January 2, 2019

Transmitted Electronically

Barbara A. Lee
Director
Department of Toxic Substances Control
P.O. Box 806
Sacramento, California 95812-0806

Re: American Chemistry Council's Appeal of DTSC's Denial of Request for an Enforceable Consent Agreement and for Withdrawal of the Listing of Spray Polyurethane Foam Systems with Unreacted Methylene Diphenyl Diisocyanates as a Priority Product (R-2016-04)

Dear Ms. Lee:

The American Chemistry Council (ACC)[1] submits this letter to initiate an appeal to the Director concerning the California Environmental Protection Agency's Department of Toxic Substances Control's (DTSC) denial of ACC's request for an enforceable consent agreement (ECA) and request to withdraw DTSC's designation of spray polyurethane foam (SPF) systems containing unreacted methylene diphenyl diisocyanates (MDI) (together, "SPF Systems") as a Priority Product under California's Safer Consumer Products Regulations ("SCP Regulations"). *See* 22 Cal. Code Regs. § 69511, 69511.2 (identifying SPF Systems as a "Priority Product"). ACC initiates this appeal to the Director pursuant to pursuant to Cal. Code Regs., Title 22, §§ 69507 and 69507.2, and respectfully requests that the Director 1) reconsider DTSC's view that it lacks the authority under the SCP Regulations to negotiate and enter into an ECA, and 2) withdraw DTSC's designation of SPF Systems as a Priority Product.

[1] ACC is acting on behalf of the member companies of its Center for the Polyurethanes Industry (CPI) and Spray Foam Coalition (SFC), was recognized by DTSC as a "responsible entity" during the informal dispute resolution process, and is therefore authorized to seek an appeal to the Director, per *id.* § 69507.2(a). ACC's appeal to the Director is also timely made within 30 days of December 3, 2018, the date on which DTSC rejected ACC's request to withdraw the listing of SPF Systems as a Priority Product and concluded the informal dispute resolution process. *Id.* § 69507.2(b).

BACKGROUND

On May 1, 2018, DTSC issued an e-mail alert stating that, effective July 1, 2018, SPF Systems would be listed as a Priority Product under California's SCP Regulations. *See* 22 Cal. Code Regs. § 69511, 69511.2 (identifying SPF Systems as a "Priority Product"). ACC initiated an informal dispute resolution process with DTSC on May 30, 2018. *Id.* §§ 69507, 69507.1 ACC requested that DTSC withdraw its listing of SPF Systems as a Priority Product under the SCP Regulations and re-asserted the points set forth in its comments ("Comments") to DTSC. *See* ACC Comments Responding to the Listing of Spray Polyurethane Foam Systems with Unreacted Methylene Diphenyl Diisocyanates as a Priority Product (R-2016-04), June 6, 2017.

ACC argued that DTSC's listing was unlawful based on the grounds set forth in its Comments from the regulatory docket. Specifically, ACC showed that SPF Systems do not meet the criteria for inclusion as a Priority Product, and DTSC's designation of SPF Systems as a Priority Product is arbitrary, capricious and contrary to law. *See* ACC Comments at 19. Further, DTSC impermissibly combines multiple unique products into one oversimplified SPF Systems product category. *Id.* at 1-2. As a result, DTSC did not analyze individual products to account for their different uses, application methods, exposure potentials, and concentrations. *Id.* at 2. DTSC also did not justify its determination that SPF Systems present the potential for (1) public and/or aquatic, avian, or terrestrial animal or plant organism exposure, *and* that (2) exposure to SPF would contribute or cause significant or widespread adverse impacts. *Id.*

ACC further showed that DTSC also did not adequately consider product stewardship, safety proposals, and industry practices that curtail potential exposure to MDI during the use of SPF Systems. *Id.* DTSC did not provide reliable evidence that SPF Systems present the potential for significant or widespread adverse impacts or even offer a threshold to define for potential for significant or widespread adverse effects. Instead, DTSC asserted an overbroad and unspecific "precautionary approach" that falls short of providing adequate evidence necessary for a justified listing. *See* SPF Systems Final Statement of Reasons (SPF Systems FSOR) at 3. More troubling, DTSC then ignored recent existing data showing a lack of actual exposures to MDI in SPF applications. As stated in ACC's Comments, recent data show a decline in asthma rates associated with isocyanates and no cases attributable to unreacted MDI in SPF in California. *See* ACC Comments at 14-18. DTSC's listing of SPF Systems as a Priority Product lacks an objective, scientific systematic process and is therefore arbitrary and capricious. *Id.* Nor did DTSC fairly respond to ACC's Comments, as its repeated refrain on multiple issues in the SPF Systems FSOR has been that DTSC "made no changes to the proposed regulation as a result of the public comments." *See e.g.*, SPF Systems FSOR at 8, 9, 10, 11, etc.

