Memorandum: Analysis of the Toxic Substances Control Act (1976)

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I. Introduction

The Toxic Substances Control Act (TSCA) is a key federal law that protects human health and the environment from potential harms from chemicals by regulating all substances that exist within U.S. commerce. The proactive regulatory framework sets the TSCA apart from other environmental laws that primarily regulate contaminants once they enter the environment and cause harm. The TSCA primarily pertains to chemicals produced or imported by manufacturers and other entities involved with commerce, but the law serves as a critical public health measure that protects both the natural and built environment from potential exposure to harmful chemicals. This memorandum analyzes the TSCA only.

II. Analysis of the Law

Background

In the 1960s and 1970s, U.S. attitude towards environmentalism was one of action. Widespread public concerns regarding the introduction of pollutants and potentially hazardous chemicals into the environment lead to the passage of the Environmental Protection Agency (EPA) in 1970 and early environmental laws, such as amendments to the Clean Air Act (1970) and the National Environmental Policy Act (NEPA) (1970).[1] NEPA, enacted by Congress in 1969 and signed into law by President Nixon on January 1, 1970, requires federal agencies to consider the environmental impacts of proposed actions in advance of decision-making.[2] It also established the President's Council on Environmental Quality (CEQ), which "coordinates the

[1] EPA History
[2] What is the National Environmental Policy Act?

federal government's efforts to improve, preserve, and protect America's public health and environment."[3]

Actions to regulate toxic substances arose from this landscape. In 1971, the CEQ signaled the need for comprehensive legislation that regulated potentially harmful substances.[4] Four years later, in a 1975 press release, the EPA Deputy Administrator John R. Quarles testified in favor of proposed legislation to regulate toxic substances and potentially harmful chemicals.[5] Quarles argued that many existing environmental laws, such as the Clean Water Act (also known as the Federal Water Pollution Control Act) (1972), dealt with harmful substances retroactively and cited the need for a new federal law that proactively regulated such substances before they pose a significant problem "to human health and the environment."[6] Eventually, the 94th Congress enacted the TSCA and President Ford signed it into law on October 11, 1976.[7]

A. The 1976 Law

The TSCA as it was originally passed in 1976 authorized the Administrator of the EPA ("Administrator") to regulate chemicals that might pose hazards to human health or the environment and obtain information and all new and existing chemical substances.[8] Today, the original text and framework remains in the current iteration of the law as Title I, but as a result of several amendments to the TSCA over time, the TSCA now consists of six titles:

- Title I – Control of Toxic Substances
- Title II – Asbestos Hazard Emergency Response

[3] Council on Environmental Quality
[4] An Overview of TSCA, its History and Key Underlying Assumptions, and its Place in Environmental Regulation, David Markell, pg. 338
[5] Quarles Testifies on the Need for Toxic Substances Act
[6] Quarles Testifies on the Need for Toxic Substances Act
[7] Title I of the Toxic Substances Control Act (TSCA): A Summary of the Statute
[8] Toxic Substances Control Act

- Title III – Indoor Radon Abatement
- Title IV – Lead Exposure Reduction
- Title V – Healthy High-Performance Schools
- Title VI – Formaldehyde Standards for Composite Wood Products

To allow the EPA to secure information on chemicals, the TSCA requires manufacturers and processors to gather information and keep records on the chemicals present in U.S. commerce that may pose hazards to human health or the environment.[9] The TSCA grants authority to the Administrator to act as the regulating authority, but notably requires that the Administrator should act reasonably and prudently and not in a way that may "impede unduly or create unnecessary economic barriers to technological innovation."[10]

Title I – Control of Toxic Substances

Title I of the TSCA lays out the core framework of the law, which authorizes the EPA to perform two main functions. First, it authorizes the EPA to promulgate regulations on existing and new chemicals that:

(1) "May be potentially hazardous to human health or the environment or produced in a quantity so significant that exposure or release of those chemicals might be dangerous; or
(2) chemicals that may be potentially hazardous, but the exact hazards or risks of injury are not yet identified."[11]

Under the TSCA, a chemical means "any organic or inorganic substance of a particular molecular identity."[12] It does not include food, drugs, cosmetics, pesticides, or any other

