



# American Forest & Paper Association

October 11, 2012

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Regulations Section  
Department of Toxic Substances Control  
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**Re: Comments on the Safer Consumer Products Proposed Regulation, Dept. Ref. No. R-2011-02, Office of Administrative Law Notice File No. Z-2012-7017**

Dear Ms. Von Burg:

On behalf of the American Forest & Paper Association (AF&PA), we respectfully submit the following comments to the California Department of Toxic Substances Control (DTSC) regarding the proposed Safer Consumer Products (SCP) draft regulations issued on July 27, 2012.

AF&PA is the national trade association representing pulp, paper, packaging and wood products manufacturers, and forest landowners. Our companies make products essential for everyday life from renewable and recyclable resources that sustain the environment. The forest products industry accounts for approximately 5 percent of the total U.S. manufacturing GDP. Industry companies produce about \$190 billion in products annually and employ nearly 900,000 people. The industry meets a payroll of approximately \$50 billion and is among the top 10 manufacturing sector employers in 47 states. In California, the paper industry employs nearly 23,000 individuals at 489 manufacturing facilities, meeting an annual payroll of over \$1.6 billion. The estimated state and local taxes paid by the forest products industry totals \$318 million annually.

AF&PA has worked with the Green Chemistry Alliance (GCA) in the last few years to provide the DTSC with data and expertise to assist in developing regulations that will lead to safer consumer products and avoid unnecessary obstacles and burdens to businesses. We appreciate the opportunity to highlight our concerns on recycled materials and food contact material at the DTSC public hearing held on September 10, 2012. We believe DTSC has made some positive revisions to the proposed regulation. However, we believe more changes are needed for this to be a viable program.

## **Appropriate Analysis on Environmental and Economic Impacts**

AF&PA requests that DTSC complete a proper California Environmental Quality Act (CEQA) review before this regulation moves forward. In March 2008, DTSC issued a CEQA Notice of Exemption on the SCP (DTSC 1332 (03/04/08)). CEQA requires the state to follow a protocol of analysis and public disclosure of environmental impacts of proposed projects

and adopt all feasible measures to mitigate those impacts.<sup>1</sup> Contrary to what is claimed by DTSC in the Notice of Exemption, we believe the regulation could have a significant environmental impact. As we explain in more detail below, we believe the SCP could have a significant environmental impact, as it would create a disincentive for manufacturers to use recycled feedstock and could deter efforts to increase paper recovery in California. We believe DTSC has not used its best efforts to make a thorough investigation, instead suggesting that the CEQA review will be done at a later time “during implementation of the regulatory program.” The suggested future environmental review does not excuse DTSC’s requirement to adequately analyze the reasonably foreseeable significant environmental effects of the proposed regulations.

In addition, the DTSC’s Economic and Fiscal Impact Statement and Economic Analysis on the SCP is inadequate and lacking any substantive information about the real costs of the proposed regulations to California, consumers, or the regulated community. DTSC states that the economic and fiscal impact of the regulation is unknown and will be quantifiable only after the regulation is implemented and operating. The open-ended and undefined requirements that DTSC has included in the proposed regulations are unacceptable. It also is unacceptable for DTSC to finalize these regulations without knowing and understanding the actual cost of the regulations and the effect on businesses and jobs in California. We strongly recommend that the regulation be tailored to ensure that responsible party compliance with this program does not lead to excessively burdensome economic effects that could unintentionally result in perverse incentives for jobs to leave the state and for citizens to be deprived of safe and beneficial products that are legally marketed throughout the rest of the US.

On October 1, 2012, Senator Rubio and 15 Senate and Assembly members sent a letter to Governor Brown requesting that California withhold submission of the proposed regulations to the Office of Administrative Law until DTSC conducts an economic analysis that complies with the requirements set forth in the recently enacted SB 617 (2011). AF&PA agrees with Senator Rubio that this is not the economic climate to be crafting a regulation that has significant uncertainty on how it will effect businesses of all sizes and jobs in California. AF&PA requests the DTSC to conduct an economic analysis on the SCP that complies with the requirements in SB 617, and withhold the proposed regulations until that analysis is complete and stakeholders are given an opportunity to comment.

