The original documents are located in Box C31, folder "Presidential Handwriting, 11/12/1975 (1)" of the Presidential Handwriting File at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

November 12, 1975

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: JAMES T. LYNN

FROM: JAMES E. CONNOR

SUBJECT: Toxic Substances Legislation

The President reviewed your memorandum of November 8 on the above subject and made the following notation:

"Favor -- McCollister"

Please follow-up with appropriate action.

cc: Dick Cheney

THE WHITE HOUSE

WASHINGTON

November 11, 1975

MR PRESIDENT:

Jim Lynn recently gave you his memorandum of November 8 regarding Toxic Su bstances Legislation. This memorandum has now been staffed with the following results:

Jim Cannon and Bill Seidman -- favor Toxic Substance Control Legislation, with the McCollister version being most acceptable. Additional comments submitted by Jim Cannon are at TAB A.

Max Friedersdorf comments:

> "The McCollister bill won't be the one acted upon. The Office of Legislative Affairs recommends that we support amendments to Tunney-Eckhardt bill."

Phil Buchen's office is troubled by some aspectsof the Tunney Toxic Substances bill. Details are at TAB B.

No comments have been received from Jack Marsh at this writing.

Jim Connor

Favor - McCollister

THE PRESIDENT HAS SEEN....

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

NOV 8 1975

ACTION

MEMORANDUM FOR: THE PRESIDENT

FROM: JAMES T. LYNN /s/

SUBJECT: Toxic Substances Legislation

This Tuesday, November 11, the House is going into final markup on toxic substance legislation. Congressman John McCollister, the ranking minority member of the Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, has introduced a bill as an alternative to a bill introduced by the majority (Eckhardt, Van Deerlin and Broadhead). McCollister has requested an explanation of the Administration's position (Tab 1).

Issues

Do you favor continued support by the Administration of legislation regulating production and use of toxic substances, and if so, do you want any change in the current program proposed by the Administration?

Background

More than 9,000 chemicals are now being manufactured and several hundred new chemical substances are being introduced into commerce each year. Many of these chemicals present potential hazards to human health and the environment. The objective of toxic substances legislation is to establish a regulatory program for protecting

-- public health and the

-- environment from the adverse effects of

  -- new chemical substances
  -- new uses of existing chemical substances, and
  -- existing chemicals

during the full cycle (production, marketing, use, disposition).

The regulatory tools in the legislative proposals include banning a chemical, restriction on its uses and geographic distribution, or restriction on the total amount manufactured, and the enforcement mechanisms include both EPA administrative procedures and citizens' actions.

Toxic substances legislation was first proposed by the Executive Branch in 1971 and has been submitted, albeit with varying proposals as to degree of Federal intervention, to Congress each year thereafter. As recently as June of this year, Administration spokesmen have testified in support of a need for toxic substances legislation. This testimony was followed by submission of proposed Administration amendments to legislation which is now pending in an indefinitely postponed mark-up in the Senate Commerce Committee. A detailed chronology of the events leading to formulation of our present position is included in Tab 2.

Existing Regulatory Authorities

The following table summarizes existing regulatory authorities over toxic substances:

Existing Statutory Authorities
for the Regulation of Toxic Substances

Type of Protection	Statute
Production	
Protection in work place	Occupational Health and Safety Act
Protection from releases in:	
Air	Clean Air Act
Water	Water Pollution Control Act
Marketing and Use	
Food and Drugs	Federal Food, Drug and Cosmetic Act
Pesticides	Federal Insecticide, Fungicide and Rodenticide Act
Consumer Products	Consumer Product Safety Act

The above statutes permit the Federal Government to

-- ban or pre-screen certain toxic substances (pesticides, food additives and drugs) before they are introduced, or

-- ban consumer products containing toxic substances which pose a threat to public health, or

-- restrict the discharges of toxic substances into the workplace, or

-- regulate the amount of toxic substances that can be released directly into the air or water from an industrial source.

However, the above statutes do not provide

-- any basis for testing and controlling a toxic substance before it is introduced (with the exception of pesticides, food additives and drugs).

-- regulatory authority to control all forms of entry of toxic substances into the environment, e.g., release of freon from discarded refrigeration and air conditioning equipment, leaching of printing ink from discarded cardboard boxes into streams.

Issue 1: Should the Administration continue to support toxic substances legislation?

The basic thrust of toxic substances legislation is to restrict or prohibit the use of all hazardous substances before they enter the environment in any way. The more significant arguments considered when I agreed last June with EPA, CEQ, Commerce, Labor and HEW that the Administration should continue its support of toxic substances legislation are

-- Full protection to public health can be accomplished only by controlling entry into the environment of specific hazardous substances before they are marketed.

-- As the economy continues to expand, the health and environmental threat from the production of hazardous substances will increase.

-- The Environmental Protection Agency estimates the annual direct cost to industry will be slight -- in the neighborhood of $80 to $140 million in an industry with annual sales of $72 billion and after-profit taxes of $5.5 billion.

-- The tendency toward over-regulation can be controlled by providing in the legislation such safeguards as a requirement for careful consideration of the benefits, costs and risks of each action.

-- Because both spokesmen for your Administration and the previous Administration have continuously supported toxic substances legislation since February, 1971, a change of position will be criticized as a retrenchment from environmental goals.

Arguments against such legislation are

-- Since 1971, enactment of occupational, health and consumer protection laws has fulfilled many of the objectives of the toxic substances legislation orginally proposed. As of this date, there is no toxic substance in use which regulatory agencies presently believe should be banned, but that cannot be banned under existing statutory authorities. It would be prudent to wait and see whether any problem chemicals can not be regulated by existing legislation prior to enacting toxic substances legislation.

