

HOUSE BILL REPORT

SB 5369

As Reported by House Committee On:
Environment & Energy

Title: An act relating to reassessing standards for polychlorinated biphenyls in consumer products.

Brief Description: Reassessing standards for polychlorinated biphenyls in consumer products.

Sponsors: Senators Billig, Padden, Short, Shewmake, Schoesler, Lovelett, Conway, Boehnke, Salomon, Nguyen, Van De Wege, Wagoner, Dhingra, Dozier, Hasegawa, Hunt, Keiser, Randall, Torres and Valdez.

Brief History:

Committee Activity:

Environment & Energy: 3/13/23, 3/21/23, 3/23/23 [DPA].

Brief Summary of Bill
(As Amended By Committee)

- Prohibits the manufacture, distribution, and sale by manufactures of paints and inks containing chlorine-based pigments, beginning January 1, 2025.
- Prohibits the knowing sale by retail establishments of paints and inks containing chlorine-based pigments, beginning January 1, 2026.
- Authorizes the Department of Ecology (Ecology) to adopt rules to restrict chlorine-based pigments in other projects.
- Directs Ecology to petition the United States Environmental Protection Agency to reassess its regulations on certain manufacturing processes excluded from polychlorinated biphenyl restrictions under the federal Toxic Substances Control Act.

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 part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: Do pass as amended. Signed by 12 members: Representatives Doglio, Chair; Mena, Vice Chair; Dye, Ranking Minority Member; Barnard, Berry, Couture, Duerr, Fey, Lekanoff, Ramel, Slatter and Street.

Minority Report: Without recommendation. Signed by 3 members: Representatives Ybarra, Assistant Ranking Minority Member; Abbarno and Goehner.

Staff: Jacob Lipson (786-7196).

Background:

Polychlorinated Biphenyls and the Toxic Substances Control Act.

Polychlorinated biphenyls (PCBs) are synthetic organic chemicals that were commercially manufactured and used in a variety of products, including electrical insulating and transformer oils, hydraulic equipment, paints, plastics, rubber products, pigments, and dyes. The federal Toxic Substance Control Act (TSCA) enacted in the 1970s banned the commercial manufacture and use of PCBs, and delegated authority to the Environmental Protection Agency (EPA) to implement and enforce PCB handling, cleanup, and disposal regulations. Environmental Protection Agency rules adopted to implement the TSCA establish, for certain manufactured products, an allowable threshold of up to 50 parts per million of PCBs. The TSCA also contains a preemption provision related to state regulation of chemicals regulated under the TSCA, which states that states may not establish requirements on chemicals unless those requirements are identical to the EPA requirements, adopted under a separate federal law, or would prohibit the use of a substance in a state.

Safer Products for Washington.

In 2019 legislation creating Safer Products for Washington was enacted, establishing an administrative process for the regulation by the Department of Ecology (Ecology) of priority chemicals in priority consumer products, in consultation with the Department of Health. Under the Safer Products for Washington regulatory process, certain chemicals were defined as priority chemicals in statute, including perfluoroalkyl and polyfluoroalkyl (PFAS) chemicals, PCBs, phenolic compounds, phthalates, and organohalogen flame retardants (OFRs) and other flame retardants identified under the Children's Safe Products Act. Ecology is also authorized to designate additional chemicals as priority chemicals every five years beginning June 1, 2024, if the chemicals meet qualifying criteria, consistent with a schedule established in the 2019 law.

Under the schedule for Ecology's regulatory activities to implement Safer Products for Washington, Ecology must also:

- identify priority consumer products that include priority chemicals, taking into consideration specified criteria by June 1 of the year following the designation of priority chemicals;
- determine regulatory actions for the priority chemicals in priority consumer products by June 1 two years following the designation of priority consumer products, such

as:

- a determination that no action is needed;
 - requiring manufacturers to provide notice of the use of a chemical; or
 - restricting or prohibiting the manufacture, distribution, sale, or use of a priority chemical in a consumer product; and
- adopt rules to implement regulatory determinations, by June 1 of the year following a determination of regulatory actions.

Ecology must submit a report to the appropriate committees of the Legislature when identifying priority chemicals, identifying priority consumer products, or determining regulatory actions. Identification of priority chemicals, identification of priority consumer products, and regulatory determinations by Ecology do not take effect until the adjournment of the regular legislative session immediately following the Ecology action.

Ecology was required to make regulatory determinations for the initial round of statutorily designated priority chemicals and their associated priority consumer products by June 1, 2022, and must adopt rules to implement those regulatory determinations by June 1, 2023. In June 2022 Ecology submitted a regulatory determination report to the Legislature.

Polychlorinated Biphenyls under Safer Products for Washington.

