



May 30, 2018

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

Re: American Chemistry Council's Request for Informal Dispute Resolution of DTSC's Listing of Spray Polyurethane Foam Systems with Unreacted Methylene Diphenyl Diisocyanates as a Priority Product (R-2016-04).

Dear Ms. Lee:

On May 1, 2018, the California Environmental Protection Agency's Department of Toxic Substances Control (DTSC) issued an e-mail alert stating that, effective July 1, 2018, spray polyurethane foam (SPF) systems containing unreacted methylene diphenyl diisocyanates (MDI) (together, "SPF Systems") would be listed 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").

The American Chemistry Council (ACC) submits this letter to initiate informal dispute resolution proceedings concerning DTSC's decision to list SPF Systems as a Priority Product. ACC respectfully requests that the DTSC resolve this dispute pursuant to Cal. Code Regs. tit. 22, §§ 69507 and 69507.1.¹ As set forth more fully in ACC's Comments dated June 6, 2017, which are attached hereto and incorporated by reference, DTSC's listing of SPF Systems as a Priority Product is unlawful on multiple grounds. At the outset, 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 (Exhibit A). Further, DTSC impermissibly combines multiple unique products into one oversimplified SPF Systems product category. *Id.* at 1-2. As a result, DTSC has not analyzed individual products to account for their different uses, application methods, exposure potentials, and concentrations. *Id.* at 2. DTSC also

¹ ACC acting on behalf of the member companies of its Center for the Polyurethanes Industry (CPI) and Spray Foam Coalition (SFC) is a "responsible entity" authorized to initiate informal dispute resolution because it represents a broad group of manufacturers, importers, assemblers, and retailers of SPF that are directly affected by DTSC's listing of SPF as a Priority Product. ACC's request for informal dispute resolution is timely made within 30 days of May 1, 2018 publication on the DTSC website of its decision listing SPF as a Priority Product. *Id.* § 69507.1(a).



has not justified 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.*

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. In contrast, DTSC asserts apparently for the first time in this administrative context use of an overbroad and unspecific “precautionary approach” that falls short of providing adequate evidence necessary for a justified listing. *See* Final Statement of Reasons (FSOR) at 3. In addition, recent data show a decline in asthma rates associated with isocyanates and no cases attributable to unreacted MDI in California. *Id.* 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 FSOR has been that DTSC “made no changes to the proposed regulation as a result of the public comments.” *See e.g.*, FOSR at 8, 9, 10, 11, etc.

In short, ACC disputes DTSC’s resolution of the issues and legal concerns underlying the listing of SPF Systems as a Priority Product, including those matters and legal issues highlighted in ACC’s Comments. ACC further reserves the right to raise other issues, including a full response to DTSC’s position set forth in its FSOR and elsewhere, during the course of this informal dispute process.² ACC highlights several of its principal concerns with DTSC’s listing of SPF as a Priority Product under the SCP Regulations below.

² FSOR, *Safer Consumer Products Regulations – Listing Spray Polyurethane Foam Systems with Unreacted Methylene Diphenyl Isocyanates as a Priority Product*, R-2014-04, at 4 (Feb. 2018). Considering the breath of issues under dispute, resolution of the disputes through informal process must include but not be limited to opportunity to: explain the issues under dispute; meet and confer in a good faith effort to resolve those disputes; provide follow-up written comments on items emerging from the meeting and additional discussion as appropriate; memorialization of the issues discussed, resolutions reached, and the basis/rationale for each outcome.

DISCUSSION

I. DTSC Has Impermissibly Interpreted its Regulatory Authority by Listing SPF as a Priority Product Under the SCP Regulations (See ACC Comments at 1-24).

