



March 11, 2013

Ms. Carol Kraege
Washington State Department of Ecology
PO Box 47600
Olympia WA 98504-7600

Re: Toxics Policy Reform for Washington State – Toxics Reduction Strategy Workgroup

Dear Ms. Kraege:

Below please find a summary of comments from the Toy Industry Association (TIA) on the “Toxics Policy Reform for Washington State” white paper (White Paper) released by the Department of Ecology (DoE) “Toxics Reduction Strategy Workgroup” (Workgroup). TIA appreciates the opportunity to provide comments on this White Paper, and hopes to work with the Department of Ecology in your stated mission to protect the environment and to promote the wise management of air, land and water in Washington.

TIA is a not-for-profit trade association representing six-hundred (600) toy makers, marketers and distributors, large and small, located throughout North America. TIA’s members account for approximately 85% of the annual U.S. domestic toy market of \$21.6 billion, according to research from the NPD Group. Additionally, TIA members and other toy companies – along with the retailers, wholesalers, distributors and direct suppliers with whom the toy industry works – account for an estimated 21,142 jobs in Washington and have a direct economic impact of almost \$3 billion to the state. TIA is founded on the mission of bringing fun and joy to children’s lives. In that pursuit protecting the safety of our young consumers is our top priority, and TIA and our members have long been leaders in toy safety. In this role, we develop safety standards for toys, working with industry, government, consumer organizations, and medical experts. The U.S. risk-based standards are widely recognized and used as models around the globe. TIA regularly conducts education seminars on these industry standards, and to educate parents and caregivers on choosing appropriate toys and how to ensure safe play.

While we recognize that the White Paper is the product of a working group attempting to offer their perspectives and ideas, TIA is disappointed it was compiled through an unbalanced process, and is based on subjective information rather than scientific evidence from credible, peer-reviewed sources; we also understand that the White Paper does not intend to provide a comprehensive review of the issue or a comprehensive set of recommendations. Consequently, we hope the White Paper and its recommendations will not be used as a foundation or starting point for legislative or regulatory action. Instead, we hope that DoE will conduct a balanced, comprehensive and scientific review of toxics exposure in the state, before beginning to meaningfully discuss a statewide strategy. TIA hopes that we can be a part of that critical discussion, but would like to note the following areas of significant concern with this White Paper.

Unbalanced Process

It is notable that while the Workgroup included members from the business community, it did not include any businesses from the consumer products sector. We are aware that DoE sent invitations to participate in the Workgroup, but it is unclear whether participation from all segments of industry was solicited. What is clear, however, is that (although the group purports to utilize their “expertise and experience” to craft toxics reduction strategies) they have focused on an area – consumer products – in which none of them have practical experience or specific expertise. This lack of knowledge is evident, specifically in the reiterated statement (Page 10), “...there currently is no comprehensive state or federal safety standard for chemicals in consumer products.”

This statement is simply false. Chemicals in products are fully addressed by the Federal Consumer Product Safety Act, Federal Hazardous Substances Act, Flammable Fabrics Act, Poison Prevention Packaging Act, Refrigerator Safety Act, Child Safety Protection Act, FIFRA, Resource Conservation and Recovery Act, and the Toxic Substances Control Act (TSCA).

In 1972, the Consumer Product Safety Act was enacted to establish the Consumer Product Safety Commission's authority and authorize the CPSC to develop standards, bans, and recalls of products. The Consumer Products Safety Improvement Act amended the CPSA in 2008, to provide significant new regulatory and enforcement tools, and addressed specifically, lead, phthalates, toy safety, imports, ATVs, and civil and criminal penalties. This law was again amended in 2011 to provide even greater authority to enforce the CPSA. The Federal Hazardous Safety Act establishes restrictions and labeling requirements for a number of specific chemicals and also any others that may present toxicity, irritation, sensitization, or other hazards.

The Federal Consumer Product Safety Act, Federal Hazardous Substances Act, Flammable Fabrics Act, Poison Prevention Packaging Act, Refrigerator Safety Act, and the Child Safety Protection Act, altogether comprise a comprehensive federal safety standard for chemicals in consumer products.