### **Scope of the Program**

It ultimately is DTSC’s responsibility to strike the proper balance between the scope of the program and the resources available to achieve success. A program that takes on more than it can achieve is unsustainable and will produce little to advance public health and environmental protection.

We are pleased that the Department has chosen to focus the program initially by limiting the regulation to five Priority Products. We believe this is a practical approach that will enable the Department to steer the program, learn what works best, and make adjustments

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<sup>1</sup> Public Resources Code Section 21080, 14 Cal. Code Regs Section 15357.

accordingly. However, the regulatory scheme DTSC has proposed still is in excess of what the initial phase should be, and far in excess of that which it has resources to support. We, in concurrence with the GCA, strongly recommend DTSC consider a more focused program concentrating on the substances in consumer products that pose true risks for human health and the environment, based on risk, considering hazard, exposure and the likelihood of harm. We believe that a more focused approach in the regulation would address the practical problems raised by the scope and complexity of the draft.

One of the more concerning aspects of the proposed regulation is the discretion the Department gives itself to implement the program. The Department allows itself considerable discretion for decisions without providing sufficient clarity for the regulated community to understand what they must do to comply with the regulation.

### **Recycled Materials**

We commend the DTSC staff for its efforts to revise these regulations so they are workable for businesses. Despite this work, the latest version of the SCP regulation largely ignores the input of those who design, manufacture and sell recycled content products in California, will deter efforts to increase paper recovery, and is out of step with regulatory approaches used in other states and internationally.

Paper recycling is one of the nation's great environmental success stories and AF&PA is a leader in promoting paper recovery and recycling. In 2011, a record-high 66.8 percent of the paper consumed in the U.S. was recovered for recycling. Paper and paperboard recovery has increased 81 percent between 1990 and 2011. Paper recycling reuses a renewable resource that sequesters carbon and helps reduce greenhouse gas emissions. In addition, in 2011 the amount of paper that was recovered for recycling saved 174 million cubic yards of landfill space.

In keeping with the forest products industry's legacy as a leader in sustainability, in 2011 AF&PA launched the *Better Practices, Better Planet 2020: Continuing AF&PA's Commitment to Sustainability* initiative. As part of this initiative, the industry has set a goal to further increase paper recovery for recycling to exceed 70 percent by 2020 and will work with communities, businesses, and schools to reach this goal.

The draft proposal explains that the DTSC may specify a higher alternative analysis threshold if the source of the chemical of concern is a "contaminant in recycled materials" and meets other criteria including the chemical "cannot reasonably be removed from the product." We appreciate that the proposal includes an option that the DTSC may ease the alternative analysis threshold level for recycled feedstock, but we are requesting an exemption for recycled feedstock to prevent a host of unintended consequences. These include unnecessary costs and burdens that will discourage manufacturing of products that use recycled feedstock without creating environmental or public health benefits, including increased compliance costs to detect even *de minimis* amounts of chemicals.

AF&PA is concerned this provision will impose a disproportionate burden on those who use recycled feedstock, will create a disincentive to using recycled feedstock, will decrease demand for recycled feedstock where virgin fiber is an alternative raw material and

will ultimately be counterproductive to recycling programs. Added costs to manufacturing of recycled content products created by this regulation could lead to more material being landfilled, and will hinder the state's ability to achieve its ambitious new 75 percent recovery goal by 2020. Exempting unintentionally added chemicals from the regulation's requirements is consistent with other state, federal and international chemical regulatory policies.

### **Regulatory Duplication – Exemption for Food Contact Materials**

The statute is firm on the issue of regulatory duplication, stating that the Department should not supersede the authority of other agencies and that the Department shall not duplicate or adopt conflicting regulations for products already regulated.<sup>2</sup> It appears that this proposal goes beyond the statute to assert the Department can regulate a product if it believes it would provide a higher level of public health and environmental protection by regulating the product under the SCP. If the potential health or environmental impact from the chemical in the product is regulated by another agency, by definition any action by the Department would be regulatory duplication, which is prohibited by the statute.