As part of the informal dispute resolution process ACC and DTSC representatives (including the Deputy Director of the Safer Products and Workplaces Program) met on September 5, 2018 to discuss ACC's concerns with DTSC's listing of SPF Systems as a Priority Product under the SCP program. *See* Sept. 25, 2018 Letter from Lee Salamone to M. Williams. At that meeting, ACC explained that the administrative record did not justify DTSC's decision to list SPF Systems as a Priority Product, that there remained outstanding issues DTSC did not adequately address during the rulemaking process, and that regulatory requirements stemming

from the listing would provide little, if any, public health benefits, wasting administrative and industry time and resources.[2]

During the Informal Dispute Resolution Process, as an alternative to listing SPF Systems as a Priority Product, ACC proposed that DTSC and ACC explore an enforceable consent agreement (ECA) that could produce an example Alternatives Analysis as one possible outcome. ACC had raised the prospect of entering into non-enforceable agreement with DTSC in 2015 before DTSC initiated the SPF Systems Priority Product review and listing process. DTSC declined that offer because it was deemed non-enforceable. At the September 2018 meeting, ACC explained that an appropriately drafted ECA could expedite outcomes that enhance public health, maximize industry and regulatory time and resources, advance DTSC's strategic goals and objectives, and bypass DTSC's concerns with voluntary stewardship programs. ACC argued that DTSC has authority under Chapter 6.5 of Division 20 in the California Health and Safety Code to enter such an enforceable consent agreement. DTSC indicated that it would evaluate its legal authority under the SCP Regulations to enter into such an agreement.

On December 3, 2018, DTSC issued a letter rejecting ACC's request to withdraw DTSC's designation of SPF Systems as a Priority Product. DTSC stated that its decision to list SPF Systems as a Priority Product came after a long period of information gathering, discussion, and analysis and that the final listing established that an Alternatives Analysis is warranted. DTSC claimed that ACC did not present any new arguments or information in the informal dispute process, and DTSC addressed ACC's arguments in an appendix document that cross-referenced DTSC's analysis and conclusions from its SPF Systems FSOR. DTSC concluded that it lacked authority under the SCP regulatory program to enter the type of ECA proposed by ACC. This reflects, DTSC said, the same conclusion reached by Director Barbara Lee in 2015 after DTSC considered its legal authority to enter into a voluntary agreement with ACC prior to initiating the SPF Systems listing process. DTSC's December 3 Letter concluded the informal dispute resolution process ACC initiated on May 30, 2018.

Consistent with Cal. Code Regs., Title 22, § 69507(a), DTSC has acknowledged that the automatic stay pending resolution of administrative appeals will remain in effect until either (1) January 2, 2019, if ACC opts not to pursue an administrative appeal, or (2) the Director has issued a decision on any administrative appeal pursued by ACC.

ARGUMENT

I. THE LISTING OF SPF SYSTEMS IS UNWARRANTED BECAUSE DTSC HAS AUTHORITY TO ADOPT AN ECA COVERING REGULATED PARTIES

ACC submits that entering into an ECA, in lieu of listing SPF Systems as a Priority Product, would promote DTSC's public health and environmental protection objectives in a streamlined and collaborative manner. Such an agreement would capture nearly all (if not all) regulated manufacturing entities in the state of California and would reduce the time and cost of reaching the same health and environmental objectives. While an ECA, properly crafted, could

[2] ACC also reiterated its arguments against listing made in its June 6, 2017 comments and its May 30, 2018 letter initiating the informal dispute resolution.

produce an Alternatives Analysis as one possible outcome, and it could also facilitate mutually agreeable risk management solutions. DTSC has statutory authority to enter such an ECA under the SCP Regulations. The authorizing legislation of the SCP Regulations contemplates the type of ECA that ACC is now proposing and empowers DTSC to negotiate such an agreement under the SCP program. Further, DTSC has itself stated during the SCP program rulemaking process that it can implement the Health and Safety Code's full suite of enforcement tools granted in its authorizing legislation.

