Testimony of VPIRG Executive Director Paul Burns concerning S.103
Senate Health and Welfare Committee

January 17, 2018

Chairwoman Ayer and Members of the Senate Health & Welfare Committee, for the record my name is Paul Burns and I am the executive director of the Vermont Public interest Research Group (VPIRG). VPIRG is Vermont's largest consumer and environmental advocacy organization with approximately 50,000 members and supporters across the state.

VPIRG has a long history of engagement on issues related to protecting the public from toxic chemicals, including chemicals found in commonly used consumer products. We were deeply involved with the Legislature's consideration and passage of Act 188 during the 2014 session, and we have been part of the discussion to remedy certain weaknesses in the law since then. That includes S.103, which is before you now.

As you know, much of the substance of S.103 is focused on matters that are within the purview of the Senate Natural Resources and Energy Committee. This includes sections on well testing and improved coordination among agencies regulating toxic or hazardous substances.

However, the House has proposed several important changes to Act 188, which fall squarely under your committee's jurisdiction. The amendments offered by the House echo a number of ideas that have been favorably considered by this committee in the past.

Below is a brief background on the topic and a description of the key elements of S.103 as passed by the House that relate to Act 188. This testimony is similar to information that I shared with your committee toward the end of the last session.

Background on S.103

The 2016 discovery of the toxic chemical PFOA in private drinking water wells in Bennington County and elsewhere around the state served as a wakeup call concerning the ongoing threat posed by industrial chemicals in our lives. PFOA has been linked to cancers, developmental problems in babies, thyroid and liver problems, and other negative health impacts.

In the immediate aftermath of the discovery, the Legislature passed Act 154, establishing a diverse working group of stakeholders to figure out how to prevent future toxic threats to public health and our Vermont environment. This group offered more than a dozen recommendations to the Legislature at

the start of the 2017-1018 legislative session, each of which had the support of a majority of the work group participants (made up of businesses, academics, scientists, advocates and agency officials).

Several of the recommendations or elements of them were included in S.103 as it initially passed the Senate. Unfortunately, once the Senate Natural Resources and Energy completed its work on the bill, there was insufficient time for Senate Health and Welfare to take up the bill before last year's crossover deadline. The House Natural Resources, Fish & Wildlife Committee made a commitment to look at other recommendations of the Working Group, and that led to the proposed improvements to Act 188.

Background on Act 188

It's worth keeping in mind that the purpose of Act 188 (and the amendments now contained in S.103) is to protect some of the most vulnerable Vermonters – children – from known toxic chemicals.

As you know, children are uniquely susceptible to toxic threats. Their growing bodies and developing immune systems are at greater risk of harm. And as children, they tend to put products directly into their mouths in a way that adults do not.

So to protect Vermont's children, this Committee and later the General Assembly passed Act 188 in 2014. In so doing, Vermont adopted a list of nearly 70 "Chemicals of High Concern to Children" that had already been established by the state of Washington.

Under Act 188, manufacturers of children's products are required to report to the State if they use any of these known toxic chemicals in a child's product sold in Vermont. (S.103 includes an important improvement to that reporting requirement.)

If the chemical threat is significant or urgent enough to warrant further action to protect children, Act 188 set out a process whereby the Commissioner of Health could further regulate a children's product containing one or more of the dangerous toxins. But as it stands, the process includes so much red tape that the Commissioner is effectively and needlessly hamstrung.

The House Natural Resources, Fish & Wildlife Committee took a great deal of testimony on this topic and the full House overwhelmingly passed a revised bill that still requires the Commissioner of Health to rely on highly credible, scientific data, but at least provides a viable path to regulatory action if necessary.

Brief description of proposed changes to Act 188 contained in S.103

1. Universal Product Code (UPC) Reporting

Many manufacturers of children's products are failing to provide the Universal Product Code when they report that one (or more) of their products sold in Vermont contains one of the chemicals of concern to children. Without the UPC it can be difficult if not impossible to link a particular product with a specific chemical, and that was exactly the kind of disclosure envisioned when lawmakers passed Act 188 to begin with.

If consumers do not have access to information that allows them to make informed purchasing choices, then Act 188 is failing to hit the mark in a fundamental way. The Health Department has recognized this

as well and if requiring UPC information by rule. We encourage you to go further and concur with the House language in S.103 that requires UPC data as a matter of law.

