December 3, 2010

Regulations Coordinator
Department of Toxic Substances Control
Regulations Section
PO Box 806
Sacramento, CA 95812-0806

Dear Regulations Coordinator,

In 2007, the Department of Toxic Substances Control (DTSC) launched the Green Chemistry Initiative, an ambitious effort to improve the safety of chemicals in products sold in California. The 5th plank of the Initiative—to “Accelerate the quest for safer products”—received authorizing legislation, AB1879 (Feuer, D-LA), signed by Governor Schwarzenegger in September 2008. A two year process ensued, with extensive input from an array of stakeholders, and from the Green Ribbon Science Panel—a scientific advisory group established by the statute. On November 16, 2010 the Department published extensive revisions to the Safer Consumer Products Alternatives Regulations (R-2010-05), originally proposed on September 14, 2010.

AB 1879 grants DTSC the authority to establish a systematic process for identifying and prioritizing chemicals of concern in consumer products and using alternatives assessment to guide the selection of safer substitutes. Yet the revised regulations—if adopted as written—fail to implement this authority and would not achieve their most basic goal: to promote the development and adoption of safer chemicals, products and manufacturing processes, according to the principles of green chemistry.

In January, 2008 a joint UC Berkeley, UCLA report commissioned by DTSC and endorsed by 130 University of California faculty and researchers, identified three critical gaps in chemicals policy (the Data Gap, Safety Gap and Technology Gap) and recommended means for California to address those gaps. The signatories to this

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1 2008 report and references available at
http://coeh.berkeley.edu/greenchemistry/briefing/default.htm
For more complete analysis of the three chemicals policy gaps, see Wilson MP, and Schwarzman MS.
*Toward a New US Chemicals Policy: Rebuilding the foundation to advance new science, green chemistry*
letter served as chief authors of that report and presently serve on the Green Ribbon Science Panel.

While previous versions of the Safer Consumer Products Alternatives Regulations would not, on their own, have definitively closed the gaps, they would have at least initiated the process of developing a more comprehensive approach to the management of hazardous chemicals in products. These latest revisions to the proposed regulations, however, have rendered the effort unsupportable. *At present, the revised regulations would perpetuate data gaps, severely restrict DTSC’s ability to systematically identify and address chemicals in products that pose threats to human and environmental health (perpetuate the safety gap), and do nothing to promote the innovation of safer products (perpetuate the technology gap).*

**The revised regulations will not close the data gap**

To close the data gap, chemical producers and product manufacturers must generate and publicly disclose information on the use and hazard characteristics of chemicals in products. While the lack of data requirements from manufacturers was a core weakness in previous drafts, the revised regulations have eliminated even the rudimentary information that previous versions would have generated (e.g., the identity of products containing one of a potentially long list of chemicals of concern). In the present draft, chemicals must be designated by DTSC as Chemicals of Concern (CoCs) in order to qualify for all subsequent provisions of the regulations. Because the current revisions would, in effect, so severely limit the number of chemicals designated as CoCs and the number and range of products brought under scrutiny (see issue numbers 1 and 2 below), little to no new information would become available. They would ultimately tend to select for the small number of substances that are already data-rich.

As a result, the revised regulations would make no significant new information about the identity or potential hazards of chemicals in consumer products available to DTSC, the public, or companies in supply chains. This information is the key to identifying potentially hazardous substances and their safer alternatives. It is also essential for transforming the market for chemicals and products into one that advantages safer substitutes.

**The revised regulation will not close the safety gap**

To close the safety gap, government needs information and legal tools to identify, prioritize, and take action to replace hazardous chemicals with safer alternatives. In addition to denying DTSC the requisite information, the revised regulations create an

*and environmental health*. Environmental Health Perspectives. 117(8):1202-1207. 2009.
excessively high evidentiary standard for designating CoCs, and they place the burden of proof of significant health or environmental harm on DTSC as a prerequisite for action. Revisions to the regulations have transformed them into a mechanism for responding to a demonstrated threat of impact, rather than an upstream approach to identification & prioritization of hazards, and alternatives assessment.