-- Because the recognition of a prospective hazard is often difficult, there is a reasonable chance that most toxic substances which escape control under existing authorities will also pass through the sieve of the proposed legislation. (The effect of fluorocarbons (propellants in aerosol sprays) on the ozone layer is a case in point).

-- Dow Chemical estimates the annual direct cost of this legislation to the chemical industry to be $2 billion. However, neither this estimate or EPA's estimate includes the indirect costs of the legislation. Examples of indirect costs include the cummulative effect of

regulations on the climate for innovation, changes in the scope and direction of research activities, possible shifts in production and marketing patterns, and adverse effects on small companies who might not be able to bear the cost of the required testing.

-- Under its existing authority, EPA can examine any substance -- even substances over which it has no regulatory authority -- and through publicizing findings, EPA can have a substantial effect on the conduct of those producing and marketing such substances.

-- It is doubtful that the natural tendency toward over-regulation could indeed be controlled because of the political forces that can be expected to act on regulatory personnel to regulate on an expansive scale and the tendency of environmental groups and private citizens to institute litigation pressing for regulation to the limits of the law.

Issue 2: <u>If you agree to continue support of toxic substances legislation, should any change be made in the scope of the regulatory program proposed by the Administration</u>?

There are four proposals before the Congress:

1. H.R. 7664 (McCollister)
2. H.R. 10318 (Eckhardt)
3. S. 776 (Tunney)
4. The Administration Proposal (actually a recommended set of amendments to S. 776 (Tunney)). (Tab 3)

All of the approaches under consideration provide EPA with the discretionary authority to require testing of a substance either before or after it is marketed. The regulatory approaches differ in the following specifics:

<u>The Process Used to Identify a Problem Substance</u>

-- McCollister would direct EPA to promulgate a list of problem substances -- both existing and newly developed. Only substances on the list require EPA approval before marketing.

-- All of the other approaches require

  -- as to new (never marketed) substances and new uses of existing substances, a pre-marketing review by EPA; under Tunney, mere lack of information can be basis for a ban.

-- as to existing substances, EPA review at the discretion of the Administrator.

-- Emergency situations: All of the approaches authorize EPA to petition in District Court for prohibition or limitation; Tunney would also authorize emergency action administratively by EPA.

(When the Administration first proposed toxic substance legislation in 1971, the intent of the legislation was not to include pre-market screening provisions. This position was subsequently changed to allow pre-market notification, i.e., industry would merely notify EPA of its interest to market a chemical, but EPA would have no review authority until after the chemical was introduced into commerce. An additional change has been the recent agreement to allow EPA to regulate a chemical during its 180 day review period.)

The Criteria Determining Whether a Substance is a Problem

-- McCollister requires that the substance pose "a substantial danger to health or environment" meaning unreasonable risk of death, of widespread or severe personal injury or illness or of widespread or severe harm to the environment.

-- Eckhardt and Tunney require "an unreasonable risk to human health and the environment" meaning any risk greater than associated benefits.

The Burden of Proof and Timing in the Process Identifying a Problem Substance

-- McCollister puts burden on EPA to produce list; burden then shifts to applicant regarding marketing of substances on list; if dispute, marketing permitted until settlement.

-- Other approaches put burden on applicant to justify marketing any new substance or any new use of an existing substance; if dispute, proposed Administration amendment permits marketing until settlement; Tunney and Eckhardt would not.

-- All approaches require EPA decision within 180 days.

Enforcement

-- All approaches provide for EPA administrative action

and authorize an adversely affected private citizen to request judicial review of EPA action for failure to perform a non-discretionary action.

-- In addition, Tunney and Eckhardt would authorize any interested private citizen to

  -- seek injunctive relief against EPA

  -- petition EPA Administrator to perform a discretionary act.

-- Administration has not objected to Tunney/Eckhardt approach.

Relationship to Other Statutes

-- McCollister would prohibit Administrator from acting, and Tunney/Eckhardt would authorize Administrator to determine not to act, if problem could be prevented or sufficiently reduced under any other Federal law.

Summary

The Administration could take any of four postures.

1. Oppose toxics legislation of any kind on the ground that recently enacted existing legislation covers nearly all of the problems.

Pro

-- Would not subject industry to a new regulatory program.

-- Would provide additional time to determine the precise nature of new regulatory authority to fill the gaps in existing authorities.

Con

-- Would place the Administration in the position of retrenching from environmental goals.

-- Would not provide regulatory authority to control the entry of certain toxic substances into the environment that are presently uncontrolled.

-- Would not provide an information base upon which to base regulatory actions for those toxic substances which may ultimately pose a threat to public health.

2. Support legislation covering only those substances, which are not now adequately covered (discharge of fluorocarbons and PCB's resulting from aerosol sprays, and disposal of refrigerators and cardboard boxes).

Pro

-- Would provide a basis for attacking the more serious problems of substances people are talking about.

-- Would provide additional time before embarking upon a full scale regulatory program.

-- Would not duplicate substantial existing authority to control toxic substances.

Con

-- Would place the Administration in the position of retrenching from environmental goals.

-- Would not provide an information base upon which to base regulatory actions for those toxic substances which will ultimately pose a threat to public health.

-- A series of piecemeal regulatory authorities is not as efficient, programmatically, as a broader approach using administrative discretion.

3. Support the McCollister bill (substances regulated limited to those on list, strict criteria determining problem substances, limited private legal action).

Pro

-- Would provide regulatory authority to control the more serious toxic substances.

-- Would provide relative certainty as to what is to be regulated.

-- Would minimize the impact on industry relative to other legislative proposals containing similar coverage because substances not on the list would not be reviewed.

