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TSCA

CONGRESS

Now that TSCA reform has passed despite a polarized Congress, many are wondering how it came about. Richard Denison at the Environmental Defense Fund has been engaged for many years on toxics legislative reform and explores the critical junctures that opened up the opportunity to update this major environmental legislation despite multiple obstacles.

Why Passage of Toxic Chemical Reform Is a Really Big Deal



By RICHARD DENISON

First, the obvious: It's the first major environmental legislation to be enacted in more than 20 years. And it's all the more remarkable that it passed, with strong bipartisan support, in a divided Congress and at a time when most environmental issues are highly polarizing. Last month, the House passed the bicameral agreement by the overwhelming margin of

403-12. And just this week, the Frank R. Lautenberg Chemical Safety for the 21st Century Act (H.R. 2576) came to the Senate floor by unanimous consent, passed on a voice vote and was sent the president's desk for his signature.

While virtually every provision of the new law significantly improves on existing law, it does so by delicately balancing long-standing interests that are competing or

in direct conflict. The new law is built on carefully crafted compromises, classic in the sense that no one got everything they wanted but everyone got something, and not just overall but in each major section of the law. What makes this accomplishment extraordinary is that the balance was reached, not by skirting around the most contentious issues, but by directly tackling and seeking to resolve the differences.

How Was This Possible?

First, it took a long time. My organization started working 20 years ago toward legislative reform of the Toxic Substances Control Act (TSCA). The first conversations on Capitol Hill that planted the seeds that grew into the Lautenberg Act took place in 2004—convened, appropriately enough, by staff for the late Sen. Frank Lautenberg (D-N.J.), who made the cause of improving chemical safety his last crusade in a long congressional career devoted to improving public health. Those conversations yielded the first reform legislation, the Kids-Safe Chemicals Act of 2005, a 35-page “message” bill aimed primarily at demonstrating that there was interest in Congress in reforming TSCA.

Not surprisingly, that bill went nowhere. It was actively supported by health and environmental groups, and actively opposed by the chemical industry. And members of each party in Congress lined up accordingly—to the extent it got their attention at all. Nonetheless, in retrospect it was an important milestone because it began a serious conversation about both the need for reform and what reform should look like.

A series of bills built on that first one were introduced in both houses, one nearly every year from 2008 through 2013. And while they grew in length and in co-sponsorship, and increasingly reflected input from a broader range of stakeholders, they too went virtually nowhere—supported only by Democrats and nongovernmental organizations (NGOs), and uniformly opposed by Republicans and industry interests.

Industry Embraces Reform

The second critical ingredient was a shift that began in 2009 in the chemical industry’s stance, to acknowledge the need for reform—which it termed “modernization.” That shift was spurred by years of incremental but important actions driven by state and national advocates calling on states and the market itself to restrict chemicals. These critical players stepped in to fill the void left by a failed TSCA and to respond to the rising demands from consumers and the public for safer chemicals.

Industry’s decision to come to the federal negotiating table was an acknowledgment of a growing loss of confidence in the safety of chemicals. Thereby was born a first piece of common ground: a mutual interest in a stronger federal system, for the industry as a means to restore lost confidence among the public and the marketplace, and for health, labor and environmental advocates as a means to better ensure the safety of chemicals.

That common interest fostered a host of formal and informal stakeholder dialogues, both on and off Capitol Hill, that were instrumental in delineating the issues and articulating stakeholders’ often diametrically op-

posed positions, but also gradually illuminating where common ground on specific issues might be found.

A Pinch of Political Courage

All of that might still have been for naught had not a bold step been taken by a most unlikely pair of senators: public health champion Sen. Lautenberg and Sen. David Vitter (R-La.), a staunch ally of the chemical industry. They rather hastily negotiated the first bipartisan reform bill, the Chemical Safety Improvement Act of 2013—introduced, as it turned out, less than two weeks before Lautenberg’s untimely death. That bill, flawed as it was, opened for the first time a bipartisan path forward—a critical development if there was to be any hope of actually enacting legislation in such a divided Congress.

That bill also served as the starting point for what became the Lautenberg Act. Over the next three years, an ever-enlarging group of lawmakers from both parties and both Houses engaged in both moving and improving the TSCA reform legislation.