Consumer products which are ultimately disposed of in a landfill are regulated by the Resource Conservation and Recovery Act, if the products contain hazardous materials. If the products do not contain hazardous materials, there is no evidence to demonstrate if, or to what extent, such non-hazardous consumer products contribute contaminants the environment.

Additionally, discussion of ideas and specific recommendations to reduce toxics from primary sources, under DoE's current authority and/or improvements and efficiencies within existing state programs is glaringly absent from the White Paper.

Lack of Sound Science

While the stated goal of the Workgroup to improve toxics reduction efforts in Washington is a laudable one, the White Paper fails to provide any scientific evidence to support that consumer products are a contributor, either nominally or significantly, to the stated problem of toxics exposure in the state. Despite this lapse, the Workgroup built their twelve recommendations on the undemonstrated premise that consumer products are the source of the “toxic chemicals” they seek to reduce.

Throughout the White Paper, sweeping and unfounded statements are made related to consumer products that are used as justification for the Workgroup's recommendations. For example, on Page 3 it states, "...chemicals migrate from consumer products or household dust onto people's hands and then into their mouths..." with no attempt to qualify this statement with regard to specific chemicals or even one cited reference to substantiate the claim. Additionally, on Page 2 it states, "Responsible parties at cleanup sites experience extraordinary costs when they are required to clean up contaminants that originate from a wide variety of sources outside their control such as consumer products..." However, there is no scientific evidence provided to demonstrate how, or to what extent, consumer products contribute contaminants or result in additional or increased response costs at cleanup sites. We find this statement particularly specious, as even a casual perusal of a list of cleanup sites reveals that industrial sources are the main or only contributor to such contamination at an overwhelming majority of sites.

Where scientific data or studies are referenced within the White Paper, the text states or implies a link between a chemical(s) and a disease or condition which is not established in the cited information. For example, it states, "...exposure to BPA may be linked to early puberty in girls." The citation here is for note 10 Golub et al, 2008. The Golub paper makes essentially no mention of chemical exposure or BPA being the cause of puberty timing alterations. Rather, it addresses the effects of altered puberty timing. The phraseology in the White Paper inaccurately suggests a closer link between BPA exposure and the reported effects of early puberty in girls.

Again on Page 4, statements are made regarding Hypospadias in WA and suggesting a link to phthalates and other chemicals. Citation 11 (Porter et al, 2005) evaluates possible risk factors for Hypospadias (maternal age, race/ethnicity, diabetes, gestational age, low birth weight), and discusses occurrence in Washington. However, there is no mention of a possible link between the birth defect and exposure to phthalates or other chemicals. The information for note 12 is just a reference to the birth rate in Washington (86,000/yr). The White Paper makes the jump from the birth rate divided by the Hypospadias rate (1 in 200) multiplied by 50% boys to come up with ~215 boys in WA.

Among several other similar examples, the White Paper links childhood cancers and chemicals (Page 4), but in Davidoff, 2010, as ultimately cited in references for note 14, Davidoff makes no comment on causation of the childhood cancers.

Additionally, the White Paper emphasizes exposure to "toxic chemicals". However, nowhere in the Paper is the term "toxic chemical" defined. One of the recommendations in the White Paper is for authorities to ban or restrict priority toxic chemicals. However, no criteria are presented that define what is meant to the Workgroup by a "priority toxic chemical". That oversight is a critical limitation of the document. Ultimately, at sufficiently high exposure, any chemical, including those ubiquitous or naturally occurring, could be considered "toxic". How a chemical would be determined to be "toxic" or sufficiently toxic to be included in the proposals envisioned by this report is not specified, even though that is, in fact, the fundamental consideration forming the basis for the entire process presented in the report. Without a clear understanding of the method for determining which chemicals would be included (or not) in the proposed regulatory process, there is no way to determine which chemicals are "safer" than others on a replacement basis, or the extent to which their presence in the environment could be permitted without creating a potential public health risk or environmental concern.