Con

-- Some agencies would object strongly (EPA, CEQ, HEW).

-- Would be perceived as a retrenchment from environmental goals because bill is less restrictive than current Administration prosition.

-- Would subject industry to a new regulatory program, although a moderate one.

4. Continue to support the Tunney/Eckhardt approach with the modifications suggested by Administration spokesmen last summer (all new substances and new uses of existing chemicals reviewed, less strict criteria determining problem substances, extensive private legal action.

Pro

-- Would highlight the Administration's support for environmental legislation because Tunney bill is perceived as "tough".

-- Would provide a large information base upon which to judge the need for taking regulatory actions.

-- Would be supported by all the agencies.

Con

-- Would subject industry to a new regulatory program -- the most burdensome approach being considered.

-- In practice might not be any more effective than the aforementioned approaches.

-- Substantial authority to private citizens and groups could unreasonably tie up marketing.

Messrs. Marsh, Seidman, Cannon and Greenspan will be providing you with their views on appropriate courses of action. In addition, Russ Train, Russ Peterson, and Secretary Matthews should be called in the event you are disposed to change current Administration position.

I am hopeful that we will be in the position to advise John McCollister of your thinking early next week.

TAB 1

JOHN Y. McCOLLISTER
SECOND DISTRICT, NEBRASKA

WASHINGTON OFFICE:
217 CANNON OFFICE BUILDING
202-225-4155

DISTRICT OFFICE:
FEDERAL BUILDING
215 NORTH 17TH STREET
OMAHA, NEBRASKA 68102
402-221-3251

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE

COMMITTEE ON SMALL BUSINESS

SUBCOMMITTEE ON ACTIVITIES OF REGULATORY AGENCIES

Congress of the United States
House of Representatives
Washington, D.C. 20515

TOP PRIORITY

July 24, 1975

James T. Lynn, Director
Office of Management and Budget
252 Executive Office Building
17th and Pennsylvania, N.W.
Washington, D. C. 20503

Dear Jim:

Recently the Subcommittee on Consumer Protection ~~and Finance, on which I~~ serve as ranking Minority member, completed hearings on several toxic substances control bills. During these hearings, John Quarles, Deputy Administrator of the Environmental Protection Agency, testified on behalf of the Administration.

I was surprised and disappointed to learn from Mr. Quarles' testimony that the Administration has changed its position on the issue of pre-market screening and notification. H.R. 7664, which I am sponsoring, and H.R. 7229, sponsored by Mr. Eckhardt, provides that the Administrator of the EPA will compile a list of substances for which pre-market notification is required. Although the standards for including a substance on the list differ, both bills require that a substance be on the list before the manufacturer, processor, or importer has a duty to notify the EPA and submit test data prior to marketing the substance. A similar provision was found in last year's House-passed bill and it is my recollection that such a provision was not opposed by the Administration at that time. Mr. Quarles, however, testified in favor of a provision requiring the manufacturer, processor or importer of any new chemical or existing chemical with a significant new use notify the EPA 90 days prior to marketing.

I have some serious doubts as to the wisdom of the approach articulated by Mr. Quarles. I am afraid that such an approach will prevent the EPA from clearly focusing on those substances which present true hazards to man and the environment. Because of the importance of this issue, I would be most interested in knowing why the Administration has changed its position in this regard.

Sincerely,

JOHN Y. McCOLLISTER
Member of Congress

JYM/nng

TAB 2

CHRONOLOGY OF THE TOXIC SUBSTANCES CONTROL BILLS

1971

- The Council on Environmental Quality (CEQ) in their study on toxic substances recommended national toxic substance legislation.

- The Administration in February proposed the Toxic Substances Control Act providing for (1) prohibition of the manufacture and distribution if necessary of toxic substances, (2) for standards of testing, and (3) for imminent hazard provisions.

1972

- The Administration's proposed Toxic Substances Act passed the Senate.

- The House passed a bill with some major differences.

- The differences were not resolved in conference and the Congress adjourned without further action.

1973

- Another version of the Toxic Substances Act, different from the Administration's bill was enacted, with substantial differences, in both the House and Senate.

- The bill failed to become law through the inability of the House and Senate to resolve differences.

- The Administration submitted some compromise language but the Congress did not take further action.

1975

- The Administration in January decided not to send up another bill because of a new spending limitation on new programs.

- Senator Tunney introduced a new bill (S.776) and the House has under consideration similar bills (with some significant difference) introduced by Eckhardt (H.R. 7229) and McCollister (H.R. 7664).

- In March, CEQ Chairman Peterson and EPA Deputy Administrator Quarles, testified in favor of Senate 776 with Administration amendments. In June EPA submitted statements to the House and Senate in support for the S. 776 with Administration amendments.

- Both the Senate and the House Committees have completed hearings on their versions of the legislation.

- Late in October, Mr. Eckhardt introduced a new version of his bill (H.R. 10318) which in most instances brings his legislative proposal closer in line with S. 776.

- The House plans to go to markup on November 12 on H.R. 10318 and has asked for prompt agency reports on the bill.

- The House Committee on Science and Technology (Teague Chairman) has proposed H.R. 3118 as an amendment to the Clean Air Act which would direct EPA to study and then if necessary regulate substances affecting ozone (fluorocarbons). This specific substance approach has been opposed by various agency witnesses (with OMB clearance) by supporting the more general toxic legislation with administration amendments as a more comprehensive alternative.

