



February 27, 2013

VIA EMAIL

Secretary Matthew Rodriguez, Chair
Environmental Policy Council
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Re: Comments for February 28, 2013 CEPC Hearing On the Need for a Multimedia Evaluation of DTSC's Safer Consumer Products Regulations

Dear Secretary Rodriguez:

On behalf of the California Manufacturers & Technology Association (CMTA) we appreciate this opportunity to provide comments on the need for a multimedia life cycle evaluation for the Department of Toxic Substances Control's (DTSC's) proposed Safer Consumer Products Regulations, pursuant to California Health and Safety Code Section 25252.5. We submitted a letter on October 26, 2010 that is incorporated herein by reference. As discussed below, a multimedia evaluation of the proposed regulations is critically important to ensure that any adverse impacts to public health and the environment are considered in the creation of this groundbreaking new regulatory framework.

DTSC has proposed the draft regulations to implement the "Green Chemistry" legislation passed by the California Legislature in 2008, a largely unprecedented regulatory effort intended to reduce toxic chemicals in products. Unlike previous laws which focused on regulating pollution from facilities, the new law and proposed regulations regulate *products* sold in California.

Recognizing the far-reaching impact of the new law, the Legislature also directed DTSC to conduct, as part of its rulemaking process, a multimedia evaluation of the adverse impacts the proposed regulations could have on other media such as air, water, waste disposal, or public health. The Legislature did not leave responsibility for this important holistic analysis to DTSC alone, however, but specifically drafted the new law to require DTSC to solicit input from other agencies with expertise in and responsibility for impacts to the environment or public health. The Legislature further directed the Environmental Policy Council to review that multimedia evaluation, thereby enlisting the expertise of the directors of the state's key environmental agencies. This legislative expansion of the Council's role is almost unprecedented, having occurred only once in the Council's 20-year existence.

Despite the Legislature's express direction that DTSC prepare a multimedia evaluation with input from other expert agencies, DTSC recommends that the Council simply accept DTSC's unilateral conclusion that because the regulations do not identify a specific chemical or product to be regulated, the proposed new regulatory process could not possibly result in significant adverse impacts to public health or the environment. This circular reasoning ignores the clear mandate of the Legislature, which specifically directed DTSC to develop a regulatory process, and to consider any and all unintended consequences that could result from that new regulatory framework.

DTSC further concludes that a multimedia analysis of each chemical or product at a future date will be sufficient to prevent significant adverse public health and environmental impacts. But that future evaluation cannot replace an evaluation of the process being established *now*. The Legislature's mandate was for DTSC, other agencies, and the Council to consider *all* potential adverse impacts from the process established by DTSC's proposed regulatory framework. To conclude that this step can simply be skipped over, or somehow shifted to regulated entities who will be required to conduct future reviews of particular chemicals and products - reviews that are not designed to receive input from the Council or other agencies - would be directly counter to the Legislature's express mandate for a careful, holistic consideration of the implications of this new regulatory process.

The Council's legislatively mandated task is to help DTSC consider and address any adverse impacts that may be the unintended result of these regulations. The Council cannot fairly and legally carry out this historic mandate by making a determination based solely on DTSC's cursory review. Moreover, as a matter of public policy the Council should not simply take a pass, but should instead fulfill the purpose for which the Council was created by providing the agencies, industry, and public with the benefit of Council members' unique ability to provide a holistic review and refinement of these landmark regulations.

Conclusion

The Council cannot conclusively determine that the proposed regulations will not, in any way, adversely impact public health or the environment. The Legislature required that DTSC consult with other agencies to consider unintended impacts of these regulations, and required that the Council conduct a thorough review of the regulatory process put in place by DTSC. We ask that both DTSC and the Council fulfill its role in this vitally important process. A full multimedia review will allow the Council, DTSC and the public to become better informed about the options available to DTSC to implement the Green Chemistry laws.

Thank you again for this opportunity to comment.

