



Scott Pruitt, Administrator,
United States Environmental Protection Agency
1200 Pennsylvania Avenue N.W., Washington, DC, 20460

May 15, 2017

RE: Comment on Executive Order 13777: Enforcing the Regulatory Reform Agenda, Docket ID: EPA-HQ-OA-2017-0190: **The Toxic Substances Control Act needs strengthening and vigorous enforcement.**

Partnership for Policy Integrity (PFPI) is pleased to respond to EPA's request for comments consistent with Executive Order 13777. PFPI is a nonprofit organization that provides science and legal support so that citizen groups, environmental organizations, and policymakers can better understand energy development impacts on air quality, water quality, ecosystems, and the climate. Our current work focuses on biomass energy, oil and natural gas drilling, and hydraulic fracturing.

Not only do we disagree with the intent of this executive order, which is to eliminate existing regulations, but we are strongly in favor of strengthening existing protections and funding for enforcement to protect human health and the environment. In this testimony, we will make the case that the Toxic Substances Control Act be strengthened. It is somewhat improved after legislative changes in 2016, but still inadequate.

Citizens have a right to know what health hazards they're being exposed to as a result of government-regulated activities.

The Toxic Substances Control Act (TSCA) is a federal law designed to protect Americans from chemical risks. However, PFPI has found that the law and its implementation by the Environmental Protection Agency (EPA) is allowing the manufacturers of dozens of toxic chemicals used for oil and gas drilling and hydraulic fracturing to hide information about these chemicals from the public. Hence, citizens are unable to determine where and when many of these chemicals have been used, if these chemicals have leached into our water supplies, and how we might protect ourselves from future exposure.

Following is a description of how some important portions of TSCA currently work and their weaknesses, namely, why these standards need to be strengthened and not eliminated.

PFPI has found that there are significant problems with EPA's oversight of new chemicals proposed for use in oil and natural gas drilling. In 2016, PFPI published a first-ever review of EPA's health assessments and regulatory determinations for 105 fracking and drilling chemicals reviewed under TSCA's New Chemicals Program between 2009 and 2014¹. What we found is disturbing:

- Health studies were available publicly in only 2 of 99 cases, and submissions from six chemicals were missing entirely.
- EPA requested health studies in only five cases, despite expressing health concerns in 88 cases. Concerns included irritation to skin, eyes, and mucous membranes; neurotoxicity; and kidney and development toxicity.
- EPA approved almost all these chemicals for manufacture.

Citizens are prevented from learning about the identities of the large majority of these chemicals by TSCA's broad "confidential business information" provisions.

The modifications made to TSCA by the Lautenberg Act enacted in 2016 remove some legal hurdles that may have prevented EPA from requesting health or environmental testing for new chemicals, which is a modest step forward. However, PFPI believes TSCA should be stronger still, so that such testing would be mandatory.

Under the older version of TSCA, the agency could request testing to shed light on health or environmental impacts only if more than one condition were met:

First, EPA had to find that insufficient information was available to determine the health or environmental effects of the new chemical.

And then, EPA would have to make either of these findings:

- 1) That the chemical may pose an unreasonable risk of injury to health or the environment, or,
- 2) That the chemical would be produced in substantial quantities and might be expected to enter the environment in substantial quantities or lead to significant exposure to people.²

Some have argued that this earlier standard made it difficult for EPA to ask for testing: If insufficient information existed about a new chemical's health or environmental effects, but the chemical had not yet been used commercially, EPA might have found it difficult to argue that unreasonable risk of injury or substantial exposure would result. In practice, the records we reviewed showed that EPA frequently asked for *environmental* testing despite the seemingly weak position that the agency was in to request testing data. This evidence raises questions about why EPA did not ask for health testing as frequently as environmental testing, and whether the law was really to blame. This failure is one of the reasons that Congress' investigative arm, the Government Accountability Office, has placed EPA's chemical review program on its list of government programs at highest risk of waste, fraud, abuse and mismanagement.³

The revised standard removes these legal hurdles, whether real or apparent. The new law requires EPA to make an affirmative conclusion prior to allowing commercial manufacture that the chemical will not pose an unreasonable risk, a standard that should encourage EPA to request testing data more broadly.⁴ The new standard also allows the agency to seek testing information more readily, as long as any one of these four conditions is met:

- 1) The chemical presents an unreasonable risk of injury to health or the environment -- without regard to costs or other nonrisk factors, or
- 2) There is insufficient information to determine health and environmental impacts, or
- 3) In the absence of sufficient information, there may be an unreasonable risk of injury to health and the environment without consideration of costs or other nonrisk factors, or
- 4) The chemical is likely to be produced in substantial quantities and will either enter the environment in significant quantities or result in substantial human exposure.⁵

PFPI continues to recommend that chemical manufacturers be required to conduct health testing data each time they seek approval to manufacture a new chemical. EPA should effectively put this policy into practice under the new standard. At the same time, we recommend that Congress and the President enact legislation to make this policy mandatory as soon as possible. Without health testing data, it is unclear how EPA can effectively protect the public from chemical risks.

The 2016 changes to TSCA may enable EPA to give the public increased access to confidential information about new chemicals used in oil and natural gas drilling and hydraulic fracturing.

However, these changes don't go far enough, because they do not require EPA to make public the identity of new chemicals that are later used in oil and natural gas wells. Even though the law could be stronger, the agency should nonetheless use the 2016 revisions to vigorously review when confidentiality is warranted, and make public the identities of chemicals when it is not.

Previously, chemical manufacturers could legally withhold as confidential virtually any information about their new chemicals when they submitted applications to manufacture these chemicals to EPA.⁶

EPA could have then challenged these confidentiality designations, though the agency rarely did so.⁷

The 2016 revisions to TSCA allow manufacturers to withhold a similar range of information about their new chemicals, but they generally require earlier substantiation of claims by manufacturers and require EPA to review the claims by certain deadlines:

- With some exceptions, manufacturers must substantiate their confidentiality claims when they first submit an application to EPA (or when they first make other submissions under TSCA).
- For chemical identities, companies must substantiate confidentiality claims on the date the chemical is first offered for commercial distribution.⁸ They must offer proof that they have already sought to protect the confidentiality of the chemical, that disclosure is likely to cause competitive harm, and other evidence.⁹

Within 90 days of receiving a confidentiality claim, EPA must review and approve the claim, approve it in part, deny it, or deny it in part.¹⁰ The claims generally expire after 10 years unless the manufacturer resubstantiates them.¹¹

Not only must EPA conduct these reviews for chemicals submitted after enactment of the new TSCA rules, but EPA must review whether many identities can still be claimed confidential for chemicals that have previously been offered for commercial distribution.¹²

Within approximately one year after the new TSCA rules were enacted (June 22, 2016), EPA must compile a list of all substances that chemical makers have manufactured or processed in the 10 years prior to enactment.

Within five years of compiling the list, chemical makers must substantiate confidentiality claims for chemical identities on this list that are withheld as confidential unless they have done so within five years of a date to be set by EPA.

The agency must then determine whether the identities can continue to be withheld as confidential. The agency can extend its own five-year deadline by two years.¹³

Separately, EPA must assign a unique identifier to each chemical for which the agency approves a request to withhold the specific chemical name from disclosure.

Recommendations

The new TSCA rules must be improved. Two of the most critical improvements would be to make health testing mandatory for new chemicals, and require public disclosure of identities for oil and gas chemicals when these substances are used commercially. However, the current rules do have the potential to

address two of biggest problems regarding health risks from oil and gas drilling: the use of chemicals in hydraulic fracturing that are confidential or have unknown health effects. Since 2010, a growing number of states have required oil and gas companies to disclose chemicals used in hydraulic fracturing. While these state rules are a step forward, they usually allow drillers to withhold chemical identities as confidential, and drillers often do so. Citizens, therefore, cannot know the full range of chemicals to which they may be exposed. Compounding the problem is the lack of health testing data associated with many chemicals that leaves citizens and scientists in the dark about health effects. EPA identified both of these unknowns as significant data gaps in its recently published study of fracking and drinking water.

Citizens and states should address these shortcomings by pushing EPA to use its new TSCA authority to require health testing for new chemicals proposed for use in oil and gas drilling and fracking. They should also press EPA to vigorously review confidentiality claims and make public chemical identities when confidentiality is unwarranted. As the new TSCA provides, EPA must assign a new, unique identifier to chemical where companies want the identity to remain confidential. This allows citizens and states to achieve greater transparency, and an opportunity to reform state fracking chemical disclosure laws in the following way: for each fracking chemical disclosed, drillers must include the unique identifier assigned to the chemical by EPA. Then, even if drillers also declared the chemical's identity confidential at the state level, citizens would be able to know the chemical's EPA-assigned unique identifier. That identifier, in turn, would enable citizens to access EPA records that would show whether federal regulators had health or ecological concerns about the chemical. Ideally, the EPA records would also include health and environmental testing data.