TAB 3

SENATE AND HOUSE TOXIC SUBSTANCES BILL
Section-by-Section Synopsis of Differences

Topic	H.R. 7664 (McCollister) June 5, 1975	H.R. 10318 (Eckhardt) October 22, 1975	S. 776 (Tunney) Feb. 20, 1975	Administration Comments on S. 776 June 23, 1975
Pre and Post-Market Review				
(a) Existing Chemicals	(1) EPA Administrator publishes a list of chemicals which are likely to pose substantial danger to public health.	(1) Similar to H.R. 7664.	(1) EPA issues rules for data development for those chemicals for which there is a reason to believe that they may present an unreasonable risk to human health and the environment.	(1) Similar to S. 776.
	(2) Any existing chemical -- which is on the list -- can not be manufactured or distributed in commerce for a new use unless the manufacturer submits test data to EPA 90 days prior to introduction into market (EPA can extend this period by an additional 90 days).	(2) Similar to H.R. 7664.	(2) This provision of H.R. 7664 not in this Bill.	(2) Did not comment on this topic.
	(3) Chemicals - on the list -- can be produced unless EPA issues a rule prohibiting such an action. - off the list -- are automatically produced with no EPA review.	(3) Similar to H.R. 7664.	(3) The Administrator can prohibit the manufacturer of the chemical if it poses an unreasonable risk to public health.	(3) Similar to S. 776.

Topic	H.R. 7664 (McCollister) June 5, 1975	H.R. 10318 (Eckhardt) October 22, 1975	S. 776 (Tunney) Feb. 20, 1975	Administration Comments on S. 776 June 23, 1975
(b) New Chemicals	(1) Same procedure used for existing chemicals.	(1) Same procedure used for existing chemicals.	(1) Manufacturers must submit information on all new chemicals to EPA.	(1) Similar to S. 776.
			(2) If EPA does not prohibit or limit the use of the chemical within 90 days, the product can be introduced into commerce - this period can be expanded to a total of 180 days.	(2) Similar to S. 776.
			(3) If EPA prohibits the introduction of the chemical, and if the manufacturer appeals the decision, the EPA prohibition remains in effect during the appeal period.	(3) If EPA prohibits the introduction of the chemical, and if the manufacturer appeals the decision, the EPA prohibition does not remain in effect during the appeal period.
		(2) The Administrator can also prohibit or limit the use of a substance on the basis of insufficient or unavailable data to determine the effects of a substance on health or the environment.	(4) Same as H.R. 10318.	(4) Did not comment on this topic.
(c) Criterion for prohibiting or limiting the use of a chemical.	"Likely to pose substantial danger to health or environment" -- meaning "unreasonable risk of death, of wide spread or severe personal injury or illness or of wide spread or severe harm to the environment."	"Likely to pose an unreasonable risk to health or the environment."	Poses or may pose an unreasonable risk to human health and the environment -- meaning any risk associated with the manufacture of a chemical if such risk outweighs the benefits associated with such manufacture.	Did not comment on this topic.

Topic	H.R. 7664 (McCollister) June 5, 1975	H.R. 10318 (Eckhardt) October 22, 1975	S. 776 (Tunney) Feb. 20, 1975	Administration Comments on S. 776 June 23, 1975
Imminent Hazards	(1) The EPA Administrator can petition the U.S. District Court to prohibit the manufacturer of any chemical which "presents imminent and unreasonable risk to health or the environment."	(1) The EPA Administrator can petition the U.S. District Court to prohibit the manufacturer of any chemical which will result in "any unreasonable threat to human health or the environment."	(1) The EPA Administrator can petition the U.S. District Court, or by a suspension* order, prohibit the manufacturer of any chemical which "will result in an unreasonable risk to human health and the environment."	Did nto comment on this topic.
	(2) The prohibition remains in effect if the agency decision is opposed.	(2) Same as H.R. 7664.	(2) If EPA's decision is not opposed within 5 days, the suspension order "may be issued and shall take effect and shall not be* subject to judicial review."	Did not comment on this topic.
Citizen Actions				
1. Judicial Review	(1) Authorizes any citizen to request judicial review of failure to perform a non-discretionary action.	(1) Similar to H.R. 7664.	(1) Similar to H.R. 7664. *	Did not comment on this topic.
2. Citizens Civil Action	(1) None authorized.	(1) Authorizes any citizen to seek injunctive relief against: (a) any person, including U.S. Government. (b) any other governmental instrumentality. (c) Administrator of EPA.	(1) Similar to H.R. 10318. *	Did not comment on this topic.

* The provisions are included in the latest staff working draft (June 6, 1975) but are not contained in S. 776 (Feb. 20, 1975) as introduced.

Topic	H.R. 7664 (McCollister) June 5, 1975	H.R. 10318 (Eckhardt) October 22, 1975	S. 776 (Tunney) Feb. 20, 1975	Administration Comments on S. 776 June 23, 1975
3. Citizens Petition	(1) None authorized.	(1) Authorizes any citizen to petition the Administrator to perform a discretionary action.	(1) Similar to H.R. 7229.*	Did not comment on this topic.
		(2) If the Administrator denies the petition, the petitioner can request a court to undertake a complete re-examination of the issue.	(1) Similar to H.R. 10318. *	Did not comment on this topic.
Burden of Proof	(1) Not addressed in this Bill.	(1) Not addressed in this Bill.	(1) Under existing statutes, * the burden of proof is upon EPA to demonstrate that a rule or regulation is needed to protect public health. This provision states that failure by EPA to prove that demonstrable harm to health exists is no basis for revoking the rule.	Did not comment on this topic.
Relationship to Other Statutes	(1) The Administrator would have no authority to exercise the provisions of the Act if the risk to health or the environment could be prevented or reduced to a sufficient extent by actions taken under any other Federal law.	(1) The Administrator would have no authority to exercise the provisions of the Act if the entirety of the risk to health and the environment is protected by other Federal laws administered by agencies other than EPA.	(1) The Administrator would have no authority to exercise the provisions of the Act unless he determines that the risk associated with a substance can not be prevented effectively under other Federal law.	Did not comment on this topic.

