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Secretary Linda S. Adams, Chair
California Environmental Policy Council
1001 I Street, P.O. Box 2815
Sacramento, California 95812

Re: Need for a Multimedia Evaluation and CEQA Compliance of the Safer Consumer Product Alternatives Regulations

Dear Secretary Adams:

We have reviewed the Department of Toxic Substance Control ("DTSC") report, entitled Recommendation on the Need for a Multimedia Evaluation of the Safer Consumer Product Alternatives Regulations (the "Report"). The Report, intended to illicit a California Environmental Policy Council ("CEPC") determination that the multimedia lifecycle evaluation required under Health and Safety Code § 25252.5 is not required, concludes that, by design, the Safer Consumer Product Alternatives draft regulations (the "Proposed Regulations") will have no significant adverse impact on public health or the environment. The conclusion is unsupported.

Overwhelming evidence and common sense dictate that adoption of the Proposed Regulations could result in significant adverse environmental effects. For this reason, the CEPC should decline to adopt DTSC's recommendation, and the necessary multimedia lifecycle analysis should be prepared. Moreover, the CEPC should utilize this opportunity to inform DTSC that this potential for adverse environmental impacts means further California Environmental Quality Act ("CEQA") analysis must be undertaken prior to the adoption of the Proposed Regulations.

The Draft Regulations May Result in Potentially Significant Environmental Impacts

While CEQA compliance is an obligation that is separate and distinct from Health and Safety Code § 25252.5 and its requirements, CEQA is a useful tool that can inform the analysis of potential environmental impacts in any context. Following is a discussion of relevant CEQA requirements, which is instructive in an assessment of whether a multimedia lifecycle analysis should be required.

Deciding whether agency action requires CEQA compliance is a three-tiered process informed by three questions:

(1) Is there a project?

(2) If there is a project, is that project exempt?

(3) If the project is not exempt, does it have the potential to result in significant environmental effects?

"'Project' includes among other things, an activity directly undertaken by a public agency that has the potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment…" (CEQA Guidelines § 15378(a)(1).) Adoption of a rule or regulation can be a "project" subject to CEQA. (*Wildlife Alive v. Chickering*, 18 Cal.3d 190 (1976); *Plastic Pipe & Fittings Assn. v. California Building Standards Com.*, 124 Cal.App.4th 1390 (2004).) A "project" must also be discretionary. "'Discretionary' means any project which requires the exercise of judgment or deliberation…" (CEQA Guidelines § 15357.)

Once an agency determines its action is a "project", it must then consider whether it is covered by a CEQA exemption. If the "project" is not exempt, the agency must prepare an Initial Study to determine whether the "project" has the potential to result in a significant environmental effect, or move straight to preparing an Environmental Impact Report ("EIR"). (Id. at §§ 15063 and 15064.) An EIR must be prepared when an Initial Study supports a fair argument that the "project" may have a significant environmental effect. (CEQA Guidelines § 15064(f)(1).)

The Draft Regulations are a Project Requiring CEQA Compliance

Adoption of the Proposed Regulations is a discretionary activity being directly undertaken by DTSC, and rulemaking does not fall outside the CEQA definition of "project". DTSC also has broad discretion to adopt regulations that carry out the purposes of the statute and the public process currently being undertaken is indicative of DTSC's opportunity for deliberation. Finally, there is "substantial evidence" to support a fair argument that adoption of the Proposed Regulations has the potential to result in a direct physical change and/or a reasonably foreseeable indirect physical change to the environment.

First, implied in the Legislature's inclusion of Health and Safety Code § 25252.5 (multimedia life cycle evaluation) is the potential for environmental impacts. The Legislature recognized the potential for adverse environmental impacts even if DTSC does not. Additionally, however, history teaches that any regulation adopted to implement California's Green Chemistry Initiative has the potential to result in environmental impacts. No doubt, implementation of the Proposed Regulations will result in transitions from one chemical or product to another triggering, among other things, associated changes in product formulations and manufacturing processes. Inherent in each such change is the potential for significant environmental impacts.

