



August 29, 2016

Mr. Benjamin Molin  
Office of Legal Affairs  
Department of Toxic Substances Control  
1001 I Street  
Sacramento, CA 95812-0806

Submitted online via CalSafer portal, <https://calsafer.dtsc.ca.gov>

RE: Comments of the American Chemistry Council on Safer Consumer Products Regulations – Listing Children’s Foam-Padded Sleeping Products Containing TDCPP or TCEP as Priority Product

Dear Mr. Molin:

The American Chemistry Council (ACC) submits the following comments on the Department of Toxic Substances Control’s (DTSC) proposal to amend the Safer Consumer Product (SCP) regulations to adopt the Priority Products list (article 11) and to add one Priority Product to that list. Our comments are directed to the rulemaking process generally, and the broader process of stakeholder engagement that informs the rulemaking process as well as selection of draft Priority Products and chemistries; we do not offer comments specific to the two flame retardants that are part of the product-chemical Priority Product designation.

**The Peer Review Process Should be More Transparent.**

ACC previously suggested that DTSC consider a peer-review process for Product Profiles. We view DTSC’s External Peer Review of this proposal to be a positive step. That said, DTSC should release the basis for the review and conclusions in a manner that allows for public review and understanding. The reviewers noted, for example, unclear links between exposure to the chemicals at issue in children’s foam-padded sleeping products and potential body burden, which is an important limitation in the technical record. DTSC program goals cannot be achieved without a clear understanding – and documentation – of exposures to relevant California populations from Priority Products; without this connection, health risk and potential adverse impacts cannot be understood.

**The Economic Impact Statement Should be Revised and Enhanced.**

We encourage DTSC to request a new process for preparation of the Economic Impact Statement (EIS) to ensure that SCP program objectives are met. The EIS process used here reveals flawed assumptions, a lack of supporting data, and improper selection of measures such that DTSC



should consider requesting a revision in this rulemaking. Specific examples and discussion follow.

The EIS contains the following statement in Section A(2) (Estimated Private Sector Cost Impacts): "...it costs less to manufacture polyurethane foam without flame retardants than to produce foam with flame retardants." The Supporting Attachment offers additional detail. We are deeply concerned about the approach for such an "economic" review, which yields an inappropriate and unsupported conclusion. This approach makes several mistakes:

- **It improperly looks at the cost of manufacturing a material instead of the cost of manufacturing the finished consumer product.** The approach assumes that the cost comparison to be made in economic reviews is "material x containing chemical y" with "material x not containing chemical y." But this is not the correct comparison. To avoid loss of product function or performance, a manufacturer may need to add new components, materials, coatings, wiring, insulation, and so forth. Different product design, composition, and assembly may require more parts, more time and labor to assemble, more time to dry or cure, more or longer lab testing to ensure performance, and so forth.
- **It fails to hold performance constant.** The correct examination is between products of equivalent performance – here, children's foam-padded sleeping products that offer equivalent fire resistance. Whether flame retardants are or are not required by regulation in these products is irrelevant for purposes of an economic and fiscal review.
- **It assumes non-flame retardant products will be the result of the regulation, but fails to offer any economic or fiscal analysis of the result of this scenario.** The EIS leaps from the statement that children's products are not required by regulation to be flame retarded, coupled with a statement that it costs less to make foam without flame retardants than with it, to the conclusion that all manufacturers will therefore respond to the rulemaking by eliminating flame retardants. These assumptions and conclusions are unsupported in the EIS with data. Further, they make no economic sense, because some manufacturers choose or may choose to offer flame retardancy as a product feature that offers consumer benefits, and those benefits must have an economic measure that can be described in an EIS. An appropriate economic review would include this discussion.
- **It fails to address costs of testing a substitute product for performance and safety.** An alternative product formulation or design may trigger legally mandated or company required testing requirements. Cosmetics may need to be tested for function and allergies, for example. Manufacturers may need to test a new product formulation or design for consumer acceptance or appeal; if consumers do not like a new taste, smell or texture, for example, they will not buy the new formulation, which has an economic impact. New testing protocols may be lengthier and more expensive. A new design may need to be tested for safety; for example, products intended for dermal contact with people may be tested for allergic reactions.
- **It fails to include the full cost of reporting.** The economic analysis fails to take into consideration the full cost of reporting. Many products include recycled content that may have trace levels of the identified substances. Product manufacturers may face

significant testing and reporting requirements to measure the presence of the identified substances even though they may not be directly impacted.