In its December 3, 2018 Letter, DTSC has asserted, without support that it lacks authority to enter an ECA under the SCP Regulations. *See* December 3, 2018 Letter at 2. DTSC cites its consideration of ACC's proposal to enter into a consent agreement in 2015. *Id.* DTSC also maintains that negotiating an ECA would be an impermissible regulation by settlement and that the California Administrative Procedure Act (APA) prohibits imposition of regulatory-like requirements without meeting the burdens of notice-and-comment and other APA protections. *Id.* For the reasons discussed below, DTSC's conclusions regarding an ECA under the SCP Regulations are mistaken and should be reconsidered in this Appeal.

A. DTSC Has Legal Authority to Enter an ECA to Effectuate the Public Health and Environmental Protection Goals of the SCP Regulations

DTSC's authorizing legislation in California's Health and Safety Code provides DTSC authority to enter an ECA under the SCP program.

First, DTSC promulgated the SCP Regulations pursuant to Chapter 6.5, Division 20 of the California Health and Safety Code, §§ 25252 and 25253. Article 8 of Chapter 6.5 of Division 20 of the Health and Safety Code, § 25180, reflects DTSC's enforcement authority over matters within the entirety of Chapter 6.5. That authority includes the power to negotiate enforceable consent agreements. *Id.* § 25180(d). Specifically, DTSC's enforcement authority under Chapter 6.5 includes "the issuance of order imposing administrative penalties, the referral of violations to prosecutors for civil or criminal prosecution, *the settlement of cases,* and the adoption of enforcement policies and standards related to those matters . . . ." *Id.* (emphasis added).

Second, DTSC itself recognized in the FSOR for the SCP Regulations that it (1) "has the authority under Article 8 of Chapter 6.5 of Division 20 of the Health and Safety Code to enforce any of the provisions of these regulations" and (2) such authority includes "the issuance of orders imposing administrative penalties, the referral of violations to prosecutors for civil or criminal prosecution, *the settlement of cases*, and the adoption of enforcement policies and standards related to those matters." SCP Regulations FSOR at 105-06 (emphasis added). DTSC's authority to negotiate and execute ECAs, then, is not limited to cases involving hazardous waste generation alone as DTSC suggested during the informal dispute resolution process. Rather, DTSC is empowered by statute to enter ECAs as a means of enforcing the SCP Regulations.

Third, DTSC has entered ECAs in the past with a broad purpose of protecting human health and the environment. For example, DTSC has authority to enter ECAs when it determines that there may be a threatened violation of the Health and Safety Code that endangers the public health and environment — DTSC need not wait for an actual triggering violation of a statute or

regulation. DTSC has also entered into consent agreements in the past that function in lieu of a full permitting application and work in tandem with a rulemaking process for the purpose of immediately protecting the public health and environment while DTSC develops regulations.[3]

In sum, the plain language of Health and Safety Code Chapter 6.5, DTSC's assertions in its FSOR for the SCP Regulations, and its past practice negotiating consent agreements all demonstrate that DTSC does have the authority to enter ECAs, and DTSC's conclusion to the contrary is legally erroneous and unjustified.

B. Execution of an ECA Would Not Be an Impermissible "Regulation Through Settlement" and Would Not Divest the Public of Opportunities to Participate

DTSC also asserts that delisting SPF Systems as a Priority Product and entering into an ECA constitutes an impermissible "regulation through settlement" that divests the public of an opportunity to participate in the process. That conclusion likewise is mistaken.

First, DTSC's consideration of SPF Systems as a Priority Product has already progressed through a significant notice-and-comment process that included a public hearing. DTSC has assembled and responded to comments in an FSOR document. Further, both DTSC and ACC would certainly be cognizant of the public review process that has already taken place and the comments made for listing SPF Systems.

Second, DTSC is incorrect that the ECA process necessarily would bypass further public input and engagement. DTSC can make the terms of a proposed consent agreement available for public review and comment and has done so in the past.[4] DTSC can host public meetings to discuss the terms of proposed agreements. As such, it is not the case, then, that delisting SPF Systems as a Priority Product and entering an ECA would insulate the product from public review and comment.

C. An ECA Would Not Result In "Disproportionate Compliance" with the Regulations

DTSC argues that entering into an ECA would permit disproportionate compliance with the terms of any agreed upon order because it may not cover all regulated entities that manufacture SPF Systems in California. This concern is misplaced.

