



**Comments of Unifrax I LLC
on
Priority Products Draft Regulatory Concepts and
Topics for Stakeholder Input
California Department of Toxic Substances Control**

June 30, 2014

Introduction

Unifrax I LLC, a manufacturer of Refractory Ceramic Fiber (RCF), offers the following comments on the May 22, 2014 Draft Regulatory Concepts Document for Priority Products.¹

Unifrax has no comments on the three products proposed for priority listing. However, as this initial analysis may be considered a precedent for future proceedings, the topics listed in the draft for public input on priority product listing are extremely important. Unifrax is concerned that the topics listed in the draft do not expressly invite input on two major types of relevant information: (1) the adequacy of existing regulation of the product; and (2) the feasibility of substitutes. For the following reasons, Unifrax urges the Department to make it clear in the final Regulatory Concepts Document that information in both of these areas is critical to priority product decisions and will be fully considered.

Existing Regulation

California Health and Safety Code section 25257.1(c) provides that "DTSC shall not duplicate or adopt conflicting regulations for product categories already regulated or subject to pending regulation consistent with the purposes of this article (3)(A)." This is reflected at two points in the final regulations. First, section 69501(b)(3)(A) provides the following exemption:

This chapter does not apply to a consumer product that the Department determines is regulated by one or more federal and/or California State regulatory programs, and/or applicable treaties or international agreements with the force of domestic law, that, in combination:

1. Address the same potential adverse impacts, potential exposure pathways, and potential adverse waste and end-of-life effects that could otherwise be the basis for the product being listed as a Priority Product; and

¹ A detailed description of Unifrax and the company's products is provided in the company's Comments of November 1, 2010 and October 11, 2012 on the proposed Green Chemistry regulations, and in several other comments filed throughout the rulemaking proceeding.

2. Provide a level of public health and environmental protection that is equivalent to or greater than the protection that would potentially be provided if the product were listed as a Priority Product.

This exemption is discussed as follows in the final Statement of Reasons:

To effectuate this exemption, section 69501(b)(3)(A) requires an evaluation and determination by DTSC as to whether or not a product qualifies for the exemption based on the other programs under which the product is regulated. This is necessary to ensure that any product exempted from the regulations, and, thus, from the intent and requirements of the authorizing legislation, truly meets the qualifying conditions. Typically, DTSC's determination would occur at the point when DTSC is evaluating a product for possible listing as a Priority Product. If DTSC determines the conditions for the exemption are met, the product would not be further considered for listing as a Priority Product, and thus not subject to any of the consequent requirements of the regulations (p. 33, emphasis added).

Similarly, Section 69503.2(b)(2), which expressly governs priority product rulemaking, provides:

(2) Other Regulatory Programs. The Department shall next consider the scope of other California State and federal laws and applicable treaties or international agreements with the force of domestic law under which the product or the Candidate Chemical(s) in the product is/are regulated and the extent to which these other regulatory requirements address, and provide adequate protections with respect to the same potential adverse impacts and potential exposure pathways, and adverse waste and end-of-life effects, that are under consideration as a basis for the product-chemical combination being listed as a Priority Product. If a product is regulated by another entity with respect to the same potential adverse impacts and potential exposure pathways, and potential adverse waste and end-of-life effects, the Department may list such a product-chemical combination as a Priority Product only if it determines that the listing would meaningfully enhance protection of public health and/or the environment with respect to the potential adverse impacts, exposure pathways, and/or adverse waste and end of-life effects that are the basis for the listing.

