Testimony of VPIRG Executive Director Paul Burns concerning S.55
Senate Health and Welfare Committee

February 19, 2019

Chairwoman Lyons 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 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.

Background on S.55

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 2017-2018 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. S.55 is essentially the new version of S.103, which 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 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.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 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 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 is planning 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 Chemicals

The several other states most often recognized as leaders in protecting children from toxins in children's products take an approach to listing of concern that differs from the approach used in Act 188. That means that Vermont is currently out of step with other states.

In Washington, Maine and Oregon, 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. (Note: more detailed information on the specific criteria used by these three states can be found at the end of this testimony.)

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.

The "weight" of scientific evidence is a term that has not been clearly defined, but it has been used by industry groups to stall action on chemicals at the Environmental Protection Agency for decades. Determining the "weight" of evidence could require an examination of every study ever done on the topic, and 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 what S.55 allows. The bureaucratic language in the law as it stands now is unnecessary and could hinder reasonable action by the Commissioner.

3. <u>Role of the Working Group</u>

Some Industry opponents of S.55 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 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…"*

It is striking that the governor would suggest 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.

VPIRG believes that it would be more appropriate to prioritize and protect our children's health, and we are certain that this can be done without jeopardizing our state's economy. 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.[1] 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. <u>"Exposure"</u>

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. <u>Probability of adverse health impacts</u>

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."*

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

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. <u>Addressing the rollback of reporting requirements</u>

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 just last week), the Health Department seeks 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 is sold in stores here. The goal of this reporting 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.

"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, in 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 understand that industry representatives lobbied for this change. We also 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.

§ 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.

I appreciate your consideration of this testimony.

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Criteria for Listing Chemicals in Other State Programs on Chemicals of High Concern in Children's Products

No other state with a similar program related to toxic chemicals in children's products uses a "weight of evidence" standard for listing chemicals of high concern to children. If Vermont uses this standard, we are out of step with other states, and will be less able to collaborate and build on the work and expertise in our partner states. **The language in S.55 is much more consistent with the criteria for listing chemicals used in other similar state laws around chemicals in children's products.**

Maine Toxic Chemicals in Children's Products Law:

http://www.mainelegislature.org/legis/statutes/38/title38sec1693.html

Title 38: WATERS AND NAVIGATION
Chapter 16-D: TOXIC CHEMICALS IN CHILDREN'S PRODUCTS
§1693. Identification of chemicals of concern

1. Criteria. By January 1, 2010, the department, in concurrence with the Department of Health and Human Services, Maine Center for Disease Control and Prevention, shall publish a list of chemicals of high concern, referred to after September 1, 2011 as "the list of chemicals of concern." A chemical may be included on the list only if it has been identified by an authoritative governmental entity **on the basis of credible scientific evidence** as being:

A. A carcinogen, a reproductive or developmental toxicant or an endocrine disruptor; [2011, c. 319, §3 (RPR).]
B. Persistent, bioaccumulative and toxic; or [2011, c. 319, §3 (RPR).]
C. Very persistent and very bioaccumulative. [2011, c. 319, §3 (RPR).]

Washington Children's Safe Products Law:

http://app.leg.wa.gov/RCW/default.aspx?cite=70.240&full=true

70.240.010

Definitions.

(9)"High priority chemical" means a chemical identified by a state agency, federal agency, or accredited research university, or other scientific evidence deemed authoritative by the department **on the basis of credible scientific evidence** as known to do one or more of the following:

(a) Harm the normal development of a fetus or child or cause other developmental toxicity;
(b) Cause cancer, genetic damage, or reproductive harm;
(c) Disrupt the endocrine system;
(d) Damage the nervous system, immune system, or organs or cause other systemic toxicity;
(e) Be persistent, bioaccumulative, and toxic; or
(f) Be very persistent and very bioaccumulative.

Oregon's Toxic Free Kids Act:

https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB478

Senate Bill 478

SECTION 3. (1) The Oregon Health Authority shall establish and maintain a list of high priority chemicals of concern for children's health when used in children's products. **The authority shall include on the list chemicals that are listed on the Washington State Department of Ecology's Reporting List of Chemicals of High Concern to Children** on the effective date of this 2015 Act. (2) In establishing by rule the practical quantification limits for chemicals on the list, the authority shall consider guidance developed by the State of Washington and other federal, state and nongovernmental organizations with the applicable expertise. (3) The authority shall post the list of high priority chemicals on its website. For each high priority chemical on the list, the authority shall post: (a) Information regarding the known health impacts associated with exposure to the chemical; and (b) Data collected under section 4 of this 2015 Act in a format that is searchable and accessible to the public. (4) The authority shall review and revise the list of high priority chemicals every three years. In completing the revisions under this subsection, the authority: (a) May not add more than five chemicals to the list of high priority chemicals during each three-year revision period under this subsection**; (b) Shall consider adding or removing a chemical from the list of high priority chemicals if, after the effective date of this 2015 Act, the chemical is added to or removed from the Washington State Department of Ecology's Reporting List of Chemicals of High Concern to Children or a list maintained by another state agency, another state or a federal agency that the authority has identified by rule as a list intended to identify high priority chemicals;** and (c) May remove a chemical from the list of high priority chemicals if the authority determines that the chemical is no longer being used in children's products. (5) The authority shall update the list of high priority chemicals on its website within one year after the date on which a chemical is added to or removed from the list.