



Testimony of VPIRG Executive Director Paul Burns concerning S.55 House Human Services Committee

April 2019

Chair Pugh and Members of the House Human Services 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 the Toxic-Free Families Act (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.55, which is before you now.

Below is a brief background on how we got here and a description of the key elements of S.55 that fall under the jurisdiction of this committee.

Background on S.55

The 2016 discovery of perfluorooctanoic acid (PFOA) in private drinking water wells in Bennington County and elsewhere around the state served as a wake-up call to the people of Vermont 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 2017-2018 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).

Two bills dealing with chemical threats were passed by the Legislature in 2018, but were vetoed by Gov. Scott. An override attempt was made on one of those bills, S.103, which passed the Senate but fell four votes short in the House. The bill before you today – S.55 – is essentially the new version of last biennium's S.103. The legislation would amend Act 188 in order to better protect children from dangerous chemicals in children's products.

Background on Act 188

It's worth keeping in mind that the purpose of Act 188 (and the proposed amendments now contained in S.55) is to protect some of the most vulnerable Vermonters – children – from known toxic chemicals.

As you may 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 their hands and products directly into their mouths in a way that adults do not.

So, to protect Vermont's children, 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.55 includes important improvements 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 move to 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.

Brief description of proposed changes to Act 188 contained in S.55

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 a chemical of high 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 by lawmakers when they 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 is moving to require UPC and other descriptive information by rule. We encourage you to go further and require the additional information as a matter of law.

2. Criteria for Listing New Chemicals

When Vermont legislators initially passed what is now known as Act 188 in 2014, they established a list of 66 chemicals deemed to be "chemicals of high concern to children." This list was taken directly from the law already in place in the State of Washington.

Manufacturers of children's products sold in Vermont that contain one or more of the chemicals of high concern to children must report once every two years to the Department of Health. As the law was being debated, legislators made clear that they wanted parents and other consumers to be able to have access to clear information about toxins in children's products so that they could make informed

purchasing decisions. Manufacturers must also pay a small fee of \$200 for each chemical of high concern to children that they report using in a child's product sold in Vermont.

Act 188 also lays out a process by which new chemicals can be added to the list. However, Vermont's process differs from that used in other states. In Washington, Maine and Oregon, (the three states in addition to Vermont that are seen as leaders in protecting children from exposure to toxic chemicals) the criteria for listing chemicals is essentially that, on the basis of credible scientific evidence, the chemical in question has been found to cause particular kinds of harm (such as cancer or reproductive and developmental disorders), and that it is persistent and bioaccumulative.

By contrast, under Vermont's Act 188, the Commissioner of Health cannot add chemicals to the list of chemicals of high concern to children unless he or she makes a determination based on the weight of credible, scientific evidence. That may sound like a small difference, but it means a great deal to the chemical industry.

The "weight of evidence" is a term that is not defined in Act 188, but it has been used by industry groups to stall action on chemicals at the Environmental Protection Agency for many years. In fact, in the waning days of the Obama administration, EPA officials waged an intense battle with chemical industry lobbyists (some of whom were later elevated by President Trump to positions of great authority within EPA) over the use and definition of a "weight of evidence" standard.

According to a fascinating October of 2017 *New York Times* expose on the influence of the chemical industry and others over the Trump administration's EPA, Dr. Nancy Beck, then the Senior Director of Regulatory Science Policy at the American Chemistry Council (the chemical manufacturers' lobbying group), pressed hard for EPA to use and define a weight of evidence standard.¹

The Times noted that "the [EPA] had repeatedly rejected the idea, most recently in January [2017], in part because the definitions were seen as a guise for opponents to raise legal challenges."

Soon thereafter, Dr. Beck was chosen for the position of Deputy Assistant Administrator at the EPA's Office of Chemical Safety and Pollution Prevention. Dr. Beck may be the quintessential fox guarding the hen house.