This provision is described in the final Statement of Reasons as follows:

Section 69503.2(b)(2) specifies that DTSC is to consider the scope of other regulatory programs and the extent to which they address and provide adequate protection against the same potential adverse public health and environmental impacts, exposure pathways, and adverse waste and end-of-life effects being considered as a basis for

listing a Priority Product. Other regulatory programs include: other California State regulatory programs and other federal regulatory programs, including those that stem from applicable treaties or international agreements with the force of domestic law. This section further provides that if a product is regulated by another entity, with respect to the same potential adverse impacts, exposure pathways, and adverse waste and end-of-life effects, DTSC may list that product as a Priority Product only if DTSC determines that the listing would meaningfully enhance protection of public health and/or the environment with respect to the potential adverse impacts, exposure pathways, and/or adverse waste and end-of-life effects that are the basis for listing the product as a Priority Product. These provisions are necessary to ensure that DTSC maximizes the effective use of its resources by focusing on those public health and environmental concerns that are not already being adequately addressed by another federal or California State regulatory program.

This provision is also necessary to implement and ensure consistency with Health and Safety Code section 25257.1(c), which provides that “DTSC shall not duplicate or adopt conflicting regulations for product categories already regulated or subject to pending regulation consistent with the purposes of this article.” Federal and California regulatory agencies, and regulatory regimes created by legally binding treaty obligations, will be evaluated to determine if they fall under this statutory provision (p. 177).

While it is clear from these materials that the adequacy of existing regulation is a primary consideration in the priority product process, it is not mentioned in the draft Concepts Document. The final Document should include a clear request for input on this issue with respect to all products considered for priority product listing.

Feasibility

Section 69503.2(b)(2) of the final regulations provides:

(3) Safer Alternatives. When deciding whether to list a product-chemical combination as a Priority Product, the Department may also consider whether there is a readily available safer alternative that is functionally acceptable, technically feasible, and economically feasible.

The final regulations include definitions of both technical and economic feasibility, described in the final Statement of reasons as follows:

Section 69501.1(a)(29) defines “economically feasible” to mean that an alternative product or replacement chemical does not significantly reduce the product manufacturer's operating margin. This is necessary to make specific the use of the term “economic impacts” in the enabling legislation in Health and Safety Code section 25253(a)(2)(M). The term

“economically feasible” is used in Articles 3, 5, and 6. This criterion includes the economic viability of the alternative that would allow the product to be profitable for the manufacturer. The responsible entity must consider the effect on the operating margin of the manufacturer. This factor reflects marketplace realities and business realities in determining whether there is an economically viable alternative to a Priority Product. Thus, this term is necessary to make clear that one of the considerations during the AA is whether the use of an alternative will significantly reduce the operating margin of a manufacturer. The purpose of this program is not to put companies out of business, but to ensure a fair and reasonable search for safer alternatives that may actually be used.(p.67)

Section 69501.1(a)(65) defines "technically feasible" to mean that the technical knowledge, equipment, materials, and other resources available in the marketplace are expected to be sufficient to develop and implement an alternative product or replacement chemical. This provision is necessary to ensure that there is a technical ability to develop and produce an alternative, and is referred to in Article 3, Article 5, and Article 6. As part of a determination of whether there is a readily available alternative, an alternative needs to meet the criteria for “functionally acceptable”, “technically feasible”, and “economically feasible” (see sections 69503.2(b)(3), 69505.4(b), 69505.6(a)(2)(C), 69506(a), 69506.5(b), and 69506.8). The term “technical feasibility” establishes the criteria to determine if there are resources available to achieve implementation of the alternative. This evaluation may, for example, consider the generation of knowledge about the product’s or process’s design, performance, production requirements, preliminary production costs, and level of resources needed and available.

The provisions of the regulations related to “technically feasible” ensure that an alternative is readily available (p. 98)

While the Draft Concepts Document solicits input on some types of information relevant to feasibility determinations, it omits others and makes no clear mention of the requirement that both technical and economic feasibility of potential alternatives must be considered in the listing process. The final Document should solicit input on all relevant aspects of both economic and technical in the listing proceeding.

Conclusion

For the reasons stated above, the final Regulatory Concepts Document should clearly solicit public input on the adequacy of existing regulation and the feasibility of potential alternatives in priority product listing proceedings.

Respectfully submitted,

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