

COMMENTARY ON THE REVISED CALIFORNIA SAFER CONSUMER PRODUCT REGULATIONS (and Summary of Significant Changes) (dated January 2013)

Nicholas A. Ashford, PhD, JD
President Ashford Associates, and
Professor, Massachusetts Institute of Technology

Evaluation of the Key Criteria:

- 1. The initial Candidate Chemicals that are chemicals listed by one or more of the sources named in the regulations and that have hazard traits that have public health and environmental concerns are appropriate.**
- 2. The evaluation criteria for prioritizing the product-chemical combinations in Article 3 for identifying all types of consumer products containing Candidate Chemicals as potential Priority Products are sufficient and appropriate. Revised regulations appropriately specify the key prioritization criteria as critical factors necessary to identify potential Priority Products. The product-chemical combination identified and nominated for Priority Product listing meet the key prioritization criteria.**
- 3. The principles outlined in the proposed regulations that establish the Alternatives Analysis Threshold for COCs that are contaminants in Priority Products are scientifically understood and practical**
- 4. The definitions of the various “adverse” impacts and general usage of the terms “adverse” impacts and “adverse effects” used throughout the proposed regulations are appropriate. A qualitative or quantitative determination of adverse impact or effect can be made, and is adequately protective of public health and the environment when reliable information is available.**

In general, the scientific portion of the proposed rule is based upon sound scientific knowledge, methods and practices. However, while the rule is basically sound, some clarifying changes need to be made.

General remarks: Being able to classify as a chemical of concern on the basis of the availability of a safer *chemical* substitute is extremely important and should be retained. This ties together risk assessment and alternatives assessment. However, the rule (and the summary of significant changes) is inappropriately structured and written in language that discusses only *chemical* substitution. More prominence needs to be given to substitutions or alternatives that include ‘use of a safer technological or administrative approach that delivers a comparable functional purpose’.

In the four-page document entitled **Summary of Significant Changes**, bullet four on page 2 reads:

“The regulations clarify that the required AA evaluation of chemical hazards and adverse impacts is limited in scope to the COCs, alternative replacement chemicals, and any other chemicals in the alternatives that differ from the chemicals in the Priority Product”

However, the rule itself obliquely, but specifically, requires that *non-chemical* alternatives are to be included in the alternatives analysis and the regulatory responses required of the manufacturer of the COCs. This is missing from the statement above.

The Definitions section 69501.1 (a)(10) clearly considers “alternative” to include changes in the “manufacturing process.”

Article 5 Alternatives Analysis - Section 69505

Unfortunately, reference to this expansive and inclusive definition of alternatives is only obliquely referenced in the section dealing with ‘identification of Alternatives’ - Section 69505.5 (b)(1A) on page 62 reads:

In addition to any alternative identified under section (a)(3)(B), the responsible entity shall identify and consider alternatives that meet the definition of ‘alternative’ under section 69501.1...

Fortunately, Section 60505.6 (a)(2)(B) on page 64 does consider non-chemical alternatives, but in general the rule is poorly written in bringing attention to these. **The rule should be re-written.**

In addition, under the discussion of Alternatives Analysis, bullet four on page 2 of the **Summary Document** should be amended to read:

“The regulations clarify that the required AA evaluation of chemical hazards and adverse impacts is limited in scope to the COCs, alternative replacement chemicals, **and any other chemicals in the alternatives that differ from the chemicals in the Priority Product, and safer technological or administrative approaches that deliver a comparable, but safer functional purpose as the COCs.**”

Article 6 Regulatory Responses - Section 69506

Section 69506.6(a): line 1 (page 83) [sentence continued from page 82, last line] delete the word “product” and substitute the words **“technology or approach”** so that it reads “a selected alternative technology or approach”

In addition, in the discussion Regulatory Responses in the four-page document entitled **Summary of Significant Changes**, add the following to the end of bullet two:

“or safer technological or administrative approaches that deliver a comparable, but safer functional purpose as the COCs.”

I question the limitation of bullet 7 on ‘DTSC not being able to require a new Alternatives Assessment based on the receipt of new information’ and in the text of the regulation itself to that effect. I recommend its elimination.

ADDITIONAL REMARKS REGARDING THE ECONOMIC IMPACT OF THE PROPOSED RULE

While not asked to comment upon the likely economic impact of the rule, I offer the following remarks.

1. The costs of additional tasks imposed upon the proposed rule should be balanced against (1) the public health and environmental consequences of not implementing the rule, and (2) the benefits of stimulating replacement of problematic chemicals (derived from the list of chemicals of concern) by more benign chemicals, changes in reformulated or substitute products, process technology, and other technological and administrative practices.
2. In general, much chemical production and usage has remain static for decades, while new products, synthetic pathways, ad approaches have been the focus of innovation that have insufficiently penetrated the market and general practice. Thus, the proposed rule can properly be interpreted as a ‘modernization of the chemical industry’ [1].
3. There will be winners and losers among industrial actors, but innovation and economic growth crucially depends on industry and product turnover and evolution. Otherwise the industrial sectors and nations in which they are embedded remain static and uncompetitive.
4. Europe and Asia are advancing in chemical innovation, and the chemical industry in the United States cannot afford to lag behind in the development and deployment of environmentally safer chemicals and processes.
5. Finally, the proposed rule advances the regulation of chemicals from an exclusively risk-driven process towards a technology-based process which is less expensive by not requiring detailed and full-fledged risk analysis, and instead fostering *comparative* risk analysis and functional analysis -- and the identification of better technologies and approaches [2].

[1] "Using Regulation to Change the Market for Innovation," N.A. Ashford, C. Ayers, R.F. Stone, *Harvard Environmental Law Review*, Volume 9, Number 2, Summer 1985, pp. 419-466. Available at <http://hdl.handle.net/1721.1/1555>

[2] “Rethinking the Role of Information in Chemicals Policy: Implications for TSCA and REACH”, Lars Koch and Nicholas A. Ashford, *Journal of Cleaner Production* 14(1): 31-46 2006. Available at <http://hdl.handle.net/1721.1/38476> Revised version published in

Environmental Law Network International 2(2005):22-37. Available at
<http://hdl.handle.net/1721.1/55292>

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nicholas A. Ashford". The signature is written in a cursive, flowing style.

Nicholas A. Ashford, Ph.D., J.D.
President, Ashford Associates, and
Professor of Technology and Policy
Submitted 3 March 2013 in response to Service Authorization Number OSA 12-055