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November 13, 2015

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

Re: *Draft Stage 1 Alternatives Analysis Guide*

Dear Director Lee:

The California Sportfishing League represents the interests of California's anglers and the larger sportfishing industry. The Department of Toxic Substances Control has published a *Draft Stage 1 Alternatives Analysis Guide*, purportedly to assist responsible entities in performing an alternatives analysis for priority products. The League and its members are particularly concerned about the Guide in light of the Department's inclusion of "Fishing Weights and Gear" as a product category from which the Department, within the next three years, may designate priority products—such as those fishing goods containing lead—for regulation.

The Guide is substantively and procedurally defective. The alternatives analysis that the Guide requires will be ruinously expensive to produce, especially for the fishing weights and gear industry, in which small manufacturers are common. The alternatives analysis requirement therefore will become a de facto product ban, compelling manufacturers to remove their products from California. That outcome will hurt not just California businesses, but also the tens of thousands of Californians who use these products to fish for a living or for recreation, and the communities dependent on outdoor recreation and tourism. And despite its bland disclaimers, the Guide functions like a regulation, but the Department apparently has no intention of proceeding with required rulemaking under the Administrative Procedure Act. As explained in greater detail below, these deficiencies amply justify the Department in scuttling the current draft and beginning anew.

THE SAFER CONSUMER PRODUCTS PROGRAM AND THE ALTERNATIVES ANALYSIS

The Health and Safety Code directs the Department to establish by regulation a process for identifying both “chemicals of concern” and the products that contain those chemicals. Health & Safety Code §§ 25252, 25253. The law also mandates that, for products containing such chemicals, the Department develop by regulation a suite of “regulatory responses,” which can include labeling notices and prohibitions on use. *See id.* § 25253(b).

The Department has responded to these legislative directives with its Safer Consumer Products Program. The Program includes regulations that govern, among other things, the factors and procedures to identify chemicals of concern and the products that contain those chemicals, as well as the obligations of manufacturers of such “priority products.” *See Cal. Code Regs. tit. 22, §§ 69502-69505.9.* These obligations include the requirement that manufacturers of priority products prepare an analysis that identifies possible alternatives to the priority product, as well as factors relevant for the comparison of the alternatives. *See id.* §§ 69505.1, 69505.5. The regulations also require the Department to publish “guidance materials” for producing this alternatives analysis. *See id.* § 69505(a). Although the regulations authorize the Department to ban priority products, *see id.* § 69506.5(a), that power may be exercised only *after* an alternatives analysis has been completed, *see id.* § 69506.1(c).

THE GUIDE DEMANDS A PROHIBITIVELY EXPENSIVE ANALYSIS AND THEREFORE WILL IMPOSE A DE FACTO PRODUCT BAN

Once the Department has designated an item as a priority product, manufacturers of that product have only four basic options: withdraw the product from commerce; reformulate the product; demonstrate that the product does not contain chemicals at levels the Department has deemed to be of concern; or prepare an alternatives analysis (in two Stages). *See id.* §§ 69505.1, 69505.2, 69505.3. For products that do contain chemicals of concern and for which reformulation is not practicable, the only options are withdrawal of the product or the production of the alternatives analysis. Hence, if reformulation is not practicable, then the Department’s prohibitively expensive alternatives analysis will result in a de facto product ban. As explained below, the Guide’s implementation for fishing weights and gear will produce that unfortunate outcome.

Exceedingly arduous are the Guide’s “suggested” steps for the Stage 1 alternatives analysis. To begin with, the analysis must identify the product’s function, considering the product’s utility or service, the conditions under which it operates or is used, and its service life. Guide at 25. Then, the analysis must address the product’s performance and efficacy, as well as its compatibility with different “substrates.” *Id.* Next, the analysis must identify the relevant chemicals of concern, determining the use of the chemicals in

