

Challenging DTSC's Sweeping Regulation of Microplastics

The California Department of Toxic Substances Control (DTSC) has proposed listing “microplastics” as a Candidate Chemical under the Safer Consumer Products (SCP) regulations. Microplastics would be defined as “plastics that are less than 5 millimeters (mm) in their longest dimension, inclusive of those materials that are intentionally manufactured at those dimensions or are generated by the fragmentation of larger plastics.” American Chemistry Council (ACC) seeks to challenge DTSC’s listing of microplastics once the listing is finalized.

The challenge would be brought under the California Administrative Procedure Act (APA), attacking DTSC’s action as exceeding its statutory authority. A successful challenge would stop California from issuing SCP requirements for any type of product that contains microplastics and could have an even broader effect by clarifying that DTSC’s authority is limited to regulating *discrete* chemicals rather than sweeping categories of chemicals.

SCP Requirements

The SCP regulations use a two-step process for regulating chemicals in products: DTSC first identifies a Candidate Chemical and then designates specific Priority Products containing that chemical, at which point manufacturers face stringent compliance obligations including alternatives analyses and potential product restrictions. ACC anticipates that DTSC will finalize its listing of “microplastics” as a Candidate Chemical by August 2026, at which point the regulation may be challenged under the APA.

The Claims

ACC’s claims would focus on DTSC’s action as *ultra vires*: DTSC exceeded its statutory and regulatory authority because “microplastics” does not meet the ordinary meaning of “chemical” for the SCP regulations. The SCP regulations define “chemical” as “[a]n organic or inorganic substance of a particular molecular identity,” which requires a particular chemical composition or molecular structure. Cal. Code Regs. tit. 22, § 69501.1(a)(20)(A). The Candidate Chemicals List currently follows the plain language understanding of a “chemical” by identifying chemicals according to their particular molecular identity.¹ DTSC’s Technical Document, however, acknowledges that plastics “are comprised of a variety of polymers” with “structural heterogeneity and complexity.” This would be DTSC’s first attempt to regulate an entire category of chemicals as “collectively” having a particular molecular identity.

Traditional canons of statutory interpretation strongly suggest “microplastics” are not chemicals. The interpretation of a statute—including DTSC’s scope of authority—is a purely legal question for a court to decide in the first instance, and there is a substantial argument based on the plain language of the statute. ACC believes the case could be progressed expeditiously to a decision on the merits.

Why Now

Once the Candidate Chemical regulation is finalized, it will be ripe to challenge under California law. We further believe that this is an opportune time to bring a challenge based on the plain meaning of the statute, rather than waiting for DTSC to begin the process of identifying Priority Products.

¹ All existing Candidate Chemical listed come from an “Authoritative List,” i.e., a list of known carcinogens or toxins maintained by another public health agency or organization.