Polychlorinated biphenyls are one of the five statutorily-defined priority chemicals to which Ecology was required to apply the Safer Products for Washington process. Paints and printing inks were identified by Ecology as priority products for PCBs, due to the presence of PCBs as an inadvertent contaminant in paints and inks. Ecology-identified paints and inks that avoid or reduce the inadvertent generation of PCBs as a safer alternative that is less hazardous and that are feasible and available, and determined that paints and inks are a significant source of PCBs in the environment and a potential source of exposure for people and wildlife. However, in its June 2022 regulatory determinations report to the Legislature, Ecology also concluded that because Ecology believes that Ecology is preempted by TSCA regulations, Ecology made a regulatory determination on PCBs in paints and printing inks to take no action on PCBs under Safer Products for Washington.

Other.

Washington has established five types of product stewardship programs, including a program focused on the collection, reuse, and recycling of architectural paint.

The Pollution Control Hearings Board (PCHB) is an appeals board with jurisdiction to hear appeals of certain decisions, orders, and penalties issued by Ecology and several other state agencies. Parties aggrieved by a PCHB decision may obtain subsequent judicial review. Penalties that are appealable to the PCHB may be imposed and collected following certain protocols.

Summary of Amended Bill:

The Department of Ecology (Ecology) must petition the United States Environmental Protection Agency (EPA) to reassess the federal Toxic Substance Control Act polychlorinated biphenyl (PCB) regulations related to manufacturing processes excluded from PCB limits for the purpose of eliminating or reducing PCBs in consumer products. Ecology must include specified information in its petition and may consult with the Department of Health and other state agencies, but is not required to generate new data for the petition. Ecology must seek completion of the petition review by January 1, 2025, if practicable.

The manufacture, sale, and distribution by manufacturers or distributors of paints and inks containing chlorine-based pigments is prohibited, beginning January 1, 2025. The knowing retail sale of paints and inks containing chlorine-based pigments is prohibited, beginning January 1, 2026. Ecology may, by rule, identify additional products that may contain inadvertently generated PCBs to be subject to restrictions on chlorine-based pigments. Ecology must initiate rulemaking to identify such products by October 1, 2023. Any restrictions on the manufacture, sale, and distribution of paints and inks containing chlorine-based pigments may take effect no later than 12 months after the adoption of Ecology rules on such products. Restrictions on the knowing sale of paints and inks containing chlorine-based pigments by retail establishments may take effect no later than 24 months after the adoption of Ecology rules.

Ecology may require a person to demonstrate compliance with a product through the submission of either information or testing data indicating that a chlorine-based manufacturing process was not used in the manufacture of pigments contained in a product.

The prohibitions on chlorine-based pigments do not apply to paint manufactured from recycled paint collected under the state's paint stewardship program, or to the sale of previously-owned products made in casual and isolated sales or by nonprofit organizations. Ecology may, by rule, exempt products upon determining that a product: (1) is incapable of being manufactured using other methods; and (2) allowing for the continued manufacture of a product containing a chlorine-based pigment would not result in meaningful impacts to human health, the environment, or the ability of entities regulated under state and federal water quality laws to comply with water quality standards. Ecology may also extend the compliance deadline if a prohibition is not technically feasible for a person to comply with.

Ecology is prohibited from enforcing or administering the prohibition on chlorine-based pigments if either:

- the EPA adopts new regulations that do not align with prohibitions on chlorine-based pigments; or
- a court of competent jurisdiction determines the prohibitions to be preempted.

If a prohibition on chlorine-based pigments is determined to be preempted by a court, Ecology must establish a reporting requirement for chlorine-based pigment manufacturing processes or PCB content on paints, inks, or other products within 18 months of the

preemption determination.

Ecology may adopt rules to implement, administer, and enforce restrictions. Ecology may impose civil penalties of up to \$5,000 for a first offense and \$10,000 for subsequent offenses. Prior to imposing a penalty, Ecology must issue a notice of violation to a manufacturer or retail establishment at least 60 days in advance. Ecology may not collect penalties from retail establishments that demonstrate that a product was in its possession as of the effective date of restrictions on the manufacture, sale, and distribution of the product. Penalties are deposited in the Model Toxics Control Operating Account and are appealable to the Pollution Control Hearings Board.

A severability clause is included.

Amended Bill Compared to Original Bill:

As compared to the original bill, the amended bill:

1. eliminates the requirement that the Department of Ecology (Ecology) adopt a rule under the Safer Products for Washington law pertaining to polychlorinated biphenyls (PCBs) in paints and printing inks;
2. establishes a new statutory prohibition on the manufacture, sale, and distribution of paints or inks that contain chlorine-based pigments, beginning January 1, 2025;
3. establishes a new statutory prohibition on the knowing sale by retail establishments of paints or inks that contain chlorine-based pigments, beginning January 1, 2026;
4. 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 demonstrate the absence of chlorine-based pigments in the product, beginning 12 months after the adoption of Ecology rules for manufacturers and beginning 24 months after the adoption of Ecology rules for retail establishments;
5. 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;
6. 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;
7. 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;
8. authorizes Ecology to 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;

9. directs Ecology to adopt a rule requiring the 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;
10. authorizes Ecology to adopt rules to implement, administer, and enforce chlorine-based pigment requirements, and authorizes Ecology to impose penalties for violations that are appealable to the Pollution Control Hearings Board;
11. 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; and
12. 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.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 23, 2023.

