



February 28, 2013

Debbie Raphael, Director
Department of Toxic Substances Control
1001 I Street
Sacramento, CA 95812-0806

Dear Ms. Raphael,

On behalf of BizNGO, we are very encouraged by the progress that DTSC is making towards robust and effective regulations for implementing AB 1879. The basic SCP framework mirrors in large part the best practices among downstream user companies in BizNGO. Our comments are designed to support the development of an AA process that can be effectively implemented by users of chemicals of concern in priority products. Below is a summary of BizNGO's comments and recommendations.

- Streamline the AA process while ensuring it meets the intent of AB 1879. To that end, BizNGO recommends that DTSC provides more guidance on what is sufficient for the first stage AA.
- The second stage AA should also be streamlined in the following ways:
 - If a company chooses to switch out of the chemical of concern into an identified safer alternative, the economic analysis should not be required.
 - Remove the additional requirement for human and environmental health review, which is required in the first stage AA.
- BizNGO is concerned that in issuing a regulatory response for each AA submitted by each responsible entity DTSC is created an uneven playing field. Some entities will receive longer periods and possibly less stringent regulatory responses than other entities. To create a level playing field, which is what the regulations should accomplish, DTSC needs to release a single regulatory response for each COC/Priority Product combination. All responsible entities filing AA reports for COC/Priority Product combination should have the same time to prepare and submit their reports and the same regulatory response.
- Recommends that the regulations promote transparency as much as possible, including using data already in the public domain.
- Strongly supports in Article 2 the Candidate Chemicals List with the recommendation that it be regularly updated, at least every 12 months to reflect revisions to the reference lists.
- Supports the inclusion in Article 4 of the right to petition for a chemical list as well as a chemical.
- Recommends simplifying Article 5 as much as possible, including relying on the Guidance Materials to provide greater detail when needed on what is required for an AA.
- Strongly support Article 5, Section 69505.6, that the public have the right to submit comments on the publicly available AA executive summary before DTSC issues a determination notice on the AA.
- Information that is made publicly available from the AAs must be sufficient for the public to understand how the alternative recommendation and regulatory response determinations were made and submit comments for the public review.



Sincerely,

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BizNGO Note on Government Policy Positions

Participants in BizNGO are all working towards the use of safer chemicals in commerce. Reflecting the diversity of participants in the Working Group, we have a diversity of perspectives on government, NGO and industry initiatives. While BizNGO strives for consensus on all of its policy positions and all participants agree on the government policy issues we address, we may not achieve consensus on the specifics of every BizNGO policy statement.

§ 69501.1(a) Definitions

(29) “Economically feasible”

BizNGO recommends the following change:

“Economically feasible” means that an alternative product or replacement chemical is **commercially available for a similar functional use in similar products** ~~does not significantly reduce the manufacturer’s operating margin.~~

Rationale: Market availability of an alternative is the best indicator of the economic feasibility of an alternative. If an alternative is in use in a similar, if not exactly the same, product type then it demonstrates the economic viability of the alternative. Also it places the analysis at the appropriate level of the market versus the responsible entity. BizNGO’s proposed definition of “economic feasibility” aligns with the same level of analysis as the definition of “technical feasibility”, which is at the level of marketplace not the level of a responsible entity’s technical knowledge, equipment, and materials. The definitions of “technical feasibility” and “economic feasibility” should both be at the same level of analysis—the marketplace. Marketplace level of determination of economic feasibility is also important for consortia performing AAs.

(51) “Potential” – BizNGO supports this definition

(56) “Safer alternative”

(65) “Technically feasible” – BizNGO supports this definition

§ 69501.4 Chemical and Product Information

(d) Safer Consumer Products Partner Recognition List

BizNGO supports the Recognition List as a means of creating a community of practitioners in support of the program.

§ 69501.5. Availability of Information on the Department’s Website.

BizNGO is strongly supportive of the provisions in this section. In general, transparency will be critical to the success of the program. Providing AAs to the public will enhance the quality of AA submissions and further the development and dissemination of safer alternatives.

§ 69502.2. Chemicals of Concern Identification.

(a) Candidate Chemicals List.

BizNGO supports the Candidate Chemicals List and the use of authoritative bodies to identify the chemicals on that list. It mirrors processes developed by the states of Maine, Minnesota, and Washington to identify chemicals of high concern as well as how GreenScreen quickly screens for chemicals of high concern to human health or the environment.