TIA also notes that the White Paper accepts the "precautionary approach" and the idea that the mere presence of a chemical necessitates that action be taken. DoE has stated on several occasions that "the

presence of a chemical in a product does not necessarily mean that the product is harmful to human health,” but this White Paper seems to ignore that fact.

Concerns with Recommendations

It is not established in the White Paper, if or how, the proposed recommendations would achieve the goal of reducing the source(s) of human and environmental exposures to toxics in Washington. As stated above, we hope there will be a comprehensive, science-based review conducted in order to appropriately identify the issues related to toxics which the state may need to address, if any, and the Workgroup’s recommendations may serve as a starting point for discussion in that context. Additionally, several recommendations are broader political positions without material action items.

We have additional concerns with several recommendations which are highlighted below:

Chemical Regulation (Recommendations 2, 3, & 11) – TIA believes the type of regulation recommended in the White Paper should be done at the Federal Level in order to provide manufacturers with consistency and predictability, and avoid a patchwork of state laws that would make it difficult to bring products to the marketplace. TIA supports TSCA reform to keep pace with advances in science and technology.

There are a few principles which are critical to the Workgroup’s stated desire for “sensible chemical policy that supports a healthy and thriving economy”:

- Ensure a risk-based approach is used when prioritizing chemicals for review and evaluate practical approaches to information and data development.
- Create a workable program that ensures chemicals are safe for their intended uses and that industry remains innovative and globally competitive.
- Rely on credible and authoritative scientific data that demonstrates some harm before creating new mandates.
- Create policies that aid companies in developing and using safe chemicals and materials.
- Incorporate the concept of exposure (as contrasted with simple presence) as a basis for regulation.
- Ensure that products being regulated are significant contributors to any observed exposure.

Additionally, the White Paper recommends that one priority should be a focus on chemicals potentially impacting sensitive subpopulations such as children. As part of this focus, a conclusion is made that there should be an assessment of information regarding chemicals of concern present in children's products to identify "safer" alternatives that could be used. However, methods by which a "safer" alternative would be identified are not identified. TIA notes that many factors need to be considered when identifying an alternative as “safer,” including the physical safety properties of an alternative which is extremely important to the toy industry.

Taxes (Recommendation 8) – The White Paper recommends a “tax on priority toxics.” Taxing a manufacturer, retailer or consumer based on the presence of a chemical in a product that is safe for use, and fully complies with federal and state requirements is unwarranted and

unreasonable. As stated above, no criteria are presented that define a "priority toxic chemical." Ultimately, at sufficiently high exposure, any chemical could be considered "toxic".

Additionally, the Workgroup states the need for a healthy environment and a robust economy, but the potential negative economic impacts of such a tax scheme are not discussed in the White Paper.

Labeling & Consumer Information (Recommendations 5 & 6) – Labeling of products that are already safe for use, and fully comply with federal and state requirements is *misleading to consumers* and may even conflict with federal labeling mandates. Existing federal law provides for the mandatory labeling of toys and children's products for recognized hazards. Additional labeling as proposed in the White Paper may lead to unintended consequences for safe products, and/or consumers will become de-sensitized to the warning labels on products and come to ignore labels that attempt to communicate true hazards. There is also the potential for conflicting labeling statements to undermine the stringent safety notification requirements that are mandated federally for toys.

Proposed Statutory Liability Scheme is Unnecessary and Flawed (Recommendation 7)

The White Paper's makes many false assumptions related to consumer products in the section on liability (Page 18). Because it is specified in the White Paper that research and further work is needed in this section, we have provided a detailed discussion of the potential flaws with the liability scheme if it is pursued as described.

Existing Regulations Adequately Control Consumer Exposure -- Consumer exposure during product use is adequately controlled by existing regulation; the Workgroup's plan to cover liability for *unforeseen or unintended* uses of consumer products is misplaced. Unforeseen uses have not been adequately studied to determine if there would be additional exposure or not. Importantly, if one cannot foresee a certain use, it would be impossible to study or to predict exposure from that use. Any regulation of unforeseen use would be based on speculation, rather than credible science. Any liability for consumer exposure should be limited to intended and reasonably foreseeable uses of products. Under product liability common law, it is unconscionable to allocate liability to a manufacturer for exposure or a risk of harm resulting from a use that was not intended or readily foreseen. Consumers bear some responsibility for using products as intended and as labeled.

