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Secretary Linda S. Adams, Chair  
Environmental Policy Council  
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**Comments Regarding the Need for a Multimedia Evaluation of the Safer Consumer Product Alternatives Regulations Proposed by the Department of Toxic Substances Control (DTSC)**

Dear Secretary Adams:

As you are aware, Health and Safety Code section 25252.5 requires that the Department of Toxic Substances Control (DTSC) prepare and submit to the Environmental Policy Council (EPC), a multimedia life cycle evaluation of the proposed Safer Consumer Product Alternatives regulations unless the EPC conclusively determines that the regulations will not have any significant adverse impact on public health or the environment.

Further, as you are also aware, DTSC has published a report entitled *Recommendation on Need for a Multimedia Evaluation of the Safer Consumer Product Alternatives Regulations*, the main conclusion of which is that:

*DTSC finds that the Safer Consumer Product Alternatives draft regulations will, by design, have no significant adverse impact on public health or the environment.*

In addition, DTSC has indicated in its Public Notice<sup>1</sup> that:

*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.*

If left unchallenged by the EPC, these two findings could result in the enactment of a major regulatory program without any meaningful analysis of the potential for environmental and public health impacts stemming from that enactment. DTSC

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<sup>1</sup> 45-Day Public Notice and Comment Period for Proposed Rulemaking , Safer Consumer Product Alternatives, Department Reference Number: R-2010-05; Office of Administrative Law Notice File Number: Z-2010-0908-01

maintains that no multimedia analysis or California Environmental Quality Act (CEQA) analysis is required because DTSC has designed a perfect regulation that will be perfectly implemented such that there will never be any action taken by DTSC or a party subject to the regulation that could create a potential adverse impact on the environment or public health. Obviously, DTSC's position is not reasonable and does not conform to the requirements of section 25252.5 or the provisions of CEQA.

As outlined below, DTSC's arguments against the need for a multimedia or CEQA analysis are simply incorrect. Given this, EPC must direct DTSC to prepare a full multimedia analysis of the proposed Safer Consumer Product Alternatives regulations as dictated by statute. Further, although it may be outside the narrow scope of the October 27<sup>th</sup> Public Hearing, the EPC should also object to DTSC's claim that the proposed Safer Consumer Product Alternatives regulations are exempt from CEQA and urge DTSC to prepare the same type of programmatic CEQA document prepared by other agencies during similar rulemaking proceedings.

### **The EPC Must Require a Multimedia Analysis**

As noted above, DTSC contends in its report to the EPC that the draft regulations "by design" have no adverse impacts on the environment or public health. The report then presents approximately eight pages to support this conclusion, which consist primarily of the factors that DTSC says it will consider in evaluating chemicals and products if the regulations are enacted. The "analysis" presented consists mainly of excerpts from the regulatory language itself or from the Initial Statement of Reasons prepared by DTSC. This analysis falls far short of the "conclusive" evidence that the statute requires.

Although there is a description of the DTSC regulation, the DTSC report includes no description of how the regulation will operate in reality, what steps will actually be taken by DTSC and other parties to prevent adverse environmental and public impacts, or exactly how DTSC can guarantee that there will never be adverse impacts resulting from an action taken by DTSC or other parties as a result of these regulations.

It should be noted that while DTSC has offered no real evidence that there will not be adverse impacts on the environment and public health from the Safer Consumer Product Alternatives regulations that apply to all consumer products, the California Air Resources Board (CARB, another agency that is required to present the results of multimedia analyses to the EPC prior to the enactment of new fuel specifications) has an approximately 70-page document<sup>2</sup> that provides guidelines for all the steps that must be taken in assessing whether a new fuel might have adverse impacts. In response, DTSC argues that similar analysis is not required prior to adoption of the Safer Consumer Product Alternatives regulations because they do not focus on one specific chemical. While that particular statement is true, impacts similar to those contemplated in the multimedia analysis prepared by CARB can be expected in this context. Furthermore, because they will occur in multiple contexts, there is the potential that they will be

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<sup>2</sup> *Guidance Document and Recommendations on the Types of Scientific Information Submitted by Applicants for California Fuels Environmental Multimedia Evaluations*, prepared by the University of California, Berkeley, the University of California, Davis and Lawrence Livermore National Laboratory and submitted with input by the Multimedia Working Group for Cal/EPA use, Revised June 2008.

exponentially greater. This alone should make EPC wary of adopting DTSC's recommendation and facilitating adoption of the proposed regulations absent more detailed consideration of the potential impacts that will stem from their adoption.