AF&PA requests a clear exclusion for food contact materials from the SCP. AF&PA believes that food contact materials are already fully regulated by a comprehensive federal regulatory schedule that ensures the safety of these materials for the public health and the environment throughout the full life cycle of the materials. Further regulation of these materials by DTSC under the Green Chemistry Initiative (GCI) would be duplicative and in conflict with the existing federal regulatory scheme. The GCI specifically prohibits regulatory duplication or conflict with existing or pending regulations of other Agencies that are consistent with the initiative's purposes. An additional layer of state regulation will inhibit technological innovation and the development of safer and more environmentally friendly food packaging materials, and, ultimately, could even force safe packaging materials out of the California market.

California should focus the SCP regulation on products not already subject to thorough regulations. Since the U.S. Food and Drug Administration's (FDA) regulatory system is already in place, the regulation would do nothing to further protect the public. According to DTSC's Initial Statement of Reasons, the GCI intends to address what it believes is a "structural weakness" in the federal Toxic Substances Control Act (TSCA). Further regulating food packaging which is already fully regulated by FDA will not achieve GCI's policy goals and is unlikely to result in safer consumer products.

The safe use of food contact materials (FCM) is not regulated by TSCA, but rather the Federal Food, Drug, and Cosmetic Act (FDCA). The FDCA provides for a robust regulatory structure to protect the safety of the public health and environment. The FDA employs more than 30 chemists, toxicologists, and other scientific staff, for the sole purpose of evaluating the safety and environmental impact of chemicals in FCMs. With all of the decades of experience this team has, it would be wasteful, from both a policy and resource perspective, for DTSC to attempt to duplicate this system. The GCI product mandate is broad, addressing almost all consumer products on the market. Thus, considering the scientific and technical

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<sup>2</sup> GCI Section 25257.1(c) states, "The department shall not duplicate or adopt conflicting regulations for product categories already regulated or subject to pending regulation consistent with the purposes of this article."

complexity of evaluating FCMs, DTSC should defer to the reasoned and scientific judgment of FDA.

One of the reports that helped shape the underlying policies to GCI was *Green Chemistry in California: A Framework for Leadership in Chemicals Policy and Innovation*.<sup>3</sup> The report identified three information gaps in federal chemical policy: (1) a data gap, based on a lack of information on which chemicals are safe and what products contain them; (2) a safety gap, based on the rationale that government agencies do not have the legal tools or information to prioritize chemical hazards; and (3) a technology gap, which supposedly results in a lack of emphasis in industry on green chemistry principles. These gaps were connected to gaps in health and environmental damage occurring in California. The simple fact is that these weaknesses and information gaps do not apply to food contact materials (FCMs). Regulations by FDA require food contact materials manufacturers to ensure the safety of their products for the public health and environment *before* placing the product on the market. This premarket evaluation ensures that the gaps—data, safety, and technology—identified in the *Green Chemistry* report are not applicable to FCMs.

Rigorous premarket evaluation ensures that substantial amounts of data are available on FCMs and their potential exposure to the public and the environment. Modern food packaging is carefully designed to preserve the quality and safety of the food and extend the shelf life of products, preventing food waste. Other consumer products covered by the GCI are inherently designed to contact the consumer or the environment, resulting in direct exposures that are substantially higher exposures than to any food contact substance. The FDA is fully aware of the potential uses of FCMs and, if the Agency became aware that a particular use of a chemical was unsafe, could take regulatory action to remove the substance from the market.

A technology gap does not exist for FCMs because the industry is highly active in producing green, sustainable materials. The recycling of FCMs has long been of interest for materials such as paper. FDA reviews recycling processes to ensure that any substances that may be present in the source material of a recycling stream do not contaminate the finished product or make it unsafe for use. Products are constantly being developed that are biodegradable, compostable, or are manufactured using renewable and sustainable raw materials. Of course an existing regulatory framework ensures these new materials are safe for their use. The SCP would subject innovative and beneficial FCMs to multiple regulatory schemes, delaying the arrival of such materials to the market and possibly precluding their manufacture altogether because of the increase in regulatory costs.

We believe if DTSC attempts to duplicate FDA's regulatory framework it could result in product deselection rather than extensive analysis of chemical alternatives and is unlikely to help consumers understand the complex scientific analysis that goes into a safety evaluation for a food contact material. FCMs are designed specifically to ensure the safety of food for the entire shelf-life of a product, and reformulation could impact the efficacy of a product,

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<sup>3</sup> Wilson M.P., Chia D.A., Ehlers B.C., "Green chemistry in California: a framework for leadership in chemicals policy and innovation," 2006, available at <http://coeh.berkeley.edu/FINALgreenchemistryrpt.pdf>.

potentially resulting in an increase of foodborne illness. Yet the use of a Chemical of Concern in an individual food packaging product may be extremely small, without any reasonable possibility for the substance to become part of food or have consumer/environmental exposure. Thus, many FCMs, the safety of which has already been established under the existing FDA framework, could be forced out of the California market due solely to the presence of one Chemical of Concern.