The revised regulations will not close the technology gap

Closing the technology gap depends in part on funding and incentivizing the development of new technologies, but it also hinges on establishing the legal drivers and policy signals to advantage safer substances in the marketplace, thereby increasing demand for green chemistry and driving innovation. Significant investment in green chemistry education, research and development are unlikely to occur without the appropriate market signals. Through many limitations and exemptions, the revised regulations would provide few reasons for chemical producers and product manufacturers to rigorously assess the ingredients their products or search for safer alternatives. Each of the issues we discuss below contributes to our conclusion that the revised regulations contain virtually no incentives for business innovation.

These failings in the revised regulations result from many issues, several of which we discuss in more detail below.

1) Severely limited list of Chemicals of Concern (CoCs)

The list of CoCs will be severely limited by several stipulations of the revised regulations, including (a) the extent of evidence required, (b) the way that exposure potential is established, and (c) the requirements that the CoC list be paired down based on DTSC resources available to carry out the evaluation of CoCs in products.

(a) Compared to the requirements of the previously proposed regulations, DTSC would now be required to conduct an extensive and comparative assessment and prioritization process before designating a substance as a CoC [§ 69302.3]. DTSC would be required to assess the degree of threat to human and environmental health as a prerequisite to naming a CoC. This would create a burdensome process and require DTSC to obtain information on chemical identity, use and hazard traits that is rarely readily available.

(b) Characterizing exposure potential can legitimately assist in prioritizing CoCs, yet the definition of exposure used in the revised regulations would severely restrict chemicals that could qualify as CoCs. The revisions require that exposure be established through either (i) monitoring of people, wildlife or the environment that shows the presence (and environmental accumulation) of a chemical, or (ii) modeling that predicts significant impacts from a point source
Exclusive reliance on these measures of exposure lacks scientific basis and would severely limit the number of CoCs. Environmental monitoring and biomonitoring data exist for—at most—several hundred of the tens of thousands of chemicals in commerce. And modeling point sources ignores the cumulative impact of aggregate exposures.

(c) DTSC would be required to limit the list of CoCs based on the Department’s resources that are available to evaluate the products that contain those CoCs. The identification or prioritization of CoCs should not hinge on the availability of DTSC resources, since identification of CoCs is in itself an important market signal that can speed the development and adoption of safer alternatives in advance of regulation.

2) Severely limited list of Prioritized Products

A set of limitations similar to those imposed on designating CoCs would be imposed by the revised regulations on designating priority products. These revisions would, in effect, radically restrict the number and range of products subject to the process called for by the statute. These restrictions include (a) limited definition of priority products with extensive exemptions, (b) burdensome process for determining Priority Products, and (c) the requirement that the priority product list be limited by DTSC resources.

(a) The revised regulations now arbitrarily narrow to three categories, the products that would be subject to the regulation: children’s products, personal care products, and household cleaning products. Any product that does not fall into one of these categories is exempt from the regulations, even if it contains a CoC [§ 69303.3(c)(1)].

(b) The revised regulations further stipulate a lengthy and data intensive prioritization process before designating a Priority Product [§ 69303.3]. DTSC would be required to evaluate and compare products’ potential human health and environmental threats according to a long list of attributes of the CoCs they contain, multiple assessments of exposure potential, and whether they are addressed by other laws. The ensuing labor-intensive process would require information on chemical identity, use, and hazard that is not readily available to DTSC. Furthermore, each of these steps has been revised in ways that would, in effect, drastically narrow the universe of products that can be subject to the regulation.

(c) Revisions to the proposed regulations now require that the number of priority products be limited to those for which DTSC has sufficient resources to evaluate their subsequent alternative analyses. Again, this curtailment by available resources unnecessarily removes the market signals to pursue safer alternatives in advance of regulation.
As with the constraints placed on naming CoCs, the requirements of this revised product prioritization process ensure that a very limited number and range of products will be designated as priority products or will be subject to the regulatory process.