Sincerely,



Michael J. Rogge
Policy Director, Environmental Quality

cc: The Honorable Matt Rodriguez, Secretary, CalEPA
Miriam Ingenito, Deputy Secretary, CalEPA
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Cliff Rechtschaffen, Senior Advisor, Office of the Governor
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ATTACHMENT 1

I. Regulatory Background

In 2008, the enactment of Assembly Bill 1879 (Stats. 2008, Ch. 559) established Health and Safety Code sections 25252 and 25253, requiring DTSC to adopt regulations to do the following:

- 1) Establish a process to identify and prioritize those chemicals or chemical ingredients in consumer products that may be considered a chemical of concern. (H&S Code § 25252);
- 2) Establish a process for evaluating chemicals of concern in consumer products, and their potential alternatives, using an alternatives analysis, to determine how best to limit exposure or to reduce the level of hazard posed by the chemical of concern. (H&S Code § 25253); and
- 3) Establish a range of regulatory responses that DTSC may take following the completion of the alternatives analysis. (H&S Code § 25253).

In addition, before adopting any regulations, Health and Safety Code section 25252.5 requires DTSC to "prepare a multimedia life cycle evaluation conducted by affected agencies and coordinated by the department." Section 25252.5(a) provides:

(a) Except as provided in subdivision (f), the department, in adopting the regulations pursuant to Sections 25252 and 25253, shall prepare a multimedia life cycle evaluation conducted by affected agencies and coordinated by the department, and shall submit the regulations and the multimedia life cycle evaluation to the council for review.

The Legislature specifically required DTSC to consult with other agencies in evaluating potential multimedia impacts of its regulations:

(e) In coordinating a multimedia evaluation pursuant to subdivision (a), the department shall consult with other boards and departments within the California Environmental Protection Agency, the State Department of Public Health, the State and Consumer Services Agency, the Department of Homeland Security, the Department of Industrial Relations, and other state agencies with responsibility for, or expertise regarding, impacts that could result from the production, use, or disposal of consumer products and the ingredients they may contain.

The multimedia evaluation must identify and evaluate any significant adverse public health or environmental impacts that may result under the regulations from the production, use or disposal of a consumer product or consumer product ingredient. The evaluation must, at a minimum, address impacts associated with: air pollutant emissions; surface water, groundwater, and soil contamination; disposal or use of byproducts and waste materials; worker safety and impacts to public health; and other anticipated impacts to the environment.

Subdivision (f) of H&S Code § 25252.5 provides that a multimedia life cycle evaluation is not required only if the Council, following an initial evaluation of the proposed regulations, "conclusively determines" that the regulations "will not have any significant adverse impact" on public health or the environment.

(f) Notwithstanding subdivision (a), the department may adopt regulations pursuant to Sections 25252 and 25253 without subjecting the proposed regulation to a multimedia evaluation if the council, following an initial evaluation of the proposed regulation, conclusively determines that the regulation will not have any significant adverse impact on public health or the environment.

The question the Council will face at the February 28, 2013 hearing, then, is whether any part of the proposed regulatory process could possibly result in significant adverse public health or environmental impacts. As discussed below, this legislative mandate cannot be carried out based on DTSC's brief conclusions about its own regulations. A more rigorous analysis is needed and is expressly what the Legislature required. Therefore, the Council should review the regulatory process proposed in the regulations after DTSC presents a full multimedia evaluation to the Council.

II. The Council's Legislative Mandate is to Prevent DTSC from Adopting Regulations with Potentially Significant Adverse Impacts to Public Health or the Environment

The Council was established in 1993 and brought together first to consolidate permitting at California's environmental agencies and then expanded in the wake of the adverse impacts from the Air Resources Board's MTBE fuel additive. (H&S Code § 43830.8.) Now, DTSC's proposed Safer Consumer Products regulatory process represents a sweeping change, including regulation of many thousands of products, and creation of a joint-and-several liability scheme similar to the landmark CERCLA law, where any responsible entity in the supply chain can be held accountable and all responsible entities must take responsibility. This comprehensive, complex process is more difficult to review, especially under a multimedia analysis, than a single fuel additive because it involves many more possibilities and a much more complex scheme. Complexity of the analysis, however, is no reason to avoid performing the statutorily required review, and in fact the comprehensive coverage of these unprecedented regulations makes a rigorous analysis by DTSC and review by the Council even more critical to considering all the possible implications. Indeed, the very fact that DTSC's proposed regulatory process is void of *any* requirement to consult with other expert agencies is enough to prevent the Council from making a "*conclusive determination*" that that regulatory process of identifying chemicals and products "*will not*" have "*any significant adverse impact on public health or the environment.*" (H&S Code 25252.5(f).)

