

On April 28, 2015, the US Senate Environment & Public Works (EPW) Committee approved [S.697](#), the bipartisan bill introduced on March 10 by Senators Tom Udall (D-NM) and David Vitter (R-LA), to modernize the Toxic Substances Control Act (TSCA). Before approving S.697, the EPW Committee amended the bill with compromise language negotiated by Senators Udall and Vitter with Democratic Senators Cory Booker (NJ), Jeff Merkley (OR) and Sheldon Whitehouse (RI) to address a number of issues that had been raised regarding the original bill. The Committee voted 15-5 to report out the amended bill, with Senators Booker, Merkley, Whitehouse and Tom Carper (D-DE) joining the Republican majority in favor of the bill.

Among other changes to the current TSCA law, S.697 would require EPA to make an affirmative determination that a new chemical does not present an unreasonable risk of injury under its intended conditions of use before it can be manufactured, imported or processed in the United States. The bill also would require EPA to designate existing chemicals (i.e., those on EPA's TSCA Inventory) as "high" or "low" priority through a risk-based prioritization process and then conduct safety assessments of and make safety determinations about the high-priority chemicals. Under the existing TSCA statute, EPA is not required to determine whether any chemical – new or existing – is safe, and the agency has no obligation whatsoever to review existing chemicals at all. S.697 also provides that companies could ask EPA to conduct a safety assessment of a chemical that has not yet been designated, but while EPA could agree to assess a limited number of such chemicals, the agency could not give them preference over chemicals that it has designated as high priority. S.697 also would make it easier for EPA to require testing of chemicals, including giving the agency the authority to issue administrative orders requiring testing. S.697 also places limitations on companies' ability to claim certain chemical data as "confidential business information." Additionally, the bill makes it less difficult for EPA to limit or ban a chemical that is determined to present an unreasonable risk by eliminating the current TSCA requirement that EPA must select the "least burdensome" alternative when taking action.

As introduced, S.697 was criticized on various grounds by some states and NGOs. Some of the chief arguments made against S.697 are that it too broadly restricts the ability of states to regulate chemicals, makes it difficult for EPA to designate a chemical as "high priority," provides inadequate opportunity to review a "low priority" designation, does not give priority to evaluation of persistent, bioaccumulative and toxic (PBT) chemicals, and retains the "unreasonable risk" standard that exists in the current TSCA law.

The bill as amended and approved by the EPW Committee makes a number of changes to attempt to address these and other concerns, including the areas below.

Preemption of State Chemical Regulation

The amended S.697 clarifies that it does not preempt state air and water laws or state information collection and disclosure laws. The amended bill further provides that any state chemical regulation that is in effect before August 1, 2015 is permanently protected from preemption. (The grandfather date in the original bill was January 1, 2015.)

The amended bill also modifies the "pause" on state regulation of a chemical that would occur when EPA designates the chemical as high-priority, by providing, among other things, that:

- Preemption of new state regulatory actions would start when EPA defines the scope of uses of a chemical (which it must do no later than six months after designating the chemical as high priority) and end when EPA makes a safety determination about the chemical (which it must do no more than five years after a chemical is designated as a high priority).
- If EPA misses the deadline for making the safety determination, any waivers from the "pause" filed by the state(s) seeking to regulate the chemical(s) are automatically granted.
- If EPA fails to make a decision on a state waiver within 90 days, the waiver is approved.

The amended bill also would allow states to "co-enforce" regulations on chemicals, including seeking penalties.

Priority Designation of Chemicals

The amended S.697 provides that EPA may designate a chemical as high priority if it has either "significant" (rather than "high") hazard or "significant" (rather than "widespread") exposure. The amended bill further allows 90 days of public comment for all listing decisions (both high- and low- priority) and permits persons to seek judicial review of EPA's designation of a chemical as a low priority within 60 days after the designation is published.

PBT Chemicals

Additionally, the new version of S.697 requires that when setting the initial list of high priority chemicals, EPA must give preference to the chemicals among EPA's list of "Work Plan Chemicals" that are PBTs, and PBTs are added to the criteria that EPA must consider when making prioritization determinations.

Unreasonable Risk

The amended bill clarifies that EPA cannot take into account “costs and other nonrisk factors” when determining whether a chemical presents an “unreasonable risk” of injury.

The amended S.697 makes a number of other changes to alleviate concerns that have been raised. While critics of the bill acknowledged that the changes addressed some issues, they have expressed their continued opposition to the bill as written. In particular, former EPW Committee Chair Senator Barbara Boxer (D-CA), who now serves as the committee’s Ranking Member, stated at the EPW Committee meeting that she will offer a number of amendments to S.697 when it is brought to the Senate floor. A date has not yet been set for consideration of the bill by the full Senate.

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