



December 29, 2011

California Department of Toxic Substances Control  
Attn: Heather Jones - Safer Consumer Products Regulations - MS 22-A  
P.O. Box 806  
Sacramento CA 95812-0806  
via email: gcregs@dtsc.ca.gov

**SUBJECT: Comments to "Green Chemistry Regulations"  
Draft Regulations for Safer Consumer Products, R-2011-02**

Dear Ms Jones:

The Department of Toxic Substances Control (DTSC) has developed draft regulations providing Safer Consumer Products as required by Health and Safety Code sections 25252 and 25253 and intended to: (1) establish a process by which chemicals or chemical ingredients in consumer products may be identified and prioritized; and (2) develop criteria by which chemicals and their alternatives may be evaluated and reduce exposure to these chemicals and the hazards posed by them.

The proposed Draft Regulations stem from Assembly Bill 1879 giving the California Environmental Protection Agency greater authority to regulate toxins in consumer products, and Senate Bill 509, which authorized development of an online Toxics Information Clearinghouse to provide Californians with information on hazardous chemicals. The draft regulations establish methods to identify and prioritize chemicals of concern in consumer products and to outline the four-step process developed in the regulatory language, provide the manufacturer, seller and consumer responsibilities and consequences, and describe approaches to the daunting task of cataloguing and maintaining chemical and product information.

The DTSC has requested stakeholder comment by December 30, 2011 in order that all comments may be considered during finalization of the regulatory package being proposed for adoption. This document constitutes our comments to the proposed draft regulations, beginning with General Comments to the overall structure and implementation. The draft regulations are presented as DIVISION 4.5, TITLE 22, CALIFORNIA CODE OF REGULATIONS, CHAPTER 55. SAFER CONSUMER PRODUCTS; our Specific Comments herein are ordered according to the Code section and subsection designations, with section titles for clarity.

### **General Comments**

- (1) The main body of the draft regulatory package consists of a detailed mechanism by which an enormous amount of data is to be collected and analyzed, and from which the DTSC and certified assessment entities are to implement control on an on-going basis. The sheer scale of this as a data management task needs to be subjected to predictive modeling to

determine the escalating magnitude of the task as time progresses. From this modeling effort, the agency then may assess the necessary data management construct in advance, and determine whether sufficient resources (human and capital) are now and will be available in the future to adequately manage the task.

- (2) One area of the draft regulations is particularly troubling: the entire suite of provisions mandating product "end-of-life" management crosses jurisdictional boundaries and imposes DTSC oversight on issues of solid and liquid waste management already under the purview other state agencies. For example, the California Department of Resources Recycling and Recovery (CalRecycle) is deeply engaged in Product Stewardship program development, and the extension of manufacturer responsibility, including proper product end-of-life management. These comments will isolate a number of the specific areas of conflict proposed in these draft regulations, but we request that a thorough assessment be conducted on the impact and portent of this proposed DTSC expansion of oversight will have on on-going programs of this nature in other agencies of purview.
- (3) The proposed regulations require that companies attempting commerce in California must assume a defensive stance, clearly a disincentive to doing business in this state compared to other states. This negative aspect can be counter-balanced by developing and initiating a strong incentive program rewarding companies that indeed seek to bring new, safer chemicals and formulations into California. An organized and funded incentive mechanism would speed the time required to make green alternatives technically and economically available on the state's marketplace.
- (4) In the current economy, well-meaning "Green Chemistry" actions may well cause more harm than good by placing costly barriers in front of California commerce with particularly damaging impacts upon emerging companies. This issue was advanced during repeated public hearings before both the California Environmental Policy Commission (CEPC) and the DTSC. Our firm also provided such comment; see our comments to CEPC dated October 24, 2010 ([http://www.terutalk.com/pdf/20101023JDMT\\_Comments-CEPC\\_Green\\_Chem\\_Regs.pdf](http://www.terutalk.com/pdf/20101023JDMT_Comments-CEPC_Green_Chem_Regs.pdf)) and our comments to DTSC dated October 31, 2010 ([http://www.terutalk.com/pdf/20101031JDMT\\_Comments-DTSC\\_Green\\_Chem\\_Regs.pdf](http://www.terutalk.com/pdf/20101031JDMT_Comments-DTSC_Green_Chem_Regs.pdf)).
- (5) In the latter set of comments we provided four key Recommendations. We would like to emphasize and reiterate the last of these previously-submitted Recommendations as pertinent for inclusion in these comments:

*Expand upon the outreach and educational aspects of the process to include careful and transparent examination of how and where information a company may feel is proprietary might be divulged as a result of these processes. Provide sufficient assistance and time between notification of impending mandate to divulge sensitive information and the first incidence of compliance, based upon the company's own determination of that sensitivity. A simplified process for claiming an interim confidentiality status would be of value.*

## **Specific Comments**

Article 1. General.

§ 69501. Purpose and Applicability.

Subsection (4) (A): The determination of applicability indicates the chapter does not apply if a consumer product is regulated by federal or California programs that "address the same

adverse public health and environmental impacts and exposure pathways..." and "provide a level of public health and environmental protection that is equivalent to or greater than the protection that would potentially be provided if the product was listed as a Priority Product." This section requires that DTSC arrive at a subjective decision regarding not only the toxicity of a particular chemical or formulation, but on the adequacy of control on that material by other agencies of purview. This hazards a boundless and subjectively determined authority for the DTSC, sanctioning expansion of oversight regardless of the state and or federal structures already in place.