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THE WHITE HOUSE

WASHINGTON

November 10, 1975

MEMORANDUM FOR: JAMES E. CONNOR

FROM: JIM CANNON

SUBJECT: Lynn Memo of November 8, 1975
re: Toxic Substances Legislation

The Domestic Council recommendations on the questions of Toxic Substances Control favors continued Administration support for legislation. The fact that we do not now have a reasonable way to prevent PCB's (polychlorinated biphenyls) and fluorocarbons (aerosal propellants) -- two widely publicized toxic substances -- from discharging into the air and water argues for legislation to protect the public health.

The McCollister proposal imposes the least burden on the industry, but contains provisions for eliminating those toxic substances that are now known to be harmful or will later be found unacceptable. Although it does not control the introduction of a new chemical that may be dangerous, it can cause the substance to be banned.

Although pretesting and prenotification are desirable public health methodologies, the burden seems to be more onerous than the risk would justify.

We recommend your favoring Toxic Substance Control legislation, with the McCollister version being most acceptable.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: November 8 Time:

FOR ACTION: Phil Buchen
Jim Cannon
Max Friedersdorf
Jack Marsh
Bill Seidman

cc (for information):

FROM THE STAFF SECRETARY

DUE: Date: MONDAY, November 10 Time: 12:00 p.m.

SUBJECT:

Lynn memo (11/8) re: Toxic Substances Legislation

ACTION REQUESTED:

____ For Necessary Action

____ Prepare Agenda and Brief

__X__ For Your Comments

__X__ For Your Recommendations

____ Draft Reply

____ Draft Remarks

REMARKS:

We are troubled by at least two aspects of the Tunney Toxic Substances bill (S. 776):

(1) Its requirement that manufacturers must submit information on all new chemicals to EPA -- through an expanded regulation process, this requirement could become onerous and unnecessarily expensive.

(2) Its authorization for any citizen to request a court to re-examine the failure of the EPA Administrator to perform a discretionary action.

Many will regard these two aspects of the bill as the type of unnecessary government interference in business activities that the President has been criticizing.

Edward C. Schmults

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James E. Connor
For the President

THE WHITE HOUSE
WASHINGTON

NOV. 8, 1975

MR. PRESIDENT

JIM LYNN WANTED YOU TO KNOW THAT ALTHOUGH THIS IS AN "ACTION PAPER" THE STAFFING RESULTS ARE NOT IN (SEE PAGE 9).

HE HOPES YOU WILL HAVE A CHANCE TO READ IT THIS WEEKEND AND PERHAPS MEET ON IT MONDAY.

TERRY

DICK CHENEY HAS SEEN.

THE PRESIDENT HAS SEEN

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

ACTION

MEMORANDUM FOR: THE PRESIDENT

FROM: JAMES T. LYNN

SUBJECT: Toxic Substances Legislation

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Do you favor continued support by the Administration of legislation regulating production and use of toxic substances, and if so, do you want any change in the current program proposed by the Administration?

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-- public health and the

-- environment from the adverse effects of

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    -- new uses of existing chemical substances, and
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during the full cycle (production, marketing, use, disposition).

The regulatory tools in the legislative proposals include banning a chemical, restriction on its uses and geographic distribution, or restriction on the total amount manufactured, and the enforcement mechanisms include both EPA administrative procedures and citizens' actions.

Toxic substances legislation was first proposed by the Executive Branch in 1971 and has been submitted, albeit with varying proposals as to degree of Federal intervention, to Congress each year thereafter. As recently as June of this year, Administration spokesmen have testified in support of a need for toxic substances legislation. This testimony was followed by submission of proposed Administration amendments to legislation which is now pending in an indefinitely postponed mark-up in the Senate Commerce Committee. A detailed chronology of the events leading to formulation of our present position is included in Tab 2.

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The above statutes permit the Federal Government to

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-- ban consumer products containing toxic substances which pose a threat to public health, or

-- restrict the discharges of toxic substances into the workplace, or

-- regulate the amount of toxic substances that can be released directly into the air or water from an industrial source.

However, the above statutes do not provide

-- any basis for testing and controlling a toxic substance before it is introduced (with the exception of pesticides, food additives and drugs).

-- regulatory authority to control all forms of entry of toxic substances into the environment, e.g., release of freon from discarded refrigeration and air conditioning equipment, leaching of printing ink from discarded cardboard boxes into streams.

Issue 1: Should the Administration continue to support toxic substances legislation?

The basic thrust of toxic substances legislation is to restrict or prohibit the use of all hazardous substances before they enter the environment in any way. The more significant arguments considered when I agreed last June with EPA, CEQ, Commerce, Labor and HEW that the Administration should continue its support of toxic substances legislation are

-- Full protection to public health can be accomplished only by controlling entry into the environment of specific hazardous substances before they are marketed.

-- As the economy continues to expand, the health and environmental threat from the production of hazardous substances will increase.

-- The Environmental Protection Agency estimates the annual direct cost to industry will be slight -- in the neighborhood of $80 to $140 million in an industry with annual sales of $72 billion and after-profit taxes of $5.5 billion.

-- The tendency toward over-regulation can be controlled by providing in the legislation such safeguards as a requirement for careful consideration of the benefits, costs and risks of each action.

-- Because both spokesmen for your Administration and the previous Administration have continuously supported toxic substances legislation since February, 1971, a change of position will be criticized as a retrenchment from environmental goals.

