

HOUSE BILL REPORT

SSB 5135

As Passed House - Amended:

April 15, 2019

Title: An act relating to preventing toxic pollution that affects public health or the environment.

Brief Description: Preventing toxic pollution that affects public health or the environment.

Sponsors: Senate Committee on Environment, Energy & Technology (originally sponsored by Senators Rolfes, Frockt, Salomon, Palumbo, Cleveland, Carlyle, Kuderer, Saldaña, Billig, Dhingra, Pedersen, Wellman, Hunt, Das, McCoy, Liias, Darneille, Hasegawa, Keiser and Van De Wege).

Brief History:

Committee Activity:

Environment & Energy: 3/21/19, 4/2/19 [DPA];

Appropriations: 4/6/19, 4/8/19 [DPA(ENVI)].

Floor Activity:

Passed House - Amended: 4/15/19, 60-37.

Brief Summary of Substitute Bill (As Amended by House)

- Directs the Department of Ecology (ECY) to identify priority consumer products for at least five priority chemicals every five years, with the first process beginning in 2020.
- Authorizes the ECY to take regulatory actions with respect to priority consumer products containing priority chemicals, including restricting or prohibiting the manufacture, sale, or use of a priority chemical in a priority consumer product, or requiring a manufacturer to disclose certain information about the use of a priority chemical in a priority consumer product.
- Authorizes the ECY to require manufacturers to provide certain information about their use of a chemical to support the identification of priority consumer products containing priority chemicals.

HOUSE COMMITTEE ON ENVIRONMENT & ENERGY

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: Do pass as amended. Signed by 7 members: Representatives Fitzgibbon, Chair; Lekanoff, Vice Chair; Doglio, Fey, Mead, Peterson and Shewmake.

Minority Report: Do not pass. Signed by 3 members: Representatives Shea, Ranking Minority Member; Dye, Assistant Ranking Minority Member; Boehnke.

Staff: Jacob Lipson (786-7196).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass as amended by Committee on Environment & Energy. Signed by 18 members: Representatives Ormsby, Chair; Bergquist, 2nd Vice Chair; Robinson, 1st Vice Chair; Cody, Dolan, Fitzgibbon, Hansen, Hudgins, Jinkins, Macri, Pettigrew, Pollet, Ryu, Senn, Stanford, Sullivan, Tarleton and Tharinger.

Minority Report: Do not pass. Signed by 13 members: Representatives Stokesbary, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Rude, Assistant Ranking Minority Member; Caldier, Chandler, Dye, Hoff, Kraft, Mosbrucker, Schmick, Steele, Sutherland and Ybarra.

Minority Report: Without recommendation. Signed by 1 member: Representative Springer.

Staff: Dan Jones (786-7118).

Background:

Restrictions on Toxic Materials in Consumer Products.

Several federal policies restrict the use of certain substances with toxic properties in consumer products or manufacturing processes. These include:

- The Consumer Product Safety Commission administers several laws regulating the inclusion of toxic compounds in consumer products.
- The United States Food and Drug Administration's regulatory responsibilities include the safety of biological products, such as vaccines and prescription and nonprescription drugs.
- The Environmental Protection Agency administers the Federal Insecticide, Fungicide, and Rodenticide Act, which regulates the sale, distribution, use, and labeling of pesticides, as well as the Toxic Substances Control Act, which includes notification and testing requirements for many chemicals in commercial use and restricts the use of certain chemicals.

State law restricts the use of several substances in various consumer products, including:

- Bisphenol A in sports bottles and other containers;
- lead in vehicle wheel weights;
- copper in boat paint;
- polybrominated diphenyl ethers (PBDEs), a class of flame retardants, in a variety of consumer products;

- five flame retardants (TDCPP, TCEP, decabromodiphenyl ether, HBCD; and additive TBBPA) in children's products and residential upholstered furniture;
- cadmium, phthalates, and lead in children's products;
- lead, mercury, hexavalent chromium, and cadmium in product packaging;
- perfluoroalkyl and polyfluoroalkyl (PFAS) chemicals in firefighting foam and certain types of food packaging, contingent upon the identification of suitable alternatives; and
- mercury, in several categories of consumer products.

Children's Safe Products Act.