Citizens and states should also encourage EPA to expedite development of new exposure assumptions for chemicals used in hydraulic fracturing. Currently, in its review of new chemicals proposed for oil and gas drilling and hydraulic fracturing, EPA generally assumes that the chemicals do not leak, spill or are otherwise released accidentally. This assumption contradicts a growing body of evidence and is likely to cause the agency to underestimate human and environmental exposure to drilling and fracking chemicals.

An EPA representative told us that the agency was working on a new exposure standard for hydraulic fracturing (though not drilling) chemicals that would account for the potential for leaks and spills. However, no date was given for its completion and implementation.¹⁴

In summary, we oppose the broad elimination of environmental and health regulations proposed by the Trump Administration and EPA. We instead urge the strengthening of existing regulations and additional funding for their enforcement, in particular the rules within TSCA that A) give the EPA more authority to require health testing of new chemicals before they are approved for manufacture, and B) give EPA more authority in requiring public disclosure of chemical identities that are now legally shielded from view by the manufacturers.

Thank you for taking our comments.

Respectfully submitted,

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¹ "Toxic Secrets: Companies Exploit Weak US Chemical Rules to Hide Fracking Risks," published by Partnership for Policy Integrity, April 2016. www.pfpi.net

² Toxic Substances Control Act, Pub. L. No. 94-469 § 5(e).

³ U.S. Government Accountability Office. (2009). High-Risk Series: An Update (Publication No. GAO-09-271). 22-24. Retrieved from <http://www.gao.gov/assets/290/284961.pdf>. U.S. Government Accountability Office.

(2017). High-Risk Series: An Update (Publication No. GAO-15-290). 425-429. Accessed online at <http://www.gao.gov/assets/690/682765.pdf>.

⁴ Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182 § 5(a)(3) and § 5(g).

⁵ Pub. L. No. 114-182 § 5(a)(3), §5(e) and §5(f).

⁶ Pub. L. No. 94-469 § 14 (codified as amended at 15 U.S.C. § 2613).

⁷ Government Accountability Office. (2013, March). EPA Has Increased Efforts to Assess and Control Chemicals but Could Strengthen Its Approach. 28-29. Accessed online at <http://www.gao.gov/assets/660/653276.pdf>.

⁸ Pub. L. No. 114-182 § 11(c)(2)(G) and (c)(3) (modifying Pub. L. No. 94-469 § 14 and codified as amended at 15 U.S.C. § 2613 (c)(2)(G) and (c)(3)).

⁹ Pub. L. No. 114-182 § 11(c)(1)(B) (modifying Pub. L. No. 94-469 § 14 and codified as amended at 15 U.S.C. § 2613 (c)(1)(B)).

¹⁰ Pub. L. No. 114-182 § 11(g)(1)(A) (modifying Pub. L. No. 94-469 § 14 and codified as amended at 15 U.S.C. § 2613 (g)(1)(A)).

¹¹ Pub. L. No. 114-182 § 11(e)(1)(B) (modifying Pub. L. No. 94-469 § 14 and codified as amended at 15 U.S.C. § 2613 (e)(1)(B)).

¹² Pub. L. No. 114-182 § 11(g)(1)(C) (modifying Pub. L. No. 94-469 § 14 and codified as amended at 15 U.S.C. § 2613 (g)(1)(C)).

¹³ Pub. L. No. 114-182 § 8 (modifying Pub. L. No. 94-469 § 8 and codified as amended at 15 U.S.C. § 2607).

¹⁴ Electronic mail from Greg Schweer, Chief New Chemicals Management Branch, Office of Pollution Prevention and Toxics, to Dusty Horwitt, Senior Counsel at Partnership for Policy Integrity (July 14, 2015). Meeting with Greg Schweer et al., Chief New Chemicals Management Branch, Office of Pollution Prevention and Toxics, Dusty Horwitt, Senior Counsel, Partnership for Policy Integrity, Aaron Mintzes, Policy Advocate, Earthworks (February 10, 2016)