



October 11, 2012

VIA EMAIL
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VIA MAIL
Krysia Von Burg, Regulations Coordinator
Regulations Section
P.O. Box 806
Sacramento, CA 95812-2806

Re: Comments on July 27, 2012, Draft Safer Consumer Product
Alternatives Regulations

Dear Ms. Von Burg:

On behalf of the Alliance of Automobile Manufacturers ("Alliance"), I am pleased to submit the following comments in response to the latest draft of the Department of Toxic Substances Control's ("Department" or "DTSC") Safer Consumer Product regulations (the "July 2012 Proposal"). The Alliance is a trade association of 12 car and light truck manufacturers, consisting of BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda North America, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota Motor North America, Inc., Volkswagen Group of America, and Volvo Cars of North America. As indicated in prior letters, the Alliance appreciates the complexity of the task at hand, and the efforts put forth to date in preparing the July 2012 Proposal. The Alliance embraces the goals and vision for safer consumer products embodied in California's Green Chemistry Statute (the "Statute").

Although it is apparent from the July 2012 Proposal that the Department has considered some of the many comments made by the Alliance and other concerned industry groups, the July 2012 Proposal remains unworkable. Without extensive changes to the draft regulations, the Department will be frustrated in its inability to implement them, industry will be facing compliance uncertainty, and the Statute's goals will be thwarted.

Moreover, a full environmental impact and multimedia assessment of the rulemaking, together with a robust Alternatives Analysis (“AA”) and full economic analysis of all feasible alternatives, is necessary in order for the DTSC to comply with the Statute, the Administrative Procedures Act (“APA”) and the California Environmental Quality Act (“CEQA”).

The Alliance submitted extensive comments on all prior versions of draft regulations, and hereby incorporates each of its previous comments by reference in this letter.¹ Throughout the regulatory development process, the Alliance has consistently advocated for revisions that will render the Green Chemistry Regulations more effective, efficient and expedient, while maximizing the potential for environmental benefits envisioned by the Statute.

I. EXECUTIVE SUMMARY

The Alliance has five major concerns with the July 2012 Proposal:

1. **Violation of Health and Safety Code § 25257.1**

Health and Safety Code § 25257.1 prohibits the Department from adopting regulations which limit, duplicate, and/or conflict with the regulatory authority of other departments or agencies. The July 2012 Proposal does not comply with § 25257.1; instead, it purports to allow the Department to “consider” other regulatory programs as it implements its own rules. This language falls short of the clear statutory directive to avoid duplicative or conflicting regulations and puts the Department in the position of evaluating whether the rules of other agencies “provide adequate protections” with respect to any issues of concern to the Department. The rules should be changed to provide a blanket exemption for products already regulated under existing schemes, including automobiles and their components.

2. **Violation of Due Process: The July 2012 Proposal Does Not Comply with Fundamental Requirements of the Administrative Procedure Act**

The July 2012 Proposal sets in motion a piecemeal process whereby the details of regulatory requirements will be developed through an evolving series of vaguely described processes, including the posting of lists, work plans, and other “guidance” on the Department’s website. These yet-to-be-developed documents will have a major impact on the actual tasks that the regulated community will be expected to perform in carrying out the requirements of the July 2012 Proposal, including the requirement to undertake the critical AAs that are the heart of July 2012 Proposal. All such documents should be subjected to the APA notice-and-comment process before they are finalized. Otherwise, the public and the regulated community will not have sufficient information to understand the full scope of the program, which is necessary in order to provide meaningful and thorough comments. The Department has a legal duty to expose all aspects of its regulatory program to public comment; it may not relegate key elements to some uncertain, piecemeal, future process conducted without APA compliance.

¹ Attachment C to this letter is an index of all previous Auto Alliance comments. We also incorporate by reference the exhaustive comments submitted by the Durable Products Coalition, European Union, TechAmerica, American Chemistry Council, Consumer Specialty Products Association, California Chamber of Commerce, California Foundation for Commerce and Education, and ICF International.

3. The July 2012 Proposal Is Not Supported By Required Economic Impact Analysis

The APA requires that a certain set of basic information be provided as a means to allowing stakeholders to understand how proposed regulations will impact the economy, businesses and consumers. The Department has not complied with this requirement. The Department claims that the July 2012 Proposal is too general, vague and open-ended for it to be able to identify how business would be impacted. While we share the Department's concern about the overbreadth and vagueness of the proposed rules, this does not excuse the Department from the requirement to comply with its statutory duties. Government Code § 11346.3(a) requires that state agencies proposing to adopt regulations assess the potential for adverse economic impacts on California businesses and individuals. It requires that a state agency "consider the proposal's impact on business, with consideration of industries affected including the ability of California businesses to compete with businesses in other states." Cal. Gov. Code § 11346.3(a)(2). The agency should prepare an "economic impact analysis that assesses whether and to what extent" the regulation will affect: creation or elimination of jobs in California, creation or elimination of existing businesses in California, the expansion of businesses currently doing business in California, and the benefits of the regulation to the health and welfare of Californians. *Id.* at § 11346.3(b).

4. Violation of CEQA

CEQA requires the preparation of a program Environmental Impact Report ("EIR") prior to adoption of the proposed regulations. The Statute's requirement that a multi-media analysis be prepared unless it is conclusively determined that there is no potential for a significant adverse effect on public health or the environment is a tacit, if not express, recognition of the real potential that adoption of Green Chemistry Regulations could result in significant environmental impacts.

Instead of preparing a programmatic EIR or the necessary multi-media analysis, the Department relies on a Notice of Exemption which alternatively asserts a statutory and categorical exemption to which it is not legally entitled. It is critically necessary for the Department to conduct a programmatic analysis now, so that it can make any modifications to the July 2012 Proposal that are necessary to address potentially significant environmental impacts and can analyze reasonable and feasible alternatives to specific provisions of the July 2012 Proposal - or the July 2012 Proposal as a whole - before the regulations are adopted and enforced.

DTSC attempts to limit the scope of the environmental review required by CEQA to the Department's own administrative activities, thereby ignoring any "reasonably foreseeable" activities that might occur as a result of the Department adopting the July 2012 Proposal. DTSC implies that the "project" consists merely of DTSC's "intellectual evaluation and analysis" (i.e., Department employees administering the program in an office environment). However, in its Economic Analysis, its Initial Statement of Reasons and in public statements, the Department states that it anticipates a growth in green business and overall growth in jobs. The Department also asserts that having a large list of Chemicals of Concern ("COCs") will serve as a signal to

the market to switch out of these chemicals to other product ingredients. If these potential changes are reasonably foreseeable enough to justify the purported economic benefits of the July 2012 Proposal, then the potential impacts of said changes must be analyzed under CEQA and in the multimedia analysis that is required under the Statute.

5. Other Substantive Problems with the July 2012 Proposal

A typical automobile has about 30,000 parts, and most individual parts are themselves composed of multiple materials. Each major automaker works with a global network of more than 1,000 suppliers. Automakers track over 2,500 substances in a common data system at a 0.1% level which has resulted in over 304 million data sheets and 100,000 system users. While DTSC acknowledges the complexity of automobiles in its inclusion of the concept of “highly durable products,” the proposed regulatory steps and structure do not accommodate the unique considerations of such products.

The July 2012 Proposal also fails to acknowledge the steps that automakers and suppliers are already taking to identify substances of concern and impose engineering standards that restrict the use of such substances and prevent regrettable substitutions. This system, now in place for more than a decade, is already a well-established tool for identifying substances of concern and imposing engineering standards that restrict the use of substances of concern and prevent regrettable substitutions.

Finally, the July 12 proposal fails to address the potential for conflict with the stringent performance, quality, reliability and safety standards that automakers must meet.

In light of the complexity of our products, we have the following concerns with respect to the workability of the July 2012 Proposal:

A. Chemical Scope

As the Alliance has stated repeatedly throughout the regulatory development process, the July 2012 Proposal, similar to all previous proposals, does not set forth an achievable scope of chemicals to be regulated. Although the Statute specifically calls for chemical prioritization, the July 2012 Proposal does not prioritize. Instead, it calls for an initial COC list of up to 1,200 chemicals and contemplates addressing trace amounts of chemicals (below the 0.1% level). The scope of chemicals to be regulated is simply not practical, meaningful or legally defensible.

Of particular concern is the DTSC’s plan to include in this list certain naturally occurring contaminants and contaminants from recycled materials. DTSC’s interpretation therefore completely dis-incentivizes automotive recycling (e.g., steel) and further discourages the use of recycled metals and plastics out of concern of likely untraceable and inconsequential levels of naturally occurring and historic trace materials.