- **It fails to consider costs of the policy with respect to product trade-offs and sustainability objectives, including those mandated or incentivized by state law.**

The economic analysis fails to consider impacts on availability of material suitable for recycling and other end-of-life considerations. Economic impact studies should consider life cycle consequences in their review. As Priority Products move through the process, there may be impacts, for example, on the availability of material on the recycling stream, or alternative products may be landfilled instead of recycled. If such considerations are not applicable, the EIS should indicate they were considered and not included in the review.

DTSC should seek revision of this specific EIS to address these issues. DTSC should consider developing tailored rules for conducting economic and fiscal reviews of subsequent Priority Product rulemakings that more closely supports the purposes of the SCP program.

**The Meaning Of “Widespread And Significant Exposure” Should Be Supported With Substantial Evidence To Show That Measured Exposure Levels Of The Identified Substances In Priority Products Currently On The Market Present An Identifiable and Significant Risk To Human Health Or The Environment.**

Section 25252 of the Health and Safety Code plainly states that the potential for exposure to the chemical “in a consumer product” is at the core of the program and the implementing regulations. Section 69503.2 of the implementing regulations makes clear that, for a product-chemical combination to be listed as a Priority Product, there must be potential for exposures from that product to contribute to or cause significant or widespread adverse impacts.

DTSC does present a determination that exposures to the chemicals at issue in the proposed Priority Products “may contribute to or cause significant and widespread adverse impacts.” But the underlying evidentiary basis for this determination is insufficient.

Most importantly, the EIS and Attachment state that many affected children’s product manufacturers no longer offer flame-retarded products for sale. If, as of September 2016, there are no products offered for sale in California that contain the flame retardants at issue, it is hard to see how DTSC could conclude that there is current, widespread and significant exposure to justify Priority Product designation.

DTSC also makes assumptions about the availability of flame retarded children’s products, but the agency does not present quantified data that the product-chemical combination is widely available for purchase in the U.S.; indeed, the EIS claims that many manufacturers no longer offer flame-retarded children’s products. It does not offer data specific to California product availability. Instead, it bases its determination on the “widespread detection” of the chemicals in indoor and outdoor environments with no connection made to the children’s products at issue. DTSC does not explain what “widespread detection” means. DTSC does not differentiate between the mere detection of a chemical, which can correlate to extraordinarily low levels of

human exposure (or none at all, if the route of human exposure does not correlate with the media in which environmental detection was made).

At the end of this exercise, it is apparent that there is no factual basis presented upon which a rational conclusion can be reached that there is “widespread and significant exposure” to the chemicals at issue from children’s foam-padded sleep products in California.

Further, we are concerned that the proposal’s approach to determining “widespread and significant exposure” is so broad that it defeats the purposes of the statute; certainly the Safer Consumer Products law contemplates meaningful prioritization of chemicals, and there must be scenarios where exposure to a chemical does not implicate “widespread and significant exposure” for the SCP law to have integrity and meaning.

Aside from this immediate proposal, we urge the agency to:

- Ensure that it has updated data about California availability of product-chemical combinations immediately before proposing a priority product. This is particularly important where a market trend is underway to modify formulations or chemistries.
- Offer a process of reaching a determination of “widespread and significant exposure” that is based on evidence of actual, not assumed, exposure from the consumer product at issue relative to levels that are like to present an actual risk to human health or the environment.
- Offer meaningful, objective, and scientifically accepted definitions of both “widespread” and “significant” that further the purposes of the statute.<sup>1</sup>
- The regulations are concerned with widespread and significant adverse impacts. DTSC should take an approach to Priority Product rulemakings that recognizes the difference between widespread and significant exposures and adverse impacts; there may be no correlation at all. DTSC should avoid improperly correlating “widespread and significant exposure” to adverse effects. Effects, or the risk of effects, should not be assumed for consumer products based on mere detection of a chemical in the environment or in biomonitoring data. Proposed rules should take account of this.
- Observe that “widespread or significant exposure” is not the same thing as where available evidence suggests that adverse impacts are not seen in connection with use of a consumer product, DTSC should take note of this.