So, the industry lobbyists want a weight of evidence standard to be met before any new chemical can be added to Vermont's list. Public health and environmental advocates oppose the standard. But keep in mind, we are only talking here about the standard by which a new chemical might be added to the state's list. Being on the list means that the state begins to collect data on the use of the chemical in children's products and may one day share that information in a user-friendly way with consumers.

Since the purpose of Act 188 is to protect some of our most vulnerable residents – our children – from chemical threats, it is only reasonable that its policies would be precautionary in nature. That is, that the law would tend to err on the side of protecting children and preventing harm.

S.55 maintains an appropriate level of scientific review before a chemical can be added to Vermont's list. Specifically, in Sec. 4. 18 V.S.A. § 1776, it states that:

¹ <https://www.nytimes.com/2017/10/21/us/trump-epa-chemicals-regulations.html>

(b) Additional chemicals of concern to children. The Commissioner may by rule add additional chemicals to the list of chemicals of high concern to children, provided that the Commissioner of Health, on the basis of credible, peer-reviewed scientific information, has determined that a chemical proposed for addition to the list meets both of the following criteria in subdivisions (1) and (2) of this subsection...

Subdivisions 1 and 2 enumerate the potential harm that exposure to the chemical may cause:

- The Commissioner of Health has determined that an authoritative governmental entity or accredited research university has demonstrated that the chemical:
 - harms the normal development of a fetus or child or causes other developmental toxicity;
 - causes cancer, genetic damage, or reproductive harm;
 - disrupts the endocrine system;
 - damages the nervous system, immune system, or organs or causes other systemic toxicity; or
 - is a persistent bioaccumulative toxic.
- The chemical has been found through:
 - biomonitoring to be present in human blood, umbilical cord blood, breast milk, urine, or other bodily tissues or fluids;
 - sampling and analysis to be present in household dust, indoor air, drinking water, or elsewhere in the home environment; or
 - monitoring to be present in fish, wildlife, or the natural environment.

If Vermont officials were required to determine the “weight of evidence” in the case of each new chemical considered, it’s possible that they could be forced to examine every study ever done on the topic. This could also force the development a system to weigh 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. If they are not the same, how much less should they weigh? What about epidemiological studies versus lab studies?

Fundamentally, Vermont’s 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. That is the system of review that S.55 provides. The bureaucratic language in the law as it stands now is unnecessary and could easily hinder reasonable action by the Commissioner. In fact, we would argue that it is intended to do just that.

3. Role of the Working Group in Regulating Toxic Threats

You will hear from some industry opponents of S.55 who want to preserve a requirement under current law that prevents the Commissioner of Health from initiating action against a potentially dangerous children’s product unless and until the Working Group (established under Act 188) initiates the rulemaking process.

In a letter to House members in 2017, 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.”

Similarly, in his veto message last year, Gov. Scott elevated the interests of the manufacturing sector over the interests of those seeking to better protect children. Consider this passage from the governor’s veto message:

“It is possible to continue to keep Vermonters safe without harming the economy or costing the state good jobs. We cannot afford to give manufacturers another reason to look elsewhere for their location or expansion needs. In Vermont, this sector has not rebounded as well from the Great Recession as compared to other parts of the country, and other states are more aggressively recruiting good paying manufacturing jobs. We must pursue policies that enhance and encourage the possibility for more production and jobs for Vermonters, not fewer. Section 8 of this bill puts the growth of this sector at risk by creating more uncertainty and unpredictability for business operations...”

The governor’s claim that Vermont’s entire manufacturing sector will be put at risk simply by giving his own Health Commissioner the authority to consult with the Working Group and initiate a lengthy rulemaking process by which a dangerously toxic children’s product could be regulated by the state is without merit.

VPIRG believes that it would be more appropriate to prioritize and protect our children’s health, just as Act 188 was intended to do. We are certain that this can be done without jeopardizing our state’s economy, and S.55 is one good example of how we can do that.