the product, their necessity, their role in the product, and other legal requirements affecting their use. *Id.* at 27. Then, the analysis must identify potential alternatives, considering possibilities according to factors such as chemical substitutions, alternatives currently available in the marketplace, and product or process redesign. *Id.* at 28. Next, the analysis must develop, by means of a so-called “iterative process,” a list of potentially relevant factors to govern the alternatives analysis, including adverse environmental impacts, adverse public health impacts, adverse waste and end-of-life effects, environmental fate, materials and resource consumptions impacts, physical chemical hazards, physiochemical properties, and associated exposure pathways and life cycle segments. *Id.* at 34. (The Guide spends five pages explaining life cycle analysis alone. *See id.* at 37-41, 47). Then, the analysis must embark on an impacts assessment, which requires significant amounts of data, some of which “may be more difficult to apply in a generalized way, and can be difficult to find and interpret,” such that a “responsible entity will need technical expertise.” *Id.* at 50. *See also id.* at 54 (“Because available data are so varied, widespread, and frequently updated, creating and maintaining a useful database can be challenging.”); *id.* at 55 (“[T]he responsible entity may need to use multiple data sources to supplement the information.”). Next, the analysis must proceed to the “screening” stage, designed to narrow the scope of the Stage II analysis, considering many of the factors used in the initial identification of possible alternatives.

Thus, the Stage 1 alternatives analysis is no mere pro forma exercise, but rather a substantial scientific and technical endeavor. Yet the task does not even end here. The Guide only discusses the *first* part of the *first* stage of the alternatives analysis. The Department anticipates *six more chapters* of the Guide just for the Stage 1 analysis. *See id.* at 3. And that additional work does not even include the Stage 2 alternatives analysis, which will entail “considerable data requirements and resources.” *Id.* at 59. Evidently, what the Department expects from the alternatives analysis is akin to that required for an Environmental Impact Report, which routinely costs tens of thousands of dollars to prepare. *See* John Watts, Comment, *Reconciling Environmental Protection with the Need for Certainty: Significance Thresholds for CEQA*, 22 Ecology L.Q. 213, 228 (1995).

Such a regulatory expense for manufacturers of fishing weights and gear would be cost-prohibitive. The majority of companies falling under the SIC code for fishing equipment (39490200) have less than \$1 million in annual sales and fewer than four employees. Further, less than a quarter of the manufacturers polled as part of a recent study on the economic impact of banning traditional fishing tackle believed that their products can be reformulated without lead; and those few that indicated otherwise suggested that their productions costs would *double*. *See* Attachment A (Southwick Assocs., Economic and Participation Impacts from a Ban on Traditional Fishing Tackle in California 2 (2015)). Thus, for much of the fishing weights and gear industry, the Guide’s prescriptions will result in the de facto ban on many of the industry’s lead-based products: reformulation or redesign would be infeasible, and an alternatives analysis would be economically impracticable. Yet such a de facto proscription cannot be reconciled with the

Department's own regulations authorizing such a ban only *after* an alternatives analysis has been completed. *See* Cal. Code Regs. tit. 22, § 69506.1(c).

And besides its doubtful legality, such a ban would have serious and negative economic impacts. For example, if the prices for lures, flies, and tackle were to double, over 75,000 of the state's anglers would leave the sport altogether, and nearly 300,000 would fish less. The ensuing reduction in fishing would result in a loss of \$173 million in sales. *Id.* at 2-3. The environment would be compromised as well, given that fishing license fees and excise taxes provide significant funding for the California Department of Fish and Wildlife's conservation programs. *Id.* at 3. Moreover, they would also have a profound impact on millions of Californians who fish as a source of food

The Guide's requirements are legally doubtful and economically imprudent. They should be abandoned.

THE GUIDE'S IMPLEMENTATION RAISES SUBSTANTIAL QUESTIONS UNDER THE UNDERGROUND REGULATION DOCTRINE

In a prior comment letter, the League expressed serious concerns over whether other aspects of the Department's Safer Consumer Products Program may violate the California Administrative Procedure Act, Gov't Code §§ 11340-11361. *See* Letter of Maureen F. Gorsen, Counsel for California Sportfishing League, to Ms. Barbara A. Lee, Director, California Department of Toxic Substances Control, at 3-5 (Sept. 3, 2015). These concerns are equally applicable to the Guide, its protestations to the contrary notwithstanding. *Cf.* Guide at 10.

