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Lynn L. Bergeson (LLB): Hello and welcome to All Things Chemical, a podcast produced by Bergeson & Campbell (B&C[®]), a Washington, D.C., law firm focusing on chemical law, business, and litigation matters. I am Lynn Bergeson. This week, I was delighted to sit down with Daniel Rosenberg, Director, Federal Toxics Policy, Healthy People & Thriving Communities Program with the Natural Resources Defense Council, better known as NRDC. Daniel's distinguished legal career has placed him at the forefront of the evolving law and policy of domestic chemical regulation. Daniel and I discussed new Toxic Substances Control Act (TSCA), the U.S. Environmental Protection Agency's (EPA) implementation of the 2016 amendments of TSCA under Lautenberg, several recent regulatory initiatives involving persistent, bioaccumulative, and toxic (PBT) chemicals, per- and polyfluoroalkyl substances (PFAS), and much more. An engaging and formidable advocate, Daniel's views are always forcefully spoken and clearly articulated. Now here is my conversation with Daniel Rosenberg.

Daniel, I have been looking forward to visiting with you today. Thank you so much for being here.

DR: (DR): Thank you for having me. It's a pleasure to be here.

LLB: Great. For the benefit of our many listeners, I would welcome an opportunity from you to just share a little background about yourself, your advocacy. Give our listeners a sense of who Daniel Rosenberg is.

DR: Sure. I graduated from law school here in Washington, D.C., in 1994, and I went to law school with the intention of doing some kind of public interest law, consumer protection focus. I didn't have a real solid idea of what that was going to be. During my law school, I worked at Public Citizen, a public citizens' Congress watch, which was sort of a first entry into federal policy on toxic chemicals and things of that nature. When I graduated law school, my first job was working for the U.S. Public Interest Research Group (U.S. PIRG) in their Washington, D.C., office, working on issues. I worked on the reauthorization of the Safe Drinking Water Act in 1996 and the Food Quality Protection Act in 1996, and other

toxics-related issues. I left there and worked for a short time for a small public interest law firm that does Clean Water Act citizen suits.

Then in 2000, I started at NRDC. Originally, I worked in the Water Program, so I was working a lot on wetlands protection and things related to mountaintop removal mining. Then in 2005, I went to the Hill to work for Senator Lautenberg, Frank Lautenberg from New Jersey, as his environmental legislative counsel. I did that for about two and a half years and then returned to NRDC to their Health Program. Since then, my focus has been on toxics exclusively and, really since 2009, mostly on TSCA (Toxic Substances Control Act), chiefly the legislative process of developing the legislation that became the Frank Lautenberg Act, which was about a six-year process, I think, maybe more than that. Maybe seven years.

LLB: Yes, I think it was closer to ten.

DR: Yes, it was a long time. Then, since 2016, on the implementation, And that's a lot of what I'm doing now.

LLB: Exactly. Your really diverse background in environmental law and policy is impressive, Daniel. I didn't appreciate the early work on water, and mountaintop, and other topics of that sort, which I'm sure really helps provide a holistic approach to environmental law and policy. But it's caught my ear, and in preparing for this podcast, I recognize that you did have a stint with Senator Lautenberg, the late, great Senator Lautenberg. Is that what got you really into the toxics area? Because you are a formidable expert on all things TSCA, and most recently the implementation of the Lautenberg amendments. Is that what got your interest, or did you just default into this area, as opposed to other areas of environmental law?

DR: Senator Lautenberg himself was very broadly committed to protecting the environment and public health. And he cared passionately about climate issues and air pollution and water issues. But toxics was a real focus of his in a bunch of ways, certainly on Superfund, chemical security issues, right to know, and he was one of the creators of the U.S. Chemical Safety Board. He had a real long-time interest in and passion for addressing toxic chemicals. That was a big part of what got me into it, because, looking for things where he wanted to focus his attention and his time, whether legislative or in hearings, or in topics for questioning people in hearings, or topics for holding hearings when the Democrats were in the majority so he could choose the hearing topics. That was often about toxic chemicals, a range of subjects. That was definitely a place to get deeper into those policy issues.