B. Product Scope

The Alliance applauds the Department’s decision to limit the initial scope of products regulated under the July 2012 Proposal. That said, the definition of “component” remains vague,

allowing for complex assemblies such as engines to be the subject of an alternative analysis. Additionally, the petition process provided for in Article 4 of the July 2012 Proposal (and only recently added to the regulatory scheme) enables the regulation of an endless scope of products from day one, irrespective of whether said products are on the initial Priority Products list published by the Department. Given the gravity of the task before the Department, the scope of products to be regulated must be further refined.

C. Reporting Scope

Put simply, the July 2012 Proposal requires too much from both the Department and industry. The current draft of the regulations sets forth unworkable reporting obligations that implicate enormously high compliance costs, and which will require unprecedented amounts of Department manpower. Examples include the multiplicity of notifications and open-ended data requests. Moreover, it requires the submittal of information that is unnecessary and the submittal of which could compromise valuable trade secrets and stifle innovation. Prior to adoption, the scope of reporting under the July 2012 Proposal must be refined.

D. Regulatory Response Scheme

The July 2012 Proposal sets forth multiple regulatory responses that can be undertaken by the Department. While some of these potential responses are expressly provided for under the Statute, many are not. In addition, many would be overly burdensome for both the Department and industry, and some raise potential conflicts with existing regulatory schemes. These are discussed in some detail below but include the labeling and end of life requirements. The regulatory response scheme set forth in the July 2012 Proposal requires further consideration and revision prior to adoption of the regulations.

II. LEGAL DEFICIENCIES

In addition to textual issues that are described in Section III below, the July 2012 Proposal suffers from a number of significant legal deficiencies. These issues are described below.

1. Constitutional Violations

A. Ultra Vires and Overbreadth

As a threshold matter, the July 2012 proposal is overbroad. As an illustration of this fact, the Alliance focuses the Department's attention on the plain language of the Statute. Specifically, the plain language of Health and Safety Code § 25257.1:

- (a) This article does not limit and shall not be construed to limit the department's or any other department's or agency's existing authority over hazardous materials.
- (b) This article does not authorize the department to supersede the regulatory authority of any other department or agency.

- (c) The department shall not duplicate or adopt conflicting regulations for product categories already regulated or subject to pending regulation consistent with the purposes of this article.

The plain language of § 25257.1 directs the Department to develop regulations by identifying the universe of what is already regulated and drafting in such a way as to avoid any conflicts with that universe. As currently drafted, however, the July 2012 Proposal is in direct conflict with the Statute. Section 69503.2(a)(3) states:

Other Regulatory Programs. The Department shall consider the scope of other California and federal laws, and international agreements with the force of domestic law, under which the product or the Chemical(s) of Concern in the product is/are regulated, and the extent to which these other regulatory requirements address, and provide adequate protections with respect to, the same adverse public health and environmental impacts and exposure pathways that are being considered as a basis for the product being listed as a Priority Product. [Emphasis added.]

Under this language, the Department would treat the existence of other regulatory programs merely as a factor to be “considered,” which falls short of the clear statutory directive to avoid duplicative or conflicting regulations. The Department appears to be attempting to reserve the right to second-guess the degree to which the regulatory programs of other agencies “provide adequate protections” with respect to any issues of concern to the Department. Taken to its logical conclusion, this language can be understood to mean that unless existing regulations address the entire lifecycle of a product to the Department’s satisfaction, the Department retains the right to regulate. This provision in the July 2012 Proposal is not consistent with the statute, nor is it faithful to the policy objectives that the legislature was seeking to achieve with § 25257.1. The goal of the legislature was to impose a clear limit on the scope of the Department’s authority. In contrast, the July 2012 Proposal would put the Department in the role of evaluating the adequacy of other agencies’ regulations and filling in the “gaps” as perceived by the Department.

In order to comply with the statute, the Department must, prior to adoption of the July 2012 Proposal, either 1) undertake a robust analysis of where conflicts exist, and amend the regulations to address the same, or 2) amend the Proposal to include an express exemption for products already regulated. Absent these changes, the July 2012 Proposal is unreasonably overbroad and subject to challenge on the grounds that it is *ultra vires*.

B. Due Process

The Summary of the Proposed Regulations (“Summary”) that was released with the July 2012 Proposal includes a Section V, which highlights the key implementation milestones for

purposes of the regulations. Notably, many of the key milestones (e.g., the First COC list², First (proposed) Priority Products list, AA Guidance, etc.) will not be released until sometime after the regulations are adopted. In addition, §§ 69505 and 69505.3(b)(2)(A)(2) of the July 2012 Proposal reference the AA Guidance and other information that is to be posted on the Department's website (but not yet available), and that must be considered in developing AA under the regulations. It is not clear when this information will be released to the public, and how this information will inform the process.

The inability to review these critical documents during the public comment period on the July 2012 Proposal raises due process concerns. Because it is virtually impossible to effectively comment on the July 2012 Proposal and preserve our rights under the APA without having access to these other key documents, the Alliance is being deprived of meaningful participation in the regulatory adoption process for the July 2012 Proposal. Moreover, various aspects of the regulatory scheme give rise to the possibility that affected entities will be deprived of property by means of a regulatory adoption process that is wholly inadequate and does not comport with the requirements of the APA. If the Department does not address these notice issues and/or the failure to comply with APA requirements, adoption of the July 2012 Proposal will most certainly give rise to valid claims for violations of affected stakeholders procedural and substantive due process rights. *Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (There are two basic elements to a claim for violation of procedural due process: (1) deprivation of a protected interest, (2) by means of inadequate procedures.); *Rochin v. California*, 342 U.S. 165, 208 (1952) (Substantive due process can be summarized as a constitutional guarantee of respect for rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty." Where government action "shocks the conscience" or is "inherently impermissible" an action alleging a violation of substantive due process rights is proper.).

At a minimum, the Department must ensure that upon release, all documents critical to the implementation of the July 2012 Proposal are subjected to the same rigorous APA process that the July 2012 Proposal is being subjected to (see the additional discussion of notice-and-comment requirements below).

C. Vagueness/Ambiguity

Absent the ability to review the July 2012 Proposal together with the aforementioned key documents, and based upon the information that has been released to date, the Alliance must presume that one or more of the key documents referenced above will include subjective requirements that will place the validity of each said document and the July 2012 Proposal in jeopardy. Laws regulating industry must give fair notice of the conduct that is required or proscribed. This is essential to the protections provided by the Due Process Clause of the Fifth Amendment, which also requires the invalidation of impermissibly vague laws. *See FCC v. Fox*

² It is our understanding that the initial COC List has already been finalized. As a means to addressing some of the concerns set forth herein, the Auto Alliance urges the Department to release the list for consideration in connection with the July 2012 Proposal.

Television Stations, Inc. et al. 132 S.Ct. 2307, 2309 (2012), citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) and *United States v. Williams*, 553 U.S. 285, 304 (2008).

As alluded to above, the industries subject to compliance with the July 2012 Proposal are entitled to a regulatory proposal that includes objective standards that they can rely upon with certainty. To the extent that the July 2012 Proposal and/or other documents referenced in the July 2012 Proposal and released after adoption of the July 2012 Proposal do not contain reasonable, objective standards; they are all subject to legal challenge. See *People v. Mobil* (1983) 143 Cal.App.3d 261, 276, citing *Paccar, Inc. v. National Highway Traffic Safety*, 573 F.2d 632, 634 (9th Cir. 1978) (“Manufacturers who are held to standards of compliance are entitled to testing criteria that they can rely upon with certainty. The procedures should be rational and unequivocally demonstrable. Compliance should be based upon objective measures rather than subjective opinions of human beings . . . Statutes prescribing penalties, civil or criminal, must be drafted without ambiguity.”).

D. Commerce Clause

The aforementioned problems with the July 2012 Proposal implicate a fourth and final constitutional issue. As currently drafted, the July 2012 Proposal has the potential to result in unreasonable interference with interstate commerce by imposing excessive regulatory burdens on entities outside of California. As an example, product reformulation that is required under the July 2012 Proposal might ultimately impose excessive costs on manufacturers located in other states, potentially leading to job losses and other adverse economic consequences. Also, the proposal unfairly benefits manufacturers located in California who export to other states. These negative impacts may be of little concern to California, since the lost jobs would not be California jobs, but they may be a major concern in other states and regions. Moreover, the infrastructure that could ultimately be required to accomplish the Department’s preferred product reformulation may influence how and where said products are manufactured, forcing certain regulatory and land use decisions on the part of other states. In sum, the breadth (or overbreadth) of the July 2012 Proposal raises commerce clause/dormant commerce clause problems that should be further analyzed prior to adoption. This analysis should be undertaken in conjunction with the preparation of a comprehensive economic impact analysis, as discussed below.

