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SEPTEMBER 18, 2013

REGULATION OF EXISTING CHEMICALS AND THE ROLE OF PRE-EMPTION UNDER SECTIONS 6 AND 18 OF THE TOXIC SUBSTANCES CONTROL ACT

U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON ENERGY AND COMMERCE, SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

ONE HUNDRED THIRTEENTH CONGRESS, FIRST SESSION

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Opening Statement of the Honorable John Shimkus
Subcommittee on Environment and the Economy
Hearing on "Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the Toxic Substances Control Act"
September 18, 2013

(As Prepared for Delivery)

Today's hearing continues the subcommittee's examination of the Toxic Substances Control Act, including statutory provisions, regulatory implementation, and practical outcomes. On June 13, our subcommittee held a hearing on the history and impact of Title I of TSCA. On July 11, the subcommittee explored regulation of chemicals before they enter commerce, under TSCA section 5, and protection of sensitive business information, under TSCA section 14. I believe these hearings have helped us understand a law as complex as it is broad.

Our focus now is on regulation of chemicals once they are in commerce, under TSCA section 6, and the role of federal pre-emption, under TSCA section 18.

These two sections of TSCA have been subject to a great deal of discussion. Notwithstanding the testimony of three of our witnesses at the July 11 hearing that TSCA section 5 is doing a fine job reviewing and, if necessary, limiting the use of new chemicals, some argue that TSCA is broken because TSCA section 6 has not produced more bans or other limits on chemicals. Others, including some on our panel today, suggest that concern is overstated.

EPA has been more active issuing regulations on TSCA section 5 new chemicals than it has been on TSCA section 6 ones—but it has issued regulations under section 6. Charlie Auer, who testified in our June 13, hearing stated that TSCA section 6 "had surprising early success in efforts between 1978 and 1980." The question is: what has changed?

Today we explore just what TSCA section 6 asks of EPA, including what "unreasonable risk" is and whether this is a novel concept in federal law. We will also examine requirements in the law regarding the application of "least burdensome" regulations. We will study the role of risk assessment and cost-benefit analysis, how and whether it is done, and what role it plays in any final rulemaking decision.

Understanding section 6 and its link to the pre-emption provisions in TSCA section 18 is also important. If EPA has taken action to test a chemical or regulate a new or existing chemical in commerce, TSCA forecloses state action unless the state or locality meets one of four criteria.

In many areas the states should handle local pollution issues, because they have a wealth of experience and capability to do so. But chemical regulation is not an area where states have traditionally taken a lead role because of the impacts on interstate commerce.

In our June TSCA hearing, witness Beth Bosley said TSCA is a law about products -- not pollution. TSCA vests EPA with authority to regulate risks to humans and the environment from chemicals that are not otherwise covered by some more targeted statute.
TSCA is about making interstate commerce in chemicals work for all of us. I thank all our witnesses for appearing today, and look forward to their insights about the appropriate roles of the parties and the uniqueness of TSCA in this respect. I urge members to take today's opportunity to learn the fundamentals of these sections of this law.

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Opening Statement of the Honorable Fred Upton
Subcommittee on Environment and the Economy
Hearing on "Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the Toxic Substances Control Act"
September 18, 2013

(As Prepared for Delivery)

Today's hearing, the third of an ongoing examination of the Toxic Substances Control Act, gives us a chance to think through two values that should always guide our policy decisions: respecting the authority of the states and facilitating interstate commerce. Getting this balance right is a matter of justice because government decisions are only just when they are made at the right level of government.

This subcommittee's first hearing this Congress was entitled, "The Role of the States in Protecting the Environment." We saw firsthand just how seriously state officials take their duty to protect the environment, and how they each apply distinct local knowledge and experience to find the optimum policy outcome for the people they serve.

Meanwhile, in four different centuries, each with its own set of technologies and challenges, this committee has been the main steward of the power vested in Congress to regulate commerce among the states.

Why is that important?

No matter how dedicated we are to respecting the primary role of the states in governing Americans, we all recognize the importance of issues only Congress can tackle. The Standard Time Act is just one example. And TSCA is in the same family. A system shared by all states that imbeds safety in the invention, manufacture, and use of chemicals and chemical based-products is the very purpose of TSCA.

Can the states and members of Congress find common ground on chemical safety regulation? It is imperative that we do so. Our duty at the state and federal level must represent consumers, workers, and the general public who want and need protection from unreasonable exposure risks, but also want and need an integrated U.S. market for products that contain chemicals. All states, all consumers, and all workers are better off if we share, and don't impede, that market.

Let's ensure that the national government's scrutiny of chemicals and the products they go into is objective and thorough, and that any necessary restrictions are in place. But let's also avoid excess regulation. That way, the states can be confident that they don't have to reinvent the wheel and shoulder this regulatory responsibility one by one.

Finding this balance, and understanding what's at stake, is our purpose today in this ongoing effort.

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Testimony of Mark Greenwood
Before the U.S. House of Representatives Energy and Commerce Subcommittee on Environment and the Economy

Hearing on
"Regulation of Existing Chemicals and the Role of Preemption under Sections 6 and 18 of the Toxic Substances Control Act"

September 18, 2013

Chairman Shimkus, Ranking Member Tonko and members of the Committee, I thank you for the invitation to testify today on the implementation of Section 6 of the Toxic Substances Control Act ("TSCA"), the principal legal authority under which the U.S. Environmental Protection Agency ("EPA") is authorized to regulate existing chemicals in commerce.

My name is Mark Greenwood. I am an attorney practicing environmental law through my firm Greenwood Environmental Counsel. I am appearing here today to offer my personal views on the implementation of TSCA, and do not represent the interests or views of any particular client. My comments are informed by my experience in private practice as well as my experience at EPA. From 1988 to 1990 I was Associate General Counsel for Pesticides and Toxic Substances, and from 1990 to 1994 I served as Director of the Office of Pollution Prevention and Toxics ("OPPT"). In these roles I was directly involved in EPA's efforts to address the risks of existing chemicals, including the challenges presented by EPA's asbestos ban and phase-out rule, the litigation surrounding

that rule and the program aftermath when the rule was vacated by the U.S. Court of Appeals for the Fifth Circuit.

My testimony will focus on the key elements of Section 6 that commenters on TSCA often cite when arguing that the EPA existing chemical program has failed to achieve its intended objectives. My goal is to provide members of the committee with contextual information surrounding the regulation of existing chemicals under TSCA that I hope will assist your evaluation of this subject.

Overview of EPA Experience with TSCA Section 6

When TSCA was originally enacted in 1976, the statute was viewed my many people in EPA and outside the Agency as the cutting edge of environmental law. In 1971 the Nixon Administration submitted the first version of the Toxic Substances Control Act to Congress. In support of the legislation, the Council on Environmental Quality submitted a report indicating that this bill was intended to provide a "New System" for addressing the environmental challenges of the time that would not be limited by the jurisdictional limits of media-specific statutes for air and water pollution or of statutes that only looked at certain materials, such as pesticides. This new system would allow EPA to address health and environmental risk in an integrated and comprehensive way. Regarding the regulation of existing chemicals, the CEQ report characterized the new role for EPA as follows:

> The Administrator of the Environmental Protection Agency would be empowered to restrict or prohibit the use or distribution of a chemical substance if such restriction were necessary to protect health or the environment. In imposing such

> a restriction, the Administrator would be required to consider not only the adverse effects of the substance but also the benefits to be derived from its use.[1]

While the legislation proposed by the Nixon Administration was modified, in some cases significantly, before the enactment of TSCA in 1976, the perspective reflected in this statement was carried forth as an expectation for how EPA would be using its Section 6 authority to address existing chemicals.

EPA did not, however, move ahead quickly to use Section 6 on specific existing chemicals. Many explanations have been offered for the slow implementation of the TSCA existing chemical program but several factors are particularly worth noting. First, once TSCA was enacted EPA had a pressing responsibility to create the TSCA Inventory and then establish the framework for the new chemical program. Since chemical manufacturers had immediate statutory responsibilities in this area, it was important to give priority to clarifying those responsibilities. Second, the first major existing chemical challenge for the Agency involved creating the regulatory structure for the ban on polychlorinated biphenyls ("PCBs") that was mandated under Section 6(e) of the statute. This effort required a variety of complicated rulemakings addressing precedential issues for EPA on how it would regulate hazardous substances in commerce and provide for their safe disposal.

Third, EPA was also challenged by the broad mandate, with no specific agenda, that Congress had provided in TSCA. After the statute was passed, there were substantial internal debates within EPA about the relative importance of, and thus resource allocation

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[1] U.S. Council on Environmental Quality, "Toxic Substances" (April 1971), p. vi.

for, information collection, chemical testing and risk management activities. Given the thousands of chemicals in commerce, EPA was further challenged to determine which chemicals warranted priority action.

EPA reached a conclusion early in the history of TSCA's implementation, however, that asbestos would be a prime target for regulatory action under Section 6. The rulemaking on asbestos began with the issuance of an Advance Notice of Proposed Rulemaking on October 17, 1979. As time passed into the 1980's without EPA initiating Section 6 actions on other chemicals, the asbestos rulemaking took on an importance larger than the issue of asbestos itself. It became the test case of whether Section 6 (and the promise of TSCA itself) could work. The stakes became particularly high as the Agency's regulatory strategy also began to shift from an array of less stringent approaches, such as labeling or limitations of particular uses, to a comprehensive ban and phase-out of all asbestos uses.

The final asbestos ban and phase-out rule was issued on July 12, 1989. It drew legal challenges from multiple parties in U.S. Court of Appeals, Fifth Circuit. The court issued its decision on the various challenges to the rule on October 18, 1991 in *Corrosion-Proof Fittings, et al. v. Environmental Protection Agency, 947 F.2d 1201 (5th Cir. 1991).* The decision represented a complete loss for the Agency, as the court vacated the primary sections of the rule.

With this decision, some stakeholder groups began to characterize TSCA as a "broken" statute. While this characterization was probably an overstatement, the court's opinion clearly set forth a more restrictive version of EPA's authority and flexibility under Section 6 than the Agency had assumed TSCA provided. The decision came at a time when OPPT was being given additional responsibilities in the Agency, including expansion of the Toxic Release Inventory and other "right to know" programs, as well as implementation of the Pollution Prevention Act. As Office Director of OPPT during this time, I worked with my staff to develop and pursue a variety of new approaches, both regulatory (e.g., expanded use of TSCA Significant New Use rules) and collaborative (e.g., Design for Environment program), to recast the TSCA program as an effort to improve the management of existing chemicals using a variety of tools, without being dependent on Section 6 as the primary mode of action.

Over the last several years, legislative efforts aimed at reform of TSCA have once again focused on a rewriting of Section 6 as the centerpiece of revitalizing EPA's existing chemical program. Thus it is useful for the committee to evaluate the current structure of Section 6 to determine its strengths and weaknesses.

Unreasonable Risk Standard

The threshold finding that EPA must make to justify a rule under TSCA Section 6 is that "there is a reasonable basis to conclude that the manufacture[2], processing, distribution in commerce, use or disposal of a chemical substance or mixture, or that any combination of

[2] "Manufacture" also includes import of a substance under TSCA.

such activities, presents or will present an unreasonable risk of injury to health or the environment." Based on this finding, EPA may take a variety of actions, which may include a ban on manufacturing, production restrictions, limitations on use, labeling, controls on disposal, recordkeeping or product recalls.