In addition, the Children's Safe Products Act (CSPA) directs the Department of Ecology (ECY), working with the Department of Health, to use fetal and childhood exposure potential to identify high-priority chemicals of concern to children (CHCC). Under the CSPA, the ECY identifies high-priority chemicals based on credible scientific evidence that the chemical causes specified types of harm to human health or the environment.

The CSPA requires manufacturers of children's products containing these identified CHCCs to annually report information about the use of the chemicals to the ECY. The annual notice filed with the ECY must include:

- the chemical number of the CHCC used;
- a description of the product or component containing the substance;
- a description of the chemical's function in the product; and
- the amount of the chemical used in each unit of the product.

Manufacturers in violation of restrictions on the use of chemicals regulated under the CSPA or in violation of reporting requirements associated with the use of chemicals on the CHCC list are subject to fines of up to \$5,000 for initial violations and up to \$10,000 for subsequent violations. The ECY has rulemaking authority to implement, administer, and enforce the provisions of the CSPA.

State Hazardous Waste Management Laws and the Model Toxics Control Act.

In implementing the state hazardous waste management laws, the ECY requires dangerous waste generators to properly dispose of waste at approved dangerous waste management sites and facilities. Persons who generate dangerous waste are responsible for identifying their wastes as such based on characteristics including the waste's corrosiveness, ignitability, toxicity, or reactivity.

The Model Toxics Control Act (MTCA), which is administered and enforced by the ECY, requires liable parties to clean up sites contaminated with hazardous substances and authorizes the ECY to conduct certain pollution prevention activities. Hazardous substances under the MTCA include dangerous or extremely dangerous substances identified under state hazardous waste management laws, petroleum and petroleum products, and hazardous substances identified under the federal Comprehensive Environmental Responses, Liability, and Compensation Act.

Persistent, Bioaccumulative Toxins.

In 2006 the ECY adopted a rule under state hazardous waste laws outlining the processes it follows for efforts to reduce and phase out the uses, releases, and exposures to persistent,

bioaccumulative toxins (PBTs). The PBTs are substances with toxic or harmful effects on people or animals that have a lengthy decomposition time in the environment and accumulate up the food chain in the bodies of organisms, including people. The PBT rule authorizes the ECY to develop a list of PBT substances, which can include all types of PBT chemicals or metals, except fertilizers and pesticides regulated under the Federal Insecticide, Fungicide, and Rodenticide Act. This PBT list is used to inform various ECY activities, including monitoring, voluntary PBT phase-out and use-reduction efforts, and PBT public awareness activities. There are currently 18 individual chemicals and eight groups of chemicals on the ECY's PBT list, creating a total list of 74 PBT chemicals.

The ECY also uses the PBT list to identify and prioritize candidates for the development of chemical action plans (CAPs). In developing a CAP, the ECY works with an external advisory committee to evaluate the chemical's uses, releases, impacts, and management. The CAP process concludes with the issuance of a report with recommendations for how to reduce or manage certain uses of the PBT and encourage safer alternatives to the PBT. Chemical action plan processes have been initiated or completed for a number of chemical groups, including:

- polychlorinated biphenyls;
- PFAS; and
- PBDEs in a variety of consumer products.

Other Provisions.

The ECY has an established administrative process that allows for information submitted to the ECY to be designated for the ECY's confidential use because the information relates to unique production processes and its release would hurt the competitive position of the entity that submitted the information. The ECY may designate these submitted records as confidential if doing so would not be detrimental to the public interest and is in accord with other policies and purposes governing the ECY's activities.

The Pollution Control Hearings Board (PCHB) is an appeals board with jurisdiction to hear appeals of certain decisions, orders, and penalties made by the ECY and several other state agencies. Parties aggrieved by a PCHB decision may obtain subsequent judicial review.

Under the Administrative Procedure Act, an agency is required to make specified determinations and perform additional analysis during the rulemaking process when adopting a significant legislative rule. Requirements imposed on a state agency when adopting a significant legislative rule include:

- determining that the rule is needed to achieve the general goals and specific objectives of the statute that the rule implements;
- completing a cost-benefit analysis and determining that the probable benefits of the rule are greater than its probable costs;
- determining whether the rule imposes more stringent requirements on private entities than on public entities; and
- determining if the rule differs from federal regulations and law.

Significant legislative rules include rules that adopt substantive provisions of law pursuant to delegated legislative authority and impose penalties or sanctions for violations.