2. APA Issues

A. Economic Impact Statement

The Economic Impact Statement prepared for the July 2012 Proposal is wholly deficient. After a cursory analysis, containing little more than general predictions unsupported by facts and analysis, the Department has concluded that: “this regulation may have a significant statewide economic impact directly affecting businesses, but that it is not expected to affect the ability of California businesses to compete with businesses in other states.” 45-Day Public Notice at 27.

Government Code § 11346.3 requires that state agencies proposing to adopt regulations assess the potential for adverse economic impacts on California businesses and individuals. Cal. Gov. Code § 11346.3(a). It requires that a state agency “consider the proposal’s impact on business, with consideration of industries affected including the ability of California businesses

to compete with businesses in other states.” *Id.* at § 11346.3(a)(2). The agency should prepare an “economic impact analysis that assesses whether and to what extent” the regulation will affect: creation or elimination of jobs in California, creation or elimination of existing businesses in California, the expansion of businesses currently doing business in California, and the benefits of the regulation to the health and welfare of Californians. *Id.* at § 11346.3(b). If, however, the agency initially determines that a regulation “will not have a significant, statewide adverse economic impact directly affecting business,” an agency does not have to prepare the economic impact analysis and “shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support its initial determination.” *Id.* at § 11346.5(a)(8). Section 11346.3(e) provides that:

Analyses conducted pursuant to this section are intended to provide agencies and the public with tools to determine whether the regulatory proposal is an efficient and effective means of implementing the policy decisions enacted in statute or by other provisions of law in the least burdensome manner. Regulatory impact analysis shall inform the agencies and the public of the economic consequences of regulatory choices, not reassess statutory policy. . .

In *Western States Petroleum Association v. Cal. State Bd. of Equalization*, 2010 WL 3384044 (Superior Ct. L.A. County, April 27, 2010), a superior court invalidated a California State Board of Equalization (“BOE”) rule on the grounds that the economic impact statement was not sufficient to comply with Government Code § 11346.3. The court found that “[t]he Economic Impact Statement prepared by the BOE does not comply with [the § 11346.3] requirement because the calculation of costs contained therein bears no relationship to the actual effect of the change from the [old to the new methodology], and also because the BOE did not determine the cost (tax) that a [particular type of refinery] would necessarily incur in reasonable compliance with the new rule [as required under Government Code § 11346.5(a)(9)], but instead the BOE attempted to determine the cumulative economic impact of the new rule based on the aggregate assessed value of all California refineries.”

Given the fact that the Department acknowledges several potential negative economic impacts in its 45-day public notice, e.g., the regulation “may have the effect of increasing the costs of products . . . may have a possible short term minimal impact on the reduction of jobs . . . may have a significant statewide economic impact directly affecting some businesses . . .,” (*see* 45-Day Public Notice at 29-30), a more thorough analysis of potential economic impacts is required. The aforementioned conclusions, coupled with a determination that it is not possible, due to the nature of the regulations, to quantify any of the potential economic costs (businesses, jobs, and otherwise) of the July 2012 Proposal, does not satisfy the requirements of the Government Code. The Department must provide additional information about potential economic impacts, and compare said costs to those of meaningful alternatives (*See* Health and Safety Code § 57005), if it hopes to comply with Government Code § 11346.3 and avoid a successful legal challenge.

By failing to provide an economic analysis, the Department has made it impossible to assess how automakers will be affected. We are concerned that the brief review of the potential economic impacts performed by an economist for the California Foundation for Commerce and

Education indicates that the impacts on industry could be severe. The report prepared for the California Foundation for Commerce and Education by Andrew Chang and Company is Attachment E to this letter.

We urge the Department to suspend this rulemaking until it conduct a full economic analysis as required by and to consider alternative regulatory designs and language in light of that analysis.

B. Notice-and-Comment Requirements

Article 5 of the July 2012 Proposal addresses the AA process, which is at the core of the July 2012 Proposal. Within Article 5, §§ 69505.3 and 69505.4 lay out a two-stage AA process (with five steps in the first stage and three steps in the second stage), describing in general terms the purposes and goals of each step. Other portions of Article 5 address such issues as the timing and mechanics of preparing and submitting an AA report, certain factual information that must be included as part of each AA report, and the review/approval process for AA reports.

The AA process has the potential to be very time-consuming and resource-intensive, and the July 2012 Proposal leaves open a great many unknowns with respect to the process. Just to cite one example, Stage 2, Step 1 requires the responsible entity to “evaluate and compare the economic impacts of the Priority Product and the alternatives.” § 69505.4(a)(2)(C). While the proposed rules do define the term “cost impact,” they neither specify a methodology to be used in carrying out the economic analysis, nor do they provide any indication regarding what level of detail the DTSC will require. The same can be said for many of the other tasks and evaluations required by Article 5.

Section 69505(a) of the July 2012 Proposal, which is the very first section under Article 5, provides as follows:

Before finalizing the initial list of Priority Products under § 69503.4, the Department shall make available on its website guidance materials to assist persons in performing AAs in accordance with this article. The Department shall periodically revise and update the guidance materials.

Presumably, the guidance referred to in § 69505(a) will be used by the Department to fill in the extensive “blanks” in the AA process and give responsible parties more concrete direction on how to carry out their Article 5 tasks.

It is clear that any AA guidance the Department may issue must be subject to notice-and-comment rulemaking under the California APA, as well as future work plans and listing decisions. The APA sets forth a mandatory process in which “regulations” are subject to a notice-and-comment process before they may be formally adopted. The notice-and-comment process provides a means for the regulated community and other interested parties to communicate pertinent information to the agencies in advance of rulemaking. Among other things, this helps to ensure that the standards are feasible and take into account the realities of the affected industry.

The APA defines the term “regulation” very broadly to include “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency.” Cal. Gov. Code § 11342(g). In other words, the applicability of the APA to a given agency communication or directive is determined by the nature of the communication or directive, not by what the agency has chosen to call it. Thus, any effort by the Department to create a “standard of general application,” to “make specific the law enforced or administered by it,” or to “govern the procedure” of such a law – even if styled by the agency as “guidance” – must be treated as a “regulation” under the APA, subject to notice and comment.

If an agency attempts to bypass the notice-and-comment requirements of the APA, the result can be an “underground regulation.” This is defined as any “regulation” that has not properly been adopted as a regulation and filed with the Secretary of State pursuant to the APA. 1 CCR § 250. Unless expressly exempted from the APA by statute, underground regulations are prohibited. *See, e.g.,* California Government Code §§ 11342.600, 11346. State agencies are prohibited from “issuing, utilizing, enforcing, or attempting to enforce” any “guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule” which is a regulation, and which has not been adopted under the APA. Cal. Gov. Code § 11340.5(a).

Here, where the DTSC is seeking to establish an all-new AA process applicable to a wide range of industries, it is especially important that the APA process be followed. Any direction the DTSC may provide to responsible entities with respect to the AA process, whether styled as “guidance” or otherwise, should be fully vetted with the public before it becomes effective. The DTSC has no more experience with the AA process than the regulated community does, and thus the DTSC needs all the feedback it can get on the processes and requirements it seeks to impose. It would not be in the best interests of the DTSC, the regulated community, or the State of California for the DTSC to release AA guidance that is unrealistic or excessively burdensome, or that would fail to achieve the desired objectives for one reason or another.

In light of the above, the Alliance hereby requests the DTSC to follow the APA notice-and-comment process for the guidance materials prepared by the DTSC pursuant to § 69505(a). In addition, since any guidance materials must go hand-in-hand with the formal regulations, it must be recognized that the publication of such guidance materials may alert the regulated community to new issues or concerns with respect to the July 2012 Proposal itself. To the extent that this occurs, the Alliance hereby requests that the DTSC accept further comments on the July 2012 Proposal at the same time that it accepts comments on the AA guidance materials.

C. Alternatives Analysis

The 45-day public notice that accompanied the release of the July 2012 Proposal includes a very brief discussion of alternatives. Among other things, the section titled: “Consideration of Alternatives” describes the purported alternatives to the July 2012 Proposal that have been considered and rejected by the Department, and clearly demonstrates that no meaningful

alternatives to the July 2012 Proposal have been given consideration over the course of the lengthy regulatory process.

Aside from the “Do Nothing” alternative, the Department claims to considered a “Products and Chemical Hazard Categories prioritization Process to Develop Safer Consumer Products,” and then goes on to describe earlier drafts of the proposed regulations as a third alternative. Prior drafts of what is now the July 2012 did not deviate substantially from the approach that is set forth in the July 2012 Proposal. Accordingly, it is apparent that the Department has done little more than summarily address one other possible regulatory approach.