3) Ineffective alternative assessments

The revised regulations provide numerous means for product manufacturers to sidestep a meaningful alternatives analysis (AA). This was to be a core function of AB1879 and the Safer Consumer Products Alternatives Regulations (emphasis added). Extensive data gaps, and the restricted lists of CoCs and priority products discussed above, would already reduce the potential for a positive impact of AAs. However, the revised regulations change the alternatives assessment process in several ways that will further constrain their utility.

(a) The revised regulations define a suitable alternative by several health and environmental criteria, but further require it to be “functionally equivalent” [§69301.(a) (41)] and “technologically and economically feasible,” achievable with existing “knowledge, equipment and materials” and providing “at least a comparable rate of return” [§69301.(a)(80) (A)]. These revisions set a prohibitively high bar, virtually guaranteeing that manufacturers would not find suitable alternatives for CoCs in their products. This would discourage innovation of safer alternatives, which—though they may be less immediately profitable to companies—could produce public benefit and a great rate of return for society. 2

(b) Changes in the revised regulations greatly reduce oversight of the AA process. DTSC would be given authority to review AAs (based on available resources) for “completeness and compliance,” but this implies an administrative rather than a substantive review [§69305]. Furthermore, the revised regulations have eliminated quality standards for AAs, as well as any certification or training process for third-party verifiers [§69305.1].

These and other modifications to the AA process in the revised regulations would drastically reduce the utility of AA and the likelihood that they would serve their intended function.

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2 This new definition essentially codifies one of worst aspects of TSCA § 6 in which regulatory action hinges on demonstration of viable alternative, and that its adoption constitutes the “least burdensome” option.
4) Lack of information transparency

Finally, the revised regulations have removed many of the checks on claims of confidential business information (CBI). Under the revised regulations, companies would not have to provide justification for CBI claims, nor would the existence of these claims be made public [§69310.5 of the proposed regulations was eliminated in the revised version]. Procedures for the review of CBI claims by DTSC have also been eliminated. As a result, public scrutiny will be virtually impossible for multiple core aspects of the regulatory process, including the identification and prioritization of CoCs and priority products, as well as the evaluation of alternatives.

History has proven that such lenient CBI provisions result in widespread, unjustified trade secret claims, with the result that neither the consumer market nor the public can make use of information on chemical ingredients, uses, hazard traits or potential alternatives. This undermines the intent of the statute and the core goals of the California EPA Green Chemistry Initiative.

Conclusion

In sum, the process established by the revised regulations would ensure that only a select few chemicals would be designated as CoCs and an equally limited number and range of products would be subject to the regulation. Extensive CBI claims would likely render the process opaque to the market and to the public. Together, these factors would remove the market signals that drive producers to proactively replace hazardous substances with safer alternatives. Ironically, it would also encourage the regrettable substitutions that AB1879 was written to end. The result is a far cry from a process that was intended to systematically identify, prioritize and take action on hazardous substances in order to improve the safety of consumer products sold in California.

As we stated at the outset, if adopted as written, the revised regulations would perpetuate data gaps, severely restrict DTSC’s ability to systematically identify and address chemicals in products that pose threats to human and environmental health (perpetuate the safety gap), and do nothing to promote the innovation of safer products (perpetuate the technology gap).

Furthermore, the extensively revised regulations reflect no recognizable recommendations of the Green Ribbon Science Panel—the scientific advisory group legally charged with advising DTSC in implementation of AB1879. Its 26 members were not advised of the changes nor were they allowed to provide input on them outside of the unacceptably short 15 day public comment period.

With the publication of the Green Chemistry Initiative’s final report in 2008, California EPA Secretary Linda Adams declared it a “far-reaching market-driven strategy with an ambitious aim—the launch of a new chemicals framework and a quantum shift in
environmental protection.” In fact, the revised proposed implementing regulations undermine Cal/EPA’s ability to accomplish this vision. They would fail to generate the market structure necessary to promote the innovation of safer substances according to the principles of green chemistry. As such, we can no longer support these regulations, and we urge DTSC to withdraw them.

Respectfully Submitted,

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3 California Green Chemistry Initiative, Final Report, December 2008
http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/upload/GREEN_Chem.pdf