Agencies must publish small business economic impact statements for rules that will impose more than minor costs on businesses. A small business economic impact statement must include analysis of the rule's costs and a consideration of whether the rule will cause businesses to lose revenue or will have a disproportionate impact on small businesses. The agency must also take steps to reduce the rule's costs to small businesses and must involve small businesses in rule development processes. If an agency rule is identified to impose disproportionate impacts on small businesses, the agency is directed, where legal and feasible within the bounds of the authorizing statute, to reduce the costs imposed on small businesses by the rule. Small business economic impact statements must be published at the same time as the notice of a public hearing on the draft administrative rule.

As a result of legislation enacted in 2013 and 2014, the ECY's Water Quality and Shorelands and Environmental Assistance programs must identify peer-reviewed science, scientific literature, and other sources relied upon to take a significant agency action. Significant agency actions include specified types of agency actions, including those that:

- by rule, adopt substantive requirements with penalties for noncompliance;
- by rule amendment or adoption, result in significant amendments to an existing policy or program; or
- result in the development of technical guidance, assessments, or documents used to implement a state rule or statute.

In addition to citing the sources of information relied upon for significant agency actions, the ECY's Water Quality and Shorelands and Environmental Assistance programs must identify cited sources as belonging to one of eight specified categories.

Summary of Amended Bill:

Priority Chemical and Priority Consumer Products.

Priority chemicals are defined to include perfluoroalkyl and polyfluoroalkyl (PFAS) chemicals, polychlorinated biphenyls (PCBs), phthalates, organohalogen flame retardants (OFRs) and other flame retardants identified under the Children's Safe Products Act (CSPA), and phenolic compounds.

The Department of Ecology (ECY), in consultation with the Department of Health (DOH), may also designate priority chemicals. Every five years, the ECY must designate at least five priority chemicals or chemical classes. To be designed as a priority chemical by the ECY, a chemical must be:

- designated as a high-priority chemical for children under the CSPA;
- designated by the ECY as a persistent, bioaccumulative toxin (PBT);
- regulated in consumer products under CSPA or laws targeting polybrominated diphenyl ethers (PBDEs), product packaging, PFAS in firefighting foam, mercury, copper in boat paint, and Bisphenol A;
- a hazardous substance under the Model Toxics Control Act or state hazardous waste management laws; or
- of concern to sensitive populations and sensitive species, after considering hazard traits; toxicological endpoints; aggregate or cumulative effects with other chemicals; environmental fate; the potential of degradation into another chemical with hazard traits or environmental or toxicological endpoints; the potential contribution to

adverse health or environmental impacts; the potential impacts on sensitive populations, species, or environmentally sensitive habitats; and the potential exposures to the chemical.

Sensitive populations and species are defined to include people and species that may be disproportionately or more severely affected by priority chemicals.

Every five years, the ECY must also identify priority consumer products that are a significant source of or use of priority chemicals. In designating a priority consumer product, the ECY must consider criteria that include:

- the volume of a chemical in the consumer product;
- the volume or number of units of a product sold in Washington;
- the potential for exposure to the priority chemical by sensitive populations or species;
- the potential for chemicals to be found in the outdoor environment;
- regulatory actions taken by other states or nations;
- whether the product has been identified as a source of a chemical as part of chemical action plan under the PBT rule or other reports or information gathered under the CSPA; and
- other specified state laws that restrict toxic chemicals in consumer products.

To assist with the identification of priority consumer products and making regulatory determinations, the ECY may request that manufacturers submit a notice to the ECY containing the information that is required to be reported under the CSPA or other information relevant to specified aspects of the use of a chemical in a consumer product.

The following products may not be identified as priority consumer products:

- food and beverages, tobacco products, drug or biological products regulated by the United States Food and Drug Administration;
- finished products regulated by the Federal Aviation Administration (FAA);
- motorized vehicles;
- finished products regulated or certified by the FAA or Department of Defense, as well as parts, materials, and processes when used to manufacture or maintain those regulated or certified finished products, and chemical products used to produce an agricultural commodity; and
- plastic shipping pallets manufactured prior to 2012.

Department of Ecology Regulatory Actions.