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[3] *See, e.g.,* Consent Order (Cyanide Waste), *In re Hitachi Chemical Diagnostics, Inc.*, Docket No. RPDD 06/07 HQ-1001 at 1-2 (Sept. 18, 2006) ("The Department intends to establish appropriate grants of authorization for cyanide wastes as part of its rulemaking process … When [Permit by Rule] regulations are promulgated, or a specific form of authorization is issued to Respondent, for the activities authorized … Respondent shall immediately comply with all the requirements of such PBR regulations or authorization for these activities, and this Order shall cease to have any force or effect.").

[4] *See, e.g.,* Consent Order, *In re Hartwell Corp.*, Docket No. SRPD05/06SCC-4354, at 4 (Oct. 30, 2006) ("DTSC will provide the public with an opportunity to review and comment on the final proposed remedy for the Facility Depending on the level of community concern, DTSC may conduct a public hearing to obtain comments.").

As ACC has explained, it represents most, if not all, SPF manufacturers in California that would be covered by the Priority Product listing. ACC would make every attempt to ensure that all covered entities in the State are signatories to any ECA and bound by the terms thereof. Moreover, regulating SPF Systems through the Priority Product system would lend itself to the same theoretical inequities as an ECA, as late entrants to the SPF System market in California will not have participated in the Alternatives Analysis or subsequent regulatory response. ACC and DTSC could also explore potential options by which late-market entrants could be held to similar compliance obligations as set forth under an ECA. Negotiating an ECA, then, would not increase the risk of disproportionate coverage as compared to listing SPF Systems as a Priority Product and proceeding with an Alternatives Analysis.

II. THE LISTING OF SPF AS A PRIORITY PRODUCT IS CONTRARY TO THE DTSC REGULATIONS AND UNSUPPORTED BY THE RECORD

ACC also requests that DTSC remove SPF Systems from its list of Priority Products under the SCP Regulations. In its December 3 Letter, DTSC rejected ACC's request to withdraw the Department's Listing Regulation and delist SPF Systems as a Priority product. DTSC asserted that ACC provided no new substantive information during the informal dispute resolution process and the Department prepared an Appendix responding to ACC's arguments with citations to its SPF Systems FSOR (the "December 3 Appendix"). DTSC also stated that its decision to list SPF Systems was made after due consideration and was supported by review by an independent External Scientific Peer Review panel. As set forth more fully in ACC's Comments dated June 6, 2017 and its letter to DTSC initiating the informal dispute resolution process dated May 30, 2018, both of which are attached hereto and incorporated by reference, ACC renews its request that DTSC withdraw the Listing Regulation and delist SPF Systems as a Priority Product because DTSC's decision is unlawful on multiple grounds.

A. DTSC Impermissibly Interpreted its Regulatory Authority by Listing SPF as a Priority Product Under the SCP Regulations (*See* ACC Comments at 1-24; Informal Dispute Letter at 3-5)

1. In Listing SPF Systems as a Priority Product, DTSC Has Not Shown an Adequate "Potential for Public and/or Aquatic, Avian, or Terrestrial Animal or Plant Organism Exposure to the Candidate Chemical(s) in the Product."

DTSC asserts in its Appendix to its December 3 Letter that it demonstrated the potential for exposure to MDI in SPF Systems.[5] Contrary to DTSC's arguments, the Department has failed

[5] The Department argues that it based its listing on reliable information as well as information provided by the industry showing that unreacted MDI was detected and measured in the breathing zone of SPF applicators during and after spraying- in some instances exceeding occupational thresholds. According to DTSC, the levels of airborne MDI persist for the duration of spraying, which is often a continuous process that can last several hours. DTSC also relied on studies showing that inhalation and skin absorption are exposure routes for MDI. DTSC also argues that the SCP Regulations do not require or specify a minimum exposure threshold to determine whether the potential for exposure exists. *See* December 3 Appendix at 2. DTSC cites to its *Summary of Technical Information and Scientific Conclusions for Designating Spray Polyurethane Foam Systems with Unreacted Methylene Diphenyl Diisocyanates as a Priority Product*, Revised February 2017. DTSC also iterates that a numeric threshold would not be appropriate for SPF Systems given the allegedly low levels at which MDI can harm workers.

to meet its regulatory obligations when analyzing SPF Systems. The SCP Regulations require DTSC to consider: (i) how a product is used; (ii) the occurrence, frequency, extent and duration of the exposure and (iii) engineering and administrative controls. DTSC, however, has chosen to regulate multiple distinct SPF products under one generic umbrella without consideration of how each product is used. *See* SPF Systems FSOR at 8. Moreover, DTSC improperly rejected existing controls, application methods, and other safety practices that are currently in place to reduce potential for exposure to MDI. *See id.* at 12-13.

