

SCPA Delays Could Impact Industry

Chemical Processing, January 2011

By Lynn L. Bergeson

Adoption and implementation of potentially "game changing" regulations are now unclear.

In response to concerns expressed by diverse stakeholders over the final draft of its Safer Consumer Product Alternatives (SCPA) regulations, the California Environmental Protection Agency (CalEPA) has delayed implementation of the regulations, which focus on chemicals and chemical ingredients in consumer products. The net effect of this recent development on the regulation of chemical substances in consumer products in California is uncertain. This column discusses the recent change in plans and its implications for the chemical community.

Originally scheduled to go into effect on January 1, 2011, the start date of the game-changing regulations is now indeterminate. CalEPA released a widely circulated December 23, 2010, letter from Linda Adams, California's Secretary for Environmental Protection, to Assembly Member Mike Feuer (D -LA), author of the 2008 law (A.B. 1879) that would require regulations to address chemicals and chemical ingredients in consumer products. In the letter, Secretary Adams responded to Feuer's concerns about the November 16, 2010, release of revisions to its SCPA regulations by the state's Department of Toxic Substances Control (DTSC). A copy of the Adams letter is available at <http://www.dtsc.ca.gov/upload/GRSP-12-23-2010.pdf>.

Feuer charged that the revisions not only failed to address the flaws of the earlier version but "compounds them by fundamentally altering the approach called for under legislation I authored." In addition to Feuer's letter, the Environmental Working Group (EWG) and 32 other organizations submitted a letter on December 14, 2010, to California Governor Schwarzenegger urging him to "take immediate action to stop implementation of the draft regulations" because of their wholesale failure to give expression to the intent of the Green Chemistry legislation.

Although A.B. 1879 expressly requires DTSC to adopt SCPA regulations by January 1, 2011, Adams stated that "DTSC has agreed to take additional time to be responsive to the concerns raised and revisit the proposed regulations." DTSC and its regulation development team will reconvene a so-called Green Ribbon Science Panel in early 2011 to address the "programmatic issues that have been brought to our attention via the public comment process." Adams states that "[t]his additional time and expertise will help ensure that the vision behind this component of the Green Chemistry Initiative and implementing statute AB 1879, is fully realized." Secretary Adams has shared no timetable as to when this review will occur. It is thus unclear when the state intends to adopt new regulations and implement them.

Implications for Industry

Based on these developments, it would appear that industry-supported changes in the revised regulations could be subject to further discussion and revision. Among these issues are the

proposed exemption of nanomaterials, various definitional changes, including changes to the definition of "responsible entity," and removal of the Tier 1 Alternatives Assessment process.

Earlier versions of the regulations posed significant challenges for the chemical community. Key among them were the near total absence of discernable science-based standards to support priority decisions. The term "chemical" used in the SCPA specifically included "nanomaterial." Nanomaterial, in turn, was defined poorly and in ways largely indifferent to the global conversation underway to define and categorize "nano" with precision to avoid regulating conventional chemicals in new and different ways. The proposed regulations also provided much greater access to commercial information the chemical industry regarded as confidential. In addition, concerns were expressed about the open-ended nature of the "Alternatives Assessments" process, how it was to be conducted, and the need for third-party verifications, and many other issues.

Secretary Adams' decision to step back, regroup, and reconvene the Green Ribbon Science Panel appears appropriate and the right decision under the circumstances. Most would agree that getting this game-changing regulatory program right is vastly more important than ensuring its timely implementation.

That said, chemical stakeholders will need to focus on the details of the deliberations of the Green Ribbon Science Panel and the deliberative and administrative process that is followed when revisiting the regulations. Stakeholders will also need to ensure that the rules are properly focused and capable of fulfilling the Green Chemistry Initiative's ambitious legislative goals. Certainly, some of the regulatory trends, particularly those initiated by the Office of Environmental Health Hazard Assessment, evidenced in earlier drafts of the regulations suggest that the chemical community will need to work hard to get it right.

Lynn L. Bergeson is Chemical Processing's Regulatory Editor. You can e-mail her at lbergeson@lawbc.com.

Lynn is managing director of Bergeson & Campbell, P.C., a Washington, D.C.-based law firm that concentrates on chemical industry issues. The views expressed herein are solely those of the author. This column is not intended to provide, nor should be construed as, legal advice.