Every five years, the ECY, in consultation with the DOH, must determine regulatory actions to reduce the use of priority chemicals in priority consumer products and to increase transparency. The ECY may determine that no regulatory action is currently needed, may require manufacturers to provide notice of the use of a chemical consistent with the CSPA reporting requirements, or may restrict or prohibit the manufacture, distribution, sale, or use of a priority chemical in a consumer product.

To restrict or prohibit priority chemicals or members of a class of priority chemicals in priority consumer products, the ECY must determine that safer alternatives are available and feasible, and either:

- the restriction will reduce a significant source of or use of a priority chemical; or

- the restriction is necessary to protect the health of sensitive populations or species. Restrictions adopted by the ECY may include exemptions.

When determining regulatory actions, the ECY may also consider other specified factors. The ECY may not require disclosure of or restrict the use of chemicals in internal components of electronic products.

Schedule.

From an initial list of priority chemicals that may include PFAS chemicals, PCBs, phthalates, OFRs, other flame retardants identified under the CSPA, and phenolic compounds, the ECY must designate priority consumer products that are a significant source of or use of those chemicals by June 1, 2020. The ECY must determine regulatory actions for these priority chemicals and priority consumer products by June 1, 2022, and must adopt rules to implement those regulatory actions by June 1, 2023.

Every five years, the ECY must:

- designate five priority chemicals, starting June 1, 2024;
- designate priority consumer products for those chemicals, starting June 1, 2025;
- determine regulatory actions for those priority consumer products and chemicals, starting June 1, 2027; and
- adopt implementation rules for those regulatory actions, starting June 1, 2028.

The ECY must submit a report to the appropriate committees of the Legislature when identifying priority chemicals, priority consumer products, or determining regulatory actions. Identification of priority chemicals, priority consumer products, and regulatory determinations by the ECY do not take effect until the adjournment of the regular legislative session immediately following the ECY action. The ECY may begin to evaluate priority consumer products before the designation of priority chemicals takes effect, may consider regulatory determinations before the designation of priority products take effect, and may initiate rulemaking before regulatory determinations take effect.

When identifying priority chemicals and priority consumer products, the ECY must: (1) notify the public, including via the Washington State Register, of the selection and the sources of information that it relied upon and the basis for the selection; and (2) publish a draft schedule for making determinations. The ECY must provide an opportunity for review and comment on the regulatory determinations. The ECY must also create a stakeholder advisory process by June 1, 2020, to provide expertise, input, and review of the ECY identification of priority chemicals, priority consumer products, and regulatory determinations.

Confidential Information, Program Administration, Enforcement, and Other Provisions.

The ECY must cite, publish, and categorize the sources of information that it relied upon, including peer-reviewed science, in the course of taking significant agency action, in the same manner as is required for significant agency action taken by the ECY's Water Quality and Shorelands and Environmental Assistance programs. Each adopted rule to restrict a chemical or require disclosure of a chemical is a significant agency action, and also a significant legislative rule for purposes of the Administrative Procedure Act.

A manufacturer that submits information or records to the ECY may request that the information or records be made available only for ECY's confidential use. The ECY must grant this request if it is made in accord with the policies and procedures established under the ECY's existing administrative process and standards for evaluating confidential information submitted to the ECY. The ECY must also keep confidential and may not publicly disclose any information furnished to the ECY by a federal agency on the condition that it be afforded the confidentiality protections available under federal law.

Manufacturers in violation of requirements, rules, or orders related to priority chemicals, priority consumer products, and associated regulatory actions are subject to civil penalties of up to \$5,000 for a first offense and up to \$10,000 for repeat offenses. Penalties and orders are appealable to the Pollution Control Hearings Board.

The ECY may adopt rules to implement, administer, and enforce this chapter, and must adopt rules to implement regulatory determinations to restrict or prohibit a priority chemical in a priority consumer product, or to require the disclosure of a priority chemical's use. For regulatory determinations to restrict, prohibit, or require disclosure of a priority chemical in a priority consumer product, the ECY must prepare a small business economic impact statement and identify the expected costs and benefits of the proposed or adopted rules to state agencies and private entities. Rules adopted to implement regulatory determinations to restrict or prohibit a priority chemical may not take effect until at least 365 days after the rule is adopted. Input from the stakeholder advisory process must be considered and addressed when adopting rules.