Government Code § 57005 requires that before adopting any major regulation the Department “consider whether there is a less costly alternative or combination of alternatives which would be equally as effective in achieving increments of environmental protection in a manner that ensures full compliance with statutory mandates within the same amount of time as the proposed regulatory requirements.” The Alliance believes that there are several viable alternatives to the July 2012 Proposal that have yet to be considered. Attachment D to this letter identifies several alternative regulatory designs that would be equally, if not more, effective in achieving the aims of the Statute.

D. CEQA and Multimedia Environmental Review

The July 2012 Proposal has the real potential to result in “direct physical change[s] in the environment” and/or “reasonably foreseeable indirect physical change[s] in the environment,” and an initial study and programmatic environmental impact report must be completed prior to adoption of the July 2012 Proposal. See Public Resources Code § 21065 and CEQA Guidelines § 15378 (definitions of “Project”). See also CEQA Guidelines § 15168; and *Plastic Pipe and Fittings Association v. California Building Standards Commission* (2004) 124 Cal.App.4th 1390, 1413 (“Thus, an activity need not cause an immediate environmental impact to be considered a project. We conclude that the regulations here at issue may have a reasonably foreseeable indirect environmental impact for the reasons expressed [during public comment].”).

The Alliance has reviewed the draft Notice of Exemption (“NOE”) prepared to satisfy the Department’s obligations under CEQA. As indicated in previous correspondence, an NOE is not sufficient to satisfy the Department’s obligations. The NOE circulated in connection with the July 2012 Proposal does not change our opinion on this issue. Specifically, the Department’s belief that the July 2012 Proposal will “eliminate or reduce the adverse public health and environmental impacts of consumer products. . .” is simply not enough to support its reliance on a CEQA exemption. See e.g., *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644,656-658 (Categorical exemption is inapplicable where adoption of regulations tightening emission standards for architectural solvents will result in environmental effects.).

CEQA analysis is required to be conducted prior to adoption of the July 2012 Proposal, and should be conducted in a programmatic EIR that analyzes the potential for impacts and potential alternatives to the July 2012 Proposal and/or specific provisions of the July 2012 Proposal that may be feasible and might reduce the potential for significant environmental

impacts in connection with its adoption. Preparation of a program environmental document will ensure that the Department considers broad policy alternatives and program wide mitigation measures at a time when the agency has the greatest ability to deal with cumulative impact problems. A programmatic document will also play an important role in establishing a structure within which future reviews and related actions can most effectively be conducted. *See In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal. 4th 1143, 1169.

There is substantial evidence to support the conclusion that the July 2012 Proposal will cause or compel the use of alternative substances, the impacts of which are unknown and which if history is any guide, can be devastating.³ For example, the potential for environmental impacts associated with end-of-life management requirements contained in § 69506.8 of the July 2012 Proposal, and the anticipated increase in hazardous waste disposal that is likely to result from the same, must be evaluated prior to adoption of the July 2012 Proposal so that the Department can be certain that there are not feasible alternatives to § 69506.8 that would meet the objectives of the Statute and reduce the potential for environmental impacts. Finally, any perceived conflicts between the Statute and existing environmental laws that the Department believes may exempt them from CEQA and which may ultimately be the genesis of environmental impacts of their own, must also be appropriately analyzed and considered prior to adoption of the July 2012 Proposal. *See e.g., Mountain Lion Foundation et al. v. County of Kern Department of Planning and Development Services* (1997) 16 Cal.4th 105, (Delisting the Mojave ground squirrel was a discretionary action that was not properly treated as categorically exempt from CEQA. There was no irreconcilable conflict between CESA and CEQA that exempted the Fish and Game Commission's decision from CEQA's requirements and nothing in the language or history of CEQA or CESA indicated that the Legislature intended delisting to be exempt.). A more robust discussion of the requirements of CEQA and additional examples are included in Attachment F and in prior comments transmitted during the regulatory adoption process and referenced in Attachment C.

Finally, the Statute includes a separate and specific requirement that a multi-media environmental review be conducted unless it can be conclusively determined that the July 2012 Proposal will not result in environmental impacts. *See Health and Safety Code § 25252.5*. This requirement is in addition to the requirements of CEQA and is an express recognition of the potential that public health and environmental impacts are likely to result from adoption of Green Chemistry Regulations. While the California Environmental Policy Council ("CEPC") considered the multimedia environmental review issue in connection with a prior version of the regulations, neither the Department nor the CEPC have analyzed the question of whether multi-media review is required in connection with the July 2012 Proposal. The Statute is clear on this issue, and it is not appropriate to postpone that multimedia review until after the public comment period during the APA process, as it deprives stakeholders of meaningful comment on the proposed rulemaking.

3. Antitrust Issues

³ Some examples, such as methyl tertiary butyl ether ("MTBE"), are provided in the environmental analysis included in Attachment F.

There are aspects of the July 2012 Proposal that raise concerns from an antitrust standpoint. For example, the July 2012 Proposal encourages consortiums to work together in developing a single AA for an entire product line, and/or cooperate in an end-of-life management program, the anticompetitive effects of which could result in the Department selecting single source replacement for an entire industry. As a threshold matter, the Alliance notes that these two examples might compel activities that violate antitrust laws, lead to commoditization of goods, and stifle innovation that results from competitive markets.

That being said, the Alliance (and presumptively other such industry groups) are keenly aware of antitrust requirements, and cannot compromise compliance with antitrust laws. From a practical standpoint, this means that industry could be placed in a very difficult position should the July 2012 Proposal be adopted. As such, we encourage the Department to explore how it might revise the July 2012 Proposal to address these concerns and potential conflicts that may arise.

A. Barriers to Trade

As evidenced by the concerns recently raised in the Technical Barriers to Trade notification filed in August 2012 by the National Center for Standards and Certification Information (“NCSCI”) and the National Institute of Standards and Technology (“NIST”), there are concerns that the July 2012 Proposal will affect not only interstate commerce, but world trade, and potentially violate our international treaty obligations, as they may impose an illegal barrier to trade, as that term is defined by the World Trade Organization (“WTO”).⁴ The Department must consider whether there are revisions that would serve to narrow the scope of the July 2012 Proposal and that would ensure that the July 2012 Proposal is not ultimately deemed an illegal barrier to trade.

III. REGULATION TEXT

To be clear, the Alliance firmly believes automobiles should be exempted from the DTSC’s regulatory scheme. Given the extreme complexity of automobiles (as discussed previously), the plethora of existing federal and state regulations that apply to automobiles, and the scope of protections already imbedded in the decision making processes of automobile manufacturers, an exemption for our industry is warranted. This is the fundamental position of the Alliance, and it has been communicated separately to the Governor’s office. *See* Attachment G.

In addition, the Alliance also has many concerns about the July 2012 Proposal, some of which have already been enumerated in our prior comments. In Attachment A, we provide suggested language to help address five major concerns (discussed in Section I., above). We strongly urge the Department to incorporate these revisions in the regulations. It should be noted that this list is not all encompassing, but rather their inclusion will form a meaningful basis for the further discussions and changes necessary to create a workable program. To assist the

⁴ We incorporate by reference the concerns raised in the letter submitted by Mr. Guiseppe Casella of the European Union regarding the potential for unequal treatment of economic operators.

Department in this endeavor, we have provided a redline of the entire text in Attachment B which address only these five concerns and not all of our concerns with the Proposal. Additional concerns are listed below in order of appearance in the text.

1. **Article 1. General.**

A. **Purpose and Applicability**

As currently drafted, the language in this section is so broad that it could be read to include the regulation of tailpipe emissions. This is simply not the intent of the Statute, and tailpipe emissions are already regulated subject to a national program for vehicle greenhouse gas (“GHG”) emissions and fuel economy, as well as the criteria pollutant emission regulations already in place in California. Nevertheless, the following statement on p. 22 of the Initial Statement of Reasons (“ISOR”) signals the Department’s view that these regulations could play a role in the regulation of GHG emissions from vehicles: “For example, DTSC could identify the catalytic converter in a vehicle as the component that must undergo an AA due to the release of nitrous oxide, a potent greenhouse gas.”

This telling statement raises major concerns for a variety of reasons. First, the California legislature has delegated the regulation of motor vehicle emissions, including GHG emissions, to the California Air Resources Board. *See* Health and Safety Code § 43000 *et seq.* There is no reason for the DTSC to enter this field. Second, the State of California has recently made a commitment to President Obama and the U.S. Environmental Protection Agency (“EPA”) to support the so-called “One National Program,” which enables automobile manufacturers to comply one set of with federal GHG standards rather than state-by-state GHG regulations. The Department’s proposal undermines One National Program barely one model year into that program’s existence by suggesting that the DTSC, rather than the California Air Resources Board (“CARB”), can impose additional state-based GHG-related requirements on automakers.