[9] 15 U.S.C. § 2601(a)
[10] 15 U.S.C. § 2601(b)
[11] 15 U.S.C. § 2603(a)
[12] 15 U.S.C. § 2602(2)

substance that might be regulated by a different federal law and agency. Generally, regulatory and implementation authority remains with the EPA, and states do not appear to be able to adopt primary implementation authority under the TSCA. EPA regulations promulgated under the TSCA preempt existing or new state regulations, but some programs can be operated by states if they are authorized by the EPA to do so; for example, states may develop accreditation and certification plans for contractors working with asbestos that are "at least as stringent" as the model plan developed by the Administrator.[13]

Second, the TSCA authorizes the EPA to obtain and manage information on all new and existing chemicals from manufacturers and producers.[14] Under the TSCA, whether a chemical is "new" or "existing" refers to its inclusion or absence from the TSCA Chemical Substance Inventory ("Inventory").[15] The Inventory is a constantly-changing list kept by the EPA that contains "existing" chemicals in U.S. commerce as well as any manufacturing or use restrictions that might apply.[16] The EPA also collects data and keeps records on chemicals that are produced or manufactured, but does so in partnership with producers as producers are the primary information-holders.[17] Thus, the responsibility to collect data falls mainly on the producers.[18] The TSCA authorizes the EPA to establish timelines and procedures for manufacturers and processors to import or produce chemicals, as well as the timeline and procedure for any review of new chemicals that may be manufactured.[19]

[13] 15 U.S.C. § 2646(b)
[14] 15 U.S.C. § 2607
[15] Basic Information for the Review of New Chemicals
[16] Basic Information for the Review of New Chemicals
[17] 15 U.S.C. § 2607
[18] 15 U.S.C. § 2607
[19] See *United States v. BASF Corp*. (2019), where BASF Corp. and the EPA reached a settlement agreement after BASF Corp. violated the TSCA by failing to comply with TSCA chemical reporting requirements. BASF Corp. agreed to pay $700,000 as a penalty.

In adherence to its requirement that any regulating actions by the Administrator do not significantly impede on innovation, the TSCA also contains a provision for the protection of confidential business information.[20] It establishes penalties, including criminal, for federal actors that unintentionally or intentionally share proprietary confidential information.[21] The TSCA also authorizes the EPA to take emergency action to control a chemical or mixture if it poses and imminent and unreasonable risk of injury to health or the environment.[22]

Similar to many other federal environmental laws,[23] the TSCA contains a provision that allows citizens to bring forth civil suits against any person or agency allegedly in violation of the law or subsequently promulgated regulations, including the United States or EPA.[24] Citizens may not file suit if the EPA already filed and is in the process of pursuing suit, or before the EPA and facility alleged to be in violation is notified of any alleged violation.[25]

Title II – Asbestos Hazard Emergency Response

Congress passed Title II of the TSCA, and President Reagan signed it into law, in 1986 as the Asbestos Hazards Emergency Response Act.[26] This amendment required the EPA to set standards regarding asbestos management in public and nonprofit private schools and mandated certification for contractors and laboratories that conduct asbestos-related work.[27] It also granted the EPA with enforcement authority and established penalties for schools that fail to comply.[28]

[20] 15 U.S.C. § 2613
[21] 15 U.S.C. § 2613
[22] 15 U.S.C. § 2648
[23] Including, but not limited to, the CWA (1972) and Clean Air Act (1963); Notices of Intent to Sue the U.S. Environmental Protection Agency
[24] 15 U.S.C. § 2619
[25] Citizen Enforcement
[26] Asbestos Hazard Emergency Response Act
[27] Asbestos Hazard Emergency Response Act
[28] Asbestos Hazard Emergency Response Act

Title III – Indoor Radon Abatement

In 1988, Congress enacted Title III of the TSCA as the Radon Program Development Act.[29] Signed into law by President Reagan, this amendment required the EPA to provide technical assistance and produce resources that would assist with managing radon in buildings.[30] It also required the EPA to conduct studies related to radon contamination and associated health risks.[31]

Title IV – Lead Exposure Reduction

Title IV of the TSCA was enacted by Congress in 1992 as the Residential Lead-Based Paint Hazard Reduction Act.[32] Signed into law by President Bush, it defined what lead-contaminated items included and established procedures and criteria for lead detection and control.[33] It also directed the EPA to conduct a study on lead hazards that arise from renovation and remodeling and directed the EPA to produce technical assistance and resources for lead-based activities.[34] It also directed the Centers for Disease Control and Prevention (CDC) and National Institutes of Health (NIH) to conduct a study to determine sources of lead exposure to children.[35]