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-- Since 1971, enactment of occupational, health and consumer protection laws has fulfilled many of the objectives of the toxic substances legislation orginally proposed. As of this date, there is no toxic substance in use which regulatory agencies presently believe should be banned, but that cannot be banned under existing statutory authorities. It would be prudent to wait and see whether any problem chemicals can not be regulated by existing legislation prior to enacting toxic substances legislation.

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regulations on the climate for innovation, changes in the scope and direction of research activities, possible shifts in production and marketing patterns, and adverse effects on small companies who might not be able to bear the cost of the required testing.

-- Under its existing authority, EPA can examine any substance -- even substances over which it has no regulatory authority -- and through publicizing findings, EPA can have a substantial effect on the conduct of those producing and marketing such substances.

-- It is doubtful that the natural tendency toward over-regulation could indeed be controlled because of the political forces that can be expected to act on regulatory personnel to regulate on an expansive scale and the tendency of environmental groups and private citizens to institute litigation pressing for regulation to the limits of the law.

Issue 2: <u>If you agree to continue support of toxic substances legislation, should any change be made in the scope of the regulatory program proposed by the Administration</u>?

There are four proposals before the Congress:

1. H.R. 7664 (McCollister)
2. H.R. 10318 (Eckhardt)
3. S. 776 (Tunney)
4. The Administration Proposal (actually a recommended set of amendments to S. 776 (Tunney)). (Tab 3)

All of the approaches under consideration provide EPA with the discretionary authority to require testing of a substance either before or after it is marketed. The regulatory approaches differ in the following specifics:

<u>The Process Used to Identify a Problem Substance</u>

-- McCollister would direct EPA to promulgate a list of problem substances -- both existing and newly developed. Only substances on the list require EPA approval before marketing.

-- All of the other approaches require

  -- as to new (never marketed) substances and new uses of existing substances, a pre-marketing review by EPA; under Tunney, mere lack of information can be basis for a ban.

-- as to existing substances, EPA review at the discretion of the Administrator.

-- Emergency situations: All of the approaches authorize EPA to petition in District Court for prohibition or limitation; Tunney would also authorize emergency action administratively by EPA.

(When the Administration first proposed toxic substance legislation in 1971, the intent of the legislation was not to include pre-market screening provisions. This position was subsequently changed to allow pre-market notification, i.e., industry would merely notify EPA of its interest to market a chemical, but EPA would have no review authority until after the chemical was introduced into commerce. An additional change has been the recent agreement to allow EPA to regulate a chemical during its 180 day review period.)

The Criteria Determining Whether a Substance is a Problem

-- McCollister requires that the substance pose "a substantial danger to health or environment" meaning unreasonable risk of death, of widespread or severe personal injury or illness or of widespread or severe harm to the environment.

-- Eckhardt and Tunney require "an unreasonable risk to human health and the environment" meaning any risk greater than associated benefits.

The Burden of Proof and Timing in the Process Identifying a Problem Substance

-- McCollister puts burden on EPA to produce list; burden then shifts to applicant regarding marketing of substances on list; if dispute, marketing permitted until settlement.

-- Other approaches put burden on applicant to justify marketing any new substance or any new use of an existing substance; if dispute, proposed Administration amendment permits marketing until settlement; Tunney and Eckhardt would not.

-- All approaches require EPA decision within 180 days.

Enforcement

-- All approaches provide for EPA administrative action

and authorize an adversely affected private citizen to request judicial review of EPA action for failure to perform a non-discretionary action.

-- In addition, Tunney and Eckhardt would authorize any interested private citizen to

  -- seek injunctive relief against EPA

  -- petition EPA Administrator to perform a discretionary act.

-- Administration has not objected to Tunney/Eckhardt approach.

Relationship to Other Statutes

-- McCollister would prohibit Administrator from acting, and Tunney/Eckhardt would authorize Administrator to determine not to act, if problem could be prevented or sufficiently reduced under any other Federal law.

Summary

The Administration could take any of four postures.

1. Oppose toxics legislation of any kind on the ground that recently enacted existing legislation covers nearly all of the problems.

  Pro

-- Would not subject industry to a new regulatory program.

-- Would provide additional time to determine the precise nature of new regulatory authority to fill the gaps in existing authorities.

  Con

-- Would place the Administration in the position of retrenching from environmental goals.

-- Would not provide regulatory authority to control the entry of certain toxic substances into the environment that are presently uncontrolled.

-- Would not provide an information base upon which to base regulatory actions for those toxic substances which may ultimately pose a threat to public health.

2. Support legislation covering only those substances, which are not now adequately covered (discharge of fluorocarbons and PCB's resulting from aerosol sprays, and disposal of refrigerators and cardboard boxes).

Pro

-- Would provide a basis for attacking the more serious problems of substances people are talking about.

-- Would provide additional time before embarking upon a full scale regulatory program.

-- Would not duplicate substantial existing authority to control toxic substances.

Con

-- Would place the Administration in the position of retrenching from environmental goals.

-- Would not provide an information base upon which to base regulatory actions for those toxic substances which will ultimately pose a threat to public health.

-- A series of piecemeal regulatory authorities is not as efficient, programmatically, as a broader approach using administrative discretion.

3. Support the McCollister bill (substances regulated limited to those on list, strict criteria determining problem substances, limited private legal action).

Pro

-- Would provide regulatory authority to control the more serious toxic substances.

-- Would provide relative certainty as to what is to be regulated.

-- Would minimize the impact on industry relative to other legislative proposals containing similar coverage because substances not on the list would not be reviewed.

Con

-- Some agencies would object strongly (EPA, CEQ, HEW).

-- Would be perceived as a retrenchment from environmental goals because bill is less restrictive than current Administration prosition.

