

Environmental and Land Development ADVISORY

November 17, 2010

Major Revisions to Proposed Green Chemistry Regulations: 15-Day Comment Period Ends December 3, 2010

Substantial revisions to the proposed “Regulations for Safer Consumer Products” under California’s Green Chemistry Initiative were released on November 16, 2010, by the Department of Toxic Substances Control (DTSC). The newly revised text can be reviewed at <http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/Revision-Regulation.cfm>.

With the 15-day comment period falling over the Thanksgiving holiday, DTSC is surely signaling its intent to meet the January 2011 deadline for regulations called for in the statute. The comment period on DTSC’s initial proposed set of regulations ended on November 1, 2010, and included substantial criticism of the agency’s proposals.

In the revised text just released, DTSC responded to several of the concerns that were raised, addressing five particularly burdensome provisions:

- **Fewer and Fairer Lists.** The number of chemical “lists” that DTSC required to be prepared has been reduced from four to two. The requirement for developing lists for chemicals and products “under consideration” has been removed; this eliminates concern of an ever-growing, unprioritized list that sends mixed signals on regulatory intent to manufacturers, rather than the certainty and predictability necessary for green investments in safer products.

More, but still not sufficient, fairness and due process have been added to the formulation of the remaining chemical listings by specifically calling for workshops and opportunity for oral and written comment in advance of their preparation. However, DTSC still retains the discretion to not provide any written responses to those comments.

The “Failure to Comply” list or “list of shame”—for those companies who have been deemed to not be in compliance with the requirements of the regulations—is still part of the regulations.

- **Limitation on the Products Regulated for First Five Years.** Of probably the greatest significance to chemical and product manufacturers who have been justifiably concerned with the vague and sweeping provisions for identifying “priority” products (and hence triggering the expensive data and alternatives analysis (AA) requirements) is DTSC’s recognition that some time will be required with this program before it will be ready for full implementation.

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Accordingly, in the just-released draft regulations, the DTSC proposes that for the first five years (until January 1, 2016), the regulations will only apply to three sets of product types:

- 1 - Children's products
- 2 - Personal care products
- 3 - Household cleaning products

This will no doubt come as a relief to manufacturers of nearly all other products, as the first five years of kinks in implementation and refinement in definitions and processes will be worked out solely by manufacturers of these three product types.

- **Revisiting the Scope of Supply Chain Liability.** Previous drafts of the regulations imposed joint and several liability for compliance throughout the supply chain. However, in another positive step for companies who have some role in the supply chain, but are not the manufacturers of a regulated product, the revised text appears to put a much greater emphasis on manufacturers as the primary entity responsible to comply, with a new emphasis on retailers as the next in line.
- **Elimination of the Tier 1 AA Reformulation Notice.** The requirement for manufacturers to provide notice and a Tier 1 AA for products in which they remove a "listed" chemical has been thankfully eliminated. This was of great concern to many as stifling innovation, and inadvertently adverse to the purposes of the statute in that it could encourage prolonged use of those chemicals to avoid this regulatory burden.
- **Simplifying Third-Party Verification.** While not embracing what many believe was the clear legislative intent behind the Green Chemistry Initiative to encourage the development of safer consumer products by allowing manufacturers a degree of flexibility to self-certify compliance, the newly proposed regulations offer some relief to the burdensome structure originally proposed by DTSC. For instance, the need for manufacturers to obtain third-party verification of their AA has been streamlined. The work plan submitted in advance of the AA no longer requires review of a third-party verifier, reducing at least one duplicative step. However, the AA itself still requires third-party verification, though qualifications for third-party verifiers is now far more flexible and would allow for people with experience in industrial design.

While the contents of the workplan have been streamlined, the existence of a process that requires the review and approval of a workplan in advance of an AA is still an unnecessary step that serves no statutory goal. It is a relic of government-centered hazardous waste clean-up processes (like the RCRA program), rather than a regulatory design intended to stimulate industry to accelerate innovation to safer products.

While DTSC is to be commended for the hard work put into these recent revisions, much work remains to be done. The regulations are still based on a regulatory paperwork process system that is bulky, and prone to clogs and bad decision-making—and not the implementation necessary to bring about the acceleration of innovation to safer products intended by the statute.

Comments on the revised text are due by 5:00 pm PST on December 3, 2010. They may be emailed to gcregs@dtsc.ca.gov or sent by mail:

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

If you have any questions on the original draft regulations, please see our advisories on the topic:

[New Global Supply Chain Responsibilities and Risks for Companies Selling Products into California: Proposed “Safer Consumer Product Alternatives” Regulations](#)

[Rare Meeting of the California Environmental Policy Council \(CEPC\) to Be Convened on October 27, 2010, to Consider Whether the DTSC Green Chemistry Regulations — Or Safer Consumer Product Alternatives Regulations — Will Have Multimedia Impacts](#)

[Increased Risks to Disclosure of Proprietary Information and Trade Secrets Presented by New California Environmental Legislation](#)

[Green Chemistry Initiative Threatens Nanomaterial Companies in California \(and Beyond\)](#)

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For more information on these draft regulations or to discuss strategies now about how your company can involve itself in the regulatory processes that will be unfolding over the next several years to shape California’s final green chemistry requirements, and begin preparing itself for the compliance and enforcement phases of this program, feel free to contact the leader of Alston & Bird’s Green Chemistry Compliance Team, Maureen Gorsen, former Director of the DTSC, or any of the team’s other members:

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