DTSC and the Council cannot shift this Legislative mandate to the regulated entities. DTSC points to the fact that once the process for identifying and prioritizing chemicals in products is complete, manufacturers and other Responsible Entities are required to include multimedia considerations as part of an analysis of alternatives to the chemical ingredient in their products. But the Legislature explicitly gave DTSC and the Council the responsibility for evaluating a multimedia analysis, not the regulated entities. A multimedia analysis conducted by a regulated entity cannot substitute for the kind of multi-agency consultation process mandated by the Legislature. DTSC, other environmental agencies, and the Council, consisting of the chairs and directors of some of the most important environmental agencies in California, are specially situated to assess potential unforeseen consequences of these sweeping new regulations. And the fact that the proposed regulations propose a process does not make the Council's review any less meaningful. As the Legislature directed, this is an opportunity for California's environmental agencies to provide oversight to a significant regulatory scheme that has the potential to cause major changes to California's environmental regulatory framework.

III. The Council Has Never Invoked the Exception to a Multimedia Analysis Without Some Level of Multimedia Review and Should Not Do So Here

The Council has met three times to consider fuel additives since it was tasked by the Legislature with reviewing ARB's fuel additives multimedia analysis in 1999.¹ On all three occasions, the Council reviewed a multimedia analysis prepared by ARB to assess whether the additives would have a significant adverse impact on public health or the environment. By contrast, for the first time ever, the agency that is required to conduct a multimedia analysis - DTSC - has provided no multimedia analysis at all. Instead of considering impacts to public health or the environment, including air, soil, and water, DTSC claims that because the regulations establish a process for identifying regulated chemicals and products, no adverse impacts can result from that process. As explained above, such a cursory and circular analysis cannot be sufficient for the Council to "*conclusively determine*" that there "will not" be "any" adverse impact from the regulations.

Moreover, DTSC does not explain why a multimedia evaluation conducted by expert agencies is not required *anywhere* in DTSC's proposed regulatory process. As currently drafted, the proposed regulations do not contain any process to carry out the Legislature's clear mandate for a multimedia, multi-agency evaluation. As explained above, this full multimedia review of the sweeping new regulatory framework should be conducted *now*, as mandated by the Legislature. At a minimum, however, DTSC's regulations should establish a process that would require a multimedia evaluation and Council review at the time DTSC adopts a list of Priority Products. This approach would be analogous to the Council's review of fuel additives, which occurs at the time those additives are identified by the California Air Resources Board for regulation. If the multimedia evaluation is not done now, DTSC must commit that the Council will conduct the multimedia review at the time the Priority Products are adopted.

IV. Proposed Safer Consumer Products Regulations May Result in a Significant Adverse Impact to Public Health or the Environment. Therefore a Multimedia Analysis is Required.

We note that a multimedia evaluation by DTSC and other expert agencies would be needed to consider all of the implications of these far-reaching regulations. We provide, however, the following summary of ways in which the proposed regulations may adversely impact public health or the environment:

- Reformulation or substitution required by the regulations may result in *different* but still significant adverse impacts to public health (even if those impacts are outweighed by the benefits of reformulation). Without a requirement to consult with relevant agencies or experts, DTSC may either ignore or discount impacts on other media.
- Regulatory responses like end-of-life product stewardship or product bans may result in significant adverse impacts that DTSC is unable to analyze, like foreign air emissions, which may result in significant impacts to human health in those jurisdictions.
- Increased regulatory burdens and lack of protection for intellectual property will likely stifle innovation, slowing progress in development of products that will ultimately benefit the environment.

These and other serious issues with the proposed regulations, which may cause significant adverse impacts to public health or the environment, need to be addressed through a full multimedia analysis and review. (H&S Code § 25252.5).

¹ See the California Environmental Policy Council's posted information on prior hearings: <http://www.calepa.ca.gov/CEPC/Archives.htm>

An alternatives assessment includes a multimedia life cycle evaluation under the regulations, which must be conducted by the manufacturer of the Priority Product being regulated. DTSC suggests in its recommendation to the Council that this built-in multimedia life cycle analysis will protect against significant adverse impacts to human health and the environment, and, therefore, the Council should not require a multimedia analysis of the proposed regulations. As discussed above, the legislative mandate was for DTSC to coordinate with other agencies to evaluate, and for the Council to review, the overall regulatory process, not each product-specific determination. Moreover, the built-in multimedia analysis does not preclude significant adverse impacts that may result from the proposed regulations.