LLB: I don't know exactly the time that you were on Senator Lautenberg's staff, but I know you've long been engaged in both the legislative and policy work behind toxics legislation. I read, for example, your 2013 testimony before the House Energy and Commerce Committee's Subcommittee on Environment and the Economy. In that, you very clearly articulated the now-legendary deficits of old TSCA: limited authority to address existing chemicals; the absence of any type of minimum data set, which, of course was edited out of any final legislative amendment to TSCA; overuse of confidential business information (CBI) protections; and a whole host of related concerns. In your mind, do the Lautenberg 2016 amendments as written address most of these issues, some of these issues, or not really any of these issues, in your view?

DR: It does address a lot of those issues. No question the bill was a compromise, so it doesn't address every issue exactly the way I want it, or NRDC wanted, or I would say the broader

non-governmental organization (NGO) community interested in this issue wanted. But it did attempt and does have meaningful provisions to address every issue that came up over the course of the legislative process, which was, as we alluded to earlier, a long one. There was a lot in their many hearings and lots of opportunity to identify many problems with TSCA. I think it was widely recognized, and in fact, many members of Congress on both sides of the aisle talked about it as being a failed statute, one that had not lived up to its intentions, the way many others, more or less had, the Clean Water Act and the Clean Air Act and what have you.

So there were a lot of things that were addressed. And now, obviously, implementation is the next chapter, to see how those play out. But, for example, on the question of existing chemicals, EPA really had no mandate to address existing chemicals, and they were very much limited in their ability to do so, primarily by the least burdensome test and the *Corrosion Proof Fittings* decision, which blocked most of EPA's attempt to ban uses of asbestos, and not much happened from -- that court ruling was in 1991 -- not much really happened after that for existing chemicals.

The new law does have the mandate, and it has a minimum number of chemicals. There's a set process for reviewing chemicals in a minimum number with statutory deadlines. That really established a process by which existing chemicals were going to be reviewed. It's very significant that the requirement includes the obligation of EPA to consider and protect vulnerable populations, people who are more exposed to chemicals than the average person or who are more vulnerable to chemicals than the average person, children and workers and people, other classes of people. Those are very significant.

The risk evaluation process itself seems pretty slow and cumbersome, and we would have liked to have seen more expedited action, meaning risk management on certainly chemicals where we already know that there are significant hazards, chemicals of substantial concern. And except for a small PBT provision, everything has to go through this long, somewhat drawn out risk evaluation process. That wasn't ideal from our perspective. On the other hand, EPA is moving forward with some of the most problematic chemicals, ones we've all heard of. Well, maybe not Pigment Violet 29, but the other ones --

LLB: Or the others.

DR: The other nine were all ones that people were familiar with. That's a compromise effort to address the issue, so I think that's a good thing. The new chemicals, I know that's something you follow carefully and care a lot about. One thing that we wanted was the minimum data set, a set of information tiered, required for all new chemicals, and that didn't happen. There was very strong industry opposition to that. Instead, it's more now of a case-by-case question: what data are required for each chemical.

There were significant strengthenings to the new chemicals program, however, including the requirement that EPA make a determination on each new chemical, whether or not it poses an unreasonable risk. The way it's structured, EPA cannot just say, "We don't have enough data on this chemical, so we're going to assume it's safe." The law really forces development of data and information about chemicals rather than just relying on data gaps to make decisions, which I think is a positive, and then again, it's across the whole law, really, the requirement to protect vulnerable populations, which is very significant.

Again, not everything exactly the way we conceived of it, but I think the new chemicals program is significantly stronger, and probably more so than many people realized it was

going to be. I think that's played out already in the first five years or so of implementation and will continue to play out, a dynamic of -- some people viewed it or expected that there wasn't going to be a whole lot of change to the new chemicals program.

LLB: Yes, I was one of them, Daniel.

DR: Yes, yes.

LLB: To your point, I absolutely understand the burden shifting that went on with the revised Section 5, which is probably, on balance, inevitable, right? But I think reasonable people can disagree, as probably you and I would, regarding whether the *new* new chemicals program is in fact making the world safer, better, faster, greener, cheaper. We could argue about that for days, right? We probably won't here. But to your point, I was stunned, given the paucity of vigorous debate about the wisdom of Section 5 as a run-up to Lautenberg. All of the love was going to CBI, preemption, and of course, the much-lacking Section 6 existing chemicals program.