Universal Application of Liability Equally for All Chemicals Ignores Chemical Differences and Other Important Complex Variables -- The Workgroup would apply its liability scheme universally to all chemicals to avoid the need for any chemical-by-chemical review. This ignores the complexity and multitude of variables associated with each different chemical and various chemical combinations. Any liability scheme must reflect the actual harm that is caused by each individual chemical or combination of chemicals based on the actual exposure to the chemical in the product and the actual harm caused by the exposure. Variables impacting exposure risk include: concentration levels, accessibility, durability, interactions between chemicals, and intended use. A universal system will not take into account all such variables. There is no scientifically credible way to create a universal scheme applicable to all chemicals. Any such

scheme would be unfair, vague, and overly broad, which violates the constitutional right to due process.

CERCLA Is An Inappropriate Liability Model for Consumer Products -- There is no justification for a CERCLA-like strict liability statutory scheme for product manufacturers based on alleged product releases at contaminated sites. There is no scientific evidence to demonstrate if, or to what extent, consumer products contribute contaminants or result in additional or increased response costs at cleanup sites. Allocation of liability would be infeasible because of the inability to accurately determine which, if any, and to what extent, if at all, products released chemicals to the site requiring cleanup. CERCLA currently accounts for unallocated chemical sources through the orphan share program. The Workgroup's recommendation for a strict liability statutory approach similar to CERCLA, holding product manufacturers strictly liable for alleged distributed chemicals in the environment, is beyond draconian and would be challenged as unconstitutional.

The Workgroup's approach to developing a liability scheme is based on the "precautionary principle," which would create liability for any products that "may" cause harm. The Clean Water Act, Clean Air Act, and CERCLA all limit liability to "actual harm." Even CERCLA, which holds responsible parties joint and severally and strictly liable, is based on *actual* response costs, not *potential* costs. All manufacturers, even of products with naturally occurring chemicals, unintentionally added chemicals or contaminants in the product, or inaccessible chemicals in the product, would likely be subject to strict liability under the Workgroup's proposed scheme. The Workgroup's claim that a statutory liability scheme could protect manufacturers from frivolous claims is naïve. Unfortunately, a statutory scheme would not protect manufacturers who are making products which do not cause harm from defending costly, frivolous claims. Those claims will still be made, especially because the precautionary principle upon which the statutory scheme would likely be based would be sufficiently vague and overbroad as to include any products that "may" cause harm, rather than limiting liability to "actual harm."

- A strict liability scheme, suggested by the Workgroup, could eliminate small businesses in Washington who could not afford the damages that would ensue following a finding of liability. Strict liability, not based on actual harm, would be unfair. The Workgroup's strict liability suggestion shifts the societal costs of manufacturing and using certain consumer products entirely onto the manufacturer, while others benefit.
- Consumer products which are ultimately disposed of in a landfill are already regulated by the Resource Conservation and Recovery Act, if the products contain hazardous materials. If the products do not contain hazardous materials, there is no evidence to demonstrate if, or to what extent, such non-hazardous consumer products contribute contaminants the environment.

Tort Reform is Preferable to Wholesale Replacement of Common Law System -- While we agree that the tort system needs reform, the common law system should not be replaced with a draconian strict liability statutory system. The complexity of chemical exposure and exposure-based risks of harm for each individual chemical at various thresholds, and again for combination of chemicals at various thresholds, applications and uses that a statutory or regulatory system would simply not be able to capture them all. A statutory or regulatory

scheme that opts to oversimplify such exposure-based risks would be wholly unfair to the responsible parties identified. The scientific complexities are too great to take this out of the hands of experts. While the tort system is flawed, the system ensures that competing experts will weigh in on the likelihood that a chemical in a product may have actually caused the harm alleged.