On the Senate side, Sens. Tom Udall (D-N.M.) and Vitter and then Sen. James Inhofe (R-Okla.) managed extensive negotiations that expanded as colleagues lent their support in exchange for strengthening changes—deepening and broadening engagement that proved critical to sustaining the momentum necessary to secure passage. A significantly revised bill introduced a year ago, named in honor of Lautenberg, was further negotiated to gain more bipartisan support during committee consideration, and then again in the lead-up to final passage in December 2015, by that time attracting 60 co-sponsors and passing by unanimous voice vote. Sens. Barbara Boxer (D-Calif.), Tom Carper (D-Del.), Sheldon Whitehouse (D-R.I.), Jeff Merkley (D-Ore.), Cory Booker (D-N.J.), Ed Markey (D-Mass.) and Dick Durbin (D-Ill.) all played significant roles.

The House process was much quicker but equally bipartisan, with a bill introduced in May 2015 and passed in June of last year, by the remarkable margin of 398-1. Reps. Fred Upton (R-Mich.), Frank Pallone (D-N.J.), John Shimkus (R-Ill.) and Paul Tonko (D-N.Y.), and later, Nancy Pelosi (D-Calif.), Steny Hoyer (D-Md.), Diana DeGette (D-Colo.) and Gene Green (D-Tex.), shepherded and supported moving the bill through the House and the bicameral negotiations.

Reconciling Two Very Different Bills

Those negotiations had to reconcile a more comprehensive Senate bill with a much narrower House bill. They occupied the past several months, intensifying in recent weeks and literally running right up to the House’s filing deadline for the bill last month. The resulting bill adopts the more comprehensive approach taken by the Senate bill, while adhering to the structure and retaining much more of current TSCA—the House’s preferred approach. The final bill largely incorporates the Senate bill’s policy reforms for new chemicals, but integrates them into the structure of current law. It also includes the Senate bill’s provisions for updating the inventory of chemicals active in commerce and addressing confidential business information. A more streamlined prioritization process for existing chemicals than was in the Senate bill was agreed to. The bill’s chemical testing provision is a blend of the

two original bills, and House negotiators convinced Senate negotiators to leave several sections of TSCA (e.g., exports and imports) largely untouched, as the House bill had done.

Last month, the House passed the bicameral agreement by the overwhelming margin of 403-12. And just this week, the bill came to the Senate floor by unanimous consent and was passed on an uncontested voice vote.

After 40 years, a New TSCA

The result is a new law that, while a compromise, is an enormous improvement over current law in every major respect. Specifically, the Lautenberg Act:

- Mandates safety reviews for chemicals in active commerce.
- Requires a safety finding before new chemicals are allowed on the market.
- Replaces TSCA's burdensome safety standard—which prevented the Environmental Protection Agency even from banning asbestos—with a health-based, as opposed to cost-oriented, standard.
- Explicitly requires protection of vulnerable populations, such as children and pregnant women.
- Enhances the EPA's authority to require testing of both new and existing chemicals.
- Sets aggressive, judicially enforceable deadlines for EPA decisions and compliance with restrictions.
- Makes more information about chemicals available, by limiting companies' ability to claim information as confidential, and by giving states and health and environmental professionals access to confidential information they need to do their jobs.
- Requires the EPA to reduce animal testing where scientifically reliable alternatives exist that would generate equivalent or better information.

- Requires the EPA to prioritize chemicals that are persistent and bioaccumulative, and that are known human carcinogens and have high toxicity.
- Retains a significant role for states in assuring chemical safety, by grandfathering in past state actions, preserving states' ability to take many types of actions and providing for states to get waivers to act both before and after the EPA takes final action on a chemical.

The Next Phase

Of course, now the real work begins—implementing the law. Which brings me to my last point: a fervent hope that stakeholders will give this new law every chance to work. Similar to any major legislation, no one is completely happy with it. Many critical details of the law are left to the EPA to flesh out. And, for the new law to be successful, the agency will need to make far more—and far more timely—decisions about chemicals' safety than has been the case historically. This job will be an enormous challenge for the EPA, and stakeholders no doubt will be watching closely.

I realize it's a tall order to expect stakeholders with strong interests in certain outcomes not to use every possible avenue to influence every step the EPA takes under the new law. But it's vital that its implementation lead to improved public health protection as well as a restoration of public confidence, after decades of erosion of that confidence under a badly broken chemical safety system. That means the EPA needs to be given some breathing room, to get a new system up and running, and to get some points on the board early that demonstrate its ability to make decisions and take needed actions.

We should take a long moment to celebrate a major and rare environmental achievement, recognize that it took sustained cooperation and compromise by a diverse set of players to make it happen, and hope that some of that commitment to finding common ground persists as we turn to the next phase in this long journey.