-- Would subject industry to a new regulatory program, although a moderate one.

4. Continue to support the Tunney/Eckhardt approach with the modifications suggested by Administration spokesmen last summer (all new substances and new uses of existing chemicals reviewed, less strict criteria determining problem substances, extensive private legal action.

Pro

-- Would highlight the Administration's support for environmental legislation because Tunney bill is perceived as "tough".

-- Would provide a large information base upon which to judge the need for taking regulatory actions.

-- Would be supported by all the agencies.

Con

-- Would subject industry to a new regulatory program -- the most burdensome approach being considered.

-- In practice might not be any more effective than the aforementioned approaches.

-- Substantial authority to private citizens and groups could unreasonably tie up marketing.

Messrs. March, Seidman, Cannon and Greenspan will be providing you with their views on appropriate courses of action. In addition, Russ Train, Russ Peterson, and Secretary Matthews should be called in the event you are disposed to change current Administration position.

I am hopeful that we will be in the position to advise John McCollister of your thinking early next week.

TAB 1

JOHN Y. McCOLLISTER
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COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

SUBCOMMITTEE ON CONSUMER PROTECTION AND FINANCE

COMMITTEE ON SMALL BUSINESS

SUBCOMMITTEE ON ACTIVITIES OF REGULATORY AGENCIES

Congress of the United States
House of Representatives
Washington, D.C. 20515

TOP PRIORITY

July 24, 1975

James T. Lynn, Director
Office of Management and Budget
252 Executive Office Building
17th and Pennsylvania, N.W.
Washington, D. C. 20503

Dear Jim:

Recently the Subcommittee on Consumer Protection ~~and Finance, on which I~~ serve as ranking Minority member, completed hearings on several toxic substances control bills. During these hearings, John Quarles, Deputy Administrator of the Environmental Protection Agency, testified on behalf of the Administration.

I was surprised and disappointed to learn from Mr. Quarles' testimony that the Administration has changed its position on the issue of pre-market screening and notification. H.R. 7664, which I am sponsoring, and H.R. 7229, sponsored by Mr. Eckhardt, provides that the Administrator of the EPA will compile a list of substances for which pre-market notification is required. Although the standards for including a substance on the list differ, both bills require that a substance be on the list before the manufacturer, processor, or importer has a duty to notify the EPA and submit test data prior to marketing the substance. A similar provision was found in last year's House-passed bill and it is my recollection that such a provision was not opposed by the Administration at that time. Mr. Quarles, however, testified in favor of a provision requiring the manufacturer, processor or importer of any new chemical or existing chemical with a significant new use notify the EPA 90 days prior to marketing.

I have some serious doubts as to the wisdom of the approach articulated by Mr. Quarles. I am afraid that such an approach will prevent the EPA from clearly focusing on those substances which present true hazards to man and the environment. Because of the importance of this issue, I would be most interested in knowing why the Administration has changed its position in this regard.

Sincerely,

JOHN Y. McCOLLISTER
Member of Congress

JYM/nng

TAB 2

CHRONOLOGY OF THE TOXIC SUBSTANCES CONTROL BILLS

1971

- The Council on Environmental Quality (CEQ) in their study on toxic substances recommended national toxic substance legislation.

- The Administration in February proposed the Toxic Substances Control Act providing for (1) prohibition of the manufacture and distribution if necessary of toxic substances, (2) for standards of testing, and (3) for imminent hazard provisions.

1972

- The Administration's proposed Toxic Substances Act passed the Senate.

- The House passed a bill with some major differences.

- The differences were not resolved in conference and the Congress adjourned without further action.

1973

- Another version of the Toxic Substances Act, different from the Administration's bill was enacted, with substantial differences, in both the House and Senate.

- The bill failed to become law through the inability of the House and Senate to resolve differences.

- The Administration submitted some compromise language but the Congress did not take further action.

1975

- The Administration in January decided not to send up another bill because of a new spending limitation on new programs.

- Senator Tunney introduced a new bill (S.776) and the House has under consideration similar bills (with some significant difference) introduced by Eckhardt (H.R. 7229) and McCollister (H.R. 7664).

- In March, CEQ Chairman Peterson and EPA Deputy Administrator Quarles, testified in favor of Senate 776 with Administration amendments. In June EPA submitted statements to the House and Senate in support for the S. 776 with Administration amendments.

- Both the Senate and the House Committees have completed hearings on their versions of the legislation.

- Late in October, Mr. Eckhardt introduced a new version of his bill (H.R. 10318) which in most instances brings his legislative proposal closer in line with S. 776.

- The House plans to go to markup on November 12 on H.R. 10318 and has asked for prompt agency reports on the bill.

- The House Committee on Science and Technology (Teague Chairman) has proposed H.R. 3118 as an amendment to the Clean Air Act which would direct EPA to study and then if necessary regulate substances affecting ozone (fluorocarbons). This specific substance approach has been opposed by various agency witnesses (with OMB clearance) by supporting the more general toxic legislation with administration amendments as a more comprehensive alternative.