DR: I think that's right in the sense that, certainly, I can't remember every single hearing, but those other issues definitely got more extended attention and debated hearings. I think from the non-governmental organization side, certainly there was laid out quite a bit of analysis and critique of how the new chemicals program wasn't working from an NGO perspective, as far as health protection. I think the problems were out there, and as I said, I think the new law makes a pretty good attempt to address those. But it probably wasn't as much of a debate back and forth on that as some of the other provisions. I think a lot of people assumed it was going to be more or less the status quo for the new chemicals program. Reading the law as it was finalized, that is not how I interpret it or some other people interpret it.

LLB: But to your point about how vastly different -- and I think most of us would agree the Section 6 changes to TSCA were much needed and long overdue, because without any type of implementation strategy, old Section 6 was largely untouched after *Corrosion Proof Fittings*, and EPA recognized that it really couldn't effectively regulate asbestos, of all chemicals.

Do you think the changes with respect to wanting to target the effects of chemical exposure on sensitive subpopulations is proving more difficult, given the passage of now five years and the absence of any, that I can see, recognized implementation of that provision in particular? Many of the risk evaluations that were completed over the last four years were largely devoid of any coherent approach to the regulation of those ten chemicals for which risk evaluations have been completed and how they specifically impact vulnerable, sensitive subpopulations. Is that for want of a process for doing so, or just is there another explanation as to why that aspect of Lautenberg seems to be a difficult thing to realize?

DR: I do think there is going to be some difficulty to addressing that. It's something that hasn't really been done before, certainly not under TSCA. As a new mandate with a new, broader approach, EPA is now, I think, in the process of figuring out exactly how to do that. How are you accounting for and measuring the exposures for fence-line communities and for children and workers and the elderly? It's a somewhat complicated task that EPA has to take on, and I think what's unfortunate is that EPA, under the previous Administration, so over the past four years, really abdicated that responsibility. They essentially ignored that provision of the law. Certainly in the risk evaluations, they took essentially no meaningful steps to address vulnerable populations. And in fact, in some instances, they went out of

their way *not* to protect vulnerable populations, specifically workers, by adopting the policy, assuming that every worker, 100 percent of workers are going to be using personal protective equipment (PPE), and it's going to work every time, and it's going to function.

That was indefensible in my view and our view, and went in the opposite direction of what TSCA requires, because in the provision defining vulnerable populations, it actually doesn't use that term. But workers are identified specifically as a vulnerable population. In another sense, the previous Administration adopted a policy to ignore exposures from air pollution to a chemical, methylene chloride or carbon tetrachloride, ignore exposures from drinking water from 1,4-dioxane or what have you, trichloroethylene (TCE). And so, if anything, the previous Administration looked at that mandate and ran in the opposite direction. Now, four or five years in, the new Administration and Dr. Freedhoff, who's the new Assistant Administrator, is tasked with starting now. In many respects, I believe that real implementation of TSCA with the intent to actually comply with the law and meet the requirements and the vision that Congress had when they passed the Lautenberg Act is really just starting now in 2021.

LLB: Great response to a complicated question, and for the benefit of our listeners, I've written several articles probably taking a little bit of umbrage with, you know, NRDC and probably your personal view, Daniel, with regard to the wisdom of the interpretation that workers largely are not using protective clothing and equipment in a way that would protect them from chemical exposures in the workplace. Certainly, I'm aware of Dr. Freedhoff's reversing of that presumption for purposes of new and existing chemical review. Some argue, myself included, that it is a foreseeable condition of use that workers are wearing PPE and hence to assume that they are not is not a legitimate interpretation of the law. But that's exactly why we have advocacy opportunities to argue these points. Whether or not they are appropriate assumptions or reversing those assumptions is certainly Dr. Freedhoff's prerogative, but we continue to question the wisdom of that decision.

DR: Yes, that's going to be clearly a centerpiece of activity, certainly during this Administration, how they apply that and, as you said, differing views on what the right presumption is and how to go about fulfilling the mandate to protect workers, which is clear in the law.

