

**ADDENDUM 2**  
**FINAL STATEMENT OF REASONS**  
**Safer Consumer Products Regulations**

**DEPARTMENT OF TOXIC SUBSTANCES CONTROL REFERENCE NUMBER: R-2011-02**

**OFFICE OF ADMINISTRATIVE LAW NOTICE FILE NUMBER: Z-2012-0717-04**

**OFFICE OF ADMINISTRATIVE LAW FILE NO: 2013-0718-03 S**

The Department of Toxic Substances Control (DTSC) is adding the information presented in this Addendum 2 to the final rulemaking file for the proposed Safer Consumer Products Regulations to supplement the Final Statement of Reasons document submitted to the Office of Administrative Law on July 18, 2013, and the Addendum to the Final Statement of Reasons submitted to the Office of Administrative Law on August 26, 2013.

**I. DETAILED STATEMENT OF REASONS**

**Updated Summary and Rationale**

The information below replaces the summary and rationale provided in the Final Statement of Reasons and its Addendum for the following sections of the proposed regulations:

**Section 69501.3(b)** requires that documents submitted to DTSC under the Safer Consumer Products regulations be in English and be provided in an electronic format accessible to DTSC. This provision is necessary to ensure that the information provided to DTSC (on either a mandatory or a voluntary basis) can be reviewed, evaluated, and processed by DTSC as effectively and efficiently as possible. This provision is also necessary to provide each person submitting information to DTSC flexibility as to how the information is submitted as long as it is accessible to DTSC. This flexibility is provided in recognition of the fact that different persons will have different information-generating capabilities and formats.

**Section 69509.1(a)** requires that DTSC review a trade secret claim for information submitted under the regulations, along with the information provided in support of the trade secret claim, before disclosing the information that is the subject of the trade secrecy claim. This provision is necessary to ensure that DTSC does not release to the public information for which a valid trade secrecy claim has been filed; and, on the other hand, to ensure that information is not withheld from the public based upon an invalid trade secrecy claim. This is necessary to maximize transparency and public access to information submitted to DTSC under the Safer Consumer Products regulations, while protecting validly claimed trade secrets.

**Section 69509.1(c)** specifies that, if DTSC determines that the information submitted in support of a trade secrecy claim does not establish that the information claimed to be trade secret meets the definition of “trade secret”, DTSC will notify the submitting party of its determination by certified mail. The notice will also inform the submitting party that thirty (30) days from the date of the notice of DTSC’s determination, the information will be regarded as a public record subject to disclosure. This provision also provides that during the 30-day period the submitting party may seek judicial intervention by bringing an action for a preliminary injunction and/or declaratory relief to prevent disclosure of the information claimed as trade secret.

This provision is necessary to implement Health and Safety Code section 25257(c)(3), which requires DTSC to give 30-days’ notice to the submitter of information claimed to be trade secret before releasing any such information, authorizes submitters to seek judicial intervention to prevent information release, and specifies judicial remedies that may be sought. This provision is necessary to establish a time frame and procedure for resolving disputed trade secrecy claims, and to allow time for a claimant that receives an adverse determination from DTSC to seek judicial review of the DTSC determination.

## II. RESPONSES TO COMMENTS

Presented in the Attachment to this Addendum 2 to the Final Statement of Reasons are summaries and responses to public comments submitted to the Department of Toxic Substances Control (DTSC) on the proposed revisions to the rulemaking titled *Safer Consumer Products*, which were released to the public on August 23, 2013. The proposed revisions were available for comment for 15 days (plus a weekend), with the public comment period closing on September 9, 2013.

A total of ten (10) letters commenting on the proposed revisions to the regulations released on August 23, 2013 were received. A list of commenters in alphabetical order and the number assigned to their correspondence is included in the Table presented in the Attachment. Each comment letter was assigned a number. DTSC subsequently numbered each of the comments contained in each letter and collated similar comments together. The designation “1-1” means comment letter number 1, comment number 1, and so forth. For the purpose of orderly presentation, the comments have been categorized by topic.