A severability clause is included.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony (Environment & Energy):

(In support) There are thousands of chemicals currently used in commerce for which government agencies do not have the legal tools to provide sufficient oversight to avoid harm to public health and the environment. The existing federal process under the Toxic Substances Control Act is insufficient to protect public health or ensure adequate review of chemicals before they are introduced and used by companies. Washington and other states have taken action to limit the harm from chemicals that have been widely identified as problematic, but such actions are piecemeal and often occur after harm has already been done. State agencies need authority to take action to prevent public exposure when problems with chemicals are identified. Chemicals in everyday products may act in combination with one another to cause a variety of health ailments, including reproductive, developmental, carcinogenic, and cognitive impacts. Toxic chemicals are a threat to salmon and orcas and to other indicators of the health of Puget Sound. It is more efficient and effective to reduce public and environmental exposures to harmful materials by limiting the inclusion of those

materials in consumer products in the first place, rather than conducting cleanups or doing other harm reduction after pollution has already entered the environment. Consumer products, rather than factory smokestacks and discharge pipes, are now the biggest source of pollution in the environment. By addressing nonpoint source pollution, it will reduce the costs to local governments that must treat their wastewater. Government agency evaluation of toxic chemicals should involve a robust stakeholder process. Private enterprises would like to be able to select products that will not be harmful to their clients, but the existing system makes it difficult to identify toxic-free options. Many toxic-free alternatives are feasible and available, but are difficult to identify for consumers and are not mandatory for companies to use.

(Opposed) An open stakeholder process is needed in order for the Department of Ecology (ECY) to decide which chemicals and products to focus on. The aggressive timelines for ECY evaluation would lead to insufficient consideration of stakeholder input. Chemicals should be evaluated on an individual basis rather than as classes of chemicals. Rather than simply evaluating whether a harmful chemical is present in a product, it is important to consider whether the chemical poses a risk to the consumer. Costs and benefits must be considered when evaluating the appropriateness of phasing out a chemical. If phenols that are integral to engineered wood products such as cross-laminated timber are banned, it will have the unintended consequence of discouraging the use of wood as a building material. The existing Chemical Action Plan process of the ECY is working as intended. Business obligations to report the presence of chemicals should not be dramatically expanded. The Legislature, rather than the ECY, should have the authority to restrict chemicals. The ECY has a history of exceeding its statutory authority.

Staff Summary of Public Testimony (Appropriations):

(In support) This bill would help protect the health of Washington's children, wildlife, and environment. The bill would more effectively address chemical restrictions than the chemical-by-chemical approach that has been employed by the Legislature to date. The Department of Ecology (ECY) would be given limited authority to address major sources of chemicals. Preventing toxic pollution is much cheaper than cleaning it up.

(Opposed) There are already many federal and state programs, such as chemical action plans, that address chemicals used in products. These existing programs require legislative approval before a chemical is banned, which is a better approach. The fiscal note may or may not be accurate, as California and other states have similar programs in place with much higher costs. State-specific regulations lead to confusion for retailers, and federal guidance is preferable. The bill gives too much authority to the ECY, and the ECY should have to meet higher standards before banning chemicals.

Persons Testifying (Environment & Energy): (In support) Rob Duff, Office of the Governor; Denise Clifford, Department of Ecology; Barb Morrissey, Department of Health; Erika Schreder, Toxic-Free Future; Cheri Peele, Clean Production Action; Mindy Roberts, Washington Environmental Council; Carl Schroeder, Association of Washington Cities; Joanna Grist, PCC Community Markets; Maria Hunter, Washington Department of Natural Resources; Alyson Cummings, Beautycounter; Shirlee Tan, Seattle and King County Public

Health; Holly Davies, Local Hazardous Waste Management Program in King County; and Jeff Parsons, Puget Sound Partnership.

(Opposed) Peter Godlewski, Association of Washington Business; Dan Moyer, Consumer Technology Association; Kristin Kern, American Apparel and Footwear Association; Grant Nelson, American Chemistry Council; and Jason Callahan, Washington Forest Protection Association.

Persons Testifying (Appropriations): (In support) Nick Federici, Toxic Free Future.

(Opposed) Grant Nelson, American Chemistry Council; Mark Johnson, Washington Retail Association; Charlie Brown, Consumer Technology Association; and Peter Godlewski, Association of Washington Business.

Persons Signed In To Testify But Not Testifying (Environment & Energy): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.