The essence of the "unreasonable risk" standard is that it requires a weighing of the factors enumerated in Section 6(c), which include the health and environmental risks associated with the substance, the benefits of the substance for various uses, the availability of substitutes, and the "reasonably ascertainable economic consequences of the rule." TSCA does not require on its face, and the court in the *Corrosion Proof Fitting* case confirmed, that this standard does not necessarily require cost-benefit analysis. However, it certainly would allow EPA to consider the results of a cost-benefit analysis should one be prepared.

While the general standard for regulation of existing chemicals under TSCA is "unreasonable risk", Congress has amended TSCA several times to require specific actions on certain chemicals. As part of the original statute, Congress directed EPA to phase out the manufacture and use of PCBs. In 1986, Congress amended TSCA to create an EPA program for inspection and management of asbestos in schools. In 1992, Congress added a program to address lead-based paint in residential housing. In 2008, Congress added restrictions on export of elemental mercury. In 2010, Congress required EPA to issue certain standards for composite wood products. In each case, Congress specified differing approaches unique to the particular risk of concern.

Several other federal statutes that address products in commerce have a similar structure. For example, the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), which is the legal framework for pesticide regulation, sets standards based on an unreasonable risk standard for most forms of pesticide exposure, including those affecting consumers in the home, workers or ecological resources. For purposes of pesticide residues in food, however, EPA is required to use a "reasonable certainty of no harm" standard as described under the Food Quality Protection Act. Similarly, the Consumer Product Safety Act's general standard –setting authorities apply an "unreasonable risk" standard or mandate consideration of a wide range of factors that include a balancing of the costs and benefits of a regulation. At the same time, the law has been amended several times to ban specific chemicals, such as butyl nitrite or phthalates in children's toys, and to set standards for specific products such as lead in children's products.

Thus, the committee should be aware that several federal laws regulating industrial technology and products in commerce tend to share a common pattern characterized by a general standard allowing for the weighing of health and environmental risks, the availability of better alternatives, product benefits and overall cost impact, along with targeted restrictions on risks that warrant specific action.

There are certain aspects of the unreasonable risk standard that draw support from many stakeholders. For example, most stakeholders would agree that when EPA considers restricting the uses of a chemical, the Agency should consider whether there are feasible

and practical alternatives that offer net improvements in protection of health and the environment. To do otherwise would run the risk that regulatory action could be counterproductive for health and the environment.

A more controversial topic concerns the role of cost-benefit analysis under the unreasonable risk standard. In this regard, it is useful to consider long-standing regulatory policies that have been pursued by the Executive Branch. At least since the early 1980's the Executive Branch has required federal agencies to conduct cost-benefit analysis on major regulations, to the extent allowed by statute. This approach to regulation was first formalized in the Reagan Administration with the issuance of Executive Order 12291. This Order remained in place for twelve years, to be replaced in 1983 by Executive Order 12866 issued at the beginning of the Clinton Administration. Executive Order 12866 also embraced the cost-benefit principle, stating that a regulation should be adopted "only upon a reasoned determination that the benefits of the intended regulation justify its costs."[3] The subsequent Bush and Obama Administrations have retained this element of Executive Order 12866 as the blueprint for their approach to regulation as well.

Thus, when EPA issued its asbestos ban and phase out rule in 1989, it had prepared a detailed cost-benefit analysis of the rule, which the *Corrosion Proof Fittings* cited in its criticism of EPA's decision. This cost-benefit analysis, however, was prepared by EPA because it was a requirement within the Executive Branch, not due to a specific

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[3] Executive Order 12866, Section 1(b)(6).

obligation in TSCA. What is important to recognize is that such a cost-benefit analysis would have been prepared by EPA under each of the Presidents of the last three decades and would still be required today under Executive Branch policy.

Thus one of the central questions for Congress as it considers reform of TSCA is its perspective on the proper role of cost-benefit analysis in regulatory decisionmaking. The current unreasonable risk standard in Section 6 allows regulatory decisions to be made based on cost-benefit analysis. One of the most important strategic questions in any reform of TSCA is whether the Section 6 standard should be changed to direct the Executive Branch to suspend its long-standing policies favoring cost-benefit analysis when EPA regulates existing chemicals.

Least Burdensome Alternative

Section 6 provides that the regulatory approach selected by EPA to address an unreasonable risk shall "protect adequately against such risk using the least burdensome requirements." This provision is not inherently a significant constraint on EPA's authority as agencies routinely examine options that can achieve health and environmental objectives through measures that minimize social and economic disruption. Such an approach is often described as "smarter" regulation.

As with cost-benefit analysis, this principle has also been enshrined in the Executive Branch policies that have guided regulatory policy for decades. As articulated in Executive Order 12866, agencies are expected to assess the costs and benefits of

"potentially effective and reasonably feasible alternatives" to a proposed regulation.[4] Executive Order 13563, issued in 2011, further refines this mandate by stating "Where relevant, feasible and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public."[5]

This is an area, however, where the *Corrosion Proof Fitting* decision imposed a significant burden on EPA's ability to utilize Section 6. The court interpreted the "least burdensome alternative" obligation in Section 6 to require EPA to assess <u>each</u> option potentially available that is less burdensome than the option that the Agency intends to pursue. Specifically, the court stated,

> Upon an initial showing of product danger, the proper course for the EPA to follow is to consider each regulatory option, beginning with the least burdensome, and the costs and benefits under each option…Without doing this it is impossible, both for the EPA and for this court on review, to know that none of these alternatives was less burdensome than the ban in fact chosen by the agency.[6]

This obligation sets up a task for EPA that goes well beyond the analytical task typically carried out by regulatory agencies under Executive Branch policies and other federal environmental statutes.

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[4] Executive Order 12866, Section 6(a)(3)(C)(iii).

[5] Executive Order 13563, Section 4.

[6] *Corrosion Proof Fitting,* at p. 1217.

The general expectation for options analysis in federal regulatory contexts is that agencies must examine a set of major alternatives that are, as articulated by Executive Order 12866, "potentially effective and reasonably feasible." Instead, the *Corrosion Proof Fitting* court appears to say that EPA must calculate costs and benefits for each alternative, which would essentially mean all alternatives that are arguably less burdensome than the option EPA intends to pursue under TSCA. Given the broad range of potential actions that EPA could take under Section 6, this suggests that EPA would be compelled to undertake an assessment of costs and benefits for a wide array of alternatives, including variations on those alternatives, proposed by opponents of a Section 6 rule in order for the Agency to have an adequate record for the rule.

In my experience as Director of OPPT, it was this aspect of the *Corrosion Proof Fitting* decision that had the most significant chilling effect on the Agency's willingness to pursue additional Section 6 rules in the wake of the court's decision. There was a strong concern among EPA lawyers, managers and staff that this part of the decision was a prescription for regulatory gridlock through so-called "paralysis by analysis" in future Section 6 rulemakings. Ironically, EPA viewed this part of the decision as a distortion of a reasonable regulatory principle – looking for "smart" approaches to achieving regulatory goals – that enjoyed broad support in the Agency.

Accordingly, an important issue for the committee to evaluate in its review of Section 6 is to consider the question of how to set a reasonable expectation that EPA should find effective regulatory strategies that minimize economic and social disruption, while at the

same time not imposing an overwhelming analytical burden that would stall necessary action.

Procedural Aspects of Section 6

One of the reasons that TSCA was considered an innovative statute at the time of its enactment was that it constituted a bit of an experiment in administrative law procedures. In the context of the Administrative Procedure Act, most agencies take action either through "adjudication" procedures, which tend to parallel trial-type proceedings in courts, or through "informal rulemaking" procedures, typically understood as notice and comment opportunities for the public. For the most part, EPA acts through informal rulemaking procedures, with the exception of administrative enforcement proceedings and pesticide cancellation and suspension actions.

The procedures set forth in Section 6 of TSCA create a hybrid process, incorporating elements for both informal rulemaking and adjudication. Section 6(c)(2) requires a notice and comment rulemaking process for all rules under the section but also calls for an "opportunity for a public hearing" subject to the procedural requirements of Section 6(c)(3). At this hearing, parties may present oral and documentary submissions and, where there are material facts at issue, cross-examination of witnesses may occur. A transcript of the hearing is created for the record. EPA is allowed to set ground rules for how various parties may be represented and for conduct of the hearing. Under Section 6(c)(4), EPA is allowed to provide compensation for expert witnesses and attorney fees for parties that do not have adequate resources to participate in the hearing.

These procedures for cross-examination of witnesses were invoked during the course of the 10-year asbestos rulemaking. I was involved in the preparation for, and conduct of, the 1988 hearing on the asbestos rule. It was clearly an adversarial proceeding, in which attorneys for the asbestos industry challenged EPA staff witnesses, while Agency lawyers sought to protect these staff witnesses. While these procedures added time to the rulemaking and generated additional documents, they did not, in my view, add new information or uncover new issues that had not already been raised during the multiple rounds of public comment during the rulemaking.

It is worth contrasting these procedures with the kinds of refinements of rulemaking processes that we see more often in current practice. It is much more common today than it was at the time of the asbestos rulemaking to provide an opportunity for peer review of major scientific and technical questions that are central to policy decisions on a rule. In contrast to the Section 6 process, which adds trial-type procedures onto notice and comment rulemaking on the same issues, peer review processes can provide new and valuable insights from credible experts that might not otherwise be part of typical notice and comment processes.

In evaluating Section 6, the committee may want to consider whether the procedural experiments placed in the statute in 1976 continue to have value today, or whether the experience with rulemaking over the last three decades suggests a different approach.

Conclusion

Chairman Shimkus, Ranking Member Tonko and members of the Committee, I thank you again for the opportunity to testify in this hearing. I applaud your efforts to obtain background information on the strengths and weaknesses of TSCA in its current form as a context for consideration of possible statutory reform.

Testimony
Hearing on Regulation of Existing Chemicals and the Role of Pre-Emption
under Sections 6 and 18 of the Toxic Substances Control Act
Subcommittee on Environment and the Economy
House Committee on Energy and Commerce
Wednesday, September 18, 2013
by
Justin Johnson, Deputy Secretary
Vermont Agency for Natural Resources

Main Points

1. ECOS believes that new legislation is needed to strengthen the Toxics Substances Control Act (TSCA).
2. The primary concerns of states are:
   a. That states should not be pre-empted by TSCA revisions beyond those currently in the statute;
   b. The need for EPA to conduct more chemical assessments;
   c. The safety standard burden of proof should be less onerous;
   d. States should have access to Confidential Business Information.

Ladies and gentlemen of the committee, thank you for inviting me here today to talk about our organization's views on the Toxics Substances Control Act (TSCA). I am representing the Environmental Council of the States (ECOS), whose members are the leaders of the state and territorial environmental protection agencies, and I may make comments from my own state's point-of-view as well, which I will note at the time.

My role in ECOS is as the Chairman of our Cross-Media Committee. Our Committee works on issues such as chemical management and other matters that affect air, water, and waste. Over the past year, the committee has been intently interested in TSCA reform. Our first resolution on this matter dates back to 2001, asking that states have access to confidential business information. During the ECOS Annual Meeting on September 17, we will be considering modifications to our resolution entitled "Reforming the Toxic Substances Control Act." Because I do not know the outcome of this discussion yet, I cannot address our changes in

this written testimony. I will however discuss the outcome during my oral testimony. Instead, I will summarize the primary concerns of the states as expressed in a series of conference calls about the resolution that we've had during 2013.

First, ECOS wants TSCA reform to occur and we seek a bi-partisan bill that will pass both houses and be signed by the President. We understand that we might not see every item we seek in the final bill, but some issues are of very high importance to states. Our resolution speaks for itself with respect to our priorities, but in this testimony I will focus on the top four issues of concern to ECOS.