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:

Hearing date March 13, 2023, for the original bill:

(In support of the original bill) Polychlorinated biphenyls (PCBs) are contaminating the Spokane River and the aquifer used for drinking water in Spokane. Many sources of PCBs in the environment are from legacy uses that have since been phased out, but some inadvertent PCBs in paints, inks, and other products continue to be generated. The disparity under federal law in the amount of PCBs that a product may inadvertently contain, measured in the parts per million, and the level of PCBs permitted in water discharges, measured in the parts per quadrillion, makes compliance with water quality standards impossible for certain water discharge permit holders. The paper recycling process results in the release of PCBs contained in papers and other materials, and prevents paper recycling facilities from meeting water quality standards even though the paper recycling process does not itself create PCBs. Yellow products may have particularly high levels of PCBs. To reduce PCBs in the environment, it is essential to address levels of PCBs in products, since water treatment technology cannot remove all PCBs from a waste stream. There are alternatives in use to PCB-containing paints and pigments.

(Opposed to the original bill) None.

(Other testimony on the original bill) The Department of Ecology (Ecology) supports policy actions to reduce PCBs in the environment, but the funds to implement this bill are not in

the Governor's Budget. Manufacturing of green, yellow, and other pigments has the potential to generate PCBs as a byproduct when chlorine is used in the manufacturing process. The PCBs in products end up in the environment. Ecology has tested products and identified certain types of paints and inks as products that act as significant sources of PCBs. The federal Toxic Substances Control Act petition process will not provide a quick answer to the PCB problem, but it will provide Washington with an opportunity to coordinate actions with other states. This bill should focus on products that contribute most significantly to PCB contamination. Ecology should further study what products act as significant sources of PCBs prior to implementing restrictions.

Hearing date March 21, 2023, for the proposed striking amendment:

(In support of the proposed striking amendment) Regulating PCBs in products is essential for dischargers to meet state water quality standards. Companies with advanced water quality treatment systems may still be unable to meet water quality standards. Eliminating PCBs in new products should be paired with efforts to clean up legacy sources of contamination. The striking amendment strengthens the bill that passed the Senate, and will allow the state to reduce PCBs in the environment. The exemption from restrictions for recycled paint is appropriate.

(Opposed to the proposed striking amendment) None.

(Other testimony on the proposed striking amendment) Ecology supports efforts to reduce PCBs, but the funds to carry out the work envisioned in the striking amendment are not in the Governor's Budget. The striking amendment is a stronger approach that is more likely to withstand legal scrutiny under the Toxic Substances Control Act, which preempts state action except under certain narrow circumstances into which the striking amendment fits. The striking amendment will also create a comprehensive approach to PCB contamination by prohibiting all chlorine-based pigments with the potential to generate any levels of PCBs. Retail establishments that sell paint would be subject to restrictions under the striking amendment. The effective date of restrictions on retail sale should be delayed to allow a sell-through period, and to avoid a situation in which extra carbon-intensive shipments of prohibited paints to other states needs to occur. A sell-through period for manufacturers to distribute paint should also be included. Penalties for violations are severe, and do not provide an opportunity for a retail establishment to come into compliance if a mistake has been made. The products restricted by this striking amendment have not been demonstrated to contribute significant levels of PCBs to the environment. Ecology should review products with the greatest potential for contamination. The bill should align how it considers inadvertent generation of PCBs with what exists as the standard for inadvertent generation under federal law.

Persons Testifying: *Hearing date March 13, 2023, for the original bill:*

(In support of the original bill) Senator Andy Billig, prime sponsor; Heather Trim, Zero Waste Washington; Melissa Gombosky and Doug Krapas, Inland Empire Paper Company.

(Other testimony on the original bill) Holly Davies, Department of Health; Scott Braithwaite, American Coatings Association; and Kimberly Goetz, Department of Ecology, Hazardous Waste and Toxics Reduction Program.

Hearing date March 21, 2023, for the proposed striking amendment:

(In support of the proposed striking amendment) Senator Andy Billig, prime sponsor; and Heather Trim, Zero Waste Washington.

(Other testimony on the proposed striking amendment) Riaz Zaman and Heidi McAuliffe, American Coatings Association; Kimberly Goetz, Department of Ecology, Hazardous Waste and Toxics Reduction Program; and Mark Johnson, Washington Retail Association.

Persons Signed In To Testify But Not Testifying: *Hearing date March 21, 2023, for the proposed striking amendment:* Doug Krapas, Inland Empire Paper Company.