DTSC's listing of SPF Systems as a Priority Product is inconsistent with scientific literature and health-based information systems about MDI in SPF Systems. DTSC was required to show that there is a potential "exposure to the Candidate Chemical(s)" in the SPF Systems. *See* SCP Regulation § 69503.2(a)(1). DTSC improperly views the "exposure" requirement of the SCP Regulations to be a formality in that DTSC has identified no minimum threshold level of "exposure" required to qualify a chemical of concern/product of concern combination for a Priority Product listing. *Id.* at 19. DTSC even concedes its lack of evidence to show that SPF spraying has caused observed cases of asthma. *See* SPF Systems FSOR at 3. Under DTSC's approach, nearly every consumer product sold in California would have the potential for public and/or aquatic, avian, or terrestrial animal or plant organism exposure to a chemical in a chemical-product combination. *See* SPF Systems FSOR at 18.

DTSC claims in its December 3 Appendix that the SCP Regulations anticipate that a Priority Product listing may include more than one product, citing to language in the SCP Regulations that states "[DTSC] shall specify in the proposed and final Priority Products lists the following for each listed product-chemical combination: (1)(A) A description of the product-chemical combination that is sufficient for a responsible entity to determine *whether one or more of its products is a Priority Product.*" SPF Systems FSOR at 8, citing Cal. Code Regs., tit. 22, § 69503.5, subd. (b) (emphasis added). *See* December 3 Appendix at 2-3. This approach, however, neglects an individual analysis of the frequency, extent, level, and duration of potential exposure associated with different SPF products. *Id.* This is a critical differentiation that DTSC has failed to make.

2. In Listing SPF Systems, DTSC Has Not Shown an Adequate "Potential for Widespread or Significant Adverse Impacts."

DTSC asserts in its December 3 Appendix that it has demonstrated a "potential for widespread or significant adverse impacts" from SPF Systems.[6] Contrary to DTSC's assertions, it has not demonstrated an adequate potential for widespread or significant adverse impacts from SPF Systems. Again, DTSC has not identified a minimum threshold for potential exposures to MDI in SPF Systems that would be considered to cause significant or widespread adverse impacts thus qualifying SPF systems as Priority Products. This lack of specificity and clarity

[6] The Department argues that exposure to unreacted MDI can lead to asthma, hypersensitivity pneumonitis, among other health complications, and that these potential adverse human health impacts are significant. *See* December 3 Appendix at 1. DTSC also argues that although it only needs to find that the adverse impacts are either significant or widespread in order to list as a Priority Product, the Department has found both because SPF Systems are broadly available, which demonstrates the potential for widespread adverse impacts. *See* Appendix at 2.

underscores the inadequacy of DTSC's decision-making process. *See* SPF Systems FSOR at 28 (identifying no threshold but asserting that regulations are "precautionary and flexible" and "do not contain threshold requirements for establishing Priority Products"). DTSC claims that a "precautionary approach" is authorized by the plain language of the SCP Regulations because it requires the Department to consider potential exposure and the potential for such exposures to cause significant or widespread adverse impacts to human health and the environment. Contrary to DTSC's assertions, however, this "precautionary approach" is overbroad, unspecific, unsanctioned by the SCP Regulations, and fails to ensure the administratively necessary evidence to justify a listing.

DTSC asserts that the SPF market in California and around the world is growing as evidence of the potential for widespread or significant adverse impact on California consumers. *See* SPF Systems FSOR at 20; *id.* at 28. These market data do not support DTSC's decision to list SPF Systems as a Priority Product. On the contrary, the fact that the market is growing without any recent occupational asthma cases attributed to MDI exposure from SPF Systems in California shows that industry product stewardship efforts have been successful and that listing of SPF Systems as a Priority Product is unwarranted. In fact, reliable and peer-reviewed data demonstrate that occupational asthma rates for MDI are declining. *See* ACC Comments at 14-18. And, the most recent National Institute for Occupational Safety and Health (NIOSH) data reflect likewise that isocyanates are no longer a top-ten leading cause of workplace asthma. *Id.* at 16. Ignoring this data and instead of providing actual evidence of widespread or significant adverse impacts as required, DTSC claims apparently for the first time within the administrative record that its "precautionary approach" avoids the need to show that SPF spraying has caused observed cases of asthma. SPF Systems FSOR at 3. Listing SPF Systems as a Priority Product is inappropriate because DTSC has not shown that any health effects tied to SPF Systems are significant or widespread.