Pre-emption is our number one topic. States don't want to lose the ability to act to restrict a chemical in order to prevent harm to the public or the environment. States can agree, however, that a state requirement that makes it impossible for the manufacturer to comply with both state and federal rules should result in the federal rule taking precedence. This ability to act is important to states because it is the backstop to a weak federal program, or a federal program that does not work as intended, or a federal program that acts very slowly or one that fails to act when reliable scientific data indicates that action is needed. Without the state ability to act, the only resource would be for Congress to re-address TSCA, and that is a very high bar indeed. Even though states want to keep the ability to act, I expect that not all states will need to act, and that retaining our ability to act does not mean 50 states with 50 different chemical laws. It means that states can act on chemicals in a way that their legislatures, Governors, and people deem appropriate.

This is where we find ourselves today. States have had a loss in confidence that TSCA works as thoroughly or quickly as it ought to, leaving states to pass their own laws and rules on chemical management. However, if TSCA did work thoroughly and quickly there would be

much less incentive for states to enact additional requirements. State authority would be preserved but seldom invoked. As a practical matter, implementation of a comprehensively reformed TSCA will render the state preemption issue largely moot, as states will focus their increasingly limited resources on other priorities. During the past 20 years, however, states have acted to fill the regulatory void at the federal level, illustrating the vitally important role states play in providing a "backstop" to federal inaction and as laboratories of innovation. With regard to the impact of the current TSCA Sections 6 and 18 on the exercise of states action, or on common law authority, we suggest that because EPA has acted on so few chemicals under TSCA, preemption of state authority has not been an issue under the current law.

States believe that for TSCA to work well there are at least three other key requirements.

1. Chemical Assessments Need to be Conducted. There are thousands of chemicals that the U.S. Environmental Protection Agency (EPA) hasn't acted on. Currently, EPA must conduct reviews of new chemicals to determine if they are a threat. Because of the current TSCA requirements for EPA to generate most of the data itself, this burden is beyond the agency's capability and so very few get reviewed. Most chemicals simply pass into commerce. When this happens, states may see a problem with some of these and then act. The key then, is for EPA to prioritize and review high priority chemicals, perhaps by a set of prioritization criteria. Then it can focus on the chemicals of greatest concern. But EPA currently does not have the resources to conduct this process. So, industry should supply all the needed data. This is why ECOS says that TSCA reform should ensure the burden is effectively placed on manufacturers.
2. The Safety Standard Burden of Proof Should Be Less Onerous. Currently, states think that the action standard that EPA is held to is too high, restricting its ability to limit a chemical's

use. Currently, TSCA's safety standard requires EPA to prove harm from a chemical has occurred before it can restrict use of that chemical. This is an almost impossible standard for EPA to meet. In our new resolution, we ask that TSCA be reformed so that EPA can take expedited action when a chemical presents a very serious or immediate risk to public health or the environment, including the ability to impose interim conditions to be in effect until EPA has had the opportunity to make a safety determination. This will help to alleviate state concerns about the effectiveness of TSCA.

3. Sharing Confidential Business Information with States. States need access to confidential data submitted to EPA. This is to help us fulfill our requirements protect human health and the environment. We understand that states will have to follow federal guidelines that restrict distribution of these materials, rather than the state standards which are often more open.

The other issues that our resolution addresses are also important to states although I am not detailing them here. With your permission, I will provide a copy of our final resolution as an addendum to my written testimony so that you can see these for yourself.

There are two other issues that ECOS discussed in our many calls on TSCA reform that we did not address in our resolution, primarily because of time constraints. One of these is defining what are adequate resources for EPA (e.g., annual budget) needed to conduct the assessments, prioritizations and reviews. As managers of state agencies, we understand that much is expected of us and that our ability to succeed is sometimes limited by the resources at hand. The same is true at EPA. We want EPA to succeed in chemicals management. Part of the reason we did not address this issue in our resolution is because we do not have a number to suggest, or the information we need to develop such a number.

Our second unaddressed issue is deadlines for chemical reviews. There was discussion among the states about having a more rigid system of timelines for review of chemicals. Most states have deadlines for air or water permit issuance, and so states find the use of deadlines to be customary. Perhaps similar deadlines for EPA would be appropriate and would assure timely action, but we are not currently able to suggest to you what those deadlines ought to be.

I am happy to take questions when you are ready.

TESTIMONY OF
WILLIAM K. RAWSON
LATHAM & WATKINS LLP

BEFORE THE
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY
U.S. HOUSE OF REPRESENTATIVES

"REGULATION OF EXISTING CHEMICALS AND THE ROLE OF PRE-EMPTION UNDER SECTIONS 6 AND 18 OF THE TOXIC SUBSTANCES CONTROL ACT"

SEPTEMBER 18, 2013

INTRODUCTION

Mr. Chairman and distinguished members of the Committee – good afternoon. I would like to begin by thanking the Committee for inviting me to testify today. I consider it a privilege to have this opportunity to contribute to the public discourse on the Toxic Substances Control Act (TSCA). I hope my testimony will prove useful to the Committee.

I am a partner in the law firm of Latham & Watkins LLP. I have practiced in the environmental area, with an emphasis on chemical regulation under TSCA and other environmental statutes, since 1987. I have co-authored two editions of a TSCA Deskbook published by the Environmental Law Institute. My testimony is based on my experience representing and counseling companies and trade associations on issues arising under TSCA and other environmental statutes over the last 26 years. However, I am testifying today solely on my own behalf.

All major stakeholders agree that improvements to TSCA are necessary to achieve the objectives of the statute and increase public confidence in federal chemical regulatory programs. Divergent views have been expressed in prior hearings before this Committee concerning what needs to be fixed and why. I understand the purpose of this hearing is not to advocate any specific

amendments to TSCA or to address any specific legislative proposals, but rather to share perspectives on the current statute.

As directed, my testimony will focus on EPA's experience assessing and regulating existing chemicals under TSCA section 6, and experience under TSCA section 18 pertaining to preemption. It is important to keep in mind that TSCA is only part of the story. EPA regulates the use, release and disposal of chemical substances under many other environmental statutes. Other federal agencies, including OSHA, FDA and CPSC, also have substantial responsibility for ensuring the safe handling and use of chemicals under their respective statutory mandates.

Additionally, chemical manufacturers have implemented various voluntary initiatives and product stewardship programs over the years to support the safe manufacture and use of their products. Many of these voluntary initiatives have been undertaken in collaboration with EPA and other stakeholders. These initiatives and product stewardship programs help meet the objectives of TSCA, and provide additional context for a discussion about experience regulating chemicals under TSCA.

Section 2 of TSCA states that it is the policy of the United States that "Authority over chemical substances and mixtures should be exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation while fulfilling the primary purpose of this chapter to assure that such innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment." Similarly, Executive Order No. 13563, signed by President Obama on January 11, 2011, states: "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." These similar pronouncements, made 35 years apart, give some indication of the concerns this Committee must address as it considers what amendments to TSCA might best promote the objectives of the statute.

SECTION 6: REGULATION OF EXISTING CHEMICALS

Few rulemaking actions have been taken under section 6 (excluding regulation of PCBs). This has contributed significantly to the erosion of public confidence in TSCA, and is cited as evidence that the burdens on EPA when attempting to regulate under section 6 are too high. The failed attempt to regulate asbestos-containing products also is cited as evidence that section 6 is not workable. I will address first the issue of statutory authority. I then will address what I consider to be the greatest concern relating to EPA's exercise of its section 6 authority, which is the backlog of EPA assessments of existing chemicals. I believe EPA needs a stronger mandate to set priorities and complete safety assessments of chemicals in commerce, to determine whether and how chemicals should be regulated.

Section 6(a) of TSCA gives EPA authority to regulate the manufacture, processing, distribution, use or disposal of a chemical if the Agency has a "reasonable basis" to believe the chemical "presents or will present an unreasonable risk to health or the environment." Section 6 enumerates various regulatory options – from an outright ban to warning and labeling requirements – and provides that EPA may impose one or more of the enumerated requirements "to the extent necessary to protect adequately against such risk using the least burdensome requirements."

When promulgating rules under section 6, EPA must take into account the health and environmental effects of the substance, the magnitude of exposure, the benefits of the substance, the availability of substitutes and their potential health and environmental impacts, and the reasonably ascertainable economic consequences of the proposed rule. Specific hearing requirements are set forth in section 6(c), and any rule that is promulgated must be supported by "substantial evidence" in the rulemaking record considered as a whole.

The Agency also must determine whether the concern could be better addressed by EPA or another agency under another statute. If the risk of injury to health or the environment can be

eliminated or reduced under another statute administered by EPA, then section 6(c) requires EPA to utilize its authority under that statute unless the Agency determines that it is in the public interest to act under TSCA. If the chemical risk may be prevented or sufficiently reduced by action under a federal law not administered by EPA, the Agency must refer information on the chemical's risk to the agency administering the other law. Pursuant to section 9(a), EPA may not take action under TSCA Section 6 if the other agency finds no unreasonable risk or initiates regulatory action.

As noted, Section 6 requires EPA to adopt the "least burdensome requirements" necessary to address the identified health or environmental risks. This precludes a ban of a product if a less burdensome approach would protect human health and the environment. Similarly, Executive Order 13563 directs executive agencies to "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends." The Executive Order compels each agency to "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives."

The "unreasonable risk" standard in section 6 is not unique to TSCA. For example, the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) for non-food use pesticides requires EPA to consider "any unreasonable risk to man or the environment" and take "into account the economic, social, and environmental costs and benefits of the use of any pesticide." Executive Order 13563 similarly directs EPA and other executive agencies in their regulations to "take into account benefits and costs, both quantitative and qualitative." The Executive Order directs each agency to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs."

Section 6 of TSCA places the burden on EPA to demonstrate the need for regulation. This also is not unique. When EPA promulgates an air quality or emission standard under the Clean Air Act, for example, it typically carries the burden of demonstrating the need for the level of

protection and/or specific control measures that are proposed. Courts typically give EPA wide latitude to make these kinds of judgments.

EPA applies numerous health-protective assumptions when making "unreasonable risk" findings, whether under TSCA or other environmental statutes. EPA typically sets the safe level in humans at a level 100- to 1000-fold (or more) below a dose that produced no adverse effect in the most sensitive animal study, and uses conservative assumptions concerning level, frequency and duration of exposure. The end result is that EPA regulates based on theoretical upper bound estimates of risk, with the understanding that true risks are likely to be much lower than upper bound estimates, and could be zero. EPA has stated this explicitly in rulemakings under the Clean Air Act, for example. Again, courts give EPA considerable latitude to make these kinds of judgments.

The failed effort to ban uses of asbestos is often cited as evidence that TSCA does not give EPA sufficient authority to regulate chemicals. A careful reading of the court's decision shows that EPA made procedural and substantive errors that compelled the court to set portions of the rule aside. EPA did not give proper public notice of a key element of its exposure analysis, that in some cases "completely altered" EPA's assessment, until after the hearings were closed.[1] Asbestos-containing friction products (primarily replacement drum and disk brakes) accounted for "the lion's share of the proposed benefits of the asbestos regulation," but a study commissioned by EPA raised significant concerns about the effectiveness of substitute products. One of the study authors testified that the "replacement/substitution of asbestos-based with non-asbestos brake linings will produce grave risks," and that "'the expected increase of skid-related highway accidents and resultant traffic deaths would certainly be expected to overshadow any potential health-related

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[1] *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1212-13 (5th Cir. 1991).

benefits of fiber substitution.'"[2] Other equally significant errors are noted in the court's opinion. The ruling certainly was disappointing to EPA, which had spent 10 years on the asbestos rulemaking, but I would urge careful review of the court's decision before any conclusions are drawn.

