



May 10, 2011

ASSEMBLY ENVIRONMENTAL CONSERVATION COMMITTEE

MEMORANDUM IN OPPOSITION

A.3141 (Sweeney)

S.1526 (Perkins)

AN ACT to amend the environmental conservation law,
in relation to regulation of chemicals in consumer products

This bill would, by legislative fiat, designate a list of “priority chemicals” and would direct the Department of Environmental Conservation (DEC), in consultation with the Department of Health (DOH), to conduct a periodic review and promulgate a list of “chemicals of high concern” and add additional chemicals thereto, including pesticides and controlled substances. Moreover, DEC can skip this “periodic review process” and thus the entire regulatory review process prescribed under the State Administrative Procedures Review Act (SAPA) altogether, in the event that a new determination is made by any state, federal or international governmental entity that a chemical meets the criteria for a “chemical of high concern” or a “priority chemical,” as specified in the bill.

Within two years of the bill’s enactment, DEC is directed to ban the sale or distribution in the state of children’s products containing a “priority chemical.” The bill would thus delegate authority to a state administrative agency that is unprecedented in breadth and scope, arbitrarily giving DEC bald power to control the sale and distribution of children’s products in the state.

Such state-specific control and potential bans of consumer products in New York, would erect impermissible barriers to interstate commerce in violation of the Commerce Clause of the United States Constitution.

While we are mindful that the bill has been amended to somewhat narrow its scope, the New York State Chemical Alliance (NYSCA), the statewide trade association that represents many of the major chemical manufacturers, distributors and users engaged in the business of chemistry in the state, remains **STRONGLY OPPOSED** to S.1526 / A.3141 for the reasons set forth herein.

“Children’s product” is defined over broadly in the bill, to include any item, its component parts and packaging, designed or intended for use by children aged 12 or younger. Under such an expansive definition, how would a manufacturer, importer or distributor be able to determine whether or not a personal care product, such as soap, shampoo or toothpaste, is intended for use by children? This product definition could even include embedded materials, exposure to which is inaccessible to children.



“Chemical” is defined to include even a single molecule or metabolite of a chemical. There should be a de minimis concentration exemption in the bill, such as that in the European Union’s R.E.A.C.H. program, which sets an upper limit of 0.1% for substances of very high concern, including carcinogens, mutagens and reproductive toxins. Moreover, there is no distinction between intentionally added chemical molecules, added for function, performance or efficiency, and unintentionally added chemical molecules, such as minute residues from manufacturing, packaging or transportation.

“Chemicals of high concern” are defined as those included in the list of “chemicals of high concern” published under the laws of the State of Maine.

“Priority chemicals” are defined to include the list of: tris-phosphate, benzene, lead, mercury, molybdenum, antimony, arsenic, beryllium, cadmium and cobalt.

As stated above, DEC is empowered to add additional chemicals to both chemical lists by regulation, if they are so designated by the WHO, HHS, EPA, California EPA, Maine DEC, Washington State, or EU as a “known or reasonably anticipated” carcinogen, reproductive or developmental toxicant, “known or likely” endocrine disruptor, persistent, bioaccumulative and toxic, or very persistent and very bioaccumulative.

This statutory incorporation by reference of chemical lists compiled by other state, federal or foreign governmental entities is constitutionally suspect and legally problematical. For instance, the Washington State list purporting to be incorporated herein, is being established by administrative regulation that is still in draft form and subject to public comment and further revision. This provision of the bill alone, will inevitably engender needless litigation.

Moreover, DEC may designate a “chemical of high concern” as a “priority chemical” simply by noting that such chemical or its metabolites have been found through biomonitoring to be present in humans, or via sampling and analysis to be present in the home environment, or by monitoring to be present in fish, wildlife or the natural environment, or to be present in a children’s product used in the home, school or childcare center, or is a high production volume chemical. The mere presence of a chemical in the body, home, school, daycare center, or environment, or the mere fact it is produced in high volumes, is not indicative of risk to human health or the environment. $RISK = HAZARD \times EXPOSURE$, or RISK (adverse health or environmental effects) is the product of HAZARD (inherent chemical harm) times EXPOSURE (magnitude, frequency and duration of exposure pathways to chemical). As such, hazard without exposure or exposure without hazard, contains no risk to human health or the environment. The bill is thus fundamentally flawed, by relying on the false premise that priority chemicals are inherently risky.

Manufacturers of affected children’s products may be required by DEC to submit assessments of all such products as to whether they contain priority chemicals, and the availability, cost, feasibility and performance of alternatives, including potential for harm to human health and the environment. DEC is also authorized to assess a \$600 per chemical fees to cover costs of this new reporting requirement. However, the true cost to manufacturers would be the untold thousands of dollars per product that they would be forced to pay for costly laboratory testing not required elsewhere.



While elimination of the potential for harm to children from exposure to chemicals in children's products is certainly a laudable goal, we respectfully submit that this bill would establish regulatory parameters that are not based upon peer-reviewed, science-based principles. If this bill were adopted, we fear that the public health and environmental regulatory schemes currently extant at the federal level would effectively be eviscerated and replaced with unscientific New York standards.

It is this state-level chemicals regulation process that we strongly object to, since it is more properly handled at the national level, utilizing systematic, peer-reviewed, scientific risk-based assessments. These involve established protocols to nominate, evaluate and manage chemicals of concern in the manufacture and distribution of children's and consumer products. Such a process is currently underway in Washington, D.C. with the modernization of the federal Toxic Substances Control Act of 1976 (TSCA) and EPA designated chemical action plans, as part of Congressional deliberations on the federal Safe Chemicals Act. Moreover, the sale and distribution of toys and children's products containing hazardous substances known to be harmful to children, is already illegal under the federal Consumer Products Safety Improvement Act of 2008 (CSPIA), administered by the US Consumer Products Safety Commission. (CPSC).

In any event, the costs of creating and administering such a state-level chemicals regulatory regime are huge, certainly beyond the fiscal capabilities of New York or any other state, during this current economic recession.

Finally, the New York State Interagency Committee on Sustainability and Green Procurement created under Governor's Executive Order No. 4 (2008), which was continued under Executive Order No. 2 (2011), has already rejected the notion of establishing a New York State-specific "List of Chemicals to Avoid," as it would have targeted listed chemicals for de facto bans in the state & local procurement process, without the benefit of peer-reviewed, scientific risk-based assessments.

In sum, while certainly well intentioned, this legislation is overly broad, rife with uncertainty due to numerous internal inconsistencies and undefined terms. The bill would also unnecessarily burden manufacturers, importers, and distributors of children's products, and state government itself, with its massive costs of compliance.

In view of this and for all the reasons stated herein, the New York State Chemical Alliance on behalf of its member companies, **STRONGLY OPPOSES A.3141 (S.1526) AND URGES YOU TO VOTE NO.**

Respectfully submitted,

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