(1)(C) BizNGO supports including endocrine disruptors identified by the European Commission.

(1)(I) BizNGO supports including respiratory sensitizers identified by the European Commission.

§ 69502.3. Candidate Chemicals List.

(a) Informational List.

BizNGO recommends updating the list annually:

“The Department shall post an informational list of the chemicals identified as Candidate Chemicals of Concern under section 69502.2(a) on the Department’s website within thirty (30) days after the effective date of these regulations. The Department shall ~~periodically~~ update the list **AT LEAST EVERY 12 MONTHS** to reflect changes to the

underlying lists and sources from which it is drawn, using the procedures specified in subsections (c) and (d).”

Rationale: Given that the authoritative bodies that generate the lists referred to in § 69502.2(a) regularly update their lists, the Department needs to develop a process for keeping these lists up-to-date. An annual automatic update of the lists based on changes by the relevant authoritative bodies is an easy task.

§ 69503.2.(b)(3) Safer Alternatives.

BizNGO supports the availability of safer alternatives as part of its decision in listing a product-chemical combination as a Priority Product.

§ 69504. Applicability and Petition Contents

(a) Petition Process

BizNGO supports the provision “to add to or remove from the lists specified in section 69502.2(a)”. It is important that the lists from authoritative bodies be updated periodically updated as new scientific research emerges.

§ 69505.1. Alternatives Analysis: General Provisions

(d)(2) Public review and comment

BizNGO strongly supports this provision, which provides for the “public review and comment of each Preliminary AA Report, draft Abridged AA Report, and Alternate Process AA Work Plan”. It is the quality assurance mechanism that is needed now that the certified assessors and accreditation bodies’ provision has been removed.

BizNGO recommends adding “Final AA Report to this provision:

“The Department shall post on its website a notice regarding the availability for public review and comment of each Preliminary AA Report, draft Abridged AA Report, ~~and~~ Alternative Process AA Work Plan, **and Final AA Report** submitted to the Department.”

Rationale:

Without adding “Final AA Report” there will be no quality assurance review of the final AA, which includes economic and technical feasibility.

§ 69505.2 Removal/Replacement Notifications in Lieu of Alternatives Analysis.

(b)(9)(D) The name of the replacement chemicals

BizNGO supports the requirement to provide information on the name of the replacement chemicals, concentration, and hazard traits. This information is necessary for the Department to ensure that the removal or reformulation does not increase potential exposures or adverse impacts.

(e)(2)(B) “The replacement chemical(s) meet the criteria specified in subparagraph 1. or subparagraph 2. of subsection (b)(9)(F)”

BizNGO recommends the following change:

“The replacement chemical(s) meet the criteria specified in subparagraph 1. ~~or~~ **subparagraph 2.** of subsection (b)(9)(F)”.

Rationale: As written in b)(9)(F) subparagraph 2., the Department will allow the replacement of a Chemical of Concern in a Priority Product with a Candidate Chemical to happen without an Alternatives Analysis. This is an example of a regrettable substitution. The Department should not allow a Priority Product to be replaced with a Candidate Chemical without an Alternatives Analysis done to determine if a safer alternative exists to both the Priority Product and the Candidate Chemical.

§ 69505.4. Alternatives Analysis Process and Options

(b) Abridged AA Reports

BizNGO recommends adding to the list of requirements an Abridged AA Report must meet:

NEW 69505.4(b)(5) The responsible entity demonstrates that no functionally acceptable or technically feasible alternatives is/are available, including why Sample Alternatives Analyses for similar products listed by the Department per section 69505.(b) are not relevant, and providing equivalent data as required in section 69505.7(j)(2)(A)”

Rationale: The Responsible Entity needs to identify the sources used to determine the availability of alternatives and why any alternative found was determined not to be equivalent and thereby qualifies for an Abridged AA Report.

§ 69505.5. Alternatives Analysis: First Stage

(b)(1)(B) BizNGO supports allowing the responsible entity to “consider any identified alternative in the AA, or explain in the AA Report why such an alternative is not viable for consideration.”

(c) Step 3, Initial Evaluation and Screening of Alternative Replacement Chemicals.

BizNGO suggests the following changes in bold:

(1) For those alternatives under consideration that involve removing or reducing the concentration of the Chemical(s) of Concern and using one or more alternative replacement chemicals, or otherwise adding chemicals to the product, the responsible entity shall:

(A) Use available information on hazard traits and environmental and toxicological endpoints and any other relevant information to identify the following for each alternative replacement chemical under consideration:

1. Adverse environmental impacts;
2. Adverse public health impacts;
3. Environmental fate;
4. Physical chemical hazards; and
5. Physicochemical properties.