Before the failed asbestos rulemaking, EPA had successfully promulgated several section 6 rules, albeit on a much smaller scale, without legal challenges, and without conducting a quantitative risk assessment for every alternative control measure (one of the complaints emanating from the *Corrosion Prof Fittings* decision). Further, the court in *Corrosion Proof Fittings* did not completely vacate the asbestos rule; it upheld EPA's ban on products not currently being produced in the United States, and the ban on unknown, future uses of asbestos. The court actually started with a "presumption of validity" in favor of EPA's rule, but found such fundamental errors in the rulemaking that all product-specific bans were struck down.

Witnesses at the prior hearings of this Committee have noted that conducting a rulemaking, whether under TSCA or any other environmental statute, can be time-consuming and challenging for the Agency and can take several years. Nevertheless, I would submit that one lesson of *Corrosion Proof Fittings* is that procedural requirements and substantive criteria should not be lightly set aside, as they help ensure the quality and objectivity of regulatory decisions.

Section 6 of TSCA was crafted to support sound regulatory decisions that protect human health and the environment while not placing undue economic burdens on companies that manufacture, process or use chemicals. The similarities to several provisions in Executive Order 13563 are noteworthy and provide context for evaluating the requirements of TSCA section 6. Changes to section 6 should not simply make it easier for EPA to ban the use of chemicals, but should support sound regulatory decisions that meet all the objectives of the statute. Decisions

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[2] *Id.* at 1224 n. 25 (citing written testimony).

made under TSCA should be governed by the same principles that govern other environmental statutes, and fundamentally should remain risk-based.

It remains true that very few rulemaking actions have been taken by EPA under section 6. That is not necessarily the right metric for evaluating the adequacy of the statute as a whole, as it does not account for assessments of existing chemicals and uses by EPA that did not result in regulation because chemicals or activities were found not to present significant risks or to be of low concern for further evaluation. It also ignores accomplishments under other sections of the statute, including significant new use rules promulgated under section 5(a) to curb uses of some existing chemicals. Further, it ignores voluntary product stewardship actions and other voluntary initiatives that have at times rendered formal action under section 6 unnecessary. Many of these activities addressing existing chemicals are described on EPA's website, and they are substantial. They have often involved partnerships with industry and other stakeholders, and international cooperation. But the lack of rulemaking actions under section 6 receives more attention, and continues to undermine public confidence.

This leads to the concern I expressed at the beginning of this section of my testimony. There is still a backlog in EPA's assessment of existing chemicals. I believe addressing this backlog should be the top priority for bringing EPA's regulation of existing chemicals in line with regulation of new chemicals. A clear mandate and adequate resources are needed to enable EPA to assess in a timely manner the potential risks to health and the environment from chemicals that are present in commerce in significant quantities. Once risks have been assessed, action can be taken where necessary. Additionally, the public also can take comfort with respect to those chemicals and uses that EPA determines present low concern.

All stakeholders recognize the need for EPA to prioritize its resources. I believe a rational prioritization scheme with reasonable timelines would give greater confidence to the public that

significant risks are being identified and addressed in a systematic and timely manner. Some chemicals and uses can be quickly identified as low concern. Others require more effort to characterize potential risks and ensure safety. Any new mandate should give EPA flexibility (indeed, should require EPA) to set priorities and direct resources accordingly, so that the greatest number of high priority chemicals can be assessed within reasonable timeframes.

In a prior Administration, EPA announced a Chemical Assessment Management Program (ChAMP) that was intended to accelerate dramatically the preparation of screening-level assessments for approximately 7,000 chemicals for which periodic exposure information reporting was being required under the Inventory Update Rule, now called the Chemical Data Reporting Rule. EPA did this on its own, with no statutory mandate and no change in its authority under section 6. The initiative was replaced in the current Administration in favor of Chemical Action Plans that focused on a very short list of chemicals, and more recently EPA has implemented a TSCA Work Plan which also will address a relatively small subset of existing chemicals. This is not the first time EPA has abandoned one chemical risk management initiative for another. I believe it would be very helpful for EPA to have a strong mandate to increase the rate at which it identifies and assesses high priority compounds, with follow-through to completion.

SECTION 18: PREEMPTION

As you are aware, the concept of preemption is rooted in Article VI of the Constitution, which provides that the laws of the United States shall be the supreme law of the land, notwithstanding the laws of any states. The purpose of preemption is to prevent state and local laws that might thwart the effectiveness of a national legislative and regulatory scheme. Preemption discourages state law requirements that would hinder interstate commerce by placing varying requirements on companies operating across more than one state. Preemption provisions are found in several different Federal laws regulating products, including the Consumer Product

Safety Act (CPSA), the Food, Drug, and Cosmetic Act (FDCA), and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

TSCA section 18 preempts state and local law only when EPA has issued a rule under section 4 (testing), 5 (approval of new chemicals), or 6 (regulation of existing chemicals). If EPA has not acted, states and localities are free to act. If, however, EPA has issued a rule under section 4, 5, or 6, states and localities must apply to EPA for an exemption from preemption prior to enacting additional restrictions. EPA may grant the exemption only if the state or local law would provide a higher degree of protection from risk of injury to human health or the environment than the TSCA rule and would not unduly burden interstate commerce. The state or local law also must not cause the manufacturing, processing, or distribution in commerce of the substance, mixture or article to be a violation of any TSCA requirement.

Notably, several types of state laws are not subject to preemption and the exemption process. State or local laws governing the manner or method of disposal of toxic substances are not preempted where EPA has issued a relevant disposal rule pursuant to TSCA section 6(a)(6). State or local laws that are identical to a rule issued by EPA under section 5 or 6 are not subject to preemption. State or local laws that were adopted under the authority of another federal law such as the Clean Air Act also are not preempted. Additionally, a state or local law may prohibit the use of a substance or mixture, other than its use in the manufacture or processing of other substances or mixtures.

As a practical matter, preemption has rarely come into play under TSCA because EPA has promulgated few rules under section 6 (other than regulation of PCBs), and states generally have not been in the business of regulating new chemicals (TSCA section 5) or requiring testing of existing chemicals (section 4). One TSCA preemption case is *Rollins Environmental Services (FS), Inc. v. The Parish of St. James*, in which the Fifth Circuit Court of Appeals found that

preemption applied to a St. James Parish, Louisiana, ordinance prohibiting commercial solvent cleaning in certain areas as part of an effort to ban PCB disposal activities.[3] EPA had promulgated comprehensive PCB disposal regulations under TSCA section 6(e)(1), and St. James Parish did not apply for an exemption. The court found that "[i]f every locality were able to dodge responsibility for and participation in this program through artfully designed ordinances, the national goal of safe, environmentally sound toxic waste disposal would surely be frustrated."[4] Thus, preemption in this case met the goal of not allowing state law to thwart a national regulatory scheme.

As noted, the CPSA, FDCA, and FIFRA also contain preemption provisions. A brief overview of these preemption provisions will provide context for evaluating preemption under TSCA.

Preemption under the CPSA works in a manner similar to preemption under TSCA.[5] If the CPSC has issued a rule pursuant to the CPSA that addresses the risk of injury associated with a consumer product, non-identical state and local standards relating to product performance, composition, packaging, labeling, etc., that address the same risks addressed by the CPSC are preempted. As with TSCA, states and localities are free to act if the CPSC has not. The CPSC may exempt non-identical state and local standards so long as the standard does not unduly burden interstate commerce and provides a significantly higher degree of protection from risk of injury than the CPSC's consumer product safety standard.

Under the FDCA, no state or locality may establish any requirement that is not identical to an FDA regulation governing over the counter (OTC) drugs and medical devices.[6] States and

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[3] *Rollins Environmental Services (FS), Inc. v. The Parish of St. James*, 775 F.2d 627 (5th Cir. 1985).

[4] *Id.* at 637.

[5] 15 U.S.C. § 2075.

[6] 21 U.S.C. § 360k, 379r.

localities are free to act if FDA has not acted. States and localities may apply to the FDA for an exemption from preemption. The preemption provision for OTC drugs contains an exemption for product liability actions.

Under FIFRA, a state may not regulate the sale or use of any federally registered pesticides or impose any packaging or labeling requirements that are different from those required by EPA under FIFRA.[7] However, a state may permit registration for additional uses of federally registered pesticides to meet special local needs, subject to a right of cancellation by EPA.

These other statutes demonstrate that preemption is an important concept, particularly in the area of product regulation where state laws or regulations could create conflicts with federal requirements or otherwise pose significant burdens on interstate commerce.

I hope my testimony is helpful to the Committee.

Thank you.

[7] 7 U.S.C. § 136v.

AUTO ALLIANCE

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STATEMENT

OF

THE ALLIANCE OF AUTOMOBILE MANUFACTURERS

BEFORE THE:

ENERGY AND COMMERCE COMMITTEE
THE SUBCOMMITTEE ON ENVIRONMENT
U.S. HOUSE OF REPRESENTATIVES

SEPTEMBER 18, 2013

PRESENTED BY:

Jennifer Thomas
Director, Federal Government Affairs

Summary

Protecting consumers from harmful exposure to hazardous materials is a top priority for automakers. Not only are we producing more fuel-efficient and safer cars than ever, we have also made tremendous strides in reducing the amount of substances of concern from automobiles. Automakers have eliminated the use of mercury and lead wheel weights in automobiles, and are currently working to phase out deca-BDE flame retardants and copper-lined brake pads. For more than a decade, automakers and our suppliers have maintained a global substance of concern list and database that tracks more than 2,700 substances used in automotive components to ensure restricted substances are not in autos. Additionally, automobiles are among the most recycled consumer products in the U.S – roughly 86% of a vehicles material content recycled, reused, or used for energy recovery.

However, more work remains, and the Alliance supports modernizing the Toxic Substances Control Act (TSCA) to keep pace with advances in science and technology. Inaction at the federal level to reform TSCA is compelling states to regulate on their own, creating a patchwork of state standards. A single federal chemical management program could accomplish the goal of properly managing hazardous materials in products while also creating a more predictable regulatory environment and more effectively address safety and risk issues from chemical uses nationwide.

Moving forward, legislative efforts to modernize TSCA should consider the unique concerns of complex durable goods manufacturers, such as automobile manufacturers. The average automobile has 30,000 unique components and each component is comprised of multiple chemicals and mixtures. Each automaker works with a global network of more than 1,000 suppliers, spanning multiple sectors. The Alliance urges the Committee to consider establishing clear standards for the regulation of articles under TSCA and support the continued use of existing article exemptions in most circumstances. Additionally, legislation modernizing TSCA should allow sufficient lead time to investigate and qualify viable alternatives.

The Alliance stands ready to be productive partner in any efforts to modernize this important environmental policy.

Testimony

Thank you, Chairman Shimkus, Ranking Member Tonko and members of the Subcommittee. The Alliance of Automobile Manufacturers (Alliance) is a trade association of twelve car and light truck manufacturers including BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars, Toyota, Volkswagen Group and Volvo Cars.

Together, Alliance members account for roughly 3 out of every 4 new vehicles sold in the U.S. each year. On behalf of the Alliance, I appreciate the opportunity to offer our views on the Toxic Substances Control Act (TSCA) and the need for one national program for chemical regulation. We commend the Committee for its thoughtful and thorough examination of this environmental policy.