Third, and as discussed previously, the Statute specifically prohibits the Department from regulating products where to do so would raise a conflict, or be duplicative of existing regulatory requirements. *See* Health and Safety Code § 25257.1 (“ . . . This article does not authorize the department to supersede the regulatory authority of any other department or agency. The department shall not duplicate or adopt conflicting regulations. . .”). Instead of complying with this Directive, the Department’s own ISOR posits this example of how the July 2012 Proposal can be used to impose new requirements that overlap and interfere with the regulatory authority of another agency.

A further troubling aspect of the catalytic converter example is that the basis of the DTSC’s “jurisdiction” for addressing the product is not the harmful properties of a chemical of concern contained within the product; instead, a release from the product is considered the COC. Priority products should be selected based on the COC in the product, which is the intent of the enabling statute:

On or before January 1, 2011, the department shall adopt regulations pursuant to this section that establish a process for evaluating chemicals of

concern in consumer products, and their potential alternatives, to determine how best to limit exposure or to reduce the level of hazard posed by a chemical of concern.” § 25253(a)(1) [emphasis added].

Furthermore, catalytic converters by themselves do not release GHGs; automobiles do, and catalytic converters are but one element of a much larger system. Any analysis of GHG emissions from motor vehicles necessarily encompasses a host of components, including fuels, potentially opening the door for an attempt to re-engineer large portions of the vehicle under the guise of green chemistry. For all of these reasons, the scope of the July 2012 Proposal is unworkable.

B. Definitions

The July 2012 Proposal expands the applicability of the regulation into areas not contemplated by the statute as is enumerated below.

“Adverse air quality impacts” – The current definition of adverse air quality impacts is so broad that it exceeds the scope of DTSC’s authority under the Statute. The definition must be revised to include quantitative thresholds that can be easily understood and referenced during the research and development and AA process, and so that the process for selecting Priority Products is appropriately transparent.

As the starting point for establishing quantitative thresholds, the Alliance suggests a review of thresholds applicable in the California Environmental Quality Act CEQA context. Notably, Public Resources Code § 21151.4(a) provides:

An environmental impact report shall not be certified or a negative declaration shall not be approved for any project involving the construction or alteration of a facility within one fourth of a mile of a school that might reasonably be anticipated to emit hazardous air emissions, or that would handle an extremely hazardous substances in a quantity equal to or greater than the state threshold quantity specified pursuant to subdivision (j) of Section 25532 of the Health and Safety Code... [Emphasis added].

Health and Safety Code § 25532(j) references 40 CFR 355, Appendix A, which includes a list of hazardous substances and the quantity intended to be regulated. Similarly, Health and Safety Code § 21151.4(a)(2) defines “hazardous air emissions,” and Health and Safety Code § 44321 clarifies what specific substances and quantities are intended to be regulated. Any project proponent should be able to effectively assess whether their project has the potential to exceed applicable thresholds by reviewing the aforementioned provisions so that, in an instance where there is the potential for triggering the same, they can make project changes meant to address potential exceedances prior to undertaking the environmental review process. In other words, by establishing transparent, quantifiable thresholds, the legislature has built-in the means, and an incentive to designing a project that complies with applicable standards. Moreover, this can be done in advance of subjecting any project to the formal regulatory process.

By way of example, Appendix G to the CEQA Guidelines provides direction on the means to establishing quantitative thresholds that would be appropriate in the green chemistry context. For example, pursuant to Appendix G, Section III., item (b), a project that violates stationary source air quality standards or contributes to existing or projected air quality violations will be determined to have a potentially significant air quality impact under CEQA. The means to determining whether the aforementioned violations will occur is quantifying baseline emissions in the project vicinity and comparing the baseline + project emissions to ambient air quality standards. No doubt, there are quantitative standards applicable to emissions of nitrogen oxides, particulate matter, sulfur oxides and other criteria pollutants intended to be covered by the definition of “adverse air quality impacts.” In the event baseline + project emissions exceed those quantitative standards, a potentially significant impact conclusion is reached unless: (1) the project is modified to eliminate the exceedance; or (2) mitigation intended to address the exceedance is imposed. In the GHG context, rules, regulations and guidance like EPA’s tailoring rule, South Coast Air Quality Management District’s (“SCAQMD”) Interim Guidance and Delaware and New York regulations applicable to hydrocarbon emissions, provide clarity about the levels of GHG emissions that implicate a potentially significant impact. Again, the existence of transparent, quantifiable thresholds gives project proponents a clear understanding of what constitutes a significant or adverse impact, and encourages design that will minimize or eliminate the same.

In order to remain consistent with the goals of the Statute, to ensure that the regulations are not overbroad, and as a means to encouraging forward thinking and innovative design, this definition must be revised to reference or incorporate quantitative guidelines for determining what an “adverse air quality impact” is.

“Adverse ecological impacts”/“Adverse public health impact”/“Physical chemical hazards”/“Physicochemical properties” – The Alliance is concerned that the OEHHA regulations that are also being adopted as part of the larger Green Chemistry Initiative, and that are referenced in these definitions, are too broad. In addition to the due process concerns raised by references to definitions from another potential rulemaking, the definitions lack a scientific basis, and exceed the grant of authority provided by the Statute. The Alliance urges the Department to coordinate with OEHHA on these issues, and to provide an opportunity for the public to comment on both sets of draft regulations in the same rulemaking process. This will ensure that definitions and standards are consistent and work in concert with the Statute’s prioritization mandate.

“Adverse waste and end-of-life impacts” – As currently drafted, this definition dictates that any stewardship plan adopted to address end-of-life impacts would be required to address not only the COCs that were the drivers for listing any Priority Product, but also for “Any other chemical contained in the alternatives that differs from the chemicals contained in the Priority Product.” In other words, it requires that any stewardship plan address the whole product, regardless of what chemical or component was selected for AA. This is troubling, and signifies that the manufacturers of Priority Products may ultimately be subject to end-of-life management requirements that have no rational connection to the chemicals or components that are the subject of this regulatory process. This definition is overbroad. The intent of the Statute is regulations

that focus on the COCs in certain designated components of any Priority Product, and this definition should be revised accordingly.

“Alternative” – The Alliance is also concerned about the breadth of this definition. The current version is written broadly enough that regulatory responses could apply to actions that only involved removal of any COC (without any other changes) in a Priority Product. From an efficiency standpoint, this makes little sense. Where a COC is removed, and no other changes are made, there is little or no likelihood of outcomes including “regrettable substitutions.” Accordingly, subsection (A) should be removed from this definition.

Again, in order for the Department to implement the July 2012 Proposal efficiently the regulations and their requirements must be streamlined to the extent possible.

“Component” – The current definition of component is also too broad. As currently drafted, it could still be read to include multi-component systems that are contained within a “highly durable product” like an automobile (e.g., engines, transmissions and fuel systems). Consistent with the concerns that were raised when the regulations did not distinguish between homogenous and assembled products, the Alliance is concerned that a definition this broad will complicate compliance for the auto industry, and for the manufacturers of other “highly durable products.” For a durable consumer product (such as an automobile), longer product cycles and product development times is required partially to ensure durability requirements are met. When the definition of components includes assemblies and systems which contain numerous components and the potential for hundreds of parts (such as in an engine or transmission), even longer testing and development time is required due to the complexity of the system. Moreover the proposed definition of “component” is not in keeping with the Department’s repeated statements regarding its intent to regulate materials in components and the accompanying examples given (adhesives used in carpets, a flame retardant in foam, etc.). Additionally, it is hard to see how such an approach would be effective at addressing a COC release to the environment when targeted actions are both more efficient and effective (as is the case in elimination of lead use in wheel weights and recent actions to address copper in brake pads). As such, we continue to believe that revisions to this definition are necessary.

“Consumer product/product” – While this definition appears to exempt certain “historic products,” or “a product that ceased to be manufactured prior to the date the product is listed as a Priority Product,” it does not go far enough. The Statute, specifically Health and Safety Code § 25253(b) makes it clear that the legislature did not intend to regulate certain products that were manufactured prior to development of a Priority Products list. While the Priority Product listing comes before the analysis, from a practical perspective, the legislature could not have intended to regulate assembled products like automobiles (which require a significant investment, and that are intended to remain viable long after their manufacture) in a manner that would require *de facto* replacement anytime an individual component becomes subject to a regulatory response that might require the same. From a practical standpoint, the term “historic product” must include service and repair component(s) for any automobile that is manufactured or produced prior to the date the component(s) are listed as a Priority Product. A broader definition of “historic products” must be incorporated into the July 2012 Proposal.