TAB 3

SENATE AND HOUSE TOXIC SUBSTANCES BILL
Section-by-Section Synopsis of Differences

Topic	H.R. 7664 (McCollister) June 5, 1975	H.R. 10318 (Eckhardt) October 22, 1975	S. 776 (Tunney) Feb. 20, 1975	Administration Comments on S. 776 June 23, 1975
Pre and Post-Market Review				
(a) Existing Chemicals	(1) EPA Administrator publishes a list of chemicals which <u>are likely</u> to pose substantial danger to public health.	(1) Similar to H.R. 7664.	(1) EPA issues rules for data development for those chemicals for which there is a reason to believe that they may present an unreasonable risk to human health and the environment.	(1) Similar to S. 776.
	(2) Any existing chemical -- which is on the list -- can not be manufactured or distributed in commerce for a new use unless the manufacturer submits test data to EPA 90 days prior to introduction into market (EPA can extend this period by an additional 90 days).	(2) Similar to H.R. 7664.	(2) This provision of H.R. 7664 not in this Bill.	(2) Did not comment on this topic.
	(3) Chemicals - <u>on the list</u> -- can be produced unless EPA issues a rule prohibiting such an action. - <u>off the list</u> -- are automatically produced with no EPA review.	(3) Similar to H.R. 7664.	(3) The Administrator can prohibit the manufacturer of the chemical if it poses an unreasonable risk to public health.	(3) Similar to S. 776.

Topic	H.R. 7664 (McCollister) June 5, 1975	H.R. 10318 (Eckhardt) October 22, 1975	S. 776 (Tunney) Feb. 20, 1975	Administration Comments on S. 776 June 23, 1975
(b) New Chemicals	(1) Same procedure used for existing chemicals.	(1) Same procedure used for existing chemicals.	(1) Manufacturers must submit information on all new chemicals to EPA.	(1) Similar to S. 776.
			(2) If EPA does not prohibit or limit the use of the chemical within 90 days, the product can be introduced into commerce - this period can be expanded to a total of 180 days.	(2) Similar to S. 776.
			(3) If EPA prohibits the introduction of the chemical, and if the manufacturer appeals the decision, the EPA prohibition remains in effect during the appeal period.	(3) If EPA prohibits the introduction of the chemical, and if the manufacturer appeals the decision, the EPA prohibition does not remain in effect during the appeal period.
		(2) The Administrator can also prohibit or limit the use of a substance on the basis of insufficient or unavailable data to determine the effects of a substance on health or the environment.	(4) Same as H.R. 10318.	(4) Did not comment on this topic.
(c) Criterion for prohibiting or limiting the use of a chemical.	"Likely to pose substantial danger to health or environment" -- meaning "unreasonable risk of death, of wide spread or severe personal injury or illness or of wide spread or severe harm to the environment."	"Likely to pose an unreasonable risk to health or the environment."	Poses or may pose an unreasonable risk to human health and the environment -- meaning any risk associated with the manufacture of a chemical if such risk outweighs the benefits associated with such manufacture.	Did not comment on this topic.

Topic	H.R. 7664 (McCollister) June 5, 1975	H.R. 10318 (Eckhardt) October 22, 1975	S. 776 (Tunney) Feb. 20, 1975	Administration Comments on S. 776 June 23, 1975
Imminent Hazards	(1) The EPA Administrator can petition the U.S. District Court to prohibit the manufacturer of any chemical which "presents imminent and unreasonable risk to health or the environment."	(1) The EPA Administrator can petition the U.S. District Court to prohibit the manufacturer of any chemical which will result in "any unreasonable threat to human health or the environment."	(1) The EPA Administrator can petition the U.S. District Court, or by a suspension* order, prohibit the manufacturer of any chemical which "will result in an unreasonable risk to human health and the environment."	Did nto comment on this topic.
	(2) The prohibition remains in effect if the agency decision is opposed.	(2) Same as H.R. 7664.	(2) If EPA's decision is not opposed within 5 days, the suspension order "may be issued and shall take effect and shall not be* subject to judicial review."	Did not comment on this topic.
Citizen Actions				
1. Judicial Review	(1) Authorizes any citizen to request judicial review of failure to perform a non-discretionary action.	(1) Similar to H.R. 7664.	(1) Similar to H.R. 7664. *	Did not comment on this topic.
2. Citizens Civil Action	(1) None authorized.	(1) Authorizes any citizen to seek injunctive relief against: (a) any person, including U.S. Government. (b) any other governmental instrumentality. (c) Administrator of EPA.	(1) Similar to H.R. 10318. *	Did not comment on this topic.

* The provisions are included in the latest staff working draft (June 6, 1975) but are not contained in S. 776 (Feb. 20, 1975) as introduced.

Topic	H.R. 7664 (McCollister) June 5, 1975	H.R. 10318 (Eckhardt) October 22, 1975	S. 776 (Tunney) Feb. 20, 1975	Administration Comments on S. 776 June 23, 1975
3. Citizens Petition	(1) None authorized.	(1) Authorizes any citizen to petition the Administrator to perform a discretionary action.	(1) Similar to H.R. 7229.*	Did not comment on this topic.
		(2) If the Administrator denies the petition, the petitioner can request a court to undertake a complete re-examination of the issue.	(1) Similar to H.R. 10318. *	Did not comment on this topic.
Burden of Proof	(1) Not addressed in this Bill.	(1) Not addressed in this Bill.	(1) Under existing statutes, the burden of proof is upon EPA to demonstrate that a rule or regulation is needed to protect public health. This provision states that failure by EPA to prove that demonstrable harm to health exists is no basis for revoking the rule. *	Did not comment on this topic.
Relationship to Other Statutes	(1) The Administrator would have no authority to exercise the provisions of the Act if the risk to health or the environment could be prevented or reduced to a sufficient extent by actions taken under any other Federal law.	(1) The Administrator would have no authority to exercise the provisions of the Act if the entirety of the risk to health and the environment is protected by other Federal laws administered by agencies other than EPA.	(1) The Administrator would have no authority to exercise the provisions of the Act unless he determines that the risk associated with a substance can not be prevented effectively under other Federal law.	Did not comment on this topic.

* This provision is included in the latest staff working draft (June 6, 1975) but are not contained in S. 776 (Feb. 20, 1975) as introduced.