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Competitive Chemical Regulation: A Greener Alternative

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In 2005, the City of Austin discovered that coal-tar based asphalt sealant was killing the highly endangered Barton Springs salamander. The sealant was leaching off freshly sealed parking lots and entering downstream pools where these fragile animals live. The surprise ending to the City's detective work was not only that the sealant was gradually destroying its river system but also that other asphalt sealants were far safer. More specifically, when the City investigated the market, it learned that there were other sealants that were vastly less toxic, identically effective, sold at the same price, and in some cases were made by the same company. The EPA and the Consumer Product Safety Commission did nothing in response to this discovery, so the City of Austin passed an ordinance to ban the use of the highly toxic variant of asphalt sealant. Home Depot followed the City's lead and no longer carries the sealant on their shelves.

Green chemists tell me there are many stories like this one. The news is filled with examples of end products that should have never come to market if toxicity were factored into the equation. Corrosive hair permanents, toxic drywall, and cancerous air fresheners all replay the same theme – the market is glutted with duplicate products that are unnecessarily hazardous. Consumers can't run toxicity tests on every product that they buy, and if regulators don't demand this testing and analyze it, ignorance – for the manufacturers – is bliss.

The regulatory statutes governing these products and the chemicals that are used to produce them do not require agencies to cull out these useless toxic products that would be outcompeted by greener products. In fact, the design of our current regulatory statutes impedes the ability of the agency to find and regulate the unnecessarily toxic products and chemicals. Under current laws, to ban a hazardous chemical that is both more toxic and less useful than a competitor, an agency must generally conduct a full-scale assessment of all of the risks of the chemical to man, the environment, and workers who produce it and balance those against the uses, sales, and other data about the chemical. The availability of safer products – used for the same purpose – is arguably besides the point under our current regulatory program unless the agency decides that the chemical needs to be banned, or as one court put it, subjected to the "death penalty."

While most of these disappointing statutes focus on the regulation of end products, one statute – the Toxic Substances Control Act – actually addresses the underlying, individual chemical ingredients themselves. The hope is that by eliminating unreasonably unsafe chemicals, we can improve many of the end products. The problem is that TSCA is similarly weak in that the EPA must first prove that a chemical is unsafe as opposed to chemical manufacturers first demonstrating that their products are safe and non-toxic. The Agency must prove that a chemical contains an "unreasonable risk" before regulating it at all. In effect, public health takes a back seat to the imperatives of industry and greener chemicals are often ignored and overlooked as marketable solutions.

Now, after decades of legislative inaction, TSCA is finally on the legislative drafting table for reform and is getting serious attention from both sides of the aisle. At last, Congress can fix the regulatory mistakes of the past thirty-five years and put the EPA on the right path with a shot at stronger toxic chemical regulations.

But the current 250-page amendments to the latest TSCA bill not only ignore the glaring regulatory gaps in the 1976 legislation, but it introduces still further impediments to EPA's ability to isolate and regulate toxic chemicals that are essentially worthless. Under the proposed bill as currently drafted, not only does the agency still need to engage in a full-blown cost-benefit analysis of each and every chemical, regardless of the ready availability of safer substitutes, but there are more than five prefatory steps (most if not all involving public comment) that need to be checked off before the EPA can even begin its analysis of a useless chemical.

To add insult to injury, under the Improvement Act, manufacturers have no responsibility to show that their chemicals are at least as good as some of the safest or best on the market. Such a basic market-based performance test would not only be much easier to administer than the complex, multi-layered showing of unreasonable risk, but by tethering the regulatory ideal of "safe" chemicals to what is available on the market, a "do your best" chemical standard would provide a much-needed reward for those producers who do make safer, greener, chemicals. Thus if a highly toxic chemical used for asphalt sealant can be replaced, with no added cost or loss of function, with a competitor chemical that is one-hundred times less hazardous, then EPA should not be required to do a full safety assessment before restricting the useless, highly toxic chemical. The safer, more effective chemical should be rewarded; the highly toxic chemical banned simply through a showing of their relative merits. The layers of additional procedural prerequisites and other hoops only serve to get in the way of the simple common sense principle of substitution which would provide incentives for greater chemical innovation.

If the bill becomes law, green products will continue to be buried beneath the glut of products in the market, many of which are much more toxic for absolutely no good reason. The end game – to gradually phase out toxic chemicals with much safer ones and to reward innovation in green chemistry – will be all but lost in a regulatory program that fails to discriminate between the superb and the worthless.

The best path to regulating toxic chemicals in the future seems clear – identify the best chemicals in terms of safety and effectiveness and hold other competing chemicals to that standard. Such an approach rewards genius and penalizes laggards. Common sense, not interest group agendas, should guide TSCA reform. Legislators need to get their head out of their 250 page bills. They need to keep it simple and get it right.

(Editor's Note: A version of this post was cross-published on the [Center for Progressive Reform's](#) blog.)

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