In summary, FDA has placed a comprehensive regulation for food contact materials that establish a large margin of safety. The SCP would duplicate this system, yet FDA's regulatory scheme is consistent with the purposes of SCP. Thus, the inclusion of these products in the SCP would contravene the limitations proscribed by Section 25257.1(c) of the Health and Safety Code and would not promote the safety or environmental goals of the GCI.

### **Interstate Commerce**

AF&PA objects to the proposed regulations because they would impose significant burdens on businesses that import their products into California. We believe these burdens vastly outweigh any alleged benefit of the regulations. The regulations impose burdens on the import of goods into California by requiring a detailed analysis of the contents of the products as well as the manner in which these products were produced and transported to California. DTSC acknowledges that “[r]esponsible entities will bear real costs as a result of these regulations,” but that “[s]ince most product manufacturing takes place outside California,” the expected “California employment impacts [would] be minimal.”<sup>4</sup> DTSC has adopted the view that “California firms have an edge in gaining . . . market share” for developing “greener alternatives” under the regulations.<sup>5</sup> According to DTSC, the regulations establish “new ‘rules of the game’” governing the import of products in California. Under these “new rules,” “California’s firms are likely to [be] among the most nimble in responding and thriving in the new regulatory environment.”<sup>6</sup> California does not have authority to set the “rules of the game” governing the interstate and international market for consumer goods sold in California in a manner designed to benefit California economic interests.

The regulations should not be adopted because they impose substantial barriers to the California market. These regulations allow DTSC to take over the decisions of California consumers and authorize DTSC to decide whether or not products – including safe products – can be marketed in California including, for example, the way in which they are manufactured outside California. See *Economic Analysis*, page 9 (acknowledging that some products “are likely to be banned”). The regulations authorize DTSC to deny California residents the opportunity to decide whether to purchase a product based on DTSC’s assessment of the manner in which the product was produced or whether another means of production would render a competing product economically feasible. These regulations impose significant costs on manufacturers that must bear the burden of testing their products,

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<sup>4</sup> Matthew E. Kahn, *Economic Analysis of California’s Green Chemistry Regulations for Safer Consumer Products*, at 4, 5 (Mar. 2012) (“*Economic Analysis*”).

<sup>5</sup> *Id.*, p 5.

<sup>6</sup> *Id.*, p 9.

conducting alternative analyses, and then complying with the regulatory response dictated by DTSC. These barriers are especially harmful to small businesses that lack the resources to comply with these burdensome regulations.

In contrast, there are limited, if any, benefits from the regulations. Chemical ingredients in consumer products already are subject to regulation at the national level by TSCA administered by US EPA and the Federal Hazardous Substances Act as well as other statutes administered by the Consumer Product Safety Commission. In addition to these uniform federal regulations, manufacturers already have strong incentives to ensure that their products are safe and effective both by market mechanisms through which consumers, presented with a choice, will purchase products with safer ingredients as well as remedies to consumers injured by products that are actually unsafe. The proposed regulation seeks to replace these existing protections and informed consumer choice with local government mandates. Indeed, DTSC has not demonstrated that the burdens imposed by the regulations justify the substantial costs and burdens that DTSC acknowledges that would be imposed on importers of products into the California market.

We respectfully ask you to re-examine this process before these regulations move further toward completion to ensure that California's green chemistry regulations will enhance safety, rather than add needless costs and obstacles to manufacturers doing business in California.

We appreciate the opportunity to comment on the proposed Safer Consumer Products regulation. If you have any questions regarding AF&PA's position on the proposal, please contact Laurie Holmes at (202) 463-5174 or Kathy Lynch at (916) 443-0202.

Sincerely,



Paul Noe  
Vice President, Public Policy  
American Forest & Paper Association

CC: The Honorable Matt Rodriguez, Secretary, CalEPA  
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