DTSC has also failed to provide substantial evidence that non-occupational exposure to SPF Systems causes significant or widespread adverse impacts. *See* ACC Comments at 18. DTSC points to general population statistics on asthma in the United States generally and in California specifically; however, these statistics do not provide any context for how many, if any, of these cases relate to isocyanates or to MDI in SPF Systems. DTSC acknowledges that potential exposures can be addressed through personal protective equipment (PPE), but provides no support for its conclusion that individuals and sole proprietors will not use ventilation systems or PPE consistent with product directions and health and safety documents. *See* SPF Systems FSOR at 14, 23.

DTSC asserts in its December 3 Appendix that SPF Systems are "consumer products" as defined in the California Health and Safety Code. DTSC cites to the "consumer products" definition, which includes all products used by "a person." *See* Health & Safety Code, § 25251; Cal. Code Regs., tit. 22, § 69501.1, subd. (a)(24). DTSC interprets "person" to encompass professional workers and cites the fact that some SPF Systems are marketed to Do-It-Yourself (DIY) customers who are not covered by state and federal worker protection regulations. DTSC is again mistaken—professionally-installed SPF Systems are not a "Consumer Product" under the governing statute. DTSC is required to adopt regulations "that establish a process for evaluating chemicals of concern in consumer products." California Health and Safety Code Sec.

25253(a)(1). DTSC's authority to designate Priority Products, then, is limited to "consumer products." Worker exposure is already regulated by state and federal occupational health and safety regulations. Professionally-installed SPF Systems are not a product "used" by consumers in the way that the SCP Regulations intend. DTSC cannot avoid that conclusion by pointing to internet searches that suggest that two-part SPF Systems with MDI might be marketed to consumers for home use or that some SPF Systems with MDI are marketed to DIYers to repair and maintain roofing systems. SPF Systems FSOR at 27. In fact, DTSC acknowledges that DIYers "may not apply SPF on roofing." *Id.* at 9. Additionally, SPF systems used for insulation may be purchased at some retail access points by professionals for professional use.

Finally, DTSC has not provided a clear account of its process for prioritization, including how isocyanates were selected for consideration and how DTSC weighed the various Priority Product selection criteria. *See* ACC Comments at 22. DTSC's response confirms that it did not conduct any systematic analysis of exposure by consumers. Rather, DTSC based its decision to list SPF upon "potential harm to workers" because the "presence of MDI in the breathing zone of applicators demonstrates potential exposure to MDI." SPF Systems FSOR at 18.

3. MDI Exposure is Regulated by Existing Regimes that Provide "Adequate Protection with Respect to Potential Adverse Impacts and Exposure Pathways."

DTSC argues in its December 3 Appendix that it considered all relevant regulatory authorities and determined that listing SPF Systems as a Priority Product would meaningfully enhance the protection of public health. December 3 Appendix at 3-4.[7] That is mistaken. The federal and state occupational and health regulatory programs that govern unreacted MDI exposure, however, are in fact duplicative of the SCP Regulations and adequately protective of public health. These existing regulations have set MDI exposure limits and require employers to adopt engineering and administrative controls to ensure proper ventilation, worker training programs, and PPE requirements. *See* ACC Comments at 21-22. DTSC does not dispute the existence of these regulations in its Appendix or SPF Systems FSOR, but simply asserts, without support, that they do not "provide adequate protection against potential exposures and adverse impacts." SPF Systems FSOR at 48; *see also* December 3 Appendix at 3. Here, too, however, DTSC has identified no applicable threshold in assessing either potential exposures, adverse impacts or whether the alternative programs adequately address these exposures or impacts. *See id.*

DTSC's decision to list SPF Systems as a Priority Product, despite the regulatory coverage from other sources, is a solution in search of a problem. Because the outcome is so at odds with the administrative record, the listing appears to reflect a predetermined outcome whereby DTSC ignored meaningful evidence including evidence demonstrating that state and federal laws mandating worker health and safety programs provide sufficient protection from