For example, even if a reformulation is beneficial to public health or the environment overall, that does not preclude significant adverse impacts that are *different* than the benefits gained by reformulation. A reformulation could remove all chemicals of concern from a product, but result in an increase in air emissions due to increased transportation requirements, changes in the amount of material required, or changes to the method of manufacturing. Without a process to require consultation with other agencies in possible multimedia impacts, DTSC could unilaterally determine that the reformulation has a net benefit because a chemical has been removed, even though asthma and other diseases from air pollution may increase. Thus, the Council must review the regulations to ensure that such multimedia impacts are considered in the regulations.

While reformulation may result in overall benefits to public health and the environment, certain significant adverse impacts may result nonetheless. This is particularly true in light of the fact that without consultation, DTSC will be responsible in its sole discretion for reviewing and weighing impacts on all aspects of a multimedia analysis, including impacts to soil, water, air and public health. Since this possibility exists, the Council must require DTSC to perform a multimedia life cycle analysis in consultation with other agencies. Indeed, in the context of CEQA, courts have consistently held that projects intended to benefit the environment must nonetheless be reviewed for their environmental impacts because those projects often have unintended adverse environmental impacts. See, e.g., *California Unions for Reliable Energy v. Mojave Desert Air Management District* (2009) 178 Cal.App.4th 1225 (holding that a paving rule intended to reduce PM emissions from projects required environmental review); *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644 (holding that a rule intended to reduce volatile organic compounds (VOCs) in architectural coatings required environmental review).

The regulations may also cause unintended environmental impacts by stifling or slowing product innovation. While DTSC maintains that the regulations encourage early reformulation, it is possible that in some circumstances a manufacturer (or responsible entity) will choose not to undergo any innovation or reformulation because the alternatives assessment report would require the company to reveal too much information about its business and product, including its reformulation. This could result in a subtle but cumulatively significant impact by slowing improvements to products that could reduce or avoid significant adverse impacts to human health or the environment.

For example, a chemical manufacturer may be able to reformulate an intermediate chemical used in the manufacturing process by using bio-chemicals that cost less and provide benefits to the manufacturing process. However, the manufacturer may then be forced to reveal the reformulation in the alternatives assessment report, even if the intermediate chemical would never have been subject to the final regulatory process of undergoing an alternatives analysis and report because it was never listed as a Priority Product. Instead of putting efforts into reformulating that intermediary product, which may benefit the manufacturing process but also all of the competitors, the manufacturer may instead devote resources elsewhere because it would never realize the benefit of the improved reformulation over its competition. This

disincentive to innovate, cumulatively, could have a very serious impact on public health or the environment - not by harming it, but by slowing the progress California has made over the last 40-years towards reducing our environmental impacts.

The disincentive to innovate could result in significant adverse impacts to public health and the environment. By overstating the benefits of the regulation and forcing the regulated community to go through an expensive process with little ultimate value, DTSC's regulation will also have an unintended adverse impact on economically disadvantaged populations through increased cost of necessary products sold in California. This will have a disproportionate impact on these populations denying them choice because of limited income and fewer products being available in the marketplace. The Council must therefore require DTSC to conduct a multimedia analysis of its regulations as the Legislature required.

V. Conclusion

Even though the proposed regulations are designed to benefit public health and the environment, they may result in significant adverse impacts. These significant adverse impacts may be offset by benefits, but cannot be discounted by the Council when making a determination whether there is any possibility of a significant adverse impact. DTSC's regulations do not provide any process for carrying out the legislative mandate that California's expert agencies and the Council carefully consider any and all unintended impacts of this sweeping new regulatory framework on other media, such as air, water, waste, and public health. The Legislature required that the Council conduct a thorough review of the process. We ask that the Council fulfill its legislatively mandated role in this vitally important process. A full multimedia review will allow the Council, DTSC and the public to become better informed about the options available to DTSC as to how to implement the regulations to avoid environmental impacts.

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