



October 24, 2010

Secretary Adams and Council Members
California Environmental Policy Center
Via email: cepc@calepa.ca.gov

SUBJECT: Comments to CEPC Consideration of the Need for a Multimedia Evaluation of the Safer Consumer Product Alternatives Proposed Regulations

Dear Secretary Adams and Council Members:

We applaud the California Environmental Protection Agency (Cal EPA) for convening the Environmental Policy Center (CEPC) on this important matter. We appreciate the opportunity to provide comment toward your consideration of the possible need for additional multimedia impact assessment of the draft "Safer Consumer Product Alternatives" Regulations proposed by the Department of Toxic Substances Control (DTSC) in implementation of the Green Chemistry Initiative.

We understand that the DTSC is charged with development of draft regulations on a timeline mandated by AB 1879 (Chapter 559, Feuer), SB 509 (Chapter 560, Simitian), and on the Governor's order implementing recommendations of the California Green Chemistry Initiative Final Report. The CEPC's responsibility includes consideration of the DTSC's null recommendation for additional assessment in their Recommendations on "Need for a Multimedia Evaluation of the Safer Consumer Product Alternatives Regulations", along with staff analysis and public comment.

"Multimedia Evaluation" is here understood to mean the potential for collateral damage from the proposed DTSC regulations, upon our public health, air, water and other environmental resources. Our comments are focused not on the DTSC's proposed regulations, but rather upon the CEPC's evaluation purview and intent. We intend to address our concerns regarding the DTSC's proposed regulations in a separate submittal to that department by November 1 2010; that submittal in part is dependent upon our understanding of CEPC's own regulatory path.

Our Comments are in the form of four Questions, with brief explanation, followed by our Recommendation:

1. Will socio-economic impacts be evaluated? Is there to be a Socio-Economic Impact element, if CEPC determines a "multi-media" evaluation is warranted?

State and federal law protects proprietary information, if certain protocols are followed by companies desiring to maintain their business confidentiality. The proposed DTSC regulations, coupled in particular with potential oversight of the Occupational and Environmental Health Hazard Agency (OEHHA), will substantially increase pressures on this confidentiality, risking this proprietary status.

This added burden and risk translates directly into cost upon business, and is disproportionately onerous for our emerging industries of biofuels and bioproducts, simply

by not having sufficient time, funds or experience to establish the layers of protection afforded the competing petroleum-sourced alternative.

It is our contention that by placing an immediate and substantive disproportionate economic burden upon commercialization of the very alternatives promoted by the Green Chemistry Initiative, by “un-leveling” the market controls, the implementation proposed will in effect select for the better established, better commercialized petroleum-sourced products. In doing so, we defeat the purpose of the law and concomitantly increase the multimedia impact of the proposed regulations.

2. Applicability provisions of the DTSC proposed regulations include specific industrial sector and product exceptions that depend upon non-DTSC agency oversight. Are those non-DTSC agencies of purview, and their industrial charges, removed from compliance with provisions controlling use of the proposed Chemicals under Consideration and Priority Chemicals?

If non-DTSC agencies of purview already had adequate mandatory controls over all chemicals potentially to be listed, the pre-emptive exemptions would be warranted.

In absence of provisions directing all agencies of purview to maintain a coordinated regulatory control over inclusion of the same “non-green” chemicals, the industries most likely to be significantly impacted by the proposed regulations are emerging product development efforts. This effectively unbalances the market forces and unfairly subjects sectors to compliance that their direct competitors (those using less “green” chemicals, for example), are not required to observe.

3. Do impact assessment-based Rulemakings out of the CEPC carry the same legal weight as would an impact assessment under the California Environmental Quality Act (CEQA)? In other words, are CEPC Rulemakings “CEQA-Equivalent”? If not, is the CEPC considering the possible need for a full CEQA impact assessment?

CEQA compliance is recently being driven by court briefs toward use of full “Life Cycle Assessment” (LCA) impact methodology; the CEPC’s multimedia evaluation is suggested, yet not fully defined, as potentially an LCA approach. LCA is a mechanism for comparison of socio-economic and environmental “costs” of one developmental pathway to its alternative. Consideration of an LCA approach would appear appropriate, should the CEPC recommend that additional evaluation is needed.

The CEPC’s interpretation of the relationship of such evaluation to CEQA law and attendant legal findings needs to be explored, and explained. The purview and intent of the CEPC regarding evaluation methodology therefore should be carefully and transparently defined, as this will frame the determination for or against additional impact assessment.

4. Are there potential collateral impacts to federally funded (ARRA) programs? Where federal lands, money, or personnel are affected, CEQA defers to its federal predecessor, the National Environmental Protection Act (NEPA). NEPA impact assessments require consideration of Socio-Economic Impacts.

The Green Chemistry Initiative follows on federal authorizations of the Toxic Substances Control Act of 1976 (TSCA), and upon the 2009 federal findings that the Environmental Protection Agency (EPA) did not have sufficient assessment information on the toxicity of chemicals in commercially available products.

California’s Health and Safety Code provisions amended by the new green chemistry laws essentially place the State in the favored position of pre-empting federal jurisdiction by more stringent implementation. In doing so, Recovery Act funded programs already

designed in a manner that must comply with TSCA, programs that would aid in the development and commercialization of new and less environmentally damaging “green chemistry” products, would be impacted.

California’s environmental assessment purview under CEQA defers to the national Environmental Protection Act (NEPA), where federal lands, monies or personnel may be significantly impacted. A positive determination for further multimedia evaluation by CEPC could therefore be interpreted to warrant a NEPA-mandated first stage analysis, or an “Environmental Assessment”.

Under NEPA’s provision, unlike those of CEQA, socio-economic impacts must be considered. In order for California to maintain supremacy of impact assessment purview, it follows that any CEPC-mandated multimedia evaluation would need to include assessment of potentially significant socio-economic impacts.

Recommendations

1. We recommend that the CEPC find **for** the need for a multimedia evaluation of the DTSC’s proposed regulations.
2. We recommend that **socio-economic impacts** of the proposed regulations be carefully and transparently evaluated, as a crucial element of the assessment.
3. We recommend that the CEPC’s multimedia evaluation include, specifically, an assessment of the **exclusionary mechanisms** whereby existing and deeply established industries might claim exemption from applicability of those regulations upon the basis of existing agency oversight.
4. We recommend that mandatory product ingredient compliance based upon future determination of additions to the list of Chemicals of Concern and Priority Chemicals be **applied across the marketplace**, irrespective of agency purview.
5. We recommend that any and all implementation so directly impacting California’s ability to compete in the global marketplace be considered in terms of that competitive position, in full recognition that loss of our state’s ability to effectively maintain market position collaterally impacts all areas of public health and environmental resources.

Thank you for the opportunity to submit comments before the Council. Please contact me at (530) 823-7300 or by email at mtheroux@jdm.net if you have any questions.

Sincerely,

JDMT, Inc



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Vice President

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