

SB 5369 - H COMM AMD

By Committee on Environment & Energy

NOT ADOPTED 04/07/2023

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** (1) The legislature finds that
4 polychlorinated biphenyls, or PCBs, are a hazardous chemical class
5 that have been identified as carcinogenic, a developmental toxicant,
6 toxic to aquatic organisms, and persistent and bioaccumulative.
7 According to the United States environmental protection agency, PCBs
8 are probable human carcinogens and may have serious and potential
9 effects on the immune system, reproductive system, nervous system,
10 and endocrine system.

11 (2) Humans and other organisms can be exposed to PCBs in a number
12 of ways. PCBs can be released into the environment from hazardous
13 waste sites, illegal dumping, or disposal of PCB wastes or PCB-
14 containing products in areas or landfills not designed to handle
15 hazardous waste, leaks, or releases from electrical transformers
16 containing PCBs, and wastewater discharges. Once PCBs are released,
17 the chemicals do not readily break down in the environment and can
18 cycle for long periods between air, water, and soil. PCBs can
19 accumulate in leaves and above-ground parts of plants and food crops,
20 and they are also taken up into the bodies of small organisms and
21 fish, resulting in potential exposure for people and organisms that
22 ingest the fish.

23 (3) In 1979, the United States banned the production of PCBs
24 under the toxic substances control act. However, the United States
25 environmental protection agency's regulations implementing the toxic
26 substances control act for PCBs allow some inadvertent generation of
27 PCBs to occur in excluded manufacturing processes. These
28 manufacturing by-product PCBs have been identified in wastewater,
29 sediments, and air in numerous locations and have been positively
30 identified in the testing of new products.

31 (4) The legislature finds that the state has done much to address
32 PCB contamination, including cleanup, permitting, stormwater

1 management, and fish advisories. In addition, the United States
2 environmental protection agency, Washington state, and the Spokane
3 tribe of Indians have established PCB water quality standards to
4 protect human health and the environment. These standards are
5 critical for addressing release and exposure from legacy and
6 nonlegacy PCBs. However, the standards cannot be achieved with
7 currently available water treatment technology if the waste stream
8 continues to include new sources of PCBs allowable under the toxic
9 substances control act at levels measured in products such as paints,
10 inks, and pigments that are billions of times higher than applicable
11 water quality standards. While the United States environmental
12 protection agency has restored a human health criteria standard of
13 seven parts per quadrillion in Washington waters, the toxic
14 substances control act limit for PCBs in products is an annual
15 average of 25 parts per million, with a maximum 50 parts per million
16 adjusted total PCBs. Therefore, the legislature finds that nonlegacy
17 PCB contamination may most effectively be managed upstream at the
18 product and process source as opposed to downstream facilities at the
19 end of the product life cycle. The toxic substances control act
20 standard for inadvertent PCBs does not reflect current science on
21 limits needed to protect human health and the environment and is
22 overdue for revision.

23 (5) While previous industry analysis of toxic substances control
24 act rule making has asserted negative impacts and infeasibility in
25 disallowing by-product PCBs, the legislature finds that safer,
26 feasible, and available alternatives to PCB-containing paints and
27 printing inks now exist, as determined by the department in its June
28 2022 *Safer Products for Washington* report. Moreover, since safer and
29 available products and processes to produce paints and printing inks
30 do exist, the legislature finds that use of manufacturing processes
31 resulting in products with PCB by-products is not inadvertent, but
32 intentional, and constitutes a use of the chemical within the
33 product.

34 (6) Therefore, the legislature intends to direct the department
35 to petition the United States environmental protection agency to
36 reassess its PCB regulations under the toxic substances control act
37 and to prohibit the use of chlorine-based pigment manufacturing
38 processes, which result in the generation of PCBs.

1 NEW SECTION. **Sec. 2.** The definitions in this section apply
2 throughout this chapter unless the context clearly requires
3 otherwise.

4 (1) "Department" means the department of ecology.

5 (2) "Manufacturer" means any person, firm, association,
6 partnership, corporation, governmental entity, organization, or joint
7 venture that produces a product or is an importer or domestic
8 distributor of a product sold or offered for sale in or into the
9 state.

10 (3) "Paint and printing ink" includes, but is not limited to,
11 building paint for indoor and outdoor use, spray paint, children's
12 paint, road paint, and printing inks used in paper and packaging.

13 (4) "PCBs" or "polychlorinated biphenyls" means chemical forms
14 that consist of two benzene rings joined together and containing one
15 to 10 chlorine atoms attached to the benzene rings.

