and supplements for children to levels below where Proposition 65 requires point-of-sale warnings, an area in which the Federal government has not taken regulatory action.

- Required manufacturers of wooden playground structures to stop using wood treated with chromated copper arsenate, which exposed children to high levels of arsenic.

- Required manufacturers of Mexican chili candies to reduce the high lead levels in their candies by improving their manufacturing processes, including washing the chilies before manufacture. The candies are eaten extensively by children in the Mexican-American community in California.

California's Programs are Threatened by S.1009's Overreaching Preemption Provisions

States Must Not Be Preempted in the Absence of Federal Regulation

Among the bedrock powers reserved to the states under the Tenth Amendment to the U.S. Constitution is the exercise of police powers to protect the health and safety. The courts have long recognized that regulation of health and safety matters is historically a matter of significant state concern, and the federal government has traditionally granted the states great latitude to protect the health and welfare of their citizens. To take away those historical police powers through preemption in instances where the federal government has yet to regulate or will not be regulating a chemical substance serves only to increase the risk to public health. Under S.1009:

- States are prohibited from enforcing existing state laws or from adopting new laws regulating chemical substances determined by U.S. EPA to be "high priority" even before federal regulations or orders become effective, creating a period of months or potentially years where such chemical substances are unregulated. See S.1009, § 15(a)(2).

- States are barred from adopting and enforcing new laws regulating "low priority" chemical substances – of which there will be tens of thousands – even though the U.S. EPA Administrator is also expressly prohibited from regulating those substances and has made only a preliminary safety assessment that is immune from judicial review. This creates a gaping and permanent regulatory vacuum. See S.1009, §§ 4(e)(3)(H)(ii), 4(e)(5) and 15(b)(2).

States Must Retain the Ability to Ban Use of a Chemical Substance In-State

Even where the federal government has acted to regulate a chemical substance, states must retain the ability to ban the use of that chemical substance in-state, in order to protect its residents' health and safety. In-state use bans – which do not prohibit the manufacture or processing of the chemical substance for export – do not unduly burden interstate commerce.

- Existing law gives states authority to prohibit the use of a chemical substance in-state without having to apply to the U.S. EPA for a waiver. See 15 U.S.C. § 2617(a)(2)(B)(iii). S.1009 revokes this authority by preempting state prohibitions or restrictions on the use of a chemical substance. See S.1009, §§ 15(a)(2), 15(b)(1) and 15(b)(2).

States Play a Vital Role as Co-Enforcers of Federal Standards

In numerous areas of environmental law, states and their political subdivisions play a vital role in enforcing federal standards. For example, under the nation's solid hazardous waste law – the Resource Conservation and Recovery Act (RCRA) – once state programs are certified by the federal government, states assume primary responsibility for enforcement. With respect to consumer product safety, federal law provides states with the ability to enforce federal regulations and orders. Under existing TSCA provisions, states are allowed to enact requirements that are "identical to the requirement prescribed by the Administrator," gaining the ability to enforce that requirement without having to apply for a waiver.

- S.1009 provides none of the above avenues for state enforcement. Rather, enforcement of all new prohibitions or restrictions on chemical substances is wholly dependent on the resources, priorities, and discretion of the U.S. EPA and the U.S. Department of Justice.

States Should Have a Reasonable Opportunity to Obtain a Waiver to Enforce a Higher Degree of Protection Within Their Borders

Under the existing provisions of TSCA, where the Administrator has adopted a rule with respect to a chemical substance, states are allowed to apply for an exemption to provide a higher degree of protection, so long as state requirements do not make it impossible to also comply with federal law (i.e., create a conflict) or unduly burden interstate commerce. See, e.g., 15 U.S.C. 2617(b).

- S.1009 has no directly analogous provision. The bill allows states to apply for a waiver to enforce a prohibition or restriction, if the application is filed prior to the Administrator's completion of a safety assessment/safety determination. But, depending on the timing of the state's application, the waiver either terminates automatically after completion of the safety assessment/safety determination or terminates if it "conflicts" with the Administrator's safety assessment/safety determination (which itself is not a restriction or prohibition). See S.1009, § 15(c)(6).

- Even then, S.1009 sets up an unrealistic test if a state seeks to obtain a waiver to adopt and enforce its requirements. Specifically, a state must certify that "the State has a compelling local interest to protect human health or the environment." See S. 1009, §§ 15(d)(1)(B)(i) and 15(d)(2)(B)(ii). It is unclear what is meant by "local interests" or what showing would be required. It is likely not possible to show unique circumstances that differentiate health risks by geography, since dangerous chemicals don't act differently in different locations. Risks from exposure to chemicals in the home, at the office or at retail establishments do not vary from one state to the next. Under this standard, it is unclear whether a waiver could ever be granted.

Thank you for your consideration of our comments. Please feel free to contact me if you have any questions or need further information.

Sincerely,

Brian Nelson (SM)

BRIAN NELSON
Special Assistant Attorney General

For KAMALA D. HARRIS
Attorney General

cc: The Honorable Diane Feinstein