Under S.55, the Commissioner of Health would be required to consult with the Working Group, which has industry representation on it, before proposing action. Any concerns by the industry representatives on the Working Group – or anyone else – could be shared at that time. Of course, Vermont’s rulemaking process also allows for additional public comment.

We believe that it is unreasonable to block a Health Commissioner from even proposing a rule to protect children from a product that contains a known toxin. Yet that is what our current law allows.

Remember too, that most members of the Working Group are laypeople, not medical experts.² Some have a vested 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.

Any suggestion that a “rogue” Commissioner of Health will somehow threaten the economic vitality of our state by arbitrarily and capriciously proposing to regulate too many toxic threats to children in too many children’s products is absurd.

4. “Exposure”

² Full disclosure, I am a member of the Working Group, appointed by Gov. Shumlin.

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 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 reasonable and 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.55 adopts the more practical standard that permits action by the Commissioner as long as there “may be” exposure to children.

5. Probability of adverse health impacts

S.55 would strike 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.

Later, any proposed rule would also have to go through a public hearing process before becoming final, and would be reviewed by LCAR as well.

It’s fair to say that any rule that makes it through this process will surely have demonstrated that it was intended to protect against an adverse health impact on children. That is what this law is all about.

The current language in Act 188 cited above amounts to an unnecessary and convoluted burden that will needlessly delay regulatory action to protect children, and possibly trigger costly litigation as well.

6. Addressing the rollback of reporting requirements

We are very concerned about the Health Department’s plan to rollback certain reporting requirements for manufacturers using chemicals of high concern to children in their children’s products. Specifically, in its draft amended rules related to Act 188 (public comment period ended in February), the Health Department is seeking to reduce transparency and the public’s timely access to information.

As you may know, earlier guidelines from the Department made clear that manufacturers were to report any children’s product containing a chemical of high concern to children to the Health Department before it could be sold in stores here. The goal of this reporting requirement was to give

consumers an opportunity to learn what toxins may be present in a toy or other product before purchasing it for a child. The exact language of the Department's previous guidance follows:

"8.3 Any Manufacturer intending to introduce for sale a new children's product in Vermont which contains a chemical of high concern to children between the reporting periods shall submit notice to the Department pursuant to 18 V.S.A. §1775 prior to sale."

The amended rule put forward by the Department, by contrast, will allow children's products containing one or more of these listed toxins to be on the market for up to two years (depending on when it's introduced into the marketplace) before any disclosure would have to be made.

There is no justification for this change in policy. It will not keep children safer. It will not enhance transparency. It will not assist parents who want to keep their children from being needlessly exposed to potentially dangerous chemicals.

We know that industry representatives lobbied for this change. And we understand that it would be more convenient for them to simply file reports every two years. However, in balancing the interests of industry lobbyists against the wellbeing of Vermont's children, we believe that on this issue, the Scott administration has come out on the wrong side in the proposed draft rule.

§ 1771 in Act 188 clearly states:

"It is the policy of the State of Vermont:

(1) to protect public health and the environment by reducing exposure of its citizens and vulnerable populations, such as children, to toxic chemicals, particularly when safer alternatives exist;"

As the intention of the law is to protect vulnerable populations from toxic chemicals, requiring reporting of any products upon entering the market is clearly in line with the statement outlined in Act 188 as enacted.

Waiting up to two years to report new products containing potentially dangerous toxins will result in needless consumer exposures. Such a provision in the rules is not only out of step with the law it is unethical. Manufacturers must be required to report both biennially, and when they enter a new product into the market in Vermont.

The Senate's language in S.55 attempted to address this issue in Sec. 4. 18 V.S.A. § 1776 (f), but we believe their language is vague and fails to correct the problem:

(D) requirements for when or how a manufacturer of a children's product that contains a chemical of high concern to children provides the notice required under subsection 1775(a) of this title when the manufacturer intends to introduce the children's product for sale between the required dates for reporting;

We urge this Committee to instead use the language that had previously been contained in Guidance from the Health Department. Thank you for your consideration of this testimony.