The greater automobile industry is a massive employer reaching well beyond the iconic names of auto companies familiar to us all. Auto manufacturing depends on a broad range of parts, components and materials provided by thousands of suppliers, as well as a vast retail and vehicle maintenance network of dealers. Nationwide, 8 million workers and their families depend on the auto industry. Each year, the industry generates $500 billion in paychecks, while generating $70 billion in tax revenues across the country.

Protecting consumers and our employees from harmful exposure to hazardous materials is a top priority for automakers. In fact, we have a good story to tell. Not only are we producing more fuel-efficient and safer cars than ever, we have also made tremendous strides in reducing the amount of substances of concern from automobiles. For example:

- For more than a decade, automakers have maintained the Global Automotive Substance List (GADSL), a longstanding industry-focused global substance of concern list, as well as a sophisticated tracking database – called the International Material Data System (IMDS) – to actively reduce industry-wide use of substances of concern in global production. The auto industry has invested more than $30 million dollars to build GADSL and IMDS, which now track more than 2,700 substances used in automotive components to ensure that restricted substances are not in our products. Without automakers developing a common list of substances to track and a common database for

suppliers to report into, tracking and controlling such a large number of substances would not be possible.

- In 2006, together with EPA, states, environmental groups and other industry stakeholders such as steelmakers and auto dismantlers and recyclers, automakers created the National Mercury Switch Removal Program to ensure the safe removal of mercury-containing switches in automobiles. More than 5 million switches have been collected to date, preventing approximately 11,000 pounds of mercury from being released into the environment.[1]

- Automakers eliminated lead wheel weights from all automobiles by the end of 2009, are currently phasing out the use of deca-BDE as a flame retardant, and are working with brake pad manufacturers to identify an alternative brake friction material with a smaller environmental impact than copper.

Most importantly, automobiles are among the most recycled consumer products in the U.S. Through the recycling process, end-of-life vehicles are recycled into new vehicles, old consumer products are recycled into components of new vehicles, and parts of old vehicles are recycled into new consumer products. Approximately 86% of a vehicle's material content is recycled, reused or used for energy recovery.[2] For example, used carpet becomes air cleaner assemblies and engine fan modules, and manufacturers build new tires with 10% recycled tire rubber material.

But automakers recognize that there is more work to do. TSCA remains the only major federal environmental statute that has not been substantively revised. We support modernizing TSCA to keep pace with advances in science and technology and automakers want to be part of the solution. We understand that inaction at the federal level is creating an environment in which states feel compelled to regulate chemicals on their own, potentially creating a patchwork of state standards. As you might suspect, myriad of inconsistent or conflicting state chemical

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[1] ELVS Mercury Switch Recovery Program Reporting at www.eqonline.com/services/ELVS-Mercury-Switch-Recovery-Program/annual-report.asp?year=all

[2] Society of Automotive Engineers (SAE). 2011. "Vehicle Recycling, Reuse, and Recovery: Material Disposition from Current End of Life Vehicles"

regulatory programs presents great obstacles to effective chemical management for large industry sectors, in particular manufacturers of complex durable goods, such as automobiles.

We strongly believe that reforming the national program to avoid a balkanized approach to chemical management is more in line with today's manufacturing realities and will better protect the public while supporting U.S. competitiveness and jobs. Automakers design and build vehicles to synthesize a variety of systems and individual parts to meet an array of individual customer needs and demands and to comply with thousands of pages of international, federal and state regulations. The average automobile has 30,000 unique components and each individual component is comprised of multiple chemicals and mixtures. Each automaker works with a global network of more than 1,000 suppliers, spanning multiple sectors from electronics to textiles. Many automotive components are obtained from suppliers as finished products, which are then integrated into the vehicle. Government oversight of the construction and assembly of automobiles on a component-by-component basis is burdensome, inefficient, and unnecessary to effectively manage chemicals. An approach focusing on situations presenting a real potential for consumer exposure to substances of concern would be more effective than such an overly broad approach. And even more importantly, automakers simply cannot cope with a myriad of state-specific programs of this nature, each with its own unique hurdles.

Ultimately, multiple state chemical regulatory programs will likely conflict with stringent federal environmental and safety standards. NHTSA, for example, sets vehicle flammability standards and EPA, CARB and NHTSA set greenhouse gas (GHG) emission and CAFE standards. To meet the aggressive 54.5 miles per gallon (mpg) average CAFE/GHG emission standards by MY 2025, automakers will rely on lightweight materials like plastics that contain multiple chemical components, such as flame retardants. Also, nanomaterials are used in electric and fuel cell vehicles. Automakers spend billions of dollars annually on research and development activities to advance fuel efficiency, innovate new safety technologies, and develop more sustainable materials before the need of any regulation. However, a patchwork of state programs has the potential to derail this progress by shifting the industry's focus from R&D to regulatory compliance.

For these reasons, automakers seek a comprehensive and workable national program to regulate chemicals in commerce rather than a hodgepodge of overlapping state and federal

regulations. We readily acknowledge that states do have a very important role to play and the Alliance supports a process by which states can address their specific chemical concerns with EPA in a common, scientifically-based framework under TSCA. Legislative efforts to modernize TSCA should seek collaboration with states to achieve product safety through common chemical actions and requirements yet continue to maintain strong federal preemption provisions.

A single federal chemical management program could accomplish the goal of properly managing hazardous materials in products while also creating a more predictable regulatory environment by eliminating conflicts and inconsistencies that make compliance unnecessarily burdensome and costly for both the private and public sectors. One way the auto industry has restructured itself to become one of the bright lights in a challenging economy has been its shift to fewer vehicle platforms. Reducing the number of vehicle platforms allows auto manufacturers to streamline the manufacturing process throughout production, lowering costs and ultimately resulting in better products for our customers at competitive prices. The public sector is under similar financial pressures to provide cost-effective services to the public. Reforming TSCA to make it an effective national program not only benefits the private sector by providing a unified and efficient regulatory compliance structure, but it also allows state and local governments to focus on other priority issues by freeing resources otherwise allocated to duplicative state chemical regulations. Most importantly, a unified national policy through TSCA reform would more effectively address safety and risk issues from chemical uses nationwide.

Additional Considerations:

Moving forward, it is critical that any legislative efforts to modernize TSCA consider the unique concerns of complex durable goods manufacturers as article manufacturers/assemblers. Currently, article exemptions are in place for most TSCA requirements. However, these are not statutory exemptions but rather they have been written into regulation by EPA and can be lifted, as has recently occurred with the proposed deca-BDE Significant New Use Rule (SNUR) and Test Rule. Furthermore, we are noticing a significant trend towards state legislation and regulations targeting not just chemicals but consumer products (i.e., articles). In 2013, at least 16 broad-reaching chemical regulation bills have been introduced by state legislatures across the country. While some had a specific focus, the definitions went beyond the scope of federal

definitions and were broad enough to include consumer products and automobiles. The Alliance urges the Committee to consider establishing clear standards for the regulation of articles under TSCA and support the continued use of existing article exemptions in most circumstances.

Additionally, legislation modernizing TSCA should allow sufficient lead time to investigate and qualify viable alternatives (typically 5 years in the auto industry and not all vehicles are reengineered at the same time). With roughly 250 million registered vehicles currently operating on U.S. roads[3], service parts for legacy vehicles should be exempted from any chemical substitution to avoid any disruption in the supply of hundreds of thousands of older model replacement parts, impacting automakers' ability to fulfill consumer warranties, recalls, service campaigns, or repairs of the existing fleet. This is a significant issue since the average age of the typical automobile on U.S. roads is over 11 years old[4].

Finally, TSCA/EPA should maintain a minimum threshold of 0.1% for chemical reporting and most chemical control actions. This is the *de minimis* level used by most world governments to effectively control the thousands of chemicals within thousands of products.

We appreciate the opportunity to offer our views on TSCA and the need for one national program for chemical regulation. It might be counterintuitive to some that an industry that relies heavily on chemicals would support legislation that would provide EPA more authority and better tools to regulate chemicals. But it is entirely in keeping with our overall desire as auto companies to offer the best and safest products possible to our customers and protect our employees; we welcome an effective national program. The Alliance stands ready to work with the Committee on any efforts to modernize this important environmental policy. Thank you again and I will be happy to answer any of your questions.

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[3] Polk. 2013. Polk Finds Average Age of Light Vehicles Continues to Rise [Press Release]. Retrieved from https://www.polk.com/company/news/polk_finds_average_age_of_light_vehicles_continues_to_rise

[4] Ibid.

Testimony to House Committee on Energy and Commerce,

Subcommittee on Environment and the Economy

Hearing on

"Regulation of Existing Chemicals and the Role of Pre-Emption

Under Sections 6 and 18 of the Toxic Substances Control Act"

By

Lemuel M. Srolovic
Bureau Chief, Environmental Protection Bureau
Office of New York State Attorney General Eric T. Schneiderman
September 18, 2013

SUMMARY

(1) New York Attorney General Eric T. Schneiderman strongly supports the goal of the federal Toxic Substances Control Act of 1976 (TSCA) and recognizes the critical contribution that this law — in partnership with state efforts — could make in ensuring the adequate protection of public health and the environment from toxic chemicals.

(2) The State of New York has played and is playing a leading role in protecting our citizens and the environment from harms posed by toxic substances, including protecting our residents — particularly those who are most vulnerable — from carcinogens, chemicals that mimic estrogen, and other dangerous chemicals..

(3) In practice, TSCA has largely failed to live up to its goal. TSCA should be strengthened by requiring EPA to conduct expeditious safety reviews of the tens of thousands of chemicals to which Americans are exposed. Once EPA has done so, it should be required to timely impose restrictions on the manufacture and use of those chemicals as necessary to adequately protect public health and the environment.

(4) In any reform of TSCA, it is critical to preserve the ability of states to protect their citizens and environment from chemicals that states have found dangerous. This goal can be achieved by allowing state restrictions to remain in place until EPA has imposed a restriction, and in some circumstances allowing a state restriction on a chemical to remain in effect even after EPA has imposed a restriction.

(5) Because Attorney General Schneiderman believes that achieving TSCA's goal of ensuring the adequate protection of public health and the environment from toxic chemicals is as important as ever, he offers the full assistance of his office to this Subcommittee as you review this important federal law.

TESTIMONY

Introduction

Good afternoon Chairman Shimkus, Ranking Member Tonko, and distinguished members of the Subcommittee on Environment and the Economy. Thank you for the opportunity to testify today on behalf of Eric T. Schneiderman, Attorney General of New York, regarding the regulation of toxic chemicals. I would like to begin by discussing the role that New York has played and is playing in protecting our citizens and the environment from harm posed by toxic substances. I will then discuss the need for strengthening the federal Toxic Substances Control Act of 1976 (TSCA), and the New York Attorney General's support for doing so. Lastly, I will discuss the Attorney General's views on the appropriate balance between federal and state restrictions on toxic chemicals.

Actions by New York to Protect Human Health and the Environment

For many decades, New York has been a leader in protecting public health and the environment from toxic chemicals. That exercise of traditional state power has allowed New York to protect its citizens and natural resources and to serve as laboratory for nationwide solutions to threats to human health and the environment posed by toxic chemicals.

For example, in 1970 New York banned use of the insecticide DDT, which was devastating many bird populations, including American bald eagles, peregrine falcons, brown pelicans, and ospreys. Two years later, EPA followed New York's lead in banning DDT. Twenty years later, the American bald eagle was recovering, and was "up"-listed from an endangered species to a threatened species.