LLB: Speaking of the law, we appreciate, and I've long been interested in NRDC's advocacy with regard to methylene chloride for a couple of reasons. NRDC has been an outspoken critic of the former Administration's regulatory assessment of methylene chloride, which, of course, is a widely used chemical in paint strippers, cleaners, adhesives, sealants, and other products. NRDC sued EPA in 2019 for failing to ban methylene chloride in commercial as opposed to consumer uses. We know that despite EPA's actions, several large retail outlets, even before the consumer ban, stopped stocking their shelves with methylene chloride in applications for consumers as a paint stripper. I'd be very interested in your views on how NRDC, alone or perhaps with other NGO players, leverages at your advocacy by working with retail and other nongovernment organizations. These are consumer outlets, for example, and I'm presuming that -- I don't know if NRDC and others worked together on this voluntary ban, well before EPA actually issued a rule preventing the inclusion of methylene chloride in consumer-use paint strippers.

DR: We did. That was in part a reaction. I can't remember exactly what year, maybe it was 2014? You would know, Lynn, when EPA originally did their methylene chloride risk evaluation --

LLB: Yes, I think you're right, Daniel.

DR: -- and concluded that it posed an unreasonable risk to human health, both commercial and consumer uses in paint strippers. In fact, in the Lautenberg Act, there is a provision that specifically allowed EPA to go forward and regulate methylene chloride in paint strippers (and a couple of other uses of specific chemicals) without having to go through the risk evaluation process that everything else has to go through under the law, because they had just recently completed these risk assessments and there was no reason to reinvent the wheel. So Congress gave EPA the authority to take action on methylene chloride and N-methylpyrrolidone (NMP) in paint strippers and then separately, TCE, a couple uses of TCE.

At the very end of the Obama Administration, in that six-month window from when TSCA was reauthorized to, when the new Administration took over, EPA actually proposed to ban the use of both methylene chloride and NMP in paint strippers for commercial and consumer uses. So then the Trump Administration takes office and quickly announces that they're basically shelving that, that they're not going forward with that. First, I think they maybe extended the comment period, but anyway, it became clear they weren't going to do anything. They weren't going to finalize those proposed rules. Numerous people have died from exposure to methylene chloride in paint strippers. I think University of California in San Francisco (UCSF) released a study recently documenting 85 deaths over a couple of decades. I don't remember the exact scope of time, but in any event, it's a deadly chemical. And in fact, four people are documented to have died from exposure to methylene chloride in paint strippers just between 2017 and 2019, when EPA finally finalized the consumer ban, in part because of pressure from the survivors of the victims of those deaths. That put a huge amount of pressure on then-Administrator Scott Pruitt to take action.

This is a long-winded response to your question, but seeing that EPA was not going to take action on this deadly chemical, NRDC and other organizations, including Mind the Store, did start having conversations with some major big-box retailers about this problem and our concern of these paint strippers being on their shelves. I can't remember the exact order of who we spoke to, but actually the companies were quite responsive. They were concerned about it. They really did not want to be carrying products on their shelves that were that dangerous. When it was brought to their attention what the problem was, some moved faster than others. I honestly can't recall whether it was Home Depot or Lowe's who was the first one to say --

LLB: My recollection is that Lowe's was the first to take that voluntary action, but I could be wrong.

DR: Yes, it might have been Lowe's. I think it was Lowe's, and then Home Depot. Then the rest followed quite quickly after that. I think that's an approach that certainly predates methylene chloride, retailer-focused or market-based campaigns, if you will. That has grown, and that has been one logical outgrowth of the failure of TSCA over decades to adopt meaningful regulations and controls of toxic chemicals. It's created an enormous vacuum for decades, which has led to one, market-based campaigns and pressure on retailers to remove certain chemicals or from certain products, or what have you. And then also state-based legislation, regulation, which I know from the industry's perspective, I hear a lot creates an unworkable patchwork of state laws. And you end up with California, or Vermont, or Washington, or Maine, or somewhere driving things for the whole country. But it makes sense to have both strong federal and state authorities. But if there's nothing happening at the federal level for decades, those were the two outlets that developed for taking action.

So the market campaigns, there are other groups besides NRDC and Mind the Store. Campaign for Healthier Solutions has focused on the dollar store universe. Women's Voices

for the Earth has done a number of things. Other groups have done this, and I think it's been very effective. I think you can point to many more protections. They don't apply to every company, so that's why national policy is better, because it affects everybody equally. Everybody is protected. But in the absence of that, I think a lot of meaningful protections have been adopted through the marketplace, through this type of advocacy.

