

# SENATE BILL REPORT

## SSB 5135

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As Amended by House, 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, Lias, Darneille, Hasegawa, Keiser and Van De Wege).

**Brief History:**

**Committee Activity:** Environment, Energy & Technology: 2/12/19, 2/14/19 [DPS-WM, DNP, w/oRec].

Ways & Means: 2/25/19, 2/26/19 [DPS (ENET), DNP, w/oRec].

**Floor Activity:**

Passed Senate: 3/07/19, 25-24.

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

**Brief Summary of First Substitute Bill**

- Requires the Department of Ecology (DOE), in consultation with the Department of Health (DOH), to identify priority chemicals and priority consumer products.
- Authorizes DOE, in consultation with DOH, to make regulatory determinations regarding priority chemicals.
- Requires DOE to identify priority chemicals, priority consumer products, and make regulatory determinations every five years.

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### SENATE COMMITTEE ON ENVIRONMENT, ENERGY & TECHNOLOGY

**Majority Report:** That Substitute Senate Bill No. 5135 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Carlyle, Chair; Palumbo, Vice Chair; Billig, Das, Lias, McCoy, Nguyen and Wellman.

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*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.*

**Minority Report:** Do not pass.

Signed by Senators Sheldon, Assistant Ranking Member, Energy & Technology; Brown, Rivers and Short.

**Minority Report:** That it be referred without recommendation.

Signed by Senators Ericksen, Ranking Member; Fortunato, Assistant Ranking Member, Environment.

**Staff:** Jan Odano (786-7486)

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## SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** Do pass.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Operating, Capital Lead; Billig, Carlyle, Conway, Darneille, Hasegawa, Hunt, Keiser, Lias, Palumbo, Pedersen and Van De Wege.

**Minority Report:** Do not pass.

Signed by Senators Braun, Ranking Member; Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Bailey, Becker, Schoesler, Wagoner, Warnick and Wilson, L..

**Minority Report:** That it be referred without recommendation.

Signed by Senators Mullet, Capital Budget Cabinet; Rivers.

**Staff:** Jed Herman (786-7346)

**Background:** Under the Children's Safe Products Act (CSPA), DOE, in consultation with the Department of Health, must identify chemicals of high concern for children. A high-priority chemical:

- harms the normal development of a fetus or child, or causes other developmental toxicity;
- causes cancer, genetic damage, or reproductive harm;
- disrupts the endocrine system;
- damages the nervous system, immune system, or organs, or causes other systemic toxicity;
- is persistent, bioaccumulative, and toxic; or
- is very persistent and very bioaccumulative.

Under CSPA, manufacturers of children's products containing chemicals of high concern for children, are required, in part, to annually report product information to DOE. The notice must include:

- the name of the chemical used or produced and its chemical abstracts service registry number;
- a brief description of the product or product component containing the substance;
- a description of the function of the chemical in the product;
- the amount of chemical used; and

- any other information the manufacturer determines is relevant to the appropriate use of the product.

DOE identifies, reviews, evaluates, and makes recommendations on the use and management of persistent, bioaccumulative, and toxic (PBT) chemicals. These chemicals remain in the environment for long periods of time, accumulate in the food chain, and are toxic to humans and wildlife. DOE has adopted rules for PBT chemical action plans (CAP) establishing criteria used to identify PBTs, procedures to develop a list of PBTs and periodically update that list, and the scope and content of a CAP. The purpose of a CAP is to provide general information about a PBT, its uses, impacts to the environment and human health, and to determine policy options and recommendations.

The Legislature has restricted and authorized DOE to implement regulations on the use of certain substances, compounds, and chemicals in consumer products impacting human health and the environment. These include:

- PBDE flame retardants;
- PFAS, lead, cadmium, and mercury in food packaging;
- bisphenol A in food and beverage cans and bottles;
- asbestos fibers, cadmium, chromium, lead and mercury in brake friction material, mercury in batteries, thermometers, thermostats, and fluorescent lights; and
- PFAS in firefighting foam.

In addition, the Legislature has authorized DOE to implement a comprehensive framework for managing hazardous wastes and the release of hazardous substances. Hazardous substances include materials that are short-lived, toxic, and may cause death, injury, or illness, and substances that are persistent and present a significant environmental hazard, and are highly toxic to human beings or wildlife.

**Summary of First Substitute Bill:** DOE, in consultation with DOH, must identify priority consumer products that are a significant source of or use priority chemicals. A priority chemical is defined as a chemical or class of chemicals used in consumer products including: PFAS, phthalates, organohalogen flame retardants, phenolic compounds, or PCBs. A priority chemical may also be identified by DOE, if the chemical is found to be a high priority chemical under CSPA, PBT, or the chemical is a concern for sensitive populations and sensitive species. To make a determination of a priority chemical, DOE must consider several factors about the chemical including: hazard traits, aggregate effects, cumulative effects with other chemicals with similar hazard traits, environmental fate, potential to degrade, impact on sensitive populations, and exposure.