The Department may specify in guidance materials tools that are sufficient for meeting the requirements of this subparagraph.

(B) Compare each of the alternative replacement chemicals under consideration with the Chemical(s) of Concern in the Priority Product, using the information collected and evaluated under subparagraph (A). **The Department may specify in guidance materials tools methods that are sufficient for meeting the requirements of this subparagraph.**

(2) The responsible entity may eliminate from further consideration in the AA any alternative replacement chemical(s) that it determines has/have the potential to pose adverse impacts equal to or greater than those posed by the Chemical(s) of Concern.

Rational: Given the scope of endpoints involved in compliance with this provision, BizNGO recommends that the Department identify through Guidance Materials (69505.(a)) tools that are sufficient for meeting the requirements of this section.

(c)(2) BizNGO recommends that the Department specify that alternatives equivalent to the existing chemical(s) of concern be dropped from further consideration in the first stage:

“(2) The responsible entity must eliminate from further consideration in the AA any alternative replacement chemical(s) that it determines does not reduce the adverse impacts in the areas that caused the original Chemical(s) of Concern to be listed.

(3) The responsible entity may eliminate from further consideration in the AA any alternative replacement chemical(s) that it determines has/have the potential to pose adverse impacts equal to or greater than those posed by the Chemical(s) of Concern.”

Rationale: The regulations currently do not require a responsible entity to eliminate a chemical that has the potential to pose adverse impacts equal to or greater than those posed by the Chemical of Concern. It would be more consistent to ensure that replacement chemicals that pose adverse impacts equal to or greater than those posed by the Chemical of Concern.

§ 69505.6. Alternatives Analysis: Second Stage

§ 69505.6. (a)(1) BizNGO recommends combining exposure pathway determinations in Section 69505.6(a)(1) and 69505.6(a)(3).

§ 69505.6. (a)(2)(A) BizNGO recommends the following change:

Multimedia life cycle impacts for the Priority Product and alternatives under consideration, and chemical hazards and adverse impacts for the Chemical(s) of Concern and any alternative replacement chemical(s) or other chemicals in the alternatives that differ from the chemicals in the Priority Product. This evaluation shall be based on available information and shall include the following factors to the extent relevant:

- 1. Adverse environmental impacts;**
- 2. Adverse public health impacts;**
3. Adverse waste and end-of-life effects;
- 4. Environmental fate;**
5. Materials and resource consumption impacts;
- 6. Physical chemical hazards; and**
- 7. Physicochemical properties.**

Rationale: The Department has not explained how the evaluation under Section 69505.6. (a)(2)(A) differs from the evaluation required under the first stage at Section 69505.5(c)(1)(A). The Department must clarify the Regulations to distinguish the analysis to be conducted between the first stage and second stage and ensure that any duplicative analysis is eliminated. BizNGO recommends modifying Stage 2 to focus on life cycle issues, including material and resource consumption impacts and waste and end-of life impacts not addressed in Stage 1. By focusing on the resource consumption and waste impacts, standard LCA-based approaches open up as a possibility for completing the Stage 2 analysis.

§ 69505.6. (a)(2)(C)(2) BizNGO recommends the following change:

(B) Economic impacts.

1. If none of the alternatives under consideration are Candidate Chemicals or Chemical(s) of Concern, no economic analysis is required.
2. If any replacement chemical under consideration is a Candidate Chemical, or if the Priority Product with the Chemical(s) of Concern is to be retained, the responsible entity shall evaluate, monetize, and compare the following impacts of the Priority Product and the alternatives:
 - a. Quantified comparison of the internal cost impacts of the Priority Product and the alternatives, including manufacturing, marketing, materials and equipment acquisition, and resource consumption costs;

- b. Public health and environmental costs; and
- c. Costs to governmental agencies and non-profit organizations that manage waste, oversee environmental cleanup and restoration efforts, and/or are charged with protecting natural resources, water quality, and wildlife.