- The Workgroup group recommends eliminating the expert approach in the court system and replacing it with the "precautionary principle," which would give plaintiffs awards for merely having the "chance" of being harmed by a product, without actually incurring (or demonstrating) any harm at all. This concept flies in the face of American jurisprudence, wherein an individual is to be "made whole" for any harm done. If harm has not been done, then the tort system allows for medical monitoring and other precautionary remedies. Again, this should be based on scientific expert recommendations based on the individual facts and circumstances involved in each case, not on a blanket determination by a regulator ignoring all variables involved.

Safe Harbors or Product Classes Ignores Exposure-Based Complexities -- The concept of safe harbor or product classes ignores the complexity of exposure-based harm from highly individualized chemicals or chemical combinations in unique product settings and intended for distinct uses. A safe harbor threshold for chemicals would imply that any amount over the threshold is unsafe, and thus subject to liability. That may not in fact be the case if, in a certain product, there is no exposure to a chemical, even if the chemical is above the safe threshold level. There are too many variables in chemicals, combinations, uses, exposures, and product types to be able to oversimplify into safe harbor categories. Those that do not fit within the safe harbors, would be unfairly discriminated against in the marketplace, and unfairly face liability.

Durable Innovation is Achievable Through Marketplace Incentives --The Workgroup's stated goal to provide a durable incentive for innovation to make chemicals and products safer is a good goal, but forcing innovation through a draconian statutory liability scheme will drive businesses out of the State of Washington rather than incentivize innovation in the state.

- Forcing innovation with heavy-handed regulatory oversight will require significant expenditures devoted to regulatory responses and compliance, dollars that could be devoted to innovation and job creation.
- Incentivizing innovation through other means, including the marketplace, without diverting necessary funds and staffing to regulatory compliance, would be a more durable approach.

Congress Did Not Intend To Regulate Consumer Products Through the CWA -- There is no support in the clear statutory language, the legislative history or the legislative intent of the CWA to support using the CWA to address consumer product contribution to stormwater contamination due to off-gassing of chemicals from products. There is no concrete scientific evidence to demonstrate if, or to what extent, consumer products release chemicals into the waterways of the United States during the life cycle of the product.

Existing Authority to Require Safety Recalls Already Protects Consumers -- The Workgroup suggests that producers, manufacturers, and retailers would be expected to take responsibility

(including recalling products and refunds) for any environmental or health impacts that may be caused by the product. Producers and manufacturers already take responsibility, including safety recalls and take back programs, for products that are determined to be safety risks pursuant to the CPSA and CPSIA. End-of-life management of products that contain chemicals is already regulated via the Resource Conservation and Recovery Act and state counterparts, as well as various recycling regulations.

Adding another layer of liability for the same regulated activity would be duplicative of existing regulatory schemes. Existing CPSC authority to require safety recalls includes coverage for products containing chemicals, which is the appropriate regulatory method to address actual safety issues.

Conclusion

TIA worked with Ecology in the development of the Children’s Safe Products Act regulations, and we continue to work in partnership with the Department to comply with reporting requirements and in the development of alternatives assessment guidance. We have always recognized the special relationship we have with children, who are our principal consumers; their safety and well-being is always our top priority.

We understand the importance of toxics reduction, and agree with the Workgroup that Washington should have “sensible chemical policy that supports a healthy and thriving economy.” To that end, we advocate that any new policies to encourage the research and development, and/or the use of innovative or alternative chemical technologies should be crafted as a voluntary and/or incentive-based model, be based on sound science, and take into account input from impacted industry stakeholders. Policy action based on rhetoric, or anecdotal and non-scientific evidence may have unintended consequences without addressing real issues or achieving the desired public benefit.

TIA appreciates the opportunity to comment on the White Paper, and looks forward to continued communication and collaboration with Ecology in the development of a practical, reasonable and effective approach to toxics reduction in Washington State. Please feel free to contact TIA directly via Jennifer Gibbons at: 646-512-1320 or jgibbons@toyassociation.org, if you have any questions or concerns about these comments or would like to discuss in more detail.

Respectfully,



Jennifer Gibbons
Director of State Government Affairs