LLB: Let's pivot to new chemicals, as opposed to EPA's regulation of existing chemicals. I think many, as you probably appreciate, Daniel, in the industrial chemical community are concerned about the precipitous drop-off of new chemical notifications under TSCA Section 5. Based on our own number crunching, in 2016, for example, some 600 notifications were submitted. Over the past three fiscal years, by contrast, less than 200 chemical notifications have been submitted. And many people in the industrial chemical community attribute this decline to the fact that most new chemicals now are subject to some sort of restriction via a consent order or significant new use rule (SNUR).

Some have argued, and I suspect you would take umbrage with this, that the pendulum has swung too far to the side of regulation and that TSCA may be inadvertently or explicitly discouraging chemical innovation, leaving processors and users a choice between enforcement risk, that is, you know, the SNUR conditions and consent order conditions, or continue to buy and use chemicals that may be in some environmental and perhaps material environmental effect, less desirable from a sustainability perspective. What are your thoughts on this question?

DR: First of all, I'm trying not to take umbrage quite as much.

LLB: That's okay, Daniel. That's why we're here, to have a rational conversation about numbers and statistics, and my, as you correctly noted before, personal concern with the difficulty chemical innovators have with getting new chemicals on the market in a way that enables them to compete with chemical analogs that may be less desirable.

DR: Yes, from our perspective, TSCA needs to work to protect the public from unreasonable risk from both existing chemicals and new chemicals. Obviously, the law is set up with two different programs, one for each, and they operate somewhat differently. I don't think that being very careful about what new chemicals are allowed on the market should be sacrificed, even though there are problematic existing chemicals on the market. We need really to be addressing both. I actually think that's one reason why it would have been better to have an expedited action mechanism or, for example, some sort of authorization mechanism like under REACH to address those chemicals of concern, of which there are many that are on the market: carcinogenic, mutagenic, or toxic for reproduction (CMR) substances, PBTs, very persistent, very bioaccumulative (vPvB) chemicals.

If there had been a mechanism to more quickly address and ramp down the uses of those chemicals, I think that would have more quickly created a market for safer new chemicals to take the place of those uses. But instead, we have a little bit more of a cumbersome, slow process for that. If you look at the way the law was rewritten for new chemicals, it is different. It is a different setup. I believe there is probably some significant buyer's remorse from a lot of folks in industry over that provision, it seems. And I also think there's a little bit of -- I'm just mixing metaphors now -- sticker shock or something. I think the industry really got a reprieve over the last four years. The new chemicals provisions are not meaningfully kicking in until now, assuming that they meaningfully kick in now. In lieu of the minimum data set, which industry did not want, instead, EPA does have a mandate to make sure these chemicals don't pose an unreasonable risk, and they need to have the data

to make that determination. So instead, it is a case-by-case question of whether you've provided enough information for EPA to make that determination. That, I believe, is cumbersome and frustrating for new chemical creators.

Another thing -- to go back to something that we wanted that didn't really fully happen in the law -- was we wanted to shift the burden of proof so that it was industry's burden to demonstrate that a chemical is safe rather than EPA having to demonstrate it's unsafe, the former being the way that pesticides are handled, and food, drugs, and cosmetics under the Food, Drug, and Cosmetic Act. But what did happen was there is a little bit of a shift in the burden of proof.

LLB: Yes, I think you're right. EPA now has an affirmative obligation to make one of three findings, so that burden did shift over to now we have to prove that the chemical is not --

DR: It's safe.

LLB: It is safe because it doesn't present an unreasonable risk. Or if it does, that the measures that EPA identifies would address that unreasonable risk, and given all the conditions of use that are meaningful for purposes of that particular chemical. I think a lot of people think that that burden was effectively shifted basically to the chemical innovator.

DR: Yes, EPA's making that determination, but, yes, in a sense, the burden was at least somewhat flipped. Then also, as we talked about earlier, the protection of vulnerable populations. I think that industry has got, understandably, they've got used to the way the system has worked over the past 40 years. Largely, I think -- and I'm not a chemical innovator; I don't manufacture new chemicals -- but my impression is that the system worked pretty well, was not all that burdensome. There were occasional Section 5(e) orders.

This 90-day mandate was sacrosanct, like EPA was going to decide in 90 days. I realize they didn't always do it in 90 days, but they had an extension and then [Section] 5(e) orders. But basically, that was the touchstone, 90 days. Okay, but now it doesn't require EPA to approve within 90 days. Basically, I think that that has been modified in the new law, so that if that 90 days (or the 180 days if there's a six-month extension) doesn't pan out, okay, you get your fees back. You don't have to pay the application fee, but EPA still has to make this determination one way or the other, and if they're going to let a new chemical go through, then they're going to impose the restrictions they need, either testing requirements or production limits, whatever it is.