16 (5) "Retail establishment" includes any person, corporation,
17 partnership, business, facility, vendor, organization, or individual
18 that sells or provides merchandise, goods, or materials directly to a
19 customer.

20 NEW SECTION. **Sec. 3.** (1) The department must petition the
21 United States environmental protection agency to reassess its
22 regulations on excluded manufacturing processes from prohibitions on
23 manufacturing, processing, distribution in commerce, and use of PCBs
24 and PCB items under 40 C.F.R. Sec. 761.3 for the purpose of
25 eliminating or reducing the presence of PCBs in consumer products.

26 (2) In petitioning the United States environmental protection
27 agency, the department must include legislative findings under this
28 chapter and information on:

29 (a) Health effects of PCBs;

30 (b) Release and exposure of PCBs including, but not limited to,
31 concentrations of PCBs measured in consumer products and in state
32 waters, soils, and fish tissue;

33 (c) Safer alternatives for consumer products that contain PCBs,
34 including the availability and feasibility of alternatives; and

35 (d) Other relevant data or findings as determined by the
36 department.

37 (3) The department is not required to generate new data and may
38 use previously compiled data and findings developed in the
39 performance of duties under this chapter.

1 (4) The department may consult with the department of health and
2 other relevant state agencies in developing the petition under this
3 section.

4 (5) To the extent practicable, the department must seek
5 completion of the petition review by January 1, 2025.

6 NEW SECTION. **Sec. 4.** (1)(a)(i) Beginning January 1, 2025, a
7 manufacturer or wholesaler may not manufacture, sell, offer for sale,
8 distribute for sale, or distribute for use in this state any paint or
9 printing ink that contains chlorine-based pigments.

10 (ii) Beginning January 1, 2026, a retail establishment may not
11 knowingly sell or knowingly offer for sale for use in this state any
12 paint or printing ink that contains chlorine-based pigments.

13 (b)(i) Beginning no later than 12 months after the adoption of
14 rules under subsection (3) of this section, a manufacturer or
15 wholesaler may not manufacture, sell, offer for sale, distribute for
16 sale, or distribute for use in this state a product identified under
17 subsection (3) of this section.

18 (ii) Beginning no later than 24 months after the adoption of
19 rules under subsection (3) of this section, a retail establishment
20 may not knowingly sell or knowingly offer for sale any paint or
21 printing ink that contains chlorine-based pigments.

22 (2) Upon a demand by the department, a person must demonstrate to
23 the department that a product is in compliance with the requirements
24 of subsection (1) of this section through the submission to the
25 department of:

26 (a) Testing data indicating either that a chlorine-based
27 manufacturing process was not used in the manufacture of the pigments
28 contained in the paint, printing ink, or other product; or

29 (b) Information pertaining to pigment manufacturing processes
30 demonstrating that chlorine was not used in the manufacturing of
31 pigments contained in the paint, printing ink, or other product.

32 (3) The department may, by rule, identify products that, as a
33 result of the inclusion of pigments in the product, contain PCBs that
34 were inadvertently generated in the making of the pigment. The
35 department may require products identified under this subsection to
36 demonstrate the absence of chlorine-based pigments in a product in a
37 manner consistent with subsection (2) of this section. The department
38 must initiate a rule-making process under this subsection by October
39 1, 2023.

1 (4) The prohibitions in subsection (1) of this section do not
2 apply to:

3 (a) Paint manufactured from recycled paint collected under
4 chapter 70A.515 RCW; or

5 (b) The sale of any previously owned products containing
6 inadvertently generated PCBs made in casual or isolated sales as
7 defined in RCW 82.04.040, or by a nonprofit organization.

8 (5)(a) By rule, the department may exempt a product or category
9 of product from the prohibitions in subsection (1) of this section
10 upon determining that a product or category of product is not capable
11 of being manufactured in a manner that does not rely on the inclusion
12 of chlorine-based pigments, and upon determining that allowing for
13 the continued manufacture of product or category of product
14 containing a chlorine-based pigment would not result in meaningful
15 impacts to human health, the environment, or the ability of entities
16 regulated under chapter 90.48 RCW to comply with water quality
17 standards.

18 (b) The department may, in its discretion, extend the compliance
19 deadline in subsection (1) of this section a product or category of
20 product for which a person annually demonstrates to the department by
21 October 1st of a given year that the prohibition is not technically
22 feasible for the person to comply with.

23 (6) The department may not administer or enforce the requirements
24 of this section if:

25 (a) A court of competent jurisdiction determines that federal
26 regulations preempt the requirements; or

27 (b) The requirement does not align with any regulation
28 established by the United States environmental protection agency
29 adopted after the effective date of this section.