[7] DTSC asserts that although the SCP Regulations do not apply to consumer products already regulated by one or more federal and/or State regulatory programs that the Department determines would address the same adverse health impacts as a Priority Product listing, it has concluded that no other existing regulations duplicate the SCP Regulations—these are inadequate, in the view of DTSC, to protect consumers and workers from potential exposure to unreacted MDI. For example, current regulations rely on protection from personal protective equipment (PPE), which DTSC states is the least preferred option in the hierarchy of protection; and, the DIY consumers of SPF Systems are not subject to Cal/OSHA requirements.

exposure to MDI. *See* ACC Comments at 23-24. The fact that listing resulted from a predetermined and unobjective process was further reinforced during the informal dispute process when DTSC stated that SPF is a good product, "but believes there can be a better one, a safer one." *See* Sept. 25, 2018 Letter from L. Salamone to M. Williams, page 3. Listing SPF Systems as a Priority Product will require the expenditure of significant time and resources by industry and government without providing any countervailing health benefits to consumers. Because there are no viable alternatives to SPF Systems containing unreacted MDI that provide comparable attributes and performance, DTSC's listing of SPF Systems as a Priority Product will impose additional regulatory obligations on industry but result in no benefit to the public.

B. DTSC Has Failed to Fulfill its Procedural Obligations (*See* ACC Comments at 24-29 and Informal Dispute Letter at 6).

1. DTSC's Economic Analysis Does Not Comply with Applicable Law

DTSC argues in its December 3 Appendix that it has met all requirements for the economic analysis pursuant to Government Code sections 11346.2, 11346.3, and 11346.5, Health and Safety Code section 57005, and the State Administrative Manual. *See* December 3 Appendix at 4.[8] That conclusion is mistaken. DTSC has not provided a full, final cost estimate of listing SPF Systems as a Priority Product. *See* ACC Comments at 25-26; ACC Informal Dispute Letter at 6. DTSC has presented mismatched costs and benefits by omitting certain entries on the cost side of the equation but including them on the benefit side. *See* ACC Comments at 27. Moreover, DTSC should have provided cost estimates for preparing multiple full-fledged Alternatives Analyses because, as ACC has pointed out, "SPF" encompasses various products that vary in formulation and application. Each product may present different exposure potential. The projected cost estimates are thus grossly underestimated and could reach the level of a major regulation in California.

Further, DTSC has not adequately estimated the considerable cost to California of potentially losing SPF as an insulator and air sealant or roofing product. *Id.* at 27-28. Not only does DTSC not estimate the cost of losing SPF Systems entirely, but DTSC fails to account for the reputational harm to SPF Systems after a Priority Product listing. The potential loss of market or reputational harm from the product being subject to inaccurate claims that it harms workers, users, and the public, could cause fewer builders to specify the product and fewer building owners to desire it globally. Since SPF Systems are products with multiple attributes, a diminished desire to specify the product will make it more resource-intensive for Californians to meet the State's energy requirements and address the climate change goals outlined by the Governor in 2015 and various federal requirements. Further, reluctance to use a product, based on damage to its reputation in the global market, could raise the cost of construction labor as multiple products could be required for insulation, roofing, air sealing and other attributes

[8] Specifically, DTSC states that it was not required to provide cost estimates for preparing multiple Alternatives Analyses for SPF Systems because the variations among products in the B-side may not need separate Alternatives Analyses if the alternative to the A-side in each product is the same as what interacts with the various B-sides in the same way. *Id.* DTSC also argues that it did not fail to provide a cost estimate to the State of California of potentially losing SPF as an insulator and air sealant for roofing products because the Listing Regulation does not ban the use of SPF Systems and will not necessarily prevent SPF products from remaining in the marketplace. *Id.*

achievable with a single SPF product. DTSC has failed to account for the potential loss of benefits to the state and globally.

2. DTSC Has Not Adequately Considered Alternative Pathways to Listing SPF Systems as a Priority Product, as Required by the SCP Regulations.

DTSC argues in its December 3, 2018 Appendix that it considered alternatives to listing SPF Systems as a Priority Product in both the rulemaking phase and in response to ACC's 2015 proposal to the Department. *See* December 3 Appendix at 4. DTSC cites to its SPF Systems FSOR and a letter from Director Lee dated November 17, 2015 to show that it considered as alternatives, and then rejected, voluntary actions and product stewardship efforts proposed by ACC. *Id.*; *see also* SPF Systems FSOR at 2, 52-53; Letter from B. Lee to L. Salamone (Nov. 17, 2015).