**ATTACHMENT**Responses to Public Comments Received  
During the 15-Day Comment Period (8/23/13 through 9/9/13)

| Commenter Number | Name of Commenter                             | Number of Comments |
|------------------|---|--------------------|
| 1                | Alliance of Automobile Manufacturers          | 3                  |
| 2                | American Chemistry Council                    | 3                  |
| 3                | Association of Global Automakers              | 4                  |
| 4                | Automotive Aftermarket Industry Association   | 5                  |
| 5                | Consumer Specialty Products Association       | 6                  |
| 6                | Environmental Protection Encouragement Agency | 1                  |
| 7                | Information Technology Industry Council       | 6                  |
| 8                | Koch Industries                               | 12                 |
| 9                | Procter & Gamble Company                      | 11                 |
| 10               | Rubber Manufacturers Association              | 4                  |

**Information Submittal****§69501.3(b)**

**Comments:** 1-3, 3-2, 5-1, 5-2, 7-2, 7-3, 9-3, 9-4

**Comments Summary:**

- Commenter is unclear on what will be required by subsection (b) of section 69501.3 and requests that this subsection specify the format, or provide examples of formats that DTSC can access.
- Commenter supports the changes to section 69501.3(b) that require that documents submitted to DTSC under the regulations be in English and be provided in an electronic format accessible to DTSC. Commenter agrees that this provision is necessary to ensure that the information provided to DTSC (on either a mandatory or a voluntary basis) can be reviewed, evaluated, and processed by DTSC as effectively and efficiently as possible.
- It is unclear how and when DTSC will define which electronic formats are considered accessible and how the regulated community will be made aware of which electronic formats DTSC will accept. Commenter suggests detailed information and stakeholder involvement in determining the specification of electronic formats to ensure that submitted data is "easily accessed, understood, compiled and processed" before incorporation into databases by DTSC.

- Commenter requests clarification that while documents submitted to DTSC must be in English, any supporting documents (*i.e.*, labels or similar types of examples) can include representative sections in multiple language(s) as long as one of the languages is English.
- Commenter appreciates the flexibility that DTSC is affording submitters in determining the format for information submission, which will provide flexibility and allow for potentially different submission formats rather than formats that are specified by DTSC.
- Commenter is concerned with the requirement that all documents be submitted in English. There may be certain supporting documents, such as journal articles, lab test results, foreign regulations and directives, and other documentation that will be submitted with the Alternatives Analysis that may be prohibitively expensive to translate in whole. Commenter suggests the regulations allow for limited translations of portions of documents based on relevance determination and prioritization.
- Commenter supports DTSC's requirement for submission of documents in English and in an electronic format.
- Commenter requests that DTSC clearly specify to the regulated community which electronic formats are "accessible to DTSC" to eliminate confusion.

Response:

DTSC appreciates the comments that support the revisions made to this section. DTSC has not specified what electronic formats should be submitted in an effort to allow DTSC to work with affected parties to get requested information in a format that allows DTSC to access the information, while taking into account what format the information is already in. Thus, DTSC is not and cannot specify a particular format or formats at this time in the regulations themselves. Rather, DTSC will work with information submitters on a case-by-case basis as needed to have information submitted in a format that is accessible to DTSC.

DTSC does not agree that it would be feasible to accept certain documents or portions of documents in any language other than English. If a document is being submitted to DTSC because there is pertinent information in that document, DTSC must be able to understand not only the information that the submitting entity considers relevant, but also the context in which that information appears.

No changes were made to the regulations in response to these comments.

## Trade Secrets

**Comments:** 3-3, 6-1

Comments Summary:

- Commenter supports the changes to sections 69509.1(a) and (c) and believes it is imperative that DTSC review a trade secret claim for information submitted under the regulations, along with the information provided in support of the trade secret claim, before disclosing the information that is the subject of the trade secrecy claim.
- Commenter commends DTSC's extended efforts to protect trade secrets of clients.

Response:

DTSC acknowledges and appreciates these comments supporting the revised language in section 69509.1. No changes were made to the regulations in response to these comments.