30 (7) If the requirements of this section are determined by a court
31 of competent jurisdiction to be preempted by federal regulations, the
32 department is directed to adopt a rule, within 18 months of the
33 determination of preemption, to establish a reporting requirement for
34 the use of chlorine-based pigment manufacturing processes or the PCB
35 content of any combination of paints, printing inks, or products
36 identified by the department under subsection (3) of this section.

37 NEW SECTION. **Sec. 5.** (1) The department may adopt rules to
38 implement, administer, and enforce the requirements of this chapter.

1 (2) The department may impose a civil penalty for violations of
2 any requirement of this chapter in an amount not to exceed \$5,000 for
3 each violation in the case of a first offense. Persons who are repeat
4 violators are subject to a civil penalty not to exceed \$10,000 for
5 each repeat offense. The department must issue at least one notice of
6 violation by certified mail prior to assessing a penalty and the
7 department may only impose a penalty on a manufacturer or retail
8 establishment that has not met the requirements of this chapter 60
9 days following the date the written notification of the violation was
10 sent. The department may not collect a penalty from a retail
11 establishment for a product that the retail establishment
12 demonstrates to the department was in the possession of the retail
13 establishment as of the effective date of the restrictions on
14 manufacture, sale, and distribution under section 4(1) (a)(i) or
15 (b)(i) of this act.

16 (3) Any penalty provided for in this section, and any order
17 issued by the department under this chapter, may be appealed to the
18 pollution control hearings board.

19 (4) All penalties collected under this chapter must be deposited
20 in the model toxics control operating account created in RCW
21 70A.305.180.

22 **Sec. 6.** RCW 43.21B.110 and 2022 c 180 s 812 are each amended to
23 read as follows:

24 (1) The hearings board shall only have jurisdiction to hear and
25 decide appeals from the following decisions of the department, the
26 director, local conservation districts, the air pollution control
27 boards or authorities as established pursuant to chapter 70A.15 RCW,
28 local health departments, the department of natural resources, the
29 department of fish and wildlife, the parks and recreation commission,
30 and authorized public entities described in chapter 79.100 RCW:

31 (a) Civil penalties imposed pursuant to RCW 18.104.155,
32 70A.15.3160, 70A.300.090, 70A.20.050, 70A.530.040, 70A.350.070,
33 70A.515.060, 70A.245.040, 70A.245.050, 70A.245.070, 70A.245.080,
34 70A.65.200, 70A.455.090, section 5 of this act, 76.09.170, 77.55.440,
35 78.44.250, 88.46.090, 90.03.600, 90.46.270, 90.48.144, 90.56.310,
36 90.56.330, and 90.64.102.

37 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,
38 43.27A.190, 70A.15.2520, 70A.15.3010, 70A.300.120, 70A.350.070,

1 70A.245.020, 70A.65.200, 86.16.020, 88.46.070, 90.14.130, 90.46.250,
2 90.48.120, and 90.56.330.

3 (c) Except as provided in RCW 90.03.210(2), the issuance,
4 modification, or termination of any permit, certificate, or license
5 by the department or any air authority in the exercise of its
6 jurisdiction, including the issuance or termination of a waste
7 disposal permit, the denial of an application for a waste disposal
8 permit, the modification of the conditions or the terms of a waste
9 disposal permit, or a decision to approve or deny an application for
10 a solid waste permit exemption under RCW 70A.205.260.

11 (d) Decisions of local health departments regarding the grant or
12 denial of solid waste permits pursuant to chapter 70A.205 RCW.

13 (e) Decisions of local health departments regarding the issuance
14 and enforcement of permits to use or dispose of biosolids under RCW
15 70A.226.090.

16 (f) Decisions of the department regarding waste-derived
17 fertilizer or micronutrient fertilizer under RCW 15.54.820, and
18 decisions of the department regarding waste-derived soil amendments
19 under RCW 70A.205.145.

20 (g) Decisions of local conservation districts related to the
21 denial of approval or denial of certification of a dairy nutrient
22 management plan; conditions contained in a plan; application of any
23 dairy nutrient management practices, standards, methods, and
24 technologies to a particular dairy farm; and failure to adhere to the
25 plan review and approval timelines in RCW 90.64.026.

26 (h) Any other decision by the department or an air authority
27 which pursuant to law must be decided as an adjudicative proceeding
28 under chapter 34.05 RCW.

29 (i) Decisions of the department of natural resources, the
30 department of fish and wildlife, and the department that are
31 reviewable under chapter 76.09 RCW, and the department of natural
32 resources' appeals of county, city, or town objections under RCW
33 76.09.050(7).

34 (j) Forest health hazard orders issued by the commissioner of
35 public lands under RCW 76.06.180.