2. "Weight of scientific evidence"

Under existing law, before the Commissioner of Health can add chemicals to the 'list of chemicals of high concern to children,' he or she must make a determination based on the weight of credible, scientific evidence.

The "weight of" scientific evidence is a term that's been used by industry groups to stall action on chemicals at the EPA for decades. Creating a "weight of" evidence could require an examination of every study ever done on the topic, and development a system to weight each type of study. For example, should an industry-funded study count the same as an independent peer-reviewed study? Furthermore, as scientific techniques evolve, questions may arise about whether studies from previous decades using less refined techniques are counted the same as more recent cutting-edge studies. What about epidemiological studies versus lab studies?

Fundamentally, our Commissioner of Health and the stakeholder working group should be using the best available independent, peer-reviewed and credible science when assessing threats to children's health. The "weight of" language is unnecessary and could hinder effective action by the Commissioner.

3. Role of the Working Group

Some Industry opponents of S.103 want to preserve a requirement under current law that prevents the Commissioner of Health from taking action against a potentially dangerous children's product unless and until a Working Group (established under Act 188) initiates the rulemaking process.

In a letter to House members last year, Associated Industries of Vermont stated that while "health risk is clearly a significant factor" in determining whether further regulation of a children's product is warranted, other considerations are important too, such as "economic impacts, customer needs, available feasible alternatives."

Those 'non-health' considerations may be valid, but they need not block consideration of further regulation. The Commissioner of Health under S.103 would be required to consult with the Working Group, which has industry representation on it, before proposing action. Any concerns may be voiced at that time, and later during the robust rulemaking process.

To block a Health Commissioner from even proposing a rule to protect children from a product that contains a known toxin is unreasonable. After all, most members of the Working Group are laypeople.[1] Some have a vested financial interest in preventing the further regulation of children's products. Such an individual should not have the power to stand in the way of regulatory action by Vermont's Health Commissioner.

4. "Exposure"

Current law requires the Health Commissioner to determine that children "will be" exposed to a "chemical of high concern to children" before regulatory action may be initiated. This is an unreasonably

[1] Full disclosure, I am a member of the Working Group, appointed by Gov. Shumlin.

high bar that could cause unnecessary delays in action to protect kids and/or costly litigation down the road.

If we are to take a precautionary approach to protecting children from known toxic chemicals that are contained in children's products, the key question is whether there "may be" exposure to the chemical.

By requiring the Commissioner to find that there "will be" exposure, current state law insists that a very high level of scientific certainty is necessary before reasonable action may be taken to protect children.

S.103 as amended by the House adopts the more reasonable standard that permits action by the Commissioner as long as there "may be" exposure to children.

5. Probability of adverse health impacts

The House has proposed striking as unnecessary the language in Act 188 that requires a finding by the Health Commissioner that "*there is a probability that, due to the degree of exposure or frequency of exposure of a child to a chemical of high concern to children in a children's product, exposure could cause or contribute to one or more of the adverse health impacts listed under subdivision (b)(1) of this section.*"

The requirement is not only difficult to comprehend, it may be nearly impossible to comply with, and is in any case unnecessary due to the other requirements contained in Act 188.

Remember, the Health Commissioner may only initiate a rulemaking in situations where:
1) there is a known toxin of high concern to children,
2) it is present in a product intended for use by children,
3) there has been a determination that exposure is possible, and
4) there has been consultation with the diverse Working Group.

Any further requirement for the Commissioner to demonstrate the likelihood of adverse health impacts amounts to an unnecessary bureaucratic burden that will needlessly delay regulatory action to protect children, and possibly trigger costly litigation.

Similarity to 2015 work by Senate Health and Welfare

You will find that the House proposal of amendment related to Act 188 is very similar to the approach taken by the Senate Health and Welfare Committee three years ago. This Committee took considerable testimony at that time and reached the same conclusions as the House – improvements to Act 188 were warranted in order to allow the Commissioner of Health to better protect children from toxics.

Conclusion

The changes to Act 188 that have been proposed by the House in S.103 are straightforward, reasonable and appropriate. There is no danger under this approach of a Health Commissioner going "rogue" in the pursuit of chemical reform. Any proposed rule by the Commissioner would have to be justified by science, and could not be arbitrary or capricious. Furthermore, such action could only be initiated after consultation with the diverse Working Group. I appreciate your consideration of this testimony.