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Chemical safety bill could be in peril

By Ingrid Lobet

The death of Sen. Frank Lautenberg, D-N.J., at 89 came just as he was shepherding what some believe — and others fear — may be the most significant federal law in his considerable political career.

Lautenberg’s priority for more than a decade had been modernizing the Toxic Substances Control Act of 1976, one of the country’s bedrock environmental laws, and one that experts across the health and industrial spectra agree is hopelessly out of date.

Contrary to what many people assume, chemicals do not have to be proved safe before they are introduced into products and the environment. Sometimes by the time researchers determine a compound is harmful, it has already accumulated in the bodies of Americans, even unborn babies.

Efforts to transfer the burden of proof that a chemical is safe to its manufacturer ripple through Gulf Coast Texas, where much of the nation’s chemical manufacturing heft lies.

In April, Lautenberg together with Sen. Kirsten Gillibrand, D-N.Y., introduced the latest bill in what had become his perennial effort. That bill was solidly backed by environmental and health experts; it was a non-starter with industry.

But then two weeks ago, with the senator’s health failing, something surprising happened: Lautenberg joined forces with Sen. David Vitter, R-La., who enjoys close relationships with chemical manufacturers, and he dropped certain key provisions of his bill.

The two introduced the Chemical Safety Improvement Act with 14 Republican and Democratic co-sponsors. Four more joined in the following days. Suddenly, chemical safety reform had legs.

It is not known who will champion the bill on the Democrat’s side of the Senate, but it is possible Gillibrand could take up where Lautenberg left off. Her office did not return requests for comment. Key Senate staffers now predict a push to pass the bill before Congress takes its August recess.

But in Lautenberg’s last days, groups who have supported his work for years got their first look at the fine print of the compromise, and several now say they cannot back the bill. They promise to work against it if it’s not amended.

“The bill is far more protective of the chemical industry than the health of all Americans,” says Gary Cohen, president of Health Care Without Harm.
Houston group upset

Cohen also rues the loss of a provision in Lautenberg’s initial bill that would have flagged hard-hit neighborhoods that suffer exposures “significantly greater than the average exposure in the United States,” and required the Environmental Protection Agency to address those exposures.

Juan Parras directs a grass-roots environmental group in Houston in just the kind of communities the earlier bill contemplated.

“We are not happy with it,” Parras said. “It doesn’t deal with what we are pushing for, environmental justice for hot spots.”

Parras also noted that the chemicals industry is in a state of major expansion.

The joint bill fails to emphasize the effects of chemicals on sensitive people and at various stages of life, disappointing dozens of health groups.

“Before birth and during early childhood, the brain is susceptible to even tiny amounts of toxic chemicals, and the effects can be lasting,” says Maureen Swanson, a national coordinator with the Learning Disabilities Association of America. “We do not feel the bill as it is written includes requirements that chemicals need to be safe for children.”

Another clause in the compromise draws concern from traditional supporters who say it could, because of proprietary concerns, limit the information a physician is allowed to obtain and share about specific chemicals.

Houston retailer Jeff Kaplan runs a green building and furnishing store, New Living. He notes that nearly half his sales are to people with allergies, asthma or chemical sensitivity whose doctors have recommended they steer clear of products containing certain chemicals.

Is there a gag rule?

“We have a lot of customers who are recovering cancer patients,” Kaplan said. “(Their doctors) would have to sign a confidentiality agreement (with the EPA) to help treat their patients. They would not ever be able to reveal this information publicly so no one else could find out about it.”

But Brietta Clark, a professor of health care law at Loyola Law School Los Angeles, reads the bill differently.

“If I were litigating this, I would feel very comfortable saying there is nothing you can do to keep this doctor or nurse from speaking about the chemical,” she said. “I’m not seeing anything that would act as a per se gag.”
Clark did say the Lautenberg-Vitter law vests significant new power in the Environmental Protection Agency. The agency would become the sole arbiter in determining the risk of a given chemical.

Tellingly, Sen. Barbara Boxer, D-Calif., is not one of the bill’s co-sponsors. California and several other states have often regulated chemical exposures more strictly than the federal government.

“The (bill) could have a crippling effect on every state’s freedom to regulate toxic chemicals and protect its own residents,” said Ken Cook of the Environmental Working Group.

Tracy Hester, a professor of environmental law at the University of Houston Law Center, and former partner at Bracewell Giuliani, agrees. “Indeed it does,” he said, pre-empt other states from regulating on their own.

“It also says EPA’s decision is final, as to whether a chemical really poses a risk or not,” Hester says. Whereas until now, in a state court case, that issue could be contested. “This would probably not be helpful to plaintiffs,” he said.

But opposition to the new bill is by no means universal among health and environment groups. Richard Denison, a senior scientist with the Environmental Defense Fund, endorses it.

“For the first time, all chemicals will have to be reviewed,” he said. “And for new chemicals, EPA will have to affirmatively find that a chemical is likely to be safe before it makes it on to the market. This is significant.”