36 (k) Decisions of the department of fish and wildlife to issue,
37 deny, condition, or modify a hydraulic project approval permit under
38 chapter 77.55 RCW, to issue a stop work order, to issue a notice to
39 comply, to issue a civil penalty, or to issue a notice of intent to
40 disapprove applications.

1 (l) Decisions of the department of natural resources that are
2 reviewable under RCW 78.44.270.

3 (m) Decisions of an authorized public entity under RCW 79.100.010
4 to take temporary possession or custody of a vessel or to contest the
5 amount of reimbursement owed that are reviewable by the hearings
6 board under RCW 79.100.120.

7 (n) Decisions of the department of ecology that are appealable
8 under RCW 70A.245.020 to set recycled minimum postconsumer content
9 for covered products or to temporarily exclude types of covered
10 products in plastic containers from minimum postconsumer recycled
11 content requirements.

12 (o) Orders by the department of ecology under RCW 70A.455.080.

13 (2) The following hearings shall not be conducted by the hearings
14 board:

15 (a) Hearings required by law to be conducted by the shorelines
16 hearings board pursuant to chapter 90.58 RCW.

17 (b) Hearings conducted by the department pursuant to RCW
18 70A.15.3010, 70A.15.3070, 70A.15.3080, 70A.15.3090, 70A.15.3100,
19 70A.15.3110, and 90.44.180.

20 (c) Appeals of decisions by the department under RCW 90.03.110
21 and 90.44.220.

22 (d) Hearings conducted by the department to adopt, modify, or
23 repeal rules.

24 (3) Review of rules and regulations adopted by the hearings board
25 shall be subject to review in accordance with the provisions of the
26 administrative procedure act, chapter 34.05 RCW.

27 NEW SECTION. **Sec. 7.** Sections 1 through 5 of this act
28 constitute a new chapter in Title 70A RCW.

29 NEW SECTION. **Sec. 8.** If any provision of this act or its
30 application to any person or circumstance is held invalid, the
31 remainder of the act or the application of the provision to other
32 persons or circumstances is not affected."

33 Correct the title.

EFFECT: • Eliminates the requirement that the department of
ecology (ecology) adopt a rule under the safer products for
Washington law pertaining to PCBs in paints and printing inks;

- Establishes a new statutory prohibition on the manufacture, sale, and distribution of paints or inks that contain chlorine-based pigments, beginning January 1, 2025;
- Authorizes ecology to adopt rules to identify additional pigment-containing products that contain PCBs that were inadvertently generated in the making of the pigment, and to require such products to demonstrate the absence of chlorine-based pigments in the product, beginning twelve months after the adoption of ecology rules;
- Authorizes ecology to demand that a person demonstrate compliance with chlorine-based pigment requirements by submitting either testing data or information related to pigment manufacturing processes;
- Exempts paint manufactured from recycled paint collected under the state's paint stewardship law, previously owned products, and products sold in casual and isolated sales from the prohibition on chlorine-base pigments;
- Authorizes ecology to adopt rules to exempt a product or category of product from chlorine-based pigment prohibitions if a product is not capable of being manufactured without chlorine-based pigments and the continued manufacture of the product will not result in meaningful impacts to the environment, human health, or the ability of entities whose water discharges are regulated under state water quality laws to comply with water quality standards;
- Authorizes ecology to annually temporarily exclude a product or category of product from chlorine-based pigment prohibitions if a person demonstrates that it is not technically feasible for a person to comply with chlorine-based pigment restrictions;
- Directs ecology to adopt a rule requiring reporting of information related to chlorine-based pigments, within 18 months of a determination by a court that the prohibition on chlorine-containing pigments is preempted;
- Authorizes ecology to adopt rules to implement, administer, and enforce chlorine-based pigment requirements, and establishes penalties for violations that are appealable to the pollution control hearings board.
- Delays the prohibitions on knowing sale by retail establishments of products that contain chlorine-based pigments until January 1, 2026, for paints and inks, or until 24 months after the adoption of department of ecology (ecology) rules for any other products subject to prohibitions. Requires ecology to issue a notice of violation to a manufacturer or retail establishment at least 60 days prior to imposing a penalty for violations of prohibitions on chlorine-based pigments. Authorizes the department of ecology to impose penalties for violations, rather than providing that violations of requirements are subject to penalties. Authorizes ecology to extend compliance deadlines for prohibitions, rather than temporarily exclude products from prohibitions. Prohibits ecology from collecting a penalty from a retail establishment for a product that the retail establishment demonstrates was in its possession as of the effective date of the restrictions on the manufacture, sale, and distribution of paints, inks, or other products.

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