Title V – Healthy High-Performance Schools

[29] Radon Program Development Act of 1987
[30] Radon Program Development Act of 1987
[31] Radon Program Development Act of 1987
[32] Residential Lead-Based Paint Reduction
[33] Residential Lead-Based Paint Reduction
[34] Residential Lead-Based Paint Reduction
[35] Residential Lead-Based Paint Reduction

Congress passed the Energy Independence and Security Act of 2007, which President Bush signed into law, which included an amendment to the TSCA.[36] This amendment authorized the EPA to establish state grant programs to provide technical assistance for public and nonprofit private schools to develop and implement environmental health programs.[37] It primarily pertains to the establishment of new schools, rather than renovation of existing schools, and requires the Administrator to consult with the Secretary of Education and Secretary of Health and Human Services to issue guidelines for selecting sites for new schools.[38]

Mercury Export Ban Act of 2008

In 2008, Congress enacted the Mercury Export Ban Act, which was signed into law by President Obama and amended the TSCA to prohibit the export of elemental mercury to "reduce the availability of [it] in domestic and international markets."[39]

Title VI – Formaldehyde Standards for Composite Wood Products

In 2010, Congress passed Title VI as an amendment to the TSCA, and President Obama signed it into law.[40] This amendment created regulations for specific woods and other boards used for construction that are known to emit formaldehyde during its construction.[41] This includes plywood, particle boards, and medium-density fiberboard (MDF). It also granted enforcement power to the EPA to ensure compliance.[42]

[36] Energy Independence and Security Act of 2007
[37] Energy Independence and Security Act of 2007
[38] Energy Independence and Security Act of 2007
[39] Mercury Export Ban Act of 2008
[40] Formaldehyde Standards for Composite Wood Products Act
[41] Formaldehyde Standards for Composite Wood Products Act
[42] Formaldehyde Standards for Composite Wood Products Act

The Frank R. Lautenberg Chemical Safety for the 21st Century Act

In 2016, Congress enacted the Lautenberg Chemical Safety Act, which was signed into law by President Obama and significantly amended the TSCA.[43] The Act aimed to change the TSCA to increase efficiency by establishing deadlines for the EPA to evaluate existing chemicals to bring the Inventory up to date, adopting updated safety standards for review of chemicals, and expanding publicly available information to consumers.[44]

[43] Frank R. Lautenberg Chemical Safety for the 21st Century Act
[44] Frank R. Lautenberg Chemical Safety for the 21st Century Act

Appendix A

Definitions

Definitions are directly obtained from 15 U.S.C. § 2602.

- **Administrator** means the Administrator of the Environmental Protection Agency.
- **Chemical substance** means any organic or inorganic substance of a particular molecular identity, including:
    - (i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and
    - (ii) any element or uncombined radical.

  Such term does not include:
    - (i) any mixture,
    - (ii) any pesticide (as defined in the Federal Insecticide, Fungicide, and Rodenticide Act) when manufactured, processed, or distributed in commerce for use as a pesticide,
    - (iii) tobacco or any tobacco product,
    - (iv) any source material, special nuclear material, or byproduct material (as such terms are defined in the Atomic Energy Act of 1954 and regulations issued under such Act),
    - (v) any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986 and any component of such an article (limited to shot shells, cartridges, and components of shot shells and cartridges), and

  - (vi) any food, food additive, drug, cosmetic, or devise (as such terms are defined in section 201 of the Federal Food, Drug, and Cosmetic Act) when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic, or device.

- **Commerce** means trade, traffic, transportation, or other commerce (A) between a place in a State and any place outside of such State, or (B) which affects trade, traffic, transportation, or commerce described in clause (A).
- **Environment** refers to water, air, and land and the interrelationship which exists among and between water, air, and land and all living things.
- **Manufacture** means to import into the customs territory of the U.S., produce, or manufacture.
- **Process** means the preparation of a chemical substance or mixture, after its manufacture, for distribution in commerce:
  - In the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance or mixture, or
  - As part of an article containing the chemical substance or mixture.
- **State** means any state, territory, or possessed land of the U.S.