Absent any meaningful analysis, it is not reasonable for DTSC to state that it has designed the Safer Consumer Product Alternatives regulations such that it can guarantee that they will never cause an adverse impact on the environment and/or public health. The fact is that the entire Alternatives Assessment process laid out in Article 5 of the proposed regulation will require DTSC to consider and prioritize trade-offs between differences in a multitude of hazard traits exhibited by chemicals and products of concern and potential substitutes. This fact and the unreasonableness of DTSC's position can be clearly seen on pages 5 through 9 of the DTSC report to the EPC, where DTSC first states on page 5 that the Tier II Alternatives Analysis report:

*...must include a demonstration that the production, use and disposal of the selected alternative (in conjunction with any regulatory response(s) proposed by the responsible entity or manufacturer) will have no greater significant adverse impacts on public health or the environment than the current impacts associated with the Priority Product.*

On pages 6 through 9, the report then lists nearly 100 different hazard traits grouped into seven major categories that would have to be considered in such an analysis, without providing any insight as to how each hazard trait should be ranked or weighted for purposes of comparing alternative chemicals to the chemicals of concern currently being used or how one is supposed to conclude whether the alternative has "no greater significant adverse impacts on public health or the environment." It must also be stressed that the complex process described above would apply to each chemical of concern and substitute priority product, and that the potential comparison points could number into the thousands. Given this, there is no way to ensure that all adverse impacts are avoided—a fact that even DTSC acknowledges in the Initial Statement of Reasons, noting on page 66 that "regrettable substitutions" are possible under the proposed regulations.

Given the above, the EPC cannot make a conclusive finding that the proposed regulations will not have any significant adverse impact on public health or the environment. At an absolute minimum, the EPC must require DTSC to provide a multimedia analysis using existing case studies or examples based on chemicals and products likely to be listed to demonstrate specifically how the design and DTSC's implementation of the regulations will analyze and address potential adverse environmental and public health impacts.

### **The Safer Consumer Product Alternatives Regulations Are Not Exempt from CEQA**

The intent of the legislature in enacting the California Environmental Quality Act is stated at sections 21000 and 21001 of the California Public Resources Code. Of particular significance with respect to the Safer Consumer Product Alternatives regulations are sections 21001 (f) and (g), which declare that it is the policy of California to:

*(f) Require governmental agencies at all levels to develop standards and procedures necessary to protect environment quality.*

*(g) Require governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment.*

DTSC's position with respect to the Safer Consumer Product Alternatives regulations does not comport with either of these policies, as evidenced by its claim that the rulemaking is exempt from CEQA. DTSC has provided no basis to support its claim that the rulemaking is exempt from CEQA, and other evidence clearly indicates that it is not exempt.

First, it is clear that the Safer Consumer Product Alternatives regulations represent a massive program with the potential to fundamentally alter the availability, composition, and nature of consumer products in California. The legislature intended that this type of rulemaking be subject to CEQA. The fact that the proposed regulations will have a far-reaching effect can be seen, among other places, in the Public Notice, where DTSC states:

*The regulations apply to all consumer products placed into the stream of commerce in California, and all chemicals that exhibit a hazard trait and are reasonably expected to be contained in these consumer products; EXCEPT for those products exempted by the statute:...*

Other evidence can be seen in the press release announcing the release of the draft regulation,<sup>3</sup> where DTSC Acting Director Maziar Movassaghi is quoted as saying:

*This regulation will facilitate California's transition from managing toxic chemicals at the end of their lifecycle to designing products and processes that are more environmentally benign.*

And that;

*It represents a landmark policy change that continues California's environmental leadership and fosters a new era in the design of a new consumer products economy.*

Both of these statements also acknowledge that the regulation will affect the environment, and that they should not be adopted absent consideration of the factors contemplated in the aforementioned CEQA provisions. In addition, they indicate that there will be a transition that will lead to both short-term and long-term impacts that should also be carefully considered. Again, when read in the context of the legislative intent set forth in CEQA, these statements support the conclusion that this rulemaking is not exempt from CEQA compliance.