If an alternative chemical is manufactured in California, its identification as a preferred alternative may mean a need to increase production, which in turn could result in the expansion of existing facilities and/or construction of new facilities. Similarly, manufacturing any alternative could ultimately be more energy intensive, meaning additional impacts that are not associated with its desirability as a less hazardous or "safer" chemical, or an alternative could be rare earth minerals located and mined in an area of sensitive habitat. If an alternative is manufactured outside of California, imports of the alternative would likely increase, which could mean an increase in the intensity of emissions in goods movement corridors and additional greenhouse gas ("GHG") emissions associated with transport. Additionally, the preference for reduced toxicity as the single endpoint of greatest value that is implicit in the Proposed Regulations could, in certain circumstances, manifest as a detriment to California's achievement of other important air, water and land utilization goals. Finally, there are numerous examples of chemical substitutes breeding new and different multimedia environmental impacts than their predecessors. Accordingly, while the safeguards imbedded in the Proposed Regulations may reduce certain adverse environmental impacts, they might simultaneously result in new and different and substantially more severe adverse impacts.

Real world examples illustrate the relevance of the above hypotheticals, support the determination that these and other similar types of impacts may result from adoption of the Proposed Regulations and demonstrate that these potential adverse impacts can and should be considered and analyzed before the Proposed Regulations are adopted.

- California Air Resources Board ("CARB") analysis undertaken in connection with adoption of the Low Carbon Fuel Standard ("LCFS") recognized the potential that increased production of biofuels as a means to compliance with the LCFS (adopted for the protection of the environment) would be energy intensive and could result in, among other things, new land use, biological resource, water supply and air quality impacts associated with new manufacturing facilities, alternative fuel formulations and increased biofuel production. (*See* **Attachment A**, Letter from James M. Lyons, Sierra Research to Linda S. Adams, Chair (Challenging the science behind DTSC's conclusions and including studies explaining that while biofuels have benefits including increasing the security of the nation's fuel supply, reducing vehicle emissions and providing new income streams for farmers, they also increase energy price volatility, food prices, lifecycle emissions of GHGs and have other indirect environmental impacts.) *See also* **Attachment B**, CARB Resolution 09-31.) For this reason, CARB has prepared an extensive lifecycle analysis. (CA-GREET, available at: http://www.arb.ca.gov/fuels/lcfs/ca_greet1.8b_dec09.xls.) Moreover, as a prerequisite to adoption, CARB required additional staff efforts including, but not limited to, formation of an Expert Workgroup that would address land use and other indirect effects, developing a process for documenting a fuel's carbon intensity and developing air quality guidance for the siting of biorefineries prior to implementation. (*See* **Attachment C**, Low Carbon Fuel Standard Regulation

Update (May 19, 2010).) The Proposed Regulations raise similarly complex environmental concerns. For this reason, DTSC's decision not to engage in a diverse and rigorous analysis of the potential for environmental impacts is concerning.

- EIR's discussing the potential impacts of projects associated with production of natural resources routinely analyze the potential that a proposed project would displace foreign sources of the resource in question. Utilizing a set of assumptions, this type of analysis quantifies the potential reduction in GHG emissions that would occur if the proposed project provides a new domestic source of the resource in question. (*See* **Attachment D**, *Final Environmental Impact Report*, Baldwin Hills Community Standards District, pp. 4.2-36-4.2-59 (October 2008)(Climate Change analysis includes an assessment of transportation lifecycle and GHG emissions impacts.)) The reverse analysis could easily be performed to assess the potential for increased GHG emissions where the Proposed Regulations force increased imports of an alternative chemical. At the very least, the potential for this type of impact must be acknowledged, disclosed and analyzed.

- Photovoltaics are a viable alternative to fossil fuel use that have real benefits in terms of reducing air emissions and energy usage. In addition, they are generally considered to be benign with respect to potential environmental impacts. At the same time, however, they do contain chemicals (e.g. arsenic and cadmium) that could potentially be affected by the Proposed Regulations. (*See* **Attachment A**, *supra* (includes studies contrasting photovoltaic benefits with the relatively minimal environmental health and safety concerns associated with their manufacture.)) The handling of these and other similar chemicals under the Proposed Regulations could affect the ability to manufacture photovoltaic components and other similarly situated products in a cost efficient manner. While this would serve the goal of safer consumer product's it could impede the state's ability to meet air quality and energy efficiency goals. The potential environmental impacts associated with these and other competing interests must also be considered and analyzed.

- Finally, the transition from: tetra-ethyl lead to MTBE in gasoline; lead to bismuth as an alloy substitute; lead to perchlorate in airbags; and lead to cadmium in toys are all examples of alternative formulations that have had significant direct and indirect environmental effects of their own. (*See* **Attachment A**, *supra* (includes studies and other materials that analyze and disclose some of the impacts and concerns associated with the cited transitions.)) The Proposed Regulations contain no information about how DTSC would address these potentially significant multimedia impacts. The draft regulations contain no science-based criteria or quantitative thresholds of significance that would indicate how such multimedia impacts would be compared and valued under an alternatives analysis.

