

February 12, 2019

The Honorable Bill Quirk, Chair
Assembly Committee on Environmental Safety & Toxic Materials
State Capitol
Sacramento, CA 95814

The Honorable Ben Allen, Chair
Senate Committee on Environmental Quality
State Capitol
Sacramento, CA 95814

Re: Assembly Committee on Environmental Safety & Toxic Materials / Senate Committee on Environmental Quality Joint Informational Hearing – “Are We Protecting People From Toxic Chemicals In Products?” – February 12, 2019

Dear Assembly Member Quirk and Senator Allen:

The American Chemistry Council (ACC) appreciates the opportunity to offer the following comments relative to the Department of Toxic Substance Control's (DTSC) Safer Consumer Products (SCP) regulations. ACC applauds your committees for continuing to provide legislative oversight to ensure regulatory programs are being implemented in accordance with enabling legislation. Additionally, periodic review provides opportunities to discuss areas where program implementation may require modification.

As you know, ACC and its member companies have a long history with DTSC and the SCP program. We were active participants in both the debates that eventually led to the enabling legislation and in the public comment periods on proposed regulations to implement the program. We currently have member companies that manufacture products subject to potential regulation. As your committee discusses whether changes to the SCP are necessary, ACC believes that two issue areas – increased DTSC transparency and compliance flexibility for regulated entities – are worthy of more in-depth discussion.

Program Transparency and Efficiency

ACC believes that overall program efficiency and implementation can be improved by increasing the transparency of the process DTSC uses to identify “Priority Products.” In order for the public to have sufficient confidence in DTSC and its process, and for manufacturers to participate usefully and comprehensively, the department must be clear and transparent in how decisions are made.

Increased transparency should begin early when DTSC is considering which products to list as “Priority Products.” In our experience with DTSC thus far, the department has often described the selection process in vague terms, resulting in a listing process that is opaque and appears arbitrary. ACC urges DTSC to increase the level of transparency in how the department ultimately makes a final decision to list a specific chemical/product combination as a “Priority Product.” This should include a clear explanation of the information relied upon to make the determination, as well as identifying those stakeholders who provided that information to DTSC.



ACC also urges DTSC to build upon previous efforts to initiate discussions with chemical manufacturers and consumer product companies early as it gathers information on potential “Priority Products.” The collection of data and information from manufacturers can help to improve the upfront process in the selection of future “Priority Products.” Consumer product value chains are complex and industry consultation can provide an understanding of manufacturing processes, chemistries, uses and potential exposures, product stewardship activities, toxicological data, voluntary programs, and market impacts.

To its credit, DTSC has greatly improved its outreach with the business community since the first “Priority Products” were identified in 2014. ACC believes, however, that additional engagement is warranted. By doing so, DTSC can better identify “Priority Products” that address important public health concerns that are both supported by science-based information and have strong potential to be addressed effectively under the SCP program.

Regulations Should Adhere to Statutory Criteria

ACC urges the Legislature to ensure that implementation of the SCP regulations reflect the intent of the enacting statute. AB 1879 (stats. 2008) clearly states that DTSC should 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.” Furthermore, the intent of this legislation was to ensure that the evaluation of chemicals in products and any decisions to impose a regulatory response was driven by science-based information.

ACC believes DTSC may have deviated from this important point when it finalized a 2018 regulation to list spray polyurethane foam systems with unreacted methylene diphenyl diisocyanates (MDI) as a “Priority Product.” In its response to a multitude of ACC comments, DTSC claimed it used a “precautionary approach” to guide its decision to finalize this regulation, a term not used in the statute, defined in the SCP regulations nor mentioned in any of DTSC’s supporting documentation (e.g. Final Statement of Reasons). ACC strongly urges the Legislature to encourage DTSC to fully consider existing scientific data, including data on exposure and risk, rather than rely upon an undefined precautionary approach. In our view, DTSC should be obligated to rely on fact based information so that decisions are supported by science. DTSC should not grant itself open-ended authority to impose regulatory requirements that do not meet clear and specific criteria to list “Priority Products.”

As an example, the SCP regulations require DTSC to demonstrate that potential exposures to a “Priority Product” “contribute to or cause significant or widespread adverse impacts.” Yet in the case of spray polyurethane foam systems with unreacted methylene diphenyl diisocyanates DTSC has not presented data demonstrating this listing criteria was met. The Legislature should ensure that DTSC develop and satisfy clear and specific criteria based upon sound scientific principles when determining the “Priority Products” it intends to move through its regulatory process.

Compliance Flexibility Should Be Considered

The SCP regulations require responsible entities to conduct an “alternatives analysis” on identified “Priority Products.” While this may be appropriate for some chemical/product combinations, it may not be for others. In some instances, opportunities to enhance public health could be better achieved without requiring responsible entities to conduct a costly and time consuming alternative assessment—especially where the lack of a suitable alternative is well known in advance.

For example, ACC recently proposed that DTSC formally enter into an enforceable consent agreement (ECA) with the spray polyurethane foam industry. This ECA could have enabled new and enhanced requirements on the industry regarding worker training aimed at reducing potential exposures and improving overall safety.

If crafted appropriately, this collaborative type of approach to addressing concerns identified by DTSC would have expedited outcomes to meaningfully enhance public health, make better use of DTSC’s and industry’s time and resources, and advance DTSC’s strategic goals and objectives. Unfortunately, DTSC disagrees that such an agreement can be included in this program. Instead, companies will be required to generate a document to demonstrate a well-known fact that there are no alternatives to this product.

Limitations with Alternatives Analysis

An alternative analysis (AA) is a qualitative tool used to compare chemical products to potential alternatives. The process is an emerging discipline that produces a subjective outcome, especially when the underlying framework is built upon a precautionary approach without clear and specific criteria to list a priority product. The subjective nature of an AA compounds ACC's concerns related to the arbitrary and opaque issues related with the SCP regulations. In the end, the outcomes of a subjective review of a product (AA) will be compared to an arbitrary listing of a priority product without a defined risk.

These issues demonstrate that an AA is not a sufficient tool for a binding regulatory outcome under the SCP regulations. To improve certainty within the SCP regulations, DTSC should consider developing criteria to quantify risk for each listed priority product and clear guidance on how certain regulatory responses will be applied to regulated entities.

ACC urges the Legislature to explore how the SCP program could be modified to increase the flexibility DTSC has in creating compliance obligations for responsible entities. This would help create a regulatory program that is reasonable and cost-effective while still meeting the goal of protecting public health.

ACC looks forward to further discussions with the Legislature, DTSC and other interested stakeholders on this important issue. Should you or your staff have any questions or comments, please contact me at 916-448-2581 or Tim_Stestek@americanchemistry.com. Thank you for the opportunity to share these views.

Sincerely



Tim Shestek
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American Chemistry Council

cc: Members, Assembly Committee on Environmental Safety & Toxic Materials
Members, Senate Committee on Environmental Quality