### §69509.1(a)

**Comments:** 5-4, 7-4, 7-5, 8-2, 9-5, 10-1

Comments Summary:

- Commenter requests clarification that "disclosure" refers to disclosure to the public at large.
- Commenter supports the requirement that DTSC review all trade secret claims prior to their release so that the regulations mirror the requirements of the Uniform Trade Secrets Act and the California Public Records Act.
- Commenter believes it is unclear how an affected party will know when DTSC will review claims or the factors DTSC will consider in determining whether to review a claim.
- The changes to section 69509.1(a) suggest that DTSC will not release the information claimed as trade secret until reviewing the validity of the trade secret claim. However, DTSC again failed to address the criteria or decision-making process it will use to establish the validity of the trade secret claim.
- Commenter supports the addition of this provision in the regulation to require DTSC's review of a trade secret claim and supporting documentation before disclosing the information to the public.

- Commenter commends clarifications to section 69509.1(a), noting that this section now includes language that DTSC *shall* review a claim for trade secret protection before disclosing the information that is the subject of the trade secret claim. This clarifying language implements the requirements of the California Public Records Act.

Response:

DTSC appreciates the comments that support the revisions made to section 69509.1(a). In the context of the laws governing trade secret protections and release of public records, the term “disclosure” is commonly understood to mean disclosure to the public or any other third party; therefore, DTSC does not believe that the regulations require any further clarification in this regard. DTSC will review trade secret claims at such a time that it determines it may want to disclose any information for which a trade secret claim has been submitted. DTSC disagrees that the criteria by which DTSC will evaluate trade secret claims is unclear. Section 69509.1(a) states that DTSC will review the claim “for compliance with the requirements of this article [9].” And section 69509.1(c) provides that DTSC will base its decision whether information is trade secret upon a review of the information against the criteria in paragraphs (2) through (11) of section 69509(a) to confirm that the information meets the definition of “trade secret” in section 69501.1(a)(66). No changes have been made to the regulations in response to these comments.

**§69509.1(c)**

**Comments:** 1-1, 3-4, 5-5, 5-6, 7-6, 8-1, 9-7, 10-2

Comments Summary:

- Commenter expresses support for the change to section 69509.1(c) that would provide notice to a company of DTSC’s decision regarding a trade secret claim.
- Commenter supports the modified regulatory text that requires DTSC to notify a submitting party of its determination if it determines that the information submitted in support of a trade secrecy claim does not establish that the information claimed to be trade secret meets the definition of trade secret.
- Commenters request the addition of an option by which a submitter of trade secret information can request the information be returned to the submitter by DTSC.
- Commenter requests clarification as to whether judicial review must be concluded or simply commenced within the 30-day timeframe.
- Commenter suggests that a new requirement be added to section 69509.1(c) that would require DTSC to send notice to the manufacturer contact via e-mail.

Certified mail is often slow, whereas e-mail is typically accessed on a continual basis. Requiring both an electronic mail and a certified mail notification will satisfy the legal requirements for sufficient notification, but will also ensure a more timely response from manufacturers.

- Section 69509.1(c) provides an opportunity for companies to appeal a determination by DTSC that information will not be protected as trade secret. Commenter notes that this is an important appeal right due to the sensitive nature of much of the information that is being requested by the regulation.
- Commenter notes that the changes to section 69509.1(c) implements California Health and Safety Code section 25257(c)(3), which requires DTSC to provide the submitter of a trade secret claim a 30-day notice before the information that is the subject of the claim for trade secret protection is made public, and also specifies judicial remedies that may be sought.

Response:

DTSC appreciates the comments that support the revisions made to section 69509.1(c).

DTSC declines to include an option by which a submitter of trade secret information may request the information be returned to the submitter by DTSC. Of course, DTSC will keep trade secret protected information confidential, but DTSC must also be allowed to use this information in the implementation of the regulations. Returning the information to the submitter would not allow DTSC to use this information.

Section 69509.1(c) provides that judicial review must be commenced within the 30-day timeframe. A preliminary injunction or declaratory relief, if granted, would protect the information from disclosure by DTSC at the end of the 30-day period. As specified in section 69509.1(d), the information would continue to be protected from disclosure until resolution of court proceedings on the issue. However, if judicial review is sought but no injunction or declaratory relief is obtained, the information would be considered a public record subject to disclosure by DTSC after the 30-day period for seeking judicial review has ended.