I think it's a very significant change to the law, and it's necessary in part to address things like the PFAS crisis, which is a great illustration of the problems with the new chemical program, which is that hundreds of PFAS have been approved on the assumption that -- I don't know what the original assumption was, but more recently, there was an assumption that shorter chain PFAS are safer; they're not as much of a problem.

That's really not bearing out with new science. They're just as persistent; they're more mobile in the environment. I think that the PFAS crisis is an illustration of why there needs to be stricter review and consideration of new chemicals, which is what the law has now established.

LLB: With regard to PFAS, Daniel, let me ask you. I was going to ask in a bit, but should EPA ban all uses of PFAS chemicals?

DR: EPA certainly needs to regulate PFAS as a class. There's a fairly robust conversation going on about how to analyze essential uses of PFAS. There are certainly some uses that cannot be eliminated right now. Over time, there's going to have to be some work done to first identify what are the most essential uses, and then come up with ways to replace those. But certainly there are many uses of PFAS which are not essential. Those should be phased out, eliminated, however you want to describe it, as quickly as possible. That's certainly true, and the marketplace is already moving in many instances to reflect -- that is, alluding back to our earlier conversation about market campaigns -- PFAS are coming out of rugs and carpets quite robustly. I think they're going to start coming out of various uses in apparel quite quickly. Cookware is another place. There are many uses. The other thing that the PFAS crisis highlights, which is still a problem in TSCA, we don't really know all the places that PFAS are used. We're going to get some information from this Section 8(a)(7) -- is it 8(a)(7) or 8(d)?

LLB: It's 8(a)(7). Right.

DR: 8(a)(7) rule. But TSCA does not require use reporting in a strict, meaningful sense, so we don't know the universe of PFAS that are out there. We also don't have test methods for most PFAS. We have test methods for a couple of dozen of the hundreds, maybe thousands -- who knows? -- but at least hundreds of PFAS that are on the Inventory, TSCA Inventory, so they may be being used. EPA can't -- and the states cannot -- is not currently able to find those in the environment, in our drinking water, in our groundwater, in our soil, in our air. There's an unknown amount of exposure going on to a whole set of PFAS, and TSCA currently is not ideally suited for grasping all of that. Yes, I think PFAS is a great illustration of many of the flaws and weaknesses of TSCA and what significant implications that can have for public health and the environment. Yes, I think they need to reverse the presumption. I don't think there's any basis for presuming that any PFAS are safe. And that's a great example of why the presumption should be the opposite, and unless industry can come up with very thorough, compelling data to indicate that a particular PFAS is safe, they should be regulated as a class.

LLB: You're correct that comment period on the proposed PFAS reporting rule ends on September 27. Given the enormity of the reporting burden ten years back, no exemptions for small businesses, byproducts, impurities, articles. If the rule is issued in final along the lines of the draft, the Agency is either going to get a whole bunch of information or not as much as perhaps it wishes to address precisely the issues that you've been addressing, Daniel, which is where are PFAS used, in what products and what industries. We know there is ubiquitous exposure right now in use, but we don't have a very good sense of those uses, so the reporting rule, when it's issued, will probably help EPA very much in that regard.

DR: I think so, and in reference to a timeframe and the lack of exemptions -- I know you know this -- that's how Congress wrote it. That's not an EPA policy decision or interpretation. Congress was explicit. They wanted as much information as possible over that ten-year period. Arguably, they could have gone farther back, but anyway, they chose ten years. What's interesting about that is EPA could have done a Section 8 reporting rule on PFAS any time before Congress mandated that they do it in the National Defense Authorization Act (NDAA). And one of the consequences -- the PFAS issue predates the Trump Administration. I'm not at all suggesting that that's only a problem, or that the policy failures are only through the Trump Administration. However, the public concern, and certainly the Congressional concern, has been rising, if not peaking over the last five years. You could say --

LLB: No. You're exactly right, Daniel.