To identify a priority consumer product, DOE must consider at minimum:

- estimated volume of a priority chemical to, used in or present in the consumer product;
- estimated volume or number of units of the consumer product sold in Washington;
- the potential for exposure to the priority chemical by sensitive populations or species when the consumer product is used, disposed of, or has decomposed;
- the potential for priority chemicals to be found in the environment, with priority given to surface water, groundwater, or other sensitive areas when the consumer product is disposed of or has decomposed;

- if another state or nation has taken regulatory action to restrict the priority chemical in the consumer product; and
- whether DOE has identified the consumer product in a CAP as a source of a priority chemical or in other reports or information gathered under regulations of hazardous substances.

Equal weight to each criteria is not required.

DOE may request information from manufacturers as required under the CSPA, within six months of the request.

DOE may not identify food or beverages, tobacco products, drug or biological products regulated by the Food and Drug Administration (FDA), or chemicals used to produce agricultural commodities as a priority consumer product. However, the packaging of these products may be identified as priority consumer products. Additionally, DOE is prohibited from identifying as a priority consumer product finished products, regulated by the Federal Aviation Administration (FAA) or the Department of Defense (DOD), when used in a manner as certified or regulated by the FAA or DOD, and parts, materials and processes used to manufacture or maintain the finished products. Motorized vehicles, including on and off-highway vehicles, farm equipment, and personal assistive mobility devices may not be designated as priority consumer products.

DOE must determine regulatory actions to increase transparency and reduce the use of priority chemicals in priority consumer products. The regulatory actions are:

- no action is required;
- require a manufacturer to provide notice of the use of the priority chemical; or
- restrict or prohibit the manufacture, wholesale, distribution, retail sale, or use of a priority chemical in a consumer product.

DOE may restrict or prohibit a priority chemical in priority consumer products when it determines:

- safer alternatives are feasible and available;
- the priority chemical is not functionally necessary in the priority consumer product;
- another state or nation has restricted the priority chemical; or
- it is necessary to protect the health of sensitive populations or sensitive species.

The notice a manufacturer may be required to provide must be consistent with CSPA. DOE may also request a manufacturer provide a list of products containing the priority chemical, product ingredients, information regarding exposure and chemical hazard, and a description of the amount and function of the priority chemical.

By June 1, 2020 DOE must identify priority consumer products that are a significant source of or use of PFAS, phthalates, organohalogen flame retardants, phenolic compounds, or PCBs. DOE must determine regulatory actions for identified priority consumer products by June 1, 2022, and adopt rules to implement the regulatory actions by June 1, 2023.

Beginning June 1, 2024 and every five years thereafter, DOE must identify at least five priority chemicals, priority consumer products, determine regulatory actions, and adopt rules

to implement the regulatory actions following a staggered five year scheduled timeframe. When identifying priority chemicals and consumer products, DOE must notify the public of the selection and the peer-reviewed science and other sources of information relied upon as the basis for the selection. A draft schedule for making determinations must also be included. DOE must publish the notice in the Washington State Register and provide an opportunity for public review and comment on the regulatory determinations.

Manufacturers may request the information provided to DOE be available only for confidential use. Proprietary information on manufacturing processes or chemical formulations used in products must be kept confidential.

A manufacturer in violation is subject to a civil penalty up to \$5,000 for the first offense. Repeat violators are subject to a civil penalty not to exceed \$10,000 for each repeat offense. Penalties may be appealed to the pollution control hearings board.

DOE is authorized to adopt rules to implement this act and must adopt rules to implement regulatory determinations.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony on Original Bill (Environment, Energy & Technology):** *The committee recommended a different version of the bill than what was heard.* PRO: This bill seeks to reduce the impacts of thousands of chemicals in commerce that affect the health of people and the environment. This provides tools to take action when it is determined actions need to be taken. This will help to identify pollution at its source. The evidence shows that restricting pollution at its source reduces levels in the environment. This is a systems approach and it is the logical next step to address chemicals of concern in consumer products. The health of marine waters and the aquatic environment is paramount. This is necessary to protect public health and safety by protecting the fish we eat. This bill would assist manufacturers and provide consumers with access to better products. National studies have demonstrated the significant health care costs to manage exposure toxins. These chemicals are ever present in our lives through personal care products, construction materials, and more.

CON: This would allow DOE to oversee another list of chemicals without public participation. This gives DOE a broad grant of authority over every product sold into the state. Existing laws need to be leveraged with current programs. The authority to restrict the use of chemicals should remain with the Legislature. There is no scientific consensus on the list of chemicals. This would unduly restrict manufacturers from using chemicals that have been in the marketplace for a long times.