A. 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.”

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 FSOR at 8. DTSC has failed to consider individually the frequency, extent, level, and duration of potential exposure associated with different SPF products. *Id.* Moreover, DTSC improperly rejected controls, application methods, and other safety practices that reduce potential for exposure to MDI. See *id.* at 2; see also FSOR at 12-13. DTSC’s listing of SPF Systems as a Priority Product is also 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 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 FSOR at 18. The SCP Regulations are designed to identify a subset of chemicals and products for which a more timely regulatory response might be justified. That criteria, however, does not support listing SPF Systems as a Priority Product under the SCP Regulations.

B. In Listing SPF Systems, DTSC Has Not Shown An Adequate “Potential for Widespread or Significant Adverse Impacts.”

The SPF Regulations also specify a pre-requisite for identifying a product-chemical combination for listing as a Priority Product is that there must be the “potential for one or more exposures to contribute to or cause significant or widespread adverse impacts.” SCP Regulations § 69503.2(a)(2). Here, too, DTSC has not identified a threshold minimum for potential exposures to MDI in SPF Systems that would consider exposures to be significant or widespread thus qualifying SPF systems as Priority Products. See *id.* This lack of specificity and clarity underscores the inadequacy of DTSC’s decision-making process. 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 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* 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 in SPF Systems 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. 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 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* FSOR at 14, 23.

Further, 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 Do-It-Yourselfers (DIYers) to repair and maintain roofing systems. FSOR at 27. In fact, DTSC acknowledges that DIYers “may not apply SPF on roofing.” FSOR at 9. Additionally, SPF systems used for insulation may be purchased at some retail access points by professionals for professional use.

Further, 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.” FSOR at 18.

C. MDI Exposure is Already Regulated by Existing Regimes that Provide “Adequate Protection with Respect to Potential Adverse Impacts and Exposure Pathways.”

Listing SPF Systems as a Priority Product is unwarranted because exposure to MDI is already regulated at the state and federal levels by respective occupational health and safety administrations. 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 personal protective equipment (PPE) requirements. *See* ACC Comments at 21-22. DTSC does not dispute the existence of these regulations, but simply asserts, without justification, that they do not “provide adequate protection against potential exposures and adverse impacts.” FSOR at 48. 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.*

D. Listing SPF Systems as a Priority Product Will Not Meaningfully Enhance Public Health.

DTSC’s decision to list SPF Systems as a Priority Product 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 exposure to MDI. *See* ACC Comments at 23-24. 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 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.

II. DTSC Failed to Fulfill its Procedural Obligations (See ACC Comments at 24-29).

A. DTSC’s Economic Analysis Does Not Comply with Applicable Law.

DTSC has not provided a final cost estimate of listing SPF Systems as a Priority Product. *See* ACC Comments at 25-26. 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. *Id.* at 27. Moreover, DTSC should have provided cost estimates for preparing multiple full-fledged Alternatives Analyses because as ACC has repeatedly pointed out, “SPF” encompasses various products that vary in formulation and application. Further, DTSC has not adequately estimated the considerable cost to California of potentially losing SPF as an insulator and air sealant for roofing products. *Id.* at 27-28.

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

There are no technically and economically feasible alternatives to the use of unreacted MDI in SPF currently available on the market. *See* ACC Comments at 27-29. Accordingly, 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. *Id.* 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.” 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.

III. Listing SPF as a Priority Product is Not Authorized Under—and Conflicts with—Federal and California Law (See ACC Comments at 29-34).

Finally, DTSC’s decision to list SPF as a Priority Product ultimately will result in violations of the Commerce Clause: including impermissible extraterritorial regulation and undue 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, we believe such required action would constitute an unconstitutional taking. U.S. Const., amend V. Finally, DTSC’s proposal to issue a Notice of Exemption under the California Environmental Quality Act (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.

CONCLUSION

ACC respectfully requests that DTSC initiate informal dispute resolution procedures pursuant to Cal. Code Regs. tit. 22, §§ 69507 and 69507.1 and 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

Incorporated Attachment: ACC Comments on the Listing of Spray Polyurethane Foam Systems with Unreacted MDI as a Priority Product (June 6, 2017)