American Chemistry Council

Attached are comments from the American Chemistry Council (ACC) regarding the Dept. of Ecology's Preliminary Draft Rule language pursuant to the Safer Products for Washington program.

Preliminary Draft Rule Language
Safer Products for Washington Implementation Phase 4
Comments of the American Chemistry Council
August 31, 2022

On behalf of the American Chemistry Council (ACC), we are submitting comments on the preliminary draft rule language for the Safer Products for Washington (SPW) program. ACC supports strong, science-based regulations that support product safety and the protection of human health and the environment, but we continue to have serious concerns with the way this new program is being implemented and believe that both the final regulatory determination and this preliminary proposed rulemaking is inconsistent with some of the criteria and requirements outlined in the underlying statute (Chapter 70A.350 RCW).

ACC is filing these more general comments but several of ACC's product groups will be submitting more specific comments about how these issues are more directly relevant for specific priority chemicals/chemistries and proposed priority product categories,

While we appreciate the efforts that the Department of Ecology (Department) has made to solicit and address some stakeholder feedback, we urge the Department to address the following key issues in the development of the final rulemaking:

1. **Demonstrate that the proposed regulations "will reduce a significant source of or use of a priority chemical; or the restriction is necessary to protect the health of sensitive populations or sensitive species."**

    - The Department did not demonstrate that exposure to the priority chemicals in certain priority product categories met statutory criteria.

2. **Distinguishing between different subcategories within the broad class of chemistries identified for regulation.**

    The proposed rulemaking does not make this important distinction despite clear evidence from authoritative bodies demonstrating that there are clear subcategories with very different characteristics and profiles. Where possible and appropriate, the Department should focus on specific sub-categories or sub-classes that meet the key criteria for the SPW program. Likewise, the Department should tailor its regulations to specific chemicals within a class, such as higher hazard, rather than applying regulations on an overbroad, class-wide basis.

3. **Conduct a more robust and comprehensive alternatives assessment process that considers critical issues related to product design, performance, safety, sustainability and innovation. Failure to do so will set a misguided precedent for the future regulation of chemicals and products under this new program and could also lead to regrettable substitution.**

    As stated in our earlier comments, the Department's review would also be well-informed by careful consideration and integration of other elements of alternatives life cycle thinking and analysis, a critical tool that helps with the evaluation of sustainability and environmental factors. Even if the function of a priority product is equivalent or better with the use of an alternative chemistry, substitution can have unwanted or adverse sustainability impacts that should be

carefully evaluated. A substitute chemistry may require long distance transport, process changes, increased energy use or greenhouse gas emissions across its lifecycle, for example. Global markets and supply chain impacts and disruptions should also be included in the availability and benefit-cost analysis. The importance of these recommended considerations has been demonstrated through the challenges we have seen play out in the recent pandemic where products and materials sourced from facilities outside the United States have been stressed with various availability constraints and delays.

Technical feasibility requires a demonstration that a substitute chemistry or formulation provides equivalent or better performance for a particular product. As presented, these criteria do not support a robust review of the feasibility of substituting a particular chemistry, as used in a particular application. In any given class of chemistry, different individual chemistries may be used or marketed for different applications with different levels of necessary performance. Marine paint; outdoor paint for a bridge; outdoor paint for a building; and interior paint for a kitchen, for example, may have performance requirements that differ significantly.

We are concerned that both the "already used" criteria, and the "marketed for the application of interest" criteria, are insufficiently robust to support alternatives assessment under the SPW program. For example, an identified use of the substitute chemistry may still be in a pilot or test market phase where it is unclear that the performance of the substitute meets consumer or user needs. Undesirable substitutions that affect product performance, including the stability, look, feel, sound, or smell of a product, can affect consumer acceptance of a product and can result in different use patterns and even adherence to safety and use instructions. An unacceptable product may drive consumers to reject the substitute or use less sustainable products.

Likewise, we are concerned that the "marketed for the application of interest" is insufficiently robust to support conclusions about feasibility. A manufacturer trying to enter a new market may not have sufficiently tested performance and uptake with customers. A product with sustainability tradeoffs, such that if a product containing the substitute is no longer eligible for a sustainability claim important to the customer base for example, may not get market uptake at all. The "similar application" language further weakens this provision, as it is unclear what a "similar application" is. In other words, what degree of similarity is required and does this factor in different regulatory, code-based standards, and customer performance requirements?