Therefore, it is critical that a multimedia analysis be performed and that potential impacts are analyzed in a programmatic EIR, so that the potential for these and other adverse impacts is considered, avoided and mitigated to the extent feasible.

The representations made in the Report are inconsistent with reality and the aforementioned examples. Moreover, the above discussion supports a conclusion in stark contrast to that contained in the Report: the Proposed Regulations have the potential to result in adverse environmental effects and the CEPC cannot "conclusively" determine adoption of the Proposed Regulations will not have any significant adverse impact on the environment. (*See* Health and Safety Code § 25252.5.) For this reason, DTSC must prepare the multimedia life cycle evaluation required under the Health and Safety Code prior to adoption of the Proposed Regulations, and should be urged to reconsider its initial conclusions about the appropriateness of a CEQA exemption in this instance.

The Draft Regulations are Not Exempt from CEQA

Consistent with the recommendation contained in the Report, DTSC's notice announcing the 45-day review and comment period for the Proposed Regulations includes the following statement: "DTSC has found this rulemaking project to be exempt under CEQA. A Notice of Exemption will be filed with the State Clearinghouse when the regulations are adopted." DTSC does not cite to an exemption, but that oversight is irrelevant because no exemption can apply.

For the reasons discussed above, it can not "be seen with certainty that there is no possibility" adoption may have a significant effect on the environment. (*See* CEQA Guidelines § 15061(b)(3).) For similar reasons, the CEQA exemption for Actions by Regulatory Agencies to Protect the Environment (CEQA Guidelines § 15308) cannot apply. (*See California Unions for Reliable Energy v. Mojave Desert Air Quality Management District*, 178 Cal.App.4th 1225 (2009)(District's reliance on the exemption contained in § 15308 is judged improper where the record included substantial evidence supporting the conclusion that their was the possibility for a significant effect on the environment.))

DTSC's reliance on a CEQA exemption would be judged improper by any reviewing court in this instance. The substantial evidence test governs review of an agency's factual determination that a project is exempt from CEQA compliance. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.*, 139 Cal.App.4th 1356 (2006).) Furthermore, it is the agency that has the burden of proof and must demonstrate that there is substantial evidence to support its exemption finding. (*See California Unions for Reliable Energy*, *supra*, at 1245.) By placing the concerns raised above and associated documentary evidence in the record, any CEQA petitioner would be able to support a claim that adoption of the Proposed Regulations could have a number of potentially significant environmental effects. In that event, the reviewing court would be forced to set aside DTSC's adoption of the Proposed Regulations pending proper CEQA compliance.

The Draft Regulations Have the Potential for Significant Environmental Impacts

Because adoption of the Proposed Regulations is a "project" and there is no available CEQA exemption, DTSC must either prepare an Initial Study to determine the potential for significant environmental effects or skip that step and move straight to preparing an EIR. The Initial Study process would disclose the potential impacts cited above and possibly other evidence supporting a conclusion that adoption of the Proposed Regulations could result in significant environmental effects. Pursuant to CEQA Guidelines § 15064(f)(1), any time an Initial Study discloses the potential for significant impacts, an EIR must be prepared. Thus, an EIR should be prepared prior to adoption of the Proposed Regulations.

A Programmatic EIR is the Appropriate CEQA Compliance

While it is true that analysis of some of the impacts associated with adoption of the Proposed Regulations would be "speculative" at this juncture, the fact that some of the necessary analysis would be "speculative" does not eliminate DTSC's responsibility to comply with CEQA. Moreover, any determination about whether potential impacts are speculative must be supported by substantial evidence in an administrative record, a requirement that cannot be satisfied by cursory analysis concluding that there is no potential for environmental impacts or reliance on an inapplicable CEQA exemption. (*See* CEQA Guidelines § 15145 (speculative determination requires "thorough investigation".)) Most importantly, however, a determination that analysis of some impacts would be speculative does not preclude preparation of a programmatic EIR that contains general and qualitative discussion of potential impacts including, but not limited to, those discussed above. Programmatic documents prepared by CARB prior to adoption of California's Climate Change Scoping Plan and the SB375 Greenhouse Gas Emission Reduction targets, actions that raised similar challenges, are helpful examples that might inform the scope of the necessary DTSC analysis. (*See* **Attachments E** and **F**.)