§ 69501.2. Definitions.

Subsection (a) (4): "Adverse environmental impacts" should not be defined as restricted to "Adverse air quality impacts, Adverse ecological impacts, Adverse soil quality impacts, or Adverse water quality impacts" (subsection (a)(4) (A) through (D)), but rather defer to the categorization of environmental impacts within the California Environmental Quality Act (CEQA), and the process of determination under CEQA as "Negative Impact" (not "Adverse Impact"). This definition introduces a separate and conflicting pathway for impact assessment and determination, which should definitely be avoided.

This comment applies to each Definition in this section where the term "Adverse" has supplanted the CEQA term "Negative", and where these regulations imply environmental impact should be determined in any manner outside of CEQA or the National Environmental Policy Act (NEPA) if under federal jurisdiction.

Subsection (a) (7): The currently proposed definition regarding "Adverse waste and end-of-life impacts" suggests strongly that the DTSC would have purview through these regulations over any manner of Priority Product end-of-life waste management, recycling, resource recovery and or disposal, without any determination that the consumer product constituted a toxic or hazardous substance.

Such DTSC management would then theoretically apply to select elements of the common municipal solid waste (MSW) stream as well as to liquid wastes and even storm water discharge. These areas of waste management are already entirely under the purview of other state and/or federal agencies and their own regulatory process. The proposed definition would unduly extend DTSC purview without boundaries, and perhaps more importantly, there is no functional mechanism whereby DTSC staff might actually intercede in the daily management of MSW, wastewater, and storm water to selectively apply a separate set of standards to constituents of those waste streams. Note further that this overlap impacts Article 8, Accreditation Bodies and Certified Assessors, in that such certification would of necessity encompass all of the licensing and certification standards and criteria now applicable to agency management of solid and liquid waste.

§ 69501.5 Chemical and Product Information.

The US Environmental Protection Agency (EPA) has initiated the multi-agency Tox21 program for rapid robot-enabled screening of 10,000 chemicals for potential toxicity (National Institute of Health notice dated December 7, 2011: <http://www.nih.gov/news/health/dec2011/niehs-07.htm>.) Coordination with this program would clearly be in concert with the proposed regulatory mandate that the DTSC seek to obtain and/or review information necessary to implement this chapter.

#### Article 5. Alternatives Assessments

See our comments regarding the definition of "Adverse waste and end-of-life impacts". Guidance for and certification of parties who would attempt an alternatives assessment involving potential adverse impacts from end-of-life product management will need to be well versed in pertinent aspects of solid and liquid waste management. As noted above, this provision creates an unnecessary and potentially dangerous overlap of jurisdiction with waste management authorities, which should be avoided.

§ 69506.3. Product Information for Consumers - the Responsible Party is required to identify "any end-of-life management program for this product, and any end-of-life management requirements specified by law..." during a period when Product Stewardship programs are just beginning to address the broader flow of waste and residual. The piece-meal imposition of requirements on a per chemical basis runs counter to the international trend in product stewardship and will surely interfere with development of whole-product manufacturer responsibility programs.

§ 69506.4. End-of-Life Management Requirements. Does the DTSC assume responsibility for management of literally the entire range of potential Product Stewardship plans and implementation schemes dictated by this far-reaching section?

Under what authority will the DTSC discharge these waste management oversight responsibilities? If solely upon the basis of this draft regulation, a direct conflict with existing purview is being proposed.

Who bears the responsibility to enforce section (a) (2) that requires a responsible entity to "fund, establish, and maintain an end-of-life management program ... " for any chemical, compound, or formulation falling under these regulations? These provisions constitute a usurpation of purview that threatens direct conflict within the entire construct of California waste management authority.

#### Article 8. Accreditation Bodies and Certified Assessors

This section establishes the equivalent of a licensing program that overlaps any number of other areas where activities are restricted to existing certification or licensing, such as for the Registered Environmental Health Specialist and its applicability to assessing and managing the complex issues of solid and liquid waste management.

The DTSC proposal would overlay a more general suite of certification criteria not applicable to specifics within this and other highly detailed training and certification mechanisms, and by doing so, not only allow, but literally *require* that intrusive assessments cross jurisdictional boundaries long established. Nowhere is this more apparent than with the imposition of end-of-life product stewardship plan development and implementation, and Alternatives Assessments by DTSC certified entities. If additional training is required for those certified by other programs, that training should be identified and plans developed to implement training programs. Duplicative certification with mandates for intrusive inspection without regard for existing oversight programs is an administrative breach overstepping DTSC authority.

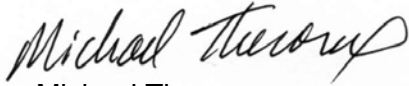
We offer these comments as an aid to DTSC's difficult task mandated by promulgated law to develop implementing regulation. We fully understand that interlacing new regulatory

programs of this scope and scale will almost certainly result in questions of overlapping purview and unintended consequences. We have attempted to isolate and clarify where we feel such purview complications and unintended consequences are most likely.

Please contact me at [mtheroux@jdmt.net](mailto:mtheroux@jdmt.net) or (530) 613-1712 if you have any questions.

Sincerely,

**JDMT, Inc**

A handwritten signature in black ink that reads "Michael Theroux". The signature is written in a cursive, flowing style.

Michael Theroux  
Vice President

cc: (via email)

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