4. **Demonstrate that "the benefits of the proposed regulations outweigh the anticipated costs", including the consideration of product redesign and recertification.**

While consideration of cost is listed in the Department's criteria for feasible and available, cost is not discussed in any of the determinations regarding priority chemicals. In other words, the Department has failed in every case to apply the benchmarks it set for itself. As a result, it is unclear to what extent the Department has considered cost and what data it will rely on when considering cost in the phase of the rulemaking as required. Furthermore, the consideration of cost should factor in product redesign considerations including the time for supply chains to assess, redesign, test, recertify and scale-up the manufacturing of products. This is particularly relevant for complex supply chains like the electronics category where the current approach is incredibly complex and will impose significant time and resource impacts downstream.

Further, although the Department purports to analyze the commercial availability of a chemical, it has failed to consider whether that chemical will be available at production scales in order to support an entire industry switching from one chemical to another. Consumer products are designed for worldwide compliance. The Department needs to consider the real-world consequences if it mistakenly assumes companies can feasibly manufacture products for a specific state. Companies do not, and simply cannot, design products tailored to a vast number of different regulatory environments.

Likewise, the evaluation of benefits of the proposed priority product regulations needs to be specific in terms of how the proposed regulations would advance the SPW objectives using concrete data, and any consideration of benefits also need to factor in the potential impact on product performance particularly if the proposed regulations have the potential to lower or affect product performance in some applications.

5. **Demonstrate that the proposed regulation is the least burdensome alternative.**

The Department's assessment should explicitly include a review of alternative approaches, including those suggested by stakeholders, and why these were not selected or considered as "less burdensome". The cost benefit considerations noted above are also directly relevant here.

The Department must perform a Least Burdensome Analysis. When promulgating a significant legislative rule, Washington's Administrative Procedure Act (APA) requires the Department of Ecology to determine that the rule to be adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives.

6. **Address the inconsistency with existing federal, state, and international regulatory requirements and avoid regulations that contribute to a patchwork of laws.**

While the preliminary rulemaking clearly considered consistency of federal regulations for some priority chemicals and products (e.g., PCBs), it fails to do so in other areas particularly the electronics product category. The Department's proposed alternatives include chemicals that other agencies are either currently or are actively considering regulating. It is important to assess whether chemicals the Department identifies as alternatives are regulated elsewhere and factor this into its assessment. The draft determination does not do so. This should include a determination that a proposed rule does not require those who must comply with it to violate other state or federal law.

7. **Ensure that any new environmental justice (EJ) provisions promote a streamlined regulatory process that does not duplicate existing requirements or result in unnecessary burdens to regulated entities.**

In its draft rule language, the Department notes that it plans to address EJ when implementing, administering, and enforcing Chapter 70A.350 RCW and solicits input on how the rule should address and incorporate EJ in its implementation. As stated above, ACC continues to stress in this context the critical importance of implementation of the Department's rule in a matter that promotes a streamlined regulatory process that is based on the best available science, avoids duplication with existing requirements, and provides full consideration of the range of

environmental sources and potential stressors, particularly those external to directly regulated entities. ACC notes that that any new regulatory requirements should not create unreasonable additional hurdles that hinder an already cumbersome regulatory framework.

For example, at RCW 70A.02.100 and 110, Washington administers EJ provisions in existing laws, including requirements for stakeholder consultation, community engagement, and the administration of a state environmental justice council, among others. Without careful consideration of current practices, new requirements contemplated by the Department risk the creation of overly burdensome regulatory processes that are unnecessarily onerous, inconsistent, and arbitrary in application. As the Department shifts to implementation, ACC encourages the state to develop processes that consider EJ issues in ways that are clear, flexible, risk-based, and refrain from duplicative or overly burdensome requirements. We further recommend that the Department evaluate identified EJ stressors and associated impacts on public health or the environment utilizing clear criteria and definitions that articulate scientifically credible risks. To avoid unnecessary duplication throughout the regulatory process, the Department should ensure that its new rule requirements also clearly reference existing RCW provisions that already address EJ concerns.

We would also like to reiterate our previously provided comments which urge the Department to consider the factors outlined above earlier in the SPW process. Waiting until final rulemaking to evaluate these factors and the requirements in the underlying statute is not optimal and ultimately wastes limited resources while contributing to potentially regrettable substitution. Consideration of these critical factors earlier in the process will support more informed rulemaking and avoid some of the concerns noted above.

Advancing chemical and product safety is a shared objective and we urge the Department to take these comments into consideration as it develops its final rulemaking proposals as well as future evaluations under the new SPW program.

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Thank you for the opportunity to provide these comments. For any questions about this submission, please contact Suzanne Hartigan, Senior Director, Regulatory and Scientific Affairs, suzanne_hartigan@americanchemistry.com, or Tim Shestek, Senior Director, State Affairs, Tim_Shestek@americanchemistry.com.