

Legal Lookout: California to Control Chemicals of Concern

Pollution Engineering, September 2010

By Lynn L. Bergeson

Eighth-largest economy in the world drafts regulations to give itself power to control the chemical content of public products.

California has a well-established reputation as a trendsetter, but the gargantuan state may have outdone itself with the June 23 draft regulation released from the California Department of Toxic Substances Control (DTSC) for safer consumer product alternatives. The regulations are intended to implement the Green Chemistry Initiative signed into law by Gov. Schwarzenegger in 2008.

Background

The draft regulations call for three phases: the prioritization process, during which DTSC will 1) identify and prioritize chemicals of concern and consumer products that contain them; 2) for those priority products identified in Phase 1, an alternatives assessment, conducted by the product manufacturers, to identify safer chemical alternatives; and 3) DTSC will impose various regulatory response actions to address any remaining concerns raised by the alternatives selected by manufacturers for implementation, and to move manufacturers toward designing safer consumer products.

DTSC stated that draft regulations will first identify chemicals that pose public health and environmental threats, and that the regulations are most prevalent in consumer products found in the marketplace. Once the final chemicals of concern list is established, the department will create two product lists. The Products under Consideration list will include products that pose public health and environmental threats. From that list, DTSC will identify and list as "Priority Products," those that are of the highest priority based on the relative degree of public health and environmental threats posed by the chemicals in the product.

Once DTSC identifies a priority product, the manufacturer must perform an alternatives assessment. This process will evaluate toxicity and other information concerning chemicals of concern in the product, and compare those data to alternative chemicals or product redesigns that may make that product safer.

After the assessment is complete, if the selected alternative continues to contain a chemical of concern, and DTSC determines there is a safer alternative, DTSC will impose a sales ban on that product within two years of the determination. The manufacturer would have a one-year opportunity to submit a revised alternatives assessment. Manufacturers would be able to sell products that contain chemicals of concern while the chemical and product are undergoing the prioritization/alternatives assessment phases provided the manufacturer remains compliant with all regulatory requirements.

Concerns with the proposal

Product manufacturers are concerned with the proposal. The breadth of the criteria for identifying chemicals and products of concern virtually ensure that few chemicals will be excluded from the process. In short, most products sold in California will be subject to review.

The prioritization process includes factors to be considered that are inherently open-ended and subject to broad interpretation. Factors to consider in making the determination of what is a priority product include the chemical, its current uses, distribution, end-of-product life issues, and potential use by and exposure to the public, including sensitive subpopulations.

The "alternatives assessment process" definition is vague. An alternatives assessment report must include a product life-cycle analysis that takes into account product function and performance, human health and environmental impacts, materials consumption, economic impacts, and "other information as needed." None of these criteria are well defined.

Also, "trade secret" status will be difficult to achieve and the information being submitted under the regulation is presumptively public unless proven otherwise.

This is a precedent-setting initiative that will have national and international product marking implications. DTSC held two half-day public workshops in July. More information is available at www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/gc_draft_regs.cfm. PE

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