**Persons Testifying (Environment, Energy & Technology):** PRO: Senator Christine Rolfes, Prime Sponsor; Rob Duff, Governor's Policy Office; Darin Rice, DOE; Jeff Parsons, Puget Sound Partnership; Holly Davies, King County; Joanna Grist, PCC Community Markets; Kristin Swenddal, Department of Natural Resources; Alyson Cummings, Beautycounter; Mindy Roberts, World Environment Center; Nick Federici, Toxic-Free Future.

CON: Grant Nelson, American Chemistry Council; Peter Godlewski, Association of Washington Business.

**Persons Signed In To Testify But Not Testifying (Environment, Energy & Technology):**  
No one.

**Staff Summary of Public Testimony on First Substitute (Ways & Means):** PRO: This bill seeks to reduce the impact of toxic pollution on human health and the environment. There are thousands of chemicals that produce amazing products, but sometimes those products cause unexpected harm, particularly to our kids and to the environment. There are old stories like lead paint, gasoline, and PCBs. This bill will address those by looking to prevention rather than trying to dig and permit our way out of the problem. Though not specifically covered in the Governor's budget, funding for this bill is aligned with the Governor's budget request related to chemical action plans and complements the Governor's budget to control local sources of toxics that can both impact our food chain our kids and our struggling southern resident killer whales. Prevention is the most cost effective way to address toxic chemicals coming from consumer products and this bill helps us to minimize future costs to address polluted storm water and cleaning up toxic waste sites. There is definitely a cost to this bill, but also a cost of not taking action. This bill would allow DOE to hire scientists to determine which consumer products are significant sources of the chemicals and to determine if regulatory action is needed. It is time to move past the chemical by chemical approach to protect our children and the southern resident Orcas exposed to these toxic chemicals.

CON: There is support for the intent behind the legislation to protect health and the wellbeing of consumers, but also want to highlight that there are already programs in Washington to protect human health and the environment. Such as the chemical action plan underway at DOE and we feel that these programs already exist and are the right pathway for moving forward in the evaluation of chemicals within the state of Washington and their impacts on human health and the environments. Any process by which the new regulations should be created in this state should provide for an open stakeholder process and the opportunity to present the best available science, which this bill lacks. In addition we are also concerned the cost to comply of this bill are likely to increase as more products are required to be reviewed. Rather than create an entirely new program to evaluate the impact of the chemicals, the current chemical action plan provides the best path for providing additional stakeholder input and evaluation. Consumers deserve to have confidence the products they buy are safe for their intended use. There is a presumption the mere presence of identified high priority chemicals in consumer products means there is a price problem and of the expansion of existing regulatory authority provided to DOE.

**Persons Testifying (Ways & Means):** PRO: Nick Federici, Toxic Free Future; Rob Duff, Governor's Office; Darin Rice, DOE.

CON: Katie Reilly, Consumer Technology Association; Peter Godlewski; Grant Nelson, American Chemistry Council.

**Persons Signed In To Testify But Not Testifying (Ways & Means):** No one.

**EFFECT OF HOUSE AMENDMENT(S):**

- Prohibits DOE from designating plastic shipping pallets manufactured before 2012 as a priority consumer product.
- Prohibits DOE from restricting or requiring disclosure of inaccessible electronic components of electronic products that the department has identified as priority consumer products.
- Provides that rules restricting chemicals take effect 1 year after rule adoption.
- Requires DOE to submit a report to the Legislature when it: (1) designates a priority chemical; (2) identifies a priority consumer product; and (3) determines a regulatory action.
- Provides that designation of priority chemicals, identification of priority consumer products and determination of regulatory actions do not take effect until after the Legislative session immediately following the action.
- Requires DOE to create an advisory group for identifying priority chemicals and consumer products, and making regulatory determinations. Input from the group must be considered during rulemaking.
- Specifies that each rule adopted by DOE to restrict or require disclosure of a priority chemical in a priority consumer product is a significant agency action and requires DOE to identify and publish sources of information relied upon.
- Specifies that each rule adopted by DOE to restrict or require disclosure of a priority chemical in a priority consumer product is a significant legislative rules for purposes of the Administrative Procedures Act.
- Requires DOE, when adopting rules to implement regulatory determinations, to identify the expected costs and benefits to state agencies and private persons and businesses.
- Requires DOE to prepare a small business economic impact statement for each rule that restricts or requires disclosure of a priority chemical in a priority consumer product.
- Revises the standard by which DOE may restrict or prohibit a priority chemical in a priority consumer product to: (1) when it determines safer alternatives are feasible and available; and (2) the restriction is necessary to protect the health of sensitive species or sensitive populations or reduces a significant source or use of a priority chemical.
- Authorizes DOE, when determining regulatory actions, in addition to criteria for selecting priority chemicals and priority consumer products, to consider if the priority chemical is functionally necessary in the priority consumer product and if a restriction is consistent with regulatory actions taken in another state or nation.