



## Department of Toxic Substances Control



**Matthew Rodriguez**  
Secretary for  
Environmental Protection

Barbara A. Lee, Director  
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P.O. Box 806  
Sacramento, California 95812-0806

**Edmund G. Brown Jr.**  
Governor

December 3, 2018

Lee Salamone  
700 Second Street, NE  
Washington, DC 20002

Dear Ms. Salamone:

As you know, earlier this year the Department of Toxic Substances Control (DTSC) adopted a final regulation designating Spray Polyurethane Foam Systems with Unreacted Methylene Diphenyl Diisocyanates (MDI) as a Priority Product (the Listing Regulation) pursuant to the Safer Consumer Products Regulations and California's Administrative Procedure Act. The Listing Regulation was approved on April 26, 2018 by the California Office of Administrative Law, and went into effect on July 1, 2018. The American Chemistry Council's Center for the Polyurethane Industry (ACC) initiated an informal dispute resolution process challenging the Listing Regulation. The ACC dispute challenged the entire listing, and requested that DTSC withdraw the Listing Regulation. During the informal dispute resolution process, the ACC proposed to enter into an enforceable consent agreement with DTSC to resolve its dispute regarding the Listing Regulation.

We are writing to let you know that after due consideration, DTSC has concluded that it must reject the ACC's request that DTSC withdraw the Listing Regulation, and also must reject the proposal to enter into a consent agreement. This letter and the enclosed Appendix and referenced supporting documents explain the reasons for these decisions.

The decision to adopt a regulation designating MDI as a Priority Product was only made after a long period of information gathering, discussion and analysis. In its May 30, 2018, letter initiating the informal dispute process, the ACC provided no new information to DTSC that had not been addressed during the previous rulemaking process. The attached Appendix addresses each of the issues raised in the May 30 letter in relation to the responses that were provided in the Final Statement of Reasons for the Listing Regulation. DTSC's Listing Regulation established that an Alternatives Analysis to fully explore the potential for safer alternatives is warranted.

In a meeting to discuss this informal dispute on September 5, 2018, the ACC proposed entering into an enforceable consent agreement with DTSC to resolve its dispute

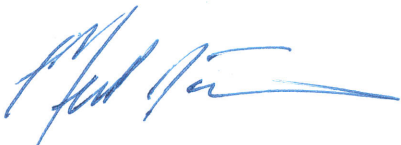
Ms. Salamone  
December 3, 2018  
Page 2

regarding the Listing Regulation. In late 2015, the ACC made a similar proposal during a meeting with DTSC's Director Barbara Lee. Director Lee advised the ACC then that DTSC does not have general authority to create an obligation for an enforceable agreement with product manufacturers outside of the Safer Consumer Products regulatory process. (See Letter from Barbara Lee to Lee Salamone, dated November 17, 2015.) Nevertheless, in response to the ACC's renewed assertion that DTSC could enter into such an agreement, DTSC reevaluated this matter, and again concluded that the Safer Consumer Products Regulations do not authorize the Department to enter into such agreements. Entering into such an agreement would be inconsistent with the regulatory requirements that apply once a Priority Product is listed. DTSC cannot regulate through a settlement: promulgation of regulations is a public process that must follow a prescribed procedure. In fact, the Administrative Procedure Act prohibits the imposition of regulatory-like requirements without going through the process required by that law.

Finally, the Listing Regulation was reviewed by an independent External Scientific Peer Review (ESPR) panel that confirmed the findings that form the basis for the Listing Regulation. The ESPR process was developed to ensure that proposed CalEPA rulemakings meet accepted standards of the relevant scientific disciplines and to prevent improper influence on rulemakings. DTSC urges the ACC to accept the results of this comprehensive, objective regulatory process, and comply with the requirements of the Safer Consumer Products Regulations. The goal is to consider whether there are alternatives to MDI that would not put consumers at risk. Spray polyurethane foam manufacturers have the requisite expertise and resources to complete successful Alternatives Analyses, and DTSC is committed to continued engagement with the Responsible Entities as they complete the analytical steps required by these Regulations.

This concludes the informal administrative dispute process and the associated automatic stay of requirements. The ACC has 30 days from the date of this letter to file an appeal to the Director.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Meredith Williams', is written over a horizontal line.

Meredith Williams, Ph.D.  
Deputy Director  
Safer Products and Workplaces Program

Enclosure/Attachments

Ms. Salamone  
December 3, 2018  
Page 3

cc: Barbara Lee, Director  
Department of Toxic Substance Control;

Lynn Goldman, Attorney  
Department of Toxic Substances Control

Karl Palmer  
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