New York has taken other actions to protect public health and the environment by restricting the sale or use of products containing harmful chemicals. They include the following:

- To protect babies and young children from exposure to biologically active bisphenol A (BPA), New York has banned the chemical in pacifiers and baby bottles for use by children under three years old. N.Y. Envtl. Conserv. Law § 37-0501 *et seq.* BPA leaches into liquids and foods and has been shown to mimic the behavior of estrogens in the human body, potentially causing changes in the onset of puberty and reproductive functioning.
- To protect babies and young children from exposure to biologically active tris(2-choloroethyl) phosphate (TRIS), New York has banned the flame retardant chemical in products intended for use by children under three years of age, including toys, car seats, nursing pillows, crib mattresses, and strollers. N.Y. Envtl. Conserv. Law § 37-0701 *et seq.* The Consumer Products Safety Commission classifies TRIS as a probable human carcinogen. Studies have shown that young children are often the group most highly exposed to TRIS, and estimate that children can ingest up to ten times as much of this chemical as adults do because of their tendency to put their hands and other objects into their mouths.
- To protect humans from harm posed by pentabrominated and octabrominated diphenyl ethers (both of which are polybrominated diphenyl eithers or PBDE), New York restricts the concentration of these brominated flame retardants in products manufactured, processed or distributed in New York. N.Y. Envtl. Conserv. Law § 37-0111. PDBE has been correlated with lower birth weight in newborns. Animal

studies indicate that pre- and post-natal exposures to PBDE may cause long-lasting behavioral alterations and can affect motor activity and cognitive behavior.

- To protect humans and the environment from toxic metals in product packaging, New York restricts the concentration of lead, cadmium, mercury, and hexavalent chromium in inks, dyes, pigments, adhesives, stabilizers, or other additives in product packaging. N.Y. Envtl. Conserv. Law § 37-0205 *et seq.* EPA has determined that lead and mercury are probable human carcinogens while cadmium and chromium are known human carcinogens. Exposure to high levels of any of these heavy metals can permanently damage the brain, kidneys, and other vital organs.
- To protect the public from a toxic and flammable dry cleaning solvent, New York restricts the use of n-propyl bromide in dry cleaning. *See* "Approved Alternative Solvents for Dry Cleaning" at http://www.dec.ny.gov/chemical/72273.html. N-propyl bromide has been found to cause sterility in both male and female test animals, and to harm developing animal fetuses. In humans, the chemical can damage nerves, causing weakness, pain, numbness, and paralysis. As a result, New York will not issue an air facility registration to any facility proposing to use n-propyl bromide as an alternative dry cleaning solvent because n-propyl bromide does not qualify as an approved alternative solvent under 6 N.Y.C.R.R. Part 232. New York City also specifically bans n-propyl bromide under its fire code because of its flammability. N.Y.C. Admin. Code §§ 27-426, 27-427.
- To protect New Yorkers that rely on groundwater for their drinking water supply, New York prohibits the import, sale, or distribution of gasoline containing methyl tertiary butyl ether (MTBE). N.Y. Agric. & Mkts. Law § 192-g. Studies of animals

have shown that exposure to large amounts of MTBE had effects on their nervous systems, and people exposed to MTBE have reported headaches, nausea, dizziness, and irritation of the nose and throat. MTBE in drinking water may also adversely affect taste and odor.

- To protect New York's rich surface water resources — from Long Island Sound to Lake Erie and Lake Ontario — New York limits the phosphorus content of household cleaning products and the sale and use of phosphorus lawn fertilizers. N.Y. Envtl. Conserv. Law §§ 17-2103, 35-0105(2)(a). Phosphorus entering New York's waters has caused reductions in the oxygen that is necessary for fish to breathe and has contributed to algae that turns water green and degrades drinking water quality.

The Federal Toxic Substances Control Act

The goal of TSCA is to establish necessary and appropriate federal restrictions on the manufacture and use of chemicals that present an unreasonable risk of injury to the health of Americans or the environment. New York strongly supports this goal and recognizes the critical contribution that TSCA — in partnership with state efforts — could make in ensuring the adequate protection of public health and the environment from toxic chemicals. Unfortunately, in practice TSCA has largely failed to live up to its goal.

The primary requirements of TSCA are:

- Under § 8(b), EPA is required to maintain an inventory of chemicals currently manufactured or processed in the United States. 15 U.S.C. § 2607(b).
- Under § 5, manufacturers must notify EPA before using a chemical that is not on the inventory or creating a new use of a chemical that is on the inventory. *Id*. § 2604.

- Under § 4, EPA is required to issue a rule requiring testing of a chemical that "may present an unreasonable risk of injury to health or the environment" or that is or will be "produced in substantial quantities" and will either enter the environment in substantial quantities or lead to human exposure in substantial or significant quantities, if there is insufficient data about the chemical. *Id*. § 2603.
- Under § 6(a), if EPA finds that "there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal" of a chemical "presents an unreasonable risk of injury to health or the environment," EPA shall protect against that risk using "the least burdensome requirement" with respect to the chemical's manufacture, processing, distribution, use or disposal. *Id*. § 2605(a).

TSCA has largely failed to meet the goal of keeping Americans and the environment safe from dangerous chemicals because only a small number of chemicals have been tested and only a handful have been restricted. For example, after TSCA went into effect in 1977, 60,000 existing chemicals were placed on EPA's inventory but only about 200 of those chemicals were tested and only a handful were restricted.

As a result of the failure of TSCA to fulfill its goal, the American public and our environment are currently being exposed to potentially hazardous chemicals on an ongoing basis, even though their toxicity is not yet fully understood. It is essential that TSCA be reformed to require EPA to increase its knowledge of these chemicals' toxicity as quickly as possible and to impose appropriate restrictions on their manufacture and use as necessary to adequately protect public and environmental health.

The pending Senate bill, S. 1009, proposes several ways to accomplish that reform, including:

- Amending § 4 of TSCA to require EPA to classify every chemical on the inventory as either low or high priority;
- Amending § 6(a)-(c) to require EPA to make a safety assessment and safety determination about every high-priority chemical;
- Amending § 6(c) to provide that, if EPA finds as a result of the safety determination that a chemical will present an unreasonable risk of injury to health or the environment under its "intended conditions of use," EPA is required to impose additional restrictions as "necessary"; and
- Further amending § 6(c) to remove the "least burdensome requirement" provision, which has acted as a barrier to regulation.

I believe that these amendments represent critical improvements to TSCA. However, I also believe that these amendments could be further improved by imposing deadlines on EPA for designating chemicals as low priority or high priority, for conducting safety assessments and determinations, and for imposing additional restrictions on chemicals that are found to present an unreasonable risk to health or the environment.

Preemption of State Laws under TSCA

Protecting the Nation's public health and the environment from the adverse effects of toxic chemicals is best achieved through a dynamic federal/state relationship in which the authority of states to enact and enforce protections — which are at least as stringent as federal protections but may also be more stringent — is preserved. That relationship animates our national laws governing air and water pollution, hazardous waste, and pesticides as well as TSCA.

TSCA's preemption provisions allow a state to impose its own restriction on a dangerous chemical until EPA has restricted a chemical, exempt several categories of state restrictions from preemption even after EPA has imposed a restriction, and establish a preemption waiver process. These provisions help to ensure that states retain their ability to protect their citizens and environment from chemicals that states have found dangerous as well as allowing states to continue to be laboratories for nationwide solutions.

§ 18(a)(1) of TSCA provides that a state may regulate any chemical unless and until EPA regulates the chemical under § 6. 15 U.S.C. § 2617(a)(1). Once EPA regulates a chemical because it has found that the chemical presents an unreasonable risk, § 18(a)(2)(B) provides that a state may not enforce an existing regulation or establish a new regulation "which is designed to protect against such risk" after the effective date of that federal regulation. *Id*. § 2617(a)(2)(B).

However, § 18(a)(2)(B) exempts a state restriction on a chemical from preemption if the state restriction is: (1) identical to EPA's restriction; (2) enacted pursuant to another federal law; or (3) a complete ban on in-state use of the chemical. *Id*. These exceptions provide important protections to states. For example, the exception for restrictions that are identical to EPA's restriction allows a state to enforce a restriction under its own law and administrative enforcement process rather than seeking to enforce it in a citizens' suit brought under TSCA in federal district court.

In addition, § 18(b) provides that a state may seek a waiver from preemption if a state restriction: (1) would not create a violation of EPA's regulation; (2) provides a significantly higher degree of protection than EPA's regulation; and (3) would not unduly burden interstate commerce. *Id*. § 2617(b). In considering necessary reform of TSCA's regulatory provisions,

the authority of states to take action to protect their citizens and the environment from threats posed by toxic chemicals should be preserved.

Conclusion

In conclusion, achieving TSCA's goal of ensuring the adequate protection of public health and the environment from toxic chemicals is critically important, as is preserving the authority of states to protect public health and the environment from the risks posed by toxic chemicals. Because TSCA has not met its goal, Attorney General Eric T. Schneiderman strongly supports your efforts and offers the full assistance of our office to you and your colleagues as you review this important federal law.

I would like to thank you Chairman Shimkus, Ranking Member Tonko, and the other members of this committee and subcommittee for your consideration of TSCA and its necessary reform.

Linda Reinstein – Summary

The Toxic Substance Control Act (TSCA) has failed to protect public health and our environment. All forms of asbestos can cause cancer and respiratory diseases, yet it is still legal and lethal in the United States. Asbestos, a known human carcinogen, has caused one of the worst man-made disasters in history. The facts are irrefutable, yet, each day, 30 Americans die from preventable asbestos-caused diseases. The WHO, ILO, EPA, and our Surgeon General all agree that there is no safe level of exposure to asbestos.

Americans trust that their air, soil, and water are safe from toxic contaminants; however, the U.S. government's failure to ban asbestos is the ultimate example of TSCA's limitations. In 1989, the EPA issued a final rule under Section 6 of TSCA, banning most asbestos-containing products. In 1991, however, most of the original ban on the manufacture, importation, processing, or distribution in commerce of asbestos-containing products was overturned. From 1900 to 2012, the U.S. Geological Survey (USGS) reported that we have used more than 31 million tons of asbestos. Those indestructible fibers remain forever in our communities. In the 30 year period beginning in 1965, nearly 1.4 million tons of asbestos was used just in friction products, such as vehicle brakes and clutches. In 2012, the USA consumed 1,060 tons of asbestos.

Americans can't manage this ever-growing risk of asbestos exposure. In 2007, ADAO identified 5 consumer products, including a child's toy, that contained asbestos. Following the 2011 tornado in Joplin, Missouri, it was reported that 2,600 tons of asbestos debris were removed from the community. Last year, tons of toxic debris littered the coastline after Hurricane Sandy. Right here under the Capitol, 10 Architect of the Capitol employees were exposed to and sickened from asbestos while maintaining the tunnels.

Congress should take responsibility for public health by drafting and passing meaningful TSCA reform legislation that truly strengthens protections for our families and environment by preventing the further use of asbestos. Americans have lost confidence in the chemical industries' ability to protect us from toxins. Congress needs to hold these industries accountable. We need to ensure that in the future, the process of approving chemicals is more transparent. The public deserves to have access to vital health and safety information.

The only true measurement of strong TSCA Reform is the legislation's ability to empower the EPA to ban asbestos.

The Committee on Energy and Commerce
Subcommittee on Environment and the Economy
"Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the Toxic Substances Control Act"
Linda Reinstein, President/Co-founder and Mesothelioma Widow
Asbestos Disease Awareness Organization (ADAO)
Wednesday, September 18, 2013

I would like to thank Chairman Shimkus, Ranking Member Tonko and the entire Subcommittee on Environment and the Economy for the honor and opportunity to testify at this hearing, "Regulation of Existing Chemicals and the Role of Pre-Emption under Sections 6 and 18 of the Toxic Substances Control Act." I know far too well that toxic chemicals are not just "threats." They are a very real part of the life and death of many people, including my husband.