ACC proposed an alternative pathway to DTSC, which would have enlisted the SPF industry to undertake a multi-year, California-focused product stewardship and safety campaign focusing on workplace safety regulations, product stewardship materials, training programs, and general health and safety information. ACC Comments at 27-29. In response, DTSC acknowledged that "trained professionals using proper PPE and implementing good safety practices are less likely to be exposed to potentially harmful levels of MDI during application of SPF." SPF Systems FSOR at 52-53. Nevertheless, DTSC chose to reject that alternative in favor of an "alternative that may result in eliminating the hazard." *Id.* at 53. But that alternative is entirely speculative as it would depend on a "market transformation where none is yet occurring and cannot be assumed to develop." ACC Comments at 27. DTSC's consideration of these viable alternatives, then, is not adequate.

C. Listing SPF Systems as a Priority Product Is Not Authorized Under—and Conflicts with—Federal and California Law (*See* ACC Comments at 29-34 and Informal Dispute Letter at 6-7).

DTSC asserts in its December 3 Appendix that listing SPF Systems as a Priority Product is authorized under, and does not conflict with, state and federal laws because the DTSC regulatory response is undefined and it would be speculative to determine at this point whether there is a conflict. DTSC also maintains that its exemption under the California Environmental Quality Act (CEQA) is warranted because promulgating the regulation that lists SPF Systems as a Priority Product is CEQA-exempt because it will not result in a potential significant environmental effect—and, DTSC will conduct further analysis at the regulatory response stage to determine whether the regulatory response is a "project" under CEQA necessitating environmental review. DTSC's proposal to issue a Notice of Exemption under CEQA for listing SPF is premature before a fulsome alternatives analysis has been developed. Such an alternatives analysis may present significant environmental effects that differ from any SPF-specific environmental effects. *See* ACC Comments at 33-34.

DTSC's decision to list SPF Systems as a Priority Product will ultimately result in violations of the Commerce Clause, including impermissible extraterritorial regulation and unduly burdensome restriction of interstate commerce in a manner that imposes costs which

clearly exceed any legitimate local benefits. It will also result in authorizing DTSC under the regulations to require regulated entities to fund third-party research on alternatives through a challenge grant. While critical details on DTSC's actions remain unclear, such required action would constitute an unconstitutional taking. U.S. Const., amend V. *See* ACC Comments at 29-33.

D. Review by External Scientific Peer Review Panel Does Not Support Listing (*See* ACC Comments at 4, 13-14, 51, and 55-56)

DTSC cites to the review work provided by an External Scientific Peer Review Panel as confirmation that the Department's findings form the basis for listing SPF Systems as a Priority Product. As ACC has pointed out in Comments, the external peer review did not definitively support DTSC's findings and DTSC failed to respond to many adverse comments made by the peer review panel. For example, one of DTSC's peer reviewers did not support the view that the effects of SPF Systems are "significant" or "widespread." *See* ACC Comments at 13. DTSC did not address this comment or comments by external peer reviewers stating that the Department misrepresented studies associated with respiratory toxicity of MDI and that the Initial Statement of Reasons should have been updated to reflect those comments. *See* ACC Comments at 56.

CONCLUSION

For the reasons discussed above, DTSC has authority to enter an ECA with manufacturers of SPF systems containing unreacted MDI. Doing so would be the most time- and cost-efficient solution, would allow the public an opportunity to participate through public comments and public hearings, and could produce an Alternatives Analysis as one possible outcome. ACC respectfully requests that DTSC reconsider its decision to list SPF Systems as a Priority Product and instead consider entering an ECA with relevant manufacturers.

Further, for all the reasons discussed above, DTSC's decision to list SPF Systems as a Priority Product is unlawful. The administrative record in this matter does not justify the listing of SPF Systems as a Priority Product under the SCP Regulations. DTSC did not address all outstanding issues during the rulemaking process, and provided an inadequate response to a number of ACC's comments. And, the effect of listing SPF Systems as a Priority Product would provide little (if any) of the public health benefits claimed by DTSC and would unnecessarily squander administrative and industry time and resources.

ACC respectfully requests that DTSC reconsider its decision to list SPF Systems as a Priority Product under 22 Cal. Code Regs. § 69511, 69511.2.

If you have any questions or need additional information, please contact me at (202) 249-6604 or Lee_Salamone@americanchemistry.com.

Sincerely,

Lee Salamone
Senior Director
Center for the Polyurethanes Industry

Cc: Lynn Goldman, Counsel, DTSC
Karl Palmer, Chief, Safer Consumer Products Branch
Meredith Williams, Deputy Director, Safer Products & Workplaces Program