DTSC will not revise this section to require DTSC to send notice to the manufacturer contact via e-mail. However, DTSC may make use of electronic notifications in addition to prescribed certified mail notices.

No changes have been made to the regulations in response to these comments.

**Legal/Administrative Procedure Act****Comments:** 2-1, 8-4, 8-9, 8-10, 8-11, 8-12

## Comments Summary:

- DTSC, by continuing its pattern of taking a piecemeal approach to rulemaking, has denied entities effected by the regulations the opportunity to comment on the entirety of the regulatory proposal. Instead, comment had to be submitted on different components of the proposed regulations at different times. This approach, which in effect never allowed any entity to comment on the entirety of the regulations, with all of the supporting documentation required by law, does not comport with the spirit of the California Administrative Procedure Act (APA), and perhaps not the law itself.
- DTSC has reserved unprecedented discretion in the decision making process. This broad discretion, coupled with a lack of criteria upon which the regulated companies can determine how DTSC will evaluate submissions or what DTSC may consider "safer" as a part of the Alternatives Analysis, creates enormous confusion and uncertainty for the regulated community.
- Commenter finds it concerning that the vast majority of the full Safer Consumer Products regulatory proposal was approved by the Office of Administrative Law (OAL) on August 28, 2013 and filed with the Secretary of State while this 15-day comment period is pending on important provisions of the overall regulatory proposal.
- The adoption of part of the proposed regulations without following required procedures for the proposed revisions violates the APA as well as OAL's implementing regulations. Specifically, the proposed revisions circulated for public review and comment failed to include the "full text of the regulation as originally proposed," as required by Government Code Section 11346.8(c) and Title 1, California Code of Regulations, section 44.
- Adoption of the proposed regulations and filing of it with the Secretary of State violates the APA, given that the regulation deleted key requirements relating to trade secret protection rights, such as the 30-day notice period prior to releasing information to the public. Due to its inconsistency with Health & Safety Code Section 25257 and the Public Records Act, OAL should have withheld approval of the entire regulatory proposal pending correction of the trade secret provisions.
- Commenter encourages DTSC and OAL to repeal the finalization of the proposed rule and instead work with industry to develop a meaningful, practical and legally defensible proposed set of regulations.



Response:

DTSC disagrees with the comments that assert that DTSC has not complied with the APA in adopting these regulations. DTSC is confident that it has complied with the APA with respect to this rulemaking, and notes that the regulations were approved by the Office of Administrative Law on August 28, 2013.

Due to a perceived lack of clarity in three provisions of the regulations, DTSC chose to remove those sections and release revised text in this 15-day comment period.

Pursuant to California Government Code section 11349.4, DTSC is permitted to revise regulations that have been returned because of failure to meet the standards of section 11349.1 without complying with the notice and public hearing requirements of sections 11346.4, 11346.5, and 11346.8 as long as the revised regulations are resubmitted to OAL within 120 days of the notice of disapproval.

DTSC does not believe that the changes made to the text of these three provisions were significant, but believes that the revised text provides greater clarity about the requirements and procedures of the Safer Consumer Products program.

DTSC has made extensive efforts to seek out and respond to the concerns of stakeholders in this rulemaking process, and has been very responsive to the many concerns that were raised in public comments. DTSC worked closely with OAL to ensure that these revisions were noticed and provided for comment in a way that comports with the APA.

DTSC made no changes to the regulations in response to these comments.

**Support****Comments:** 3-1, 4-2, 10-3

Comments Summary:

- Commenters support the changes that DTSC has made to the regulatory text of the Safer Consumer Products regulations in this revised language, because they provide clarity and certainty.
- Commenter appreciates the additions of sections 69501.3(b), 69509.1(a), and 69509.1(c), which are necessary to make the current regulation function properly.

Response:

DTSC acknowledges and appreciates these comments supporting the revised language. No changes were made to the regulations in response to these comments.