My name is Linda Reinstein. I am neither a lobbyist nor an attorney. I am a mesothelioma widow and Co-founder of the Asbestos Disease Awareness Organization (ADAO). Founded in 2004, ADAO is the largest independent non-profit organization in the U.S. dedicated to preventing exposure to eliminate asbestos-caused diseases.

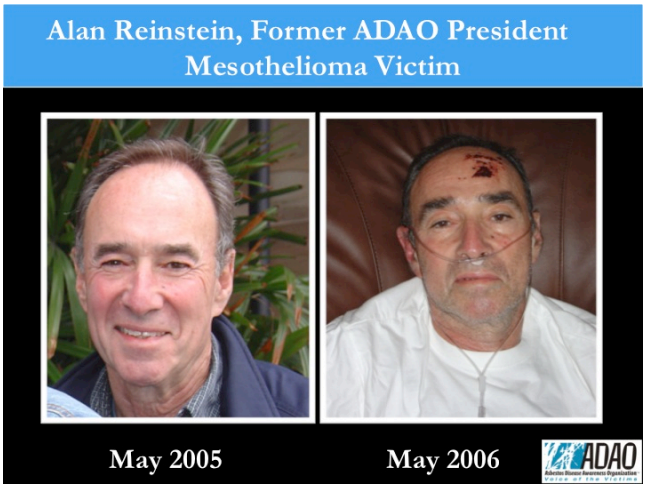
Since EPA Deputy Administrator John R. Quarles testified about the "Need for Toxic Substances Act"[1] in 1975, science and technology have advanced exponentially. Asbestos, a human carcinogen, has caused one of the worst man-made disasters in history. The facts are irrefutable, yet, each day, 30 Americans die from a preventable asbestos-caused disease.

[1] http://www2.epa.gov/aboutepa/quarles-testifies-need-toxic-substances-act

Honoring our ADAO tradition, I'd like to dedicate my testimony today to two asbestos victims, Janelle and Michael. Tragically, three months ago, Janelle lost her life to mesothelioma at the age of 37, leaving behind her husband and 11-year-old son. Michael, a 29-year-old mesothelioma patient, continues to fight for his life and faces limited treatment options. Neither Janelle nor Michael ever worked with asbestos. The asbestos victim's profile has changed; once a blue-collar worker in his mid-sixties, now there is a new, younger patient profile emerging with no known occupational exposure – people like Janelle and Michael. It is no longer only at-risk workers being diagnosed; it's also their families: children who hugged their parents and spouses who washed their clothes.

MES-O-THE-LI-O-MA – CAN'T PRONOUNCE IT – CAN'T CURE IT

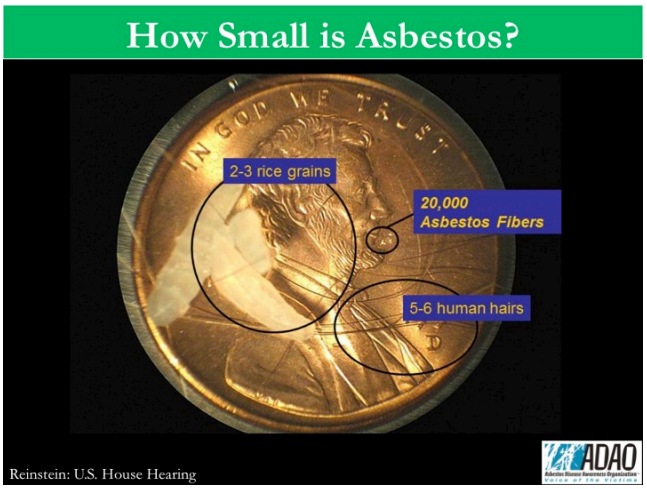
My husband, Alan, was diagnosed with pleural mesothelioma in 2003. We had never heard of the asbestos-caused cancer, mesothelioma, and shortly learned it was incurable. Alan chose to have an extrapleural pneumonectomy, a radical surgery which removed a rib and his left lung, stripped off his pericardium and surgically replaced his diaphragm – all in hopes of more time with us. In 2005, the cancer came back on his remaining lung. Alan felt like he was breathing through a pinched straw, every breath, every minute, every day. When his oxygen levels became critically low, he was tethered to supplemental oxygen. He fought a hard battle with chemotherapy for nearly a year. In 2006, Alan took his last breaths with our then 13-year-old daughter and me by his side. Alan paid the ultimate price for his job – his life.



Our daughter was only ten years old when we began our arduous family battle to fight mesothelioma and work with Congress to ban asbestos.

Today, I somberly represent Alan, Janelle, Michael and hundreds of thousands of other victims whose voices have been silenced by asbestos. I use the word "victim" because it is the only word that appropriately describes an individual exposed to asbestos; a patient, living or deceased, who was diagnosed with an asbestos-related disease; or a family member of those exposed or diagnosed. For each life lost, a shattered family is left behind.

FROM MAGIC MINERAL TO DEADLY DUST



Asbestos was once considered a "magic mineral" due to its light weight, tensile strength, heat resistance, and low cost. All six types of asbestos – chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite – are carcinogenic. Asbestos fibers can be nearly 700 times smaller than a human hair and are odorless, tasteless, and indestructible. All forms of asbestos can cause mesothelioma and lung, gastrointestinal, laryngeal, and ovarian cancers, as well as non-malignant lung and respiratory diseases.

The World Health Organization[2], International Labor Organization[3], U.S. Environmental Protection Agency[4] (EPA) and Surgeon General[5] all agree that there is no safe level of exposure to asbestos. Asbestos-related diseases are often misdiagnosed and under-reported. Exacerbated by a latency period of 10–50 years, late stage diagnosis

[2] http://www.who.int/occupational_health/publications/asbestosrelateddiseases.pdf
[3] http://www.ilo.org/safework/WCMS_144446/lang--en/index.htm
[4] http://www2.epa.gov/asbestos/learn-about-asbestos#effects
[5] http://www.surgeongeneral.gov/news/2013/04/pr20130401.html

often limits patients' treatment options. Most patients die within 6 to 12 months after diagnosis. Each death is preventable.

DEADLY MISCONCEPTIONS

Most Americans trust that their air, soil and water are safe from toxic contaminants; however, the Toxic Substances Control Act (TSCA)[6] has failed to protect public health and our environment. In fact, the U.S. government's failure to ban asbestos is the ultimate example of TSCA's limitations. Only five minor asbestos-containing products were banned as part of the original 1976 TSCA (i.e., corrugated paper, rollboard, commercial paper, specialty paper, and flooring felt.) The short version of our nation's failure to ban all asbestos in commerce goes like this:

In 1979, EPA announced it would be exploring how TSCA Section 6 could be used to protect the public from exposure to asbestos. For seven years, the agency assembled and evaluated the scientific evidence. In 1986, EPA proposed for public comment a prohibition on the commercial manufacture, import, processing, and distribution in commerce of asbestos. The Agency noted that the "human health effects caused by exposure to asbestos are well-documented...[Moreover] it is well-recognized that asbestos is a human carcinogen and is one of the most hazardous substances to which humans are exposed in both occupational and non-occupational settings." For this reason, EPA indicated that permitting the continued use and import of asbestos posed an unreasonable risk of injury to human health.

[6] http://www.epa.gov/oppt/newchems/pubs/chem-pmn/appendix.pdf

The public's participation in EPA's rulemaking process (1986-1988) yielded more than 45,000 pages of comments and testimony. EPA noted that there was wide agreement that all types of asbestos fibers are associated with pulmonary fibrosis (asbestosis), lung cancer, and mesothelioma. Ultimately, the George H.W. Bush Administration concluded that a regulation banning asbestos was the appropriate step to protect public health. (54 *Federal Register* 29460, July 12, 1989).[7]

When EPA's final rule was issued, however, the Asbestos Information Association, the Asbestos Institute, Corrosion Proof Fittings, and other powerful interests filed a lawsuit to block the asbestos ban. The Canadian Government and the Province of Quebec tried to latch onto the lawsuit because they are major exporters of asbestos. The petitioners raised all sorts of procedural complaints about how EPA conducted the rulemaking process (e.g., designating a hearing officer rather than an administrative law judge to oversee the public hearing). The U.S. Court of Appeals for the Fifth Circuit labeled this legal strategy the "protest everything approach." (947 F.2d 1201 (1991))[8]. Two key arguments made by the petitioners; however, did influence the Court: (1) the EPA did not provide the public with its methodology for estimating the benefits of an asbestos ban; and (2) the EPA did not "give adequate weight to statutory language requiring it to promulgate the least burdensome, reasonable regulation required to protect the environment adequately."

The judges returned the regulation to EPA for reconsideration, and the Administration did not appeal the Court's decision. That 30-year chronology of events leads public health advocates to ask: "If EPA can't ban a known

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[7] http://www2.epa.gov/asbestos/asbestos-ban-and-phase-out-federal-register-notices

[8] http://scholar.google.com/scholar_case?case=6165892895625819539&q=Corrosion+Proof+Fittings+v.+EPA&hl=en&as_sdt=2,5&as_vis=1

carcinogen---at which no level of exposure is safe---how can EPA regulate any toxic substance?" ("The Failed EPA Asbestos Ban," Environmental Working Group, March 2004.)[9]

Without a comprehensive ban on asbestos, companies continue to contaminate our communities with these deadly fibers. Without a comprehensive ban, asbestos continues to accumulate in our communities. The U.S. Geological Survey (USGS) reported that in 2012, 1,060 tons of asbestos was imported into the United States. We can't even manage that new *additional* risk because we don't know where the asbestos is being introduced and used.

ASBESTOS: STILL LEGAL AND LETHAL IN THE UNITED STATES

The collateral damage of asbestos consumption is staggering. USGS reported that from 1900 to 2012, we have used more than 31 million tons and imports continue. Furthermore, about 50 percent occurred between 1960 and the end of 2003.[10] From 1965 – 2000, nearly 1.4 million metric tons of asbestos was used in friction products such as brakes and clutches, and insulation.[11] Today, ships docked in U.S. ports still unload asbestos in the states of Louisiana, Texas, California, New Jersey, and more.

The United States remains dependent on imports to meet so-called manufacturing needs. USGS reported that in 2012, "the chloralkali industry accounted for an estimated 57% of U.S. consumption; roofing products, about 41%; and unknown applications, 2%."[12] For the past two years, we have seen an increase in asbestos consumption in the chloralkali industry, even though viable and affordable asbestos substitutes exist.

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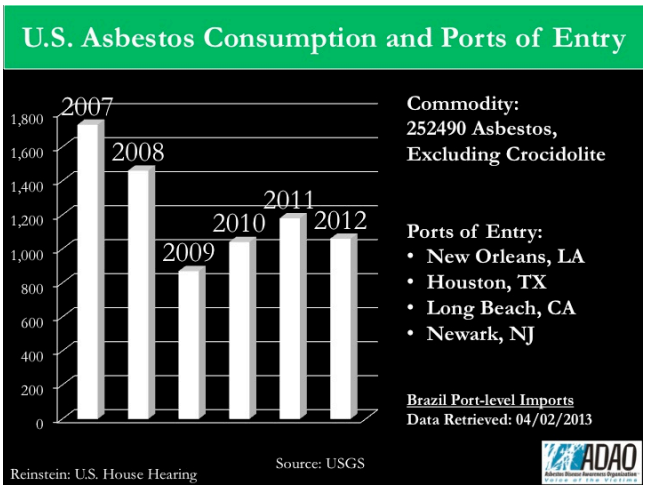
[9] http://www.ewg.org/research/asbestos-think-again/asbestos-still-not-banned
[10] http://pubs.er.usgs.gov/publication/cir1298
[11] [11] http://pubs.er.usgs.gov/publication/cir1298
[12] http://minerals.usgs.gov/minerals/pubs/commodity/asbestos/mcs-2013-asbes.pdf

In 2012, the US imported 1060 tons of chrysotile asbestos from Brazil who is the world's third largest asbestos producer.