Perhaps the most important limitation that the Administrative Procedure Act imposes on agency action is the prohibition on the enforcement of rules and standards without prior compliance with the Act's rulemaking procedures. *See* Gov't Code § 11340.5(a). Such unvetted rules are known as "underground regulations." Michael Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43, 45 (1992). As elaborated in the League's prior comment letter, to determine whether an agency action is an underground regulation requires a three-step process. First, is the action a rule or standard that interprets or makes specific the law? Second, does the rule or standard purport to guide how the agency will act in similar cases? Third, is the rule or standard otherwise exempt from the Act? *See* Cal. Sportfishing League at 3. The Guide passes each of these steps.

First, the Guide sets forth many rules and standards that make specific the Safer Consumer Products statutes and regulations relevant to the alternatives analysis. For example, the Guide purports to "provide useful approaches, methods, resources, tools, and examples to help responsible entities fulfill the regulatory requirements for the [alternatives analysis]." Guide at 9. The Guide also "helps people to understand the [alternatives analysis] process," and "relates the steps in [that] process to other types of

alternatives assessments.” *Id.* Moreover, it “expands the categories of factors that manufacturers should consider when developing, making, and evaluating products.” *Id.* Further, “the Guide provides information about . . . [a]dministrative requirements, including reporting requirements.” *Id.* The Guide’s interpretive function therefore falls squarely within the Administrative Procedure Act’s ambit. *See Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 574-76 (1996) (holding that the Act applies to “interpretive” and well as quasi-legislative rules).

Second, the Department (not surprisingly) intends that its Guide will in fact *guide* the agency’s decision-making in evaluating the adequacy of alternatives analyses. *See id.* (noting that the Guide is a “resource . . . for the Department when it evaluations submitted [Alternatives Analysis] Reports and supporting documentation.”). *See also Tidewater*, 14 Cal. 4th at 574-75 (holding that a “written statement of policy that an agency intends to apply generally” qualifies as a regulation even though “it merely interprets applicable law”).

Third, the Draft Guide does not appear to fall within any of the Act’s express exemptions. *Cf.* Gov’t Code § 11340.9. And, in any event, it is a basic legal principle that the burden of establishing an exemption is on the person who would claim it. *Petrich v. Francis*, 83 Cal. App. 72, 73-74 (1927). The Guide, however, does not even discuss these exemptions, much less meet the Department’s burden to prove their applicability. Thus, the Guide’s implementation raises serious questions under the Administrative Procedure Act.

CONCLUSION

The League and its members have already expressed their significant misgivings about other aspects of the Department’s targeting of fishing weights and gear as part of the Safer Consumer Products Program. Unfortunately, the Department’s Guide exacerbates these concerns. The alternatives analysis that the Guide requires will be economically infeasible for most fishing weight and gear manufacturers. Thus, the Guide will impermissibly convert the alternatives analysis into a product ban, hurting the state’s economy as well as the recreational interests of thousands of Californian anglers. In addition, the Guide’s prescriptions amount to underground regulations.

It also concerns the League that DTSC has not taken all the steps required to inform the regulated community of their actions, both in state and out, nor given them sufficient time to access and respond to the pending regulations. And to underscore a previous concern, most fishing tackle manufactures are small mom and pop operations that do not have the wherewithal or financial resources to comply with the proposed regulations, let alone evaluate their impact on their businesses. As a consequence, DTSC is embarking on a process that will certainly harm and potentially put California small business owners out

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of business to the benefit of larger manufactures who can simply redirect their sales to markets in the other 49 states.

For these reasons, the League urges the Department to scrap the Guide and to work with the League on producing helpful and economically feasible guidance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Maureen F. Gorsen".

Maureen F. Gorsen

CC:
David Dickerson, Chair
Marko Mlikotin, Executive Director

Attachment A