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Owens Says TSCA Law Bolsters EPA's Regulation Of Existing Chemicals

Former EPA toxics chief Steve Owens says the Toxic Substances Control Act (TSCA) overhaul law will give a major boost to the agency's authority to regulate chemicals already in the marketplace, overcoming a decades-old bar to addressing such chemicals that was underscored by EPA's failure to regulate the carcinogen asbestos.

In a recent exclusive interview with *Inside EPA*, Owens also pointed to the reform law's provisions enhancing EPA's ability to require chemical manufacturers to conduct safety testing and new restrictions on when companies can withhold certain information on substances as confidential business information (CBI).

Those provisions and others ensure that the TSCA overhaul signed into law by President Obama June 22 will mark an "unquestionable substantial improvement" to the 1976 toxics law, he said.

From July 2009 to November 2011, Owens served as the assistant administrator in the Obama EPA's Office of Chemical Safety & Pollution Prevention (OCSPP) that oversaw the original TSCA, and before that was director of Arizona's Department of Environmental Quality from 2003 to 2009.

Owens, now an attorney with Squire Patton Boggs, said in the June 16 interview, that the overhaul law ensures EPA will have significant new powers to review and regulate new and existing chemicals.

One of the major accomplishments of the law, Owens said, is the removal of language from the 1976 TSCA that mandated EPA to pursue the "least burdensome requirement" in regulating a chemical once the agency found that the substances presented an unreasonable risk of harm to health or the environment.

The U.S. Court of Appeals for the 5th Circuit in 1991 struck down EPA's attempt to ban asbestos — a known carcinogen — under section 6, finding in *Corrosion Proof Fittings v. EPA* that the agency had not met its burden of proof to establish the chemical's risk could not be reduced by any other regulatory means.

Under the original TSCA's section 6, which addressed EPA's power to regulate existing chemicals, the agency could only move to ban or otherwise restrict a chemical in commerce if it found "reasonable basis" to find that it presents an unreasonable risk, but the agency was required to use the "least burdensome requirement."

In the 5th Circuit's ruling in *Corrosion Proof Fittings*, the "least burdensome" language proved problematic for EPA to satisfy, and was seen as underscoring the significant hurdles that the agency faced in regulating existing chemicals despite their known risks.

Owens in the interview said "One of the things the agency always grappled with was how to go about reviewing existing chemicals, and does [EPA] have the authority to do so?"

Owens says the "least burdensome" language has been "one of the most significant roadblocks to effective regulation on chemicals," adding that there was "virtually not a single day while I was at EPA that I didn't have a discussion of some kind about whether and how EPA could take regulatory action on a chemical under section 6 in light of *Corrosion Proof Fittings*."

The language was always the "biggest question" to come up in those discussions, Owens says, and "the removal of that makes a huge difference."

TSCA Reform

Obama on June 22 signed into law the bill, known as the Frank R. Lautenberg Chemical Safety for the 21st Century Act, in honor of the late New Jersey Democratic senator who long pushed for TSCA reform.

The law overhauls the 1976 chemical safety law, providing significant new authority for EPA to govern both new and existing chemicals. For example, it removes the "least burdensome" language; expressly prohibits EPA from considering costs when determining whether a chemical presents unreasonable risk; and requires the agency to make an affirmative safety finding before allowing a chemical to enter the market.

Owens highlighted revisions in the law to EPA's ability to require testing, which would amend section 4 of TSCA. Section 4 gave the agency power to issue rules requiring chemical manufactures to test their substances for their effects on public health and the environment.

Owens highlighted revisions to EPA's ability to require testing, which would amend section 4 of TSCA to allow the agency to issue administrative orders to compel companies to develop new data on hazard and exposure, whereas under previous TSCA EPA had to use its rulemaking authority.

"It isn't *carte blanche* authority, so there are limitations," Owens added. For example, the law includes a requirement that EPA identify the need for the new information and explain how it used available information to inform its request of new information.

The new law also includes new restrictions on when companies may claim information is CBI and avoid disclosure,

Owens said, including setting a time limit and requiring the agency to periodically review CBI claims to ensure they are properly substantiated.

Chemicals Management

Owens testified before the Senate Environment & Public Works Committee in February 2010 on a previous, unsuccessful, TSCA reform bill introduced by Lautenberg and Sen. David Vitter (R-LA).

At that time, Owens was still head of OCSPP and Lisa Jackson was EPA administrator, and both were proponents of updating TSCA.

In his testimony, Owens said, “Administrator Jackson and I have both testified before Congress that EPA’s authority is outdated and does not provide the tools to adequately protect human health and the environment. We believe there is a growing consensus that more needs to be done to improve our management of chemicals and reduce harmful exposures to chemicals.”

In the interview with *Inside EPA*, Owens said that he hopes stakeholders will hold off pursuing litigation over EPA’s implementation of the law until such time that “at least the foundation of the new approaches can be implemented by the agency.” In that regard Owens emphasized the need for EPA to work closely with stakeholders from the outset, to minimize the possibility of litigation over its early rulemakings as much as possible.

Speaking about the preemption provisions in the bill, which were a subject of heated debate among lawmakers but which EPA did not take a position, Owens said, “this is a different way of doing it,” compared to state-federal relationships in other environmental laws.

For example, Owens added, under other federal laws, like the Clean Water Act and Clean Air Act, states can “do more, but not less,” and that the reformed TSCA “clearly has a preemptive effect on states” but adds that there are “offramps” that allow states to pursue chemical safety requirements in certain circumstances, as well as “grandfathering” in various state requirements already in place.

Under the new law, states are preempted from taking action on a chemical once EPA has determined that the substance does not pose an unreasonable risk. Potential state actions on high priority chemicals moving through the agency’s risk evolution process are also preempted.

But preemption does not apply to the first 10 chemicals EPA is directed to assess under the law, derived from its 2014 TSCA work plan for addressing risks from chemicals. Preemption would also not apply nor to industry-requested chemicals designated for risk assessment. — *Bridget DiCosmo*