Rationale: The Regulations have been revised regarding the economic impacts, but unfortunately the Department has retained the requirement that responsible entities monetize and evaluate externalized costs. The type of economic impact analysis required is extremely difficult to perform, particularly when there are multiple alternatives under consideration or when no alternative under consideration shows significant burden shifting. BizNGO recommends tiering the economic analysis requirements such that eliminating the Chemical of Concern and replacing it with a non-Candidate chemical requires no economic analysis, and that retaining the Chemical of Concern or replacing it with a Candidate Chemical requires a complete economic analysis, including consideration of externalized costs. (Externalized costs are extraordinarily hard to calculate, and should not be required for cases where the Chemical of Concern is being phased out.)

§ 69505.7.(a)(4)(A) BizNGO supports the provision that a responsible entity claiming information in an AA Report as trade secret provide a separate publicly available AA Report with trade secret information removed. The Department could clarify here and elsewhere in the Regulations that it is only this redacted AA Report for which it would seek public comments.

§ 69505.7. (d)(3) BizNGO encourages the Department to avoid requirements that include commercial sensitive information in a AA Report, which will serve as a disincentive for responsible entities to prepare a joint AA. The Department should be encouraging the development of a single AA for a particular chemical-product combination, for this will decrease review burdens and allow for uniform, fair regulatory responses. Particular responsible entity and supply chain information could be submitted later in the process in response to an audit request under Section 69508 or as part of the regulatory response. At a minimum, the Department should allow for separate attachments to the AA for individual responsible entities submitting commercially sensitive information.

§ 69505.7. (j) BizNGO supports the Department's revision to allow the selection of more than one alternative.

§ 69505.8.(b)(4)(A) BizNGO recommends the following change:

The Department shall specify in a notice of compliance for a Preliminary AA Report or Alternate Process AA Work Plan the due date for submitting the Final AA Report **for each chemical product combination**. The Department shall specify a due date that is twelve (12) months from the date the Department issues the notice of compliance, except that the Department may specify an extended due date for submission of the Final AA Report **for a chemical-product combination** if it determines based on information in **any of** the Preliminary AA Reports or Alternate Process AA Work Plans that more time is needed. The Department may also specify an extended due date for submission of the Final AA Report **for a chemical-product combination** if **any** the responsible entity submits a request under section 69505.7(k)(1)(B).

Rationale: The Department must state clearly that all AA Reports and Work Plans will have the same deadline for submission, and that an extension request granted to one responsible entity will be extended to all. Just as the Department extends a comment period for all persons based on the

extension request of one, so too must the Department ensure that all AA Reports and Work Plans are submitted simultaneously to ensure that entities are treated fairly in having the same amount of time to prepare AA Reports and Work Plans. Equally importantly, entities must not be disadvantaged by the Department reviewing AA Reports and Work Plans successively and making regulatory response determinations.

§ 69506(a) BizNGO recommends the following change:

(a) Need for Regulatory Response. The Department shall identify and require implementation of one or more regulatory responses **applicable to all responsible entities** for Priority Products and/or selected alternative products when the Department determines such regulatory responses are necessary to protect public health and/or the environment. In selecting regulatory responses, the Department shall seek to maximize the use of alternatives of least concern when such alternatives are functionally acceptable, technically feasible, and economically feasible.

Rationale: In these proposed regulations the Department is theoretically allowed to select different regulatory responses for different responsible entities. BizNGO finds this possibility unfair and believes it creates a situation ripe for claims of impropriety by the Department with regard to different treatment for different entities. Also, compliance and verification of compliance within the regulated community is greatly complicated if different entities have different requirements for similar Priority Products. If the Department is concerned with ensuring that its procedures are standardized, fair, and objective, then the Department should ensure the regulations provide a level playing field by stating that all AAs for the same chemical-product combination will be reviewed by the Department at the same time, and that the Department will issue a uniform regulatory response. For the Department to conduct simultaneous reviews, it must also ensure that the deadlines for submission as the same.

§ 69506(c) BizNGO recommends the following change:

Notice of Proposed Determination. After issuing a notice of compliance or a notice of disapproval for a Final AA Report or a final Abridged AA Report, the Department shall issue a notice of the Department's proposed determination **applicable to all responsible entities for a chemical-product combination** that one or more of the regulatory responses specified in this article is/are required, or that no regulatory response is required.

Rationale: The Regulations must be revised throughout to reflect the fact that the Department will issue uniform regulatory response(s) for a particular chemical-product combination.

§ 69506.4 BizNGO supports the revisions that state the Department may impose restrictions on replacement Candidate Chemicals as that may discourage the use of other Candidate Chemicals to replace Chemicals of Concern and specifies that the Department can control replacement alternatives when