Choosing not to prepare at least a programmatic CEQA document would mean postponing CEQA review until individual projects meant to carry out the mandates of the green chemistry statute are proposed. At that stage, DTSC will have already made its discretionary, policy-based decisions and will have eliminated many viable options to achieving the goal of safer consumer products. CEQA review is needed now, at the adoption stage, so that DTSC can fully inform itself and the public about the programmatic choices it is making.

The Draft Regulations Require a Multimedia Lifecycle Evaluation

Not withstanding the above, DTSC argues in the Report and in its Initial Statement of Reasons that no multimedia lifecycle evaluation is required because the evaluation contemplated in Health and Safety Code § 25252.5 is imbedded in the

Proposed Regulations. According to DTSC: multimedia life cycle evaluation; avoidance of regrettable substitutes; a focus on identifying and reducing adverse public health and environmental impacts; and a focus on ensuring that no increase in significant adverse impacts will result from implementation of the regulations, are built into the Proposed Regulations. (*Recommendation on Need for a Multimedia Evaluation of the Safer Consumer Product Alternatives Regulations* at p. 2 (October 2010).)

The examples raised above call this conclusion into question. Additionally, however, DTSC provides no evidence, scientific or otherwise to support its conclusion. Largely a recitation of the Proposed Regulations themselves, the Report does nothing more than ask you, the CEPC, to take DTSC's word for it. The Report alludes to the fact that DTSC is committed to a multimedia approach, and that somehow this tacit commitment is the equivalent to actual analysis. Certainly, DTSC's unsupported conclusions are not enough to support a determination about the potential for adverse environmental impacts given the far reaching implications of the Proposed Regulations. For this additional reason, the CEPC should decline to adopt the DTSC recommendation contained in the Report.

The Draft Regulations Do Not Themselves Qualify as a Functional Equivalent of CEQA

Similarly, while stated nowhere in the Proposed Regulations, the Report or the Public Notice announcing the availability of the Proposed Regulations, DTSC seems to have also taken the position that the Proposed Regulations have no potential to result in significant environmental effects and are exempt from applicable CEQA requirements because the protections imbedded in the Proposed Regulations render them *de facto* a Certified State Regulatory Program. (*See* Public Resources Code § 21080.5. *See also* CEQA Guidelines § 15250.) First, DTSC has not gone through the process of having the Proposed Regulations certified by the Secretary for Resources as being exempt from the requirements of preparing initial studies, negative declarations and EIRs. (*See* CEQA Guidelines § 15251 ("List of Certified Programs").)

Nor is it clear that the Proposed Regulations contain the necessary elements to qualify as a Certified State Regulatory Program. Even if they arguably did, agencies that rely on their own Certified State Regulatory Program as the functional equivalent of CEQA still perform multimedia analysis.

The language in § 15250 does not exempt a certified regulatory program from other applicable provisions of CEQA, and as demonstrated by the analysis contained in Attachments E and F (cited above), agencies with certified regulatory programs still undertake the functional equivalent of CEQA analysis where their actions have the potential to result in significant environmental effects. For these reasons, any argument that the Proposed Regulations are a certified regulatory program or will ultimately be judged a certified regulatory program are irrelevant to the determination of whether CEQA or CEQA type analysis is necessary at this juncture. Again, the hypothetical's and

examples set forth above constitute evidence of the many types of environmental impacts that could stem from adoption of the Proposed Regulations.

Conclusion

CEQA requires that lead agencies consider, disclose and analyze potential environmental impacts. Its very purpose is to force agencies to educate themselves about the potential consequences of any action before making a decision. Choosing not to prepare the multimedia evaluation required under the Health and Safety Code or to effectuate proper CEQA compliance would deprive DTSC and the public of the opportunity to consider key issues including: (1) whether there are feasible alternatives to all or a portion of the Proposed Regulations; and (2) whether additional provisions are necessary to ensure potential environmental impacts are mitigated. (*See* CEQA Guidelines § 15002(h).) The failure to consider these issues, cornerstones of CEQA, and the impetus for the requirements contained in Health and Safety Code § 25252.5 could facilitate adoption of Proposed Regulations that result in more environmental harm than good.

For the foregoing reasons, the CEPC should not adopt the DTSC recommendation contained in the Report and should strongly urge DTSC to postpone adoption of the Proposed Regulations until it has fully complied with CEQA and performed a multimedia analysis.

Sincerely,

Maureen F. Gorsen

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