DR: The failure of the previous Administration -- it's not all on them -- but the failure of the Administration to take any meaningful action with the authority they had under TSCA is what I think made Congress so impatient and frustrated that they -- it's pretty unusual, not as unusual now, but what we've seen over the last few years is Congress using the NDAA, the National Defense Authorization Act. There are very serious connections between PFAS and the military, no question about it. It's not typically regular order how you would pass PFAS-related legislation, but it's must-pass legislation. It's going to pass every year. And so Congress knows that if they want something done on a bipartisan basis, which action on PFAS really is, it's got to be in something like that. And so they've taken the opportunity repeatedly. It was extraordinary, really over the last two NDAA's to tell EPA, "Use your authority that you have to do this reporting rule. Use your authority to finalize the significant new use rule for PFAS in articles." Requiring the Toxics Release Inventory (TRI) listing of all those PFAS. TRI is not under TSCA, but it's in the same Toxics office. Those are all examples of, and I think a rational reaction to, members of Congress's constituents, who are extremely scared and angry over the PFAS that is in their water supplies, that's in their food, and the total inaction by EPA to address this issue, even going so far as to try and suppress, working with the White House to suppress the CDC from issuing a report about the actual health threat of PFAS. The [Section] 8(a)(7) rule, I understand from the industry perspective, is burdensome, and it requires a lot. You and Rich had a great previous podcast about that.

LLB: Thank you, Daniel. We're very engaged in this topic, and I think EPA, to your point, has, in the chemicals area, certainly with regard to industrial chemicals -- I have my own issues with regard to the PFAS and fluorinated plastic container issue that is now an issue with respect to both Food and Drug Administration (FDA) and Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) pesticide chemical contamination. But EPA has over the years worked pretty hard on addressing PFAS in significant new use restrictions, chemical regulation generally under TSCA. I can't speak as much about water and other types of PFAS contamination. But to your point, Congressional intervention reflects an extraordinary and unique level of frustration for sure, so on that, we agree. But I also think EPA has worked pretty hard on industrial chemicals to address PFAS of regulatory concern through the new chemical and existing chemical regulatory provisions under TSCA.

Let me ask about two more topics before I let you go. You've been very generous with your time, Daniel. The all-important issue of TSCA fees. EPA has struggled to calibrate those fees in a way that make those subject to the fee payment happy. We had the original list of fees, which I thought was relatively straightforward and reasonable, but I'm used to FIFRA fees, which are much more significant and robust than TSCA fees have ever been. But what do you think? Are fees as proposed in the revised Fee Rule still too low? And how can they be reset to achieve Congress's goals under Lautenberg?

DR: The short answer to your question is yes, just to cut to the chase. But I don't think EPA's focus needs to be or should be making those subject to the fees happy.

LLB: Right.

DR: I think that's the wrong word.

LLB: I was too cavalier with that, but at least not abandon them as strenuously as folks have.

DR: Yes. This goes back to a conversation you and I have had on previous panels. In just about every respect of implementation over the past four years, EPA, under the previous Administration, adopted policies, or defaulted to policies, that were going to be favorable to the chemical manufacturers, that were going to be the least burdensome, that were going to avoid the obligations of the law in order to satisfy the chemical industry. That's not totally surprising because most of the political appointees who were relevant to TSCA and Toxics at the Agency over the past four years came from the chemical industry.

We're not naive, right? We know why that happened. There are ways that the fees as proposed were essentially lowballed. I think that's something that hopefully is going to be revisited by the new Administration. I think they didn't fully account for the different -- I think they took a too narrow view of what actions or sections of TSCA should be included in where a fee is applied to. So they took a too narrow view of all the activities that take place under TSCA for which fees should be obtained from industry. They exempted the risk evaluations of the first ten chemicals, and the risk management plans from the fees, which is extraordinary. That's most of what has happened in the last four years, almost entirely -- not the new chemicals program -- but under existing chemicals, the ballgame almost entirely has been evaluating and then starting to develop risk management plans for those ten chemicals. To exempt industry from paying for any of that is certainly contrary to what Congress intended for how that program was going to work. I think everybody who pays attention to TSCA policy, that small group of us, has seen that EPA has had to hire more staff.

LLB: Significantly. Right.

DR: Stakeholders on all sides are saying they're overburdened, they don't have time to do this or that, they're overwhelmed. All of that costs money, and the point was that the fees were supposed to pay a portion. The taxpayers are paying a huge portion of the TSCA program. It's not just an industry-funded thing, but industry was supposed to pay their fair share. And I don't think the way it's been scoped out thus far has been really representative of that.