**Prior Comments or Concerns/Out of Scope****Trade Secrets**

**Comments:** 1-2, 2-2, 2-3, 5-3, 9-1, 9-6, 9-8, 9-9, 9-10

**Comments Summary:**

- Commenter is still concerned that 30 days is insufficient time to file an action in court to prevent disclosure of information in the event that DTSC determines that the information provided under a claim of trade secret protection does not meet the definition of a trade secret.
- DTSC's approach to trade secret claims in the regulations, and to confidential chemical identity in particular, is contrary to the Department's objective to promote innovation in consumer products and to reduce or replace the presence of substances, in those products, considered to pose a risk of harm.
- DTSC should address the concerns previously submitted and specifically ensure that the proposed regulations conform to the California Uniform Trade Secrets Act.
- Commenter remains concerned about confidential business information and trade secret information protections in the Safer Consumer Products regulations.
- Commenter has no objection to these most recent changes, but remains seriously concerned about the regulation's failure to provide adequate trade secret protection for the regulated community.
- Commenter again asserts that there are serious problems with the treatment of confidential business information and trade secret information in the Safer Consumer Products regulations, none of which are addressed by the changes now proposed.
- Commenter remains greatly concerned with the fundamental misunderstanding of trade secret protection and the patent process evident in the Safer Consumer Products regulations and the virtual elimination of a manufacturer's ability to maintain confidential information as a trade secret.
- There is no requirement under federal statute for the holder of the trade secret to seek patent protection in order to maintain ownership interest in the trade secret. Thus, the requirement in the regulations to file a patent application in order to obtain trade secret protection is inconsistent with federal and state law.
- Commenter strongly opposes the regulations' refusal to protect precise chemical identity unless the manufacturer can demonstrate that a patent application is pending.

**Response:**

The above comments on trade secrets do not pertain to the revisions to the proposed regulations noticed for a 15-day public review and comment period in August 2013. To the extent that these comments restate or incorporate previously submitted comments, please refer to the responses to comments included in the Final Statement of Reasons for the proposed regulations, available on DTSC's website. DTSC notes the comments, but did not make any changes to the regulations in response to these comments.

**Other**

**Comments:** 4-1, 4-3, 4-4, 4-5, 7-1, 8-3, 8-5, 8-6, 8-7, 8-8, 9-2, 9-11, 10-4

**Comments Summary:**

- Commenter remains opposed to the finalization and implementation of the proposed regulations as they are currently written and believes more thorough revisions are necessary in order to avoid harm to the automotive aftermarket industry in California.
- Commenter believes the revisions are not nearly enough to remedy the potential harm that these rules will cause to their industry if no other changes are made to the draft proposal.
- Commenter believes the regulations should go under further review and be re-submitted to the public for additional comments in order to address concerns of the industries doing business in California.
- Commenters incorporate by reference previously suggested changes to the proposed regulations.
- Commenter notes that while the proposed changes are positive, they are minor and technical changes to the regulation and do not change the industry's overall concerns, as itemized in previous comments, that the regulations are overly complex and burdensome.
- Commenter continues to be disappointed in the lack of any other substantive changes to the proposed regulations given the extensive comments that have been submitted by the regulated community.
- DTSC's proposed regulations are in conflict with existing occupational safety laws at the state and federal levels, EPA's chemical inventory and review process established by the Toxic Substances Control Act (TSCA), and the authorities provided to the U.S. Consumer Product Safety Commission under the Consumer Product Safety Improvement Act (CPSIA) of 2008.

- The proposed regulations represent an unwarranted intrusion into the business decision-making process and negatively affect protection of trade secrets and proprietary information.
- DTSC has exceeded the authority granted to it by the Legislature in the drafting of the proposed regulations, as discussed in previously submitted comments.
- DTSC continues to ignore that the proposed regulations do not meet the requirements of the Administrative Procedure Act and the California Environmental Quality Act.

Response:

The above comments do not pertain to the revisions to the proposed regulations noticed for a 15-day public review and comment period in August 2013. To the extent that these comments restate or incorporate previously submitted comments, please refer to the responses to comments included in the Final Statement of Reasons for the proposed regulations, available on DTSC's website. DTSC notes the comments, but did not make any changes to the regulations in response to these comments.

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