



June 30, 2013

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

The Honorable David Vitter
Ranking Member, Senate Environment
and Public Works Committee
516 Hart Senate Office Building
Washington, DC 20510

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

Dear Senators Boxer and Vitter:

We write to you today to convey our deep concerns with the proposed Chemical Safety Improvement Act, S.1009 as it is currently written. While we understand the need to reform the Toxic Substances Control Act (TSCA), and appreciate the efforts of the late Senator Lautenberg and Senator Vitter to try and achieve this goal, the current draft of this legislation is deeply flawed and is especially unacceptable in regards to the provision that would preempt the existing right of states to regulate toxic substances.

For over a decade, state legislatures have sought to protect human health from the dangers of toxic chemicals. The action of the states has been driven by inaction at the federal level. Unfortunately, S.1009 would halt the ability of the states to protect public health without any assurance whatsoever that the federal government will actually regulate these chemicals to protect public health.

The Tenth Amendment of the US Constitution and the existing Toxic Substances Control Act recognize the right of states to exercise police powers to protect the health and safety of the citizenry. The preemption measures in S.1009 would limit that responsibility by:

- Prohibiting the states from enforcing their existing laws or from adopting new laws regulating chemical substances determined by the EPA to be “high priority.” This prohibition takes effect prior to federal regulations even being proposed, much less promulgated. With no mandatory timeline for the regulation this will lead to exposure of our citizens to chemical identified as dangerous. This provision alone suggest that the purpose of this Act is not to modernize TSCA but to frustrate the efforts of states to fill the vacuum created by Federal regulatory failure.
- States would not be allowed to adopt any new laws regulating chemical substances deemed “low priority.” Further, the legislation bars the EPA Administrator from regulating those same substances after only a preliminary safety assessment which is immune from judicial review.

- The legislation revokes a state’s authority to prohibit the use of a chemical substance in-state without having to apply to the EPA for a waiver on the substance.
- There is no avenue for states to enforce federal law. Enforcement of all new prohibitions or restrictions on chemical substances is wholly dependent on the priorities and resources of EPA and the Department of Justice.

Among the strengths of the current TSCA is the ability of states to obtain a waiver to enforce a higher degree of protection within their borders. S.1009 sets an extremely high bar for states to achieve any waiver. One that many experts believe makes it impossible for a state to gain and maintain a waiver for enforcement of a particular chemical substance.

Federal regulations could and should be viewed as the floor for protecting public health, a level in which everyone must achieve. Under the existing provisions of TSCA, states are allowed to apply for an exemption to provide a higher level of protection in respect to a chemical substance as long as it does not impede interstate commerce.

Unfortunately, S.1009 lacks such a provision. The bill does allow a state to apply for a waiver to enforce a prohibition or restriction. The application must be filed prior to the Administrator’s determination and terminates automatically after completion of the safety assessment or terminates if it conflicts with the Administrator’s safety determination.

Furthermore, the requirement that a state certify “the State has a compelling local interest to protect human health or the environment” creates endless opportunities for chemical companies to litigate state rules. The meaning of “local interest” is undefined, and the ability to demonstrate a unique circumstance for a particular geography is peculiar considering the fact that dangerous chemicals don’t act differently in different locations.

We believe that failure to address this fundamental issue vitiates any benefit derived from action on the legislation. We strongly urge the removal of all language that preempts the ability of states to safeguard the public. States must be allowed to retain their existing authority as established in the existing TSCA and guaranteed by the Tenth Amendment.

Sincerely,

Alaska State Representative Beth Kertulla
House Minority Leader
NCEL Board Member

Alaska State Representative Geran Tarr

Alaska State Senator Bill Wielechowski

California State Senator Hannah-Beth Jackson
Former Committee Chair, Environmental Safety and Toxic Materials

California State Senator Fran Pavley
Committee Chair, Natural Resources and Water

Connecticut State Representative Diana Urban
NCEL Board Member

Connecticut State Representative Elissa Wright
Assistant Majority Leader

Connecticut State Senator Beth Bye

Connecticut State Senator Steve Cassano

Connecticut State Senator Joseph Crisco

Connecticut State Senator Bob Duff
Committee Chair, Senate Energy

Connecticut State Senator Terry Gerratana
Committee Chair, Senate Public Health

Connecticut State Senator Toni Nathaniel Harp

Connecticut State Senator Gary LeBeau
Committee Chair, Senate Commerce

Connecticut State Senator Anthony Musto

Delaware State Representative John Kowalko
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Illinois State Representative Elaine Nekritz
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The Honorable Paul Froehlich
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Iowa State Representative Dan Kelley

Iowa State Representative Sharon Steckman

Kentucky State Representative Joni Jenkins

Kentucky State Representative Mary Lou Marzian

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Committee Chair, Insurance and Financial Services

The Honorable Hannah Pingree
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Committee Chair, Legacy

Minnesota State Representative Diane Loeffler

Minnesota State Representative Joe Mullery
Committee Chair, Early Childhood and Youth Development Policy

Minnesota State Representative Barb Yarusso

Minnesota State Senator John Marty
Committee Chair, Environment and Energy

Montana State Representative Ellie Hill

The Honorable Don Preister
Nebraska State Senate - Retired

The Honorable Richard Russman
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New Jersey State Senator Bob Smith
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New Mexico State Representative Mimi Stewart
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The Honorable Steve Fischmann
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North Dakota State Senator Tim Mathern

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Oregon State Representative Alissa Keny-Guyer

Oregon State Representative Jeff Reardon

Oregon State Senator Jackie Dingfelder
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Washington State Senator Karen Fraser
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Washington State Senator Adam Kline

Washington State Senator Jeanne Kohl-Welles

Washington State Senator Sharon Nelson
Assistant Ranking Member, Ways and Means

Washington State Senator Christine Rolfes
Ranking Member, Natural Resources and Parks