LLB: A final question, Daniel, relates to the PBT rule that came out earlier this year and, in particular, EPA's issuance of the No Action Assurance (NAA) with regard to phenol, isopropylated phosphate (3:1) (PIP (3:1)), which lapses pretty soon, on September 4 at 11:59 p.m.

DR: You're keeping really close track!

LLB: This is an issue of real significance, of importance to many of our clients that manufacturer articles. Do you think EPA was right to issue the NAA? And what do you think the Agency is going to do come September 4?

DR: First of all, the no enforcement assurance action was taken in response to, I think, what can reasonably be characterized as an industry freak-out over that --

LLB: There was a meltdown. I can assure you.

DR: Yes, meltdown is a good way to say it, too. You were privy to that, I'm sure. That is a little bit absurd, not because -- PIP isn't widely used in articles. I totally get it. But that is the ultimate Washington, D.C., version of "My dog ate my homework." Nobody should have been surprised that PIP was going to be regulated. Industry had plenty of notice about this. EPA first flagged it in 2014. Even prior to that, the idea of requiring restrictions on PBTs

was in the Lautenberg law. It was discussed ad nauseum. It boggles the mind how so many companies and industries could have been ostensibly caught flat-footed by this regulation.

LLB: They were. But to your point, Daniel, it was listed in 2014. The proposed rule was issued in 2019. People can legitimately ask, why didn't you know it was going to be regulated in 2021? But the concern and the surprise were real. Whether that is well-founded is another matter.

DR: Okay, we did not support the extension, but the extension happened. To be honest, I have some sympathy for the situation Dr. Freedhoff was placed in. She was essentially brand new to the Agency, obviously not new to these issues, but in this new position, had not even been confirmed yet. And there was, as we said earlier, an industry meltdown over this and a huge amount of pressure, including from members of Congress who were themselves hearing about this out of the blue from constituent companies. We didn't want the six-month extension, but I get it. I think what's more important is what's going to happen going forward. I get that industry is very concerned about the limits on the use of PIP in articles. We were very concerned, and not just NRDC. I'm speaking more broadly than that about the carve-outs for that PIP analysis. EPA -- this is starting to sound like a broken record -- they carved out protection for workers; they excluded consideration of disposal. They weren't going to include articles that had already been produced. Those are all categorical exclusions that weakened the analysis of PIP and the other PBTs, which is not what the law requires or Congress intended. And they included exemptions without going through the exemption process that's in the law. I can't remember. Is it [Section] 6(g) or something like that? I don't know.

LLB: [Section] 6(h).

DR: [Section] 6(h). Okay, sorry. There's an exemption process that EPA can use. Congress recognized there are cases where there may need to be exemptions, and here's the process EPA should follow. But they didn't follow it. So they haven't really implemented that provision the way they're supposed to. I think what's most important is to see going forward what EPA does to both PIP and the other PBT rules, as far as complying with what Congress said they were supposed to do. That's a touchstone, I think, of our conversation is how closely -- hopefully very closely -- is this new Administration going to adhere to what's in the law?

LLB: There will be lots of opportunities in the months and years ahead to truth-test precisely that question. Daniel, I want to thank you for being as generous with your time as you have been today. I've really enjoyed speaking with you. I hope this isn't a spoiler alert, but do share with our listeners your plans with regard to a podcast that will be arriving soon, right?

DR: Hopefully sometime this fall, yes.

LLB: We absolutely look forward to that. Can you say a little bit about it?

DR: It's not an NRDC production. It's my own thing. And it's going to be an interview format primarily, at least starting out, and talking about toxics policy and talking about people who do work in the toxics area. It's talking with people about the work that they do, or have done if they're at the end of their careers, their work on toxics issues and what motivates them to do that work.

LLB: We look forward to another voice in this very rich community of views, Daniel. Thank you for sharing. Thank you for being here today, and most importantly, thank you for all you do to make the world a better place.

DR: Thank you, Lynn. I really appreciate the invitation, and it was a pleasure to be on the podcast with you.

LLB: My thanks again to Daniel for speaking with me today about domestic chemical regulation under TSCA. While we do not necessarily always agree on all issues, I always enjoy speaking with Daniel.

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