“Reliable information”/“Reliable information demonstrating the occurrence, or potential occurrence, of exposures to a chemical” are overly broad and not based on solid scientific principles. As a threshold matter, it is not clear why two separate definitions are required here. Accordingly, we suggest that they be consolidated, and that one definition for “Scientifically reliable information” replace § 69501.1 (52) and (53) in the July 2012 Proposal. This definition must exclude “other literature” as that is overbroad. This definition must also exclude individual published peer-reviewed studies that do not meet the OECD quality and reliability standards. Only studies confirmed by a recognized and established scientific body should be included in the definition of “reliable information.” Without these changes, DTSC risks undermining its entire program.

Notwithstanding the above, as currently drafted, both §§ 69501.1(52) and (53) are arbitrary, and not based on science. There is no clear indication about why studies “conducted, developed, submitted or reviewed and accepted by an international, federal, state, or local agency for compliance or other regulatory purposes” would constitute “reliable information” vis-à-vis others. Moreover, the categories listed in (52)(A)-(D) are not tied to objective standards that manufactures can rely upon. Again, presence does not dictate exposure. Accordingly, (A)-(D) should include or reference quantifiable standards for determining whether an occurrence, potential occurrence or exposure to a chemical can be demonstrated.

As an alternative to the language currently contained in § 69501.1(52), the Alliance offers some suggested edits in the attached redline, and also supports the definition proposed by the Green Chemistry Alliance (“GCA”) in prior comments:

Reliable information’ is from studies or data generated according to valid accepted testing protocols in which the test parameters documented are based on specific testing guidelines or in which all parameters described are comparable to a guideline method. Where such studies or data are not available, the results from accepted models and quantitative structure activity relationship (“QSAR”) approaches validated in keeping with OECD principles of validation for regulatory purposes may be considered. The methodology used by the Organization for Economic Cooperation and Development (OECD) in Chapter 3 of the Manual for Investigation of HPV Chemicals (OECD Secretariat, July 2007) shall be used for the determination of reliable studies.

In order to address Alliance concerns about § 69501.1(52), we suggest tying (A)-(D) to reportable quantities.

C. Information Submission and Retention Requirements

The July 2012 Proposal continues to include a requirement that most relevant submissions be signed and certified under oath by the owner or officer of the company or their authorized representative and by the individual responsible for preparing or overseeing the preparation of the documentation or information. Only the person preparing the relevant document should need to verify the accuracy of the document they prepared. It is not necessary

for senior management to review every notification sent to the Department, particularly the proliferation of notifications that this proposed regulation contemplates. The requirement for owner and operator involvement and to require two sets of signatures is over-reaching and impractical. It creates an administrative burden that will not further the accuracy of the documents filed with the Department, since the person with most knowledge is already required to sign. Moreover, it is not necessary to effectuate the Statute.

D. Chemical and Product Information

Per statements by the Department, the intent of these provisions is only to touch information generated in connection with Priority Products, and is not to require the generation of new information and paper by responsible entities prior to initiation of the AA process. As currently drafted, subsection (a) is much broader than this stated intent. First, subsections (a)(3) and (a)(4) permit the Department to request a “responsible entity” to make available/generate information without specifying when this power might be invoked. In addition, the definition of “responsible entity” should be limited to manufacturers, importers and retailers of “Priority Products,” rather than manufacturers, importers and retailers of any “consumer product.” Finally, if the Department’s intent is as it suggests, it should not be necessary to generate new information in response to any request. Therefore, subsection (4) is unnecessary. The language in subsection (a) must be revised for consistency with the Department’s stated goals, and the Statute.

2. Article 2. Chemicals of Concern and Consumer Product Prioritization Process.

A. COC Identification

The July 2012 Proposal lacks needed scientific prioritization principles and provisions. The COC list should ultimately reflect serious thinking and study on the potential harms and exposures from chemicals listed. The process here is too loose and overbroad. It allows the Department to add to the COC List at any time based on “reliable information,” the current definition of which raises the concerns discussed above. The result is that 1,200 or more chemicals will be on the list (which can be expanded at will), when the list can and should be further refined in order to facilitate efficiency in implementation of the regulations, and must be refined if the regulations are to maintain consistency with the Statute. *See* Health and Safety Code § 25252 (“On or before January 1, 2011, the department shall adopt regulations to establish a process to identify and prioritize those chemicals or chemical ingredients in consumer products that may be considered as being a chemical of concern...” [emphasis added]). *See also Hunter v. City of Whittier* (1989) 209 Cal.App.3d 588 (Ordinance too broad to satisfy the purpose of implementing authority unless standards were objective and reasonably defined.).

In order for the Department to truly send signals to the marketplace on what chemicals present the greatest concern, and to stimulate the immediate cooperation of industry to find safer substitutes, the COC list must be carefully and thoughtfully developed and prioritized. As this draft currently contemplates, the initial list will be over 1,000 chemicals and the signal to the

marketplace is dispersed and unknown. The reaction of industry will likely be to wait and see what priority products are selected.

Given that the Department has not actually published the list of chemicals, but rather provided a vague list of lists, it cannot even be known what the possible impacts are to product manufacturers. If the list will not be made available during the comment period for this rulemaking, then the future process for listing COCs must comply with the APA. The Department must provide a notice and comment period prior to identification and finalization of the COC list. This will allow interested parties to submit valuable information that may not currently be available to the Department that will better inform its ultimate COC listing determinations.

A step-wise approach to the identification of COCs would serve the Department's goals without increasing the regulated community's burden, and would render the prioritization process more transparent and fair. Absent revisions of this nature, this section is overbroad and does not reflect the intent of the Statute, nor will it be effective. A list of 1,200 COCs is an order of magnitude too large to implement effective reductions of listed chemicals, reflecting a lack of effective prioritization. The Alliance urges the Department to consider how it might revise this section for improvement in that regard.

3. Article 3. Chemicals of Concern and Consumer Product Prioritization Process.

A. Priority Products Prioritization Factors

Generally, § 69503.2 is improved as it is much more focused on exposures, potential exposures, and pathways for exposure. This will appropriately limit the universe of products to those with the greatest potential to harm the public and the environment, and is consistent with the goals of the Statute.

However, rather than actually setting forth the methodology the Department will utilize to prioritize products, the July 2012 Proposal merely identifies a number of factors the Department's staff will consider. The actual prioritization then undergoes a 180-day decision making process that lacks clear criteria. This will discourage manufacturers from seeking to get ahead of these regulations and accelerate their design of green safer products or their choice of greener, safer chemical ingredients. We urge the Department to completely re-craft this process, and to instead design a process that engages in triage and prioritization based on sound scientific principles, using a robust peer and public review.

In addition, § 69503.2 violates the statutory requirement for an exemption where there would be a conflict with, or duplication of existing laws and regulations. This should not be a judgment call of DTSC; the existence of other laws that conflict with or duplicate should, in itself, be sufficient to exempt those products. Thus, it is necessary that revisions address this inconsistency between the Statute and the July 2012 Proposal.

B. Priority Products List

Section 69503.4(a)(2)(B)(2) of the July 2012 Proposal provides that for each “highly durable product” the Department shall specify no more than ten components and/or homogenous materials per product every three years. Given the enormity of the Department’s undertaking, and the complexity of highly durable products, the Alliance is concerned that this schedule is much too aggressive for both the Department and industry. The Alliance suggests that a change to no more than five components per product every three years is still an aggressive undertaking, but one that may be achievable. Additionally, without changing the definition of components as we have suggested, the limit of even five components being addressed every three years is impractical, particularly if the components include complex assemblies such as engines and transmissions.

Section 69503.4(f) provides that the Department shall review and revise the Priority Products list at least once every three years. This implies that the Department could make changes at intervals shorter than three years. Consistent with the above, this provision is simply too aggressive and should be revised accordingly.

C. AA Threshold Exemption

The Alliance supports the Department’s decision to abandon the term *de minimis* threshold, and instead utilize “Alternatives Analysis Threshold.” Moreover, it appreciates the fact that § 69503.5(c) gives the Department flexibility in specifying the threshold for each COC that is the basis for a product or component being listed as a Priority Product. That said, in order for the implications of the threshold to be clearly understood and practically implemented, we recommend that the reliable information standard be further clarified in this section of the July 2012 Proposal. Specifically, the Alliance recommends that the following definition be added and referenced in § 69503.5:

Practical Quantitation Limit (PQL)” means the minimum concentration of a chemical that can be precisely quantified (percent relative standard deviation within +/- 10%) with an acceptable bias (percent recovery within 90-110%). An analytical result below the PQL obtained from an accepted analytical test method for the chemicals of concern in the listed priority product results in an exemption for that product from the alternatives assessment process.