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<sup>3</sup> California Environmental Protection Agency, Department of Toxic Substances Control, News Release, T-09-10, September 14, 2010.

Further, DTSC has performed no analysis, survey, economic assessment, or other study of how parties affected by the proposed regulations will respond to the enactment of the regulation either before or after implementation. Clearly, there are some responses that could create either adverse environmental or public health impacts, such as the elimination of existing consumer products from the marketplace or the creation of bars to the introduction of new products.

Changes in chemical composition and product inputs are an intended consequence of the regulations. Furthermore, they will inevitably result in impacts that should be considered, disclosed, and analyzed. For example, if DTSC wants to push for alternatives to certain chemicals, CEQA requires that DTSC inform itself about the supply of potential alternatives and how it might change as a result of that action. Similarly, it needs to consider how chemicals are manufactured and supplied, and whether the increased manufacture of proposed alternatives might necessitate a need to expand existing facilities, construct new facilities, or could result in the manufacture or supply of alternative chemicals that pose different environmental challenges, e.g., what if the manufacturing process for a chosen alternative is more energy intensive than its predecessor? The regulations could also lead to discontinued production and/or premature disposal of safe products, with potential impacts ranging from human health impacts resulting from lack of efficacious consumer products to burdens on waste handling systems. Similarly, the regulations could lead to adverse impacts by stalling the introduction of new, safer, and more efficient consumer products. The absence of desirable safer consumer products in California could result in major shifts in global supply chain logistics, as well as increased travel to bordering states and countries to purchase those products, with impacts ranging from increases in fuel usage to economic impacts associated with lost California sales and reduced sales tax revenues. Goods movement can have serious environmental and public health consequences, as environmental justice communities have long understood.

There are a number of specific examples that illustrate how consumer product changes required under the regulations could potentially lead to adverse impacts. Scientific studies illustrating these examples are contained in Appendix A to this letter. Each represents a case where the “greening” of a consumer product led to unforeseen adverse environmental or public health impacts.

There are a multitude of examples that demonstrate how California regulatory agencies need to address the requirements imposed by CEQA for projects like the Safer Consumer Product Alternatives regulations. Perhaps the best recent example is the groundbreaking AB32 program being implemented by CARB. The AB32 Scoping Plan and its Appendices<sup>4</sup> provide all of the information required to assess the environmental and public health impacts of the AB32 program, including but not limited to assessments of how technical and economic factors may create adverse impacts as well as the complete functional equivalent of a CEQA analysis, which is contained in Appendix J of the Scoping Plan document.

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<sup>4</sup> *Climate Change Scoping Plan, a Framework for Change*, prepared by the California Air Resources Board, December 2008.

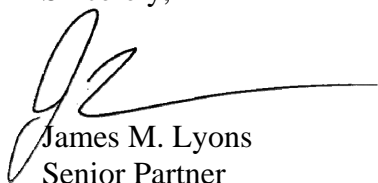
The CEQA analysis performed for the Scoping Plan is programmatic and looks at the broader environmental and public health impacts of a regulatory structure, not the specific impacts of individual actions. CARB explicitly acknowledges both the need for and appropriateness of a programmatic CEQA analysis, stating in Appendix J that:

*This analysis is necessarily programmatic. It will provide a basis for future environmental analyses and allows future project-specific environmental analysis to focus solely on the new effects or detailed environmental issues not previously considered. A program environmental document allows consideration of broad policy alternatives and program wide mitigation measures at a time when an agency has greater flexibility to deal with basic problems of cumulative impacts. A programmatic document also plays an important role in establishing a structure within which future reviews and related actions can effectively be conducted.*

It is also important to note that CARB could have attempted to argue (as DTSC has with respect to the Safer Consumer Product Alternatives regulations) that the Scoping Plan was exempt from CEQA and that there could never be an action taken pursuant to AB32 that would result in adverse environmental or public health impacts. However, CARB recognized that to do so would not have been reasonable, nor would it have satisfied the requirements of CEQA.

Based on the above, the EPC should decline to adopt DTSC's recommendation with respect to the multimedia evaluation and advise DTSC that it must fulfill its duties with respect to CEQA compliance.

Sincerely,



James M. Lyons  
Senior Partner

Attachment