In response to this continued public health crisis, 18 months ago, I began my inquiry about the toxic asbestos import trade by asking three questions via a Freedom of Information Act (FOIA) request:

- Who are the U.S. companies and/or government agencies importing asbestos?
- What asbestos-containing products are being manufactured in the U.S.?
- Where are the asbestos-containing products being used in or exported from the U.S.?



I've filed FOIA requests and exchanged emails with government officials. The hurdles and obstacles have been frustrating and maddening, especially for a small non-profit in a home office without staff.

I have been unable to get answers to any of my questions due to U.S. Code Title 13, Chapter 9, Section 301(g), which protects the confidentiality of export data collected by the U.S. Census Bureau. This roadblock led me to different questions: Why *is* the United States "dependent on imports to meet manufacturing needs," as USGS states?

To my dismay, the officials at USGS and the Census Bureau insist that information about asbestos imports cannot be disclosed. Importing and using a deadly chemical that has been banned in 54 countries across the globe, is granted a secret status? I support business, innovation, and transparency – but Americans are shutout from information needed to protect their health and our environment.

According to the Center for Public Integrity, the American Chemistry Council released a statement saying, "Diaphragms made of asbestos are a critical separation medium in the chlorine manufacturing process. Chlorine is essential for manufacturing life-saving medicines, producing solar cells, and providing safe drinking water." The statement asserted that chlorine producers "work to manage the risks and potential adverse effects to human health and the environment" and "workers potentially exposed to asbestos are protected by wearing appropriate personal protective equipment and following strict work processes."[13]

Despite the irreversible, harmful health effects of asbestos exposure, the American Chemistry Council statement continues: "Employees in the chlor-alkali industry are given annual medical examinations to determine whether an employee has incurred any adverse effects due to any possible exposure." As an asbestos widow, that statement is alarming and distorted. If a medical examination results in an asbestos-disease diagnosis, it's too *late* to save that patient because the health effects are irreversible. There is no cure for asbestosis or mesothelioma.

We have ignored the World Health Organization's Resolution stating: "The most efficient way to eliminate asbestos-related diseases is to stop using all types of asbestos."[14]

ASBESTOS CAN TAKE YOUR BREATH AWAY, FOREVER

The facts are clear: the tons of asbestos that have been mined in and imported to the U.S. have created a public health crisis. Asbestos remains in our homes, schools, and buildings, and even on consumer shelves. Workers and consumers cannot adequately identify the toxic fibers nor manage the risks of consumer, environmental and occupational asbestos exposure in products or places.

[13] http://www.publicintegrity.org/health/public-health/asbestos

Members of the Committee, do you know where these nearly invisible, deadly fibers are in your home, child's school, on consumer shelves? Do you know where they are in your district, or here in the Capitol? Americans want to know where asbestos puts their communities at risk.

CONSUMER, ENVIRONMENTAL AND OCCUPATIONAL EXPOSURE CONTINUES

CONSUMER EXPOSURE:

- From 1965 – 2000, nearly 1.4 million metric tons of asbestos was used in friction products such as brakes and clutches, and insulation.
- In 2007, ADAO identified 5 consumer products, including a child's toy, that were contaminated with asbestos.

ENVIRONMENTAL EXPOSURE:

- Natural and man-made environmental disasters have plagued us. It was reported that 2,600 tons of asbestos was collected after the 2011 Joplin, Missouri tornado and tons of toxic debris littered the coastline after last year's Hurricane Sandy.

[14] http://whqlibdoc.who.int/hq/2006/WHO_SDE_OEH_06.03_eng.pdf

- W.R. Grace Vermiculite Mine, a man-made disaster in Libby, MT, has been costly in dollars and lives. The federal government has spent more than $450 million to remediate the toxic areas in Libby, MT and provide medical care to the residents.

OCCUPATIONAL EXPOSURE:

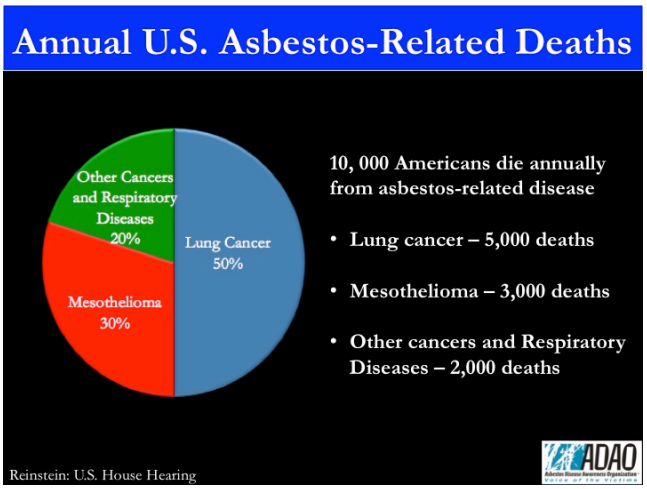
Although we have laws and regulations, workers are still being exposed on the job and the asbestos fibers they have on their clothes and shoes, and in their cars are taken home. This take-home toxin threatens their families with deadly hugs and chores. Occupational exposures can occur during auto repair work, maintenance, construction, abatement, and hazardous debris removal.

- The medical journal *The Lancet* reported that 9/11 first responders are now suffering from a variety of diseases and are 19% more likely to have cancer than other first responders. Asbestos was the primary insulation compound used when the World Trade Center was built, beginning in 1968. Due to the long latency period of asbestos-caused diseases, it will be decades before we can accurately calculate collateral damage from 9/11. [15]

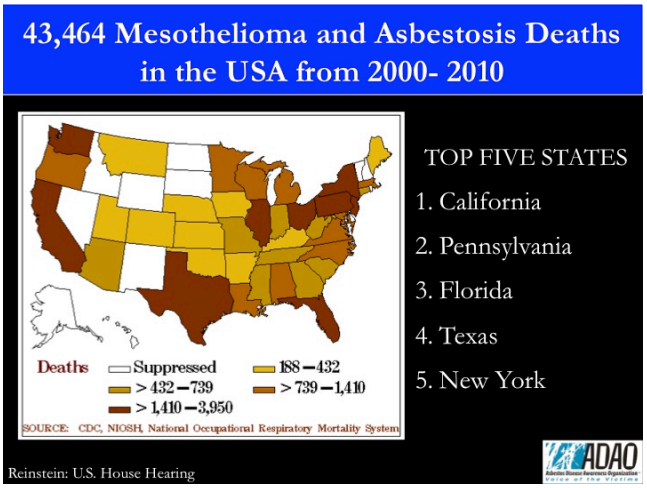
- Right here under the Capitol, ten federal employees were exposed and sickened by their work maintaining the tunnels. Asbestos dust was so thick that a worker was able to write his name on the pipe. One of their wives now has pleural thickening, an asbestos-related health condition, from washing her husband's contaminated clothes.

[15] http://www.thelancet.com/themed-911

AMERICANS REMAIN AT RISK TODAY



Each year, an estimated 10,000 Americans die from asbestos-related disease. Many physicians and public health experts indicate that this estimate is likely low due to underreporting and a focus limited to occupational surveillance. Annually, about 3,000 Americans die from mesothelioma, 5,000 from asbestos-related lung cancer, and 2,000 from other asbestos-related cancers or respiratory diseases.



The Centers for Disease Control and Prevention's NIOSH statistics from 2000 to 2012 reveal that 43,464 Americans died from mesothelioma and asbestosis – just two of the asbestos-caused diseases. The top five states with the highest mortality were California, Pennsylvania, Florida, Texas, and New York.

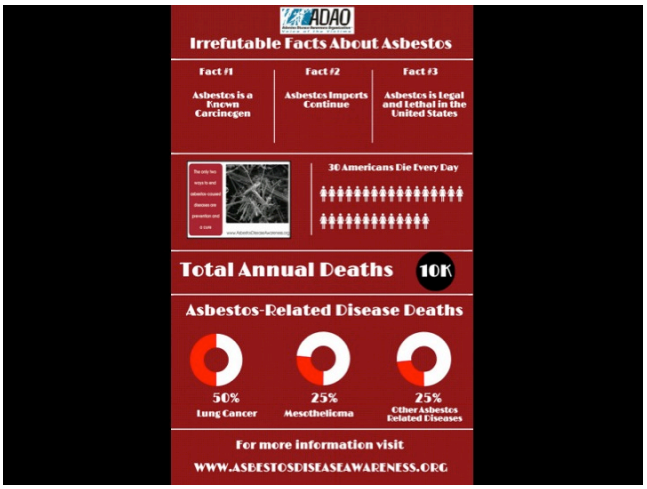
The Occupational Safety and Health Administration states that in the United States, "Asbestos is well recognized as a health hazard and is highly regulated. An estimated 1.3 million employees in the construction and general industry face significant asbestos exposure on the job." In May 2010, the United States President's Cancer Panel (PCP) released the landmark 200-page report entitled, ***"Reducing Environmental Cancer Risk: What We Can Do Now"***[16]. The panel reported, "Construction workers were found to be 11 times more likely to develop mesothelioma, due to asbestos exposures at the site."

[16] http://deainfo.nci.nih.gov/advisory/pcp/annualReports/pcp08-09rpt/PCP_Report_08-09_508.pdf

HISTORY IS A GREAT TEACHER TO THOSE WHO LISTEN

We cannot alter history or bring back the dead, but we can learn from the past to save lives. Every day, 30 Americans will die from preventable asbestos-caused diseases, yet asbestos continues to be legal and lethal in the United States. We know so much and have done so little to mitigate this disaster. Human, environmental, and civil rights have all been compromised because of asbestos, and patients like Janelle, Michael, and Alan pay the price. I know too well that the only two ways to end asbestos-caused diseases are prevention and a cure. For each life lost, a shattered family is left behind.

IRREFUTABLE ASBESTOS FACTS



1. Asbestos is a known human carcinogen and there is no safe level of exposure.
2. 54 countries have banned asbestos, but the United States has not.
3. Asbestos imports and exposure continue. In 2012, the United States imported over 1,060 tons of asbestos.
4. An estimated 10,000 Americans die each year from preventable asbestos-caused diseases.
5. Americans cannot determine or manage consumer, environmental, and occupational asbestos risk.

It is because of my husband, Alan, Janelle, Michael, and thousands of asbestos cancer warriors that I fight every day to protect and help families impacted by asbestos disease. They deserve responsibility, accountability, and transparency. Meaningful TSCA reform addressing these three issues will save lives.

- Congress should take responsibility for public health by drafting and passing meaningful TSCA reform legislation that truly strengthens protections for our families and the environment by preventing the further use of asbestos.

- Americans have lost confidence in the chemical industries' ability to protect us from toxins. Congress needs to hold them accountable.

- We need to ensure that in the future, the process of approving chemicals is more transparent. The public deserves to have access to vital health and safety information.

The only true measurement of strong TSCA Reform is the legislation's ability to empower the EPA to ban asbestos. One life lost to a preventable asbestos-caused disease is tragic; hundreds of thousands of lives lost is unconscionable.

I have attached to this testimony a petition signed by over 2,700 people urging Congress to ban asbestos.