Alternative Analysis thresholds should then be set at or above the PQL.

In addition, and in an effort to streamline the regulatory process by focusing on an achievable scope of chemicals, we recommend that § 69503.5(c)(1) be revised to exempt naturally occurring contaminants and recycled material contaminants from consideration. Attempting to regulate trace levels of naturally occurring contaminants is impractical and counterproductive to controlling, reducing or eliminating intentionally added COCs. Addressing contaminants in recycled materials will surely inhibit the use of recycled content in products, which cannot be the Department’s intent.

The focus of the Green Chemistry Statute is on design of safer consumer products and design of safer green chemistries and materials. By not exempting contaminants, the Department

is redirecting the energies and monies of industry from the important goals of the statute to lower value environmental goals.

D. AA Threshold Exemption Notifications

Section 69503.5 should be struck from the regulation. If a product contains a COC which is below the alternative assessment threshold, notification to the Department of such should not be required. The point of the threshold is to specify a level above which action should be required and, conversely, below which no action is required. An exemption notification requirement will detract resources from the task at hand – reducing COCs – and is also counterproductive. Trying to account for trace levels of chemicals, which are acknowledged by the Department as not being a priority because they are below the AA threshold set by the Department, serves no purpose and will create a burden for responsible companies. Companies (such as Alliance members) which are actively managing chemicals in their products will face a massive paperwork exercise. Companies which are not managing the chemicals in their products will simply not submit notifications. (If they do not know the chemical content of their products they will certainly not know the trace amount of chemicals which are presumably not intentionally added.) Again, with this provision, the Department is redirecting the energies and monies of industry from the important goals of the statute to administrative paperwork tasks.

As an illustration of the inefficiency likely to be associated with the AA Exemption Notification requirement, see subsection (c) which requires that AA Exemption Notification continue to be revisited and refined over the life of any product. Again, self-policing under the threat of enforcement seems more practical, and would eliminate a significant administrative burden.

4. Article 4. Petition for Inclusion of a Chemical or Product in the Identification and Prioritization Processes.

The Alliance remains concerned that this Article still contains no requirement that the Department include affected manufacturers and importers in the petition process. In order to comport with due process requirements, the provisions in this article, and specifically §69504, should be revised to provide for affected manufacturer/importer participation as early as possible, and should include a scientific peer review process.

A. Applicability and Petition Contents

Consistent with prior comments about the need for the definition of “reliable information” to be based on sound scientific principles, petitions to the Department to add COCs to the COC list must be based on sound scientific data, and the rigor of a science-based prioritization review subject to full due process rights of the APA. The regulations must include scientifically-established thresholds and standards that must be met in order for a petition to be granted.

5. Article 5. AA.

A. AA: General Provisions

While § 69505.1(a)(1) recognizes that the term “Priority Product” may mean a listed product, or the component(s) and/or homogeneous materials(s) within a component in the product that are the focus of the AA, it does not appear that the remainder § 69505.1, and many other provisions in the July 2012 Proposal acknowledge these critical distinctions. As an example, the Alliance directs the Department’s attention to § 69505.1(a)(2) in the July 2012 Proposal which provides: “All references in this article to ‘product’ mean the product as a whole.”

From a practical standpoint, the language in subsection (a)(2) dictates that the entirety of a “highly durable product” will ultimately become the focus of an AA even though the Department has repeatedly stated its position that this is not its intent. To prevent this outcome, the Alliance urges the Department to make the revisions in § 69505.1 and in other provisions of the July 2012 Proposal that are necessary to ensure that, where applicable, component(s) and/or homogeneous material(s) in components, rather than a larger product, are the focus of an AA.

The language contained at § 69505.1(g)(1)(F) is simply impractical. First, like the AA Threshold exemption, the COC Removal Notice is wholly unnecessary. Nonetheless, once a COC has been removed, a product reformulated, and a COC Removal Notice submitted, requiring that the responsible entity also track all existing inventory and ensure that products still containing that COC not be placed into the stream of commerce in California, while also meeting its existing regulatory burdens and complying with all other aspects of the July 2012 Proposal is simply impractical. As the Department has acknowledged repeatedly, the regulations are intended to be forward looking, and this provision is inconsistent with that intention. The Alliance suggests that this provision be deleted. At the very least, responsible entities must be given longer than 180-days to satisfy this requirement.

B. AA: First Stage

While subsection (b)(3) allows the responsible entity to eliminate alternatives during this initial screening phase, it does not allow eliminating alternatives based upon economic, consumer acceptance or performance considerations. These are important factors in choosing an alternative that is actually implementable. Additionally, subsection (b)(3)(A) is overly broad and would require a review of chemicals not on the COC lists. Suggested revisions to address these issues is in the attached redline.

C. Alternatives Analysis Reports

The provisions of § 69505.5 are simply too broad. The massive amount of information that the Department proposes be collected will render implementation of the regulations burdensome for the both Department and industry. Moreover, a regulatory framework with more reasonable parameters would satisfy the intent of the Statute. As an example of where § 69505.5 could be revised, the requirement that responsible entities provide the name and contact information for all parties who purchased products within the last 12 months is wholly unnecessary, and a task that will require hours of manpower in and of itself. Moreover, it is confidential business information that cannot be disclosed. Again, if the goal of the July 2012

Proposal is to be forward looking, generating this type of information simply should not be a priority.

6. Article 6. Regulatory Responses.

A. AA Report Supplemental Information Requirements

This section provides that the Department “may at any time” require the responsible entity to “provide any information” and/or “obtain or develop information to fill one or more of the information gaps...” The Department has indicated that its intent is not to require the generation of information in order to fill data gaps. This provision appears overly broad and contrary to that stated intent. Accordingly, the Alliance requests that the Department revise this section for consistency with prior statements of intent.

B. Product Information for Consumers

Section 69506.4 suffers from the same problems discussed with references to § 69501.1(a)(1), above. It requires that information be provided for the whole of a product, as opposed to the component(s) and/or homogeneous material(s) within a component in the product that are the focus of the regulation. Therefore, it also must be revised to reflect what the Department has stated is its intent.

Subsection (a)(1)(D) provides that the information made available to consumers include identification of any end-of-life management program and be available for as long as the product is in the stream of commerce. To the extent there is a disagreement about inclusion of the end-of-life management requirement, this provision is also objectionable and should be revised. See below for further discussion.

C. Use Restrictions on Chemical(s) of Concern and Consumer Products

The provisions in § 69506.5 which would allow the Department to restrict who may purchase or use a product go beyond the authority conveyed in the Statute and are wholly unnecessary to effectuate its intent. Accordingly, we suggest that § 69506.5(a) through (d) be deleted in its entirety.

D. End-of-Life Management Requirement

This section requires manufacturers to develop, fund and manage an end-of-life stewardship program for their products that generate hazardous waste. This provision is unnecessary. The statute does not authorize imposition of financial guarantees or compensation to retailers, local governments and others. Also, it is pre-empted by the federal Resource Conservation and Recovery Act (“RCRA”) insofar as it conflicts with many of RCRA’s provisions, and RCRA occupies the field where these issues of end-of-life for hazardous waste management are concerned. RCRA already requires financial guarantees for end-of-life management of hazardous waste. Moreover, RCRA requires all owners and operators of facilities that treat, store, or dispose of hazardous waste to provide financial assurance.

It may also be in conflict with the Electronic Waste Recycling Act and associated regulations promulgated by the Department. Moreover, it is excessively punitive in light of the fact that manufactures already paying an advanced disposal fee in connection with the Electronic Waste Recycling Act will now potentially be asked to provide an additional up-front guarantee of environmental practices that occur at the back end of their product's life-cycle. For these reasons, the requirements (most notably the financial guarantee aspect of the requirements) are not legally defensible and this provision must be revised.

Finally, subsection (d) provides that a responsible entity may request an exemption from the requirement to provide an end-of-life management program. Once again, however, the subsection provides no standards or clear criteria for obtaining the same. This provides industry no direction with respect to what might be considered compelling, and breeds a system where there are no clear arguments in the event of an arbitrary decision.

For each of the reasons set forth above, this section requires extensive revisions. The Department should delete the end-of-life management requirement and/or build flexibility into the existing provisions that would allow for opt-out by individual companies or industries (like the auto industry) that can demonstrate (by meeting quantitative standards) that a recycling system is in place or that they have voluntarily implemented their own effective take-back or recycling programs. Provisions of this nature would provide an incentive to manufacturers developing innovative end-of-life strategies on their own, and would minimize the Department's burden in a time of scarce resources and economic uncertainty. At a minimum, the need for the financial guarantee provisions contained at § 69506.8(a)(2)(A) should be revisited.