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<sup>1</sup> DTSC may also wish to consider that if its definition of “widespread and significant” is so broad that everything will meet it, this could be considered an illegal delegation of legislative authority. It is axiomatic that a legislature may delegate regulatory authority to an executive branch agency as long as it specifies an “intelligible principle” to limit and guide the agency in the exercise of its discretion – but also that completely unfettered, unbounded delegations of authority do not stand.

**DTSC Should Change its Approach to Reaching a Determination of Inconsistency/Incompatibility with Existing State Regulations and the Assessment of Where the Proposal May be in Conflict or Inadvertently Undermine other State Policy Objectives.**

DTSC explains that its review for “any statute regulations concerning the identification and regulation of Priority products” yielded nothing because “the only regulations concerning the identification and regulation of Priority Products are found in the SCP program.” DTSC explains that it searched California regulations using the keywords “chemicals in consumer products,” “Chemicals of Concern,” and “priority products” and the search yielded “no conflicting state regulations.” In our view, as a matter of process this keyword search looking for identical yet statutorily unique terms in other regulations is wholly inadequate. We can conceive of many cases when state regulatory programs may require or encourage, or otherwise regulate, the manufacture, use, or disposal of chemicals, materials, or products covered by a Priority Product Selection. For example:

- a chemical might be necessary for food preparation surfaces in restaurants to be able to meet sanitary standards. “Equipment food-contact surfaces and multiservice utensils shall be effectively washed to remove or completely loosen soils by the use of manual or mechanical methods necessary, such as the application of detergents containing wetting agents and emulsifiers, acid, alkaline, or abrasive cleaners, hot water, brushes, scouring pads, high pressure sprays, or ultrasonic devices.” California Retail Food Code, Part 7, 114097.
- a chemical might be necessary to meet California drinking water disinfection requirements.
- high-tech insulation products and engine oil additives might be critical to achieving policy objectives for reduction of greenhouse gases under AB 32.

Without speaking to the specific chemicals at issue, it is clear that DTSC’s process of conducting a “word search” review of generic and specialized terms contained in the primary regulations is inadequate to determine whether a proposed priority product regulation might be either inconsistent or incompatible with existing state regulations.

It is readily apparent that a key word search for “chemical of concern” would not be able to connect a specific chemical by name, category/family of chemicals, or description of the chemical by function with the relevant regulatory requirement. A more thorough and comprehensive analysis is needed.

**DTSC Should Continue to Increase Industry Stakeholder Engagement.**

ACC has previously recommend that DTSC engage industry stakeholders directly – particularly product manufacturers – to review and improve upon product-specific exposure and composition information prior to the release of the draft Priority Products and the associated documentation. As this proposal makes clear, it is just as important that DTSC maintain that engagement

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throughout the process. It does not serve the purposes of the statute to proceed with Priority Product rulemakings where manufacturers have phased out of chemistry. Likewise, it does not serve the purposes of the statute if exposures are not consumer product driven, but workplace related. If this engagement reveals that Priority Product designation is neither needed nor effective to “limit exposure or to reduce the level of hazard” in the consumer product, DTSC should not proceed to Priority Product rulemaking.

**DTSC Should Develop a Communications Plan to Better Explain that Priority Products Designations Do Not Impugn the Safety or Benefits of Affected Products or Chemistries.**

The Department should revisit its reliance on communications to initiate “market signals...[to] motivate manufacturers...to preemptively phase out Candidate Chemicals in products...”<sup>2</sup> This is inappropriate. The Alternatives Assessment process is intended to offer a mechanism to avoid regrettable substitutions; early “market signals” bypass this mechanism. Scenarios may exist where California agencies ultimately want to encourage Californians and business to use particular product-chemical combinations due to health, environmental, safety, and sustainability benefits, and the SCP program should not impede that outcome.

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ACC appreciates the opportunity to comment on this phase of SCP implementation. If you have any questions related to our comments, please contact me at Karyn\_Schmidt@americanchemistry.com or 202-249-6130.

Sincerely,

*Karyn Schmidt/SSB*

Karyn Schmidt  
Senior Director  
Regulatory & Technical Affairs

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<sup>2</sup> Background Memo: Approaches to Product Category Identification for the 3 Year Priority Products Work Plan, Green Ribbon Science Panel June 25, 2014, [http://www.dtsc.ca.gov/SCP/upload/Work\\_Plan\\_Memo\\_GRSP\\_June2014.pdf](http://www.dtsc.ca.gov/SCP/upload/Work_Plan_Memo_GRSP_June2014.pdf)