E. Regulatory Response Selection and Re-Evaluation

While the Alliance understands that the Statute conveys authority that allows the Department to impose one or more regulatory responses, it is concerned about the implications of the language contained at § 69506.10(b). From a practical standpoint, certainty is of relevance. As currently drafted, this provision could mean that a responsible entity invests significant capital in undertaking a regulatory response imposed by the Department, only to be told that the Department has changed its mind, and would instead like to impose a different regulatory response. The threat of this sort of outcome is certain to have a chilling effect on business and innovation in California. Moreover, it is not necessary to effectuate the intent of the Statute. Accordingly, we suggest that subsection (b) be deleted in its entirety.

Additionally, there should be a point where the responsible agency is deemed to have complied with its obligations under the rules and the process is concluded, as opposed to a never-ending re-evaluation of the chemical and product combination. If new evidence of a concern appears, the product and chemical combination should once again go through a meaningful product prioritization process. The Department must add a "no further action" provision to the draft regulations.

F. Exemption from Regulatory Response Requirements

Subsection (b)(6) provides that if a responsible entity claims exemption from regulatory response requirements because to require the same would conflict with, or be duplicative of,

other applicable state or federal laws, they submit a formal request for exemption from the Department. The Statute specifically precludes the Department from requiring a regulatory response where either of these two scenarios occurs. Accordingly, no notification should be required, nor does requiring one appear to be authorized by the statute. This requirement should be deleted.

7. Article 10. Trade Secret Protection.

This Article addresses trade secret protection. While the existing provisions are not objectionable, the Article would be more appropriately protective if it covered a broader category of information and set forth how the Department intends to ensure that trade secrets are actually protected.

As a means to being appropriately protective this Article should address “Confidential Business Information,” which includes not only trade secrets, but also commercial or financial information that is privileged or confidential, including customer lists. Moreover, it must set forth a protocol that contains information security systems, employee protocols and training to assure that the Department has the ability to protect trade secret information that is supplied in connection with the July 2012 Proposal. To our knowledge, the Department does not have such a protocol in place, and without it, there is no means to actually ensuring that trade secret information is actually protected, even if it is the Department’s intent to do so.

A. Assertion of a Claim of Trade Secret Protection

Notwithstanding the above, the amount of information that must be provided to assert trade secret protection appears more cumbersome than necessary. As an example, see federal regulations at 49 CFR Part 512, which provide for protection of the broader category of “Confidential Business Information” and require far less information to support a claim.

8. Other Issues

Finally, the Alliance is also concerned that the ISOR does not provide any justification to support the adoption of language discussed in detail above. *See* California Government Code § 11346.2(b) (Requires that the ISOR include: (1) A description of reasonable alternatives including the reasons for rejecting said alternatives and a description of alternatives that would lessen any adverse impacts; (2) “efforts, in connection with a proposed rulemaking action, to avoid unnecessary duplication or conflicts with federal regulations contained in the Code of Federal Regulations addressing the same issues;” and (3) “A statement of the specific purpose of each adoption, amendment, or repeal, the problem the agency intends to address, and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed. . .”).

A. Alternatives

Consistent with the AA comments set forth in Section II., above, the Alliance also wishes to point out that the AA prepared in connection with the July 2012 Proposal is also in conflict

with the Office of Administrative Law (“OAL”) process set forth in Government Code § 11346.2(b) for two reasons:

1. The ISOR does not include a description of reasonable alternatives, and reasons for rejecting said alternatives.
2. The ISOR does not include a description of reasonable alternatives to the regulation that would lessen any adverse impact on small business, and the Department’s reasons for rejecting the same.

Again, the Department has done little more than briefly consider and summarily address one additional regulatory approach, which, given the importance of these regulations and the potential impacts to affected parties, cannot possibly constitute an analysis of “reasonable alternatives.” In addition, however, and also discussed in Section II., above, there is no doubt that the July 2012 Proposal will have economic impacts on all businesses (including small businesses). The ISOR does not include an analysis of any alternatives that would lessen adverse impacts on small business and the Department’s reasons for rejecting said alternatives.

B. Unnecessary Duplication/Conflicts

The ISOR contains a cursory analysis of why the July 2012 Proposal does not conflict with the federal Toxic Substances Control Act of 1976 (“TSCA”) and, therefore, does not duplicate or conflict with existing federal law. While this may be the case with respect to TSCA, the breadth of the July 2012 Proposal dictates that it most certainly conflicts with other federal regulatory schemes that address the environment. s the Ultra Vires and Overbreadth discussion in Section I., above. Moreover, as discussed in several places above, the July 2012 Proposal’s provisions on Trade Secret Protections are far more onerous than existing federal requirements, and the Department has failed to provide any reasonable explanation for why that is the case.

C. Statements of Specific Purpose and Rationale

The statements of specific purpose for each provision in the July 2012 Proposal do not meet the standard set forth in the Government Code. In many places, the ISOR simply repeats the language contained in the July 2012 proposal, rather than explaining the purpose of the same, problem intended to be addressed, etc. As examples, the Alliance would direct the Department’s attention to the ISOR language on: Chemical and Product Information; COC Identification; and Trade Secret Protection.

The statement of specific purpose developed in connection with § 69501.4(a) of the July 2012 Proposal does not meet the standard set forth in Government Code § 11346.2(b). It does little more than repeat the regulatory language. Moreover, despite repeated comments and repeated Department statements about the intent of the product information provisions, it contains no explanation for why subsection (4), which would allow the Department to request that responsible entities or chemical manufacturers generate new information and provide said information to the Department (irrespective of whether their chemical or product is contained on the initial COC or Priority Product lists), is necessary to carry out the purpose of the Statute.

Despite repeated comments explaining why the COC identification process that is set forth in the proposed regulations must comply with the plain language of Health and Safety Code § 25252 and “prioritize” chemicals that are found in consumer products, the July 2012 Proposal still sets forth a regulatory scheme whereby as many as 1,200 chemicals will be contained in the initial COC list. The ISOR itself acknowledges that the initial COC list is “robust,” and suggests the Department’s understanding that what will be accomplished pursuant to § 69502.2 in the July 2012 Proposal is something less than the prioritization that the legislature envisioned when it adopted the Statute. *See* ISOR at pp. 56-57. Furthermore, the ISOR does not include the rationale for the Department’s determination that a regulatory scheme that does not better “prioritize” is necessary to carry out the purpose and address the problem for which it is proposed. Without this explanation, one has no choice but to assume that there is a means to better “prioritizing” COCs and developing a more manageable initial list of COCs, a list that would better reflect the intent of the Statute and more appropriately carry out its purpose. The mere fact that longer lists guide alternative regulatory schemes is not enough to justify the Department’s approach where further prioritization is both reasonable and feasible.

As discussed above, the July 2012 Proposal provisions relating to trade secrets and trade secret protections are unnecessarily burdensome and wholly inadequate to ensure the protection of valuable trade secrets. Aside from summarizing the requirements of Article 10 in the July 2012 Proposal, the ISOR does little to explain why such a narrow scope of protection is reasonable and why such a burdensome process for asserting trade secret protection is necessary to carry out the purposes of the Statute. Where a parallel scheme exists under applicable federal regulations, and such critical information is at stake, the Government Code requires a better explanation for why broader protection of trade secrets is not enough to carry out the purpose of the Statute and to address the issues that gave rise to the Green Chemistry Initiative.

While the Alliance has chosen only to highlight these specific examples, similar deficiencies exist with respect to multiple ISOR statements. The Alliance urges the Department to revisit the statements of specific purpose for every provision of the July 2012 Proposal with an eye toward ensuring that the plain language of Government Code § 11346.2(b)(1) is satisfied with respect to each.

IV. CONCLUSION

The Alliance will continue to communicate with the Department in hopes of obtaining a practical and meaningful regulation which implements the principles of green chemistry. To that end, we have supplied numerous attachments to this letter that we hope will serve as a guide to the Department as it embarks on its next draft.

As always, thank you for your time and consideration of our comments. If you have any questions, please feel free to contact me.

Ms. Jones, DTSC
October 11, 2012
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Sincerely,



Filipa Rio
Senior Manager, Environmental Affairs,

Attachments: Attachment A: Top 5 Issues: Critically Necessary Text Revisions
Attachment B: Complete Text Redline to Make Practical, Ensure Compliance is Feasible and Improve Workability of Regulations
Attachment C: Index of Alliance Comments (with CD-Rom)
Attachment D: APA Regulatory Alternatives
Attachment E: Economic Analysis
Attachment F: Environmental Impacts Analysis (with CD-Rom)
Attachment G: Letter to Governor Brown